



EMPLOYMENT TRIBUNALS

Claimant: Mr A Martin

Respondent: British Car Auctions Limited

Heard at: Manchester

On: 14, 15, 16 December 2022,
19 December 2022,
17 January 2023.

Before: Employment Judge Ganner
Mr A Murphy
Mr J Adams

REPRESENTATION:

Claimant: Mr P Sangha, Counsel.

Respondent: Ms C Clapham, Solicitor.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The respondent contravened sections 13 and 39(2) (a), (c) and (d) of the Equality Act 2010 by directly discriminating against the claimant on the grounds of age.

2 The claimant's claim for unfair dismissal is well founded and is upheld. The claimant was unfairly dismissed.

REASONS

Claims and Issues

1. By a claim form presented on 13 May 2021, the claimant claimed unfair dismissal and age discrimination arising out of the termination of his employment on 11 December 2020, when aged 67.

2. By its response form dated 16 June 2021, the respondent denied discriminatory treatment and contended there had been a fair dismissal for redundancy.
3. The complaints pursued and the issues which arose had been broadly identified at a preliminary hearing before Employment Judge Hodgson on 27 October 2021 and an updated list of issues was presented on the first day of the hearing.
4. We have in this judgment determined liability claims only. We decided the question whether the claimant would, in any event, have been fairly dismissed (the **Polkey** issue) would be dealt with at a separate remedy hearing if appropriate.
5. The list of issues was as follows: -

UNFAIR DISMISSAL

1. It is agreed that the C was expressly dismissed by the R.
2. What was the principal reason for the dismissal? The reason relied upon by the R is redundancy or, alternatively, SOSR, namely a business reorganisation carried out in the interests of economy and efficiency.
3. If the reason was redundancy or SOSR, did the R act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the C, pursuant to the provisions of s.98(4) ERA 1996?
4. In determining this question, the matters to be considered by the ET shall include:
 - a. Did the R warn and consult the C?
 - b. Did the R adopt a fair basis of selection? Consideration of this issue will include:
 - i. Whether the C was fairly scored in each of his competency-based interviews,
 - ii. Whether the outcome (rejection of the C's applications for the roles of Administration Manager and Facilities & Safety Manager) was pre-determined.
 - c. Did the R take reasonable steps to avoid the termination of the C's employment? Consideration of this issue will include:
 - i. By offering the C the FSM role given that he was the only internal candidate,
 - ii. Whether the C should have been given a trial period for the Facilities & Safety Manager role,

- iii. Whether the C was given reasonable opportunity to appeal his selection for redundancy,
 - iv. Any other roles that the C could do, e.g., the Admin Manager role (Preston).
5. If there is a compensatory award, is there a chance that the C would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason? If so, should the C's compensation be reduced and by how much?
 6. It is noted that other matters of remedy (excluding **Polkey**) shall be dealt with, as appropriate, at a separate remedy hearing.

DIRECT DISCRIMINATION (AGE)

7. Did the R treat the C less favourably because of age than either his actual comparators or a hypothetical comparator by:
 - a. Not offering him the Administration Manager role; or
 - b. Not offering him the Business Administration Manager role; or
 - c. Dismissing the C?
8. The actual comparators that the C cites are:
 - a. Mr Duncan Baker (believed to be aged 50);
 - b. Mr John Williams (believed to be aged early 40s).
9. Was the treatment a proportionate means of achieving a legitimate aim? The R asserts the following legitimate aim: the need for the business reorganisation in the interests of economy and efficiency.

Evidence and Witnesses

6. There was an agreed bundle of documents which ran to 303 pages and any reference in this judgment to page numbers in brackets is a reference to that bundle.
7. We heard evidence from the claimant and his colleague Mr John Connolly. The respondent called three witnesses, Mr Danny Entwistle, General Manager who dismissed the claimant, Mr Danny Prosser Centre Manager, who interviewed the claimant for the role of Facilities and Safety Manger and Ms Stephanie Benton, Head of Online Sales and Operations, who interviewed a Mr John Williams for Facilities and Safety Manager at Measham.

Facts

8. We now set out our factual findings, resolving any disputed matters where appropriate. Any consequential findings/inferences will be addressed within the discussion and conclusions sections below.

9. On 16 August 1999, the claimant commenced employment with the respondent at their Manchester branch as a Business Administration Manager. He worked there until he was made redundant on 11 December 2020 aged 67. The respondent is a vehicle remarketing/auction business.

10. In 2016, the respondent expanded the business and bought a second plot of land across the road from their Manchester Branch. Mr Duncan Baker was appointed as Business Administration Manager for this second plot.

11. In October 2017, the claimant underwent a performance review conducted by Ms Lisa Grimsley the regional operations manager. Various points of improvement were identified including keeping a tidy desk, monitoring of agency costs and improvements in team communications. Mr John Connolly, a branch manager since 1992, who was selected for redundancy alongside the claimant, told us that at the end of 2019, he saw Mr Entwistle taking pictures of the untidy desk, believing it to be part of an evidence gathering exercise to manoeuvre the claimant out of the business. Mr Entwistle accepted he had done this, saying that although he had spoken to the claimant about this at the time, he had “moved on and didn’t think it was a big deal”.

12. In March 2018, the claimant met with Ms Grimsley and a colleague to check his progress. He later agreed to “switch” his position with Mr Duncan Baker on plot 2. He then undertook this new role until Easter 2019, whereupon Mr Baker moved to the Transport Department and the claimant took back his old role though this now covered both plots 1 and 2 and his workload increased to an extent.

13. The claimant stated the above series of events made him very anxious to be working for the company since he believed that none of the “points of improvement” impacted on his work.

14. In or about March 2018, Mr Danny Entwistle commenced his role as General Manager for the BCAs Manchester and Preston Branches.

15. In January 2020, the claimant underwent disciplinary proceedings understood to have related to him causing the respondent to lose £100 at an auction for reselling a car at a lower price. He was given a final written warning. He missed the deadline for appeal and felt he was being treated differently since the colleague who had let the vehicle go was not reprimanded in any way. He also told us that colleagues who had caused greater losses in similar circumstances were not taken down a disciplinary route.

16. The claimant was placed on furlough in March 2020 because of the COVID-19 Pandemic.

17. Prior to this, most employees were based on site and customers would attend auctions at one of the respondent’s branches to buy and sell vehicles. However, given that the respondent was required to close all its physical branches, it could then only offer services online. This new situation led to a review of its business model, with consideration being given to streamlining/digitalising operations.

18. On 8 October 2020, an announcement was made to the entire UK workforce that the respondent was proposing to reorganise the nature of its operations and if it

were to proceed with the proposal there would have to be (98-105) a business restructure and as such, some roles would be at risk of redundancy. The proposals were known as “Project Oak” and a detailed internal communications pack was issued to all affected employees (106-111). This set out the rationale for the proposed changes (107-108), explained the process that the business intended to follow (110-111) and set out the potential timeline (109). Each branch was treated as a separate establishment and the Manchester branch was informed that there could possibly be 36 redundancies because of the proposed changes (106).

19. Each local affected branch was given updates on the changes and an explanation was provided as to how they would affect the branch in question and its employees.

20. The documentation concerning the Manchester branch (98-105) described how current roles would be impacted by a “Matched/At Risk” exercise. The 3 possible outcomes were: -

- 1) Matched=your current role would essentially exist in the future structure- i.e., same location, principally 70% or more the same-no expected impact on you.
- 2) At Risk-role reduction=your role would exist but there would be fewer of them in the future structure
- 3) At risk-no role) (N)=your current role would not exist in the future structure. (102).

21. The claimant’s role fell into the second category as it was performed by two individuals and the proposal was to reduce it to one.

22. A process was undertaken for the election of representatives and employees were informed they should notify a manager if they wished to stand as a representative (111) and the claimant was one of the individuals elected (114). There was some confusion as to whether he had been appointed to this role despite many people having voted for him. [In fact, the claimant had achieved the highest number of 22 votes with Mr Baker getting none (119)]. This was soon clarified and his position was duly confirmed. The representatives were provided with training on 16 or 19 October 2020 to ensure they would be able to understand the proposals, have good communication, organisation and core IT skills and be readily available to talk with everyone affected in their respective branches/areas (110).

23. The claimant attended all of these meetings and made a number of contributions by way of questions or comments.

24. The timeline for the consultation procedure was as follows:

- (1) On 21 October 2020, the first collective consultation meeting took place via Microsoft Teams (150-157).
- (2) On 28TH October 2020, the second collective consultation meeting took place, as before on Microsoft Teams (175-188).

- (3) On 2 November 2020, a follow-up to the second collective consultation took place, this being designed to review the outstanding actions, provide updates to the representatives and consider vacancy lists.
- (4) On 3 November 2020, the third collective consultation meeting took place.
- (5) On 9 November 2020, the fourth collective consultation meeting took place. The claimant asked these questions:- Q- Scenario at branch where three people are at risk reduced role, it's a cornerstone position. Am I correct in that one of those people should get that role? A-yes if they are all in one agreed role reduction pool one of those should get it. Q-Would it be open to anyone at regional level, or would it be one of those three people that have been doing the role. A-if it's an agreed reduced pool for three people and they are at risk of role reduction one of the three would get the role and the other two would be displaced and move to at risk/no role.
- (6) On 11 November 2020, a Q & A list was shared with all representatives (218-228). The employees were told (and we so find), that the purpose of the proposed changes in UK remarketing operations was to put in place the right structures to meet customer demand and ensure BCA remained successful. The new structures required a reduction of some existing roles, plus some new roles in branches together with an increase in roles of the online team. Clarification of most aspects of the selection process was provided with it being indicated that notably, employers must use objective criteria when making a selection decision, that these will be applied consistently, that applicants will be able to see the selection scores and that these would be validated by another senior manager and/or a member of the people team. See also question 15 Q- If I am in a pool will my performance review from this year be taken into account? A- No we are not using your performance review.

25. There was, additionally, an "Employee guide for new vacancies (189-193) which stated that there was an aim to maximise the redeployment of our existing people and certain at-risk employees would be given "priority over specific vacancies and in principle employees within their own branch will have priority for vacancies in that branch in the first instance". It also stated "An appropriate manager must support an employee's suitability for the role they apply for" (190).

26. As part of the collective consultation process, all affected employees were invited to apply for roles in the new proposed structure. The claimant applied for two roles, the first being Administration Manager based in Manchester (71-72) and the second was a Facilities and Safety Manager covering both Manchester and Preston branches (63-4). He was invited for interview for the first role on 12 November (231) and sent an email identifying the competencies for this job.

27. The claimant, needing to complete his holidays by the end of December, asked Mr Entwistle for his 3 weeks for the end of that month and this request was speedily granted. He told us he inferred from this that he was not going to be kept on since Mr Entwistle so quickly acceded to his request without checking the relevant boards, which would normally be done in these circumstances. He

therefore asked his colleague Mr Connolly to put in a similar request (which he did) and this was likewise immediately granted. Both being senior managers still on furlough, they took this as a sign they were destined not to keep their jobs.

28. The first role was pooled due to the proposed reduction in headcount, with Mr Baker (aged about 52) being the other person in the pool. The second role was not considered to fulfil the criterion of “suitable alternative employment” as defined in the redundancy consultation. Nonetheless, the claimant was invited to an interview for this position as well.

29. On 12 November 2020, Mr Danny Entwistle, the General Manager for the respondent’s Manchester branch conducted the competency-based interview with the claimant via Microsoft Teams for the Administration Manager post. The competencies had been previously sent by email and were as follows: drive and results focus; motivating and developing others; data decisions and problem solving; influencing and communicating; customer and innovation competencies and efficiency process and technology. In advance of the interview, Mr Martin had also been informed that he would be asked to provide specific examples of when he had done something in the past could he think of real-life examples of his experience in order to support his answers (238).

30. An interview guide (245) containing guidance notes for assessors was provided This document was designed to assess the candidate's suitability for the role and provide a structured way of gathering information about them and their potential. The focus was on gathering evidence of past behaviour which can be used to predict future performance. The guidance advised: -

- (i) Introduce the session
- (ii) Explain that you will be taking notes throughout the interview to ensure you capture accurately what they have said.
- (iii) You will be asking the candidate to provide specific examples of when they have done something in the past, which may be different from other interviews they have experienced.
- (iv) The candidate will need to think of real-life examples in order to support their answers.
- (v) How many **questions to** ask: you should ask a minimum of three questions per competency. Put a cross against questions which have not been used.
- (vi) **Asking** the questions: try to obtain as much specific information as you can, with examples where possible. Probe the answers provided, using the suggested follow up questions listed. **You do not need to use all the questions if you get the Information you require in the initial question.**
- (vi) **Taking Notes:** it is extremely difficult to remember accurately everything a candidate has said during an interview and it is easy to miss or forget important facts. Make sure you take legible notes

throughout the interview. Keep notes accurate, factual and job-related. Do not evaluate the evidence during the interview. You will need to evaluate the evidence after the interview.

- (vii) **Scoring:** immediately after the interview, review your notes and the indicators for each competency. Where evidence is seen, tick the indicator and write a brief bullet-point summary.
- (viii) To decide an overall rating use the following score:
 - 1 = Well Below Criteria:
 - 2 = Below Criteria:
 - 3 = Meets Criteria:
 - 4 = Exceeds Criteria:
- (ix) Remember, a candidate can legally see anything you have written down – so be sure to only capture the evidence and keep your notes for 16 weeks.

31. The claimant was interviewed in the morning and scored 16 out of a possible 24 marks across ranging from 2-3 in respect of the 6 competencies. He only achieved a 2 score for “motivating and developing others”. Mr Entwistle felt the claimant had a good understanding of how BCA operated and was aware of his 21 years’ experience in the business and that he was therefore very experienced. In the “supporting evidence” box, Mr Entwistle recorded “Andrew has a good understanding of BCA and the role having held it previously. However, since March when he requested to go on furlough the role has evolved/changed along with the focus. I don’t believe from what I have heard today AM would help move the business forward in the new world.” He circled “Offer” in his decision regarding the claimant but then deleted it and circled “Decline” instead (251).

32. Mr Entwistle told us that the claimant’s answers referred to old processes which were not relevant to how BCA would be doing things in the future and that he had not taken the time to fully understand the requirements of the new role. In response to our questions, he conceded it was “fair” to say that the interview questioning did not really discuss or explore new/ changing /evolving roles, i.e., those in the “new world”.

33. The other candidate interviewed for this role was Mr Duncan Baker (253-262), and he scored 18 out of a possible 24 marks, gaining exactly 3 marks per competency. He was interviewed in the afternoon. The decision was made that Mr Baker was the better candidate for the role. Mr Entwistle said he judged his answers to be relevant and good and that he had demonstrated a better understanding of the new role also considering him to be a proactive individual who would make the role his own. He was therefore offered the Administration Manager’s job. Mr Entwistle’s stated conclusion was that the claimant did not have the necessary capabilities for the new role compared with Mr Baker.

34. We found there were several irregularities where the mandated BCA interview guide was not followed by Mr Entwistle when interviewing Mr Baker. He did not show **any** reasoning in respect of scoring, leaving the comments section completely blank nor did he write anything in the “supporting evidence” section (261). Mr Entwistle told us he evaluated Mr Baker’s evidence during the interview, in contravention of the guidance to do so afterwards. There was another contravention of the guidance to ask “a minimum” of 3 questions per competency. Mr Baker was only asked 2 in respect of “Customer and Innovation” yet scored 3 marks (258). The claimant had been asked 3 questions for the like competency and scored only 2 (249). In respect of “Data Decisions and Problem Solving”, Mr Baker gave what Mr Entwistle agreed was a non-answer in respect of his 3rd and final answer but scored 3 for his 2 answered questions (256). The claimant gave a non-answer in respect of his 4th question and likewise scored 3 for his 3 answered questions (247), Mr Entwistle recording the comment “Examples around debt management for the claimant” but nothing for Mr Baker (261).

35. Mr Entwistle told us the claimant had not prepared well for the interview and that he had failed to answer the questions adequately and that Mr Baker was the more suitable candidate because he had a better understanding of the work required. His position was the markings had been done fairly and objectively, although he did not think the claimant was performing well generally. In evidence, he accepted that his decision was based on the claimant’s performance in interview “plus what you already know”.

36. Post-interviews, Mr Entwistle kept the documentation. He was unable to say whether they were scanned to the Microsoft Teams platform immediately upon completion.

37. Mr Entwistle accepted he could not now explain his scoring for the successful candidate by reference to the form and we find it factually impossible to ourselves evaluate whether the claimant and Mr Baker were scored in the same way in respect of this position.

38. On 16 November 2020, the fifth collective consultation meeting took place (239-243).

39. On 23 November 2020, the sixth collective consultation meeting took place. At this meeting, it was agreed between the respondent and the representatives that the collective consultation process would conclude and that the focus would continue with individual consultation meetings with the affected employees (268).

40. The claimant was invited to an interview for the role of Facilities and Safety Manager and given the same information identifying the applicable competencies as he had for the Administration Manager role.

41. The interview took place on 1 December 2020 and was conducted by Mr Entwistle, Mr David Prosser, Centre Manager, Preston and Mr David O’Driscoll, People Business Partner (271-281). The format was as before. Mr Prosser took the lead role in questioning the claimant. Messrs Entwistle and Prosser recalled all members of the panel took notes. The duties for this role focussed on different skills and experience to those featuring in the claimant’s work to date, the overarching

responsibility being for maintenance, site security, quality and health and safety at the various sites.

42. It was considered in terms of both his experience and his performance at interview, that the claimant was not suited for the vacancy, him being scored 12 out of a possible 24 marks this score being arrived at following a discussion with the other 2 panel members. Mr Entwistle told us he had briefly discussed Mr Martin's performance in his current role and that he was "unorganised". He also wrote down a comment regarding his "untidy/unorganised desk" which he appeared to accept, and which we find, in any event, was a reference to the occasion when he photographed the claimant's desk in 2019 (278). His recollection was Mr Martin was unprepared for the interview and had not focussed on what was required mentioning a specific example being he did not consider any KPIs that he could set to monitor his performance in the role. He did not specifically recall what the pass mark was but believed at least 3 for each of the six competencies would have been needed, making the pass 18 out of 24. Mr Entwistle did not therefore feel the claimant was suitable for the role and had failed to provide current examples to support his answers in relation to the competencies. He said the key duties of this role were responsibility for site security quality and Health and Safety at the sites. He believed there was little crossover between the old role and this position and "was aware" that Mr Martin wasn't very good at this aspect of the job. He believed he had no experience in carrying out the other parts of the FSM role, namely maintenance, site security and health and safety though he conceded Mr Martin had held irregular health and safety meetings previously.

43. Mr Prosser recalled the claimant "struggled" to answer the questions put to him and that his answers focussed on how tasks were carried out in the past or how certain situations were dealt with "years ago". He recalled one question put by Mr Entwistle was how to deal with an online customer complaint and the answer referenced how things were dealt with previously rather than on how he would handle this issue going forward. The claimant accepted he did not perform very well it being "not the best of interviews".

44. When cross examined by Mr Sangha, Mr Prosser told the tribunal he had scored the claimant independently. However, in his witness statement he said he had been "guided by Mr Entwistle" in respect of how he operated in his current role, how he managed his workload and what skills he would bring to his the facilities and management position. We find he was so guided relying on Mr Entwistle's negative opinion of the claimant's abilities. Mr Prosser was unable to recall what score he himself had given in the interview and no longer had his notes. No notes were disclosed in respect of the HR attendee Mr O' Driscoll, the latter not being called as a witness by the respondent. Post-evidence, we were informed Mr O' Driscoll's notes "do not exist". Whether Mr O' Driscoll made notes, which have gone astray in the same way of the other panel members, or whether they were never made in the first place (in which case it would mean the evidence of Messrs Entwistle and Prosser is incorrect), the upshot is we do have the benefit of any light Mr O' Driscoll may have been able to shine on the conduct of this interview.

45. On 7 September 2020, Mr Entwistle wrote to the claimant to invite him to an individual consultation meeting (page 284). The letter explained there would be a discussion about him being unsuccessful in his application for the Facilities and Safety Manager role and informed him of his right to be accompanied by a work

colleague or trade union representative. It was explained to the claimant the outcome of the meeting could be the termination of his employment by reason of redundancy.

46. On 8 December 2020, Mr Entwistle chaired the individual consultation meeting with the claimant (pages 293-294). This was covertly recorded by the claimant and subsequently transcribed by him (285-290). Mr Entwistle explained that the claimant had been unsuccessful in securing the second role and that he would be dismissed by reason of redundancy. The claimant was given 12 weeks' notice, he was told that this would be confirmed in writing and the claimant would be placed on garden leave until 11 December 2020, which would be his termination date. It was explained that the claimant had a right to appeal the decision and the claimant was given opportunities to ask any questions about the redundancy process or any concerns he might have (294).

47. Mr Entwistle did not send the claimant a final outcome letter confirming the outcome and appeal rights. He explained this was an oversight on his part and he believed this document would be sent by the payroll department. However, in cross examination he conceded he had minuted (p293) that he would send out the information himself and had failed to do so. The claimant was, however, aware of his right to appeal (as he told us) and chose not to do so.

48. Having re-iterated his viewpoint that the claimant had not during his interview demonstrated anything that would give him the belief that the claimant would be able to do the job (287), he went on to say (289) : - **“Well from my experience and from what I have seen in the past I didn't think in a situation where we are wanting to move the business forward in the new world you are the right person for the role”**.

49. The claimant told us in evidence (and we accept that) these words made him feel he had passed his sell-by date.

50. At the conclusion of this interview, the claimant said “Look I have been here for 21 years, I have given a lot of free time to BCA. When all of this process started, I knew I wasn't going to get a job. I get the impression Danny that I'm being forced out for want of a better expression, I know that you are going to say you're not but that's what I think. It's a feeling I'm getting and I don't think I'm wrong either and I know I'm at retirement age whatever it is, it's just an accumulation of bits and pieces that have happened that leads me to come to that conclusion. Nothing I can do about it at the moment. It is what it is.” Mr Entwistle replied, “You want me to come back on the Admin role but not the Facilities Manager role, is that right?”. The claimant made a further observation expressing surprise at the view he was not suited for the second role and the interview concluded with no further response.

51. Mr Entwistle denied that age had been a factor in his scorings of the claimant nor the decision to dismiss, as did all the respondent's witnesses. He told us the reference to the “new world” was to a 100% online one in which the roles and responsibilities had dramatically changed. He categorically denied the claimant was unsuccessful due to his age or that Mr Baker was successful due to him being younger. Mr Baker was, he said, successful on merit, due to his good performance in interview and an objective assessment of his abilities. Conversely, the claimant was unsuccessful, not because of his age but because Mr Entwistle did not believe,

based on his performance in interview, he had the necessary skills and abilities for the role in particular due to the better skill set demonstrated by Mr Baker. In answer to our questions, he said it was “absolutely not” his view that a 67 old man would find this work difficult to do. He stressed the consequences of going digital included the removal of both manual tasks and the need to walk back and forth to the rostrum these being examples of changes that would not be disadvantageous to an older candidate.

52. In December 2019, a Mr John Williams (2ND Comparator List of Issues), who worked at BCA Measham found his job was at risk of redundancy as his role as Operations Manager was being removed from the BCA structure thereby putting him at risk of redundancy. Two regional roles were created for his branch, Customer Services Manager and Facilities and Safety Manager. The staff at the Branch were pooled with those at risk at BCA Perry Barr Branch. As part of that the Operations Manager at Perry Barr (MC), was put into the pool with Mr Williams. These two new roles were ringfenced for the pool. Mr Williams applied for the role of Facilities and Safety Manager and MC applied for the role of Customer Services Manager. As a result, Mr Williams was matched to the Facilities and Services Manager role and MC was matched to the Customer Services Manager role. There was no need to interview those in the pool as they had applied for alternative roles and were therefore matched to them as part of the restructure. Ms Stephanie Benton, Head of Online Sales and Operations told us that if MC had applied for the role of Facilities and Safety Manager both those in the pool would have been interviewed or selected through a desktop exercise. In any event, the claimant would not have been able to apply for the role at that time as the two roles were ringfenced for the pool. We found this was the position.

Relevant Law

Unfair Dismissal

53. *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

54. *s98 Employment Rights Act 1996* provides that it is it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*, “ .. or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

55. Redundancy and “some other substantial reason” are both potentially fair reasons for dismissal.

56. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 6. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, *Orr v Vaughan* [1981] IRLR 63.

57. Redundancy is defined in *s139 Employment Rights Act 1996*. This provides, so far as relevant, “ ..an employee who is dismissed shall be taken to be dismissed

by reason of redundancy if the dismissal is wholly or mainly attributable to—

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

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

have ceased or diminished or are expected to cease or diminish.”

58. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under s98(4) *Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

59. *Williams v Compair Maxam Ltd* [1982] IRLR 83 sets out principles which guide Tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

60. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

61. “Fair consultation” means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

62. In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, “There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem.”

63. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296; *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70.

64. In all these matters, the employer must only act reasonably and there is a broad band of reasonable responses open to a reasonable employer.

Age Discrimination

65. By s39(2)(c) *Equality Act 2010*, an employer must not discriminate against an employee by dismissing him.

66. The shifting burden of proof applies to claims under the *Equality Act 2010*, s136 EqA 2010.

67. Direct discrimination is defined in s13 EqA 2010:

“(1) 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.”

68. By s5 EqA 2010, age is a protected characteristic. A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

69. In the case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” s23 Eq A 2010.

70. Regarding causation, the ET must establish whether or not the alleged discriminator’s reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase “by reason that” requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?” Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, Para [77].

71. However, if the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only, or even the main, reason. It is sufficient that it is significant in the sense of being more than trivial, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

72. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 in which it was said that in order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race or other protected characteristic, and a difference in treatment. In general terms “something more” than that would be required before the respondent is required to provide a non-discriminatory explanation. In **Madarassy v Nomura International PLC [2007] ICR 867** Mummery LJ said:

“The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act

of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it...The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

73. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36; Bahl v The Law Society [2004] EWCA Civ 1070**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different age would have been treated reasonably.

74. Age is unique amongst protected characteristics in the Equality Act in that direct discrimination under section 13 is capable of justification. The Equality and Human Rights Commission Code of Practice contains some provisions of relevance to this in paragraphs 3.36 to 3.41. Broadly it is suggested that the question should be approached in two stages: -

is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

75. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31: -

“although not defined by the Act, the term “proportionate” is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an “appropriate and necessary” means of achieving a legitimate aim. But “necessary” does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.”

Submissions

76. At the conclusion of the evidence, we received a written submission from each party. We considered all the arguments contained in these documents and do not see any useful purpose would be served in setting them out in this judgment as they are a matter of record.

77. The claimant submitted that a fair basis of selection had not taken place insofar as he was not fairly scored in respect of each competency-based interview and that the outcome for each of the roles sought was pre-determined. It was further submitted that the respondent had not taken reasonable steps to avoid the termination of the claimant's employment by failing to offer him the Facilities Manager or an alternative role even on a trial period.

78. In respect of age discrimination, it was submitted the respondent was motivated to reject the claimant's job applications and/or dismiss him by reason of age. The submission focussed upon the final consultation meeting and it was said that in the context of Mr Entwistle being the claimants direct line manager, it was surprising he had said nothing to rebut the claimant's sentiment he was being forced out due to his age. The contents of that interview with its reference to moving the business forward in the new world, alongside other features, established a prima facie case which shifted the burden of proof to the respondent. Regarding the second stage of the analysis, the principal argument was that the respondent did not carry out a fair and objective selection process the same being subjective and pre-determined. Regarding justification, it was submitted the respondent had asserted on the one hand that there was no discrimination, yet at the same time argued that if there was, it was justified. It was submitted the narrow basis on which dismissal could be justified in an age discrimination claim are not made out in this case.

79. The respondent argued that the principal reason for dismissal was redundancy or alternatively some other substantial reason, that the tribunal should consider whether the respondent acted reasonably in all the circumstances in treating this as a sufficient reason to dismiss the claimant under section 98.4 of the Employment Rights Act and in determining that issue, the redundancy procedure involving the claimant was fair and objective. It submitted that a thorough consultation process had been undertaken and that the claimant had been given an opportunity of alternative employment to remain within the respondent's employment. It further said he had been invited to and attended interviews for two alternative roles with a view to retaining him within the business and avoid his termination. However, following performance in these interviews, it was determined he was not a suitable candidate and was therefore unsuccessful. It was argued the quality of his answers were not satisfactory.

80. In respect of age discrimination, the respondent submitted the claimant had failed to establish a prima facie case that there was any less favourable treatment on the ground of his age and that Mr Baker was the better candidate for the job and was scored as such. It submitted in the alternative that if there was discrimination, it was justified on the basis as being a proportionate means of achieving a legitimate aim.

Discussion and Conclusions

81. We first considered the claim of age discrimination.

82. The essence of this claim is the allegation that because the claimant was unsuccessful in obtaining a role as business administration manager, he was treated less favourably than his comparator, Mr Baker, who was younger than him. That led to his dismissal. [Issue 7 (a) and (c) and 8 (a)].

83. Section 23 of the Equality Act 2010 provides there must be no material differences in the circumstances of the claimant and the comparator, here his younger colleague, Mr Baker. We are satisfied that there was no material difference between the claimant and Mr Baker in terms of skills and qualification for the role. They were also both internal candidates. Alternatively, the appropriate comparator is a hypothetical comparator who does not share the claimant's age, who was younger than the claimant and who performed similarly in the selection process/exercise.

84. We applied the statutory burden of proof. The first question we considered was whether the claimant had proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had treated the claimant less favourably in not offering him the Administrator Manager role and by dismissing him.

85. We were not swayed by generalised assertions that it was "common knowledge" Mr Entwistle did not like the claimant, nor as to supposed unfairness in the 2019 disciplinary process, nor were we able to infer that the speedily granted holidays to the claimant and Mr Connolly for December 2020 were a sign their days of being employed by the respondent were numbered.

86. We reminded ourselves that whilst there is rarely direct evidence of discrimination, there needed to be a sound factual basis to infer this was what motivated the respondent to treat the claimant less favourably. A difference in treatment would not of itself do this. Something more was required and there needed to be clear factual findings that permitted us to draw an inference of discrimination.

87. We concluded that a *prima facie* case of direct age discrimination had been inferentially proved by the cumulative effect of the following matters which are based on our findings of fact: -

- (a) In the supporting evidence section of the claimant's interview for the Administration Manager vacancy (251), Mr Entwistle asserted the role had changed/evolved and "he did not believe based on what he had heard today, the claimant would move the business forward in the new world". In evidence, he criticised the claimant for his references to "old" processes. Mr Baker, on the other hand was credited with giving a forward-thinking answer with a comment that his answers demonstrated a better understanding of the new ways in which BCA proposed to work. We consider Mr Entwistle's criticism of the claimant to be unfounded as the interview guidance itself states the focus would be on past behaviour. Mr Entwistle acknowledged in cross examination

that he did not know how a candidate could use a forward-thinking answer when being asked about past examples. In answer to questions from the panel, he also accepted that there was no real exploration of the so called “evolving” or “changing” world in the questions put to the claimant.

- (b) At his final consultation meeting, the claimant was told that he had been unsuccessful in securing the Facilities Manager role and that he would now be dismissed for redundancy. Mr Entwistle’s (covertly recorded) and unguarded words were that “from my experience what I have seen in the **past** I didn’t think in a situation where we are wanting to move the business forward in the new world you are the right person for the role” (289) in our view provide a truer reflection of (and are inconsistent with) his position on the scoring form which was recorded in terms of what he had seen “**today**”. We consider his words also betray a possible discriminatory approach when the references to “not being the right person to move the business in the new (online) world are juxtaposed with his criticism of the claimant for referring to “old” processes in his interview for the Administration Manager position.
- (c) Given the purpose of the consultation meeting was to inform the claimant he was being dismissed for redundancy after more than 20 years’ service, we have concluded that Mr Entwistle’s non engagement when confronted with the specific allegation from Mr Martin that he was being forced out due to age may well have been because he had no sufficient answer to that allegation. The respondent correctly in one sense, argued that the claimant had merely assumed age played a factor in his dismissal (which was his feeling at the time). However, he did not then know the respective scores for the administration manager role nor of the shortcomings in the selection process that we have found in respect of that position. Mr Entwistle did have that information.
- (d) We find Mr Entwistle was influenced in his decision making by his unfavourable past view of the claimant and did not solely rely on objective criteria when scoring the competency-based interview for the post of Administration Manager. He did in evidence accept using subjective criteria to an *extent*, but we conclude he gave far greater weight to these factors than he was prepared to admit. This was evident from him referencing an “untidy unorganised desk” when evaluating the claimant in November 2021 for the Facilities Manager role. Whilst accepting he had indeed taken a photograph of the claimant’s desk in 2019 and speaking to him about it at that time, he said he had” moved on “and “did not regard it as a big deal.” This is inconsistent with it then being referenced as a negative factor in evaluating his suitability for a role much further down the line.
- (e) In respect of that interview, we also conclude the reality is Mr Prosser just went along with Mr Entwistle’s decision. We rejected the latter’s evidence denying he was seeking to influence his colleague. Having been told by both Mr Entwistle and Mr Prosser that the HR representative, Mr O’ Driscoll attended and made notes, we were troubled not to have seen these and **then** to have been told post-evidence the notes did not exist.
- (f) The matters set out at (d) and (e) above negatively affected our view of the

witnesses in terms of consistency and credibility leading us to conclude the outcome of the Administration role had been pre-judged by Mr Entwistle to some considerable extent. Looking at the matter in the round, we concluded that these inconsistent aspects of the evidence were part of an attempt to downplay/mask the discrimination alleged.

88. The claimant has therefore proved, on the balance of probabilities that there are facts from which we could decide, in the absence of any other explanation, that age discrimination has taken place.

89. It was then for the respondent to prove that the claimant's failure to obtain the business administration role and dismissal (less favourable treatment) was in no sense whatsoever on the grounds of the claimant's age. Mr Entwistle denied any discriminatory intent but was unable to provide an explanation for either the major shortcomings in following the interview guidance for the Administration Manager role or the anomalous scoring which preceded non selection and which effectively led to dismissal. Given the burden of proof is on the respondent to provide cogent evidence of a non-discriminatory reason, we consider it has failed to do so.

90. For the record, we do not consider Mr Entwistle to be guilty of *conscious* age discrimination.

91. Whilst the respondent did not accept any discrimination had occurred, it nonetheless sought to justify in the alternative that the treatment was a proportionate means of achieving the legitimate aim of the need for business reorganisation in the interests of economy or efficiency. We consider there were no conceivable legitimate reasons of a public or any other nature that could possibly justify this position. No evidence was produced in support of this contention. In fact, it was said that the move to online working might be less physically demanding than the previous one and therefore well suited to older employees.

92. In view of these findings, it has not been necessary for us to consider the remaining limb of direct age discrimination relating to the job held by Mr Williams at Measham whose role in any event was not comparable to that of the claimant.

93. We then considered the claim of unfair dismissal.

94. The first question to decide was what was the reason for the claimant's dismissal?

95. We find that the principal reason was redundancy. There was a commercial and economic reason for dismissal caused by the impact of the pandemic on the respondent's business, and they needed to restructure it.

96. The second question to decide under the list of issues was the one outlined in section 98(4) of the Employment Rights Act 1996 that whether the dismissal was fair or unfair (having regard to the reason shown by the employer) – depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee, and it shall be determined in accordance with equity and the substantial merits of the case. In

respect of this question, we were not making findings of facts for ourselves but deciding whether the respondent's approach was in the band of reasonable responses.

97. The list of issues suggested that in determining the above question, the questions to be asked should include whether the respondent warned and consulted the claimant and whether a fair basis of selection was adopted which would include consideration of whether the claimant was fairly scored in each of his competency-based interviews and whether the outcome was pre-determined.

98. The third question from the list of issues was whether the respondent took reasonable steps to avoid the termination of the claimant's employment which would include consideration of whether he should have been offered the Facilities and Safety role, given that he was the only internal candidate, whether he should have been given a trial period for that role, whether he was given a reasonable opportunity to appeal his selection for redundancy and whether there were any other roles he could do such as the Administration Manager role at Preston.

99. We considered that BCA's restructure process was a fair one. The claimant was identified as being at risk, warnings were given of impending redundancies, consultation was undertaken with a view to conducting a fair selection process and avoiding job losses with arrangements for alternative employment being put in place.

100. In terms of fair scoring, we remind ourselves that the application of selection criteria, is normally a matter for an employer and that it is not our job to re-mark or scrutinise the scores. Even if the employer has not followed the rules mandated by the selection procedure or, we consider, that *some* subjectivity had crept into its mind, we should not interfere unless no reasonable employer could have dismissed the claimant in such circumstances. However, based on our findings that it is impossible to decide if the selection criteria were applied fairly, we have concluded that the process lacked transparency to such an extent that the redundancy dismissal that followed was indeed unfair.

101. The redundancy dismissal was also tainted by age discrimination and for that reason we also conclude it does not lie within the range of reasonable responses and is unfair.

102. We have focussed on the Administration Manager role being of the view that the claimant's dismissal resulted from his failure to be selected for that position. In these circumstances we do not feel it necessary to examine the scoring process for the Facilities and Safety Manager vacancy where the claimant was the sole candidate and conceded his interview" was not the best."

103. Having found the dismissal was unfair as set out above, we saw no need to examine the remaining part of the respondent's process concerning steps taken to avoid the termination of the claimant's employment. It may assist the parties to know we did not necessarily think it was unfair not to offer another role nor did we consider the respondent failed to give him a reasonable opportunity to appeal his decision for redundancy.

104. For the reasons explained above, we found the claimant succeeded in his claims for direct age discrimination and unfair dismissal.

Employment Judge Ganner
06 February 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 February 2023

FOR THE TRIBUNAL OFFICE

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