EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Game	**v**	Compass Group UK & Ireland Limited

Heard at: Bury St Edmunds (by CVP)

On: 4, 5 and 6 August 2020
7 August 2020 (In Chambers – no parties in attendance)

Before: Employment Judge M Warren

Members: Ms F Betts and Ms W Smith

Appearances
For the Claimant: In person.
For the Respondent: Mr L Varnam, Counsel.

RESERVED JUDGMENT

The claimant's claims for unfair dismissal and that he was discriminated against by reason of age and/or disability each fail and are dismissed.

REASONS

Background

1. Mr Game was employed by the respondent as a security guard from 2 April 2002 until 27 July 2018. After early conciliation between 21 August and 5 September 2018, he issued these proceedings on 5 September 2018, bringing claims of unfair dismissal, age discrimination, disability discrimination and a claim for a redundancy payment. The claim for a redundancy payment was subsequently dismissed upon withdrawal.

2. The statement of case at 8.2 of the ET1 is very brief. After the claims were resisted in the respondent's ET3, Mr Game submitted a further undated document responding in writing to the grounds of resistance.

3. At a preliminary hearing in Huntingdon on 13 September 2019, Employment Judge Ord discussed with Mr Game the details of his claim in order to try and establish the issues. At paragraphs (3) to (9) of Employment Judge Ord's hearing summary, he set out a narrative of Mr Game's claims.

4. Employment Judge Ord made Case Management Orders and listed the matter for hearing in Cambridge on 3-6 August 2020.

5. Because of the impact of the Coronavirus crisis on Judicial resources, it was not possible for the hearing to proceed with the parties attending in person. I conducted a telephone preliminary hearing on 3 August 2020 in order to assess whether this was a case that was capable of being heard by Cloud Video Platform (CVP). I have prepared and provided a separate summary of that hearing, but in short, with the agreement of the claimant and the respondent, the matter proceeded by way of a CVP hearing commencing on 4 August 2020.

The Issues

6. For the sake of completeness, I set out below by way of cutting and pasting, paragraphs (3) to (9) of Employment Judge Ord's preliminary hearing summary referred to above:-

> *(3) The claim of unfair dismissal has not been specifically identified in the claim form, but it was clear from the contents of it that the claimant complained about the fact and manner of his dismissal. On behalf of the respondent Mr Varnam indicated an objection to the adding of the claim for unfair dismissal, but I was satisfied that this was no more than a "badging" exercise, that the facts upon which the claimant relies in bringing his claims for discrimination based on age and disability are the same facts as he would rely upon in a claim for unfair dismissal and that, importantly, the respondent had already effectively pleaded to the claim for unfair dismissal in its response.*
>
> *(4) The respondent says that the claimant was fairly dismissed on the ground of redundancy, alternatively for some other substantial reason being business re-organisation and denies any discrimination either as alleged or at all.*
>
> *(5) In respect of his complaint that he was the victim of discrimination on the protected characteristic of his age, the claimant says that he was born on 7 January 1951 and thus at the date of dismissal was 67 years of age. He identifies the age group of which he is a member as being over 60.*
>
> *(6) The claimant says that the respondent has a provision, criterion or practice of identifying and dismissing as redundant employees over*

the age of 60. He says that this had happened to other security officers at other sites operated by the respondent.

(7) The claimant also says that he was not offered a part time receptionist role. He says that during the course of his employment between 1pm and 7pm each day he would work as a receptionist as was identified in his assignment instructions. When he was told that he was redundant he was asked if he wanted to do the afternoon reception role and said that he was doing it any event. He was not offered the morning reception position. He says that another person (previously a cleaner) was put into the position he had previously occupied as afternoon receptionist and that that person was subsequently trained as a security officer. That person was younger than the claimant.

(8) In relation to his complaint that he was the victim of discrimination based on the protected characteristic of disability, the claimant relies on the following matters:-

(i) First, he says that on 4 September 2017 Janet Gibbs commented on the claimant's lack of mobility and his not carrying out patrols on foot. The claimant says that he patrolled the site by car as he was permitted to do in his assignment instructions and would then check specific buildings on foot.

(ii) He said that a meeting on 4 September 2017 had been arranged by Janet Gibbs "to help with his disability" and that with Ms Gibbs he filled in a form for referral to occupational health. The claimant says that 2 days later he was told that the respondent no longer had an occupational health provider and asked for access to his General Practitioner records, to which he agreed.

(iii) The claimant says that the respondent alleges that they wrote to the claimant's consultant, Dr Chapman and to his GP but that no such correspondence was ever received by either the consultant or the GP surgery.

(iv) The claimant says that Ms Gibbs, when told this, said that the GP surgery "would say that, I'm the wife of a GP".

(v) The claimant says that subsequently in November 2017 he was advised, along with others, that the respondent had obtained the services of a new occupational health provider but that "if you want to stay with the old one, let us know" indicating that the previous occupational health advisor had been in place throughout.

(vi) The claimant says that Ms Gibbs referred at the redundancy meeting which was held with the claimant that he had just had a Birthday so that he would get a "higher rate of redundancy" which was untrue and he was subsequently told by Ms Gibbs that she had "got it wrong".

(vii) The claimant says that he was dismissed on the stated ground of redundancy which was a sham. There was no redundancy situation and it was used as a cloak to disguise the true reason for dismissal which was either his age or his disability.

(9) The claimant had previously brought a claim for a redundancy payment which was dismissed on withdrawal, a redundancy payment having been made.

7. Mr Game was ordered to write to the Tribunal within 14 days of the preliminary summary being sent to the parties, to set out in writing any objections he may have had to the way that the issues had been identified. No such communication was received.

8. In his witness statement at paragraph 47, Mr Game had made a use of the expression, "reasonable adjustments". Upon further discussion with him, I established that he did not use the expression in the sense that he was not asserting that in the way that he did his work, there was not in place a provision, criterion or practice applied to him which placed him at a disadvantage. He was not suggesting that there was a reasonable adjustment that could and should have been put in place to remove a disadvantage he was experiencing in the workplace.

9. We identified that Mr Game's complaints were that he had been dismissed because of his age and/or his disability, as acts of direct discrimination.

10. The issues for the tribunal were therefore as follows:

Discrimination

10.1 Was Mr Game treated in the way that he complains and to the extent that we find he was, did that amount to less favourable treatment by the respondent than it treated a named comparator or would have treated a hypothetical comparator?

10.2 If so, was the reason for such less favourable treatment, either Mr Game's disability or the fact that he was aged over 60?

Unfair dismissal

10.3 What was the reason or principle reason for Mr Game's dismissal? Was it the potentially fair reason of redundancy?

10.4 If so, does the decision to dismiss satisfy the test of fairness set out at section 98(4) of the Employment Rights Act 1996? In particular, was the decision to dismiss within the range of reasonable decisions that a reasonable employer might make in the circumstances of the case?

Evidence

11. We had before us a witness statement from Mr Game. He did not call any other witnesses.

12. For the respondent, we had witness statements from:

12.1 Ms Janet Gibbs, National Operations Manager;

12.2 Ms Arianne Harris, National Security Operations Manager;

12.3 Mr Chris Minter, Operational Director; and

12.4 Ms Janet Wigley, Business Director.

13. We had a bundle of documents provided in pdf format and broken down into four parts. The pagination ran to page 459.

14. We also had a chronology and a cast list provided by the respondent.

15. The Tribunal were able to read the witness statements before the hearing began. We also had the bundle in advance and so were able to read or look at in our discretion, the documents referred to in the witness statements.

16. I emphasised to the parties and in particular to Mr Game, that the Tribunal does not read the entire bundle, we only look at the documents that we are referred to and that if there are particularly important passages in the documents, both parties must ensure that they take us to them during the course of cross examination and the giving of evidence.

17. No new documents were added during the course of the hearing.

18. For closing submissions, Mr Varnam provided written submissions by way of a skeleton argument, which was provided to Mr Game the night before. I explained to Mr Game that he could send in written submissions in advance if he wished to do so. He chose not to. That is not a criticism, I made it clear to him this was purely a matter of choice.

The Law

Discrimination

19. The relevant law in relations to the claims of discrimination is set out in the Equality Act 2010.

20. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee.

21. Age and Disability are two of a number of protected characteristics identified at s.4.

22. Mr Game says that he was directly discriminated against because of his age and his disability. Direct discrimination is defined at s.13(1):

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

23. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

24. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

25. The protected characteristic does not have to be the only, nor even the main reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial*

reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

26. Section 136 deals with the burden of proof:

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

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

27. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

28. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

Unfair dismissal

29. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA). Section 98 (1) and (2) of that Act set out 5 potentially fair reasons for dismissal, one of which is redundancy.

30. Redundancy is defined in section 139(1) of the ERA as follows:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

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

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

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

31. No business or place of work is closing in this case, so the provisions of subsection (1) (b) are what concern us here.

32. Judge Peter Clark in Safeway Stores Plc v Burrell [1997] ICR 523 identified a simple three stage test, (at paragraph 24) as follows:

"(1) Was the employee dismissed? If so,

(2) Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,

(3) Was the dismissal of the employee (the applicant before the industrial tribunal) caused wholly or mainly by the state of affairs identified at stage 2 above?"

33. This simple approach, (doing away with arguments previously canvassed in the appeal courts about whether we should look at the job the employee did or the provisions of the employees contract) was endorsed by the House of Lords in Murray v Foyle Meats Ltd [1999] IRLR 562 where Lord Irvine of Lairg L.C. said at paragraph 5:

"My Lords, the language of para. (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation."

34. Later at paragraph 9 he elaborated:

"The key word in the statute is 'attributable' and there is no reason in law why the dismissal of an employee should not be attributable to a diminution in the employer's need for employees irrespective of the terms of his contract or the function which he performed. Of course the dismissal of an employee who could perfectly well have been redeployed or who was doing work unaffected by the fall in demand may require some explanation to establish the necessary causal connection. But this is a question of fact, not law."

35. If an employer is able to satisfy the Tribunal that the reason that the employee was dismissed was one of those potentially fair reasons, the Tribunal must go on to apply the test of fairness set out at section 98(4):

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

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

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

36. The seminal case to assist us in deciding whether the decision to dismiss by reason of redundancy satisfies the test of fairness set out at section 98(4) is Williams & others v Compare Maxim ltd 1982 ICR 156 EAT, which clarified that the Tribunal should ask itself whether, *" the dismissal lay within the range of conduct which a reasonable employer could have adopted".* In that case, factors were identified which might help us in answering that question:

- Whether the selection criteria were objectively chosen and fairly applied
- Whether employees were warned and consulted about the redundancy
- Whether, if there was a union, the unions view was sought
- Whether any alternative work was sought

37. Commenting on redundancy and procedure in the House of Lords in the case of Polkey v A E Dayton Services 1988 ICR 142 Lord Bridge said:

"the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation"

38. Glidewell LJ in R v British Coal Corpn ex parte Price 1994 IRLR 72 para 24 said of "consultation" that it:

"…*involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".*

In summary, he said that fair consultation means:

- When the proposals are still formulative
- Providing adequate information
- Giving adequate time to respond

- Giving conscientious consideration to the response

Of course, every case must turn on its individual facts.

39. We remind ourselves that it is not for us to impose our own views. We also remind ourselves that we must look at the circumstances of the case in the round. Failure to act in accordance with one or more of the principles in Compair Maxam does not necessarily involve the conclusion that the dismissal was unfair. Whether in the circumstances of any particular case an employer has acted reasonably in taking or not taking any step or failing to follow any procedure renders a dismissal unfair is a matter for the Tribunal to decide in the light of all the circumstances of the case in reaching the conclusion as to whether or not the dismissal was reasonable within the meaning of s 98(4). (See Grundy (Teddington) Ltd v Summer & Salt (1983) IRLR 98 EAT).

Facts

40. The respondent provides catering and facilities management services. It is a very large organisation, with 60,000 employees.

41. Mr Game's employment with the respondent as a security guard began on 27 April 2002. It appears that he was never provided with any terms and conditions of employment.

42. Mr Game's date of birth is 7 January 1951. His employment terminated on 27 July 2018, at which time he was aged 67.

43. From May 2012, Mr Game worked at a site in Hitchin originally owned by the National Grid. The site transferred to Cadent Gas on April 2017.

44. The Hitchin site consists of a Gas Holder, an Operational Gas Distribution Depot, a Pipeline Maintenance Centre, a stores workshop, offices, a Training and Development Building and some hazardous derelict land. It has a perimeter fence and is accessed via a single controlled gate.

45. In addition to Mr Game, employees of the respondent working on this site included five cleaners and two part-time receptionists.

46. Mr Game worked Monday to Friday, 7am to 7pm. His duties in practice were to unlock the buildings on the site, check the buildings and their fire doors, open up the training centre and then operate a barrier to the site, letting people in and out. He would issue keys to people using the buildings and would hand out video equipment for the training centre. He would take back the keys and video equipment at the end of use. He would monitor CCTV. He would occasionally drive his car around the perimeter fence by way of a patrol. He would also cover reception if the receptionists either went to the toilet, was on leave or otherwise taken away from his or her duties.

47. The role of receptionist was to meet and greet visitors to the site, to show those attending training to their training room, to manage the cleaners and cleaning stock and manage the use of the site facilities.

48. The cleaners of course, cleaned.

49. Mr Game has Chronic Obstructive Pulmonary Disease (COPD), bronchiectasis and bi-lateral pulmonary emboli. He has a limited ability to walk, having to rest every 5 metres or so and has to use a supply of oxygen. The respondent accepts that he is and was at the material time, a disabled person as defined in the Equality Act 2010.

50. Upon Cadent taking over National Grid's gas business in April 2017, it began a review of all of its sites, including Hitchin. This was with a view to making cost savings. Ms Harris, (Security Operations Manager) was asked to assist with this.

51. Monthly review meetings took place between senior management of the respondent and of Cadent, during which across all 69 of Cadent's sites, proposals for savings were reviewed.

52. A Mr Simon Sykes, (Portfolio Contract Manager of Cadent) formulated some proposals dated 5 June 2017, (page 125). Those proposals included, (page 133) a review of individual guarding resource allocation across its sites.

53. In April 2017, Ms Gibbs took over as National Operations Manager for the Cadent contract and she became responsible for its 69 sites, including Hitchin.

54. On 17 April 2017, having become aware of Mr Game's health issues, Ms Gibbs requested from Human Resources a copy of any Occupational Health assessment, (page 116). She was subsequently told on 2 May 2017 that there were no such assessments, (page 152).

55. In her witness statement, Ms Gibbs sets out that she had in or about May 2017 met with Mr Game, completed an Occupational Health referral and obtained permission to write to his consultant seeking a medical report. She referred to a letter to Mr Game's consultant dated 13 May 2017, which is in the bundle at page 116A. In cross examination, it was put to her that this cannot be correct, because Mr Game's consent to the release of information by his doctor and his consultant was not given until September 2017. There is no Occupational Health referral dated May 2017, nor is there any signed consent by Mr Game of that date. Ms Gibbs' attempted answer was to suggest that the document at page 116A was an earlier dated draft of the letter sent later in September. That may or may not be so, the fact of the matter is that her account in her witness statement seems to be false. We are reinforced in that conclusion when we consider the email dated 13 August 2017 in which Ms Gibbs arranged to meet with Mr Game; if it had been the case that an

Occupational Health referral had already been made, a request for medical reports submitted and the doctor or consultant had not replied, Ms Gibbs would have referred to these matters in this email, yet she does not.

56. Ms Gibbs floundered when asked to explain these inaccuracies in her witness statement. At best it illustrates a lack of care in the preparation of her witness statement and a lack of serious consideration to the implications of confirming on oath that the content of her witness statement were true. A consequence of this is that we had to treat Ms Gibbs' evidence with circumspection.

57. The meeting between Ms Gibbs and Mr Game referred to in the email of 13 August 2017, took place on 4 September 2017. Mr Game says that Ms Gibbs commented on his lack of mobility and noted that he was not patrolling on foot. They completed an Occupational Health referral together, (page 158). The answer to question 3 posed to the advisor in the referral reads as follows:

> "A job description of a security officer's role is enclosed. Peter started 27 April 2002 and later contracted this disease. There are aspects of his role that he is unable to complete such as patrols, building lock ups etc. Pete currently closes the site for example by driving through the site – but he does not check doors etc. He says that we still goes out shopping [sic] at weekends and does not need oxygen with him all the time – we need some clarity on his capability and what he can/can't do as there seems to be some confusion."

58. Ms Gibbs sent the referral to Human Resources for sending onto the Occupational Health advisors. Human Resources replied to say that there might be a problem and a delay in obtaining the Occupational Health report. They advise Ms Gibbs to seek permission from Mr Game to contact his GP and consultant, (see page 150).

59. On 5 September 2017, Mr Game provided Ms Gibbs with contact details for his doctor and consultant, (page 162). The following day, a form for written consent was forwarded to Mr Game, which he signed and returned on 7 September 2017, (page 167).

60. On 8 September 2017, Ms Gibbs wrote to Mr Game's consultant seeking information on his medical condition and in particular she asked:

> "If, in your opinion, there are any adjustments that could be made to the job role, please include these in your report."

61. She had provided a job description and described his role as that of a security officer on a large busy site.

62. This letter was written to Mr Game's consultant, not his GP. We were not referred to a copy letter written to his GP. It is clear Mr Game thought that they had written to his GP.

63. Having heard nothing further, in November 2017 Mr Game asked Ms Gibbs whether a reply had been received from his GP. She said that no such reply had been received. Mr Game therefore contacted his surgery, who said that no communication had been received from the respondent. Mr Game passed that on to Ms Gibbs, who replied words to the effect, "that's what they would say, I know, I am the wife of a GP". Ms Gibbs denies making this remark. She acknowledges that she is the wife of a GP and that she may have made observations about the speed with which a GP practice is able to respond to such a request. We find that she probably did make a remark to Mr Game along the lines that he quotes.

64. In the meantime, the review by Cadent and the respondent continued and a restructure proposal was produced in December 2017, (page 172). The rationale, (page 175) was to review the current security team structure and identify cost saving opportunities. Those opportunities were to be risk rated and any cost saving was to have no impact on the security level offered to a site. Any redundancy costs would be paid by Cadent.

65. The proposal, (page 176) was the removal of the security guard at a saving of £38,124 per annum, (ignoring the redundancy cost). It was proposed that the security guard's duties would be covered by the existing posts on site. Opening up in the morning would be carried out by the daytime receptionists, backed up by the 7am cleaner who would be trained and licenced to open up and lock up. In this context, reference is made to somebody called Kaysha Brown, about whom we will hear more shortly. Day time patrols and perimeter checks were to be carried out by the daytime receptionists. The issue of ID cards and fobs was to be carried out by the daytime receptionists. The building lock-up was to be carried out by the cleaning supervisor, backed up by the cleaners. Contractor compliance checks were to be carried out by both receptionists, who would also attend health and safety meetings in site.

66. Ms Gibbs met with Mr Game on 7 December 2017 to explain to him the proposed re-organisation, which would mean that his position was redundant. Handwritten notes of this conversation are at pages 178 and 179. Ms Gibbs explained to Mr Game that the site may need a part-time receptionist. She explained that the respondent would help Mr Game prepare a CV. He indicated that in his job search, he would not want a drop in salary. He indicated that he wished to stay in security. It was explained to him that there would be a more formal meeting at which he would have representation. The handwritten notes also record Ms Gibbs saying, "No decision is made, they are investigating but formal consultation won't happen until January". Mr Game took the opportunity to ask whether anything had been heard from his doctors, to which Ms Gibbs is recorded as responding:

> "We still waiting for a response but this was nothing to do with your health. Clients feel they don't need full time security. But will be talking with clients later and we will meet again in January."

67. Mr Game has signed both pages of these handwritten notes and at the foot of the second page is the following certificate:

> "I certify that I have discussed all contents of the form and the employee agrees with what is written."

68. That is not quite the same as the certificate reading that the employee agrees that the note is accurate but nevertheless, on the balance of probability the handwritten note was written at the time, could not have been amended afterwards and Mr Game at the time would have regarded it as an accurate note. Therefore, in respect of Mr Game's allegation that Ms Gibbs had said is unlikely and more likely and we so find, is that Ms Gibbs said nothing had been decided yet and that they would be discussing matters with the client further.

69. By letter dated 21 December 2017, Mr Game was invited to a first consultation meeting, (page 180). The letter of invitation explains that at the meeting, changes to security services at Hitchin will be discussed in depth and how that may result in Mr Game being made redundant. His input and views will be invited. It explains that his details will be obtained and provided to the respondent's careers website and he will receive a link to that website, where he will be able to search for suitable alternative roles.

70. The first formal consultation meeting took place on 16 January 2018. The notes of that meeting are at page 233. We note the following:

    70.1 Ms Gibbs informed Mr Game that his redundancy payment would be £14,670 and this was because he had just had a birthday.

    70.2 The afternoon receptionist role was vacant, this was pointed out to him and he was asked if he was interested. His answer was a categorical, "No".

    70.3 He was asked if he would like the respondent to approach his previous employer from whom he was TUPE'd across (VSG). He answered, "no".

    70.4 He said that he had been through 40 plus pages of roles on the respondent's website and there was nothing that was of interest to him and so he would like to take redundancy.

    70.5 He asked whether if anything changed during his notice period, would the process be withdrawn? Ms Gibbs confirmed that is what would happen, in response to which Mr Game said, "Ok, because I can tell you now November 2020 will be when I hand my keys back. This will be when my licence is up and I will nearly be 69". This was an indication by Mr Game that he was anticipating retiring in November 2020.

70.6 At the conclusion, the minutes read that Mr Game said, "I am happy with what we have discussed with myself and the extra dates will carry the payment up to a more sufficient figure".

71. We should note that the respondent's redundancy policy is in the bundle, beginning at page 59. Section 7 of that policy at page 61 on trial periods reads as follows:

> "If a different job role to the employee's redundant role is offered, the Company will give the employee a 4 week trial period in the role.
>
> If either the employee or the Company finds during this time that the role is unsuitable, the employee will be treated as having been dismissed by reason of redundancy and they will retain their right to a statutory redundancy payment (employees who unreasonably terminate the contract during the trial period in a new role may not be entitled to a redundancy payment)."

72. The redundancy policy and this particular provision was not expressly drawn to the attention of Mr Game.

73. A second consultation meeting took place between Ms Gibbs and Mr Game on 31 January 2018. At this meeting:

73.1 Ms Gibbs confirmed the £14,670 redundancy figure she had previously given, having been asked to specifically do so by Mr Game.

73.2 Mr Game said again that he was not interested in the receptionist or any other role. He confirmed that he had looked at the website again.

74. At some point after this meeting, the vacant afternoon receptionist role was advertised externally and internally. A cleaner on the Hitchin site, Kaysha Brown, was an internal applicant.

75. Also at some point around about this time, Mr Game received a spreadsheet from Human Resources which informed him that his redundancy payment would in fact be £11,720. This caused him to consult with solicitors, who wrote to the respondent on his behalf. He also subsequently raised a grievance.

76. On 2 March 2018 the Hitchin site was visited by a Mr Kennedy from Cadent, to carry out a security survey. What he concluded is quoted in an email between individuals working for Cadent on 12 March 2018, copied at pages 276 and 277. The relevant remarks read, "Cadent security visited site for an informal assessment on 2/3/18. Their conclusion was that security on site needs improvement, not dilution." Concern appears to be by reference to the number of visitors to the site. In due course, this became known to Mr Game.

77. A third consultation meeting was scheduled to take place on 13 March 2018. Ms Gibbs did not attend. Mr Game had not been told the meeting was cancelled. The issue was apparently that Ms Gibbs had asked Mr Game for confirmation as to whether they should be communicating with him or his solicitors and he had not responded.

78. On 17 March 2018, Mr Game raised a grievance, (page 282 and 283). His complaints were that:

    78.1 He was being made redundant because of his disability;

    78.2 He had been misled over the amount of his redundancy payment;

    78.3 Ms Gibbs was trying to make the rest of his time with the respondent as uncomfortable as possible, he would therefore like pay in lieu of notice; and

    78.4 There was still a need for his role.

79. In his witness statement at paragraph 29, Mr Game says that his grievance was also that he had not been offered suitable alternative employment, in particular he had not been offered the role of afternoon receptionist. That is not set out in his grievance and as a statement of fact, it is incorrect.

80. The redundancy process was put on hold pending an outcome to the grievance.

81. On 28 March 2018 Mr Game met with Mr Minter, (Operations Director) who was appointed to deal with the grievance. He was accompanied by his colleague, the aforementioned Kaysha Brown. Before the meeting, Mr Minter had a conversation with Ms Gibbs on 20 March. Mr Game complains that it was wrong for Mr Minter to talk to Ms Gibbs before he spoke to Mr Game. The explanation from Mr Minter is that he wanted to make sure that he understood the process being followed and the reasons behind the redundancy. Given that the grievance was about Ms Gibbs, it would have been better if he had not spoken to her first. Such discussions should have been minuted; it appears they were not. We accept however, that the discussion with Ms Gibbs was as explained by Mr Minter and that no harm was done.

82. Minutes of the grievance meeting between Mr Minter and Mr Game are at page 284. Points discussed were as follows:

    82.1 Mr Game explained that Mr Kennedy had visited the site and said that security hours needed to be increased not reduced.

    82.2 Ms Gibbs wanted him out on health grounds because after his first meeting with her, she contacted Occupational Health and his doctor.

82.3 He complained about the reduction in the figure for his redundancy payment, saying that Ms Gibbs had never said the figure she gave was an estimate.

82.4 Asked whether at any point in the process there was an offer of alternative employment, Mr Game answered “No”, (not true).

82.5 He was finding the process stressful.

82.6 Mr Minter indicated that he would speak to Glynn from Cadent, he would look at the notes of the restructure and the health meetings and would ask Ms Gibbs for a statement.

83. Later that day, Mr Minter sent an email to Ms Gibbs having arranged to meet with her the next day. He set out his questions for her. These are in the bundle at page 290A to 290C, where Ms Gibbs has also set out her answers. Thus:

83.1 Security would be managed going forward as per the proposal, which had been copied to Mr Minter.

83.2 Similar restructures were taking place on other sites, details provided.

83.3 She had written to Mr Game’s doctor and no reply had been received. An Occupational Health referral had been prepared but not pursued, because of a change of Occupational Health supplier. No further action had been taken on either because of the redundancy process.

83.4 At the next meeting, she planned to discuss garden leave and early release.

83.5 She had obtained a verbal quote for the redundancy payment from Human Resources, she had used that to give Mr Game a verbal indication, not appreciating that it was incorrect.

83.6 At every meeting alternative employment had been raised and he had been asked about the receptionist role. He had been provided with details of the receptionist role. He had rejected any help with his CV.

84. On 5 April 2018 Mr Minter asked further questions of Ms Gibbs, these questions and the answers are copied in the bundle at page 297A. Relevant points are:

84.1 The part time receptionist will be SIA certified.

84.2 The client will be responsible for the redundancy payment.

84.3 A letter was sent to Mr Game's doctor.

85. By letter dated 30 April 2018, Mr Minter provided an outcome to the grievance, which is in the bundle at pages 298-300. Mr Minter concluded that:

85.1 There were several cost savings initiatives taking place across the Cadent contract and the appropriate process was being followed. It was clear the security requirement on site was minimal and could be incorporated into other roles.

85.2 The redundancy payment of £14,670 was an informal estimate, it was misleading but not intentional and the correct figure was £11,736.

85.3 Mr Game had been offered alternative employment, that of the role of receptionist which he had declined.

85.4 The senior client had been consulted with regards to the level of security.

85.5 The decision to make Mr Game redundant was not related to his ill heath, but because of the cost saving activities being investigated with the client.

86. On 3 May 2018, Mr Game met with Ms Gibbs. The minutes of the meeting appear at page 294, wrongly dated as 3 April 2018. There was a disagreement between Mr Game and Ms Gibbs. Mr Game said that his 12 weeks' notice should start the following day, Ms Gibbs said that it had started on 2 March.

87. The note records Mr Game saying that he would not take garden leave and he could not look for another job. This seems odd, because we heard during the hearing Ms Gibbs and Mr Game agree that he was grateful that he had been given garden leave. Support again was offered in seeking alternative employment, with CV writing and help and support in looking for work, to which Mr Game's reply is quoted as being:

> "As of tomorrow I am finished, don't help re reception role you only mentioned I could apply."

88. Mr Game was placed on garden leave with effect from the following day, for which as we have noted, he was grateful.

89. Subsequently, Human Resources recognised that it was not correct to treat Mr Game as having been served with notice on 2 March. Therefore, on 21 May 2018 Ms Gibbs wrote to him again to say that having reviewed letters and meeting notes, it was agreed that his notice period did not start on 2 March and therefore she proposed that they meet again on 31 May.

Mr Game replied to acknowledge and confirm that he would attend. He also commented, "I am also happy that you have also decided to pay me in lieu of notice" which appears to be a reference to his being placed on garden leave.

90. Mr Game then met with Ms Gibbs on 31 May 2018. At that meeting, they agreed that his notice would run from 4 May and once again, he declined assistance in searching for other roles, (page 314). The minutes are at page 316.

91. Someone at Human Resources wrote to Mr Game a letter dated 4 June 2018. This stated that he became redundant on 4 May 2018. This is incorrect and unfortunately, the letter was sent to the wrong address.

92. On 12 June 2018 Mr Game wrote to Ms Wrigley complaining he had not heard from Ms Gibbs and asking her to take over the arrangements with regard to his redundancy. On 14 June he decided to chase Ms Gibbs himself by email. She replied on 16 June attaching a copy of the 4 June letter. Mr Game replied saying he had not received that letter and pointing out that the termination date was incorrect. He also wrote to Mr Minter. It is Mr Minter who dealt with the error and replied on 21 June to acknowledge that there had been an administrative error and the respondent would reset his termination date as 27 July 2018. His redundancy payment was increased to £12,192.

93. On 5 July 2018, Mr Game appealed against redundancy on the grounds that he had been selected because he was disabled, because he was aged 67 and there was a need for security on site, (page 348).

94. The appeal against redundancy was heard by Ms Wrigley on 9 August 2018. The minutes of that hearing are at page 355. The salient points are:

    94.1 Mr Game acknowledged Ms Gibbs had said that he would be replaced by an afternoon receptionist and told him that he could apply for that role. He did not agree with the proposal that his role could be replaced by the receptionists and made his point that the client, (on his case) had said more security was needed, not less. He expressed the view that if he had applied for the role of receptionist, he would have either been turned down or would have been allowed to start the job and then been thrown out a few months later. In this regard, he made reference to the fact that Kaysha had already been spoken to informally about the role.

    94.2 He said he had heard of a site called Hollingwood in Manchester which had a receptionist and a security guard and no change had been made. The basis for making that assertion was that he had heard nothing about changes at Hollingwood, whereas he had heard about changes at another site, Slough, where a security guard of a similar age to him had been made redundant.

94.3 Mr Game made his point about hearing nothing further on the Occupational Health referral and that his doctor had confirmed nothing had been received from the respondent.

94.4 Mr Game complained he had been bullied by Ms Gibbs.

94.5 Mr Game complained about not receiving the promised £14,670 redundancy payment.

95. Ms Wigley provided a written outcome to the appeal dated 21 August 2018, which begins at page 360. She concluded:

95.1 There was a genuine purpose to reduce costs for Cadent and the security role at Hitchin was genuinely redundant, with that role being shared amongst the reception staff and cleaners.

95.2 Mr Game had been given the opportunity to apply for the afternoon reception role which he declined. He had also declined offers of help in a search for roles with VSG.

95.3 Kaysha Brown had formally applied for the role following the correct process.

95.4 Ms Gibbs had written to Mr Game's GP and had never received a reply.

95.5 Mr Game had not provided any information as to why he believed he had been treated differently because of his age.

95.6 Differences between one Cadent site and another were because of differing business and security needs.

95.7 The Occupational Health referral form had been submitted but Ms Gibbs had been advised not to proceed at that point in time in September 2017, because the respondent did not have an Occupational Health provider at that time.

95.8 She agreed that a figure of £14,670 had been mentioned. She noted Mr Game had received £12,192 and proposed as a gesture of goodwill, that he should receive the difference of £2,478.

95.9 In conclusion, she upheld the decision to dismiss by reason of redundancy.

96. In reaching these conclusions, Ms Wigley had investigated matters by way of correspondence with Ms Gibbs. In her witness statement, she referred to seeing documents in the bundle, but gave no page number and we were not taken to any such documents. Ms Wigley also spoke by telephone with Mr Game's former colleagues Kaysha Brown, Kevin Kelly

and Abby Hitch. She told us that she made handwritten notes of those conversations but was unable to find them.

97. After receiving the appeal outcome letter on 21 August, Mr Game wrote back the same day to say that part of his role had been the afternoon reception role, and so Kaysha Brown has simply replaced him. Ms Wigley replied to offer to investigate that point. Mr Game replied to her to say that he did not wish her to do so.

98. Mr Game was paid an additional £2,478 redundancy payment on 29 August 2018.

99. Kaysha Brown was aged 30 and with Mr Game's blessing, she applied for the afternoon receptionist role. For this role, she obtained an SIA Licence and performed the dual role of receptionist and security guard, as envisaged in the proposed re-organisation.

100. Since Mr Game's dismissal, the Hitchin site has continued to be operated by the respondent as envisaged in the proposed re-organisation.

101. The costs savings for Cadent were not just in relation to security, there were other matters subject to the exercise, such as in respect of cleaners and cleaning, vending machines and replacing hand towels with air dryers.

102. Lastly, we should refer to the document at page 459, which was produced for the purposes of these proceedings. We accept that it is accurate, (its accuracy was not challenged). It lists seven other security guards made redundant as part of the Cadent security cost saving initiative, excluding Mr Game. Those seven were aged 25, 35, 39, 51, 63, 63, and 66. With Mr Game aged 67, four of those made redundant in the exercise were aged over 60 and four under 60.

Conclusions

103. The first and primary issue for us to resolve is, what was the reason for dismissal? This pertains to all three heads of claim:

103.1 Was the reason for his dismissal, Mr Game's age?

103.2 Was the reason for his dismissal, Mr Game's disability?

103.3 Was he dismissed for the potentially fair reason of redundancy, or some other substantial reason?

Those three questions are intertwined

104. Mr Game identifies the age group of which he is part and as the basis on which he says he was discriminated against, is those aged over 60.

105. It accepted that Mr Game was disabled at the material time.

106. Has Mr Game proven facts from which the Tribunal could properly conclude, absent an explanation from the respondent, that the reason for dismissal was Mr Game's age? If he has done so, that would shift the burden of proof to the respondent to show that age played no part in the dismissal. All that we have is the fact that Mr Game is aged 67 and the statistics quoted at the end of our findings of fact from page 459; 50% of those made redundant were under the age of 60. We could not on the basis only of these statistics and the fact that Mr Game is aged 67, properly conclude the reason for his dismissal was age. At paragraph 44 of his witness statement, Mr Game makes reference to a security officer at Manchester, younger than he, not being made redundant. Could that person be regarded as a comparator? The situation at Manchester was not the same as that at Hitchin, the duties of the Manchester security guard were not changed or redistributed and so he could not be regarded as an actual comparator. These facts are not sufficient to shift the burden of proof.

107. Are there facts from which we could properly conclude, absent an explanation from the respondent, that the reason for dismissal was Mr Game's disability? Adjustments were already in place so that Mr Game could perform his duties. There were no issues with his performance or his abilities. Mr Game points to the enquiries made by Ms Gibbs during 2017 and the fact that they were taken no further that autumn. We find that Ms Gibbs actions in September 2017 were appropriate, she had taken over management responsibility for Mr Game, could see that he was a person with disabilities and found that there was no Occupational Health assessment or record of the issue of adjustments being addressed. She therefore rightly and properly set in motion the process of obtaining this information and making the Occupational Health referral. There was a genuine hiccup with the Occupational Health provider. The respondent wrote to Mr Game's consultant, not his doctor (we believe there has probably been a misunderstanding here) and did not receive a reply. By November it had become apparent that Mr Game was likely to be made redundant and we accept that for that reason, Ms Gibbs did not push the health enquiries further. These facts are not sufficient for the Tribunal to properly conclude, absent an explanation from the respondent, that the reason for dismissal was disability.

108. Mr Game sought to rely upon Ms Kaysha Brown as an actual comparator for both his age and his disability claims. She was not in the role of security officer at the time of the redundancy process, she was a cleaner. There was no proposal to reduce cleaning staff. She wanted and applied for the afternoon receptionist vacancy. Ms Brown was not in the same circumstances as Mr Game and is not an appropriate comparator.

109. A hypothetical comparator would be a person working as a security guard in the same situation as Mr Game, but either younger than 60, or not disabled. He would be a person who reacted the same way, by indicating that he did not wish to apply for the afternoon receptionist role in adamant

terms. Such a person would have been made redundant, just as Mr Game was.

110. In respect of both the age and disability discrimination claims, the burden of proof does not shift to the respondent and these claims must fail. Even if the burden of proof had shifted, we would have found that we accepted the respondent's explanation, that this was a genuine redundancy situation and that Mr Game was dismissed by reason of redundancy, for the reasons set out below. Age or disability played no part whatsoever in the decision to dismiss.

111. In respect of the respondent's case that the reason for dismissal was the potentially fair reason of redundancy, we have:

111.1 That there was a cost cutting exercise ongoing across the Cadent sites to which the respondent was providing services.

111.2 The cost cutting was not limited to the redundancy of security guards, but also the redundancy of others and cost savings in other ways.

111.3 Security guards elsewhere were also made redundant during the same period.

111.4 The role of security guard was removed from the Hitchin site; the work of the security guard was divided up between those holding two other roles, (part time receptionists) who were carrying out other duties as well.

112. We find that the reason for dismissal in the mind of Ms Gibbs was redundancy. That was the reason, not merely the principle reason.

113. There was a diminished requirement for work of a particular kind at the Hitchin site. The work of a particular kind was the role of the security guard. There was no longer a requirement for a security guard. The requirement became that of a part time receptionist capable of also undertaking a security guard's duties. That is a redundancy.

114. Having established that the dismissal was for a potentially fair reason, we must ask ourselves whether the dismissal was fair in accordance with the test set out in s.98(4) of the Employment Right Act 1996. Considering first of all the guidance in the seminal case of Williams v Compair Maxam:

114.1 It was reasonable to consider a selection pool of one only as there was just the one single person, Mr Game, working in the redundant role as security guard at Hitchin.

114.2 As there was a pool of one, no question arises as to objective criteria for selection.

114.3 There was extensive consultation, there were many opportunities for Mr Game to have his input. He met with Ms Gibbs on 7 December 2017, 16 January 2018, 31 January 2018, 3 May 2018 and 31 May 2018. He also had a grievance meeting with Mr Minter and an appeal against dismissal meeting with Ms Wigley.

114.4 Genuine consideration was given to suitable alternative employment. Mr Game was repeatedly asked whether he was interested in the part time receptionist role and each time he was clear and adamant that he was not. There were also repeated offers to assist him with the preparation of his CV and job search. He was referred to the respondent's website where job opportunities within the respondent could be pursued.

115. On the basis of the foregoing, the respondent has complied with the classic Williams v Compair Maxam guidance.

116. However, that is not the end of the inquiry. The requirement is for the dismissal to have been fair in all the circumstances of the case as set out in the test at s.98(4). The guidance of Williams v Compair Maxam is simply that, guidance. We must still look at the dismissal overall and in the round, looking at the process followed by the respondent, and decide whether the actions of the respondent and its decision to dismiss lay within the range of reasonable responses. There are a number of criticisms that can be laid at the door of the respondent in the process which it followed. We deal with each in turn and consider whether they are sufficient either individually or collectively, to render the dismissal unfair:

116.1 Mr Game was misled from the outset as to how much he would receive in redundancy pay. He was told that he would receive more than he was actually entitled to as a matter of law. As a gesture of goodwill ultimately, the respondent paid him the additional amount. The error led to Mr Game being better off than he would have been otherwise.

116.2 The respondent got itself into a complete and utter muddle over when notice was given and when notice would run to. This undoubtedly caused stress to Mr Game and is embarrassing for the respondent. Ultimately however, the outcome was that he remained in employment longer and received more in the way of accrued holiday pay, so he was better off.

116.3 The respondent does not seem to have explained its redundancy procedure to Mr Game. That is not sufficient to render the dismissal procedurally unfair when looked at in the round.

116.4 The respondent's 4 week trial period referred to in its policy was not drawn to Mr Game's attention. That is something about which Mr Game made much during the hearing: if he had been told that he could have a 4 week trial in the receptionist role, he would have

taken it. However, Mr Game was repeatedly adamant in his consultation meetings that he was not interested in the receptionist role, that he wished to remain in security and that he would not take a pay cut. It is in our view within the range of reasonable responses for the respondent to take Mr Game's repeated statements that he is not interested in the receptionist role at face value and not to suggest that he trials the role for 4 weeks. Further, this issue was raised for the first time in cross examination of Ms Gibbs; it was not raised in his claim form or in his witness statement. It seems to be an argument that he (or someone assisting him) has thought of subsequently. We do not think that Mr Game would genuinely have wished to trial the receptionist role.

116.5 Mr Minter spoke to Ms Gibbs before hearing from Mr Game, in circumstances where Mr Game's complaint was about Ms Gibbs. It would have been better if he had not done so, but we can understand why he wanted to be clear about the process that she had followed, so that he could have an informed discussion with Mr Game at the grievance hearing. It is not something that would be sufficient to render the dismissal unfair, when viewed in the round.

117. Finally, we will run through the matters recorded by Employment Judge Ord on 13 September 2019 as having been raised as issues by Mr Game:

117.1 There was no provision, criterion or practice of identifying and dismissing as redundant employees over the age of 60.

117.2 Contrary to the statement before Employment Judge Ord that he was not offered a part time receptionist role, he was.

117.3 Ms Gibbs probably did on 4 September 2017 comment on his lack of mobility and that he was not carrying out patrols on foot.

117.4 There was a problem with the Occupational Health advisors which caused a hold up in obtaining the Occupational Health report.

117.5 It looks as if the respondent wrote to Mr Game's consultant rather than his GP and they did not receive a reply. Ms Gibbs probably did say words to the effect, with regard the GPs practice, "they would say that wouldn't they, I should know, I am the wife of a GP".

117.6 There had been a change of Occupational Health provider.

117.7 Ms Gibbs probably did incorrectly refer to Mr Game having had a birthday which increased the redundancy he was entitled to.

117.8 The redundancy was not a sham and was not used as cloak to disguise dismissal for age and/or disability.

118. In closing submissions, Mr Game made additional points about the handling of the grievance. We found no fault in the handling of the grievance, other than Mr Minter speaking to Ms Gibbs beforehand, as dealt with above. Mr Game also made several references to the mistakes made by Ms Gibbs and Human Resources; it is correct to say there were a number of mistakes, which we have analysed above.

119. Analysing everything overall and in the round, we find that the decision to dismiss Mr Game by reason of redundancy was a fair decision that was within the range of reasonable decisions a reasonable employer would make on the facts and in accordance with s.98(4).

120. For these reasons the claims of unfair dismissal, age and disability discrimination fail.

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Employment Judge M Warren

Date: 19 August 2020

Sent to the parties on: 10th September 2020.

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For the Tribunal Office