EMPLOYMENT TRIBUNALS

Claimant: Mr H Smith

Respondent: Regent Office Care Limited

Heard at: Birmingham **On:** 14 to 16 August 2017

EMPLOYMENT JUDGE Hughes **MEMBERS: Mr N Forward**
Mr J Sharma

Representation
Claimant: Mr T Perry, Counsel
Respondent: Mr R Lees, Counsel

JUDGMENT having been sent to the parties on 31 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 The claimant presented a claim on 21 February this year complaining of unfair dismissal, wrongful dismissal, direct and indirect age discrimination and claiming pay for untaken holiday entitlement. At that point, there were other claims and there were three named respondents. Early Conciliation had been complied with in respect of all three respondents.

2 The respondents submitted a Response denying all claims and saying that the claimant had been fairly dismissed by reason of redundancy.

3 There was a case management hearing before Judge Camp and in his case management order he recorded that all claims were dismissed on withdrawal with the exception of the following: unfair dismissal; wrongful dismissal (which was described as breach of contract by not giving adequate notice and/or making an inadequate payment in lieu); direct and indirect age

discrimination; and the claim for wages for untaken accrued annual leave [29]. The issues were recorded in his Order at paragraph 13 [33] some of which had fallen away. We shall address the remaining issues in our conclusions..

4 Following that hearing the claimant withdrew claims against what were then the second and third respondents, proceeding only against this respondent. He also withdrew the indirect age discrimination complaint.

5 The case was listed for three days and it should have been listed before a full tribunal but was not. Fortunately, this error was spotted at the eleventh hour with the consequence that we did sit as a full panel. There was an agreed bundle. Any references in square brackets in these reasons are to pages in the bundle. Witness statements were provided for all witnesses. The respondent called the following witnesses: Mr Gary Thomas Sheffield, who is Director of Security Operations, and was the claimant's line manager at the material time; and Mrs Bazina Wojciechowska who is the respondent's Human Resources Director. The claimant gave evidence and called Mr Jacob Thompson, a former employee of the respondent. Mr Thompson reported to the claimant and the claimant's Deputy Support Manager, Mr Colin Cragg. The witness statements were taken as read.

6 At the start of the hearing before us Mr Perry, Counsel for the claimant, confirmed that the claims for wrongful dismissal and unauthorised deductions from wages in respect of accrued holiday entitlement could be dismissed on withdrawal, with the consequence that what remained were claims for direct age discrimination and unfair dismissal. It was agreed that we would not deal with any remedy issues apart from Polkey arguments at the liability stage. We heard evidence and submissions over the first two days and these reasons were given orally to the parties on the morning of the third day of the hearing. Written reasons have since been requested by the respondent despite being the winning party and oral reasons being given on the day. This is not a productive use of scarce judicial resource.

Primary Findings of Fact

7 From the evidence we saw and heard, the tribunal made the following primary findings of fact relevant to the issues to be determined.

7.1 The respondent provides building management services, such as cleaning and security. The claimant worked for the respondent from 4 June 2010 to 14 October 2016 as a General Manager. It was common ground that he was aged 67 at the point when he was engaged by the respondent. His job description [131] stated that he was a General Manager in the Security Division with a job purpose of: ensuring the highest levels of customer service in accordance with set standards; ensuring that all staff were rostered and all site requirements were filled at all times; liaising with staff and clients on a regular basis; maintaining an acceptable level of security services at the various client locations; and ensuring that the respondent's staff adhered to all relevant policies including those concerning health and safety. The claimant's contract of employment was at page 40 of the bundle and there were two provisions that we considered it material to note. Paragraph 19 set out details of the grievance procedure and the

claimant accepted that he was aware of it [47]. Paragraph 21 was a clause concerning what was described as "positive employment", which made it clear that any unlawful discrimination by a member of staff would be treated as a disciplinary matter and would usually amount to gross misconduct.

7.2 The age profile of the respondent's staff was described in paragraph 2 of the witness statement of Mrs Wojciechowska (the respondent's Human Resources Director) which made reference to a document she had compiled [117 to 120]. It showed the ages of the respondent's staff. The unchallenged evidence was that in the respondent's Cleaning Division, the youngest employee was 17 and the oldest was 84 and in the Security Division the youngest was 21 and oldest was 73. We concluded that this evidence demonstrated that in general the respondent had no problem with employing older people, which appeared to be acknowledged in the submissions made by the claimant's representative. We were also told by Mrs Wojciechowska that this was the first discrimination claim to have been made against the respondent which was evidence that tended to suggest that the respondent is generally a fair employer. We were of course mindful that it did not follow from those general points that there had been no discrimination or unfairness in this case. It was just one part of the factual matrix.

7.3 It was common ground that up to July 2015 the claimant was spending about 80% of his time managing and overseeing a contract with Birmingham Metropolitan College, which we will call the BMC contract, and the remaining 20% of his time he was overseeing a number of other contracts including contracts with the University of Law in Birmingham and Bourneville College [96A]. Mr Colin Cragg had been trained by the claimant and reported to him. His job title was Security Contract Manager. His role was one level below the claimant's in the organisational hierarchy. Mr Cragg only worked on the BMC contract. The respondent's witnesses told us that the claimant and Mr Cragg had worked hard to make the BMC contract run smoothly. They worked well together and were a close-knit team managing that contract.

7.4 Sadly, the backdrop to this case involves the fact that the respondent was not doing very well financially which had necessitated redundancies in the Cleaning Division and the Security Division. Mrs Wojciechowska explained that she had been involved in several rounds of redundancies. The claimant had also been involved in making staff redundant, as was shown by a letter in the bundle from the claimant notifying someone of redundancy [136 to 137]. It was based on a standard template letter, a point we will return to. The claimant accepted under cross-examination that he was familiar with redundancy procedures, in particular pooling, producing matrixes, marking or scoring against them and so forth.

7.5 The BMC also had financial difficulties due to funding cuts and consequently was looking to save money on the BMC contract. As we understood it, the claimant was broadly aware of this but was not involved in discussions around how that might be achieved. Mr Jonathan King, who was one of the respondent's two Managing Directors, liaised with the client and they looked at a number of options, including reviewing the number of personnel who were assigned to the contract and the cost of those personnel. The result was that the BMC decided not to have a General Manager assigned to the contract

going forward in order to save that expense. The General Manager concerned was, of course, the claimant.

7.6 Although the claimant had not been involved in the detail of the discussions, he told us in evidence that he had a meeting with Mr King early in July during which he was informed that he was no longer required to work on the BMC contract. This was, of course, 80% of the claimant's work and so, on one analysis, he may well have been redundant at that point as a consequence of BMC's decision. However, the respondent wanted to retain his services and ways this might be achieved were discussed. This resulted in Mr King writing to the claimant on 13th July 2015 [86]. The letter stated: "As you are aware the whole reason for entering into informal discussions with you in the first instance has not been due to any intention of Regent's (i.e. the respondent's) wish to change your position but has been forced on us due to the serious financial problems Birmingham Metropolitan College has. This has led to a need for them to reduce their operating costs and the subsequent need for us to look at the costs associated with the management of our security contract." The letter went on to say that the claimant had a wealth of experience and knowledge and the respondent would very much wish for him to continue to contribute towards its future success and play a pivotal role in the business moving forward. Mr King offered the claimant the job of General Manager responsible for managing all of the business in Birmingham and providing support to the site management at the BMC contract. The letter from Mr King stated the role would be "along the lines we discussed" and that a full job description would be made available if the claimant wanted to consider the opportunity further. Mr King made it clear that the offer was on the basis of a four-day working week which was a reduction in the claimant's working hours from full time. The claimant agreed to that.

7.7 There was a factual dispute as to the terms of this four-day working week. The claimant accepted that he only spent 20% of his time (i.e. about one day per week) working on the other contracts. The BMC contract was to be managed by Mr Cragg going forward. What was in dispute was the work the claimant would be doing in addition to managing the remaining contracts. The respondent's evidence, which we accepted, was that the expectation would be that he would spend about two days per week on those contracts and on providing some support to Mr Cragg as and when required, and that he should spend about two days per week business development i.e. bringing in new business. Mr Sheffield said that the claimant was well known in the West Midlands security industry and it was hoped that if the claimant was successful in winning new contracts, he would manage them and would then be able to return to a five-day working week.

7.8 The claimant rightly pointed out that Mr King's letter was silent as to whether there was an expectation that he would be involved in business development activity going forward. However, there was a document showing what was described as the "ops restructure and proposed allocation of contracts to managers" which was produced in or around July 2016 [96A]. That document showed that Mr Cragg was listed as manager for the BMC contract and the claimant as manager for the remaining Birmingham contracts. Mr Sheffield said that this document did not capture all of the expected workload of the managers - it listed the contracts they were assigned to plus some other responsibilities e.g. a Mr Foster was listed as Training Advisor. The bundle also contained an email

sent by Mr Sheffield on 13 October 2015 (i.e. about three months or so after the discussion between the claimant and Mr King), listing the contract managers and the sites they had responsibility for. That document listed the claimant as working Monday to Thursday on BMC contract as and when required to advise and support; managing the other Birmingham contracts; and having responsibility for business development in Birmingham [138 – 139]. Bearing in mind that this was a contemporaneous document recording a business development element to the claimant's role, we thought it likely that this was what had been agreed in July. Other reasons we thought this was so were: the respondent was not being paid by BMC for the claimant to work on that contract; and the claimant's substantial knowledge, experience and contacts in the security industry which could have helped him to win contracts if he had the skills to develop new business.

7.9 It was quite clear, however, from the claimant's evidence to us that he was not comfortable with business development. He did not have experience of pitching for new business to potential clients. The claimant said that the type of business development he had engaged in was encouraging existing clients to expand the range of services covered by their contracts with the respondent. By way of example, the claimant said he had persuaded Bourneville College to engage more security guards, but that was in fact the only example he gave. We were not clear as to whether that expansion of an existing service had taken place before July 2015 or after. In fact, the claimant did not secure any new business, nor do we think that he would have been comfortable attempting to do so given that he had no experience of sales. In reality, what the claimant did after July 2015 was to work on the contracts that were assigned to him and continued to work on the BMC contract notwithstanding the fact that the client was no longer paying for the services of a General Manager.

7.10 In his evidence to us Mr Sheffield said that the expectation that the claimant would provide support to Mr Cragg as and when necessary and would cover for him when he was on holiday. The respondent did not expect him to continue as before. We accepted that evidence. It was supported by email sent by the claimant to Mr Sheffield on 4 August 2016 asking him to confirm who was overseeing BMC operations because Colin (Mr Cragg) was on annual leave and "I have been the point of contact until now" [98A]. Mr Sheffield replied saying that in Colin's absence the claimant should cover. He went on to say: "When Colin returns he manages and if he needs help he'll give us a shout or if there are any projects which are CCTV you may be asked to manage the project, that was always my understanding". Our view was that the email exchange was telling because it pointed to the claimant and Mr Sheffield knowing that he was not supposed to be working on the BMC contract apart from as and when required.

7.11 Unfortunately the claimant was unable to secure any new business during the next fifteen months which meant that it was not sustainable for the respondent to pay him for a four-day week. At this point, there can be no doubt that the respondent was looking at a potential redundancy situation. From the way the evidence developed during the hearing it appeared that the claimant accepted it was a genuine redundancy situation and what remained in dispute, aside from a few points about the redundancy process, was whether it was the claimant's role that should be looked at for the purposes of a redundancy exercise or whether others should have been considered and pooled.

7.12 Mr Sheffield and Mrs Wojciechowska told us in evidence that they had a meeting during which they discussed that very point. It is right to say that neither of them covered this meeting in their witness statements and that there were no minutes. Mrs Wojciechowska very frankly accepted when giving evidence that with the benefit of hindsight it would have been better if she had made a note of what was discussed. She said she intended to make a written record of any meetings of that sort in the future. Despite the lack of reference to the meeting in the witness statements, we accepted the accounts given by Mr Sheffield and Mrs Wojciechowska. Our assessment was that they were truthful witnesses and their accounts were genuine. We were told that the discussion centred around whether any of the contract managers listed on the operations chart [96A] should be considered as well as the claimant. In the interests of clarity, we should explain that not all of the people listed on the chart had the job title "Contracts Manager" but they all had some responsibility for managing security contracts.

7.13 Mr Sheffield and Mrs Wojciechowska looked to see whether there was there was a case for having a selection pool and concluded there was not. We were satisfied they gave proper consideration to the question of a pool and came to a reasonable business decision bearing in mind that the situation was caused by a downturn in the claimant's work resulting from the BMC's decision fifteen months before. Consequently we had little, if any, role in scrutinising the reasons for not pooling specific contract managers with the claimant. However, since we heard evidence on the point we have made findings about the explanations for not pooling the other contracts managers.

7.14 One of the issues that arose in cross-examination was why some of these managers were being discussed at all because their roles were so different to that of the claimant. Mrs Wojciechowska explained that she had to find out what the various individuals did from Mr Sheffield in order to be able to advise about whether there should be a pool. As the respondent's representative, Mr Lees, pointed out in submissions, the fact that the witnesses were able to describe the detail of the discussions, was good evidence that the meeting to discuss the pooling issue had taken place.

7.15 Mr Alan Foster was one of the people listed. His job title was General Manager but in addition he was Training Advisor. We were told he held teaching qualifications and was responsible for oversight of all the respondent's training. In evidence, the claimant accepted that he could not have undertaken that role. The respondent's witnesses said that this was the reason why Mr Foster was not thought to be a suitable person to pool and we accepted that. Ultimately the decision was for them not us - our role (subject to the point made at 7.13) was to review whether it was a reasonable decision - clearly it was.

7.16 Another person on the chart was Mr David Cleaver whose job title was Contract Manager [job description page 133 onwards]. He was a level below the claimant in the organisational hierarchy but apart managing contracts he had responsibility for compliance and standards. Under cross-examination the claimant accepted that he would not have been qualified to undertake the compliance role without training because he had no experience of compliance with ISO regulatory standards, although he did have experience of some

compliance standards. It followed that as things stood the claimant was unable to carry out the compliance role. That was the reason the respondent put forward for not putting Mr Cleaver into a redundancy selection pool with the claimant, and we thought it was a wholly reasonable a reasonable decision.

7.17 The next person was a Mr Gary Cooper who, in fact, was a Trainee Manager. It was explained that his substantive post was Supervisor who was being trained with a view to him becoming a Contracts Manager. He had responsibility for some contracts, specifically contracts with United Biscuits, which he had worked on for a long time building up a very good relationship with the client. In addition, he was training on the job by assisting other managers and reporting to them on an as and when basis or in connection with specific projects. The respondent concluded that he was not a suitable person to put into a pool. We concluded that was a reasonable business decision.

7.18 The chart also listed a Ms Michelle Shah. As we understood it, the claimant was not relying on her as being a suitable person to pool because she was Contracts Manager for cleaning and security contracts, based in the North West whereas he only managed security contracts. For the avoidance of doubt, it was clearly reasonable not to pool Mrs Shah, given the role she undertook.

7.19 The chart also Mr Gareth Jones who worked in the Midlands managing mobile security contracts [job description 128 of the bundle]. The claimant said this was work he could have undertaken. Mr Sheffield explained that during Mr Jones' tenure as mobile section manager, he had built up a considerable amount of additional business. There were about 800 clients with whom he had very good relationships. We accepted that the claimant almost certainly had the skill set to manage mobile security contracts. The difficulty was, as Mr Sheffield said, that handing over client relationships which had been fostered by Mr Jones could be damaging to the respondent's business. The claimant's evidence was that this would depend on how the handover took place. That might be so, but it was clearly reasonable for the respondent to consider that Mr Jones should not be pooled because of his value to the mobile security side of the business. It was difficult to see how pooling Mr Jones would be anything other than a perverse business decision given the unnecessary disruption of managing the handover of 800 client relationships in the event he was pooled and selected for redundancy.

7.20 That left Mr Cragg. Mr Sheffield's evidence was that Mr Cragg had a skill set which the claimant lacked because he was better at IT. We were unconvinced by that argument. The claimant told us that the IT work that Mr Cragg undertook was inputting data into spreadsheets which the claimant had devised, and analysing that data. The claimant said he could have undertaken data inputting and analysis and we accepted that.

7.21 We thought that if in 2015 the respondent had decided to make someone redundant, it was arguable that it would have been reasonable for the respondent to pool the claimant and Mr Cragg, with the caveat that the because the BMC did not want a General Manager working on the contract, the claimant would have had to be prepared to work on a lower salary grade for that contract. That said, it was equally arguable that the respondent might reasonably have decided not to pool if a redundancy had been made in 2015. Those could both be reasonable

business decisions which, if the pool had been properly considered, should not be interfered with by the Tribunal simply because there were other feasible options.

7.22 The difficulty with the analysis in 7.20 and 7.21 is, of course, that it is hypothetical. In 2015 the respondent chose to try to avoid making the claimant redundant by offering him a changed role which he accepted. This was not successful because the claimant did not bring in new business as had been envisaged and, instead, continued to work on the BMC contract which was not what the respondent wanted or expected. Absent new business, after fifteen months it was reasonable for the respondent to decide that continuing to employ the claimant was not viable because his workload had diminished in 2015 and had not thereafter increased. At that point, it was wholly reasonable for the respondent not to pool the claimant with Mr Cragg.

7.23 Having considered the respondent's explanations for not pooling each of the contract managers named on the chart, the Tribunal concluded they were wholly reasonable. Although, for the reasons stated at 7.13, we had reached the same view on the general issue of a pool in any event.

7.24 Mr Sheffield (and to some extent Mrs Wojciechowska) also gave evidence relevant to the Polkey issue. Their evidence was that if some, or all, of the other people on the chart had been pooled and a selection matrix devised, the outcome would have been no different. In summary, the evidence was that it would have come down to skill set and possibly sickness records because: all of the individuals had similar lengths of service; none of them had poor disciplinary records; and none of them had performance issues. We were told that the claimant's sickness record was worse than those of the others, although we were also told that Mr Cragg had taken twelve weeks off for an operation. For the reasons stated above, we thought that with the exception of Mr Cragg none of the other people should have been pooled. That is essentially because of the skill set argument. The skill set argument may not have applied to Mr Cragg for the reasons in 7.20 and because the claimant had trained him. The sickness record issue would have depended on whether the scoring was weighted according to number of absences, or total length of absence, and over what period. That said, we did not think that there was a case for pooling Mr Cragg fifteen months after the change to the BMC contract.

7.25 Following the meeting at which it was decided there should not be a pool, Mrs Wojciechowska obtained data from the Financial Director to see whether there was a business case for making the claimant redundant. That information showed profit on the contracts the claimant was working on to be £12,893.00 per annum. That did not take into account his car allowance of £5000 which would have reduced the amount to £7,893.00. The data showed that if the claimant was no longer working on those contracts the profit would increase to £34,643.00 [97 & 98]. Clearly therefore there was a cost saving which could be made.

7.26 Mr Sheffield became responsible for overseeing the redundancy process and he arranged a meeting with the claimant which took place on 16 September 2016 [99 - handwritten version 100]. The claimant did not receive a copy of the minutes until disclosure in these proceedings. However, it is fair to say that he did

not challenge the minutes other than to dispute whether he was given a letter at the end of the meeting. Both sets of minutes (handwritten and typed) recorded that he was. The claimant's evidence was that he was not and that the letter was given to him at a later meeting. He therefore argued that he was not informed of his right to be accompanied to the next meeting. Our findings on this point are at paragraph 7.31.

7.27 The minutes recorded the rationale that Mr Sheffield put forward as to why the claimant was at risk of redundancy. He referred to business decline and a lack of growth in the claimant's region. Mr Sheffield, explained that when BMC ceased to require a general manager, the claimant's hours were reduced and it was agreed that he would try to grow business within his region. Mr Sheffield said that because this had not happened the situation was that the business could not sustain the current cost of a General Manager with insufficient business. We have already explained that we accepted the respondent had genuinely reached a point where continuing to employ the claimant was unsustainable because he had not gained new contracts. The minutes recorded that the claimant said that he was "not surprised" and had expected this would happen at some point with the lack of sales. In evidence to us, the claimant did not deny saying that but his position was that he was not responsible for sales. We did not accept that, given our findings about the agreement in July 2015.

7.28 Mr Sheffield asked the claimant if he had any ideas to avoid a potential redundancy situation. The claimant did not put anything forward at that point but did ask for details around what any redundancy package might look like.

7.29 We thought it material to note that the claimant did not raise the pooling issue, which was central to the case before us, in that meeting. When questioned about why he did not question the pool or put forward any ideas (for example taking over the BMC contract from Mr Cragg whom he had trained) the claimant said it was because he thought the outcome was a foregone conclusion. There are different reasons a person may take the view that something is a foregone conclusion. A person might believe they were being "stitched up" colloquially speaking. Alternatively, a person might accept that the outcome was inevitable given the situation, which was consistent with what the claimant said during the meeting. In that context Mr Sheffield said that the claimant seemed sanguine about the situation. We thought was very likely to be the case. The claimant knew that the proposal in July 2015 envisaged an upturn in his work which had not materialised. Therefore he knew, or should have known, that the writing was on the wall because that state of affairs could not be maintained indefinitely. We concluded that the claimant accepted at that point that his post was at risk of redundancy.

7.30 The letter which Mr Sheffield said was handed to the claimant at the end of the meeting on 16 September (as was recorded in the minutes) confirmed that the claimant's position was at risk of redundancy and made reference to a further consultation meeting due to take place on 26 September 2016. It stated that the claimant had a right to be accompanied at that meeting.

7.31 As already noted, there was a factual dispute as to whether that letter was given to the claimant on 16 September. A subsequent letter which was sent on

14 October, made reference to the claimant informed by a letter "on the 27th September 2016" that the company had identified a potential redundancy situation. That did not really assist us to determine the question of when he was first notified in writing that his position was at risk of redundancy. The consultation meeting scheduled for Monday 26 September was rescheduled due to ill health and it took place on the 27th. Because the minutes of the meeting on 16 September did not record any discussion as to the date, time and venue of the next meeting in the consultation process, we concluded that the claimant must have received the letter dated 16 September on 16 September in order to have known that the proposed date of the next meeting was 26 September, albeit that it was ultimately re-arranged to 27 September. We therefore concluded that the claimant had been advised that he had a right to be accompanied.

7.32 There was a further consultation meeting involving the claimant and Mr Sheffield on 27 September. With the exception of one point, the claimant did not dispute the contents of the minutes of that meeting. It was recorded that Mr Sheffield obtained information from Mrs Wojciechowska about other potential positions within the company. He showed the claimant six job vacancies for Security Officers and told him about two more vacancies: one as a Contract Manager in the Cleaning Division in the North and one as a Compliance Manager based in the respondent's Head Office. The latter was a new role spanning three of the respondent's Divisions. The minutes recorded the claimant as saying all the roles were unsuitable and he would not be taking them. In evidence, the claimant accepted that he had said this although he also said he was not told about the Contract Manager role in the Cleaning Division. We concluded that it was very likely that he was told because it was recorded in the minutes. The claimant explained at some length why the Security Officer posts would not have constituted suitable alternative employment. In summary, the wage was low and they would have necessitated travelling at his own expense. We accepted that they were not suitable alternative employment for someone who had previously been a General Manager with a car allowance.

7.33 However, there was no reason to suppose that the claimant could not have carried out the Contract Manager job in the Cleaning Division. We concluded that he rejected it because he was not particularly interested in continuing to work for the respondent at that point. It may well be that he thought that because of all his contacts he would obtain other employment in the security industry quite easily.

7.34 Mrs Wojciechowska told us that the Compliance Manager post was a new role which involved ensuring compliance with various regulatory standards. She said that, if the claimant had expressed an interest in it, there would have been a discussion about what the role entailed and whether he could do it. She also said that if there were any training needs those would have been identified and the claimant could have been provided with that training to undertake the role. We concluded this was potentially suitable alternative employment, albeit it that the respondent would need to find out whether the claimant had the necessary skill set, or could have developed the skill set with training. We concluded the respondent was putting forward potential ways of avoiding redundancy in good faith, but that the claimant was not interested in them.

7.35 The claimant's representative made the point that the claimant had not been told that he could have training for the Compliance Manager role but the fact is the claimant had rejected the role out of hand. He had not asked about what the role involved. If he had, we have no doubt there would have been a discussion about skill set and possible training.

7.36 The claimant was asked if he had any other ideas about possible job roles and he said "no." He did not raise the pool issue and/or point to Mr Cragg as someone whose role he could undertake. By this point, the claimant had had about eleven days to reflect on the situation, come up with ideas and raise questions. There was a discussion around the financial package on offer.

7.37 The same findings applied to the final consultation meeting which took place on 4 October 2016. The only discussion was about the claimant's leaving date and the financial package for redundancy. It seemed to us that by this point it was wholly reasonable for the respondent to think that the claimant had accepted that his job was redundant and did not appear to be upset about that. We thought it very important to note that at no stage did the claimant suggest that the redundancy process was because of his age.

7.38 The respondent wrote to the claimant on 14 October 2016 [105]. This is the letter referred to above as containing what appears to be a date error. The letter provided details of the redundancy package. It did not inform him that he had the right to appeal. Mrs Wojciechowska said the letter was based on a template and, for some reason, the right of appeal had been deleted from the template when it should not have been. The fact is though, as the claimant very fairly accepted, he knew the respondent provided a right to appeal against a redundancy dismissal because he had sent the template letter in the past when it still referred to the right to appeal. The claimant did not appeal, nor did he complain that he had not been offered an appeal. We were told by Mrs Wojciechowska that if the claimant had appealed, an appeal hearing would have been arranged, and would have been heard by Mr King or the other Managing Director. We accepted that evidence.

7.39 The final matter we come to was whether the claimant's dismissal was influenced by his age. Paragraph 39 of the claimant's witness statement set out the details of comments allegedly made by Mr Sheffield which could tend to show he was influenced by the claimant's age. The claimant said: "I vividly recall occasions when Gary Sheffield made comments about my age in front of my colleagues. For example, he would say thing such as "How old do you reckon he is lads?" and "How old are you now Harry? I won't be working when I'm your age. I'll have well retired." In his evidence to us, the claimant said he was not bothered by the comments at the time. Mr Sheffield's account was at paragraph 27 of his witness statement. He stated that he could not recall saying "How old are you now? I won't be working when I'm your age. I'll be well retired," but went on to say that he had overheard the claimant talking about his age on occasions, generally in the context of expressing the view that some of the younger staff were not as good at their jobs as him. Mr Sheffield also said that he had made no secret of the fact that he intended to retire as soon as he could and certainly by the age of 65. Mr Sheffield said that was simply his personal preference.

7.40 When Mr Sheffield gave evidence to us, he was pressed on whether he remember saying the remark attributed to him. He said that he genuinely could not say whether he had, but that if he did, it was not said maliciously or with any ill intent. We found it quite difficult to decide whether this comment was said or not. Ultimately, we decided it was not necessary to make a finding because, if the comment was said, we fully accepted it was not said with any ill intent and caused no offence. The key point for us was whether we thought that this comment was evidence that Mr Sheffield was subconsciously influenced by the claimant's age when the redundancy exercise was undertaken. We did not accept there was any scope to draw such an inference for a number of reasons. Firstly, this was a genuine redundancy situation which came about as the result of the BMC's decision fifteen months previously. Secondly, it was reasonable not to pool the claimant with others, for the reasons set out in our findings of fact. Mr Sheffield took advice on that point from Mrs Wojciechowska and was guided by that. Thirdly, Mr Sheffield did not simply make the claimant redundant. He undertook consultation and identified such posts as were available, two of which were potentially suitable. When the claimant said he would not be taking any of them, there was nothing more to be done. Other factors which were less important because they did not directly involve Mr Sheffield were: the claimant was taken on when he was 67; the respondent tried to retain him in 2015 by proposing changes to his role; and the claimant did not at any stage suggest that he was being made redundant because of his age, nor did he put in a grievance although he was familiar with the grievance procedure. The reasons these factors carried some weight in our minds, was that they painted a picture of a non-discriminatory employer who valued the claimant's services. Furthermore, as already stated, by the point when Mr Sheffield came to deal with the redundancy process, the outcome truly was a foregone conclusion, subject to the question of whether the two potentially suitable roles had been of interest. We concluded that Mr Sheffield genuinely approached the redundancy situation without being influenced whatsoever by the claimant's age.

Submissions

8 We will not summarise the submissions as there really is no dispute as the law. We will simply summarise the law and apply it to the facts as found.

The law

9 **Unfair dismissal**

98 General

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either for a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -

…..

(c) is that the employee was redundant….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

10 In this case, the reason for dismissal was said to be redundancy. For there to be a redundancy situation the tribunal must be satisfied that the employee was dismissed; that the employer's requirement for employees to carry out work of a particular kind had ceased or diminished (section 131(1)(b) ERA); and that the dismissal was caused wholly or mainly by the cessation or diminution.[1] If the tribunal accepts there is a redundancy situation, the question of fairness under section 98(4) must be considered. In Zeff v Louis Day Transport Plc EAT/0418/10 the EAT confirmed that a formal selection process is only necessary if there is a "pool" of potentially redundant employees from which to choose those to be made redundant. In Fulcrum Pharma (Europe) Ltd v Bonaserra EAT/0198/10 the point was made that it will be difficult for an employee to challenge a "pool of one" where the employer has genuinely applied his mind to the position. Similarly in Capita Hartshead Ltd v Byard EAT/0445/11 it was held that: it is not for the Employment Tribunal to decide whether it was fairer for the employer to act in some other way; the range of responses test applies to the selection of a pool; the question of a pool is primarily for the employer; and it will be difficult for an employee to challenge it if the employer has genuinely applied his mind to it. In the event that dismissal is unfair, a Tribunal will generally go on to consider the likelihood that a fair dismissal would have taken place if a reasonable procedure had been followed, by reference to Polkey v AE Dayton Services.[2]

11 **Direct age discrimination**

The relevant legislation in respect of the allegations of direct age discrimination is the Equality Act 2010 ("the EA10"). Age is a protected characteristic as defined by sections 4 and 5 of the EA10. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

Section 39(2) provides that:

"An employer (A) must not discriminate against an employee of A's (B)—

[1] Safeway Stores v Burrell [1997] IRLR 200 EAT as endorsed by the House of Lords in Murray v Foyle Meats Ltd [1999] IRLR 562

[2] [1987] IRLR 503 HL

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.

12 Section 136 of the EA10 provides that: "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". This provision reverses the burden of proof if there is a prima facie case of direct discrimination. The courts have provided detailed guidance on the circumstances in which the burden reverses[3] which has recently been confirmed to apply to the provisions of the EA10. In most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred (see discussion below).

13 In summary, the EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it.

14 Direct discrimination is defined in section 13(1) of the EA10 as "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". However, for the protected characteristic of age there is the possibility of justification which is set out in section 13(2); "If the protected characteristic is age, A does not discriminate against B if A can show B's treatment to be a proportionate means of achieving a legitimate aim".

15 The applicable legal principles were summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, and remain good law.

15.1 In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was.[4] In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

[3] Barton v Investec [2003] IRlR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

[4] By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL

15.2 If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.[5]

15.3 Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts 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 they fail to establish that, the Tribunal must find that there is discrimination.[6]

15.4 The explanation for the less favourable treatment does not have to be a reasonable one.[7] In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.[8] If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

15.5 It is not necessary in every case for a Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.[9]

15.6 It is incumbent on a Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.[10]

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[5] By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA
[6] By reference to Igen
[7] By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL
[8] By reference to Bahl v Law Society [2004] IRLR 799 CA
[9] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
[10] By reference to Anya v University of Oxford [2001] IRLR 377 CA

16 It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.[11] However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.[12]

17 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).[13]

Conclusions

18 We shall start with our conclusions on unfair dismissal. The first issue in any unfair dismissal case it to determine the principal reason for dismissal. In this case it was not in dispute that it was redundancy, which is a potentially fair reason to dismiss. As the evidence developed, it became clear that it was not in dispute that there was a genuine redundancy situation. That left the question of whether the dismissal was fair overall. It must be borne in mind that the Tribunal's remit is narrow when it comes to decisions about redundancy – they are business decisions and it is not for us to put forward other feasible options. We simply apply the range of reasonable responses test, bearing in mind that the law says that bad business decisions are not necessarily unfair ones. The only substantive point on this concerned the pooling issue. As will be clear from our findings of fact, we accepted that the decision not to pool was properly considered and wholly reasonable as at September 2016. The position may have been different in July 2015 but only regards Mr Cragg. Even then, it is difficult to say that it would have been outwith the range of reasonable responses to decide not to pool.

[11] By reference to Shamoon
[12] By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT
[13] See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL

19 We shall now deal with the remaining points taken on behalf of the claimant regarding the fairness of the process. Firstly, we concluded the claimant was told he had a right to be accompanied. Secondly, the outcome may have appeared to be a foregone conclusion, but that was not because the claimant was being "stitched up". There was genuine consultation where the claimant was invited to put forward ideas and to consider two potentially suitable alternatives to redundancy. Finally, whilst it was right to say that the claimant was not notified of his right of appeal, the fact is that this was not a case where the claimant was an ordinary employee who was unaware of the detail of redundancy processes. He was familiar with matrixes, pools, and consultation and he knew of the right to appeal. He did not seek to do so or to challenge not being offered an appeal.

20 Put another way, the challenges to the process and methodology which were made by the claimant before us, simply did not feature in the consultation process at all. Clearly it is not for an employee to ensure the fairness of a redundancy selection exercise, but it was somewhat surprising that a well-informed employee such as the claimant, seemed content to let the process run its course without raising any questions save as to the financial package being offered. For the above reasons, we concluded the claimant was fairly dismissed.

21 Our findings on the pooling question meant that the Polkey question was academic as regards other potential members of the pool and how they may have scored if a matrix was applied. If we had concluded that failing to inform the claimant of the right to appeal had rendered the dismissal unfair, we would no doubt have concluded that an appeal would have made no difference to the outcome.

22 Our conclusions in respect of the allegation that the claimant's dismissal amounted to direct age discrimination are set out in our findings of fact. We did not accept that the claimant's age was an influencing factor. The sad fact is that the decision by the client on the BMC contract in the summer of 2015 led to a proposed change in role in July 2015 which the claimant agreed to. His failure to generate new business could not be sustained long-term. We should say for sake of completeness that the respondent did not seek to argue that if the dismissal was discriminatory it was nevertheless lawful because of objective justification.

23 Consequently, our unanimous conclusion was that the claimant was fairly dismissed; and was not directly discriminated against because of his age. Those claims were not well-founded. We issued a judgment dismissing them. The judgment also dismissed the claims for breach of contract (wrongful dismissal) and unauthorised deduction from wages in respect of accrued holiday entitlement on withdrawal.

Claimant's application for costs

24 The claimant's representative then made a costs application which can be dealt with quite briefly. He submitted that if the evidence relating to the meeting to discuss pooling had been included in the respondent's witness statements, or indeed in any paperwork up to the hearing, the claimant may have decided not to proceed with his case, not least because he had to pay a hearing fee, albeit that this will now be repaid by the Ministry of Justice.

25 The basis of the costs application was that it was unreasonable not to include that information in the witness statements. It was not put as an application for wasted costs against the respondent's solicitors, but rather as an application for costs against the respondent.

26 The amount sought was Counsel's brief fee of £2000.00 plus VAT. Mr Perry argued that this was a classic example of litigation by ambush and was unreasonable conduct.

27 In his submissions, Mr Lees pointed out that the normal order in the Employment Tribunals is no order for costs because we are generally a costs free regime. He also argued that the conduct complained of felt short of the high threshold of unreasonable conduct so there were no grounds to make an Order. Mr Lees also pointed out that when the claimant brought these claims he included other claims including indirect age discrimination, some of which were withdrawn before or at the hearing but that the age discrimination claim had to be dealt with in any event. He pointed out that our main finding of fact on the pooling issue was that, in fact, pooling was not appropriate in this instance.

28 In reply, the claimant's representative said that a significant number of claims had been withdrawn and that it is well known that it is difficult to successfully pursue an unfair dismissal claim by reason of redundancy when consideration has been given to pooling.

29 Having met briefly in Chambers, we gave brief reasons for our decision on the costs application. Pooling has been a live issue in this case throughout. The respondent dealt with it in the ET3 by setting out the reasons why the various named individuals should not have been pooled with the claimant - evidence of those reasons was also included in the respondent's witness statements. Whilst it was regrettable that the fact of the meeting was not included in the ET3 or the witness statements, to our minds, that fell far short of constituting unreasonable conduct of litigation for the purposes of founding a costs application. We thought that if the witnesses had stated in terms that they had met to discuss pooling and had chosen not do so for the reasons which <u>were</u> set out in those statements, it was highly unlikely that the claimant would have decided not to proceed because he would still have wanted to put his case on the pooling issue which was thoroughly and properly explored by Mr Perry in cross-examination.

30 Quite apart from that, the claimant would have wanted to pursue the age discrimination claim. The two claims were to a large extent inseparable. If, for example, we had concluded that the respondent should have pooled, or had failed to properly consider it, that could have been material from which we may have drawn an inference that Mr Sheffield was influenced by the claimant's age.

31 Finally, it should be noted that evidence frequently emerges late in the day for all kinds of reasons. That is part and parcel of the cut and thrust of litigation – it is not, without more, unreasonable conduct. We did not accept this was deliberate litigation by ambush – it was clearly an error. We agreed with Counsel for the respondent that the threshold of unreasonableness was not meant and

therefore there was no power to make a costs order. For those reasons, we dismissed the appication.

Employment Judge Hughes
20 December 2017