Appeal No. UKEAT/0551/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 November 2013

Before

MR RECORDER LUBA QC

MR P GAMMON MBE

MS G MILLS CBE

SWINBURNE & JACKSON LLP — APPELLANT

MS C A SIMPSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTOINE TINNION (of Counsel) Instructed by: Swinburne & Jackson LLP 7 Walker Terrace Gateshead Tyne & Wear NE8 1DH
For the Respondent	MR DAVID ROBINSON-YOUNG (of Counsel) Direct Public Access Scheme

SUMMARY

REDUNDANCY – Fairness

Genuine redundancy situation at a solicitor's firm. Pool of four solicitors in the relevant department. One post must go. Managing partner devises and applies a scoring matrix based on eight criteria. Lowest scorer is longest serving, most experienced solicitor. Tribunal find age discrimination in earlier acts of the managing partner directed towards Claimant and then an unfair dismissal based on an unfair procedure designed to produce the result that the Claimant was selected.

On employer's appeal, grounds relating to age discrimination withdrawn.

Appeal against unfair dismissal judgment dismissed.

The question for the Tribunal had been whether the dismissal of the Claimant for redundancy had been fair. It decided that it had not been. It delivered a fully reasoned judgment which contained no misdirection or other error of law.

MR RECORDER LUBA QC

Introduction

1. This is an appeal from the Judgment of the Employment Tribunal sitting at Newcastle-upon Tyne, comprising Judge Garside and members. By its Judgment the Employment Tribunal determined that the Claimant's claim that she had been discriminated against because of her age was well-founded and had not been justified by the Respondent. It further held that the Claimant's claim that she was discriminated against on the grounds of her sex was not well-founded, and that claim was dismissed. The Tribunal also determined that the Claimant had been unfairly dismissed by the Respondent and that there should be a reduction of 20% in the compensation awarded (pursuant to **Polkey v AE Dayton Services Ltd** [1988] ICR 142). Those judgments were delivered following a hearing which had taken place between 23 and 27 April 2012, and upon which the Tribunal had met to deliberate on 24 May 2012. Their Judgment was promulgated with written Reasons and sent to the parties on 31 July 2012.

2. The Claimant in the proceedings before the Tribunal was Ms C A Simpson. The Respondent to her claim was Messrs Swinburne & Jackson, a limited liability partnership. This appeal is brought by the Respondent employers. We will, in the course of our Judgment, refer to the parties as they were referred to below: that is to say, Ms Simpson as "Claimant" and the Respondent firm as "Respondent".

3. The Notice of Appeal originally took issue with the Judgment in relation to age discrimination, but that part of the appeal has been withdrawn. There is no appeal by either party in relation to the **Polkey** deduction and nor is there any cross-appeal by the Claimant in relation to the dismissal of her claim for sex discrimination. Accordingly, and subsequent to a preliminary hearing conducted at this Appeal Tribunal by His Honour Judge David Richardson

and members, the only issue in the case now turns on the Tribunal's conclusions in relation to unfair dismissal.

4. Before coming to those, it is necessary to say something as to the relevant facts.

The facts

5. The Respondent is a solicitor's firm. The Claimant, Ms Simpson, was admitted as a solicitor in 1991. She was employed by the Respondents from February 2007 until May 2011. She was deployed on commercial property transactions. There were two key figures in the Respondent firm. They were, respectively, Mr Swinburne, the senior partner and Mr Wood-Williams, the managing partner. In early 2011 the firm decided, in the light of the economic downturn, that it had to increase its income and cut its costs. It cannot have been alone in so deciding. The former, that is to say the increase of income, was in part to be achieved by routing all new instructions through Mr Wood-Williams. He was to become responsible for fixing the charging rates and distributing work around the solicitors in the firm. The latter, that is to say cutting costs, was to be achieved in part by consolidating property department operations at the Gateshead office, by redeploying dispersed staff to that office, but also in part by shedding one member of staff, that is to say a solicitor in the corporate property department.

6. The redundancy process was designed and managed by Mr Wood-Williams himself. The pool of employees at risk of redundancy comprised four solicitors. One of those was the Claimant. The second of them was a Mr Mackie, a solicitor more recently qualified than the Claimant, who had joined the firm in 2008. The third solicitor was a Miss Saigal. She was a relatively recently qualified solicitor, who had joined the firm in 2010 as a paralegal. The fourth member of the pool was a Mr Brown. He was a solicitor who had been a partner with a

previous firm but had only joined the Respondent firm some two weeks before the redundancy process was put in train.

7. Mr Wood-Williams, having identified the pool, prepared a scoring matrix using a precedent which he had obtained from the Practical Law Company. He modified that scoring matrix, and his evidence was that this was done to make it more objective. He applied a weighting to the scoring that the matrix produced. Having devised that scheme, he then produced a redundancy selection assessment form, which could be completed in respect of each of the four employees, and then he produced guidelines on the application of the criteria to the four individuals.

8. The guidelines that he produced set out the criteria and the suggested scoring. For present purposes it is only necessary to note the titles of the eight criteria. They were as follows: "Length of service"; "Skills/qualifications/training"; "Experience"; "Timekeeping"; "Disciplinary record"; "Future potential"; "Flexibility"; and finally, "Performance".

9. For each member of the pool an assessment form was completed and those criteria were applied and scored. In the event, the Respondent had been unable to produce the individual forms to the Employment Tribunal. Mr Wood-Williams convened a meeting and consulted the persons affected and he carried out the assessment, scored the results, and ultimately generated the comparative results, enabling him to determine the overall outcome. That outcome was that the Claimant scored the lowest marks and it was she who was selected for redundancy. Consultation meetings were then held with her, but she was ultimately dismissed. An appeal to Mr Swinburne, the senior partner, resulted in some slight increase in her scorings, but even after that modification she still scored the lowest points and her appeal was dismissed. Following

her dismissal the Claimant brought her claims of discrimination and unfair dismissal to the Employment Tribunal service.

The Employment Tribunal Judgment

10. The Employment Tribunal's Judgment is followed by extensive written Reasons, running to 162 typed paragraphs. The Tribunal identified the issues that they were required to address and set out their findings of fact. They set out the law relevant to the particular claims they had to determine and then, in a lengthy section of their written Reasons, their conclusions.

11. In those conclusions the Employment Tribunal dealt, first, with the discrimination claims. As we have recounted, they rejected the sex discrimination claim and upheld the age discrimination claim (but only in part). The matters upheld are described at paragraphs 141 and 142 of the Reasons. They refer to the fact that the Claimant was required to move to the office in Gateshead, in circumstances that amounted to discrimination against her on account of her age, and similarly that there had been discrimination against her in relation to the allocation of work by Mr Wood-Williams. In paragraph 142 of the Reasons the Tribunal say this:

> **"It appears to us that the reason why she was not allocated work was because there was a perception in the mind of Mr Wood-Williams that she was too old for the team that he was trying to put together. We looked to the respondent to show that was not the reason. It could show a non-discriminatory reason if figures for work allocation show no disparity and there was a logical explanation why they insisted a senior solicitor move to offices which were under construction. No such explanation has been given to us and we must therefore conclude that Miss Simpson was discriminated against on the grounds of age."**

12. Having dealt with the discrimination claims, the Employment Tribunal turned to the claim of unfair dismissal. Their findings run from paragraphs 146 to 160 of their written Reasons. At paragraphs 146 and 147 the Tribunal accept that there was a genuine redundancy situation obtaining in the firm in early 2011. The Tribunal decided that it was satisfied that the Respondent had shown a potentially fair reason for the dismissal: that is to say,

redundancy. The Tribunal then directed itself that it had to examine whether the dismissal had been fair. That, it recorded, required it to consider the redundancy selection process and whether the criteria had been fairly drawn up and fairly applied. As to the correct approach, it said this, at paragraph 147:

> **"That means that the Tribunal must examine the selection criteria used by the respondent to bring about the dismissal and the application of the criteria to Miss Simpson to determine whether the criteria was fair in the first place and then was applied fairly."**

13. The Tribunal heard evidence from the key players, that is to say the Claimant herself, Mr Swinburne, and Mr Wood-Williams. It read their written evidence. It considered the documents. It heard their oral evidence tested. It examined in some detail the criteria used by Mr Wood-Williams, the scoring under each of the criteria that was given to each of the four persons in the pool and the particular explanations, where they were tendered or advanced by Mr Wood-Williams, for his scorings.

14. The Tribunal's written Reasons set out the scoring breakdown for each of the pool members in an appendix. We were told in the course of submissions that the appendix may not represent the final version of the scoring, but whether the appendix is a stage in the development of the scorings or the final conclusions mattered not in the resolution of this appeal.

15. The Tribunal held, after a detailed examination of the criteria and their application, that they were not satisfied that the system had been fair or fairly applied. What they say, at the end of their consideration of this aspect of the case, is as follows, at paragraph 160 of their Reasons:

> **"Taking into account all these matters, we first of all find that the scoring matrix itself was not constructed in a fair way. Looking at it in the round it appears to be very heavily slanted towards Mr Mackie and Ms Saigal. The respondent had in Miss Simpson an extremely well qualified commercial conveyancer who had 20 years' experience. The scores she achieved**

were in a lot of respects lower than Ms Saigal's. If a financial analysis was undertaken by Mr Wood-Williams, he indicates that he did so, he has been unable to produce any evidence of it and he accepts that most of the assessments in regard to future potential, flexibility and performance were subjective. This was an unfair redundancy selection process. It was designed solely for the purpose of making Miss Simpson redundant. We accordingly find that there was an unfair dismissal."

16. Thereafter, in recognition that a genuine redundancy situation had obtained, that at least one member of the pool would have had to have been dismissed, and that that might have been the Claimant under a fair selection process, it imposed a **Polkey** reduction, which it assessed at 20%.

The Respondent's appeal

17. The appeal before us was well argued for the Respondent by Mr Tinnion of counsel. He developed oral argument in support of a lengthy Notice of Appeal and a more recent supplementary skeleton argument. We are grateful also to Mr Robinson-Young, appearing for the Claimant, for his written submissions and his short additional oral argument.

18. We will deal with the grounds of appeal in the order in which Mr Tinnion addressed us upon them.

Ground 2

19. We take first, therefore, ground 2 of the grounds of appeal, by which it is contended that the Tribunal misdirected itself in law concerning the use of "objective" and "subjective" selection criteria in its written Reasons. In order to test this ground of appeal, it is obviously necessary to go to that part of the Judgment in which the Tribunal direct themselves as to the relevant law in the context of redundancy dismissals. The Tribunal do that extensively between paragraphs 114 and 125 in the course of which they cite the relevant statutes and a good deal of case-law.

20. The passages of authority most fully cited appear at paragraph 119 of the written Reasons. They are taken from the Judgment of this Employment Appeal Tribunal in the well known case of **Williams v Compair Maxam Ltd** [1982] IRLR 83 in which Browne-Wilkinson J (as he then was) set out the matters which a reasonable employer would seek to address. The EAT set out five criteria, but for present purposes it is only necessary to refer to the third of the matters which Browne-Wilkinson J identified as a principle in accordance with which a reasonable employer would seek to act, namely that such an employer:

> **"...will seek to establish criteria for selection which, so far as possible, do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length of service."**

21. Having referred to **Williams v Compair Maxam,** the Tribunal then direct themselves in the following terms, at paragraph 122 and 123. They say:

> **"122. The criteria used for selection within the pool must be as objective as possible though some subjectivity is permissible. By using objective criteria the manager dismissing the employees is able to demonstrate, by quantifiable criteria, how a particular person has been selected for redundancy. Where it is sought to say that a particular criteria is fair, e.g. the efficiency of a particular worker, objectivity can be achieved by linking the criteria to appraisal reports carried out during the employment.**
>
> **123. The *Williams* case pointed out that it was necessary for the selection criteria to be carried out in a fair manner, so it is important that the criteria are as objective as possible. ..."**

22. Mr Tinnion drew our attention to those passages in paragraphs 122 and 123 and suggested that they were not an accurate statement of the law. More particularly, Mr Tinnion submitted that the law had moved on and had been developed in a series of recent authorities. He took us in turn to three such authorities. First, the decision of this Employment Appeal Tribunal in **Samsung Electronics v Monte-D'Cruz** UKEAT/0039/11/DM. The Judgment in that case was handed down by this Appeal Tribunal on 1 March 2012. Second, to the decision in **Mitchells of Lancaster (Brewers) Ltd v Tattersall** UKEAT/0605/11/SM, another decision

of this Appeal Tribunal, handed down on 29 May 2012, and finally to the decision of this Appeal Tribunal in **Nicholls v Rockwell Automation Ltd** EAT/0540/11/SM, handed down on 25 June 2012. Mr Tinnion acknowledged that he could not say positively that any of these three cases had been drawn to the Employment Tribunal's attention in argument by counsel. That is unsurprising, as two of them did not fall to be handed down until after the deliberations of the Tribunal in this case. But, says, Mr Tinnion, an Employment Tribunal must be presumed to know the law and to have researched the law adequately. His submission was that by the time the written Reasons were delivered to the parties in this case, the three Judgments I have mentioned had been handed down and were in circulation. Moreover, Mr Tinnion submitted, his instructing solicitor had brought the content of the Judgment in the second of the cases, that is to say the **Tattersall** Judgment, to the attention of the Employment Tribunal by way of an email transmission dated 29 June 2012.

23. We have been provided by Mr Tinnion with a copy of the email. Two features of it are to be noted. First, it is not suggested in the covering email that the enclosed decision in **Lancaster v Tattersall** breaks any new ground or represents some feature or development on which further argument is invited to be tendered. Further, the content of the email and indeed the fact of the email being sent does not appear to have been brought to the attention of the Claimant's representatives, which would of course have been the proper course had it been suggested that there was some new matter or new material to which the Tribunal's attention ought to be drawn. However, the thrust of Mr Tinnion's submission was that the law had been developed and moved on and was now inconsistent with the Tribunal's self-direction in paragraphs 122 and 123 of its Reasons.

24. The high water mark of his submissions was the decision of this Tribunal in the second of the cases, **Lancaster v Tattersall**, and it is sensible therefore to say something more about the

decision in that case. The Judgment of this Tribunal on that occasion was given by the Master of the Rolls on behalf of himself, Baroness Drake and Mrs Gallagher. They had been faced with a redundancy selection unfair dismissal case. The only criteria applied to those in the redundancy pool on that occasion are those recorded by the Employment Appeal Tribunal in paragraph 5 of the Judgment. The extract there reproduced indicates that the only criteria deployed in selecting from amongst the pool of potentially redundant employees was whether or not the role from which that person would be dismissed was a role that generated revenue. The Employment Tribunal had determined that that selection criteria was a subjective selection criteria and was unacceptable as a criteria to be applied when identifying who was to be made redundant. The employers appealed. In delivering the Judgment of this Appeal Tribunal at paragraph 19, the Master of the Rolls said as follows:

> **"This appears to us to be a much stronger point. As a matter of common sense, it is hard to see how it can be inappropriate for a relatively small company in serious financial difficulty and five employees in a senior management position, to apply the sort of criteria quoted in paragraph 5 above when deciding which of those five senior managers to make redundant. The description of the criteria as 'wholly subjective' does not appear to be either helpful or accurate: of course such criteria involve a degree of judgment, but they are none the worse for that. Equally, to object to a criterion because it is 'based solely on the views of the directors' does not seem to us to be a fair objection.**
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> **20. We are reinforced in this view by observations in the EAT decisions of *Ball v. Balfour Kilpatrick Limited* (EAT/823/95), and *Darlington Memorial Hospital NHS Trust v. Edwards and Vincent* (EAT/678/95), quoted in *Morgan v. Wales Rugby Union [2011] ILR 376*, para 32, and, more recent observations in *Samsung Electronics (UK) Limited v. Monte-D'Cruz* [UK EAT/0039/11/DM] paras 27 & 29.**
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> **21. The Tribunal in this case also criticised the criteria adopted by the Respondent because they were not 'capable of being scored or assessed or moderated in an objective and dispassionate way'. Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be 'scored or assessed' causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises.**
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> **22. We would therefore accept that the Tribunal went wrong on this second point; in our view, the criteria which the Respondent applied when deciding which senior management post to make redundant were unexceptionable."**

25. Mr Tinnion alights particularly on the sentence in paragraph 21 that:

> **"Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment..."**

That Judgment and those passages, submitted Mr Tinnion, mean that the self-direction by the Employment Tribunal in our case was unsound as the law had moved on.

26. In our judgment this is not a correct analysis. We do not accept that the decision of this Employment Appeal Tribunal in the **Tattersall** case reflected or was intended to reflect a new development in this branch of the law. It is important to see the decision in **Tattersall** in context. It was, as paragraph 20 of that Judgment makes clear, a case applying extensive existing authority. No less than four previous decisions of this Employment Appeal Tribunal are referred to in that paragraph. The Employment Appeal Tribunal's Judgment in **Tattersall** was an underscoring of the existing legal position. The fact that in the third of the cases relied upon by Mr Tinnion, the **Nicholls** case, **Tattersall** is referred to, takes the matter, in our judgment, no further. The simple fact is that in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgment and a degree of subjectivity. It is well settled law that an Employment Tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness. All this law is now well settled. We are not satisfied that recent authority breaks new ground and, more particularly, we are not satisfied that the Employment Tribunal misdirected themselves in this respect.

Ground 3

27. This ground contends that, even if the Employment Tribunal did not misdirect itself in its self-statement of the law, nevertheless when it came to examine the redundancy criteria employed in this case, the Employment Tribunal was wrong - on the question of subjectivity/objectivity - to castigate Mr Wood-Williams for devising and then deploying subjective criteria.

28. To make good this ground, Mr Tinnion took us to four examples set out in paragraph 74 of his grounds of appeal. The Tribunal, as he records in that paragraph, were dealing with four of the eight criteria: that is to say, flexibility, future potential, performance and timekeeping. Mr Tinnion submitted that those are all legitimate redundancy criteria and that they do not become illegitimate simply because they require an exercise of judgment on the decision taker's part rather than amounting to matters which simply require the application of objective material or information. He then took us to the way in which the Tribunal had approached each of those four criteria and submitted that the Employment Tribunal had, in respect of each, not asked themselves the right question. The right question, he submitted, was whether, on these four matters, Mr Wood-Williams had approached them in a "dispassionate and objective way" and had come to a conclusion within the range open to a reasonable employer.

29. To test these submissions, we looked in turn at each of the examples that Mr Tinnion had given. We deal first with the criterion of timekeeping. This is addressed by the Tribunal in paragraph 153 of its written Reasons. It says as follows:

> **"As far as timekeeping is concerned, Mr Wood-Williams accepts that it was a purely subjective assessment by him. The measurement was not in respect of attending the office on time or leaving before time, it was whether those being measured attended meetings. No records of attendees at meetings was consulted, if one existed. Miss Simpson's evidence is that Mr Mackie was not good at attending meetings and those that he attended he usually attended late. She says that she attended all meetings that she could attend. She has scored 3, which was later increased to 4."**

30. Insofar as Mr Tinnion contends that that is an example of the Tribunal directing itself that a particular criterion is subjective, he is simply wrong. The Tribunal is recording in paragraph 153 what Mr Wood-Williams was accepting about the criterion himself. That may be considered an apt description of a criterion which bears the label "timekeeping" but is incapable of assessment against any records because none were kept and none were referred to.

31. The second example tendered by Mr Tinnion related to the criterion of flexibility. The Tribunal dealt with that at paragraph 156. They record that:

> **"Mr Wood-Williams accepts that her file management was excellent but she was not flexible in approaching new systems. The <u>main</u> complaint is that she continued to print out files and been vehemently opposed to scanning. It is not surprising that Miss Simpson did not embrace the new systems imposed by Mr Wood-Williams."**

From that point in the paragraph, the Tribunal then go on to explain why it was not surprising that the Claimant had taken the approach she did given the background to the case. The paragraph continues:

> **"It is purely a subjective assessment by Mr Wood-Williams [for] which he gives no rational explanation why he came to the conclusion that Miss Simpson was only entitled to two [or three] points."**

32. Mr Tinnion seizes upon the reference to "subjective assessment" and submits that the Tribunal is there misdirecting itself and castigating Mr Wood-Williams inappropriately. In reality, as the language of paragraph 156 makes clear, the Tribunal was drawing attention to the fact that even if the criteria was subjective, there had been no rational explanation given by Mr Wood-Williams for the judgment or conclusions that he had reached in deployment of it. That was the gravemen of their finding.

33. The third and fourth examples relate to "future potential" and "performance". The Tribunal refer to those two matters at paragraph 160. Again, Mr Tinnion criticises the Tribunal on the basis that they have in that paragraph castigated Mr Wood-Williams for devising or deploying subjective criteria. That is not a correct analysis of paragraph 160. Again, the Tribunal is there recording Mr Wood-Williams's own acceptance that most of his assessments in regard to the matters there identified were subjective.

34. Standing back and considering these points in the round, as the Tribunal did itself, it is plain that they are not castigating Mr Wood-Williams for using largely subjective criteria. They are simply saying that, in respect of each of them, he was unable to explain the outcomes or his judgment and reasoning in relation to the scoring achieved by the application of those criteria. That seems to us to represent no error of law. Indeed, it indicates that the Tribunal were engaging with the very task that Parliament has conferred upon them, namely to determine whether a fair procedure was applied and fairly carried out.

Ground 4

35. The fourth ground of appeal contends that the Tribunal misdirected itself in law when, in the passage dealing with law, it says at paragraph 123:

> **"...the criteria used for selection must be fair, be properly applied and there must be no reason to doubt the reliability of the information used to apply them."**

That is itself only part of the full paragraph 123. Mr Tinnion's submission was that the words from "there" to "them" represent a matter which is not part of our law and puts the test for the fairness of a dismissal in a redundancy context much too high. He therefore submits that the Tribunal was misdirecting itself in law.

36. We do not accept that it is a misdirection for a Tribunal to indicate that, in considering the fairness or otherwise of the use of a redundancy process or procedure by an employer, a relevant matter is the reliability or otherwise of the information used by the employer when deploying or applying the relevant criteria. That seems, in our judgment, to be patently a potentially relevant matter. Even if we are wrong and the Tribunal went too far, we are satisfied that that had absolutely no relevant effect in this case. In order to test that proposition, we invited Mr Tinnion to take us to those passages of the Judgment which best demonstrated the error into which the Tribunal had fallen as a consequence of its alleged misdirection in law. He took us to paragraph 151 of the Judgment, which deals with length of service criteria, and then to paragraph 154 dealing with disciplinary record. Having been taken to those paragraphs, his argument ran immediately into the sand. If there had been any misdirection of law by the Tribunal, it was not evidenced by the content of either of those paragraphs. Thus, if error it was, in our judgment it did no harm at all.

Ground 5

37. The fifth ground of appeal contends that the Tribunal's criticisms of the scores given under the three criteria, disciplinary record, flexibility and "skills/qualifications/training" were perverse or constituted substitution by the Tribunal for the scores adopted by the employers. Mr Tinnion submitted that the Tribunal should have been cautious not to engage in substituting, for the scoring exercise that the employer undertook, a scoring exercise of the Tribunal's own. Upon hearing from Mr Robinson-Young, it was plain that this represented common ground. Indeed, as Mr Robinson-Young's skeleton argument reminded us, the Tribunal itself had been taken to, and had set out, the relevant passage in the Judgment of the Court of Appeal in **Bascetta v Santander** [2010] EWCA Civ 351 in which Pill LJ had said:

> **"The Tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the appeal tribunal in *Eaton Limited v King*... that it is sufficient for the**

> **employer to show that he set up a good system for selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessment on which the selection for redundancy was based."**

And it is right to record that the Tribunal then give themselves this additional further direction at paragraph 147 of their written Reasons.

> **"As stated in *Bascetta* if the respondent sets up a good system for selection and then fairly administers it, it is not for the Employment Tribunal to reassess the process as that would be substituting the Tribunal's view for that of the respondent. However, it is essential that the selection matrix is fair and then that it has been fairly applied to [the Claimant]."**

38. Mr Tinnion did not criticise the terms of the Tribunal's direction on the **Bascetta** decision or their summary of it in either of the two places at which it is mentioned. Rather, he submitted that the Tribunal must have overlooked or failed to recall this self-injunction not to themselves re-assess the scorings in the process. As evidence that the Tribunal had gone wrong, he took us to three particular examples in the Judgment. Firstly, at paragraph 154 he took us to the Tribunal's treatment of the criterion, disciplinary record. He reminded us that the criteria were drawn in such a way that the criterion measured only disciplinary matters occurring in the course or history of the relevant employee's employment. In that regard, all of the employees had scored the highest points because there had been no disciplinary issue in relation to any of them. What the Tribunal say about this, at paragraph 154, having recorded those facts, is as follows:

> **"Mr Wood-Williams said that he was unaware that Mr Mackie's practice certificate was subject to an endorsement by the Solicitors' Regulatory Authority. Mr Swinburne was aware of this however."**

And that is it. That is a recording by the Tribunal of relevant factual matters. It is no criticism of the disciplinary record criteria. It is no re-scoring of the disciplinary criteria and it exemplifies no error by the Tribunal of the type that Mr Tinnion suggested.

39. His second example related to paragraph 156 and the treatment of flexibility. As we have already recounted, in that paragraph the Tribunal identified Mr Wood-Williams' main complaint about the Claimant's flexibility. Mr Tinnion reminded us that that passage has to be seen against a factual background of Mr Wood-Williams' evidence, in which he had set out a range of concerns about flexibility (see paragraph 57). However the exercise that the Tribunal engaged in at paragraph 156, in looking at the flexibility criteria, must be seen in the context of their earlier findings about: (1) the unlawful discriminatory treatment of the Claimant by Mr Wood-Williams in relation to the way in which she was transferred into the new office environment; and (2) her work was managed and provided under Mr Wood-Williams' direction and had been allocated in a discriminatory way. Seen in that context, the approach at paragraph 156 amounts to no re-scoring by the Tribunal but an echoing by them of their earlier conclusions as to the way in which the Claimant had been treated and why.

40. The third example offered by Mr Tinnion related to the criterion, "skills/qualification/training". That is dealt with by the Employment Tribunal at paragraph 152 of the Reasons. In that respect, it is right to record that the way in which the criterion had been drawn by Mr Wood-Williams had three separate elements: skills, qualification and training. But in the event, he had scored only for "qualification" and he had scored all the candidates the same because they were all qualified solicitors (save that Mr Brown, as a former Partner, scored an additional point). As the Tribunal observed at paragraph 152, this gives no weighting at all to the other two factors, skills and training. They say in that paragraph that Mr Mackie has ten years' post-qualification experience, Miss Saigal one year, and Ms Simpson 20 years. The fact that they were all scored the same under a composite criterion, skills/qualification/training, patently called for some explanation. They record in paragraph 152:

> **"We cannot understand the logic behind Mr Wood-Williams' thinking in respect of this category."**

That is even after they had had the benefit of his oral and written evidence. In our judgment, there is no misapprehension by the Employment Tribunal of their role. They are simply examining the criteria deployed, to determine firstly whether the criteria were fair and secondly whether they were fairly applied.

41. Mr Tinnion particularly alighted on a passage in paragraph 152 which suggested that the approach taken by the Respondent in this case was like treating "a newly qualified barrister as having the same skills as a QC". What is important about that passage is the reference to skills. The Tribunal was simply there indicating that the approach taken by Mr Wood-Williams to his own classification, "skills/qualification/training", in the event gave no emphasis or weighting for skills.

42. Having considered each of those three examples in turn, and even taking them cumulatively, we are not satisfied that Mr Tinnion has made out the ground of appeal that this was a case in which the Tribunal were substituting their scores for the scores reached by the employer. His alternative proposition under the same ground is that the conclusions reached by the Tribunal in each of those three respects were perverse. In our judgment, no perversity is made out, and indeed the ground of appeal gets nowhere near the high threshold for intervention on the grounds of perversity.

Ground 1

43. The first of the grounds of appeal set out in the Notice of Appeal contends that the Tribunal engaged in an impermissible re-marking/re-assessment exercise of the scores of those in the pool. Again, we were taken to a series of examples, but in the context of Mr Tinnion's reminding us of the relevant authorities. He took us, in particular, to the decision of the Court

of Appeal in **British Aerospace v Green** [1995] ICR 1006. We were taken to those passages of the Judgment in that case which refer to the correct approach to the scrutiny of employers' marking systems. Indeed we now reproduce the content of subparagraph E(1):

> **"(1) The use of a marking system of the kind that was adopted in this case has become a well-recognised aid to any fair process of redundancy selection. By itself, of course, it does not render any selection automatically fair; every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinised officiously. The whole tenor of the authorities to which I have already referred is to show, in both England and Scotland, the courts and tribunals (with substantial contribution from the lay membership of the latter) moving towards a clear recognition that if a graded assessment system is to achieve its purpose it must not be subjected to an over-minute analysis. That applies both at the stage when the system is being actually applied, and also at any later stage when its operation is being called into question before an Industrial Tribunal. To allow otherwise would involve a serious risk that the system itself would lose the respect with which it is at present regarded on both sides of industry, and that tribunal hearings would become hopelessly protracted. There were therefore strong reasons of policy against allowing disclosure of the retained assessments at this stage, and no special circumstances justifying a departure from that policy."**

44. The thrust of Mr Tinnion's submissions was that the Court of Appeal is there saying that the Employment Tribunal should stand back from the approach taken by the employer and should not itself drill down into the scoring system in order to examine the question as to whether a dismissal was in a particular instance fair or unfair in a redundancy context. In support of that submission, that is to say that our Tribunal had gone too far in a scrutiny of the scorings in the instant case, he took us again to a series of illustrations of the approach taken by this Employment Tribunal. We were shown, in particular, the passages at paragraphs 151, 152, 154 and 156. In essence, Mr Tinnion was contending that in those passages of its written Reasons the Tribunal was exemplifying an approach of going far too far into an examination of the relevant or comparative scorings of each of the individuals.

45. We can take this matter slightly more generally without examining each of those aspects of the written Reasons of the Tribunal in terms. That is because, in our judgment, context is all. The context in which this Tribunal was approaching the question of a fair criterion, and the fair

application of that criterion, was one in which they had already found the Claimant to have been the victim of age-related discrimination at the hands of Mr Wood-Williams himself, in a context where he was exhibiting the perception that he wanted young persons in his team and not older persons. The relevant context then was that the pool of those potentially to be made redundant comprised only of solicitors, amongst whom the Claimant was not only the longest serving but apparently the most experienced. Nevertheless she had ended up being selected. In our judgment, that context required the Employment Tribunal to give close scrutiny to the criteria that the employer had used and close scrutiny to the way in which the relevant employees had been scored against the criteria. By going into that detail, it was possible, or became possible in the Tribunal's view, to determine whether a fair process had been undertaken. This was not an exercise of a Tribunal impermissibly drilling down into scores and assessments in order to re-mark the employer's scores. It was, rather, an exercise in testing the very proposition that Parliament had set for the Tribunal, namely whether the dismissal in this particular case had been one that had been fair, in the sense that it was the result of the fair application of a fair process.

Ground 6

46. The sixth ground of appeal contends that the Tribunal exhibited a basic failure to understand relevant mathematics in its criticism of the weighting applied by Mr Wood-Williams to the redundancy selection criteria. The ground alights, in particular, on paragraph 150 of the Tribunal's Reasons. It is right to say that in that paragraph, to quote the language used:

> **"The Tribunal expressed some surprise about this method...but no explanation of why this was done has been given."**

Mr Tinnion rightly submits that the Tribunal did then not go on to find that the weighting was improper or in some way improperly applied. We agree with that submission, but we cannot in the light of it, understand the thrust of the ground of appeal. To our mind, the observation in paragraph 150, reflecting a passage which appears earlier in the Judgment, simply amounts to the raising of what might be described as the judicial eyebrow. This was simply the application of a weighting system to a particular set of scores in a context in which the Tribunal were not being provided with an explanation for why weighting was necessary at all or why it was deployed in the way it was. The making of such an observation and the raising of what we have described as the judicial eyebrow had absolutely no consequential effect in this particular case, and the purported ground of appeal amounts, in truth, to no such thing.

Ground 7

47. The seventh ground of appeal is a Reasons challenge. It focuses on the way in which the Tribunal has brought matters together in paragraph 160 of its Judgment. Mr Tinnion submits that the Tribunal's conclusions and reasoning are impermissibly brief. We remind ourselves that at the end of paragraph 160 the Tribunal say:

> **"This was an unfair redundancy selection process. It was designed solely for the purpose of making Miss Simpson redundant."**

Mr Tinnion submits that the second part of that extract is not properly or appropriately reasoned. Why, he asked rhetorically, are the Tribunal finding that the process was "designed solely for the purpose of making Miss Simpson redundant" if it had earlier found that she was dismissed for redundancy in a background of a genuine redundancy situation? His submission was that the Tribunal had erred in law in failing to give sufficient reasons.

48. We need only refer to the well-known authorities of **Meek v City of Birmingham DC** [1987] IRLR 250 and **English v Emery Reimbold and Strick** [2003] IRLR 710 for the proposition that the Tribunal was required to explain to the parties in its written Reasons, in a fair and sufficient manner, precisely why it had reached the conclusions it had reached and, from each party's point of view, why it had won or lost. We apply that approach to what the Tribunal has done here. Paragraph 160 self-evidently comes at the end of a very full and lengthy set of Reasons. The written Reasons are extremely well-structured, ample and well-written. The passage at paragraph 160 must be seen in the context of the Tribunal's earlier findings of fact and, in particular, in the context of the adverse finding of age discrimination. The Tribunal, in our judgment, have sufficiently explained why the dismissal of this particular Claimant was found unfair. It has explained why the process was unfair and it has set out sufficient as to the background context for one to understand why it was able to conclude, as it did, that the exercise here was designed solely to produce the result that it was Ms Simpson who would be the one person made redundant from amongst those who faced potential redundancy.

49. This ground of appeal might have been stronger had it been possible for Mr Tinnion to advance it in the way it was drafted in his Notice of Appeal. In that Notice it was contingently expressed as turning in part on a misdirection by the Tribunal in the way it had dealt with the age discrimination claim (see paragraph 87 of the Notice of Appeal). In the event, the criticism of the Tribunal's finding on age discrimination has fallen away, and that has knocked whatever legs remained of this reasons challenge from beneath it.

50. It follows that we are not satisfied that the reasons ground is made out.

Conclusion

51. Having examined each of the grounds of appeal in turn, and having rejected each of them, it follows that the result must be that this appeal is dismissed.