EMPLOYMENT TRIBUNALS

Claimant: Ms P Cassidy
Respondent: Quest Vitamins Limited

HELD AT: Liverpool Employment Tribunal **ON:** 3 & 4 October 2017
28 November 2017 (in chambers)

BEFORE: Employment Judge Shotter

MEMBERS: Mrs JL Pennie
Mr WK Partington

REPRESENTATION:

Claimant: Mr C Cassidy, MCIM, 1stLM, MBA and claimant's son
Respondent: Mr D Flood, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed, her claim for unfair dismissal is well-founded and is adjourned to remedy listed for 12 January 2018 at Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX commencing 10.00am.

2. The claimant was not unlawfully discriminated against on the grounds of age, and her claim for unlawful age discrimination is dismissed.

REASONS

Preamble

1. By a claim form received on 8 February 2017 (the ACAS Early Conciliation Certificate is dated 23 January 2017) the claimant claimed unfair dismissal and unlawful age discrimination arising out of her dismissal by reason of redundancy on 7 October 2016, the effective date of termination.

2. The claimant, who was 63 years of age at the time of dismissal, originally relied on 3 comparators, Debbie Parnell, Charlie Purdie and Minell Zala, all of whom were in their twenties and forties. During the liability hearing the comparators were clarified as Debbie Parnell and Charlie Purdie. The main thrust of the claimant's argument is that Debbie Parnell and Charlie Purdie had been at risk of redundancy, they were allowed to job share and keep their job at reduced hours, were treated differently in the consultation process (i.e. given two weeks notice of the first consultation meeting when the claimant was given one), were considered together and both were aware the other was at risk of redundancy, unlike the claimant who was put in a selection pool of one when her line manager, Steve Calling should have been in the same pool. The claimant also argued that she should have been placed in the same pool as Debbie Parnell and Charlie Purdie, the areas in which they worked merged and the claimant should have been offered the option of a job share with them i.e. three people sharing the same job with a reduced number of hours over a 5-day week.

3. The claimant further alleges the redundancy process was unfair, consultation was a sham, she was "ambushed" at the first consultation meeting, the decision to dismiss her had been made prior to the consultation process, it was a forgone conclusion and the reason for this was her age. Finally, the claimant maintained no alternative employment or a reduction in hours was considered.

4. There is an issue as to whether the claimant appealed the decision to dismiss or requested information only, the claimant maintaining she had lodged an appeal which was denied to her by the respondent.

5. The respondent denied all the claimant's claims. It is notable Mr Flood accepted on behalf of the respondent that it can see why the claimant sought to criticise aspects of the procedure and so the Tribunal agreed having found the redundancy process and resulting dismissal outside the band of reasonable responses open to a reasonable employer.

Evidence

6. The Tribunal heard evidence from the claimant on her own behalf, and from Mr C Cassidy, her son, who also represented her during these proceedings. On behalf of the respondent the Tribunal heard from Mr de Beer, national sales manager, Ms Hannah Cross, accountant and acting human resources manager ("HR"), and Stephen Canning, regional sales manager and the claimant's line manager. There were issues of credibility; the Tribunal did not accept all of the witnesses gave their evidence truthfully to the best of their recollection for the

reasons set out below. The Tribunal relied extensively on the contemporaneous documents when it arrived at its findings of facts, although it found the note taken by Hannah Cross of the 30 September 2016 telephone conversation was an attempt to set up a defence to the claimant's allegations and did not reflect the reality of the situation that had occurred beforehand.

7. The claimant's evidence given on cross-examination was not always credible, for example, she stated that she did not realise she was in a pool of 1 and assumed the other area sales managers were in the same pool as her, when the contemporary documentary evidence shows otherwise. In cross-examination the claimant conceded there was no basis for her assumption that she was in a pool with other employees, and if she had believed she should have been in the same pool the questions drafted during the break "may have been" the time to bring this to Barney de Beer's attention. The claimant also conceded she had not told him she was willing to travel beyond her area i.e. into South Wales and the West Country, and should be in the pool with her colleagues. She agreed she had told Barney de Beer going into a bigger area would "take a lot of people's time" and spoke about the "feasibility of one person going up and down the motorway, it would take a lot of time. " In response to questions put the claimant on cross-examination concerning her silence on the key issue of her oral evidence that Debbie Parnell and Charlie Purdie would have been willing to take on the West Country, South Wales and the claimant's area with a view to job sharing with the claimant (for which there was no evidence before the Tribunal apart from the claimant's say so) the claimant was unable to give any explanation.

8. The claimant's oral evidence on the hand-written notes marked "A" and "B" referred to below was not credible. She attempted to avoid giving the only interpretation that document could reasonable have been given, namely, a theoretical question concerning payments above the contractual and statutory minimum, and the Tribunal found she had intentionally prevaricated in this respect.

9. The Tribunal did not consider Hannah Cross to be a credible witness, and like the claimant, she had difficulty recollecting what had actually taken place as opposed to what she would have liked to have happened. This is evidenced in a number of the notes made as set out below, for example, the assertion that the claimant was given "around" 2-weeks notice of the first consultation meeting when she had not; it was 7 days. She recorded the claimant had been "offered" the option to travel to other areas when this was not the case, and had the claimant agreed to travel the respondent would have pooled together other members of the sales team. The contemporaneous documentation does not reflect the claimant being informed of this, and she had no idea that the pool would have been changed had she indicated a willingness to travel.

<u>Agreed issues</u>

10. The agreed issues in the case are as follows –

<u>Unfair dismissal</u>

10.1 Was the dismissal for a potentially fair reason, being redundancy? It is not disputed by the claimant S.139 of the ERA had been met in that the claimant's work had ceased or diminished as a result of shop closures and drop in sales.

10.2 If it is, was the dismissal fairly carried out in accordance with S.98(4) of the Employment Rights Act 1996 as amended ("the ERA")? In particular,

10.1.1 Was 7 days notice of the 18 August 2016 meeting fair?

10.1.2 Was it unfair for the 18 August 2016 consultation meeting to have been carried out in a busy hotel foyer? Did the claimant indicate to the respondent that she was unhappy with this venue?

10.1.3 When was the claimant given the notes of the 18 August 2016 meeting? Was it before or after a decision had been made to dismiss the claimant by reason of redundancy?

10.1.4 Were the claimant's questions set out in communications during the period 14th to 22nd December 2016 concerning the redundancy process responded to?

10.1.5 Did the respondent give as much warning as possible of impending redundancy so as to enable the claimant to take early steps to inform herself of the relevant facts, consider possible alternatives to the solutions and, if necessary, find alternative employment in the undertaking or elsewhere?

10.1.6 Did the respondent offer the claimant alternative employment?

10.1.7 Was the claimant given the right to an appeal and did she take this right up?

10.1.8 Did the dismissal lie within the range of conduct which a reasonable employer could have adopted?

10.3 If the claimant's dismissal was procedurally unfair, would the claimant have been dismissed in any event, in line with Polkey v A E Dayton Services Limited [1987] IRLR 503?

Remedy only

10.4 Has the claimant mitigated her losses? It was agreed the claimant would produce and rely upon 2 emails not previously disclosed in connection with arguments on the claimant's failure to mitigate, if she succeeds in either of her claims.

Age discrimination

11. The issues are as follows:

11.1 Did Barney de Beer make the comment "so like your retirement Pauline" at the consultation meeting held on 18 August 2016? Did the claimant first raise the issue of early retirement?

11.2 Are Debbie Parnell and Charlie Purdie proper comparators and with no material difference to the claimant?

11.3 If Debbie Parnell and Charlie Purdie's circumstances have no material difference to that of the claimant's, did the respondent's consultation process

involving Debbie Parnell and Charlie Purdie disadvantage the claimant when both processes are compared?

11.4 Was the act of dismissal less favourable treatment in comparison to the way the respondent treated Debbie Parnell and Charlie Purdie, and was the claimant disadvantaged when compared with them?

11.5 If there was unfavourable treatment in the consultation process, was this because of the claimant's age?

11.6 Did the claimant's dismissal amount to less favourable treatment because of age?

12. Having considered the oral and written evidence, the agreed bundle and oral submissions made on behalf of the parties (which the Tribunal has not repeated but has attempted to incorporate within the body of this Judgment with Reasons) the Tribunal has made the following findings of the relevant facts. In doing so, the Tribunal has resolved such conflicts on the evidence as there were.

Findings of Facts

13. The respondent is in the business of marketing vitamin produces and employs a number of Area Sales managers. Barney de Beer, national sales manager, heads the sales team and is responsible for line managing Stephen Canning, regional sales manager, and the line-manager of the claimant, who worked part-time as an Area Sales Manager. Neil Daisy was and remains the managing director. The respondent does not employ a large number of employees, and has contracted over the years losing members of staff across the UK due to a continuing down-turn in business.

14. It is not disputed the respondent recruits and retains older workers, including the claimant who was employed when she was 60 years of age and joined the pension scheme was she was nearly 63. The Tribunal was provided with a number of examples of older employees aged 76 (one had commenced employment at the age of 44), 64 (appointed at the age of 60), an employee appointed in October 2015 when he was aged 65, and two employees aged 55 and 56 were employed in 2016. It was not disputed 40% of the respondent's total workforce was and remain aged above 50 years old.

15. The claimant, who had no line management responsibilities, covered the North of England, Midlands and North Wales. Stephen Canning covered Scotland and Northern Ireland in additional to carrying out a number of other duties and responsibilities. For example, he attended regular management meetings with the directors, organised and attended trade shows, managed the sales of Scotland, Northern Ireland and Northern England plus UK wholesalers and internet account, including those in the claimant's area and for which the claimant was not responsible. Unlike the claimant, he also dealt with export and oversees customers; promotional planning, price reviews, produce images on internet sites, advising on product range features and benefits, and planning trade shows.

16. Due to a downturn of business a number of staff had been made redundant or left, including the only HR officer, with the result that Hannah Cross, a qualified accountant, took up that mantle despite the fact she had no experience and little

knowledge of employment law relating to redundancies based on the answers she gave under cross-examination. Hannah Cross was advised throughout the redundancy by an external HR consultant, whose advice she accepted unquestioningly and related to Barney de Beer as he conducted the consultations. The Tribunal accepted Hannah Cross' evidence as credible that she received advice concerning it being appropriate for the claimant to be placed in a pool of one and not in the same pool as her 3 area sales manager colleagues or any of the more junior sales force.

17. The claimant was issued with standard term and conditions of employment on 30 September 2012, a job description and a Company Handbook.

18. It is not disputed the claimant's sales, through no fault of her own as the respondent recognise she was a capable employee, declined over the past 2 years or so, and due to adverse marketplace conditions there was no prospect of this pattern being reversed in the future. The claimant was fully aware of the situation, although there was an attempt by her representative to suggest that she was not which the Tribunal did not find credible. The claimant had been provided with all of the relevant figures and was well-aware her sales were down 13% year by year. She had regular meetings with Stephen Canning concerning the financial situation and was provided with all the relevant sales figures, including those in December/January 2016 in anticipation a business plan being produced which included growing gold and silver accounts. Promotions and special deals to boost sales were unsuccessful due to shops closing down. The respondent took the view the claimant's area (unlike the South East area within the business) was not economically viable.

19. Two of the claimant's colleagues, Debbie Parnell, who worked part-time, and Charlie Purdie (the comparators relied upon) were employed as Area Sales Managers and lived within an hour of one another; the latter covered the West Country, the former West Country and Wales. Minell Zala, who had been newly recruited, covered the South East, the best performing area. The claimant was the only Area Sales Manager line managed by Stephen Canning; Barney De Beer line managed her colleagues. All the area sales managers did the same job but in different areas.

20. In June 2016 Debbie Parnell and Charlie Purdie took part in a consultation meeting with Barney de Beer supported by Hannah Cross who in turn was guided by an external HR consultant, as they were at risk of redundancy due to a reduction of sales in their area and it being no longer viable to employ 2 members of staff for the equivalent of 7-days week. Separate meetings were held. Unlike the claimant's one and only consultation meeting Debbie Parnell and Charlie Purdie's meetings did not take place in a public foyer of a hotel.

21. Unsurprisingly, Debbie Parnell and Charlie Purdie were aware the other was at risk having been informed by Barney de Beer in a letter dated 27 June 2017 that the company had started the consultation process. One of the claimant's complaints is that she was not informed of their consultation by the respondent during her own consultation process, despite the question being asked and she maintains this was unfair and discriminatory on the basis that Debbie Parnell and Charlie Purdie were younger in comparison, had been treated more advantageously because they were then in a position to agree a job share proposal and avoid redundancy. Following

consultation Debbie Parnell and Charlie Purdie job shared in the combined West Coast and Wales area working a reduced number of hours. The agreement was reached and reduancy avoided at the consultation meeting held on 12 July 2016, before the claimant had been informed the area sales manager role in her area was at risk. .

22. The claimant was aware at the time Debbie Parnell and Charlie Purdie were involved in a consultation process; she had not been informed of this by the respondent and did not let on she possessed this knowledge until this liability hearing.

23. At the consultation meeting Debbie Parnell and Charlie Purdie were told they could not have a company car, they were given 6-months to turn their area around and their hours were cut down. The claimant did not have a company car and the respondent's position was that it could not have reduced the claimant's hours on the basis that it was not cost effective; it was envisaged Stephen Canning would take over the claimant's area.

24. The consultation with Debbie Parnell and Charlie Purdie had completed before the respondent commenced consultation with the claimant.

10 August 2016 letter marked "redundancy consultation."

25. The letter from Barney de Beer dated 10 August 2016 informed the claimant she was facing a potential redundancy situation; "the reason for this are a result of adverse market conditions and independents closing down…Sales in area 2 and 4 [the claimant's area] have reduced substantially and I write to confirm that the company will start consultation with the aim of avoiding or minimising the need for redundancy." Mr Cassidy raised the point on re-examination that the respondent's reference to sales reducing "substantially" was a subjective view. On the irrefutable evidence before the Tribunal, it was clear the claimant's sales had reduced and continued to do so by 13% per annum, and the Tribunal took the view the respondent was entitled, when analysing the business, this was sufficiently substantial to justify a redundancy situation.

26. The claimant was not advised she had the right to be accompanied at the meeting, but nothing hangs on this as the claimant was accompanied by her son, Colin Cassidy, who was not a work colleague or union representative.

27. It is undisputed the letter dated 10 August 2016 was read out by Barney de Beer to the Claimant twice in a telephone call held on 10 August 2016 and she received a hard copy on 11 August 2016. During the telephone call a meeting was arranged for 18 August 2016, and there was no evidence before the Tribunal the claimant at any stage informed Barney de Beer there was insufficient time for her to prepare for it.

28. Barney de Beer in an email sent 11 August 2016 asked the claimant if she would change the date to 12 August. The claimant who did not have enough time to prepare with one days notice, understandably refused. The claimant made it clear she wanted the meeting to go ahead on the 18th August and this was accepted by Barney de Beer. At no stage did the claimant complain she had insufficient time to

prepare and the Tribunal finds she had and was not disadvantaged in any way by 7 days notice.

The first and only consultation meeting held on18 August 2016

29. The claimant had prepared a number of questions with the support of Mr Cassidy prior to the meeting. At no stage did she indicate she had insufficient time to prepare for it either at or prior to the meeting taking place.

30. It is unfortunate to say the least the 18 August 2016 meeting was held in a hotel foyer. The respondent has rightly conceded this was unacceptable. It is notable Hannah Cross expected the claimant not to return after the adjournment due to the unsuitable venue. In cross-examination the claimant conceded there was nothing stopping her from telling Barney de Beer she should have been in a pool with the other area sales mangers at the meeting, and given the contents of the claimant's hand-written note prepared during the adjournment, the Tribunal finds the claimant could have put forward her case, had she been so inclined. However, it is undisputed the claimant was ill at ease (which she described as "unhappy and uncomfortable") with the venue and being over-heard by members of the public and this may well have impacted on the claimant's ability to argue her case and respond to Barney de Beer's refusal to clarify the redundancy position in relation to the other sales managers.

31. It is notable Hannah Cross' attempt to re-write in her telephone note dated 30 September 2016 the events of the 18 August 2016 meeting is a far from truthful version of the reality. It is clear to the Tribunal, having considered the written evidence in detail, the claimant was not offered the option to travel to other areas such as London, and she was not informed that due to her unwillingness to travel she would not be pooled with the other sales team. The Tribunal found there was no such reference, and had the respondent genuinely considered travel to be an issue, it was incumbent on Barney de Beer to make this clear in order that the claimant was in a position to make an informed choice. He failed to do so, and his failure resulted in a procedural and substantive unfairness.

32. There is an issue as to what was said at the first consultation meeting. Tribunal has before it 3 versions of notes reflecting what transpired at that meeting. The Tribunal has picked through the relevant passages as follows in order that a decision could be made as to what transpired based on the contemporaneous documentation as opposed to the less reliable memory of witnesses. It is undisputed during a break of 10 minutes the claimant with the assistance of Mr Cassidy, prepared further two questions marked A and B.

31.1 The claimant's notes record Barney De Beer indicated it was a confidential meeting and the first in "possibly" a series of meetings. It would depend on the claimant's proposals. This is repeated in the notes of Colin Cassidy, which recorded in addition the meeting was to "discuss and explore alternative and proposals." Hannah Cross recorded Barney De Beer "strictly outlined that it is not a redundancy meeting it is consultation where the aim is to explore alternatives to redundancy..." and Barney De Beer was not sure how many meetings there would be "until suggestions and questions are put by the claimant." The Tribunal finds there was no reference to the

respondent putting suggestions to the claimant, and the documentary evidence reveals no suggestions were made.

31.2 It was stated the redundancy was about the position and not the person. This is repeated in the notes of Colin Cassidy.

31.3 Barney de Beer confirmed consultations were taking place in other areas, but it was confidential. This is repeated in the notes of Colin Cassidy.

31.4 The claimant was not being scored and nor was she pooled with employees in other areas. The claimant was made aware that she was in a stand-alone position and in a pool of one. Her notes state "Barney said he wasn't using a scoring system or pooling me with other areas he was consulting with. He said it was confidential what was going on in other areas." This is not reflected in the notes of Colin Cassidy, see below; it is in the notes of Hannah Cross who recorded "the scoring system does not apply as it only applies to situations where there are two or more people in a role and a reduced number of people are required to do the job. In this situation the area is only being done by one person."

31.5 The claimant alleges when she stated she had not been given anything meaningful to consult on, and whether details could be provided at a future meeting Barney De Beer's alleged response was "well we could have another meeting, but what would be the point except to have a nice cup of tea and a chat if you don't have any proposals." The notes reflect the claimant saying "everything was put onto me." Colin Cassidy recorded "BD states Pauline has to come up with a plan otherwise we would just be sitting at these meetings drinking tea." Hannah Cross recorded "Barney told Pauline…at the moment the company had nothing to work on because Pauline had not provided any suggestions or questions that required further research…we are unable to taken it further without any suggestions and questions from Pauline." The Tribunal found contrary to Hannah Cross' 30 September 2016 note, neither she nor Barney de Beer made any reference to the possibility of the claimant's area increasing south and the possibility of a pool of 3/4had she been prepared to travel, and it is more likely than not a reference was made to sitting at meetings drinking tea if the claimant failed to come up with proposals. The upshot was that the claimant knew if she were to avoid redundancy, proposals needed to be put forward.

31.6 After the adjournment the claimant told Barney de Beer she was "unhappy and uncomfortable" with the redundancy meeting in full view and hearing of the public. His response was that she could swop places with Hannah Cross and "snuggle closer so we could talk more quietly." Colin Cassidy reported the claimant as saying "PC- also states she is upset and uncomfortable that the meeting is being conducted in an open space and that people waiting to go on holiday etc are sat on the sofas listening to them... BD suggests PC swops places with HC and "snuggles up" to Barney so people can't hear conversation." There is no reference to this in Hannah Cross' notes," and Barney de Beer in evidence disputed this was said. The Tribunal found Barney de Beer's evidence less

credible on this point, preferring the evidence of the claimant and Colin Cassidy as more persuasive, despite the credibility issues outlined above, as such comments appeared to follow on from the rather flippant reference to tea drinking when an employee is facing losing their livelihood.

31.7 The claimant was told she had a week to consider the position. Barney de Beer did not "want to put words" in her mouth and she talked about the "feasibility of one representative covering the whole country from Scotland or the Lake district onwards "travelling down to London on the M6 would take all of their time." Colin Cassidy in his note records "Talks about areas that she covers, but states she is finding it difficult to work out future scenarios that Quest might think would work, as they are refusing to give any information. Questions if it is sensible that one person might cover from Scotland to London as they would spend their time on the M6 rather than in front of customers." Hannah Cross recorded the following; "Pauline said that without prejudice [the Tribunal finds there is no doubt the claimant used this phrase as recorded in her hand-written note at A and B] that if the role was no longer available that she would not want to be travelling to another area such as London. She asked what redundancy package would be provided." Barney de Beer interpreted the claimant's response to mean that she did not want to travel any further than she was already travelling, and did not want to travel to London. The reference to "without prejudice" was meaningless to him. In cross-examination it was put to Barney de Beer that the claimant only mentioned not travelling to London in theory and without prejudice. The Tribunal finds the claimant's position on travelling was not explored or clarified with her, and it was not difficult, in the heat of the moment, for a single comment to be misinterpreted. It is clear from the different notes taken that a straightforward question as to whether the claimant would travel beyond her area so as to avoid redundancy was not put to her despite Hannah Cross' 30 September 2016 note. The effectiveness of the consultation meeting was not assisted by the fact it took place in a public forum, and it is unsurprising key questions went unasked and so the Tribunal found.

31.8 The claimant put to Barney de Beer the two additional issues she had discussed with Mr Cassidy during the adjournment marked A and B in her hand-written notes. The claimant was reluctant, under cross-examination, to admit that her concern was contractual rights. Eventually, she admitted that the questions related to contractual and additional payments over and above the statutory minimum and voluntary redundancy. In response to the question "in theory and without prejudice what would Quest do to look after any employees in additional to statutory and contractual requirements, if redundancies were unavoidable but there is a mutually agreed voluntary redundancy situation?" Barney de Beer responded ""so like your early retirement Pauline." The claimant and Colin Cassidy assured Barney De Beer the claimant was not retiring but being made redundant. Colin Cassidy recorded the same question being asked and Barney de Beer's response being as follows; ""is that like you voluntarily retiring Pauline...**BD: States he was not au fait with this**, [my emphasis]

but states he will need to speak with Neil Dainty to see." Hannah Cross recorded "Pauline asked that if she went for voluntary redundancy that was mutually agreed would her redundancy pay be increased above the statutory. We discussed whether she could opt for early retirement…Colin said that it would be voluntary redundancy not retirement." Having considered the cumulative evidence on the reference to retirement, Barney de Beer's explanation and his motivation, the Tribunal found on the balance of probabilities, Barney de Beer was seeking clarification of the claimant's position and not suggesting she was retiring as he was unclear whether the claimant's reference to a mutually agreed voluntary redundancy was the same as retirement.

32 Colin Cassidy's notes differ form the claimant's in a number of respects, as follows:

32.1 Colin Cassidy omits the reference by Barney De Beer to the claimant being in a stand-alone position as set out above, setting out Barney De Beer's comment in respect to a question about scoring systems as follows "Stated scoring systems are only used if there is a pool of people….refused to state how many people were affected in the field team but confirmed they were consulting with other field based customer staff."

32.2 "CC asks if the 'at risk' group comprises of the different territory managers and customer facing field people across UK…reads out names of other people across the UK who perform the same or similar roles as Pauline, asks directly if those people (who have less tenure than Pauline) are in the at risk group with Pauline…"

33 Hanna Cross' notes different from those above, as follows:

33.1 Barney De Beer presented graphs showing sales figures down by 13% and discussed the loss of business.

33.2 "Barney asked Pauline to give an example of an alternative role she could do within the company, but Barney outlined that there were currently no alternative roles available within the company…it is the performance of the area and has nothing to do with the performance of the role being carried out."

33.3 "Barney said the pot of potential customers and sales have shrunk. Pauline agreed it is a lot more challenging due to internet sales with bigger players in the market."

34 It is notable under cross-examination Hanna Cross referred to the claimant mentioning retirement at the start of the meeting, when she disclosed her age. There is no evidence of this in any of the notes, and the Tribunal concluded, given the similarity of the notes as to how discussion relating to early retirement came about, Hannah Cross' evidence was not credible and it preferred the claimant's evidence that she had not raised the issue of her age or early retirement at the outset of the consultation meeting. It is notable when asked to explain why the claimant's alleged comment had not been recorded Hannah Cross replied she never wrote it because it was not necessary. In the Tribunal's

view Ms Cross' observation underlined the problem with a number of the notes produced, which it found were not an entirely true and accurate minute of what had been said at that meeting. The Tribunal did not find Hanna Cross to be a credible witness in this regard, given her evidence that the claimant had at the outset of the 18 August 2016 meeting mentioned her age and asked if there was a possibility of early retirement. It is inconceivable that such an important matter would have been omitted from the meeting notes, especially given the fact Hannah Cross' role as HR was to take the notes following specialist HR advice being given on redundancy.

35 The Tribunal finds on the balance of probabilities the 18 August 2016 meeting resulted in the following;

35.1 The claimant did not mention at any stage her belief that she should be in a pool with other area sales managers primarily because she knew she was in a stand alone position and did not want to travel down to London on a regular basis. The claimant did not address the possibility of her extending her area of responsibility on a job share basis to the West coast and Wales area, and nor was this explored with her as part of the consultation process, which should have been a two-way process and was not for a number of reasons, not least venue and the lack of information given to the claimant by the respondent as to the possibility, according to the 3 October 2016 note taken by Hannah Cross, of the claimant being offered the option to travel to other areas.

35.2 The claimant chose not to make any proposals on the basis that, according to the claimant evidence on cross-examination, "we were not the ones to tell the respondent." The claimant's stance was less than reasonable given the responsibility on her to put forward suggestions as to how redundancy could be avoided.

35.3 The Tribunal finds it was outside the band of reasonable responses for the respondent to hold a genuine belief the claimant did not want to travel south. There was no discussion on relocation, or an increase in the area of travel. Had there been such a discussion in accordance with Hannah Cross 3 October 2016 note, the claimant would have been told if she was willing to travel the pool for selection would have extended to other members of the sales team and she would have been given the option to apply for the job together with the other sales team personnel. The Tribunal found the respondent's failure to make this clear at the only consultation meeting resulted in a procedure and substantive unfairness that gave rise to an unfair dismissal.

35.4 Given the position the claimant had found herself in, the Tribunal found it surprising she did not suggest other area managers should be included in the same pool; despite her evidence before the Tribunal that had (which was found not to have been the case). The claimant made no reference to her awareness of the consultation relating to Debbie Parnell and Charlie Purdie, she put forward no proposals of a job share and nor did she seek an extension of 6-months with a plan for improving sales. The Tribunal found Debbie Parnell and Charlie Purdie were materially different to the claimant

on comparison as a result of the proactive steps they took to avoid redundancy, and the claimant's failure to taken any steps whatsoever.

36 In an email sent 31 August 2017 at 14.11 Hannah Cross sent Barney de Beer a "copy of Pauline's redundancy letter." She explained "We have to do a second letter before sending out an official redundancy letter. I am following the procedure outlined by our external human recourses provider."

37 There is a dispute between the parties as to whether the letter was sent, and if so, whether the claimant received the letter, which was not posted recorded delivery and could not be tracked. On the balance of probabilities the Tribunal decided the letter had been sent to the claimant at her correct address, and for some unaccountable reason it had not been received by her. This resulted in the claimant informing Barney de Beer of this in a telephone conversation that took place on 5 September 2016 as set out below.

38 The 31 August 2016 letter was marked "Redundancy" and referred to the consultation process commencing 11 August 2016, the 13% year-by-year reduction in sales, loss of clients and loss of the Nutricentre. It referred to "consultation meetings" in the plural on 18 August 2016 (when there had only been one meeting) and confirmed "we have considered ways in which we might avoid or minimise the needed for redundancy. At the meeting you were unable to give any suggestions as you were unable to relocate to other areas of the UK, and as it is your area being affected you felt that there were no suitable options. We feel that we are now at the final stage of this consultation process. There is the option now for you to attend a final meeting to discuss any further suggestions you may have to avoid redundancy." The claimant was informed she had the right to be accompanied as the meeting could result in dismissal. This meeting never took place, and the respondent's omission in this respect resulted in a procedural and substantive unfair dismissal.

39 There is an issue as to whether Barney de Beer telephoned the claimant on 31 August 2016 informing her the 31 August letter would be sent as this is denied by the claimant, who referred to the log of telephone calls in the bundle which reveals no calls were made on this date, although there were calls on 10th August 2016 and 5 September 2016 which are not in dispute. In cross-examination Barney de Beer referred to the possibility that a different phone was used, which may account for it not being on record. There was no evidence of a different account before the Tribunal; it was open to Barney de Beer to have requested a record of the logged call details in order to show, beyond doubt, his recollection was born out by a reality and the Tribunal concluded an adverse inference can be raised by Barney de Beer's failure to adduce evidence confirming the 31 August 2016 call had been made. Accordingly, it found on the balance of probabilities there had been no such call preferring the claimant's evidence on this point.

40 It is undisputed the next contact between the claimant and Barney de Beer was on 5 September 2016 by telephone. The contents of that call are disputed; Barney de Beer maintains he had read out the letter of 31 August 2016 to the claimant when she informed him that she had not received a copy. The claimant disputed this, maintaining the first time she was informed of the contents of that letter was when it was emailed to her by Hannah Cross on 13 October 2016 as confirmed in the contemporaneous documentation. It is notable there is no documentary evidence a copy of the 31 August 2016 letter was sent earlier than 13 October 2016 and the

respondent's omission in this regard resulted in a procedural and substantive unfairness. A reasonable employer would have re-sent a copy of the 31 August 2016 letter by return and arrange a follow-up consultation meeting in writing, which the respondent failed to do. Had the Tribunal preferred Barney de Beer's evidence on this point to that of the claimant (which it did not), it is most unsatisfactory for a key letter to be read out over the telephone; employees in a stressful redundancy situation where their livelihood is at risk, do not always hear what is being said hence the requirement for such matters to be put in writing.

41 Barney de Beer's version of that telephone call was that he went through the letter with the claimant and she assured him she understood its contents, the option for a final meeting and it was for her to indicate within the next 5-days if she wanted that meeting to take place. The claimant's version of the 5 September 2016 call was that she was informed the redundancy was going ahead as planned, she had said that she had not had any information or correspondence since 18 August and nor had she received answers to any questions put at the 18 August meeting, or the minutes of that meeting to which Barney de Beer responded that he "would find the answers from Mr Dainty."

42 In order to establish whose recollection could be relied upon, the Tribunal considered in detail the party to party communications. In cross-examination it was put to the claimant that in none of her post-dismissal letters did she refer to the missing 31 August 2016 letter which she had been told about on the 5 September 2016. The claimant's response was confusing and not credible; she said "I don't know its floating around. I don't know of its existence at all." This was clearly not the case, and the Tribunal is satisfied on the balance of probabilities, the letter had not been read out by Barney de Beer, the claimant did not knew of its contents and she did not informed him during that telephone conversation that she understood the letter.

43 At 12.25 on the 5 September 2016 Barney de Beer forwarded the minutes "as discussed." The Tribunal finds the minutes of the 18 August 2016 meeting were provided to the claimant before a decision was made to make her redundant. The contents of the minutes were not questioned by the claimant. The 31 August 2016 letter was not forwarded in the same email, despite on Barney de Beer's account of event the letter had not been received by the claimant and as a consequence read out to her. There was no satisfactory explanation as to why a copy of the 31 August 2016 letter had not been provided at the time as the minutes, and the Tribunal infers that this was because the letter had not been discussed.

44 The evidence before the Tribunal was that Neil Dainty took part in the redundancy process, in that he authorised the claimant's dismissal, Barney de Beer having made the initial decision to dismiss. The Tribunal observed that Neil Dainty's input at this stage of the process could have made any appeal unfair had the claimant appealed her dismissal, which for the reasons set out below the Tribunal finds that she had not.

The claimant's dismissal by reason of redundancy

45 In an email sent 12 September 2016 a redundancy letter and redundancy calculation were attached. The 12 September 2016 letter referred to "our meeting on 18 August 2016 and 5 September 2015, the latter not being a meeting at all but

telephone conversation. There was no reference to an alleged 31 August 2016 telephone conversation, and the Tribunal infer that the lack of reference was due to no such conversation having taken place.

46 The 12 September 2016 letter headed "confirmation of redundancy" confirmed "due consideration" was given to other opportunities within the respondent, but "as we have discussed, there appear to be no suitable alternative positions available at the present." The claimant was informed she had the right to appeal to Neil Dainty by 16 September 2016, setting out her reasons. The claimant's insistence before the Tribunal that she had appealed and it was her intention to do so, was not credible, and had she objectively addressed her mind to the position she would have realised the letter of 14 September 2016 did not include any information that could be interpreted to be grounds of an appeal, even taking into account of the fact neither the claimant nor Colin Cassidy (who on his own account described himself as well qualified, had worked managerially for two decades, holds numerous post-graduate qualification and who can state with "a high level of certainty and credibility" that he has both the "academic and managerial experience, expertise and knowledge in the procedure and processes surrounding the subject of this Tribunal claim") are legally qualified. The Tribunal is not looking for a council of perfection in the drafting of appeal letters; but there must be some element that points to an appeal, even if that specific word is not used, and the claimant's reasons for raising one.

<u>The alleged appeal letter</u>

47 The claimant sent a letter to Neil Dainty dated 14 September 2016 drafted by Colin Cassidy. Neil Daisy and Barney de Beer did not read the 14 September 2016 letter to be an appeal. There is no reference to any appeal, and on a commonsense interpretation of the letter, it cannot be an appeal. The letter is a request for information "by return." The claimant sought information relating to the number of redundancies, and an "organogram and territory map of the filed sales force." She sought clarification of restrictive covenants and what was to be said to customers who will not have a "rep any more." Finally, the claimant queried her contractual notice period. It is notable the claimant did not criticise in the letter the decision to dismiss her, and conceded this to have been the case under cross-examination. In cross-examination the claimant finally conceded, after a number of repeated questions, that the letter cannot be interpreted as one of an appeal, and so the Tribunal found. There was nothing to stop the claimant from appealing.

48 On the 22 September 2009 the claimant received Barney de Beer's response to her 14 September 2016 letter, which was in short a reiteration of the confidentiality point expressed at the single consultation meeting which had place in August. The claimant was awarded an addition 2-weeks notice.

49 The claimant responded immediately in a letter dated 22 September 2016, 6 days after the time limit for an appeal to be lodged. The first paragraph referred to her not being satisfied with the responses and the methodologies which led to her being selected for redundancy. It referred to the "inappropriate" meeting in a hotel foyer, and how a "true consultation would have been…a plan to operate a field sales team with a lesser number of customer facing Quest employees, or combining territories where remaining employees would have larger geography to cover." Further information was sought, including the number of redundancies made across the sales force, an organogram of the field sales force and UK coverage map.

50 The claimant also complained as follows; "When I asked without prejudice would Quest offer an enhanced package to an employee accepting an offer of voluntary redundancy…Barney inexplicably introduced the subject of my retirement in to the conversation. I found this insensitive as my age…should not have any factor in a redundant process…there was no plan of structure and affected job losses and no chance to reapply for any jobs created in the re-structure. It appears that this is a sham consultation process as, if my role was not included in any risk group, all accounts in area 2 & 4 would not have any field activity…my role is not redundancy, my job is being taken away from me and given to someone else…Barney is on record saying there is no at risk group, that I was not being pooled together with any other employees and now under the questionable veil of confidentiality…you have unfairly selected me for redundancy, or as I see it, unfairly dismissing me…unless you remedy this situation immediately and without prejudice, I will seek redress against Quest for unfair dismissal, failure to consult, breaking my contract of employment and potential discrimination on more than one of the protected characteristics of the Equality Act 2010". In cross-examination the claimant conceded that this was not a letter of appeal, and so the Tribunal found, concluding it was a letter before action.

51 It is notable in all of the party-to–party exchanged after 5 September 2016 at no stage did the claimant refer to the 31 august 2016 letter or request a copy. Given the tenor of the communications the Tribunal found this surprising, and infer from the claimant's silence that the letter had not been read out to her, as recollected by Barney de Beer and the claimant's recollection was accurate that it had not.

52 The claimant worked her notice period, and on the 29 September 2016 a telephone conversation took place with Hannah Cross inviting the claimant to a meeting with her and Stephen Canning, to address the concerns and discrimination alleged in the claimant's 22 September 2016 letter. By this stage of the process Stephen Caning had been made aware of the claimant's redundancy, and the fact that he was tasked with taking over the claimant's area which was to be subsumed into his own region and that of Barney de Beer. The claimant was not replaced and her work as not distributed between the three remaining area sales managers whose areas did not change. The evidence before the Tribunal was Debbie Parnell and Charlie Purdie continued to job share over a 5-day period in the West Country and South Wales, and Minell Zala continued to cover the South East. It is irrelevant to the Tribunal whether the respondent was consulting with other employees other than the area sales managers during the period of the claimant's consultation, as it was open to the respondent on a commercial basis to decide that other sales personnel should not be placed in the same pool as area sales managers, and having addressed their minds to the issue of selection pool on which HR advice was taken, it cannot be said that the decision fell outside the band of reasonable responses.

53 The claimant rejected Hannah Cross' invitation to a meeting as she believed the respondent was "trying to cover [their] tracks as Quest had missed steps in the process" and it was too late as the decision to make her redundant had been made. The claimant was offered the opportunity to have the meeting by telephone, external HR having made the suggestion to Hannah Cross and advised "that we could as the decision to take the redundancy has already been finalised."

54 A telephone conversation took place on 30 September 2016 witnessed by Colin Cassidy. In the note of that meeting provided by Hannah Cross it is clear Hannah

Cross admitted “they hadn’t done things properly from the start…she wished I had stopped the original meeting on the 18th August when I said I was uncomfortable.” Reference was made by the claimant to the telephone conversation of 5 September 2016 and not being given a copy of the 31 August 2016 letter. It is notable despite this being the case the claimant was still not provided with the 31 August 2016 letter until 13 October 2016.

55 A telephone meeting was finally held on 3 October 2016 and a note of that meeting was taken by Hannah Cross in which she referred to the following:

55.1 “Before the first actual consultation with you took place **we gave you round 2 weeks to think about any proposals** [my emphasis]. You never came up with any proposals and **we offered you the option to travel to other areas such as London and other areas within the UK. You replied straight away that you would not be willing to travel to these areas. Because you were unwilling to travel to these areas we could not pool you together with other members of the sales team. If you said yes, and that you would be willing to do this area, then you would have been pooled together with the other sales team and you would have been given the option to apply for that job together with the other sales team** [my emphasis]. Also after the meeting you had the option to think about further proposals and get back to us because you were no longer in an uncomfortable environment, but you did not provide us with any other proposals.”

55.2 On the issue of venue Hannah Cross wrote; “If you were not happy with the venue for the consultation then it was up to you and the representative to stop the meeting. You should have been more forceful and stopped the meeting…the meeting was with you and Barney ad it was not an opportunity for your representative to lead the meeting, he seemed to be far more involved and he should have only been there to take minutes.”

55.3 On the issue of age discrimination, Hannah Cross wrote; “no one in the meeting ever mentioned your age, **it was you who mentioned your age and asked whether you had the option to go for early retirement** [my emphasis]. It was only then when Barney asked your representative whether you were able to go for early retirement.”

55.4 On the issue of being pooled with Stephen Canning Hannah Cross confirmed he had the capacity to manage the claimant’s area and “you could not be pooled with him because he has a different skill set to you as he has managerial skills…**You did not want to take the offer of travelling to London** [my emphasis] so you would not travel to Scotland and Northern Ireland, so this against was not a suitable option for you.”

55.5 On the issue of the 31 August 2016 letter Hannah Cross admitted there had been a misunderstanding and **Barney de Beer had informed her “he had emailed you the second letter and he said that you had no further suggestion in which to avoid redundancy** [my emphasis]. We should have provided you with a date and time for the second meeting and I apologise for this and we should have dealt with this better.” For the avoidance of doubt the Tribunal found there was no evidence of Barney de Beer emailed the 31

August 2016 to the claimant and it found on the balance of probabilities, the 3 October 2016 note of the telephone conversation was an attempt by Hannah Cross to set up a defence in preparation for the claimant's claims before this Tribunal, and give a skewed version of what had actually taken place as a smokescreen behind which the respondent's procedural and substantive unfair treatment of the claimant could be minimised if not eradicated.

56 The claimant was forwarded the 31 August 2016 letter by Hannah Cross via an email sent on 13 October 2016, to which she never responded although a further undated email/letter was sent after 7 October 2016, irrelevant to the issues in this case. The claimant did not dispute at any stage that she had given the respondent the impression at the 18 August 2016 meeting she did not want to relocate to other areas in the UK, and the respondent had got this wrong. In all of the claimant's correspondence to the respondent she does not say that she was willing to travel further than her area or job share. The Tribunal accepts the claimant's evidence, based on contemporaneous documents, that the word "relocation" was not used and nor was it put to her, despite the reference by Hannah Cross after the decision to dismiss the claimant by reason of redundancy, and had relocation been put to the claimant that may well have been the catalyst for a more meaningful consultation about alternatives to avoid redundancy.

57 It is notable at the outset of the liability hearing the claimant argued anybody who was customer facing should have been placed in the selection pool including all sales representatives, territory managers and area sales managers. This was not an argument put forward by her during the consultation process, and nor did she suggest Stephen Canning and/or the remaining area sales managers should be placed in the same pool at risk of redundancy. It is not disputed the area sales managers carried out the same role as the claimant, the only difference being the area in which they worked. Hannah Cross had received advice from HR not to pool together all areas in the UK, and only to pool together Debbie Parnell and Charlie Purdie who both covered the South West and Wales, the external HR consultant having been provided with a breakdown of staff and areas, including the claimant.

58 It is undisputed Debbie Parnell and Charlie Purdie were unsuccessful in turning their area around, faced redundancy and resigned from their employment in April and June 2017 respectively. The evidence of Hannah Cross under cross-examination was that as at 27 June 2016 Debbie Parnell and Charlie Purdie were at risk of redundancy. They have not been replaced.

<u>Relevant Law</u>

<u>Redundancy</u>

59 For the purposes of Section 139 Employment Rights Act 1996 as amended ("the EAR") 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 his employer has ceased or intends (i) to carry on that business in the place where the employee was so employed, or cease—(ii) to carry on the business for the purposes of which the employee was employed by him, 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. In subsection (1) *"cease"* and *"diminish"* mean cease and diminish either permanently or temporarily and for whatever reason.

60 Section 94(1) of the Employment Rights Act 1996 (the "1996 Act") provides that an employee has the right not be unfairly dismissed by his employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is unfair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 of the 1996 Act. That the employee was redundant is a potentially fair reason under section 98(2) and section 139 sets out the definition of redundancy for the purposes of the Act.

61 Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

62 The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that f the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed.

63 In William and others v Compair Maxam Limited [1982] IRLR 83, the Employment Appeal Tribunal (EAT) held that a generally accepted view in industrial relations is that in a redundancy situation a reasonable employer will seek to give as much warning as possible of impending redundancies so as to enable both the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternatives to the solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult the trade union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant and when a selection has been made, the employer will consider with the union whether the selection has been made in accordance with these criteria. The reasonable employer will seek also to see whether instead of dismissing the employee, he can offer him alternative employment. The EAT held that these principals should be departed upon only where some good reason is shown to justify the departure.

64 On behalf of the respondent the Tribunal on the issue of selection pool, was referred to the EAT judgment in Capita Hartshead Ltd v *Byard* [2012] IRLR 814. In this case the claimant was in a pool of one, which meant that she had little realistic chance of making representations as to that choice. The employer defended this on the basis that clients were personal to individual actuaries and her client list had decreased. The Tribunal held there were other actuaries doing similar work, there had been no criticisms of the claimant's ability and the risk of losing clients if their

actuaries had to be rearranged was 'slight'. The employer appealed on the basis that the Tribunal had interfered unacceptably in the pool selection. Having reviewed the case law, Silber J at para 31 gave this summary of the true position: "Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy; "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited *[1982] IRLR 83);*

(a) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others *(*UKEAT/0691/04/TM*);*

(b) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan *EAT/663/94);*

(c) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he *has "*genuinely applied*"* his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

65 The above guidelines in Capita Hartshead were cited and applied in Wrexham Golf Club v Ingham UKEAT/0190/12, a further case on this issue referred to the Tribunal by Mr Flood. The EAT held that the pool is primarily for the employer to determine, with intervention by a Tribunal to be exceptional. Moreover, the link with the range of reasonable responses test was again stressed. HHJ Davidson at paragraph 25 raised the following questions; "was it reasonable for the respond not to consider developing a wider pool of employees? Section 98(4) requires this question to be addressed and answered. On the face of it would seem to be within the range of reasonable responses to focus upon the holder of the role of club steward without also considering the other bar staff…"

Age discrimination

66 Section 4 of the Equality Act 2010 ["The EqA"] lists age as one of the protected characteristics covered by the Act. Section 5(1) of the EqA states that a reference in the 2010 Act to a person who has the protected characteristics of age is "a reference to a person of a particular age group" and a reference to persons who share that characteristic is "a reference to persons of the same age group". An age group is a group of persons defined by reference to age, whether to a particular age or to a range of ages – Section 5(2). Section 13 of the EqA deals with direct discrimination

and 13(1) states (A) discriminates against another (B) if, because of a protected characteristic [age], A treats B less favourably than A treats or would treat others.

67 Section 13(2) provides if the protected characteristic is age, A does not discriminate against B if A can show that A's treatment of B to be a proportionate means of achieving a legitimate aim. This is not an argument relied upon by the respondent in this case.

68 Section 5(1) EqA states that a reference in the Act to a person who has the protected characteristic of age is 'a reference to a person of a particular age group', and a reference to persons who share that characteristic is 'a reference to persons of the same age group'. An 'age group' is a group of persons defined by reference to age, whether to a particular age or to a range of ages — S.5(2). In other words, whenever the Act refers to the protected characteristic of age, it means a person belonging to a particular age group.

69 The definition of 'age group' in S.5(2) EqA allows the claimant to define the disadvantaged age group as he or she wishes, and in the present case the claimant defines it as retirement age. According to the Code of Practice on Employment issued by the Equality and Human Rights Commission (EHRC) ('the EHRC Employment Code'), an age group can also be relative, consisting, for example, of people who are 'older than me' (see para 2.4). The claimant relies on two people who are younger than her as her comparator.

70 Section 136 of the Equality Act provides: "(1) this section applies to any proceedings relating to the 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 provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

71 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case, age], failing which the claim succeeds.

Conclusion – applying the law to the facts

Unfair dismissal

72 With reference to the first issue, namely, was the dismissal for a potentially fair reason, being redundancy, the Tribunal found it was. It is not disputed by the claimant S.139 of the ERA had been met in that the claimant's work had diminished as a result of shop closures and drop in sales as there was no requirement for an area sales manager in the area covered by the claimant.

73 With reference to the second issue, namely, was the dismissal fairly carried out in accordance with S.98(4) of the ERA, the Tribunal found it was not for the reasons already stated. Dealing with the claimant's arguments in particular, it found:

73.1 The 7-days notice of the 18 August 2016 consultation meeting fell within the band of reasonable responses and was fair for the reasons set out above. It is notable at no stage did the claimant indicate she had insufficient time to prepare, and when asked to bring the date forward, she insisted on the meeting taking place as arranged on the 18 August.

73.2 It did not fall within the band of reasonable responses for the 18 August 2016 consultation meeting to have been carried out in a busy public hotel foyer. The claimant indicated at the time she was unhappy with the venue, so much so Hannah Cross did not expect her to return after the adjournment. It would have been reasonable for the respondent to have adjourned the meeting and reconvened in a more suitable venue which provided the claimant with privacy.

73.3 The claimant was given the notes of the 18 August 2016 meeting before a decision had been made to dismiss her by reason of redundancy. She was not however provided with a copy of the letter dated 31 August 2017 until after the decision was made to dismiss. The respondent's failure resulted in a procedural and substantive unfairness.

73.4 The claimant's questions concerning the redundancy process were not responded to in full, and as a result she was not informed by the respondent of the position concerning Debbie Parnell and Charlie Purdie, and according to Hannah Cross' 3 October 2016 note highlighted above, the offer to travel to other areas and be pooled with other members of the sales team. The communications dated 14 to 22 December 2016 are irrelevant, the decision having been made to dismiss the claimant by reason of redundancy had been made and the effective date of termination was 7 October 2016.

73.5 There was no satisfactory evidence that the respondent gave as much warning as possible of the impending redundancy so as to enable the claimant to take early steps to inform herself of the relevant facts and consider possible alternatives to the solutions. The evidence before the Tribunal was that Debbie Parnell and Charlie Purdie were consulted as early as 27 June 2016, the claimant received the redundancy consultation letter on 10 August 2016 after the agreement for Debbie Parnell and Charlie Purdie to job share, despite Hannah Cross' 3 October 2016 note confirming had the claimant agreed to travel she would have been pooled with other members of

the sale team, which by definition would have included Debbie Parnell and Charlie Purdie. The respondent's failure resulted in a procedural and substantive unfairness.

73.6 The claimant was not offered alternative employment despite Hannah Cross' evidence in the 3 October 2016 note that had she agreed to travel, the claimant would have been pooled with her colleagues and given the opportunity to apply "for the job."

73.7 The claimant was given the right to an appeal and she did not take this right up.

74 With reference to issue 10.1.8, the Tribunal found the dismissal did not lie within the range of conduct which a reasonable employer could have adopted; it was procedurally and substantively unfair for the reasons set out above.

75 On behalf of the respondent the Tribunal was referred to the EAT decision in Fulcrum Pharma (Europe) Ltd v Bonassera and anor [2010] WL 4137098 in which it was held that the fact that the claimant had previously carried out a more junior role than the senior employee did not, by itself, determine that both roles should be included in the pool for selection. Mr Flood submitted that this decision can be reversed to the effect that the fact Stephen Canning was a senior employee working in sales and line managed the claimant in her area, did not, by itself; determine he should have been included in the same pool of selection as the claimant. The Tribunal accepted this argument and found the respondent was entitled to take a view that the claimant was in a separate pool to her line manager, who had responsibilities over and above those held by the claimant as set out above.

76 With reference to the selection pool the Tribunal is aware there is a balance to be struck when considering the level of discretion to be given to an employer making economic decisions, bearing in mind the rule that a Tribunal must not substitute its own view for that of the employer. In respect of Stephen Canning, his duties and responsibilities were by far over and above those of the claimant. For example, not only did he line manager her, but he also attended directors meetings, organised and attended trade shows which the claimant attended with him but did not organise, dealt with UK wholesalers and internet accounts, including those in the claimant's area for which the claimant was not responsible. In addition, he dealt with export and oversees customers; promotional planning, price reviews, produce images on internet sites, advising on product range features and benefits, and planning trade shows. Given the considerable differences in seniority and responsibilities, the Tribunal found it fell well within the band of reasonable responses for Stephen Canning not to have been included in the pool. The same cannot be said for Debbie Parnell and Charlie Purdie given the contents of Hannah Cross' 3 October 2016 note, which confirmed the claimant would have been included in the same selection pool as her area sales team colleagues had she agreed to travel. Avoiding substituting its own view for that of the respondent and taking into account Hannah Cross' observations made in her capacity as HR officer, the Tribunal was satisfied the respondent took the view the pool for selection would have consisted of the claimant "pooled together with the other sales team" and she "would have been given the option to apply for that job together with the other sales team" had she agreed to travel. The respondent's failure to properly explore the claimant's intentions concerning travelling to the same area covered by Debbie Parnell and

Charlie Purdie as an alternative to redundancy, resulted in a procedural and substantive unfairness.

77 In arriving at its decision the Tribunal took into account Mr Flood's submissions in relation to the cases cited above, including Capita Hartshead Ltd v Byard particularly in relation to the function of the Tribunal is not to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited, Hendy Banks City Print Limited v Fairbrother and Others and Taymech v Ryan. The Tribunal, scrutinising the evidence, accepted Hannah Cross and Charlie de Beer had *"genuinely applied"* their mind to the issue of who should be in the pool for consideration for redundancy. The problem lay in the fact that there were different versions as to who should have been included in that pool, the claimant in a stand-alone position according to her consultation meeting or in a pool with colleagues had she agreed to travel.

78 In accordance with the test set out in William and others v Compair Maxam Limited, the claimant was not given as much warning as possible of impending redundancies so as to enable her to take early steps to inform herself of the relevant facts, consider possible alternatives to the solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The respondent did not consult as to the best means by which the desired management result could have been achieved fairly and did not seek to see whether instead of dismissing the employee, the claimant could be offered the opportunity to apply for alternative employment along with her colleagues. The EAT held that these principals should be departed upon only where some good reason is shown to justify the departure, and the respondent had, on the balance of probabilities, shown no good reason. It would have been well within the range of reasonable responses for the respondent to have informed the claimant they would have widened the pool to include Debbie Parnell and Charlie Purdie had the claimant been willing to travel to their area.

79 Taking into account the size and administrative resources of the respondent's undertaking, it had acted unreasonably in treating the claimant's redundancy as a sufficient reason for dismissal in accordance with equity and the substantial merits of the case. Applying the objective standards of the reasonable employer – the "band of reasonable responses" test, and not substitute its own view for that f the respondent. The dismissal fell outside the band of reasonable responses open to reasonable employer.

80 With reference to issue 10.3, namely, if the claimant's dismissal was procedurally unfair, would the claimant have been dismissed in any event. In line with Polkey v A E Dayton Services Limited [1987] IRLR 503, the Tribunal found on the balance of probabilities that she would have eventually been fairly dismissed by reason of redundancy. The claimant's case before the Tribunal is that she would have agreed a job share with Debbie Parnell and Charlie Purdie working a full-time 5-day week divided between the three of them. The parties will deal with the extent of a full-time working week at the remedy hearing as no evidence has been adduced as to the number of hours worked by Debbie Parnell and Charlie Purdie over a 5-day week. The Tribunal finds the claimant would have been fairly dismissed by reason of redundancy, having worked a reduced number of hours (to be established) no later than 1 April 2017. On the balance of probabilities, the claimant would have been put

on notice that she was at risk of redundancy it being more likely than not the combined area would not have improved in performance.

Age Discrimination

81 The Tribunal took into account the statutory burden of proof as clarified in Igen and Barton set out above, and the well-known case of Madarassy v Nomura International plc [2007] IRLR 246. The first stage requires the Claimant to prove facts which could establish that the Respondent has committed an act of discrimination, after which, and only if the Claimant has proved such facts, the Respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of age discrimination. In coming to the conclusion as to whether the Claimant had established a prima facie case, the Tribunal has examined all the evidence provided by the parties concluding the claimant, on the balance of probabilities, has established a prima facie case of age discrimination given the fundamental procedural irregularities and unfairness of her dismissal. Once the burden shifted to the respondent it considered the explanations put forward on its behalf, the motivations for the respondent's action in dismissing the claimant and the manner in which the redundancy process took place.

82 With reference to the first issue, namely, did Barney de Beer make the comment "so like your retirement Pauline" at the consultation meeting held on 18 August 2016; the Tribunal found that he did. The Tribunal did not find the claimant first raised the issue of early retirement, she mentioned voluntary redundancy.

83 With reference to the second issue, namely, are Debbie Parnell and Charlie Purdie proper comparators and with no material difference to the claimant, in respect of their responsibilities and job title, the Tribunal found they were not materially different. However, there existed material differences in relation to how they approached the redundancy consultation in comparison to the claimant, and in the area they were responsible for prior to and following its re-organisation. Debbie Parnell and Charlie Purdie shared a region, lived close by to each other and had put forward positive alternatives at the consultation meeting, unlike the claimant who was solely responsible for her area, was concerned about travelling and put no proposals forward at her consultation meeting. It is uncontroversial both were considerably younger than the claimant and were not selected for redundancy, but the Tribunal found there was no causal connection with age. On the balance of probabilities, the Tribunal found employees younger than the claimant, with the same responsibilities as her and working in the same area, which had not put forward positive alternatives to redundancy, would have been treated the same way as the claimant.

84 In short, the claimant has failed to establish there was no less favourable treatment between her and her comparators, accordingly she has not raised a prima facie case in respect of this particular complaint, and the burden of proof has not shifted to the respondent. However, the claimant has raised a prima facie case in respect of the alleged retirement comment made by Mr de Beer for the reasons set out below, and the burden of proof shifted to Mr de Beer.

85 On behalf of the respondent the Tribunal was referred to the House of Lords decision in Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 33C that the question of less favourable treatment than an appropriate comparator

and the question of whether treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without the other being determined at the same ground. There is, essentially a single question, "Did the claimant, on the prescribed ground, receive less favourable treatment than others". It was submitted by Mr Flood, the 2-stage process and comparators could be short-circuited by looking at the reason for the behaviour, and the Tribunal was referred to the judgment of Lord Nicholls at paragraph 5, which it duly considered, accepting Mr Flood's submissions.

86 Mr Flood also submitted on the burden of proof the Tribunal should not mechanically apply the rule when all the evidence demonstrates that discrimination has or, as the case may be, has not taken place. The Court of Appeal in the well known case of Khan and anor v Home Office 2008 EWCA Civ 578, CA, held that the rule 'need not be applied in an overly mechanistic or schematic way'. The Tribunal was referred to Martin v Devonshires Solicitors [2011] ICR 352 in which the EAT held that if, for example, a Tribunal can make positive findings as to an employer's motivation, it need not revert to the burden of proof rules at all. This has since been endorsed by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054, SC.

87 In the alternative, the Tribunal considered the third issue. With reference to the third issue, namely, If Debbie Parnell and Charlie Purdie's circumstances have no material difference to that of the claimant's, did the respondent's consultation process involving Debbie Parnell and Charlie Purdie disadvantage the claimant when both processes are compared, the Tribunal did not accept it had in respect of the notice period for the reasons set out below. The Tribunal found the claimant was given the opportunity to put forward alternatives at and following her consultation meeting. However, there was a significant difference in respect of the venue and the claimant's unhappiness with consultation taking place in a public foyer which disadvantaged her. The disadvantage was further exacerbated by the respondent's failure to convene a second consultation meeting, delay providing the claimant with a lost letter for a period of some 1.5 months after the decision dismissing the claimant on the grounds of redundancy was communicated to her on 12 September 2016 prior to which Hannah Cross confirmed to Barney de Beer a second letter should be sent out before the official redundancy letter in accordance with HR advice. The Tribunal considered the motivation in relation to these procedural deficiencies, concluding on the balance of probabilities that they arose as a result of incompetence and inexperience and not age discrimination.

88 The claimant complains she was treated differently in comparison to Debbie Parnell and Charlie Purdie in respect of the notice they were given of the consultation meeting, two weeks as opposed to the claimant's one week, and she claims she was disadvantaged by this, treated less favourably than her comparators and the less favourable treatment was because of her age. In this regard, the claimant was not treated less favourably than Debbie Parnell and Charlie Purdie; she had sufficient time to prepare and Tribunal has no information before it as to why Debbie Parnell and Charlie Purdie had 2-week notice of their consultation meeting. As indicated above, the claimant agreed to the 18 August 2016 date, she was ready for the meeting and could have asked for more time having refused to meet earlier as proposed by Barney de Beer.

89 The Tribunal finds it was inevitable Debbie Parnell and Charlie Purdie were aware of each others consultation on the basis that they worked in the same area on the same duties and their area "never needed" staff for 5-days per week as opposed to 7 days. Against this background and the fact the claimant did not share her area, the Tribunal found she was not caused any detriment by the fact that she was required to keep her consultation confidential when Debbie Parnell and Charlie Purdie were aware of their respective consultations. This is especially the case bearing in mind the claimant was also aware of their consultation and its outcome during the relevant period, information she did not divulge during her consultation meeting.

90 The claimant also complains she should have been given 6-months to turn her area around, although she did not make this claim in her ET1 or at the relevant time during her consultation period. The respondent's evidence was that Debbie Parnell and Charlie Purdie were given 6-months to turn their area around, which they failed to do and both left their employment by June 2017. In direct contrast to the claimant, Debbie Parnell and Charlie Purdie made commercial proposals to Barney de Beer as to why a 6-month extension should be given; the claimant did not make any proposals and it is difficult to see how she can be prejudiced by her own failure to make proposals. It is notable the claimant took the view proposals should come from the respondent and ignored the fact that there was an obligation on her. If she believed there was a commercial argument to be put forward for a 6-month period to turn around the area she could have put this to Barney de Beer at any stage of the process. The claimant was capable of writing detailed letters, and it would have been a relatively straightforward matter for her to have made the suggestion backed up with facts and figures. She chose not to do so.

91 Mr Cassidy submitted the claimant's sales had dropped but only to the same level as the sales in her area when she first joined the respondent, and she should have been given the same chance. This was not an argument put forward by the claimant during the redundancy process, and the Tribunal struggled to see how this argument would have assisted the claimant given the fact the respondent was looking at her areas financial viability in 2016 and not 2012, with a view to making a commercial decision.

92 With reference to the fourth issue, namely, was the act of dismissal less favourable treatment tin comparison to the way the respondent treated Debbie Parnell and Charlie Purdie, and was the claimant disadvantaged when compared with them, Debbie Parnell and Charlie Purdie were not dismissed unlike the claimant who was. Clearly the claimant was disadvantaged by comparison, but this cannot be attributed to unfavourable treatment of her on the part of the respondent by reason of the claimant's protected characteristic of age for the reasons already stated, the claimant having failed to propose alternatives to redundancy and put forward supportive commercial arguments

93 With reference to the fifth issue, namely, if there was unfavourable treatment in the consultation process, was this because of the claimant's age, had the Tribunal found the claimant had been treated unfavourably, which it did not, it would not have found this was because of the claimant's age. The claimant's dismissal does not amount to less favourable treatment because of age. The Tribunal in arriving at this decision had considered the burden of proof provisions and whether the comment made by Barney de Beer at the 18 August consultation meeting gave rise to adverse

inferences, concluding it did not when taken in context as recorded by the parties in the notes of that meeting. Barney de Beer provided an explanation for this comment untained by age discrimination. His explanation as identified in the evidence above, was found to be a genuine one by the Tribunal who found as part of the fact finding exercise, he was merely seeking clarification as to whether the claimant was referring to early retirement when she made reference to voluntary redundancy. There was no other evidence before the Tribunal that could point to Barney de Beer having a discriminatory mindset when it came to the claimant's redundancy process.

94 The Tribunal considered also whether the fact the respondent had unfairly dismissed the claimant gave rise to a fair inference of discrimination. On the balance of probabilities, it accepted the procedural deficiencies were down to the incompetence of Hannah Cross and inexperience of Barney de Beer. Hannah Cross was not a qualified HR professional; she was an accountant who had stepped into the breach, had little knowledge of HR matters and redundancy. It was evident from Hannah Cross's evidence before the Tribunal she was confused by the process and relied heavily on external advice. She took her advice from a HR professional, on defining the pools for selection. Despite Hannah Cross' ham-fisted attempts at minimising the respondent's exposure in the note she made after termination of the claimant's employment but before the claimant's contract had expired, the Tribunal accepted on the contemporaneous evidence before it, age was not a determining factor in relation to how the claimant was treated during the redundancy consultation period and by the decision to dismiss by reason of redundancy.

95 The Tribunal heard no submissions or evidence from the parties on whether the respondent's treatment of the claimant was a proportionate means of achieving a legitimate aim.

96 In conclusion, the claimant was unfairly dismissed, her claim for unfair dismissal is well-founded and is adjourned to remedy listed for 12 January 2018 at Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX commencing 10.00am. The claimant was not unlawfully discriminated against on the grounds of age, and her claim for unlawful age discrimination is dismissed.

97 As the unfair dismissal complaint has been adjourned to a remedy hearing the parties are ordered to comply with the following case management orders:

97.1 The claimant will send to the respondent a schedule of loss setting out her gross and net losses taking into account the Tribunal's findings on the Polkey principle as set out above, together with documents (including those relating to mitigation of loss) she wishes to rely upon at the remedy hearing) no later than 14 December 2017.

97.2 The respondent will send to the claimant a counter-schedule of loss together with any documents (including those relating to mitigation) it intends to rely on at the remedy hearing, no later than 1 January 2018.

97.3 All the relevant documents to be relied upon by both parties will be placed in to a number remedy bundle and witness statements relating to remedy will be exchanged, if relevant, no later than 8 January 2018.

98 The case is listed for a remedy hearing, estimated length 2 hours, before a full Tribunal on 12 January 2018 at Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX commencing at 10.00am.

99 If any party believes that it is necessary for better management of the case, it may apply to the Tribunal in writing and giving at least seven days' written notice to the other parties for other Case Management Orders or to vary these orders.

____
Employment Judge Shotter

5 December 2017
JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 December 2017

FOR THE TRIBUNAL OFFICE