EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Singh**		
Respondent 1:	**Bradford College**		
Respondent 2:	**Inprint & Design Limited**		
Heard at:	**Leeds**	**On:**	**25, 26 and 27 March 2019**

Before: **Employment Judge Rogerson**
Mrs L Hill
Mr D C Dowse

Representation

Claimant: Ms A Macey, Counsel
Respondents: Mr T Wood, Counsel

RESERVED JUDGMENT

1. The majority judgment of the Employment Tribunal is that the complaint of unfair dismissal succeeds. The dismissal was procedurally unfair, and a remedy hearing will be listed with a time estimate of ½ day to deal with remedy in relation to that complaint.
2. The minority judgment (Employment Judge) is that the complaint of unfair dismissal fails.
3. The unanimous judgment of the Employment Tribunal is that the complaint of direct age discrimination, made pursuant to section 13 of the Equality Act 2010, fails and is dismissed.
4. The complaint of disability discrimination is withdrawn and is dismissed.

REASONS

Issues.

1. The issues to be determined for the remaining complaints of age discrimination and unfair dismissal, had been identified and agreed at a preliminary hearing. The first issue to determine is the reason for dismissal?

2. Was the reason redundancy and a potentially fair reason as the respondent contends, or was it because of the claimant's age, direct discrimination and automatically unfair, as the claimant contends.

3. The claimant alleges that "*the respondent pushed through the consultation despite the claimant's capacity to engage and failed to genuinely consider alternatives to redundancy* ***to avoid his access to the final salary pension*** *scheme"* (see paragraph 26 of the ET1). In his witness statement (paragraph 38) the claimant states: "*I felt there was an ulterior motive for pushing through my dismissal* ***to avoid allowing me access to my pension****. I felt that this was MS's way of getting back at me for questioning his decisions"*.

4. If the reason for dismissal was in fact, redundancy the claimant challenges the fairness of that dismissal by alleging that the respondent:

    (a) failed to warn the claimant at the first opportunity of the likely redundancy;

    (b) failed to engage in a fair and meaningful consultation;

    (c) failed to consider all alternatives to redundancy.

5. If the dismissal was procedurally unfair, would following a fair procedure have made any difference to the outcome? If so what is the effect on remedy? (Polkey-v- AE Dayton Services Ltd 1987 IRLR 503 HL).

Findings of Fact

6. The Tribunal heard evidence for the respondent from Mr M Speight, (Managing Director of the second respondent and the dismissing officer), Mr C Malish (Chief Executive Officer of the first respondent) who communicated the appeal outcome to the claimant, and Ms C Guest (HR business partner of R1). For the claimant we heard evidence from the claimant. We also saw documents from an agreed bundle of documents. From the evidence we saw and heard we made the following findings of fact: Any minority findings of fact are identified separately in these reasons.

7. The claimant was employed by Bradford College (R1) from 11 October 1982 until 6 July 2018. R1 is a Further and Higher Education Training Institute. In 2002, R1 merged its printing department with that of the University of Bradford creating a separate legal corporate entity of R2 'Inprint & Design Limited'.

8. The claimant was seconded from R1 to R2 with effect from 1 February 2003 and he remained a seconded employee until the termination of his employment on 6 July 2018. It was accepted by the respondent, that the claimant was a long serving employee with an exemplary record of service and attendance.

9. R1 and the University of Bradford are the sole shareholders of R2.

10. On 3 March 2014, Mark Speight (MS) was appointed as the Managing Director of R2. He was a seconded employee from the University of Bradford. The claimant had the opportunity to apply for that role but chose not to. The claimant says (paragraph 13) that whilst he was confident he could have taken on the role, he was caring for his mother and did not want the extra pressure at the time. He had agreed when the previous Manging Director retired in September 2013, to 'act up' in that role until March 2014, when Mark Speight was appointed.

11. The claimant accepts that the role of Managing Director and Deputy Director are different roles. The Managing Director has more financial accountability and responsibility for the running of the business on behalf of the shareholders and the board of directors.

Background to Redundancies

12. In August 2017, Mr Speight first appraised the board of his concerns about the financial position of R2. Page 103 is an email from Mr Speight to the board which states: *"I can't let the business carry on as it is on the basis that both shareholder institutions state revenues decline and I do nothing"*. We accepted he had genuine concerns which were based on the accounts we saw that showed the business had gone from profit in 2014, to a loss of £37,000 by the year end of 31 July 2017.

13. There were 3 reasons for the poor financial position of R2. Firstly, shareholder spend had declined. Secondly, R2 had to supply shareholders with its services at 'cost'. Thirdly, the amount of external work had declined because of a 'TECKAL' regulatory exemption which restricted R2's ability to generate income from external sales because it required that 80% of R2's turnover had to be generated from direct sales to its educational institute shareholders (the college and the university). This meant only 20% of its turnover could legally be sourced from external third parties, which is where most profit could be made.

14. In December 2017, the board of directors, were again informed by Mr Speight of the need to address the financial situation of R2 by reducing the fixed costs. This meant salaries, because other fixed costs (rent and leases) had already been reduced. Mr Speight identified the need for redundancies identifying the claimant's role. The board approved that decision. He explained his rationale for this decision was the needs of the business going forward. Originally 21 employees had been seconded to R2, which included a management team of six which was not required or justified for the number of employees in the business. Mr Speight had rationalised the cost base over the following three years but further reductions were necessary. R2 paid the full salary and associated costs for all the seconded employees.

15. From Mr Speight's perspective, the business no longer required the senior management support of a Deputy Managing Director. It was a 'luxury' a business the size of R2, could no longer afford. The claimant role was not the only proposed redundancy identified with 4 other redundancies identified in the factory and in 'front end' client services.

Redundancy Process

16. Although the board approved the decision to make redundancies in December 2017, there was then a delay in the commencement of that redundancy process, until May of 2018. Ms C Guest explained that funding cuts for R1 meant that in March 2018 it was also undergoing a 'restructure and change' programme which included redundancies. It was felt that both redundancy processes should be kept together as far as possible. One obvious advantage of that was that the available resources (including vacancies) could be pooled together.

17. The restructure and change programme at R1 started slightly earlier than the redundancy consultation process at R2, because of the numbers of redundancies contemplated by R1, which triggered the collective consultation obligations. At R2, 3 roles were identified and 5 affected employees. These were one role of Deputy Director, one administrative role, and a factory worker role in the printing team of 3. Only for that pool of 3 was a scoring exercise planned to select one print team member for redundancy.

18. Although only 5 employees were affected and R2 was not obliged to consult for 30 days, Ms Guest wanted to ensure that those affected employees had this longer period to "*ensure that all questions could be considered and all alternatives could be considered"*.

19. It was clear from the evidence that the need for R2 to make redundancies had been identified by Mr Speight as early as August 2017 and was agreed by the board in December of 2017. Had the wider restructure and change programme not been a factor, the redundancy process would have started much earlier than it did, probably as early as January 2018.

Consultation

20. On 1 May 2018, individual consultation and group consultation commenced. The claimant describes how he attended a meeting with Mr Speight and a HR officer. He was informed that the company was going through financial difficulty and had decided to restructure the organisation, and for that reason the claimant's role and other roles were at risk of redundancy. He accepts that he was visibly in shock and took the rest of the afternoon off with the agreement of Mr Speight.

21. The claimant visited his GP the next day, and was given a fit note for two weeks commencing 2 May to 15 May for "*work related stress and carer strain"*. The GP records describe the work-related stress as a reactive episode of stress to the redundancy situation the claimant was facing and

the 'carer strain' was an ongoing issue related to the claimant's caring responsibilities for his mother.

22. By a letter dated 2 May 2018, the respondent (see page 112) wrote to the claimant confirming in writing, the business reasons and organisational changes, behind the redundancy situation. The letter explains the "*very difficult trading conditions and the significant fall in sales revenue from the shareholders, who form the majority of the business revenue (80%) and the need for cost cutting measures*".

23. The letter also identifies the '30' day period of consultation running from 1 May to 30 May and explains the purpose of consultation. It explains clearly: "***the purpose of consultation is to explore ways of avoiding or reducing the number of redundancies. We will also discuss other options such as suitable alternative employment within the organisation and other internal roles. It is also an opportunity for you to make suggestions or proposals as to how redundancies could be avoided or minimised, as well as raising any other concerns or questions. Additionally, consultation is an important way for the organisation to identify your needs, and offer any support or assistance that you may require".***

24. The claimant is invited to a one to one consultation meeting on 8 May 2018. He is informed of his right to be accompanied by a trade union representative or other work colleague. He is also advised of access to support and counselling service provided either from the University of Bradford's counselling services or by making a referral to occupational health. The claimant accepts those services were offered to him but he did not access them because he has family members, including, a brother who is a clinical psychologist and a sister-in-law a GP who were able to provide him with that support.

25. The claimant did not attend the one to one consultation meeting on 8 May because he was not well enough to attend.

26. On 9 May 2018, a second letter was sent to the claimant. The letter explains the purpose of that one to one consultation meeting was to discuss the consultation process to date, and to answer any questions the claimant had. This had to be explained in writing because the claimant was not at work and the respondent wanted to keep him in the 'loop' with information that was provided to other affected employees. The claimant was informed of an option of voluntary redundancy with enhanced redundancy pay on offer until 18 May 2018, to all 'at risk' employees. The letter also reminded the claimant of the counselling services available. It reaffirms the importance of consultation and offers the claimant alternatives to a 'face to face' meeting at work, by having a 'face to face' meeting off site, or consultation in writing or by telephone.

27. The claimant did not respond to that letter or to any of the options offered.

28. The next contact from the respondent to the claimant is by a letter dated 14 May 2018.The letter records the contact Mr Speight has had with the claimant since the letter of 9 May. It provides a copy of the management of sickness and absence policy. It requests that the claimant provides a convenient date for a one to one meeting to be arranged. It acknowledges that this was a difficult time for the claimant and reminded him of the counselling service. It refers to the absence for "work related stress and carer strain" recorded on the claimant's fit note and explains that an occupational health appointment is to be arranged to "*establish if there is anything the college can do to support you*".

29. Ms Guest provides the claimant with all the information sent to occupational health, identifying 9 specific questions and explaining the background to the claimant's absence. She makes it clear she is "*seeking medical advice on the reasons for the employee's absence from work and their **ability to participate** in the consultation process".* The claimant would have known from this letter that occupational health advice was being sought at this early stage, in order that R2 could help the claimant, engage in the consultation process. It was not about getting the claimant back to work.

30. The nine questions asked are all seeking advice about the steps the respondent could take to help the claimant engage in consultation including "*whether the claimant was prevented from speaking to his line manager or another appropriate contact e.g. HR because of his condition*". The claimant would have had the opportunity to tell occupational health about any difficulties he had with either the process or the people involved. He would see this was in order, to better inform the employer of any adjustments they could make to the consultation process for his benefit.

31. Oddly, although the claimant's witness statement refers to each of the letters sent by the respondent, he does not refer to this letter. His explanation for this is that it was an oversight on his part. The minority did not accept that explanation finding that the claimant deliberately chose not to refer to this letter in his evidence, because the contents of that letter do not help the case he advances at this hearing about his failure to respond to that request.

32. On 16 May 2018, occupational health wrote directly to the claimant informing him of an appointment made on 22 May 2018 at 9am. The claimant does refer to this letter in his statement and states that he could not make the 9am appointment because of medication which meant that he was unable to function or to get to an appointment at that time. He says in his witness statement "*I had no problem meeting with occupational health, it was the timing of the appointment that was the difficulty*".

33. The claimant did not attend that appointment which was cancelled at his request. He rang Mr Speight to inform him he couldn't attend and to "*beg for time to get better"*. Mr Speight says that during this phone call the claimant complained that he felt bullied. Although the claimant denies using the word bullied, he accepts he used words to that effect.

34. The majority accepted the claimant's account that he asked Mr Speight for another appointment at his home address so that he did not have to travel (paragraph 32 of his witness statement) and assumed another appointment would be made.

35. By letter dated 23 May 2018, Mr Speight wrote to the claimant. His letter refers to the claimant's perception that he was being bullied and seeks to assure the claimant that was not the intention which was to ensure that contact was maintained during consultation. He offered alternative methods of communication and asked the claimant to express his preferred method of communication. The letter also offers to arrange another occupational health appointment, if the claimant wanted this. It is made clear the reason for the referral was to better understand what support could be provided to the claimant during his absence in the consultation period.

36. The claimant received the letter and understood it to be saying that the respondent could not delay the process indefinitely. He says that *"they did not explain why they could not delay it for a short period for me to get the medication under control*". He says at paragraph 33 of his witness statement "*I thought OH and R2 would help with advising me but I never received another appointment"*.

37. The minority finds that it was reasonable for the second respondent to ask the claimant to inform them if he wanted another occupational health appointment, before arranging that appointment. Understandably the respondent was more cautious about doing this without the claimant's agreement, given his perception of bullying. The claimant did not reply to that letter by informing the second respondent that he wanted another occupational health appointment at a different time/venue because of his medication. He was just asking to be left alone for an indefinite period to get better.

38. The claimant did contact Mr Speight on 25 May 2018, (paragraph 36 of his statement) "*to confirm that he was still too unwell to engage with them at that time"* and wanted time to get better. He does not refer in his evidence to making any request for another occupational health appointment.

39. By a letter dated 30 May 2018, Mr Speight wrote to the claimant, firstly to remind him of the counselling services available. Secondly to advise him that R2 was not in a position, to postpone the consultation period 'indefinitely', and wanted to ensure it had engaged in meaningful consultation with the claimant. Thirdly, to warn the claimant that the consequence of his failure to engage in that process, was that the process would be concluded without his involvement. Fourthly, Mr Speight offered to arrange another occupational health appointment, (if the claimant wanted this) so that the respondent could understand what support could be offered during the absence and consultation period. Fifthly, he offers the claimant five alternative methods to engage in the consultation

process. Either face to face, by telephone, by written correspondence, via a union representative or any other method that the claimant suggested.

40. The letter makes it clear that a response is required by 6 June 2018 (already extending the consultation period from 30 May to 6 June) or the respondent would have no alternative other than to "make a decision about your job in the absence of any communication with yourself".

41. The minority finds the letter was written in clear unambiguous language which would have left the claimant in no doubt of the 3 options the claimant had: another occupational health appointment: engaging in alternative consultation in one of the 5 ways offered: or the process proceeding without his input.

42. The claimant did not reply to that letter but does provide a letter dated 2 June 2018.This is his only written communication with the second respondent in the consultation period. He says he prepared this letter with the assistance of his nephew. In the letter the claimant wants to bring to the attention of the respondent, the 'barrage of communication' since 2 May 2018. That he feels harassed by this conduct, and that his GP has signed him off as medically unfit for work. The letter states; *"If you are unclear as to my current disposition, the following should clearly outline my current state … I have been prescribed Sertraline for depression and anxiety, Zopiclone for sleep disorder and Beclomethasone (steroid inhaler for my asthma which has worsened since this process begun) ……. My goal, in spite of my current health predicament is to get well and move forward amicably. Currently, I am not in a position to do so and your method and frequency of communication is only exacerbating my condition. I would ask, that* ***until I am in a position to return to work, you strongly reconsider your communications and allow me the time to fully recover and return to full health"*****.**

43. As a result, of this letter, Mr Speight sought advice from Ms Guest. Their discussions are referred to in paragraph 26 of Ms Guest's witness statement and paragraph 31 of Mr Speight's statement. He says they considered what to do next and concluded that they had tried to make all reasonable adjustments to the process that they could, but the claimant simply would not engage. He did not attend the occupational health appointment arranged for him. He understood the claimant to be saying "don't contact me until I'm well enough to return to work" with no indication of when that might be. Given the ongoing financial difficulties that R2 was experiencing, the decision was taken to make the claimant redundant.

44. Ms Guest refers to the claimant's letter of 2 June and his feeling that the level of communication had been excessive, which made him feel harassed. She didn't agree that five letters and one phone call were excessive when the respondent was trying to engage with him in a redundancy consultation exercise and was trying to undertake that process in the most supportive way possible. The claimant had still failed to identify when/how he might be well enough to participate in the consultation exercise. She says they decided that the claimant should be

made redundant despite him not having engaged in consultation for a number of reasons:

a. It was essential that financial savings were made given the financial situation.

b. The strategic review had identified the claimant's role of deputy managing director as a luxury given the size and resource of R2 which could no longer be maintained.

c. The claimant had failed to engage in any way whatsoever with the consultation process.

d. The claimant had failed to indicate when he might be fit enough to participate in the consultation process. He had given no time frames and had expected the respondent to leave this process open indefinitely which was not possible.

45. The claimant's employment was terminated by a letter dated 8 June 2018. That letter reviews the process from the beginning of the consultation process on 1 May 2018, the five letters sent, and the claimant's failure to indicate his preferred method of communication during the consultation period. It confirms that a final review of the situation had taken place to consider whether the role of Deputy Director should be made redundant and that following this review it was felt that everything possible had been done to consult without success. As a result, the respondent confirmed its decision that the role was redundant and gave 12 weeks' notice of termination of employment with the last working day being 6 July 2018. The letter provided that if the claimant's illness continued during the notice period he would not be required to work his notice and a final payment would be made in August 2018. It sets out the claimant's statutory redundancy payment entitlement of £13,462 was to be paid in August 2018.

46. During the notice period, the claimant was informed the respondent would continue to support the claimant in identifying any suitable alternative employment opportunities (college and group wide) located on the website with contact details. The claimant was also offered help with interviews and CV writing.

47. It is understandable, in the light of the claimant's communication of 2 June 2018, why Ms Guest would be more cautious in her communications with the claimant and why she signposted the claimant to the services on offer, so that he could access those services independently. Had the claimant indicated a preferred method of communication, that method could have been used and the respondent could have been more proactive in their communications with him.

48. The claimant was also informed of his right to appeal the decision terminating his employment. On 12 June 2018, he sent a grievance letter and an appeal. The grievance was sent to the Interim Group Chief Executive Officer of R1, Mr Chris Jones. The claimant complained that the decision was reached when he was signed off by a GP and prescribed medication for depression, anxiety, sleep deprivation and chronic asthma.

He complains he was therefore "not well enough" to attend the consultation meeting. He alleges age discrimination because he was 12 weeks away from being able to access his final salary pension scheme.

49. In his letter of appeal, the claimant sets out four grounds of appeal: that he was given inadequate warning, he previously provided sick notes from his GP while suffering from ill health, re-deployment was not offered and he felt it was an unfair process: he did not understand the selection criteria and basis on which the decision was reached.

50. An appeal hearing took place on 2 July 2018 with Mr Chris Jones supported by Rachel Murphy(HR). Mr Speight attended to present the management case. The claimant was accompanied by a work colleague. Mr Speight set out the rationale for the redundancies and the history of communications from 1 May to 8 June 2018, when the decision was made.

51. The minority judgment refers to Mr Speight's reference to the 2nd June 2018 letter, when he presented the management case (page 130) at the appeal. He states "*He asked that I reconsider communications to allow time to recover. I consulted with HR and we decided that if we'd received some objective feedback from OH in respect of his condition then we would obviously have allowed more time in the process if OH had felt it would have been beneficial to his recovery, but due to the failure to open up any two-way dialogue, we felt that the process couldn't be suspended at the time. Therefore, on 8th June in consultation with HR I sent the letter informing him of his redundancy and right of appeal"*

52. Mr Speight left after presenting his case and the claimant presented his case. The claimant complained about the number of letters that he received. He was asked why he chose not to attend the occupational appointment that had been arranged for him. His answer, as recorded in the minutes, is that he spoke to his GP who said he needed time. He thought occupational health were on the payroll of R1. He was "*being paranoid and thought they were trying to push him to come back to work to be got rid of"*. He said he felt it was too soon and was on the college's premises. He didn't know who Medigold (occupational health provider) were and that it was outsourced and he was in 'confusion'. He was asked how he wanted to resolve the grievance and he replied that he wanted the respondent to "let him get better".

53. All the fit notes from 1 May onwards record the reason for the absence as 'work related stress and carer strain'. The GP notes we saw also record the claimant informing his GP on 16 May 2018 that his employer wanted to obtain OH advice, and he had booked to see an employment solicitor. His GP on that date "*encouraged the claimant to engage with occy health*". The claimant's GP was not as the claimant implied at his appeal, discouraging him from attending that appointment.

54. On 12 July 2018, the claimant provided a further fit note for two months until 11 September 2018 and the claimant is still as at the date of this hearing, unfit for any work and still taking medication.

55. Unfortunately, Mr Jones was unable to deliver the outcome of the appeal/grievance meeting due to ill-health but he had made his decision to reject the appeal before his absence. His decision was communicated to the claimant at a meeting on 17 July 2018, by another director Mr Chris Malish (Director of Finance). The notes of that meeting are at page 135. Mr Jones found the claimant had been given adequate warning of the redundancy process, that the college had behaved in a reasonable way and had tried to communicate with the claimant who had not engaged in the process. When an occupational health referral had been made the claimant chose not to attend. Mr Jones found that whilst it may have been possible to extend the consultation period with specific information about the support required, it could not have been extended 'indefinitely' until the claimant was better, which was what the claimant had wanted.

56. In relation to the grievance, Mr Jones found that Mark Speight had wanted to commence the process of restructure in December 2017 but there was a delay in progressing the plans due to the wider restructuring programme. He found no grounds for age discrimination. A further right of appeal was offered to the claimant, who decided not to exercise that right.

57. By letter dated 17 July 2018, the appeal outcome was confirmed in writing. The letter states: *"I have concluded that the college correctly followed its policy during the consultation period. The 30 day consultation period was sufficient to enable effective consultation to take place. The consultation process commenced with an individual brief for yourself and then a general staff meeting on 1 May 2018 and you received a letter dated 2 May setting out the fact that you were affected by change. This letter also offered you access to counselling and occupational health services. I recognise that finding yourself in this position after many years loyal service caused you considerable distress and resulted in you seeking help from your GP. However, I believe the college acted reasonably in seeking to establish a channel of communication with you and attempting to arrange a meeting with occupational health for you. I note that you chose not to attend.* ***In the absence of any agreed channel of communication it was impossible for the college to explore with you the reasons why your post had been selected and consider other options, including redeployment. With regard to your ill health, I have considered whether the college could have extended the consultation period for you. With more specific information about the support you required I think it would have been reasonable to extend the consultation by up to two weeks to allow you to fully participate. However, it would not be reasonable to expect the college to extend it indefinitely***.

58. The letter confirmed the findings communicated at the appeal that the decision about the roles selected for redundancy was made by December 2017, and was not age discrimination.

59. On 24 July 2018, after the outcome letter and appeal notes had been sent to the claimant he requested a correction to the notes. His correction was: *"I had not been given any further opportunity or alternative occupational*

health meeting at home or a mutual location, as I was not well enough to attend the original appointment that I had been made to attend …. I have only been off ill for two weeks and the policy states four weeks before I should engage with occupational health. I sent a letter on 2Nd June 2018 to Mark Speight asking for the college to give me some ***time for my health to improve****, I had no reply and received a letter on 8 June dismissing me while being on sick leave under observation with my GP and taking medication for anxiety and depression".*

Applicable Law

60. Section 139 of the Employment Rights Act 1996 provides that "*an employee who is dismissed shall be taken to be dismissed, by reason of redundancy, if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish*".

61. If the respondent shows redundancy was the reason for dismissal the next question is whether the dismissal for that redundancy reason was fair or unfair having regard to the requirements of section 98(4) of the Employment Rights Act 1996. This 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)*
    (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,
    (b) *shall be determined in accordance with equity and the substantial merits of the case.*

62. In the case of Iceland Frozen Foods Ltd-v- Jones1982 IRLR439 EAT the Employment Appeal Tribunal provided some helpful guidance on the application of section 98(4). It reminds the tribunal to start with the words of that section, that in applying the section the tribunal must consider the reasonableness of the employer's conduct, not whether they consider the dismissal to be fair and that the tribunal must not substitute its decision as to what the right course to adopt for that of the employer. The function of the employment tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

63. For the direct age discrimination complaint, sections 136 (Burden of Proof) and 13 of the Equality Act 2010, apply requiring the claimant to establish a 'prima facie' case of discrimination by establishing facts from which a tribunal could conclude, the dismissal was less favourable treatment of the claimant because of his age. An alternative way of putting this is to simply ask the question "Was the reason why the claimant was dismissed because *the decision makers (Mr Speight/Ms Guest) were*

subconsciously/consciously motivated in dismissing the claimant by his age, in order "to avoid his access to the final salary pension scheme".

Conclusions

64. Firstly, dealing with the age discrimination complaint, the unanimous findings of the tribunal are that the first and second respondent have shown there was a genuine redundancy situation within the meaning given by section 139 of the Employment Rights Act 1996, in December 2017, which affecting the claimant's role and 2 other roles in the organisation.

65. The business requirements for those roles had ceased for genuine financial and organisational reasons (see paragraph 22 of our findings). The business had to make cost savings and had decided the claimant's role and 2 other roles were no longer required. In the claimant's case given the size of the business and its requirements going forward, a deputy director was considered a luxury the business no longer required or could afford. Those circumstances put the claimant's continued employment at risk and were the only reason why the claimant was dismissed. The claimant's dismissal had nothing whatsoever to do with the respondent wanting to avoid him accessing his pension in October 2018, when he was 55 years old.

66. Neither Mr Speight or Ms Guest were motivated in any way by claimant's access to the pension scheme, which they could not influence in any way. They were carrying out the instructions given by the board of directors of the second respondent, to make redundancies, as a cost saving measure in December 2017, (10 months prior to the claimants 55th birthday). The redundancy affected other employees, as well as the claimant. It was not made clear to the tribunal in the claimant's evidence in chief, in cross examination or in submissions, how the claimant says these decision makers were 'avoiding' him accessing his pension scheme. He was and has always been able to access his pension scheme, when he reached his 55th birthday. The timing of his and the other redundancies had nothing to do with the claimant's pension but everything to do with making costs savings the respondent had to make. The claimant has not established a prima facie case of discrimination. The complaint of direct age discrimination fails and is dismissed.

67. Based upon our findings that the reason for the claimant's dismissal was redundancy, the respondent has also shown a potentially fair reason for dismissal. The business reasons for the redundancy were clearly explained at the first meeting with the claimant on 1st May 2018, in writing on 2 May 2018 (see paragraph 22) and in the dismissal and appeal letters. Our findings of fact support the business reasons identified and relied upon by the respondent (see paragraphs 12 13 and 15). The business was making a loss, costs savings had to be made and 3 roles were identified by the business as being roles the business no longer required, which included the claimant's role.

68. Having found a potentially fair reason of 'redundancy' was the claimant's dismissal for that redundancy reason fair, having regard to the requirements of section 98(4) of the Employment Rights Act 1996. A fair

procedure with regard to a redundancy dismissal would normally require that the employer "*warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and take such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation"* (Polkey v A E Dayton Services Ltd [1988] IRLR 503 HL).

69. The claimant challenges the fairness by complaining of a failure to warn him at the first opportunity of the likely redundancy, a failure to engage in a fair and meaningful consultation, and a failure to consider all alternatives to redundancy. The unanimous view on the first alleged failure is that it is not made out based on our findings of fact. Although the decision was made in December 2017, the delay in warning of redundancies was explained and was reasonable and fair. Warning was given to affected employees at a reasonable time. The decision to delay the start to pool the resources of R2 with the much bigger redundancy exercise taking place at R1 was done for the benefit of the affected employees at R2. If the process had begun in January 2018 for R2 employees, it would have concluded by the end of February 2018 when the employees would have been dismissed without the benefit of the pooled resources including the option of an enhanced redundancy payment/vacancy information/HR resource available.

Minority Conclusion

70. For the second complaint of unfairness there is a minority and majority conclusion. The minority decision is that there was no failure by the respondent to engage in fair and meaningful consultation and there was no failure to consider alternatives. The claimant was clearly informed of the purpose of consultation at the beginning of the process by a letter dated 2 May 2018. He was informed "***the purpose of consultation is to explore ways of avoiding or reducing the number of redundancies. We will also discuss other options such as suitable alternative employment within the organisation and other internal roles. It is also an opportunity for you to make suggestions or proposals as to how redundancies could be avoided or minimised, as well as raising any other concerns or questions. Additionally, consultation is an important way for the organisation to identify your needs, and offer any support or assistance that you may require".***

71. The claimant was offered an occupational health appointment with a letter explaining that the purpose of that appointment was to "***seek medical advice on the reasons for the employee's absence from work and their ability to participate*** *in the consultation process".* The claimant did not attend due to his ill-health but then never contacted the respondent or occupational health to rearrange that appointment. If as he says now the only problem was the timing/location of the appointment because of the medication he was taking he could easily have communicated that to the respondent and asked for another appointment. He was aware after he cancelled the first appointment, in letters of 23 May 2018 and 30 May 2018 that a further appointment could be arranged if he wanted it.

72. The claimant's GP had encouraged him to cooperate with occupational health, presumably because he understood that it was a supportive measure taken by the employer. Ms Guest, to her credit was very clear and transparent about the information she wanted from occupational health. It was all about how to engage in consultation with the claimant and nothing else. The claimant could have informed the respondent that he wanted another appointment if that was what he really wanted but he did not want that appointment. What he wanted was to be left alone to get better and he wanted to avoid dealing with the redundancy. That is why his letter of 2 June 2018 does not refer to or request another appointment. He complains the communications were excessive and were harassing him. Nothing in either the volume (5 letters) or content of those communications supports that view.

73. The claimant treated the decision to make his role redundant as a 'personal' decision against him rather than a business decision. He reacted badly to it and did not want to engage in any process that might bring his employment to an end. At his appeal hearing, the claimant offers a different reason for not attending occupational health, which is based upon an unfounded 'mistrust' of the respondent/occupational health process. This is because the respondent was open and transparent about the purpose of the referral and had disclosed all the information sent to occupational health. The claimant could have told occupational health of any difficulties he had with the process or people. The respondent would then have had to address those difficulties in the consultation process thereafter.

74. If the claimant did not trust occupational health, he had another option which was to use an alternative method of consultation. He did not do so leaving the respondent with no other option but to continue the redundancy process without his input. The respondent did not rush this process, it took 39 days before making the decision to make the claimant redundant. When an employer's hands are effectively 'tied' by an employee's decision not to engage, the only reason, why meaningful and effective consultation cannot take place, is the employee's failure to engage in the process.

75. One of the purposes of consultation identified in the first letter of 2 May 2018, was to discuss with the claimant alternatives to redundancy. Without the claimant's input, all that the respondent could reasonably do was to signpost the claimant to the available vacancies/support services. In the same way they signposted counselling services it was then up to the claimant whether he accessed those services or not. When the claimant complains about the amount of contact but then does not offer an alternative method of contact, the second respondent was left with no alternative. In those circumstances the minority decision is that the respondent has acted reasonably and fairly and within the band of reasonable responses open to a reasonable employer faced with circumstances where an employee is absent from work and not engaging in consultation. It followed a reasonable and lengthy consultation period of

30 days, extended to 39 days for the claimant and was entitled to proceed without the claimant's input.

Majority Conclusion

76. The majority conclusion is that after the second respondent received the letter from the claimant dated 2 June 2018, it should have made another appointment for the claimant to attend an occupational health appointment. The reason why the respondent should have made a second occupational health appointment, is that in the letter, the claimant has provided details of the medication he was taking, for depression and anxiety and for sleep disorder (mental ill-health issues). Given this new information the respondent should have been alerted to the possibility the claimant was unfit to engage in the consultation process due to mental health problems. The claimant gave evidence that he had informed Mark Speight and at the appeal hearing that he would have attended a further occupational health assessment. Mark Speight had accepted at the appeal that he would have extended the consultation period had this been necessary following the occupational health appointment (see paragraph 51).

77. Given the nature of the absence, the respondent should have sought advice about the effects of the medication on the claimant's ability to attend and participate in the consultation process. Simple adjustments would then have been identified by occupational health which the respondent could have implemented in the consultation process. The claimant had already indicated prior to the first occupational health appointment on 19 May 2018, in a telephone call to Mr Speight that the reason he could not attend was because of the timing of the occupational health appointment which was at 9am. His preference was for a later appointment/different venue because of his medication. He had therefore indicated a willingness and a wish to have occupational health input. He assumed that the respondent would then make another appointment to meet his request of a later time or at home and the respondent should have given the claimant one further opportunity to have an occupational health appointment.

78. If the respondent had made that referral to occupational health, the claimant would have attended that appointment and a report would have been received within two weeks of 2 June 2018, which means that that information would have been provided to the respondent by 15 June 2018. On 16 June 2018 the respondent would have then started a consultation period of 30 days to 16 July 2018. The most likely outcome of this consultation would be that the claimant would have been made redundant because the business no longer required a Deputy Director.

79. In terms of suitable alternative employment, the claimant was at the time and up to this hearing incapable of work due to ill-heath. The minority felt that mental health issues raised were not properly considered and the respondent should have focussed on the individual not the process. His long service and exemplary attendance should have been given more

consideration. Although his employment would have been extended to a later date, the outcome would have been the same if that procedure failing had been rectified. The majority agreed with the minority conclusion that alternative employment opportunities had reasonably been signposted by the respondent but the claimant's ill-health has/is preventing him from working. The claimant would still have been given notice of termination on 16 July 2018 which would have taken the termination date to the 14 October 2018.

80. For those reasons the minority found that the claimant was unfairly dismissed procedurally because of the respondent's failure to make a further occupational health referral, before concluding the consultation process. The consequence of that decision is that the claimant's employment would have been extended to 14 October 2018. Any effect of that decision in relation to compensation will be dealt with at a remedy hearing which is to be fixed for ½ day, if the parties do not resolve the issue by agreement before that date.

Employment Judge Rogerson

Date 17 May 2019