Case Number: 2500066/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr P Hardy	**AND**	**Amec Foster Wheeler Group Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Teesside **On: 28,29 and 30 June 2017**
Deliberations: 4 August 2017

Before: Employment Judge Shepherd **Members: Ms S Don**
Mr G Gallagher

Appearances

For the Claimant: Mr M McDonough
For the Respondent: Ms G Roberts

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. The complaint of age discrimination is not well-founded and is dismissed.

REASONS

1. The claimant was represented by Mr McDonough and the respondent was represented by Ms Roberts.

2. The Tribunal heard evidence from:

Paul Hardy, the claimant;
Graham Robertson, Operations Manager;
Paul Jones, Contracts Manager;
Susan Leight, HR Business Partner;
Ian Wanless, Shutdowns Director.

3. The Tribunal had sight of a bundle of documents consisting of 409 pages. The Tribunal considered those documents to which it was referred by the parties.

4. The issues to be determined by the Tribunal had been agreed by the parties and set out as follows:

4.1 It is agreed that:

a. Mr Robertson did discuss with the claimant whether he wanted to work part time (however the circumstances surrounding these discussions appears to be in dispute); and

b. Not all of the claimant's appeal points were answered however there appears to be dispute as to why this happened (the claimant alleging that it was an act of victimisation).

Unfair dismissal (S.98 (4) Employment Rights Act 1996)

4.2. It is conceded by the claimant that there was a potentially fair reason for dismissal, as per S. 98 (1 & 2) of ERA 1996,

4.3. Was the claimant unfairly dismissed, as per S. 98 (4) ERA 1996?

4.4. Is the claimant correct in describing his post as that of Contract/Delivery Manager from July 2014 or is the respondent correct in describing his role as that of "IMS Maintenance Delivery Manager"?

4.5. Was the claimant's role substantially different to that of Mr Jones?

4.6. Did the respondent consult with the claimant before taking the decision to make the claimant's post redundant?

4.7. Did the respondent consult at the correct time?

4.8. Was the claimant provided with sufficient information in order to engage properly in a consultation process?

4.9. If it is found that there was some "consultation" was it full and fair?

4.10. Did Mr Robertson inform the claimant that the level of salary was a factor in deciding to make his post redundant?

4.11. Did the respondent institute a fair selection process?

4.12. Should the respondent have widened the pool for selection to include other managers who dealt with other clients?

4.13. Was the claimant consulted or interviewed prior to instituting the selection criteria?

4.14. Was the claimant properly and fairly scored under the terms of the selection criteria and was the claimant given sufficient information about the scores such that he could properly challenge the scores?

4.15. Did the respondent properly seek suitable alternative work for the claimant before dismissal?

4.16. Did the respondent properly consider all representations made in respect of the appeal and was the appeal fairly dealt with and rejected in particular by refusing to answer detailed questions put by the claimant's representative, prior to the submission of the appeal?

Remedy

4.17. Should there be a *Polkey* reduction because the claimant had committed an act of gross misconduct prior to dismissal as alleged by the respondent.

4.18. Should there be a *Polkey* reduction because the claimant would have retired by early 2017, as pleaded by the respondent?

Age Discrimination

4.19. Did the claimant discuss his retirement with colleagues?

4.20. Was the claimant selected for redundancy on grounds of his age, by being selected ahead of younger employees and agency workers? By being asked to reduce his hours of work?

4.21. Was the claimant's dismissal an act of discrimination on grounds of age, as per Ss 13 and 39 (2) of Equality Act 2010?

4.22. Are these alleged acts of age discrimination, other than the dismissal, out of time or do they constitute a series of acts as per S123 (3), culminating in the dismissal which is in time?

4.23 Is Mr Jones a relevant comparator or should the claimant have to rely on a hypothetical comparator? Specifically, is he in the same "age-group" or "range of ages" for the purposes of S 5 (1) Equality Act 2010?

4.24. Are Mr Joyce, Mr Haycock, Mr Murphy and Mr Robertson relevant comparators? It is conceded that they are all younger than the claimant.

4.25. Did the claimant make protected acts, as per S 27 (2) of EA 2010, starting on 1 August 2016 when the claimant sent an email complaining of age discrimination and at various dates via his representatives culminating in the submission of a grievance on 3 October 2016?

4.26. Was the claimant victimised, as per S 27 (1) and 39 (2) (d) of EA 2010 by the respondent refusing to answer the claimant's questions about the selection and in particular refusing access to Mr Jones' scores in the selection matrix?

4.27. Was the claimant victimised (S 27 (1) & S 39 (2) (d) of EA 2010) in respect of the way that the appeal was dealt with?

4.28. Was the claimant's dismissal an act of victimisation?

4.29. Did those alleged acts also constitute direct discrimination, as per S 13 of EA 2010?

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions.

5.1. The claimant was employed by the respondent from 12 March 2007. The respondent is a global company servicing and facilitating pipelines and platforms for various energy companies managing projects on behalf of major companies throughout the UK.

5.2. The claimant worked on the plant of the respondent's client, Sabic in North Tees. The claimant said that in 2014 he was appointed as Contract Manager/Delivery Manager. The respondent said that the claimant's job title was that of IMS Maintenance Delivery Manager.

5.3. Graham Robertson, became the claimant's manager in around June 2015. He said that the claimant often talked about his retirement to him and other members of staff. In the claimant's year end performance review completed in November 2015 it is stated that the claimant commented:

> "I feel that due to where I am in my career I would have limited need for development"

and Graham Robertson commented:

> "Paul is nearing retirement (2017) and we are agreed that he has no outstanding areas for development."

The claimant's evidence in this regard was guarded. He said that he had never provided a specific date for his retirement.

5.4. The Sabic Aromatic plant was due to close at the end of 2016 and there would then be a shutdown of that plant that would be likely to lead to a reduction in the workforce.

5.5. In April 2016, a discussion took place between the claimant and Graham Robertson in which Mr Robertson asked the claimant if he wanted to work part-time leading up to his retirement. Mr Robertson indicated that the discussion was “off camera”. Graham Robertson said that there was a possibility of the claimant working part-time hours on a different contract ‘BP Cats’. He did not mention the specific position he was considering to the claimant. The claimant said that Mr Robertson indicated that, if he did not agree to work part-time, he would have to consider placing him in a pool which was at risk of redundancy together with Paul Jones, the Delivery Manager for Sabic in South Tees. The claimant produced a written note of this conversation in which it was stated that he had informed Graham Robertson that he would not agree to request to work on a part-time basis and Graham Robertson had said that this could mean that Paul Jones and the claimant would be at risk of redundancy and the claimant’s salary level could work against him.

5.6. Graham Robertson said that he recalled saying to the claimant that he may have difficulty maintaining his high salary going forward. He did not recall saying to the claimant that if he did not agree to work part-time then he would have to consider redundancy. However, Mr Robertson agreed that if the claimant did not retire or work part-time on a different project, the respondent would, as a matter of common sense, have to carry out a redundancy process in respect of the Sabic contract in view of the plant closing, but that did not necessarily mean that the claimant would be the one to be made redundant.

5.7. Graham Robertson did not have a similar conversation with regard to working part-time with Paul Jones, because Paul Jones had not given any indication that he was going to retire imminently. Paul Jones was 59 years of age. The claimant was 66 years of age.

5.8. In or around the beginning of June 2016 the respondent was informed by the client, Sabic, that there was a requirement to save costs and reduce the headcount at North Tees and Wilton, primarily due to the close down of the plant. Fewer people would be required to supervise the work and ensure delivery of the contract in the future. Mr Robertson reviewed the headcount and requirements for the future and concluded that it was only necessary to have one person in the role of “maintenance manager” to deliver the maintenance contract for the client. That meant there was a requirement to lose one of the Delivery Managers working at the North Tees and Wilton sites.

5.9. On 15 June 2016, the claimant and Paul Jones attended a meeting with Graham Robertson and Suzanne Leight, HR Business Partner. A presentation was made to the claimant and Mr Jones regarding the business requirement to reduce the headcount.

5.10. On 17 June 2016 Susan Leight wrote to the claimant and Paul Jones confirming that the respondent was considering redundancies in the area of senior management on the Sabic IMS contract. The letter provided a copy of the slides that had been presented on 15 June 2016 and asked for feedback with any objections in respect of the scoring criteria which had been provided by 22 June 2016. No objection or concerns were raised by either of the two employees in the pool.

5.11. On 23 June 2016, the claimant sent an email to Susan Leight in which he referred to the conversation he had with Graham Robertson earlier with regard to being asked to consider working part-time. He stated:

> "I see from the Redundancy Selection Criteria Form (SCF) that you gave Paul Jones and I last week that Salary is not one of the Assessments criteria, I would hope that there is not a predetermined motivation to select me for Redundancy based upon my salary level rather than 4 stated criteria."

Susan Leight did not respond to this email because she was of the view that the claimant could discuss this with Graham Robertson in the next consultation meeting.

5.12. Graham Robertson carried out the scoring exercise for the claimant and Paul Jones. The claimant scored a total of 350 and Paul Jones scored a total of 469.

5.13. On 29 June 2016, the claimant attended a consultation meeting with Graham Robertson and Susan Leight. The claimant was informed that he had been provisionally selected for redundancy and provided with a copy of his scores and the claimant indicated that he disagreed with the scoring. He was invited to have a look at his scoring and put together any questions he may have for the next meeting which was arranged for 1 July 2016.

5.14. On 1 July 2016, the claimant attended a further consultation meeting. At the outset of the meeting the claimant said that he felt the meeting was being pushed through and rushed. It was indicated to the claimant that there were no set timescales but if he felt it was moving too quickly another meeting could be arranged the following week. The claimant indicated that he had some challenges against the scoring criteria and was creating a portfolio to support the challenges.

5.15. On 1 July 2016 Susan Leight wrote to the claimant inviting him to a further meeting on 7 July 2016 and indicating that if they were unsuccessful in their search for alternative employment by that date they would review the situation and may issue formal notice of redundancy after that meeting.

5.16. On 7 July 2016, the claimant attended the fourth consultation meeting with Graham Robertson and Susan Leight. The claimant was given the opportunity to raise questions. There was some discussion about possible alternative roles but the claimant did not challenge the scores.

5.17. On 8 July 2016, the claimant was sent a letter confirming the decision to terminate his employment by reason of redundancy. It was erroneously stated that the termination was with effect from 22 July 2016. However, the claimant was also informed that he was placed on gardening leave until the end of his contractual notice on 8 October 2016.

5.18. On 25 July 2016, the claimant sent an email to Susan Leight indicating that he wished to lodge an appeal. He set out his grounds of appeal and in these he stated:

> "1. I believe the selection of myself as opposed to the other person in my pool i.e. Paul Jones (PJ) has been made based on my higher salary level and potential retirement next year.
>
> 2. The Selection criteria scoring has in my opinion been artificially adjusted lower than my true Technical Skills, Qualification and Experience, Performance and Performance and interpersonal skills so that I scored lower than PJ.
>
> 3. The Person Specification that was used to carry out the Selection was not reflective of the Actual role of a cross site Delivery Manager.
>
> 4. The Selection of myself was in my opinion predetermined due to earlier conversations with Graham Robertson where he said that my high salary level would work against me in any Selection Assessment.
>
> 5. The 2 candidates in my Pool i.e. myself and PJ were not treated the same in that I was asked if I would work Part Time on a reduced salary and that if this was not acceptable then this could lead to myself and PJ being put at risk of redundancy, whilst PJ was not subject to these discussions.
>
> 6. I was invited to 2 meetings by Graham Robertson where I felt that HR should have been present as discussions arose about Part Time working, redundancy and at-risk situations which suggest there was a predetermined desire to make myself redundant."

5.19. On 27 July 2016, the claimant sent an email to Susan Leight stating that he had taken legal advice and, following a meeting with his representative the following week, he would be lodging new comprehensive grounds for appeal. He stated that he was suffering from stress and anxiety and indicated that he would be setting out a grievance regarding what he believed to be an act of age discrimination. He also indicated that he would not be fit enough to attend an appeal hearing and envisaged the probability was that he would wish his appeal/grievance to be dealt with in writing.

5.20. On 1 September 2016, the claimant sent an email to Susan Leight indicating that he was in the process of making preparations for his appeal/grievance which was being written by his legal advisors on his

instructions. He provided a list of 16 questions and indicated that he would present his appeal/grievance upon the response.

5.21. On 6 September 2016 Susan Leight sent an email to the claimant stating:

> "The matters you have raised relate purely to the redundancy process and consequent dismissal and we will therefore deal with these as an appeal against the decision to make you redundant not as a grievance.
>
> The matters raised in the document are of the type that would fall to be discussed/investigated as part of any appeal process as appropriate. As a result we do not believe these need to be answered in order for you to submit grounds of appeal."

5.22. On 12 September 2016, the claimant's legal adviser sent an email to Susan Leight indicating, among other things, that there were two matters upon which they wish to make representations, age discrimination and unfair selection for redundancy and failure to properly consult which were inextricably bound together and it seemed sensible to put both the grievance and appeal into the same document. It was stated that the questions asked were not grounds of appeal grievance they were questions which they needed to be addressed in order to properly prepare an appeal and a grievance.

5.23. On 19 September 2016 Susan Leight sent an email to the claimant's legal adviser indicating that the claimant had indicated that he believed that a significant part of the reason for his dismissal was on account of his age and that, as this matter related to the redundancy process and the consequent dismissal the respondent would not be dealing with this as two separate matters. The grievance procedure should not be used to complain about a dismissal as this was stated to be "precisely what the appeal process is for". It was indicated that the respondent felt it had been more than reasonable in relation to the timescales and asked that the claimant submitted his appeal by 26 September 2016.

5.24. On 3 October 2016, the claimant lodged his appeal on the grounds of unfair selection for redundancy together with a separate grievance relating to allegations of age discrimination.

5.25. Ian Wanless, Shutdowns Director, was appointed to deal with the appeal. As the claimant had previously requested the appeal to be dealt with on paper, there was no hearing.

5.26. On 8 November 2016 Ian Wanless wrote to the claimant providing the outcome of the redundancy appeal. This letter provided a response to each of the questions the claimant had raised in his points of appeal. The appeal was not upheld.

5.27 It was conceded by the respondent that the aspects raised by the claimant under the heading of 'grievance' had not been responded to expressly but that the letter providing the outcome of the appeal had dealt with

all the substantive issues raised and that the claimant's grievance was merely a repetition of the issues raised in the appeal.

5.28. Paul Jones was appointed to the position as Teesside Contracts Manager and had responsibility for delivering the maintenance contract for Sabic at the North Tees and Wilton sites.

5.29. Irregularities were found in respect of overtime claims by another employee and the involvement of the claimant and it was alleged that the claimant had acted so as to enable the other employee to improperly claim additional overtime payments. The respondent alleged that, had the claimant not been dismissed for redundancy, he would probably have been dismissed for gross misconduct following a fair investigation. The claimant denied any improper conduct. There had been no investigation and the Tribunal is not in a position to reach any conclusion in respect of these allegations.

5.30. The claimant presented a claim to the Employment Tribunal. The claims brought were for unfair dismissal and age discrimination.

The Law

Unfair Dismissal

6. Where an employee brings an unfair dismissal claim before an Employment Tribunal and the dismissal is established or conceded, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons set out in Section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason, the Employment Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with Section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Redundancy is a potentially fair reason for dismissal under Section 98(2).

7. The definition of redundancy is contained in Section 139(1) of the Employment Rights Act 1996. This states:

> "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: -
>
> (a) the fact that the employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business –

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

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer

have ceased or diminished or are expected to cease or diminish"

8. If it is accepted that the reason for dismissal was redundancy then it is necessary to decide if that dismissal was reasonable under Section 98(4) of the Employment Rights Act 1996. In judging the reasonableness of an employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases, there is a band of reasonable responses within which one employer might reasonably take one view and a different employer might reasonably take another view and the function of the Tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which an employer might have adopted.

9. The factors which a reasonable employer might be expected to consider are whether the selection criteria including the pool for selection were objectively chosen and fairly applied, whether the employee was warned and consulted about the redundancy, whether any alternative work was available.

10. In **Williams & Others v Compare Maxam Limited [1982] ICR 156**, the Employment Appeals Tribunal laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The factors suggested which a reasonable employer might be expected to consider were whether the selection criteria were objectively chosen and fairly applied, whether employees were warned and consulted about the redundancy, whether, if there was a union, the union's view was sought and whether any alternative work was available.

11. In carrying out a redundancy exercise, an employer should begin by identifying the pool of employees from whom those who are to be made redundant will be drawn. The Tribunal will consider whether an employer acted reasonably in identifying the pool for selection and may consider whether other groups of employees are doing similar work to the group from which the selections were made, whether employees' jobs are interchangeable and whether the employees' inclusion in this unit is consistent with his or her previous positions. A fair pool of selection is not necessarily limited to those employees doing the same or similar work. Employers may be expected to include in the pool those employees whose work is interchangeable.

12. In **Polkey v AE Dayton services Ltd [1998] 142 HL** Lord Bridge of Harwich said:

"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:

(c) that he was redundant.

> But an employer having prima facie grounds to dismiss. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus … in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select redundancy and take such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference …. "

13. In the case of **R v British Coal Corporation and Secretary of State for Trade and Industry Ex parte Price [1994] IRLR 72** Glidewell LJ stated:

> "Fair consultation means:
>
> (a) consultation when the proposals are still at a formative stage;
> (b) adequate information on which to respond;
> (c) adequate time in which to respond;
> (d) conscientious consideration by an authority of the response to consultation."

Direct discrimination

14. Section 13 of the Equality Act 2010 provides;

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 4 of the Act defines the protected characteristics, one of which is age.

15. In **Islington Borough Council v Ladele [2009] ICR 387** Mr Justice Elias explained the essence of direct discrimination as follows:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

16. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the tribunal that the prohibited characteristic was one of the reasons for the

treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome, see Lord Nicholls in **Ngarajan v London Regional Transport [1999] IRLA 572.**

17. Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** and **Carter v Ashan [2008] ICR 1054**. The Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054** confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

18. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; **see Glasgow City Council v Zafar [1998] ICR 120.** Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage two of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

19. Since the House of Lords Judgment in Shamoon v Chief Constable Royal Ulster Constabulary [2003] IRLR 285 the Tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, **Ladele, Amnesty International v Ahmed [2009] IRLR 884, Aylott v Stockton on Tees Borough Council [2010] IRLR 994, Martin v Devonshires Solicitors [2011] ICR 352, JP Morgan Europe Limited v Cheeidan [2011] EWCA Civ 648, and Cordell v Foreign and Commonwealth Office [2012] ICR 280.**

20. For a finding of direct discrimination, it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nhgarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established

Victimisation

21.

Section 27 of the Equality Act provides as follows: -

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

22. In a victimisation claim there is no need for a comparator. The Act requires the Tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan** [2001] IRLR 830:-

"The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

23. To benefit from protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the Tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 is applicable.

24. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi** EAT0269/09. Once the Tribunal has been able to identify the existence of the protected act and the detriment, the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572 and **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, and **St Helen's Metropolitan Borough Council v Derbyshire** [2007] IRLR 540. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others** [2010] IRLR 136. In **Martin v Devonshires Solicitors** EAT0086/10 the EAT said that:

> "There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."

25. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan v Agnew** [1994] IRLR 61. In **Owen and Briggs v James** [1982] IRLR 502 Knox J said:-

> "Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the

decision-making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

In **O' Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 the Court of Appeal said that if there was more than one motive it is sufficient that there is a motive that there is a discriminatory reason, as long as this has sufficient weight.

26. **Burden of Proof**

Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

27. Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong** [2005] ICR 931 and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

"The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

28. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see

what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

29. The Tribunal considered the oral and written submissions provided by Mr McDonagh on behalf of the claimant and Ms Roberts on behalf of the respondent. These were detailed and helpful submissions. They are not set out in detail in these reasons but the Tribunal has given careful consideration to those submissions and the authorities referred to in reaching its conclusions.

Conclusions

30. The Tribunal is satisfied that there was a genuine redundancy situation and that was the reason for the claimant's dismissal. This was accepted by the claimant.

31. The Sabic Aromatic plant in North Tees was known to be due to shut down at the end of 2016. Sabic informed Graham Robertson, the Operations Manager in June 2016 that there was a requirement to save costs and reduce the headcount at the North Tees and Wilton sites. This was primarily due to the expected wind down and closure of the plant. It was determined that only one delivery manager would be required to deliver the maintenance contract for Sabic. The claimant and Paul Jones carried out substantially the same role. The Tribunal heard a significant amount of evidence with regard to the difference in the roles carried out by the claimant and Paul Jones.

32. The Tribunal is satisfied that the claimant and Paul Jones performed substantially the same role for the same client and the respondent needed to reduce the number of employees carrying out that role from two to one. Both the claimant and Paul Jones carried out additional duties. The job title and job descriptions were of little or no assistance in this regard. Graham Robertson was the line manager and his evidence was clear and consistent in that both the claimant's and Paul Jones' primary functions were those of delivery managers for Sabic, the claimant at North Tees and Paul Jones at Wilton.

33. Graham Robertson discussed the pool for selection with Suzanne Leight, HR Business Partner and it was determined that the pool should consist of the claimant and Paul Jones. This was the obvious pool for selection. The claimant alleged that the pool for selection should have been extended to other delivery managers employed by the respondent.

34. The other delivery managers worked at different locations with different clients. The Tribunal heard evidence from Graham Robertson that extending the pool in this way would not be appropriate in view of the nature of the relationship with the clients. He gave evidence that each manager working on client delivery is normally firmly

embedded within the client relationship. He said that they know the client, they know the contract, they know the challenges and issues with delivering the contract. The Tribunal heard evidence with regard to each of the other managers the claimant contended should have been included in the pool and the reasons why they were not included. The Tribunal is satisfied that the respondent considered the pool for selection and that there were clear business reasons not to extend it to the other delivery managers. The claimant did not challenge the pool for selection during the consultation prior to his selection. The decision to limit the pool for selection was within the band of reasonable responses.

35. With regard to the question of consultation, a meeting was held with the claimant and Paul Jones on 15 June 2016. This was shortly after Graham Robertson had a conversation with the client at the beginning of June 2016 when he had been informed that there was a requirement to save costs and reduce the headcount at the North Tees and Wilton sites. Graham Robertson reviewed the headcount and concluded it was only necessary to have one person fulfilling the role of Maintenance Manager, he had discussions with HR and then a presentation was made to both of the employees in the pool. The rationale behind the proposal to reduce the headcount was explained and the claimant was provided with the scoring criteria and asked for feedback. The claimant did not object to the proposed criteria. These were the standard criteria that had been used by the respondent in previous redundancy situations. Indeed, the claimant had used these criteria when carrying out the procedure himself in respect of other employees.

36. The claimant attended four consultation meetings. The Tribunal is satisfied that There was reasonable consultation. The consultation was carried out as soon as the decision was made following the information received by Graham Robertson from Sabic in early June 2016. There were no agency staff employed in the relevant roles who could have been removed. Graham Robertson did make attempts to avoid the redundancy situation informally in April and May 2016 by discussing with the claimant the possibility of him working part-time. The claimant had indicated that he was nearing retirement and this was set out in his year-end performance review. It was entirely reasonable and appropriate that discussion should take place with the claimant of this nature. It was accepted by Graham Robertson that he went on to talk about redundancy. This was a discussion about the future plans in respect of the workforce and it was appropriate for Graham Robertson to mention the possibility of future redundancies. The claimant alleged that Graham Robertson said that his salary level would count against him. Graham Robertson provided an explanation that the claimant's high salary would make it harder to find an alternative role. The Tribunal is satisfied that the selection for redundancy was on the ground of the scores against the respondent's standard selection criteria.

37. The selection criteria were fair criteria, they were the respondent's standard Criteria and the claimant made no objection to them. In an email the claimant indicated that he hoped there was not a predetermined motivation to select him based upon his Salary level rather than the four stated criteria. It was pointed out by Ms Roberts in her submissions that, although it was not conceded, it was not unfair to consider salary as a criterion when performing redundancy exercises.

38. Graham Robertson carried out the scoring exercise. He did not go through the

annual appraisals. However, he was the line manager of both the employees within the pool for selection, he had carried out the appraisals and had sufficient knowledge of them both to complete the appropriate scoring. The claimant was provided with his scores during the consultation meeting on 29 June 2016. The claimant was invited to look at his scoring and put together any questions or comments he may have. The claimant raised a number of questions on 30 June 2016 and he asked to see the scoring of the other person in the pool. This was refused in accordance with the respondent's usual practice. At the next meeting, on 1 July 2016, the claimant indicated that he felt the meeting was being pushed through and rushed. It was indicated that if the claimant felt this was moving too quickly, a further meeting could be arranged and, it was for a week later. At that meeting on 7 July 2016 the claimant did not challenge his scores.

39. It was submitted by Mr McDonagh, on behalf of the claimant, that the claimant had only been given seven working days to make any representations regarding his selection for redundancy. Also, that he had been given no information beyond his scores in the selection process. The Tribunal is satisfied that the claimant was given sufficient information with regard to the reasons for redundancy, the composition of the pool and the criteria and his scores. He was also given sufficient time to make any representations.

40. Susan Leight sent a copy of the claimant's CV to the respondent's Recruitment Manager and asked him to search for job roles for the claimant. The claimant had indicated that he did not want to relocate but would be prepared to commute on a weekly basis and that he would consider positions of less responsibility but wanted to maintain his salary level. Also, Stuart Robertson had asked the claimant if he would be prepared to work part-time leading up to his retirement. The Tribunal accepts that the respondent made reasonable attempts to find suitable alternative employment for the claimant.

41. The claimant was provided with the opportunity to present an appeal. His initial indication of grounds for appeal were set out in his email of 25 July 2016. It was submitted by Ms Roberts, on behalf of the respondent, that matters became complex and conflated following the involvement of the claimant's legal adviser. There was lengthy and convoluted correspondence from the claimant, or on his behalf, which served to cause confusion. The Tribunal accepts this submission, matters became more complicated and questions were put on behalf of the claimant that he required to be answered prior to the presentation of his actual appeal. The respondent's position was that the questions raised were of the sort that would be considered and investigated as part of an appeal. It would be repetitious and unnecessary to respond to the questions only for the claimant to then present his actual appeal. It was said that this was, in essence, a fishing exercise from which the claimant was seeking a basis upon which he could lodge an appeal.

42. The respondent informed the claimant that the questions raised would need to be reviewed and investigated as part of the appeal process. The claimant had also indicated that he was raising a grievance and the respondent informed him that it would not be dealing with an appeal and a separate grievance but that they would all be dealt with as part of the same process. It was indicated that all the claimant's

concerns were with regard to the termination of the claimant's employment and the age discrimination allegation would be dealt with as part of the appeals process.

43. The respondent accepted that the aspects that fell under the title of grievance in the claimant's grounds of appeal and grievance submitted on 3 October 2016 were not expressly responded to. However, it was submitted that the outcome letter from Ian Wanless dealt with all the substantive issues raised and that the claimant's grievance was merely a repetition of those issues. The claimant asked for his appeal to be dealt with on paper. The Tribunal is satisfied that Ian Wanless dealt with the substantive issues raised in respect of the claimant's appeal.

44. Ian Wanless accepted that he had not seen the document which had been provided to the respondent on 3 October 2006 challenging the scoring in the selection criteria form. Susan Leight confirmed that the claimant's questions in relation to discrimination and his document challenging the scores were overlooked as part of the appeal process. She indicated that no points were intentionally missed she believed the age discrimination element to be directly attributable to the selection criteria and she honestly thought this had been answered. Ms Leight said that the reason they were not dealt with was because of the nature, length and manner of the claimant's legal representative's correspondence. She found it overwhelming and that resulted in some of the claimant's grievance points being overlooked.

45. The Tribunal has considered this aspect carefully and is satisfied that the substance of the claimant's appeal was dealt with save for the claimant's arguments with regard to the scoring that had been carried out. This was as a result of an oversight. The substance of the appeal by the claimant was considered and investigated and the procedure was within the band of reasonable responses.

46. Had the Tribunal found that there were defects which meant that the procedure followed meant that the dismissal of the claimant was outside the band of reasonable responses, any compensatory award would have been reduced by 100% to nil following the case of **Polkey** as the Tribunal is satisfied that the claimant would have been selected for redundancy if a fair procedure had been followed.

47. The Tribunal has considered the claims of age discrimination. The Tribunal is satisfied that the claimant had discussed his retirement with colleagues. It was referred to in his annual appraisal or performance review document on the basis that the claimant was nearing retirement in 2017. The evidence of Graham Robertson was clear in that the claimant had indicated that he was going to retire. This was supported by the evidence of Paul Jones who said that the claimant used to mention his plans for retirement all the time in front of him and other people and that he had a wall planner which provided a countdown to retirement. The Tribunal is satisfied that the claimant had discussed his retirement with colleagues and his line manager. The claimant accepted that he had mentioned that he may consider working part-time after September 2017. He also accepted that he had discussed his retirement he said that, although people might have asked him, he never gave any specific date.

48. The Tribunal is not satisfied that Paul Jones was an appropriate comparator. He was not in a different age group. He was 59 and the respondent was 66. In any event, Paul Jones was not in the same material circumstances. He had not indicated

an intention to retire in the near future. The claimant had indicated that he intended to retire at the end of 2016 or sometime in 2017. If Paul Jones had given a similar indication, there was no evidence to show that he would have not been treated in the same way as the claimant. The claimant has not shown facts from which the Tribunal could conclude that the respondent had subjected the claimant to less favourable treatment compared to a real or hypothetical comparator. If the claimant had shown prima facie case, the Tribunal Is satisfied that the respondent has shown that the reason he was selected for redundancy was because of his lower scoring on the selection criteria.

49. With regard to the allegation that the claimant was asked to go part-time because of the protected characteristic of age, the claimant has not established facts on which the Tribunal could conclude that the respondent had subjected him to less favourable treatment compared to a real or hypothetical comparator. Paul Jones had not indicated that he was nearing retirement. The Tribunal is satisfied that the claimant had discussed his approaching retirement although he had not been specific about the date. Had Paul Jones discussed retirement in the same way then there is no evidence that he would have been treated any differently. If the claimant had established a prima facie case, then the Tribunal is satisfied that the respondent has shown that the discussions about working part-time were not as result of the claimant's age.

50. The claimant also alleged that it was age discrimination not to widen the pool for selection. The comparators, Haycock, Murphy and Joyce were not in the same material circumstances as the claimant. They worked on other contracts with other clients and there were clear business reasons established for not including them in the pool. The claimant has not established a prima facie case; the burden of proof did not shift to the respondent. If it had shifted, then the respondent has shown that the identified comparators were not included in the pool because of their embedded relationship with separate clients on separate contracts. The Tribunal accepts Graham Robertson's evidence in this regard, the respondent would not disturb the relationship with other clients for the sake of saving a job role from an entirely different client or contract.

51. The Tribunal accepts the clear and credible evidence of Graham Robertson with regard to the respondent relying on people to work as long as they can. The respondent has numerous people who are over 70 working for them. There is a distinct skill shortage at the younger end of the age demographic scale and there are not enough younger people coming through who are sufficiently skilled. The respondent seeks to retain the skills of the "older", talented and skilled staff. There was no reason established as to why the respondent would select older employees for redundancy.

52. It is accepted by the respondent that the claimant carried out protected acts as set out in section 27 (2) Equality Act 2010. The first allegation was on 27 July 2016. The respondent had refused to provide the scoring for Paul Jones before the protected act in accordance with its standard procedure. The claimant was eventually given the scores of Paul Jones after the protected act. The claimant has not established a prima facie case with regard to this allegation of victimisation and, if he had done so, the Tribunal is satisfied that the refusal to provide the scores for Paul

Jones was not because of the protected act. It was the standard procedure of the respondent.

53. The Tribunal is not satisfied that the claimant has shown that the way the appeal was dealt with was because of the protected act. There was no less favourable treatment established. The claimant's appeal was dealt with reasonably. He was allowed three months to make an appeal. It was reasonable to deal with the grievance within the appeal. The failure to specifically address certain points was an oversight on the part of Susan Leight who gave clear evidence that the "constant barrage and lengthy emails" from the claimant's representative meant that she found it overwhelming and it resulted in some of the claimant's grievance points being overlooked. The Tribunal accepts this evidence and is satisfied that the respondent has established that the reason for the alleged acts of victimisation was not because of the claimant's age.

54. In the circumstances, the Tribunal finds that the complaints of unfair dismissal and age discrimination and not well-founded and are dismissed.

Employment Judge Shepherd

Date 10 August 2017

Sent to the parties on:

11 August 2017

For the Tribunal:

G Palmer