Appeal No. UKEAT/0403/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

BRUNEL UNIVERSITY — APPELLANT

MRS SHEILA KILLEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD LEIPER (of Counsel) Instructed by: Veale Wasbrough Vizards Barnards Inn 86 Fetter Lane London EC4A 1AD
For the Respondent	MR LINDSAY HEASMAN (Representative)

SUMMARY

REDUNDANCY – Definition

An Employment Tribunal held that the Claimant had been unfairly dismissed, and less favourably treated, because of her age. She had occupied a senior post. The department in which she worked was restructured. The ET held that the loss of the Claimant's post and her dismissal in consequence was not by reason of redundancy, but a dismissal for some other substantial reason, and it was entitled to do so. It found that it was an act of age discrimination not to appoint her to one of the new posts in the restructured organisation, and held her unfairly dismissed. On appeal, it was held that the ET was entitled to conclude that the dismissal was for SOSR, but since it had accepted that the appointment to the available post depended on interview, and that the person (a man) appointed to it had performed better than the Claimant, and for that reason had apparently rejected a claim of discrimination on the grounds of sex, there was no adequate basis on the facts which the ET had found for concluding that there had been age discrimination. The assessment of the fairness of the dismissal was flawed, but that issue would be remitted to an ET for determination.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. The Employment Tribunal at Watford, Employment Judge Manley, Mr Jackson and Mrs Sood, held for reasons promulgated on 31 May 2013 that Mrs Killen, whom I shall call "the Claimant", had been unfairly dismissed and had been less favourably treated because of her age. The Tribunal rejected other complaints.

The background facts

2. Mrs Killen began work on 23 April 2001. She was head of conferences in the residential catering and conferences services department, graded at H4; the higher the number, the higher the post. In 2012 a bid was made, known as a market test exercise, to provide services in-house for the University, which is the Respondent. It was successful. As a result of that, a change of structure of the management was proposed. The head of conferences role became wider, to encompass hotel and retail. The Employment Tribunal accepted that this was so much wider than the Claimant's existing role that it was not suitable that she should be assimilated to that post.

3. Underneath that post in the new structure that was to replace the old structure, there were five posts; they were at grade H3. One of them was that of deputy conference manager, the others being finance manager, business development manager, deputy hotel manager and deputy retail manager. The two officers, Ms Jager and Ms Strachan, dealing with the restructuring had to apply the policy of the University. That was, in the event of a reorganisation, to assimilate or to ringfence where appropriate. At paragraph 16 the Tribunal said that assimilation was "use[d] where the new job is substantially similar to the old. The employee slotted into the new posts", and ringfencing:

> **"[…] is determined by using the same ideology for assimilation and the old and new jobs are found *not* to be substantially similar but the university will take the view that they have sufficient elements in common so as to give the employee an opportunity to be considered for the new post, usually by a selection process."**

4. Ms Jager and Ms Strachan decided that the post of head of conferences and hotel and retail was not substantially similar so that the Claimant could be assimilated to that post, nor did they consider that the post of deputy catering manager was so similar that she could be assimilated to it, but they did consider there were sufficient similarities that she should be ringfenced for that deputy post. In due course, she applied for both the head post and the deputy conferencing manager post. She was interviewed for the latter; she did not succeed in obtaining the post. She was served with notice of redundancy and dismissed purportedly by reason of redundancy on 31 October 2012.

5. She claimed that this process and the resultant dismissal had been unfair to her under section 98 of the **Employment Rights Act 1996** (ERA). She claimed also that she had been less favourably treated by reason of her sex and her age. There had been an additional complaint that it was because of her race, which was not proceeded with, having been withdrawn by her representative prior to the hearing.

6. The Tribunal first considered the question of whether there had been a dismissal by reason of redundancy or, in the alternative, as the University contended it would be, for some other substantial reason. It rejected the first and found the latter. At paragraph 53(1) it concluded that there had been no reduction in the requirements of the business for employees to carry out work of the particular kind that the Claimant had carried out, nor had it ceased or diminished nor was it expected to cease or diminish. It did, however, consider that the restructuring exercise was valid. This constituted some other substantial reason of a kind

sufficient to justify the dismissal of an employee holding the position that she held under section 98(1)(b). That, therefore, required the Tribunal to examine, under section 98(4), whether the dismissal was fair or unfair, having regard to that particular reason. It concluded that it was unfair. It did so because it thought that the employer should have assimilated the Claimant to the deputy conferencing manager role, and if that were wrong and it were right to require her to be interviewed for the post, as she was, aspects of the process by which she was interviewed were unfair to her. I shall deal with the detail later in the course of describing the argument.

7. As to the discrimination complaints, it considered that the burden of proof shifted. It would appear that the Tribunal thought it shifted in respect of both age and sex. It then looked to the Respondent to explain why it was that the Claimant had been treated as she was and was satisfied on probability that there was no discrimination on the ground of sex but concluded that there was on the ground of age.

The appeal grounds

8. The University appeals against these findings on three grounds, which may be summarised as being (1) that there was in truth a redundancy, (2) that the Tribunal substituted its own view as to whether the Claimant should have been assimilated to the deputy catering manager post, and (3) that the conclusion in respect of age discrimination was reached in error of law. In either of those two latter respects, it was said not only was there an error of law in the approach but also the conclusion was perverse.

9. Although Mr Leiper, who appeared for the University here, though not below, addressed discrimination first, I shall deal with the grounds as they have been set out in the Notice of

Appeal and the order in which they were addressed by Mr Heasman, representative for the Claimant, who appears here as he did below. As to redundancy, it is submitted that the Tribunal did not properly apply the statutory test. There can be no objection to the way in which the Tribunal posed the test it had to apply (paragraph 53(1)). The words there reflect sufficiently accurately the wording of section 139 of the **ERA 1996**. So far as material, that provides:

> **"(1) For the purposes of this Act 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."**

10. Some observations; as Mr Leiper, in an argument of exceptional clarity, submitted, the focus has to be upon the statutory words. In **Safeway Stores PLC v Burrell** [1997] ICR 523, in a judgment of an Appeal Tribunal chaired by HHJ Peter Clark, which was subsequently to be described in **Murray v Foyle Meats** [1999] ICR 827 in the House of Lords as a judgment upon which in the words of one of their Lordships he could not improve, it was said at 530 under the heading "Reduction in the Work":

> **"From time to time the mistake is made of focusing on a diminution in the work to be done, not the employees who do it."**

11. The focus, submitted Mr Leiper, is not upon the particular work being done by the particular individual but the need of the business for employees to do work of a particular kind. In its findings, what the Tribunal said, having set out the test, was this (paragraph 53(1)):

> **"We have concluded that there was no evidence before us of any diminution in work carried out by Ms Killen. There is no evidence in the documents nor any oral evidence of removal of any duties from the job description for the new posts. […] The increase in numbers of people working in the department from eight or nine to twelve or thirteen indicates on its own a potential increase in the work to be carried out, presumably because the work included seeking new client business. We cannot find that there was a reduction in work or that such a**

reduction was expected either within the department or specifically with the work carried out by Head of Conferences. We therefore do not find that it was a redundancy dismissal."

12. He argues that by asking whether there was any evidence of diminution in work carried out by Ms Killen the focus of the Tribunal was placed in the wrong place. The test does not depend upon whether her work diminished but on the requirements of the business for employees to carry out work of a particular kind.

13. He responsibly and properly referred also to **Shawkat v Nottingham City Hospital NHS Trust (No. 2)** [2002] ICR 7, a decision of the Court of Appeal, Robert Walker and Longmore LJJ. That was a case in which a thoracic surgeon was required to undertake not only thoracic surgery but also cardiac surgery after a reorganisation established a cardiothoracic unit to replace the unit in which he had formerly worked. His claim was rejected, but in the course of the judgment of Longmore LJ at paragraph 12 consideration was given to the question of whether a reorganisation leading to a dismissal necessarily meant that the dismissal was by reason of redundancy. Longmore LJ referred to the earlier case of **Murphy v Epsom College** [1985] ICR 80, in which Sir Denys Buckley had said at page 93:

"Every case of reorganisation must, I think, depend intimately on its particular facts. In each case it must be for the industrial tribunal to decide whether the reorganisation and reallocation of functions within the staff is such as to change the particular kind of work which a particular employee, or successive employees, is or are required to carry out, and whether such change has had any, and if so what, effect on the employer's requirement for employees to carry out a particular kind of work."

14. In his judgment Longmore LJ went on to note that the Tribunal had found that despite the change that had occurred the employer's requirements for employees to carry out thoracic surgery had not ceased nor diminished. That was a conclusion of fact open to them, and that was, as he put it, "the end of the matter". He noted that it can follow from the fact of a reorganisation that there is a requirement that has ceased or diminished for employees to carry

out work of a particular kind, but it need not follow, and, as he put it in important words for present purposes at the end of paragraph 13, "[…] it is for the tribunal to decide whether it does or not".

15. Accordingly, I am concerned here with a question of fact. The only issue is whether the Tribunal, which had, it is accepted, on the face of it, directed itself to the appropriate test, had reached a decision on fact that was open to it. The only reason for supposing it might not have done is the way in which it described Mrs Killen's work. This, in my view, is to take that sentence in isolation from its context. The Tribunal was considering what the employer did, what the employer's requirements were for employees generally to do work of various particular kinds, but very much the same work as before with some additional work, and it was in that context that it described how Mrs Killen's work did not particularly diminish, how there was no evidence that any postholder would do anything less in their new post than in the old, and how the fact that more people were employed might indicate that there was an expansion of work, far from a reduction of it, and therefore imply an increase rather than a decrease in the requirement of the business for employees to carry out work of a particular kind. Mr Leiper is right in saying the Tribunal did not specifically identify what particular kind of work it had in mind; in a case such as this, however, in which the Tribunal had at the very start of its judgment accepted that it would not set out all the facts, I do not think that this justifies regarding its conclusion as an error of law. Accordingly, in my view, there is no proper force in this first ground of appeal.

16. If I were wrong in that conclusion, however, the conclusion on this part of the appeal could have no effect upon the overall conclusion of the Tribunal on either of the other two aspects of it, its decision that there had been a dismissal that was unfair and on the question of

age discrimination. To his credit, Mr Leiper accepts that whether the dismissal was for some other substantial reason or was by reason of redundancy, in this case in its particular circumstances it makes no difference to the analysis of the facts that bear upon fairness or unfairness. In my view, this ground is therefore a non-ground. In effect, the purpose of it is perhaps the somewhat forensic one, as Mr Leiper frankly admitted, to attempt to demonstrate that the Tribunal's approach was lacking in this respect such that it might be supposed more readily that it was lacking in other respects.

17. There is, in my view, more substance in both of the other two grounds that follow. As to substitution, what the Tribunal said, having concluded that they were looking at a dismissal for some other substantial reason, was this, so far as is material (paragraph 53(2)):

> **"We accept that there was a reorganisation here, and we accept that it was a valid restructure in the circumstances of a successful in-house bid and that the merging of conferences with hotel and retail was a reasonable and quite proper step to take. The question, therefore, is whether that justified the dismissal of Ms Killen. Certainly, that is arguable in her case, given the fact that some of her responsibilities were now to be carried out in other new posts including, it appears, the Head of CHR, the Deputy Conference Manager and even, possibly, the Finance Manager post. […"**

18. The Tribunal at this stage had accepted it was not suitable to assimilate Mrs Killen to the head of conferencing, hotel and retail. It concentrated therefore on whether she should have been appointed to the deputy conferencing manager post for which she had applied (paragraph 53(5)):

> **"As we have said in our findings of fact, we have really struggled to see what differences there are in the roles as described in the documents that the respondent referred to, led them to decide that this was not a similar post to Ms Killen's existing post of Head of Conferencing. It was also one grade lower. As indicated we believe that there are minor differences only. If that finding of fact is not sufficient, we go on to say this; having looked at the documents referred to and heard the work that Ms Killen did in her existing post, bearing in mind the age of the HERA document [a document from 2007 describing what she was then doing, there being no other form of job description] and what is contained within it, we have taken the view that no reasonable employee would have thought that the jobs were not substantially similar. Whilst it is said that the post involves more of a selling emphasis, that is not clear on the face of the document save, as we have indicated, minor reference in the aims and objectives section. We must state clearly that we do not substitute our view but that, looking at it from the perspective of the industrial jury, we have formed the clear view that the**

> **decision not to assimilate Ms Killen into the Deputy Head role, which we remind ourselves again was one grade lower than she was in her existing role, falls outside the range of reasonable responses."**

19. As to that, it is important to remember the context within which this question arose. The overall question that had to be asked and answered was that posed by section 98(4) of the ERA 1996. The overall conclusion is therefore what matters. The broad overview of the facts relevant to this conclusion was that the original role performed by the Claimant had been split into a number of component parts. As it happened, ultimately no alternative job was found for her nor offered to her. The Tribunal plainly thought in paragraph 53(5) that the post of deputy head of conferencing should have been offered to her. They did so, it would seem, on the basis of that which the documents described. That is the principal point of reference for the comments it made in paragraph 5.

20. In paragraph 53(8) it dealt with the interview that Mrs Killen had for the deputy head post. She had not asked to be assimilated to the post; but she did apply for it. She was in competitive interview with two others who, like her, had been ringfenced for that post as having jobs that were sufficiently similar in content to the deputy head post. A Mr Lindsay, who was in his late 30s and had been the conference operations manager under the previous structure, was selected. The other disappointed candidate, a year younger, was Caroline Barringer, who had been deputy head and conference marketing manager under the old structure. At paragraph 53(8) the Tribunal said, in respect of the interview:

> **"We do not believe that Ms Killen was properly aware that the new posts needed to have a greater emphasis on selling, though that was in the minds of the interview panel. She was not aware that that was a major difference that they were seeking answers to but we do believe that Mr Lindsay was aware of this because of his previous involvement."**

21. The “previous involvement” that the Tribunal were there referring to was the fact that Mr Lindsay had given the in-house presentation that secured the bid consequent upon which the restructure was made and had worked closely with Ms Strachan in that process. He would therefore be well aware of the nature of the new structure. He had also sought the assistance of Ms Jager, who had issued a general invitation to those concerned to do so, which he, though not the Claimant, had taken up.

22. The importance, however, of paragraph 53(8) is that it suggests that the Tribunal accepted that there was a “major difference” between the job that the Claimant had been doing and the job that the employer wished to have done by the deputy conferencing manager. The difference might not have been so readily apparent on the documents – that is the purport of 53(5) – but there is no suggestion in what the Tribunal said that the interview panel had impermissibly, in the sense of showing favouritism to Mr Lindsay, sought to hide the fact that they were looking for a greater emphasis on selling. There is nothing to suggest that the view of the employer was not an honest view. The Tribunal simply made no finding one way or the other about it. It had earlier found (see paragraph 25) that the role performed by the Claimant, as it had been, and the intended role of deputy head of CHR were not substantially similar. Accordingly, the approach that the Tribunal took at 53(5), in which it concluded that no reasonable employer would have thought the jobs were not substantially similar, was one that relied for that conclusion upon only a partial view of the evidence that it had. It did not on the face of it take into account that it thought (53(8)) there was actually a major difference between the two roles so far as the employer intended. The question of whether it might have been unfair to the Claimant not to have expressed that intended difference in documentation is a different question and not one that the Tribunal expressly addressed here.

23. Mr Leiper criticises the approach because he submits that the Tribunal had in fact substituted its view. The Notice of Appeal asks, rhetorically, what else was it doing? He relies for this upon **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, per Mummery LJ (see paragraphs 40-46). The Tribunal in that case had said repeatedly that it was conscious it must not substitute its view, but the court thought that was precisely what it did. I am far less sure that the facts of this case lend themselves necessarily to that conclusion, since a Tribunal has overall to look at a dismissal and ask whether it is fair or unfair, and in most cases that will involve asking whether the decision to dismiss falls within the range of responses reasonably open to the employer.

24. That does not necessarily mean that at each and every stage an employer should satisfy itself as to the range of reasonable responses. It may do so in some cases (see **Sainsbury's Supermarkets PLC v Hitt** [2003] IRLR 23), but the question that has to be asked and answered by statute, it must be remembered, is the overall question. If ultimately a Tribunal concludes that a dismissal is unfair, it will of course be taking a different view from that which the employer took, for few employers set out deliberately to be unfair to their employees. That is no reason for supposing that the Tribunal in question has substituted its view.

25. But, here, Mr Leiper points to the difficulties that the Tribunal had in reaching this conclusion, given an approach that I have already indicated appears inconsistent as between 53(5) and 53(8), an inconsistency that may and probably is explained by the different emphasis it placed in one paragraph on the documents and in the other on the legitimate view of the employer, but also, as he submits, that in an email that was before the Tribunal of 8 August 2012 the Claimant herself had said that she could not understand why she had been

red-circled for the deputy head of conferences position, because not only did it have diminished responsibilities but also the planning, budgeting, finance, contracts and various other key elements had been removed from the current role. If that was right, and if it was true, as the Tribunal accepted, that the difference between her then current post and that of the new head of conferencing, hotel and retail was that part of the post that she had done consisting of the part where she had responsibilities was now to be carried out in other new posts, "including, it appears, the head of CHR, the Deputy Conferences Manager and even, possibly, the Finance Manager post" (paragraph 53(2)), given also that the trade union that had been involved throughout the consultation had identified Ms Barringer but not the Claimant as assimilable to the deputy head post and by implication took the view that a reasonable employer did not have to consider the jobs substantially similar, this Tribunal, ignoring also as it did the actual view of the employer, was reaching a decision that if it was not substitution, was arguably perverse. It did not reflect the evidence before it; it is difficult to see the basis upon which the Tribunal could come to that particular view. As I have said, it looked only at part of the scene on its own findings, that portrayed by the documentation.

26. In summary, I have concluded that the decision of the Tribunal in respect of its finding in 53(5) cannot, for the reasons I have expressed, stand. It seems to me to constitute an error of law, or, alternatively, there is such an inconsistency between 53(8) and 53(5) as to demand an explanation that is not forthcoming.

27. The Tribunal went on at 53(6) to consider what its conclusion would be if it were wrong about the substitution point. If this alternative basis upon which it concluded there was unfairness stands, then there is no force in this ground of appeal either. But, in my view, it does

not. The difficulties with it are twofold. First, the overall decision (paragraph 53(12)) is expressed in these terms:

> **"Taking all these matters into account, our judgement is that the decision to dismiss Ms Killen on the basis of this interview when other jobs appear to be available, including on a lower grade, which in relation to the Deputy Head post, was very similar, was one which was outside the range of reasonable responses and was an unfair dismissal."**

28. The same problems arise in respect of the conclusion that the post was very similar there, as do in respect of 53(5) on the same basis as I have just described. Secondly, and separately, I do not consider that the reasons that the Tribunal gave from paragraph 6 onward could be sufficient to justify its conclusion. That is because, first, it said that what it had to do was to consider the rest of the process used for the deputy head selection, this on the basis that the Claimant was not simply assimilated. It referred in that paragraph to the oral evidence given by the employer's witnesses "that there was to be a new focus on new business". Again, the Tribunal make no comment as to whether this was a genuine view or one expressed to disguise what had been favouritism toward Mr Lindsay. As I shall describe when dealing with the question of discrimination, the Tribunal accepted that Mr Lindsay had scored better at interview.

29. It therefore turned (paragraph 53(7)) to consider his position. It thought he had the advantage of having visited Ms Jager, one of the appointing officers, during the selection process and been given information by her. He had been aware from his earlier involvement of the potential importance of the emphasis on selling, which in fact, though not necessarily in the documents, was clear to the employer. He therefore had advantages. The advantages are described at paragraph 53(7):

> **"We accept that Mr Lindsay did however become deeply involved [in the in-house bid]. The employment tribunal cannot say whether that was on purpose or not, but as a matter of fact, he spent more time with Ms Strachan, he presented the bid, and therefore it was likely and**

indeed seems to have been the case, that he was able to 'sell' himself at interview more easily because he had that knowledge. Ms Killen was simply not able to do that. Mr Lindsay therefore had a clear advantage. What is more, he also had the advantage of having visited Ms Jager during the selection process. Ms Jager gave him information that was not given to others and has we have commented [sic], it might well have been unwise of her to do this and knowing that she was on the interview panel."

30. The Tribunal took this into account, but what they were describing was an advantage that Mr Lindsay had that was in the event unfair to the Claimant. However, section 98(4) does not require an overall assessment of unfairness; it is fairness by reference to the employer's actions. It is whether the employer acted reasonably or unreasonably in treating the reason he had as a reason for dismissing the employee. The fact that one candidate may have advantages over another that have little directly to do with their qualities for the job does not assist with knowing whether the employer's actions were or were not fair unless the employer consciously knew of them and unless it is said the unfairness consisted of the employer taking no steps to remedy that disadvantage. From a completely different context, an example might be in the fair competition that takes place between members of a quiz team and another team. If the teams were asked in the course of the quiz by the quizmaster for information about a particular country, the chance that one member in one team happened to be a national of that country would give that team an advantage that might be said to be unfair, but it would be no unfairness of the question-master, unless he knew about it and did nothing to adjust, for him to pose the question and to accept the answer.

31. Accordingly, in my view, for both those reasons, the alternative approach taken by the Tribunal is insufficient.

Age discrimination

32. The Tribunal dealt with age discrimination as follows (paragraph 53):

> **"(13) […] We have found that the burden of proof does shift in this case. There is an obvious difference in the protected characteristic of Ms Killen and Mr Lindsay. Ms Killen is female, Mr Lindsay male. She was aged 57 and he was aged 38. He was appointed in a competitive interview to Deputy Head and that was to be the same grade as he was already on, whereas it was one grade lower for her.**
>
> **(14) We have found that the burden of proof does shift for a number of reasons, bearing in mind that we must find more than a simple difference in treatment and a difference in a protected characteristic. The first thing is, obviously, she was on a higher grade at H4 than the Deputy Head post at grade H3, whereas he was on the lower grade of H2. Secondly, in any event, he had been involved in the bid process and had presented when that is something you might normally have expected from the Head of Conferencing. Thirdly, he had assistance before the interview from one of the interview panel.**
>
> **(15) As the burden of proof has shifted to the respondent, we look to it for an explanation of this less favourable treatment. We do accept the respondent's explanation with respect to sex discrimination. We have noted that the respondent has a number of women in relatively senior appointments and at other levels, including the external appointment to Head of Conferencing, Hotel and Retail. It seems to us unlikely that there was any discrimination on that ground.**
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> **(16) However, we are concerned about questions around the age profile. Of three people made redundant, one was aged 57, one aged 60 and one aged 39. The respondent's explanation for this is that Mr Lindsay was appointed because he had scored better at interview and we accept that on the face of it he did. However, this is a slightly circular argument, because, as we have indicated, he did that because he was aware of what was required of him, which Ms Killen had been kept out of. Ms Strachan's credibility has been tarnished by our findings that she has not told the truth about Ms Killen's willingness to be involved in the bid process and that she had used offensive language. As far as the comment about "old people being retained in old jobs" is concerned, we do not think that that was meant to be a reference to age necessarily, but as indicated for the unfair dismissal claim, it is an indication that the respondent did not wish to retain those people who had been in employment longer and that might well affect the age of those employees. We do not accept the respondent's explanation for the difference in treatment, and we therefore find that age discrimination has occurred, although we accept it may not be have been [sic] deliberate or conscious."**

33. These conclusions are problematic. Mr Leiper approaches the ground of appeal by arguing first that the burden of proof should not have shifted at all, because there was, in reality, no more than a difference of age and a difference of outcome. To support that submission, he refers to **Laing v Manchester City Council** [2006] ICR 1519 CA, in particular paragraphs 51, 60-62 and 67. The essential point is that a Tribunal is not entitled, he submitted, to look at one part of the circumstances before it in order to require the employer to be put to proof as to the reason for the difference in outcome. He noted that the analysis in **Laing** was approved by the Court of Appeal in **Madarassy v Nomura International PLC** [2007] ICR 867 CA, in which in particular Mummery LJ at paragraph 71 said that the section:

> **"71. […] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**
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> **72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in *Laing* (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all."**

34. In **St Christopher's Fellowship v Walters-Ennis** [2010] EWCA Civ 921, the Court of Appeal reiterated a similar approach (see paragraphs 18 and 39 in particular in the judgment of Mummery LJ).

35. The essential question in a case of alleged discrimination is whether the conduct complained of was taken against the Claimant because of a proscribed ground. That calls for an enquiry into the cause of the treatment, the reason why it happened. That question may be answered by a Tribunal by simply saying that the employer does not have to satisfy it of the reason for the treatment where there is insufficient to suppose, on the available evidence, that there has been some act of discrimination. However, if it does call upon the employer and is satisfied by the employer's answer, the question of whether it correctly applied the burden-of-proof provisions or not becomes meaningless. Overall, the Tribunal has concluded that the employer has satisfied it that the reason for the treatment was nothing whatsoever to do with discrimination on the proscribed ground.

36. In my view, the Tribunal here was entitled to take the view that it needed an explanation from the Respondent. There was more than simply a difference in age and sex and a difference

in treatment. The first matter to which the Tribunal had regard was the fact that she was of a higher grade and therefore impliedly better qualified for the post. All of course has to be viewed in the light of the particular circumstances, but in general if it is shown that of two applicants for a post one has a protected characteristic that the other does not, that person is not appointed and that person is on the face of it likely to be better qualified than the other, there is sufficient to call for an explanation.

37. The Tribunal went further here. It took into account the involvement of Mr Lindsay in the bid process and that he had assistance before the interview from one of the interview panel. The difficulty caused by those two findings is that there is no conclusion at any stage during the course of its judgment that that was because of any discriminatory or improper action on the part of the employer. Although therefore inclined to think that the first reason would be sufficient, the fact is that the Tribunal did shift the burden of proof, relying on three reasons, two of which do not properly give rise to any reason for supposing that what happened was discriminatory on the ground of age. Thus, though the Tribunal might have shifted solely upon the basis I first explained, that is not actually the basis it chose, and, the second and third reasons not being expressed as separate or further reasons, they cannot be ignored as part of the reasoning as a whole. As Mr Leiper has amply demonstrated, it might well have been open to this Tribunal, having regard to the other factors that it mentioned and the other evidence before it, to have concluded, taking into account the approach enjoined by **Laing** and **Madarassy**, that it would not require the burden to be shifted at all.

38. On the basis that it did shift, there are further difficulties. First, the reasons given in paragraph 53(14) for shifting the burden of proof apply with equal force in the case in respect of sex they do in the case of age. The Tribunal thought itself satisfied by the Respondent's

explanation that there was no involvement of gender, but it does not say what the explanation was. On the face of it, it is difficult to see why the explanation should have been any different from that offered in respect of age; that is, that the reason for the difference in treatment – that is, the appointment of Mr Lindsay and not of the Claimant – was that he scored better at interview. If therefore that fact stood on its own without any particular reason to think it infected by discrimination of sex or race, it would be a satisfactory and suitable reason, and so it was, the Tribunal thought, in respect of sex discrimination. Why the Tribunal thought it was insufficient in respect of age is set out at 53(16). The reference in the fourth sentence containing the expression "circular argument", which it is difficult to understand, is that Mr Lindsay had an advantage in the process, but it does not say anything to suggest that that advantage had anything to do with his age nor that the employer gave him that advantage because of his age. There is nothing in that fact to suppose that his success at interview was age-related. As to Ms Strachan's credibility, that seems to be beside the point. It might have been made relevant, but the Tribunal did not make it so.

39. The comment about "old people being retained in old jobs" gives rise to a further problem still. The Tribunal found in paragraph 33 of its findings of fact that the words of the director had been reported as being that he did not want "the same old people doing the same old thing". That had become "old people remaining in the same old jobs" in the Tribunal's quotation marks at paragraph 53(11), but the import is different. "Old people being retained in old jobs" in 53(16), again, is unfaithful to the Tribunal's own findings of fact and is a third recitation of what was supposed to have been said. But even so far as that was concerned, the Tribunal immediately went on to say that it did not think that it was necessarily meant to be a reference to age. It may have been describing that seniority was what was meant by "old people", which might, and perhaps usually would, relate to age, but it is far from clear. It does

not link the comment with the process. There is no suggestion or finding that the employer here preferred Mr Lindsay because he was younger or because it had the attitude that senior people should be moved on to make way for younger blood or anything of that sort. The basis for rejecting the employer's explanation for a difference in treatment in 53(16) is unclear, and it is, argued Mr Leiper, inconsistent for the Tribunal to accept the explanation in 53(15) only apparently to reject it in 53(16) without there being any better basis to do so on the ground of age than there was on the ground of sex.

40. I accept these submissions. It seems to me that once the Tribunal here had concluded that there was an apparently genuine appointment because Mr Lindsay performed better at interview, without any criticism of the scoring on the face of 53(16), that was a sufficient reason unless there was some evidence to show that that reason was itself affected directly by the age of Mr Lindsay, but there is nothing in what follows that shows that it was or might have been. It follows that the decision in respect of age discrimination simply cannot stand on the basis upon which it was reached, and I see no obvious alternative basis for it. Mr Lindsay being aware of what was required whereas the Claimant was not was not the doing of their employer, and had nothing on the face of it to do with age. The comment about "old people being retained" was said by the Tribunal not necessarily to relate to age. Ms Strachan's credibility did not on the face of it affect the scoring of the interview. In short, the employer gave an explanation, which would have been accepted but for the factors the Tribunal mentioned, but none had any relationship to age.

Conclusion

41. The conclusion, therefore, to which I have come is: first, that the Tribunal was entitled to conclude that the dismissal here was for some other substantial reason; secondly, that it was

wrong to conclude on the evidence that it accepted that this was age discrimination, and that finding must be reversed; thirdly, standing back from the facts, it did not in my view approach the assessment of fairness appropriately. This was a case in which a senior manager who had performed the job, without any criticism to which the Tribunal referred, found herself in a position in which her former role no longer existed in the same form, but her employer had, on the Tribunal's findings, need for work broadly of the same kind to be performed by employees. On the findings of the Tribunal, there were either more employees appointed to the organisation following the successful bid or a substantially increased number of permanent employees, though slightly less overall, from 15 permanent employees to 30.

42. The result of the process was that the Claimant did not obtain any alternative employment with the Respondent. It may have been that there was no suitable employment; it may have been there was. It may have been that the process used to select for the posts that might have been available was unfair within section 98(4); I find myself unable to accede to the primary submission of Mr Leiper that this Tribunal should substitute its own conclusion. It seems to me the question as to the fairness of dismissal should in all these circumstances be remitted.