YG/MF

EMPLOYMENT TRIBUNALS

Claimant: **Mr F Talukder**

Respondent: **ProLicht UK Limited**

Heard at: **East London Hearing Centre** **On: 4 – 6 January 2017**

Before: **Employment Judge Goodrich**

Members: **Mr G Tomey**
Mrs BK Saund

Representation

Claimant: **In Person**

Respondent: **Miss S Ibrahim (Counsel)**

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:-

The complaints of race and age discrimination fail and are dismissed.

REASONS

The claim and the issues

1. The background to this hearing is as follows.

2. On 1 August 2016 the Claimant presented his ET1 Employment Tribunal claim. He had, as required, undertaken ACAS early conciliation. They provided a certificate covering the period from 27 May 2014 to 6 February 2016. He gave his dates of employment with the Respondent as being from 27 May 2014 to 6 May 2016. The Claimant made complaints of age discrimination and race discrimination. Attached to his claim form were details of claim. Essentially his claim concerned the circumstances of his dismissal, namely that it was an act of age and race discrimination. Amongst the points made in his claim form were the following:

2.1. The Claimant challenged whether there was in fact a redundancy

situation: and, even if there was, whether he should have been the person selected for redundancy.

2.2. He stated that he felt very strongly that he was dismissed due to his age and ethnic background.

2.3. He considered that if anyone were to have been dismissed it should have been Mr Cole or Mr Francis. In particular, he referred to Mr Cole and that Mr Cole's main client, Skoda, was unhappy with his performance.

2.4. He could not find any logical reason why he was dismissed and so, he concluded, it was due to discrimination because of his age and ethnic background.

3. The Respondent filed an ET3 response disputing the Claimant's claims. Amongst the points made in their grounds of resistance were the following:

3.1. When the Claimant started work for the Respondent in May 2014 there were about 126 sites on the Mazda project managed by the Claimant.

3.2. By March 2016, by the Claimant's own admission, there were only 37 sites remaining and the project was nearing its end.

3.3. As the Claimant had less than two years' service the Respondent did not follow a full redundancy procedure.

3.4. Had a redundancy selection exercise been undertaken the Claimant would have scored the lowest.

3.5. Additionally, had the Claimant not been selected for redundancy, he accessed on the Respondent's computer the contract of employment of Mr Cole, which would have justified summary dismissal for breach of confidentiality.

3.6. The decision to dismiss the Claimant was a purely commercial one and had nothing to do with his age or race.

4. On 26 September 2016 a Preliminary Hearing was conducted before Judge Foxwell. Judge Foxwell identified the issues in the case and reviewed the Case Management Orders. He set the case down for a four day hearing.

5. Although the case was listed for a four day hearing this Tribunal was only available for three days and we reserved judgment on the case.

6. At the outset of the hearing the Tribunal discussed the issues with the parties. It was accepted that the issues were as summarised by Judge Foxwell in paragraphs 4 – 9 of the Preliminary Hearing conducted by him on 26 September 2016. They are as follows.

The issues

"4. The Claimant confirmed that he was born on 28 March 1956 and

was aged 60 at the date of his dismissal. I asked him how he described his ethnic origin and he said that he was mixed-race Asian/Scottish.

5. The Claimant said that his complaints relate to his dismissal only and that he relies on two actual comparators: Rob Francis, who he believes is in his mid-30s and is white British; and Kevin Cole, who he believes is in his early 50s and is white British.

6. It is common ground that the Claimant was employed as contracts manager on a large contract the Respondent had with the motor company Mazda for the supply of signs. The Respondent's case is that the Claimant was dismissed essentially by reason of redundancy (although he has insufficient qualifying service to claim unfair dismissal) because its requirement for employees to do work on this contract was expected to diminish; it concedes that the contract is still continuing (albeit at a reduced rate) and will not end until some point in 2017.

7. The Claimant says that in fact there is substantial work still to be done under the contract with the prospect of more in Southern Ireland. He says that in any event he had special responsibility for the Mazda contract and particular expertise not shared by his comparators which makes it inexplicable on ordinary commercial or performance grounds why he was chosen for dismissal rather than one of them. He says that his comparators worked on smaller contracts and are less experienced and technically proficient than him. He suggests that there were also issues with Kevin Cole's performance. The Claimant contends that the proper inference is that a reason for the difference in his treatment was because of age or race. The Respondent denies this.

8. Accordingly, this is a claim of direct discrimination by dismissal because of age or race. The Claimant confirmed that he was making no other claims.

9. If the claim succeeds the Tribunal will have to decide what remedy the Claimant should receive and will have regard to the question whether he has taken reasonable steps to mitigate his losses."

Other case management matters

7. The Tribunal had a discussion as to whether the Claimant or the Respondent would give their evidence first. Miss Ibrahim on behalf of the Respondent suggested that the Respondent give their evidence first as it was essentially a case about the reason for dismissal and it might be easier to hear their evidence first. Mr Talukder expressed a preference for giving his evidence first. As the burden of proof was on him the Tribunal decided to follow the usual process and have the Claimant give his evidence first.

8. The Claimant also expressed a wish to read out his witness statement rather than, as is the Tribunal's normal practice now, to have the statements read by the Tribunal and proceed immediately to cross-examination. The Respondent had no objection to this, provided that their witnesses also read out their witness statements; and this is what the Tribunal did.

9. The Respondent introduced some additional documents on the first morning of the hearing concerning whether the Claimant could have mitigated his losses sooner, which the Tribunal allowed to be admitted.

10. On the second morning of the hearing, however, the Respondent asked to introduce some additional documents about the Respondent's financial figures for the most recent financial year, only obtained the previous evening. As the Claimant was acting in person and had had no proper opportunity to consider the documents, the Tribunal indicated to Miss Ibrahim that we would be reluctant to do this; and Miss Ibrahim did not press the Tribunal to have them included.

The relevant law

11. In respect of direct age and direct race discrimination the Tribunal is concerned with less favourable treatment contrary to section 13 of the Equality Act 2010 (EQA) when read with section 39. It is recognised that it is unusual for there to be clear, overt evidence of age or race discrimination and that the Tribunal should expect to have to consider matters in accordance with section 136 EQA and the guidance thereof set out in the case of *Igen Ltd v Wong* and other cases [2005] IRLR 258 (CA) concerning when and how the burden of proof my shift to the Respondent and what the Respondent must prove if it does. The Tribunal has read and adopts the 13 guidelines set out in *Wong*; and guidance has been given in numerous other cases.

12. At the first stage the Tribunal has to make findings of primary fact and determine whether those show in respect of the Claimant and a real or hypothetical comparator, less favourable treatment and a difference in age group or race. In the case of a real, named comparator, the Tribunal looks for a difference in treatment which a reasonable person would consider to be less favourable and which this Claimant also felt was less favourable treatment.

13. In establishing whether there has been less favourable treatment comparisons between two people must be such that the relevant circumstances are the same or not materially different. This phrase was the subject of extensive consideration by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. The Tribunal must be astute in determining what factors are so relevant to the treatment of the Claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is made will be a fair and proper comparison.

14. If the Tribunal is satisfied that there was less favourable treatment and a difference in age or race in comparable circumstances we proceed to the second stage. We direct ourselves in accordance with section 136 EQA and ask, in respect of each item of less favourable treatment that has been proved, whether the Claimant has proved facts from which the Tribunal could reasonably conclude in the absence of an adequate explanation, that the less favourable treatment was because of the Claimant's age or race. Findings of fact which affect whether the Tribunal could so conclude will vary from case to case. Relevant factors include breach of a provision or recommendation in the Equality and Human Rights Commission's Code of Practice, to which the Tribunal should give consideration. Unreasonable treatment on the part of an employer does not necessarily equate to unlawful discrimination but could be a matter from which an inference could be drawn at this stage, leaving the employer to

prove that it had or would have treated a person of another age group or race unreasonably too.

15. If the Tribunal could reasonably conclude, absent a non discriminatory explanation, that there was unlawful age or race discrimination, we move to the third stage. In the absence of an adequate explanation, the Tribunal will uphold the complaint. The Tribunal looks to the employer to see whether it provides and proves a credible, non discriminatory explanation or reason for the difference in treatment. In the absence of such an explanation that the Tribunal accepts as proven on the balance of probabilities, we will infer or presume that the less favourable treatment occurred because of the Claimant's age or race.

16. Tribunals have often been encouraged to concentrate on the question of why the Claimant was treated as he or she was – was it on the prohibited ground or not? When dealing with hypothetical comparators the stages tend to merge or become identical.

The evidence

17. On behalf of the Claimant the Tribunal heard evidence from the Claimant himself; and from Mr Peter Franklin, formerly managing director of the Respondent, from 25 August 2014 to 31 March 2015.

18. On behalf of the Respondent the Tribunal heard evidence from Mr Marco Willenbrock, director of the Respondent and vice president of the German subsidiary of the parent company of the group of which the Respondent forms part; and Mr Terence Smith, operations manager for the Respondent.

19. In addition the Tribunal considered the documents to which it was referred in an agreed bundle of documents.

Findings of fact

20. The Tribunal sets out below the findings of fact we consider relevant and necessary to decide the issues we are required to decide. We do not seek to set out each detail that was referred to us. We have, however, considered all the evidence provided to us and we have borne it all in mind.

21. To a considerable extent the parties were agreed as to the facts in the case. The essential issue was why was the Claimant dismissed. Was it, as was the Claimant's case, that there was no logical reason for why he was dismissed and so it was due to discrimination because of his age and ethnic background? Or was it, as was the Respondent's case, that it was a redundancy dismissal for purely commercial reasons and has nothing to do whatsoever with the Claimant's age or racial background?

22. The Claimant, Mr Feroz Talukder, referred to himself at work and was referred to as "Fred".

23. The Claimant was born on 28 March 1956, so was aged 60 at the date of his dismissal.

24. The Claimant describes his ethnic origin as being mixed race Asian/Scottish.

25. The Claimant was employed by the Respondent from 27 May 2014 until he was notified at a meeting on 8 April 2016 that he would be dismissed. He was dismissed with notice, the effective date of termination of his employment being 6 May 2016. He had, therefore, less than the necessary two years' continuous employment with the Respondent with which to be able to bring an "ordinary" unfair dismissal case.

26. The Claimant was employed by the Respondent from 27 May 2014 until he was notified by Mr Willenbrock on 8 April 2016 that he was being dismissed , the reason given being that the project on which the Claimant was working was nearing its end and Mr Willenbrock had been unable to identify any alternative work to give him. The Claimant was dismissed with notice, the effective date of termination of his employment being 6 May 2016.

27. The Respondent, ProLicht (UK) Limited, is one of seven subsidiaries of the head of the group of companies, ProLicht Werbung GmbH.

28. The seven subsidiary companies of ProLicht Werbung GmbH were described by Mr Willenbrock as being:

28.1. ProLicht Service, Germany;

28.2. ProLicht Reklama, Poland;

28.3. ProLicht Hungary, Hungary;

28.4. ProLicht UK, based at Harlow;

28.5. ProLicht France, France;

28.6. ProLicht Iberia, Spain; and

28.7. ProLicht CE Romania.

29. The total workforce of the seven subsidiaries amounted to about 750 employees, although the UK company, the Respondent in these proceedings, is much smaller. In early 2016 it had about 13 employees although at the date of this hearing these numbers have reduced to five or six employees.

30. ProLicht (UK) is what was described as a full service provider for corporate identity signage. This covered the survey, deinstallation, installation and maintenance of the signage. ProLicht (UK) (the Respondent) also ensures that the relevant building permits are obtained from local authorities. Internally, the projects are dealt with in full by the project managers. The whole project, from surveying the site, ordering the signage and installing it, is completely managed by the Respondent itself. Where technical support is needed, the group companies assist.

31. In recent years, the company has successfully undertaken the rebranding for clients such as Skoda, Mazda, Lexus and BP in the UK.

32. The circumstances of the Claimant starting work for the Respondent were as follows.

33. The managing director at the time the Claimant commenced his employment with the Respondent was Mr Peter Franklin. Mr Franklin was the managing director of the Respondent from 25 August 2004 to 31 March 2015. Until 1 April 2010 he had been a shareholder of the Respondent. After the sale of his shares he remained in position as managing director until he left the company on 31 March 2015.

34. Shortly before the Claimant commenced employment with the Respondent the group of companies of which the Respondent formed part had secured two large new contracts. These were contracts for Skoda car dealer rebranding for the VW Group; and Mazda car dealer rebranding for Mazda Europe and Mazda UK.

35. In order to provide the necessary services for these contracts and other work, the Respondent embarked on a recruitment drive, recruiting about nine new employees in a relatively short space of time of whom the Claimant was one.

36. The Claimant was interviewed by Mr Franklin and offered a position with the Respondent which he declined.

37. In an email to Mr Franklin on 14 March 2014 the Claimant explained that he was rejecting the offer because a significant part of his week would be spent travelling the country carrying out site surveys or supervising sign installations. The Claimant wanted to be predominately office based.

38. Mr Franklin was, however, impressed with the Claimant's qualities. He rethought what offer he could make and made the Claimant an offer of what would predominately be an office based position.

39. By letter dated 11 April 2014 Mr Franklin made a new offer of employment, which the Claimant accepted.

40. The position offered to the Claimant was a contracts manager. Mr Franklin stated that the duties of the position would be as discussed between them and a job description would be agreed – although, in fact, no written job description was ever agreed. He was notified that the position would be Harlow office based but that he would be expected to meet with clients off site when required by the role.

41. Although the initial intention of Mr Franklin was for the Claimant to be a contracts manager supervising all the contracts of the project managers, in practice the Claimant's role during his employment was much closer to that of a project manager, managing the Respondent's Mazda contract.

42. At the time the Claimant's employment with the Respondent started Mr Franklin was spending a large amount of his time managing the Mazda contract. He did not wish to do this and asked for the Claimant to do so. The Mazda contract was a large contract and throughout the Claimant's employment his time was almost entirely spent in managing the Mazda contract. Although he did, from time to time, undertake minor other additional work and from time to time gave advice to Mr Cole and Mr Francis in their management of the Skoda and Lexus contracts respectively, the Claimant had no line management responsibilities, contrary to what had originally been envisaged.

43. The Claimant's day to day duties were almost entirely spent managing the

Mazda contract. His description of the normal sequence of supervising the rebranding of the Mazda dealer showrooms was as follows.

44. A survey would be undertaken of the showroom, it would be photographed and measured and a survey sent to the designers employed by Mazda.

45. The designers would produce a colour visual to show what it would look like with its new corporate identity.

46. The Mazda team would present the proposed design to the dealer and would ask if the dealer was happy with it.

47. Once the dealer had accepted the proposal the Claimant would produce a quotation for the signage which would be sent to the Mazda office in Dartford who would present it to the dealer with any necessary small adjustments and the dealer would accept the quotation.

48. Mazda would instruct the Claimant to proceed with the manufacturer. The Claimant would review the file to make sure that it contained all the information needed. For many of the showrooms building work was required, in which case a structural engineer would be involved. The would notify the office when the signs would be delivered on site. Often foundation work would be needed, in which case he would make sure it had been completed before the signs were on site. The Claimant would organise delivery and installation of the signs.

49. After the signs had been installed the dealer would sign a satisfaction note and the Respondent would send invoice to be paid.

50. The Claimant estimated that generally the process would take about ten weeks from start to finish; and that he had about up to five sites in any one week in progress, although sometimes it would be less than that or occasionally a fallow period of none.

51. The Claimant's two chosen comparators are Mr Kevin Cole and Mr Robert Francis, although the Respondent has disputed that they are apt comparators for the Claimant's direct age and direct race discrimination complaints.

52. The Respondent accepted, however, that in practice the work and responsibilities of Mr Cole and Mr Francis were similar to those of the Claimant.

53. Mr Cole was the designated person for servicing a large contract the Respondent had with Skoda.

54. Mr Francis serviced the contract the Respondent had with Lexus.

55. All three individuals, therefore, were dealing with big car dealer manufactures and were working for those customers. There was a high degree of similarity in their responsibilities although how they operated the contracts was not identical. The Claimant preferred to be more office based, although he did meet with Mazda and their designers fortnightly and visited various sites. Mr Cole spent a high percentage of his time outside the office visiting sites and installations of Skoda's.

56. In the opinion of Mr Franklin Mr Cole was poor at the administrative aspects of

his job. By the time of Mr Franklin's departure his opinion was that disciplinary procedures should be taken against Mr Cole and, shortly after his departure, he provided details to Mr Willenbrock of what he perceived to be Mr Cole's shortcomings.

57. In his opinion Mr Cole should have been dismissed.

58. Mr Willenbrock did not share Mr Franklin's opinion. His explanation for retaining Mr Cole was that there had already been two individuals that had been servicing the Skoda contract and had left the Respondent's employment, so getting another project manager would have been yet another upheaval for the client. Mr Willenbrock's opinion was also that the expectations of the Skoda client were in his words, *"ridiculous"*. They had far higher expectations of the Respondent than they were able to deliver. Mr Willenbrock also explained that the expectations of clients were such that they were seldom satisfied with their project manager. We accept to some extent that this was the case as Mr Smith gave credible evidence that some of Mazda's dealers were unhappy at the Claimant's reluctance to visit their sites; although we also accept that Skoda had far more complaints about Mr Cole than Mazda had about the Claimant, as was the Claimant's evidence. The Claimant's evidence to this effect was supported by Mr Franklin and, at least to some extent, by Mr Willenbrock.

59. The Claimant did not give much evidence on his comparability with Mr Francis, preferring to concentrate his criticism of the Respondent on their retention of Mr Cole in spite of what the Claimant and Mr Franklin perceived to be poor performance on his part of the Skoda contract.

60. Mr Franklin gave plausible evidence, which we accept, that the Claimant, of the three of himself, Mr Cole and Mr Francis was the strongest, most experienced and most effective of them.

61. Between the start of the Claimant's employment and the end of March 2016, the Claimant was working very hard on the Mazda contract. The volume of work required was very high. He worked long hours and often work weekends. He had an administrator, Ms Gill Baker, working for him.

62. A Mr Janzen from the Respondent's sister company in Germany, wrote an email to the Claimant, copied to Mr Smith and Mr Willenbrock, criticising the Claimant. Included in his email was the statement:

> "*I'm slowly getting pissed off about the situation in UK! Even if MMUK is difficult to handle as a customer, I really don't understand why it takes more than one and a half day to answer an email which was sent from myself to you?*"

63. The Claimant was annoyed and upset at Mr Janzen's email. He sent an email in return on 14 October. He told him that the issues were complicated and involved; he was resigning from ProLicht and would leave on 13 November; and was insulted by his insinuation that he was lazy or incompetent.

64. A few days later the Claimant reconsidered his decision to resign and spoke with Mr Smith about withdrawing his resignation. Mr Smith supported the Claimant in this and contacted Mr Willenbrock to seek to persuade him to accept the withdrawal of the Claimant's resignation.

65. Mr Willenbrock agreed to the Claimant withdrawing his resignation. Mr Willenbrock and the Claimant had an exchange of emails confirming the withdrawal of the Claimant's resignation. Mr Willenbrock accepted the Claimant's conditions for withdrawing his resignation; mainly of getting some additional help and support from Mr Smith and being allowed to manage and administer the project as he (the Claimant) felt necessary.

66. In January 2016, unbeknownst to the Claimant, Mr Smith, Ms Evans, the Respondent's Finance Manager had a meeting in Mr Willenbrock's German office to discuss, amongst other issues, the Claimant's future when the Mazda contract would be completed, or nearing completion.

67. Although Mr Willenbrock was in overall charge of the Respondent organisation, it was Mr Smith who ran the company on a day-to-day basis. Mr Willenbrock is German, he worked for the German subsidiary company and both he and the Claimant estimated that they probably saw each other about six to seven times during the Claimant's employment with the Respondent; and that Mr Willenbrock was not in the UK very often.

68. Mr Willenbrock was concerned that the work under the Mazda contract would be coming to an end before very long. Mazda were pushing to put through as many sites as possible before the end of March 2016 and Mazda had notified ProLicht that there was unlikely that there would be a group contract going forward.

69. Notwithstanding the meeting in Germany, Mr Smith placed an advertisement for a talented and enthusiastic Project Manager and Project Management Assistant. His explanation for this was that Ms Baker, who had been providing administrative assistance to the Claimant in the Mazda contract had left the company. In view of subsequent events this appeared to be an optimistic assessment of the need to recruit the posts concerned. In fact, however, no recruitment was made.

70. By early March 2016, Mr Willenbrock had decided that the Claimant should be dismissed. He wrote an email on 4 March 2016 to Ms Jo Evans, the Respondent's Finance Manager who also covered HR issues for the Respondent. He copied Ms Haworth who provided external HR advice to the Respondent on a consultancy basis. He notified Ms Evans that he would terminate the Claimant's employment due to lack of work available to him after 31 April 2016 (presumably he meant 30 April) when the majority of the Mazda project had been completed.

71. Mr Willenbrock also referred to the Claimant's two years' qualifying service ending on 27 May 2016. He proposed that 13 May 2016 be the Claimant's last possible day working for the Respondent.

72. In the timing of the notice period both the Claimant and Mr Willenbrock agreed in their evidence at this hearing that the timing of the end of the Claimant's employment was in order to prevent him having two years qualifying service. The Claimant additionally suggested both in his evidence and closing submissions that Mr Willenbrock accepted that the two years service issue was a factor in the timing of the notice period, as he had received advice to this effect from the Respondent's human resources consultant, although he did not accept that it was a reason for the Claimant's selection. We doubt whether it formed part of the reason for the Claimant's selection for reasons we explore later.

73. Mr Janzen asked the Claimant for details of what outstanding work there was on the Mazda contract.

74. On 7 March 2016, the Claimant sent Mr Janzen an email. In the email he explained to Mr Janzen that the UK dealer list published in October 2015 showed 137 sites; and, according to the Respondent's records there were still 37 sites that had not been ordered with the factory. He gave details of the status of the sites and, shortly afterwards, details of where they were.

75. Although Mr Smith was the day-to-day manager of the Respondent Mr Willenbrock did not ask Mr Smith for his opinion as to who should be made redundant. It was his decision alone to select the Claimant.

76. When notified of Mr Willenbrock's decision Mr Smith did not agree with it.

77. Mr Willenbrock wrote an email to Mr Smith on 16 March 2016 notifying him that he suggested that he should be dismissed on 7 or 8 April.

78. Mr Smith replied to Mr Willenbrock's email notifying him that there were many sites within the remaining 37 or so sites that were far more technical than the standard sites; and that following the Claimant's departure there would be nobody with the expertise to deal with them.

79. What was a particular concern to Mr Smith was that he was already very busy with the day-to-day running of the Respondent; and that he would be likely to have to shoulder the burden of the additional work that would be caused by the Claimant's departure. In short he fought for the Claimant's retention.

80. Mr Willenbrock sought to reassure Mr Smith by notifying him that they would obtain additional help and technical expertise when needed from employees within subsidiary companies; and his intention was also for the Claimant to help Mr Smith get to understand the needs of the customer during what was anticipated to be the Claimant's notice period.

81. The Claimant must himself have been concerned about his future employment prospects. A few days before he was dismissed he had a meeting with Mr Smith, on 5 April 2016, in the course of which he expressed concerns that, with the Mazda programme coming towards an end, his future employment might be in doubt. The Claimant had also at that time received an approach from a recruitment company asking whether he was interested in two positions that were available.

82. Mr Smith was in a difficult position in the meeting on 5 April with the Claimant. By then he was well aware that Mr Willenbrock was about to dismiss the Claimant. He did not, however, feel that he could tell the Claimant this as Mr Willenbrock was to be undertaking this task.

83. Both the Claimant and Mr Smith agree that Mr Smith informed the Claimant of a number of contracts that might be "in the offing", although not definite yet; that the Claimant asked for a £5,000 pay rise; and that Mr Smith indicated to the Claimant that he would support such a request.

84. In dispute is whether Mr Smith mentioned in the possible future contracts in the offing various contracts that either were already being performed by Mr Cole or were subsequently performed by him. This is a dispute that is not particularly easy to resolve as the contemporaneous documentation did not contain references to exactly what contracts were referred to in that meeting; and it is probably unnecessary for us to resolve the dispute in any event. If it is, on the balance of probabilities we find the Claimant's account of the conversation to be the more likely. Mr Cole was in an uncomfortable position at the meeting, for the reasons we have explained and may have been seeking to provide some reassurance to the Claimant; and Mr Smith's evidence was that he was still hoping that he might persuade Mr Willenbrock to change his mind. If so, he might have mentioned the contracts that Mr Cole was working on or had been earmarked to work on when they came into fruition.

85. Whether or not Mr Smith made any further attempts between meeting with the Claimant on 5 April and the Claimant's meeting on 8 April 2016 to persuade Mr Willenbrock to change his mind, he was unsuccessful.

86. On 8 April 2016, Mr Willenbrock called the Claimant to a meeting at which he told him that he would be dismissed.

87. By letter on the same day Mr Willenbrock confirmed that the Claimant would be dismissed. He notified the Claimant that as the Mazda project was nearing its end and there was no alternative work for him he would be provided with one month's notice; he would be expected to work his notice period; and his date of termination would be 6 May 2016.

88. The Claimant was very upset. He challenged the letter of dismissal. He stated in an email to Mr Willenbrock that he was baffled by the statement that the Mazda contract was nearing its end as there was still 37 showrooms to be signed which had not yet been ordered.

89. Mr Willenbrock replied stating that only part of the 37 sites had the complete level of work to be done, whilst the majority of the work for a number of sites had already been accomplished.

90. The Claimant did not in fact work his notice period. He went off work sick with stress, providing a fitness note certifying him off work for six months.

91. The Claimant sent an email to Mr Smith on 3 May 2016, complaining that he (Mr Smith), Jo (Evans) and Marco (Willenbrock) had been plotting his dismissal for some time.

92. Mr Smith replied to the Claimant's email. He told the Claimant that he had fought tooth and nail to change Marco's (Willenbrock) mind; that he did not understand why he had decided to end his employment and particularly the timing he applied. He notified the Claimant that he was baffled by it and he certainly did not agree with the decision.

93. The Claimant wrote to Ms Evans, by letter dated 4 May 2016 notifying her that he had not been issued with the company handbook telling him how to proceed in the event of a grievance. He disputed that the Mazda project was nearing its end. At the end of the email he expressed the opinion that he did not understand why he had been

dismissed and formed the opinion that he had been discriminated against either due to his age, ethnic background or possibly both. He asked to be reinstated or compensated.

94. The Claimant instructed solicitors to draft a letter of appeal on the Claimant's behalf. In the letter of appeal he again referred to the work still needing to be done on the Mazda contract.

95. He also referred to Mr Cole and asserted that the Skoda account and showrooms had reduced to approximately nine sites, and that there had been issues with his performance, with Volkswagen being unhappy with his performance. He repeated his opinion that he had been dismissed because of being older and being of mixed rate whereas Mr Cole is white British.

96. The appeal hearing took place on 28 June 2016. Contrary to the Respondent's policies it was conducted by Mr Willenbrock, the individual that had dismissed the Claimant. The Claimant was unsuccessful in his appeal and Mr Willenbrock sent him a letter dated 4 July 2016 explaining why the appeal was unsuccessful. Amongst the points given in Mr Willenbrock's rejection of the appeal were the following:-

92.1 The remaining Mazda work had been incorporated into (Terry Smith's) role and that he had shown that he was able to manage the project within his current workload and to the client's complete satisfaction.

92.2 Disputing the Claimant's assertions as to how many Mazda sites were still needing to be completed.

92.3 None of the work referred to by Terry Smith as being in the offing had come to fruition.

92.4 The Mazda programme had diminished so that there was a genuine redundancy situation and no alternative work for the Claimant to do.

92.5 Disputing that he had been dismissed for discriminatory reasons and asserting that the decision had nothing to do with the Claimant's age and ethnicity.

92.6 So far as the Claimant's criticisms of Kevin (Cole's) performance Mazda were also unhappy with his (the Claimant's) performance, although the decision to dismiss was not based on the Claimant's quality of work.

97. Mr Willenbrock also made reference to the Claimant accessing Mr Cole's contract in breach of confidentiality. Mr Willenbrock accepted, however, in answer to questions from the Judge that the Claimant had never had drawn to his attention what was or was not permissible so far as computer usage was concerned. Nor did Miss Ibrahim refer to the issue in her closing submissions.

98. The Respondent produced in the bundle of documents an equal opportunities policy and a discipline and grievance policy. We have some doubts as to whether they were in place while the Claimant was employed by the Respondent. Even if they were, they were of little or no use because the Claimant had never had them drawn to his attention.

99. The Claimant describes himself as being of mixed race Asian/Scottish ethnic origins. Mr Cole and Mr Francis are white.

100. The Claimant was aged 60 at the date of his dismissal. Mr Cole and Mr Francis, the Claimant's chosen comparators were estimated by the Claimant to be in their early 50s and late 30s respectively.

101. Mr Willenbrock in the course of his evidence stated that he was unaware that the Claimant had mixed race ethnic origins; and believed that the Claimant was much the same age as Mr Cole. The Claimant accepted in answer to questions from the Judge that Mr Willenbrock might not have appreciated that the Claimant was of mixed race origins (from his appearance and accent he could be thought to be white UK British; although the Claimant considered that Mr Willenbrock could have made an "educated guess" from the Claimant's surname of Talukder (the Claimant described himself at work and was referred to as "Fred" rather than Feroz which is in fact his first name).

102. The Tribunal finds that Mr Willenbrock was unaware that the Claimant was mixed race; and unaware that there was any significant difference between the Claimant's age and that of Mr Cole, although he was aware that Mr Francis was of a younger age group. We so find because:-

98.1 Mr Willenbrock was an infrequent visitor to the Respondent's work premises, had only spoken to the Claimant about 10 to 12 times during his employment with the Respondent and was not a social friend of the Claimant outside work.

98.2 Mr Willenbrock had not interviewed the Claimant to appoint him to the job whereby he might have learnt at least about the Claimant's age.

98.3 As referred to above the Claimant accepted that his mixed race origins were not readily apparent and the difference between the ages of the Claimant and Mr Cole was relatively small. As Mr Cole was not a witness the Tribunal is unable to say whether or to what extent Mr Cole looks younger than the Claimant. To us the Claimant looked at youthful 60 and could easily be thought to be younger.

103. Part of the background to the Claimant's dismissal were difficult financial circumstances of the Respondent. During 2013 and 2014 they made an operating loss putting the company close to insolvency. In 2015 a net profit was achieved. However, with both the Skoda and Mazda contracts being predicted to decline in work and income during 2016, without equivalent work to replace these contracts, there was a decline in the Respondent's workforce. The Claimant's position was never replaced and there have been further reductions in staff since the Claimant's dismissal. In January 2016 the Respondent employed 13 or approximately 13 individuals. By the date of the Respondent's ET3 response there were eight employees which has since diminished to five or six. There has, therefore, been a redundancy situation leading to a diminution in employees to perform the work carried out by the Respondent.

104. Why did the Respondent dismiss the Claimant? Was it because of his age or race; or was it for the reasons given by the Respondent? This in turn requires consideration of the Respondent's reasons, or explanations for dismissing the Claimant

which were as follows:-

100.1 The Claimant was working exclusively on the Mazda project which the Respondent had been informed would decline severely after March 2016.

100.2 Although the Skoda contract that Mr Cole was the individual responsible for was declining, there were a number of other smaller contracts Mr Cole was working on by the time of the decision to dismiss the Claimant. These included smaller contracts with Harley Davidson, Reno Trucks, Volvo Trucks and Bentley, as well as a hope of obtaining more business from Whitbread.

100.3 The Lexus contract that Mr Francis worked on was also in decline but he was successful in obtaining a maintenance contract with Lexus as well as some other work.

100.4 As Mr Francis and Mr Cole had established relationships with the clients they were working with it was better to have them continue with these customers than replace them with the Claimant.

100.5 Mr Smith had the skills to take over the remainder of the Mazda contract even although he was unhappy at the extra workload required of him.

105. The Tribunal accepts the Respondent's reasons or explanations at least to the extent that we are satisfied that the decision to dismiss the Claimant was in no sense whatsoever because of his age or ethnicity. We so find including because:-

101.1 The Claimant has accepted that he never experienced any racial or age discrimination up until the date of his dismissal.

101.2 Mr Willenbrock was willing to accept the Claimant retracting his resignation. The email exchange also shows that he was willing to give the Claimant reassurance about the support he would get on the Mazda project and autonomy in performing the work as part of the basis of the Claimant's withdrawal of his resignation. This suggests that the retention or dismissal of the Claimant was based on Mr Willenbrock's assessment of commercial realities, rather than the Claimant's age or ethnicity.

101.3 Our findings of fact as to Mr Willenbrock's knowledge of the Claimant's age or ethnicity show that it was not a factor in Mr Willenbrock's decision to dismiss the Claimant. On receipt of the letter from the Claimant's solicitors setting out grounds of appeal Mr Willenbrock became aware of the Claimant ethnicity. By then, however, Mr Willenbrock had made his decision and was unlikely to change it.

101.4 The loss of the Claimant was not the only reduction in the Respondent's headcount as other individuals, such as Ms Evans, were subsequently to leave and not be replaced.

101.5 From the Tribunal's collective experience it is readily understandable that an employer such as the Respondent would prefer to have their employees keep their existing customers whom they had built up

relationships (even if Mr Cole's relationship with Skoda was not particularly good) rather than have a change of client.

101.6 Although we have criticisms of how the Respondent went about dismissing the Claimant, the Respondent's disciplinary procedures provide that the company may, at its discretion, decide not to follow the procedure in part or in full where an individual has less than two years continuous service.

Closing submissions

106. On behalf of the Respondent Miss Ibrahim gave a tight skeleton argument at the outset of the hearing. Additionally she gave oral submissions. These included the following:-

102.1 Submissions as to the relevant law and reference to a number of authorities, namely *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] ICR UK HL; *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010; and *IPC Media Ltd v Millar* UKEAT/0395/12/SM.

102.2 Submissions as to the findings of fact the Tribunal was invited to make.

102.3 Responses to issues raised by the Judge such as the Respondent's failure to follow the guidance in the Code of Practice of the Equality and Human Rights Commission on employment, particularly as to the Respondent failing to make its employees aware of their equality policy or provide any training on or promotion of it.

107. The Claimant gave oral and typed submissions in his closing statement. These included:-

103.1 Submissions as to the facts the Tribunal was invited to find.

103.2 Submissions as to the work from Mazda being ongoing beyond the Claimant's dismissal and indeed the date of this hearing.

103.3 Submissions as to his comparators performing their work less efficiently and effectively as he did.

103.4 Disputing the Respondent's "commercial rationale" as to his dismissal.

103.5 Taking his submissions into account he could not find any logical reason why he was dismissed and has concluded that it was as a result of age discrimination or his ethnic background.

Conclusions

108. The Claimant was poorly treated by the Respondent over his dismissal and the Tribunal can readily understand why he might be suspicious that his age and race could be factors. Had the Claimant two years continuous service with the Respondent and the Respondent dismissed him in the way they did the Tribunal has no doubt whatsoever that he would have been unfairly dismissed. The first inkling he had as to

his dismissal was being informed that he was being dismissed as a "fait accompli". There was no warning of impending prior redundancies even although his dismissal was first being considered in January 2016. There was no consultation with him about possible dismissal or alternatives to dismissal. Three days before the Claimant's dismissal he was actively misled by Mr Smith, who knew that Mr Willenbrock was determined to dismiss him. It is readily understandable that he felt shocked, angry and upset at his dismissal.

109. It is arguable whether or not, having in mind the burden of proof provisions in section 136 EQA and guidance given in the *Igen v Wong* case and many others whether or not the burden of proof passes to the Respondent to prove that the Claimant's dismissal was in no sense whatsoever because of the Claimant's age or race. In support of the burden of proof passing the Respondent are that:-

105.1 The manner in which the Claimant was dismissed was poor treatment of him for the reasons we have described. The Tribunal is well aware that unreasonable treatment does not necessarily equate to discriminatory treatment. Nor, however, should we assume that the Respondent treats all its employees unreasonably. Unfair or unreasonable treatment calls for an explanation.

105.2 The Respondent may be a small company in the sense that the UK employees amounted to only 13 employees. Small employers are not expected to adopt the same formalities as large employers, although nor should they be expected to ignore the Equality and Human Rights Commission's advice on having an equal opportunities policy and making sure that it is understood by the workforce.

105.3 In this case the Tribunal needs to explore why it was that the Claimant was dismissed, which is entwined with the Respondent's explanations for its treatment.

110. The reasons given in our findings of fact above the Tribunal has concluded that, whilst he was badly treated by the Respondent in the manner of his dismissal, his dismissal was in no sense whatsoever because of his age or race.

111. Whilst, therefore, the Tribunal has considerable sympathy with the Claimant his claims fail and are dismissed.

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Employment Judge Goodrich

09 February 2017