EMPLOYMENT TRIBUNALS

Claimant: Mr A Cameron

Respondent: LEW Europe GmbH, Branch UK (Company No: FC031079)

HELD AT: Liverpool **ON:** 19 & 20 November 2018

BEFORE: Employment Judge Shotter

MEMBERS Ms F Crane
Mr J Murdie

REPRESENTATION:

Claimant: In person
Respondents: Mr B Williams, Counsel

JUDGMENT having been sent to the parties on 23 November 2018 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:

Preamble

1. By a claim form received 2 May 2018 following ACAS early conciliation between 4 April and 26 April 2018 the claimant, who was employed by the respondent as a sales and applications engineer, claimed unfair dismissal and direct age discrimination. The claimant's comparator was himself in 2009 when he was dismissed by reason of redundancy following a 3-day consultation period, and as a result followed the "correct" redundancy procedure. The claimant alleged when he was dismissed for the second time on 24 January 2018 the respondent followed an unfair procedure; there was no consultation or right of an appeal and this was because he was being dismissed due to his age and the respondent's belief that he was nearing retirement.

2. In its Grounds of Resistance, the respondent denied the claimant had been unfairly dismissed, maintaining he was dismissed due to redundancy and it was not based on age. It accepted the redundancy process was not followed, but this was

with the agreement of the claimant who received 2-weeks additional salary and a payment in lieu of notice thus saving him the cost and time of attending work. The claimant denies this was the case.

3. The issues were discussed with the parties. The claimant did not conceded a genuine redundancy situation existed.

Issues

4. Taking into account the above allegations the issues are as follows:

Unfair dismissal

3.1 What was the reason for dismissal? Was the claimant was dismissed by reason of redundancy, a potentially fair reason within the meaning of Section 98(1) ERA, in that there was a diminution or cessation in the requirement of the respondent for work of the kind carried out by the claimant?

3.2 In using that reason as the reason for dismissal, has the respondent acted fairly in all the circumstances including;

- 3.2.1 Did the respondent consider a pool for selection?
- 3.2.2 Was that considered reasonable and was the respondent's conclusion that the claimant was in a pool of one reasonable?
- 3.2.3 Did the respondent inform and consult with the claimant before making the decision to dismiss?
- 3.2.4 Did the claimant agree to forgo consultation in return for an enhanced redundancy payment?
- 3.2.5 If there was a procedural defect, does it render the dismissal unfair?
- 3.2.6 If so, would consultation have resulted in a different outcome? If so, what are the potential chances of a different outcome in percentage TERMS?
- 3.2.7 How much longer would consultation have taken?
- 3.2.8 Was the claimant paid sums more than his entitlement and if so, were those sums sufficient to exceed the remuneration for the period of consultation?

Age discrimination

3.3 Can the claimant identify a comparator (real or hypothetical) whose circumstances are not materially different from the claimants?

3.4 Was the claimant less favourably treated by being dismissed in comparison to the comparator?

3.5 Was the less favourable treatment because of the claimant's age? (Justification was not an issue raised by the respondent and the Tribunal was not required to consider this).

Evidence

2 The Tribunal heard evidence from the claimant on his own behalf. For the first time at this hearing he raised the issue of being called “Dad” by Kath White, and being called “Grandad “and “Grandpa” by her children when they visited the office. There was no reference to the claimant being described in this way in the ET1 the contents of which stands as the claimant’s witness evidence, and the Tribunal took the view, on balance, the claimant exaggerated the effect of this and the fighting granny Christmas present he received from Kath White, in an effort to strengthen his age discrimination claim. It is undisputed that the claimant did not raise this as an issue with the respondent at any time. The claimant suggested Brian Carter had overheard Kath’s White’s children calling the claimant “Grandad “and “Grandpa.” On the balance of probabilities, the Tribunal accepted that he had not and preferred Brian Carter’s evidence to that of the claimant. However, it did find Brian Carter was aware of the fighting grannies Christmas present and thought nothing of it as it was typical of the banter and type of joking and joke presents exchanged in an office made up of three people who got on well and had worked together for a number of years. The Tribunal concluded, as Kath White was not the decision maker in respect of his redundancy, and had no prior knowledge of it, this evidence did not assist the claimant and the burden of proof did not shift to the respondent to provide an explanation untainted by age discrimination as a result of it.

3 On behalf of the respondent the Tribunal heard from Brian Carter, UK Sales manager and the claimant’s line manager, Yves Declerck, head of sales for Western Europe with LEM Europe the decision maker, and Harmer Graffert, general manager of LEM Europe. The Tribunal accepted the evidence given on behalf of the respondent was credible; it came from a different perspective from the claimant who was unable to understand the Western Europe strategic picture. The claimant’s lack of understanding was partly due to the lack of consultation.

4 The Tribunal was referred to two bundles of documents, one an agreed bundle, the other the claimant’s bundle marked “C1.” The claimant relies on his grounds of complaint as the basis of his witness statement, and confirmed under oath its contents. The Tribunal has also considered the witness statements and oral submissions, which it does not intend to repeat, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts having resolved conflicts in the evidence as there were.

Findings of Fact

5 The respondent is a trading division of LEM Europe GmbH (“LEM”) operating in the UK. LEM Europe is a German registered office divided into Western Europe and Germany with Scandinavia. For the purposes of this litigation the Tribunal is concerned with Western Europe LEM, which includes UK, France, Spain, Portugal, Belgium, Holland, Luxemburg and Italy. In mid-2016 the respondent and Italy fell under the responsibility of Yves Declerck in his capacity as head of sales for Western

Europe. Yves Declerck had been in the business for 22 years, and was keen on succession planning because of the paucity of experienced engineers and the threat on business of East and Far East markets. Yves Declerck's credible evidence was that no future growth was envisaged for Western Europe and based on the financial figures he concluded UK was the worst performer turnover per head, and Sterling had performed poorly against Swiss Francs that further adversely affected the value of business generated in UK.

6 Yves Declerck was looking for synergy and savings across the whole of Western Europe and was mindful of the varying performance in the various offices. For example, Italy had a turnover of 10.4 million Swiss Francs generated by 4 people dealing with those sales and in comparison, UK had a turnover of 4.4 million Swiss Francs with 3 people generating those sales. Cash flow and margins were relevant but turnover was the key. Yves Declerck in oral evidence stated; "we know we talk turnover at LEM" and the Tribunal accepted his evidence as credible, and the claimant's lack of knowledge on high finance matters was indicative of his level within the organisation and the stark difference between him and his line manager, Brian Carter who understood the wider global picture.

7 There were a number of press releases in the bundle produced by the claimant in support of his argument that there was no valid business reason for his redundancy. confirming the respondent was performing well financially. Yves Declerck explained this was largely down to a "surprise performance" on the part of Spain, and had been was factored into his decision-making process when he had a vacancy in Paris office and a French, Spanish and English speaking degree education engineer was appointed in October 2017 in an attempt by Yves Declerck to synergise all of the offices in the Western Europe region and make sure they could cover each other, carry out all of the roles of sales, administration, data entry and internal client support provided by qualified engineers, preferably those who had engineering degrees.

8 The respondent had no redundancy policy.

The claimant's employment

9 The claimant was first employed by the respondent in 2007 as a field sales engineer and he was made redundant due to the respondent's poor financial performance because of the world-wide crash in 2009. The process took 3-days during which consultation took place. The claimant left his line manager, Brian Carter and colleague Kath White, running the UK office.

10 The claimant was recruited by Brian Carter in 19 July 2010 as an internal sales engineer answerable to Brian Carter. He was issued with a written statement of employment that provided him with 8-weeks' notice and a normal retirement age of 65. The document was signed by the claimant on 27 October 2010. He was responsible for sales and service and/or technical support to customers for which he would use a complex data base, and data analysis. The claimant travelled a total of 140 miles to and from home and the office. One day a week "in the field" was expected. There was no issue with the claimant's performance as reflected in the review forms included within the bundle, which the Tribunal does not intend to repeat.

11 Kath White was perceived by Brian Carter, who line managed her and the respondent to be the “backbone” of the UK office, hence its decision to leave the branch situated in Skelmersdale where she lived. Kath White was the person who had close links with clients, and it is undisputed she was responsible for the office and administration, based in the office 5 days a week. She was responsible for data input, and ordering for clients. The claimant had received some training and covered for Kath White whilst she was ill or on holiday. Apart from this, Kath White had completely different responsibilities and job description compared to the claimant. The Tribunal found that an employer, acting reasonably, would not have included her within the redundancy selection pool in 2018.She was not included in the 2009 redundancy selection of the claimant, who was in a stand-alone position. Kathy White supported the claimant and Brian Carter in the field, but she was not technically qualified as an engineer and did not undertake any technical work.

12 Brian Carter was and remains the UK sales manager, and the claimant has no issue with his description as the general manager. Brian Carter was and remains a full-time sales manager working half-day per week in the office, the other spent working from home or with clients. He lined managed the claimant and Kathy White, having first recruited the claimant in 2007. Brian Carter is 55 years of age, the claimant 59 years of age at the time of the dismissal. Brian Carter was and remains a qualified electronics engineer with a degree, unlike the claimant who has no degree, and he is perceived by the respondent as possessing an enhanced set of skills with more experience in comparison to the claimant, who was recognised to be a valued team member who had stepped up to cover during Brian Carter’s illness due to cancer for approximately 12-months. The claimant now argues that he carried out Brian Carter’s entire role during the sickness absence and as a result Brian Carter should have bene placed into the pool for redundancy selection. It is undisputed during the year the claimant provided cover he performed well, however, he was greatly assisted by Brian Carter who was at the end of the phone during this period. As soon as Brian Carter’s health had improved the status quo returned, with each taking on their substantive roles and duties.

13 Brian Carter has 35 years in the electronics industry in comparison to the claimant’s 12-years’ experience in that area. He does not have the power to make strategic decisions, such decisions are left to those in head office including Yves Declerck, who made the decision that it should be the claimant who was to be made redundant. Brian Carter did not make the decision to dismiss the claimant by reason of redundancy, and he was unaware at the time that Yves Declerck had considered closing the UK office and making Brian Carter redundant in addition to the claimant.

14 In an email sent 4 January 2016 Hartmut Graffert wished the claimant a happy birthday. He wrote “good health for the future (reaching 64 is already very good but staying in a good shape is even better. How about retiring???)” Hartmut Graffert was 60 years old at the time, older than the claimant, and he had mistakenly got the claimant’s age wrong. The claimant took the mistake in good cheer and made a joke of it, as the claimant was 59 at the time. Nothing more was said, and the claimant at the liability hearing accepted a mistake had been made about his age. The Tribunal concluded it was not evidence of any discriminatory motive, and Hartmut Graffert played no part in the decision-making process that resulted in the claimant’s

redundancy. Hartmut Graffert was involved in contingency planning, and for this purpose the respondent collected the ages of its employees. The Tribunal found contingency planning did not lie behind the claimant's dismissal, there was no causal nexus between the claimant's age and his redundancy which was exclusively attributable to the financial performance of the UK branch in comparison with other branches, and the decision to cut costs given the effect on the market by countries such as China.

15 On an unknown date in 2016 Yves Declerck asked the same question about retirement of employees based in the UK and Italian branch as he had just taken over UK and Italy and was looking to put in place succession planning. Contrary to the claimant's belief, the Tribunal did not accept discussions about succession planning amounted to age discrimination.

16 Frank Rehfeld, head of the group, together with Yves Declerck reached a view that cost savings were needed in the Western Europe division. Yves Declerck spoke to his managers, and it was decided Brian Cater was necessary for the business, the claimant was not and his role could in part be moved the Paris. Dan Eigle had been appointed to the Paris branch in October 2017, he spoke English, French and Spanish. He held a degree in engineering and could deal with technicalities involved in client queries in different languages, compared to the claimant, who could speak German but that language was not required in the Western Europe division. The ability to speak Spanish was particularly important given the growing Spanish market. The claimant did not have these skills.

17 Based on the contemporaneous evidence before it the Tribunal accepts on the balance of probabilities, that whilst the respondent was performing well financially it did not see its business growing in the Western Europe Division in the future at all due to shifting markets. A chart produced by the respondent reflected the only growing market was in Iberia, with a slight increase in Benelux countries. The total Western Europe trend was downward, and the UK had a 5.5 million turnover per head, in comparison to other countries that almost doubled the turnover.

18 The claimant referred the Tribunal to a list of potential future projects totalling 13 as evidence of the UK's increasing future performance. The claimant was unable to prove, on the balance of probabilities, that any of the future projects had resulted in actual contracts. The Tribunal accepted on the balance of probabilities, Brian Carter's evidence that the possible future projects referred by the claimant had not borne fruit and only three were viable for the future but had not gone into production. The "hit rate" of potential future projects going into production was 20%, supporting the evidence before the Tribunal that winning sales was a complex process, and there was no guarantee at the time of the claimant's redundancy that any of 13 potential projects would become live in the future. At the time of this hearing not one of the projects had been put into production.

19 Brian Carter gave evidence that the UK had experienced income reduction in the financial years leading to 2018, and this was supported by a chart showing these figures placed before the Tribunal. It accepted on balance, the respondent had been adversely affected by the value of sterling and the increasingly competitive market. The respondent was not losing money, however, due to the diminished growth

potential, the effect of world market forces and its performance in comparison to the other countries within the Western Europe Division, the decision was taken to cut costs and the claimant's redundancy was one method by way this was achieved. The claimant today argues costs would have been better cut elsewhere; his package was less than that of Brian Carter and Kath White would have been an obvious cost saving. The claimant was not in a position to make understand or make such commercial decisions; and the Tribunal cannot substitute its views for that of the respondent on how it should better run its business. This is not the role of the Tribunal and it does not have the expertise to do so. It is undisputed the claimant's role was not replaced.

20 The Tribunal found considering the substantial differences between the claimant's role and that of Brian Carter (including his line-management responsibilities of the claimant and Kath White), a reasonable employer acting within the band of reasonable responses would not have included Brian Carter as part of a selection pool and the claimant was in a pool of one as he had bene in 2009. In the alternative, even if a pool of two had been appropriate the Tribunal found on the balance of probabilities, the claimant would still have been selected for redundancy due to the fact that Brian Carter was more valuable for the ongoing business partly as a result of his expertise, long experience and his higher level of understanding of strategy and markets on an international scale. He had worked in Europe on behalf of the respondent in the past, was well known to those at executive level, and possessed an international expertise unlike the claimant who did not.

The redundancy

21 Yves Declerck decided the claimant was to be made redundant one week before the claimant was dismissed, and initially he he was going to fly over and consult with the claimant only to be persuaded by Brian Carter that he should do it, despite Brian Carter not being the decision maker. A limited power of attorney was given to Brian Carter signed 22 January 2018 in order that he could make the claimant redundant. The decision to dismiss had been made beforehand. The redundancy letter dated 24 January 2018 was written after Brian Carter had taken ACAS advice and produced a briefing note for the respondent to pay the claimant an enhanced claimant. Brian Carter took the view that he could obtain a more generous package for the claimant than if Yves Declerck had come across and consulted. His aim was to exit the claimant quickly with as little upset as possible, and for this reason the claimant was given no prior notification of the meeting, the impending redundancy and he was not informed that he was at risk or offered any consultation. However, in compensation for the lack of consultation the agreement reached, absent a compromise agreement or COT3, the claimant was paid enhanced notice pay and an additional two weeks salary to short-circuit the consultation that should have taken place. The evidence before the Tribunal was had the claimant taken part in any consultation it would have made no difference to the final decision to dismiss by reason of redundancy.

22 . At the meeting on the 24 January 2018 the claimant was taken completely by surprise and presented with a fait accompli before he signed the pre-drafted 24 January 2018 dismissal letter confirming its contents had been agreed. The letter included a reference to Brian Carter having "shortened the redundancy period to reduce stress on all those involved in return for an enhanced redundancy payment of

two additional weeks of salary" totalling £1544.92. The claimant signed the letter as agreeing its contents without fully appreciating the position. The Tribunal found it was not surprising he was unable to absorb the information put before him, there had been no hint of any redundancies in the pipeline, he was shocked at being made redundant and on being told to turn around and drive back the 70-mile journey home having lost his job. The claimant received the additional monies, however, the Tribunal accepted on balance that he signed the letter without properly reading it and the reality was that there was nothing he could do to change the situation. He was not advised of his right to be accompanied or to an appeal. He was told Yves Declerck had made the decision to make him redundant, and he did not appreciate there was the possibility of any redress from head office. It is noted by the Tribunal that when the claimant's employment was terminated by reason of redundancy on 26 February 2009 following 3-days consultation, he could continue working during the notice period and the letter of termination did not inform him of his right to an appeal. It is noted the respondent has pleaded a reduction of any award by 25% for the claimant failure to appeal, despite the fact that he was not informed, at any stage, of his right to an appeal and to whom the appeal should have been made. On this basis it was not just and equitable to make such a reduction.

23 The claimant's responsibilities were split between Kath White, Brian Carter, and employees working abroad, including Dan Egile in the Paris office. The claimant's role was never replaced, and his suspicion now that it will be replaced has no evidential foundation. There was no evidence that the work was still in the UK available for the claimant to take up, and the claimant's main issue with his redundancy is his belief that the respondent's profits exceed his "running costs" and it was not good business to make him redundant.

24 The effective date of termination was 24 January 2018. The claimant received a payment in lieu of notice, a bonus payment, holiday pay, statutory redundancy pay and "enhanced redundancy."

Law

25 Section 139(1)(b) of the1996 Act provides that for the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to... (b) the fact that the requirements of that business - (i) for employees to carry out work of a particular kind, 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.

26 There is a three-stage process, namely: "(1) Was the employee dismissed? If so, (2) had the requirements of the employer's business for employees to carry out work of a kind ceased or diminished, or were they expected to cease or diminish? If so, (3) was the dismissal of the employee...caused wholly or mainly by the identified at stage (2)?": see Safeway Stores plc v Burrell [1997] ICR 523; IRLR 200 endorsed by the House of Lords in Murray & anor v Foyle Meats Ltd [1999] ICR 827; IRLR 562 per Lord Irvine of Lairg LC.

27 Redundancy (as defined in Section 139 above) is a prima facie fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996 ("the 1996 Act"). Section 98(4) provides that: -

> "*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 a sufficient reason for dismissing the employee, and*
>
> (b) Shall be determined in accordance with equity and the substantial merits of the case".

28 It is for the employer to show the reason or reasons for the dismissal and that it is a reason falling within Section 98(2) of the 1996 Act and Section 98(4) provides that-

> *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 a sufficient reason for dismissing the employee, and*
>
> *(b) Shall be determined in accordance with equity and the substantial merits of the case".*

29 The question for the Tribunal is that the reasonableness of the decision to dismiss and the circumstances of the case, having regard to equity and the substantial merits, and the Tribunal will not substitute its own view for that of 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 the 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 by reason of redundancy, was reasonable in all the circumstances of the case.

30 The fundamental approach for assessing fairness in the context of redundancy dismissals was established in the Employment Appeal Tribunal well-known case of Williams v. Compare Maxam Ltd [1982] ICR 156. The EAT held d that a reasonable employer would seek to act in accordance with five principals, which are as follows:

> 1. The employer will seek to give as much warning as possible of impending Redundancies so as to enable employees, who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult with the employee as to the best means by which the desired management results can be achieved fairly, in particular, the employer will seek to agree 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 employee whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union and/or employer.

4. The employer will seek to ensure that selection is made fairly in accordance with these criteria and will consider any representations the union/employer may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

31 The EAT stressed that not all of the five factors will be present in every case, but the basic approach expected is that as much "as reasonably possible should be done to mitigate the impact on the workforce and to satisfy them that the selection has been made fairly and not on the basis of a personal whim". In considering these principals, the Tribunal must not put itself into the shoes of the employer and exercise its own judgment as to who should have been made redundant or offered alternative employment and the consideration to be adopted by the Tribunal is set out by the Court of Appeal in British Aerospace v. Green [1995] ICR 106, 109E which is that the Tribunal's function 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.

Age

32 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 an 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.

33 According to the Code of Practice on Employment issued by the Equality and Human Rights Commission an age group can also be relative, consisting, for example, of people who are 'older than me' - para 2.4.

34 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.

35 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.

36 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.
>
> (5) This section does not apply to proceedings for an offence under this Act."

37 The House of Lords 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". This approach was applied to in **Aylott** and the Court of Appeal upheld the Tribunal's decision that the claimant's mental disability was the ground of his dismissal and the respondent's stereotypical view of and reactions to mental illness. In the case of Mr Cameron, he has been unable to establish he received less favourable treatment than others.

Conclusion applying the law to the facts

38 With reference to the first issue, namely, the Tribunal found the claimant was dismissed by reason of redundancy, a potentially fair reason within the meaning of Section 98(1) ERA, in that there was a diminution in the requirement of the

respondent for work of the kind he carried out within the UK branch and for the claimant to carry out his work in the place where he was employed by the respondent. A decision had been made that the UK branch was not performing as well as other branches, and to save costs the claimant's role was absorbed by other employees, including an employee based in Paris. In oral submissions the claimant acknowledged that he had not understood what was meant by redundancy. The Tribunal took the view that whilst the legal definition of redundancy had been mat by the respondent, it still had to act fairly and it had failed to do so.

39 With reference to the second issue, namely, in using that reason as the reason for dismissal, has the respondent acted fairly in all the circumstances, the Tribunal found that it had not due to the lack of consultation, failure to inform the claimant of his right to be accompanied and the right to appeal. The Tribunal found on the facts set out above it the respondent's conclusion that the claimant was in a pool of one was objectively reasonable. Brian Carter had different responsibilities and expertise, he had an engineering degree with international experience when the claimant did not. He worked at a higher level than the claimant and was the claimant's line-manager. He remained in this position in the 12-month absent with cancer, and advised/assisted/mentored the claimant during this period when the claimant covered some of his duties. The claimant's role is not comparable with that of Kath White, and a reasonable employer would have included her in the selection pool. In contrast to the claimant, she was the "backbone" of the respondent, responsible for administrative tasks and wholly office based. The claimant submitted that "no one had to go it was all part of succession planning" and the evidence for this was that Kath White should have been considered because he had been trained in her duties, and therefore the real reason for his dismissal was age. The Tribunal did not agree, having found Kath White carried out a different role and the fact the claimant could provide some cover was insufficient to include her within the selection pool.

40 The respondent did not inform and consult with the claimant before making the decision to dismiss, and in this respect the decision to dismiss was unfair. The fundamental approach set down in Williams v. Compare Maxam Ltd was ignored, and it was not reasonable for consultation not to have taken place and the claimant had not been given any warning of the impending redundancy. The claimant had agreed to forgo consultation in return for an enhanced redundancy payment, however, the process of requesting such an agreement without giving the claimant notice or an opportunity to absorb and/or understand fully the effects of the meeting held on 24 January 2018, amounted to an unfairness in itself. The claimant submitted that he was not given the opportunity to forgo consultation and the Tribunal agreed with this analysis. The dismissal was unfair, however, had consultation taken place over a three-week period, it would not have resulted in a different outcome. The consultation in 2009 took place over a period of three days before the claimant was dismissed by reason of redundancy. In 2018 an enhanced payment made, more than the claimant's contractual and statutory entitlement sums sufficient to exceed the remuneration for the period of consultation.

41 Turning to the alleged age discrimination, with reference to the first issue, namely, can the claimant identify a comparator (real or hypothetical) whose circumstances are not materially different from the claimant, the Tribunal found that he has not. The claimant compares himself hypothetically with himself when he was

made redundant on 26 February 2009, nine years younger than he was in 2018, seven years after he had returned to work for the respondent. Mr Williams submitted the claimant struggled to find a comparator who was not materially different, and the circumstances of the 2009 redundancy were conflated with the one in 2018. An "older apple" compared with the same "younger apple" amounts to materially different circumstances. The Tribunal agreed, given the circumstances in 2009 were completely different to those in 2018. The claimant does not necessarily have to point to an actual person who has been treated more favourably in comparable circumstances, but his hypothetical comparator based on a younger version of himself in 2009 must by the comparison help to shed light on the reason for the treatment. Asking whether a hypothetical someone without the claimant's protected characteristic would have been treated in the same way as the claimant will only help determining whether there was direct discrimination if the situation of the claimant resembles that of the comparator in material respects. S.23(1) stipulates there must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator. In other words, in order for the comparison to be valid, 'like must be compared with like' and the Tribunal reached the conclusion that it was not when the claimant compared the redundancy in 2009 with the one in 2018, preferring Mr Williams' submissions on this matter. In short, there was no evidential basis on which the Tribunal could find, on the balance of probabilities, that the respondent would have treated a true statutory hypothetical comparator who was in the same position as the claimant but younger, more favourably on age grounds. In the well-known case of **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL** (a sex discrimination case), Lord Scott explained 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'. On the facts of Mr Cameron's case the Tribunal concluded that the respondent would have treated a younger sales and applications engineer in the same way as the claimant was treated in that he or she would have been dismissed for purely financial reasons given the factual matrix set out above. The age discrimination complaint was therefore not made out as the comparison relied upon by the claimant did not determine he had suffered unfavourable treatment on the ground of age.

42 In closing submissions Mr Williams correctly reminded the Tribunal that the claimant had accepted when he was dismissed the first time he was the most inexperienced and he was unable to show how he had somehow overtaken his line manager, Brian Carter, who was paid more and was "higher up the food chain" in expertise and qualifications.

43 In submissions the claimant referred the Tribunal to a number of first instant cases by which the Tribunal is not bound and does not intend to deal with. The Tribunal has considerable sympathy for the claimant and the position he had found himself in, through no fault of his own, but there was no evidence adduced by him that could point to any age discrimination. In submissions the claimant referred to Kath White's children calling him "gramp" maintaining this was discriminatory and evidence of age discrimination. The Tribunal did not agree. Kath White or her children were an irrelevance in the redundancy procedure, the only decision maker was Eves Declerk and the Tribunal considered his motivation in some depth,

exploring the financial imperatives on which he gave evidence and the contemporaneous documents to ascertain whether they hid age discriminatory motives, satisfied that there was none. The Tribunal is aware that discrimination is often hidden and sometimes unacknowledged even by the perpetrator, hence the application of the reverse burden of proof. It was satisfied this was not the case here, Eves Declerk's motivation was nothing other than financial, and it is not relevant to the Tribunal's consideration whether the claimant believed the business was being run badly as a result of the decision to make him redundant. Mr Williams correctly submitted that the law does not interfere in how a respondent runs its business, its concern is to consider whether a genuine redundancy situation had arisen or not.

44 In arriving at its decision, the Tribunal considered the burden of proof provisions set out in section 136 of the EqA and found the claimant had not satisfied it that there are primary facts from which inferences of unlawful age discrimination can arise, and the burden of proof has not shifted to the respondent. As indicated above, the burden of proof involves the two-stage process identified in **Igen**, 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. There was no unsatisfactory explanation from the respondent that could raise any adverse inferences in favour of the claimant. If the Tribunal is wrong on this point, and had the claimant proven primary facts from which inferences of unlawful discrimination can be drawn (which he did not) and had the burden shifted to the respondent, the Tribunal would have gone on to find the explanation given was untainted by age. In arriving at this decision, the Tribunal took into account the respondent's procedural failures satisfied that the dismissal of the claimant was caused wholly by the need to reduce costs on a commercial basis given the performance of the UK in comparison with other countries and the fall in the value of sterling. It did not necessarily follow from the fact that the dismissal was found to be unfair within the context of a redundancy dismissal as established in Williams -v- Compair Maxam Limited cited above, the respondent having had not given to the claimant as much warning as possible, it had not consulted with the claimant, he was not advised of his right to an appeal or informed of his right to be accompanied at the 24 January 2018 meeting, was causally connected to age discrimination. On the balance of probabilities there was no causal connection between the claimant's age and his dismissal. It is notable Brian Carter's evidence that he attempted to "spare" Cath White of any distress because of the claimant's redundancy, hence the way the meeting took place with the claimant returning home that day, and yet the claimant was not even provided with his most basic rights to a fair hearing. In order to have carried out a fair hearing and appeal, the Tribunal are of the view it would have taken the respondent between 21 days given the fact that the relevant personnel are based abroad. A fair procedure would not have resulted in a different outcome, and the decision to dismiss the claimant was totally unconnected with is age.

45 After the judgment and reasons were delivered the Tribunal considered remedy in the light of them, having already heard submission of the "no difference rule" set out in Polkey. For the avoidance of doubt, it did not accept the claimant's submission that had consultation taken place over a period of three-days (as it had done in the earlier redundancy) the outcome would have been different. There was no evidence that this would have been the case and the claimant presented no cogent arguments in support of this assertion. One cannot compare a redundancy that took place in

2009 under wholly different circumstances with the decision made in 2018. Mr Williams submitted that as the claimant had received an extra payment for notice, on the just and equitable argument, he had not suffered any loss. It is undisputed the claimant received 12 weeks notice when he was entitled under the contract to 8-weeks. Mr Williams offered no submissions in respect of an ex-gratia payment in the form of an enhanced redundancy.

46 The claimant received a payment in lieu of notice in the sum of £10,107 (3 months), a bonus payment of 12% of salary in the sum of £4851.36, holiday pay in the sum of £466.46, statutory redundancy pay in the sum of £8163.33 and "enhanced redundancy" in the sum of £1544.92.

47 The claimant's entitlement to loss of statutory rights was not a sum included within the additional payments, and there was no suggestion this was in the respondent's consideration when it attempted to reach an agreement with the claimant without entering into a compromise agreement or COT3. The Tribunal took the view that the claimant should receive damages for loss of his statutory rights in the sum of £500 and it was not just and equitable to deduct that sum from the extra 4 weeks' notice ex gratia payment made to him. It is undisputed the redundancy payment subsumes the basic award the claimant would have received for unfair dismissal. On this basis the Tribunal ordered the respondent to pay damages for loss of statutory rights in the sum of £500. The claimant's complaint of direct age discrimination was not well-founded and is dismissed.

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Employment Judge Shotter
7.2.19

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 February 2019

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FOR THE SECRETARY OF THE TRIBUNALS