EMPLOYMENT TRIBUNALS

Claimant: Ms O Gorton

Respondent: TJ Crompton Limited

HEARD AT: Manchester **On:** 7 December 2020

BEFORE: Employment Judge Batten
Ms A Ashworth
Mr P Dobson

REPRESENTATION:
For the Claimant: Ms S Houghton, litigation friend
For the Respondent: Mr A McMillan, Accountant

JUDGMENT having been sent to the parties on 31 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form submitted on 4 November 2019, the claimant complains of unfair dismissal and age discrimination. The respondent entered a response to the claims on 18 December 2019 and a case management preliminary hearing took place on 10 February 2020, at which a list of the issues to be determined by the Tribunal was discussed and agreed, as set out below. The final hearing had been listed on 2 occasions previously and postponed.

Evidence

2. The Tribunal was provided with a bundle of documents and witness statements from the claimant, Ms Karen Houghton (the claimant's sister-in-law), both of whom gave evidence in chief and were cross-examined. The

respondent tendered a short witness statement from Mr Timothy Crompton, the respondent's director and sole share-holder. Mr Crompton did not attend the hearing due to illness, and the Tribunal dealt with an application by the respondent's representative to postpone the hearing, which was refused for the reasons set out below.

3. In addition, the claimant supplied a schedule of loss and supporting documents. The respondent provided a document comprising its comments on the claimant's schedule.

Postponement application

4. At the beginning of the hearing, Mr McMillan for the respondent, told the Tribunal that Mr Crompton would not be attending the hearing because he was terminally ill. The respondent's representative told the Tribunal that he had a letter about Mr Crompton's ill health although the letter was not immediately made available to the Tribunal nor to the claimant. The respondent's representative was asked if he wanted to make an application to postpone the hearing and he said that he was "not sure". It was explained to Mr McMillan that a witness is expected to attend for cross-examination on their evidence, whether in person or via video platform (which had been set up and offered to the parties for such purpose) and that, in the absence of an opportunity for the claimant to challenge the respondent's witness, the Tribunal would be unlikely to give much weight to matters set out in his witness statement. Mr McMillan then proceeded to ask the Tribunal to consider postponing the hearing due to the absence of Mr Crompton because of ill-health. The claimant made representations as to why she considered the hearing should proceed, pointing to the history of postponements in this case and the claimant contended that it had never been the intention of the respondent to call Mr Crompton to give oral evidence at this or any previous listed hearings because of his health.

5. After consideration, the Tribunal decided not to postpone the hearing. The Tribunal appreciated that Mr Crompton was very ill. The Tribunal had been referred to a letter from the respondent to the Tribunal, dated 22 June 2020, which had been produced for a previous hearing, listed on 6 July 2020. It was clear to the Tribunal, from reading that letter that there had been no intention for Mr Crompton to attend the hearing on 6 July 2020 because of his illness, his shielding, and the fact that he would be attending hospital that week. There was no suggestion of a postponement application on that occasion for any reason, for example, Mr Crompton was in hospital and/or wanted to attend the Tribunal hearing on another occasion; neither was there an application for a postponement this morning until the Tribunal pointed out to the respondent's representative that, in the absence of Mr Crompton attending to confirm his evidence under oath and be cross-examined, it was unlikely that the Tribunal could give much weight to what was set out in his statement and that it would be difficult for the respondent to challenge the claimant's evidence without calling Mr Crompton to give evidence under oath. The respondent's representative was referred to previous correspondence from the Tribunal and the directions on witness statements, which confirm that

witnesses are expected to attend to give evidence either in person or via video link.

6. In the circumstances, the Tribunal concluded that there was no intention for Mr Crompton to attend this hearing even if it proceeded. The respondent's representative told the Tribunal that he proposed to rely on Mr Crompton's statement as read, as had been his intention because both the hearing on 6 July 2020 and today had apparently been listed on Mr Crompton's hospital treatment days. The Tribunal considered that Mr Crompton's treatment was booked in advance, such that the hospital would or could have been told of the hearing date(s) as dates to avoid when booking treatment, or conversely the Tribunal could have been informed of his treatment dates as dates to avoid when listing the hearing. The Tribunal had been told that Mr Crompton was undergoing a course of treatment and that his last treatment was expected to be on 14 January 2021. However, the respondent's representative was unable to say how long it might be before Mr Crompton would be well enough to attend the hearing to give his evidence thereafter. The Tribunal noted also that the respondent's representative had said that Mr Crompton was in fact terminally ill but the respondent produced no medical report on the current position, instead supplying a letter from the Christie Hospital, Manchester, dated 13 March 2020 and an email string between the respondent's representative and Mr Crompton ending on 26 October 2020 in which Mr Crompton told the respondent's representative that he was undergoing immunotherapy treatment on 3 December 2020.

7. In light of all the above considerations, and the previous adjournments, the Tribunal determined that it was in accordance with the overriding objective for the hearing to proceed.

Issues

8. At the outset, it was confirmed that the issues to be determined by the Tribunal were as set out in the record of the case management preliminary hearing which took place on 10 February 2020, as follows.

Indirect age discrimination:

9. It had been agreed with the parties, at the case management preliminary hearing, that there is one issue for determination of this complaint at the final hearing:

a) Did the respondent apply to the claimant a provision, criterion or practice (PCP) of including LIFO as a criterion for deciding whom to select for redundancy?

10. It is recorded as common ground that, if LIFO was a criterion, it would put younger employees at a particular disadvantage when compared to older employees, because of the relatively limited opportunity that young employees would have had to acquire a long period of service. The respondent does not seek to justify the use of LIFO as a proportionate means of achieving a

legitimate aim; the respondent's position is simply that it was not a criterion at all.

11. If the age discrimination complaint succeeds, the Tribunal shall decide on the claimant's remedy. She seeks only compensation. When assessing the award of compensation, the Tribunal shall be required to imagine what would have happened had LIFO been excluded from the decision. Would the claimant have been dismissed in any event? Is there a quantifiable chance that this might have happened? The parties agreed, at the case management preliminary hearing, that these questions should be determined at the same time as deciding whether or not there was any indirect discrimination.

Unfair dismissal

12. There are 2 questions for the Tribunal in respect of this complaint:

a) Can the respondent prove that the sole or principal reason for dismissal was that the claimant was redundant?

b) If so, did the respondent act reasonable or unreasonably in treating that reason as a sufficient reason to dismiss the claimant?

13. The claimant will focus specifically on the use of LIFO as a criterion, the lack of advance consultation and the change in the selection criteria during the course of the appeal.

14. If the dismissal is found to be unfair, the respondent will argue that the claimant's compensation should be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event. The parties agreed that this issue should be determined at the same time as the fairness or otherwise of the dismissal.

Findings of Fact

15. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

16. The claimant was employed from 4 January 2017 until 31 July 2019 by the respondent as one of 4 receptionists at the respondent's Optician's practice. The claimant was the youngest receptionist and the most recently appointed to that job.

17. The respondent has only 5 employees on its payroll. For reasons which were unclear to the Tribunal, the rest of the respondent's staff, of which there are in excess of 10 in addition to the 5 employees, work for the respondent on a self-employed basis, including the Practice Manager.

18. On 31 July 2019, at the end of the working day, the claimant was invited into a side room at the end of the day for "a word". The claimant was then informed by Mr Crompton, the sole director of the respondent at the time, that she was being dismissed for redundancy with immediate effect. The claimant was in shock. The claimant was handed a prepared letter, reference, final payslip and pension details.

19. The claimant was told at the time that her selection for redundancy was based on "LIFO" (that is last in, first out) and because she was the employee with the shortest service, she was being made redundant. The claimant was also told not to come back to work and that she would be paid for her 4 weeks' notice entitlement.

20. When the claimant arrived home, she found that her final pay had already been paid into her bank account and it looked as though the money had been paid in by the respondent before Mr Crompton had told the claimant that she was being made redundant.

21. On 1 August 2019, the claimant appealed against the decision to make her redundant and, on 21 August 2019, the respondent held an appeal conducted by Mr Crompton as a review into his decision. At the appeal hearing, Mr Crompton said that he had used other criteria for selection in addition to LIFO but refused to provide the claimant with details or the scoring when she requested it. Unsurprisingly, the claimant's appeal was unsuccessful and the appeal outcome was confirmed to the claimant in writing on 2 September 2019.

22. In February 2020, after discussion at the case management preliminary hearing, the respondent sent the claimant a document purporting to illustrate a "selection process", which it said had been undertaken against certain criteria, and the scores applicable to each receptionist, albeit that much of the document was redacted. An unredacted copy was produced at this hearing at the Tribunal's request.

The Law

23. A concise statement of the applicable law is as follows

Redundancy and unfair dismissal

24. Under section 98 (1) and (2) of the Employment Rights Act 1996, the Tribunal must first decide what was the reason for the claimant's dismissal.

25. The respondent has advanced redundancy as the reason for the claimant's dismissal. Redundancy is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996.

26. The definition of redundancy is set out in Section 139 (1) of the Employment Rights Act 1996:

… 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 the 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.

27. If the respondent can show a potentially fair reason for dismissal, the Tribunal must then consider the test in section 98 (4) of the Employment Rights Act 1996: whether in the circumstances including the size and administrative resources of the respondent's undertaking the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant; and the Tribunal must make its decision in accordance with equity and the substantial merits of the case.

28. In assessing the reasonableness of a dismissal for redundancy, the Tribunal must follow the guidelines laid out in Williams and others v Compair Maxam Ltd [1982] ICR 156 having regard to the question of whether the dismissal lay within the range of reasonable conduct which a reasonable employer could have adopted. The factors to be considered are:

27.1 whether employees were warned and consulted about the redundancy;
27.2 whether the pool for selection was drawn appropriately;
27.3 whether the selection criteria were objectively chosen and fairly applied;
27.4 the manner in which the redundancy dismissal was implemented; and
27.5 whether any alternative work was available.

29. The Tribunal must also consider whether the dismissal falls within the band of reasonable responses available to an employer in the circumstances of the case.

Indirect discrimination

30. The Equality Act 2010, section19, so far as material, provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's [in this case age].

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

31. Sections 23(1) and (2)(a) of the Equality Act 2010 provide that, for the purposes of claims under section 19 and others, there must be no material difference between the circumstances of the claimant's case and that of her comparator(s).

32. The burden of proof in relation to claims of discrimination brought under the Equality Act 2010 is found in section 136 which provides that, if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision.

Conclusions

Unfair Dismissal

33. First the Tribunal considered whether a redundancy situation existed at the respondent and found that there was a redundancy situation in relation to the receptionists. The Tribunal took into account that 4 receptionists were reduced to 3, and there was no evidence that the claimant had been replaced. However, the Tribunal was concerned that the respondent had described its approach as one of conducting "a review" and deciding that it was the claimant's position that no longer existed. A redundancy situation is about the requirement for work of a kind ceasing or diminishing – in this case the requirement for receptionists at the practice - rather than an individual or their particular job unless there was a situation of a pool of one, which was not the case here as there were 4 receptionists. The respondent's representative explained that the respondent's rationale was that the claimant's work could most easily be managed by the other 3 receptionists. The Tribunal considered that this description did not amount to an objective assessment of the 4 receptionists but rather it showed that the respondent's decision had focussed on the claimant.

34. In addition, the Tribunal noted the evidence that one other receptionists had been absent at the material time, on long-term sick leave for 3 months. The

respondent's representative told the Tribunal that, in fact, two receptionists were able to do all the work of 4. Despite this position, the respondent had not been inclined to consider or make an additional redundancy beyond that of the claimant as the Tribunal was told that the cover was possible because one of the 2 receptionists who had been working and not off sick, had in fact increased her hours after the claimant left. Such a situation led the Tribunal to question whether there was in fact a true redundancy situation at the respondent. Nevertheless, the Tribunal considered, on the evidence before it that there was a redundancy situation relating to receptionists at the respondent at the material time.

35. The Tribunal then considered the procedure adopted to make the claimant redundant and concluded that this was entirely unfair and inappropriate. There was absolutely no evidence of any consultation, either with the claimant or with any other receptionist. The decision to make the claimant redundant was predetermined. A letter confirming the termination of the claimant's employment and final payments were arranged before the meeting on 31 July 2019. In those circumstances the Tribunal considered that it would have made no difference if there had been any consultation at that meeting, but the Tribunal found that there was not.

36. The respondent's document, produced in February 2020 after discussion of the issues at the case management preliminary hearing, purports to illustrate a fair selection process. In essence, the respondent's case was that the claimant was pooled with the other 3 receptionists; that would appear on the face of it to be a reasonable approach to pooling. However, the Tribunal was concerned about the documents produced by the respondent because there were differences in the detail and the scoring between the redacted and the unredacted documents. The Tribunal took account of the fact that neither document had been given to the claimant at the time of her redundancy nor at her appeal, and the heavily redacted document was produced only after the case management preliminary hearing discussion.

37. The Tribunal found the scorings and their application to be entirely unreliable. The application of the respondent's criteria for selection were not explained. The Tribunal was not told who undertook the selection, the basis for the scores, the timescales measured or how the criteria were moderated and the scores were not understandable. In one case, the experience gained at a previous employer, a long time ago, was taken into account for no apparent reason. The scoring against certain criteria did not make sense: for example, the employee LB had a written disciplinary warning and suffered a score of minus five, whereas the claimant had no disciplinary warnings but was awarded minus ten for that criterion and the rationale for such was not explained. In addition, the claimant was marked down for having asked about her holiday entitlement, which is a statutory right – the respondent did not explain why such an enquiry should be held against the claimant. The Tribunal also found that there was no consideration of any suitable alternative employment for the claimant.

38. The Tribunal considered the appeal process. The claimant's appeal hearing was conducted by Mr Crompton, the original decision-maker, as a review of

his previous decision. There was no thought given by the respondent to the possibility of either another senior person at the practice handling the appeal, or engaging a third party with relevant experience to conduct an independent appeal. This meant that Mr Crompton was highly unlikely to change his own mind and the Tribunal were not surprised to hear that he did not do so.

39. In light of the above, the Tribunal concluded that the respondent's dismissal of the claimant was unfair. The Tribunal went on to consider whether any compensation as may be due to the claimant should be reduced on the ground that, had the respondent acted fairly, the claimant would or might had been dismissed in any event. In this regard, the Tribunal found that, on the evidence available, it was not possible to conclude that the claimant would have been made redundant in any event. The respondent's selection process was irregular and unreasonable. The purported scoring has been found to be impenetrable and unreliable. In those circumstances, the Tribunal could not draw any conclusions as to what chance there would have been of the claimant being made redundant or whether there was a percentage chance of the claimant being dismissed if the respondent had acted fairly.

Age discrimination

40. The claimant pursued her claim of age discrimination on the basis that she was told that she had been selected for redundancy from the receptionists using LIFO (that is last in, first out). The respondent denies LIFO was a criterion and maintained in its pleadings that the claimant was selected following a scoring process against other criteria. The Tribunal's conclusions on the scoring process and the criteria for selection are as set out above under the claim of unfair dismissal.

41. The Tribunal accepted the claimant's unchallenged evidence that LIFO was used as a criterion for her selection and that the respondent had openly told her so. The other criteria referred to by the respondent included experience and skill. The Tribunal considered that the application of those criteria was also tainted with age discrimination - the respondent's comments in the scoring sheets about previous and long experience of the other receptionists would mean that any young employee was likely to be substantially disadvantaged in the selection process, as the claimant was.

42. The list of issues drawn up at the case management preliminary hearing record that it is common ground between the parties that, if LIFO is found to be a criterion, it would put younger employees at a particular disadvantage when compared to old employees, because of the relative limited opportunity the younger employees would have had to acquire a long period of service. The respondent did not seek to persuade the Tribunal otherwise today. Indeed, the tribunal noted that the respondent had taken into account the other receptionists' service at other employers. Given their long service, this meant including matters of history up to 10 years beforehand. The Tribunal considered that the claimant could not possibly have competed with such on any objective basis.

43. The respondent did not seek to justify the use of LIFO as a proportionate means of achieving a legitimate aim. Its position has been that it was not a criterion at all. However, the Tribunal has found against the respondent on that point and therefore the Tribunal must conclude that the dismissal of the claimant was an act of indirect age discrimination.

Remedy

44. In respect of losses of earnings, the claimant told the Tribunal that she was out of work from 1 August 2019 for 8.5 weeks until she found alternative employment. In respect of that period, the claimant has received 4 weeks' pay in lieu of notice and so has sustained a net loss of earnings of 4.5 weeks' pay. The respondent's representative said that the respondent did not dispute that the claimant's loss of earnings were incurred for such a period. The parties have agreed that the claimant earned £188.02 per week working for the respondent and so her loss of earnings for 4.5 weeks is £846.09, together with employer's pension contributions amounting to £9.92, making a total of **£856.01** net.

45. Although the claimant obtained a job for which the basic hours per week were 2.5 hours less than the hours she worked for the respondent per week, her payslips show that she has been able to make up the shortfall through regular overtime working. In those circumstances the Tribunal declined to make any award for future losses of earnings.

46. The Tribunal awarded interest on the claimant's loss of earnings, pursuant to regulation 6(1)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 6(1)(b) provides that interest shall be for the period beginning on the mid-point date [defined in regulation 4(2) as the day which falls halfway through the period beginning on the date of the act of discrimination complained of, and ending on the date of calculation] and ending on the date of calculation, at the applicable rate of interest which is currently 8%. The act of discrimination was the claimant's dismissal on 31 July 2019 which was 70 weeks ago. The interest period is therefore 35 weeks. Interest at 8% on the arrears of remuneration of £846.09 for 35 weeks is **£45.55**.

47. In respect of injury to feelings arising from the age discrimination complaint, the Tribunal considered that an award in the mid band of the guidelines in the case of *Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102,* as uplifted from time to time, was appropriate. In determining that the award for injury to feelings shall be **£17,500.00**, the Tribunal took into account the manner and timing of the claimant's dismissal - the act of discrimination was the termination of the claimant's employment with immediate effect, the lack of notice, the deliberate absence of consultation or any fair procedures and the fact that, despite everything, the respondent described the claimant, in the reference it handed to her at dismissal, as a "model employee". The unchallenged evidence of the claimant was that she was shocked and very upset. The claimant said that she did not believe it was a redundancy at the time and that she felt that she had done something wrong. In this respect, the Tribunal took note of the comments on the claimant as recorded in the

respondent's scoring document which tend to suggest that there may be some basis for her view. The scoring document contains a number of criticisms of the claimant which the Tribunal considered to be unwarranted and which convey an attitude to the claimant that the Tribunal considered to have contributed to the injury to her feelings.

48. The Tribunal awarded interest on the award for injury to feelings, pursuant to regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 6(1)(a) provides that interest on awards for injury to feelings shall be for the period beginning on the date of the act of discrimination, which was the claimant's dismissal on 31 July 2019, and ending on the date of calculation, which is 7 December 2020. As already stated above, that is a period of 70 weeks. Interest at 8% on the award of £17,500.00 for 70 weeks is **£1,884.61.**

Claimant's application for a preparation time order

49. At the end of the hearing, the claimant made an application for a preparation time order to be paid by the respondent. The Tribunal considered the application, heard representations from both parties, and refused the claimant's application. The reasons for refusal are as follows.

50. The Tribunal has had regard to the provisions of rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

"A Tribunal may make a costs order where the party or that representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings, the way the proceedings have been conducted and whether the claim or the response has no reasonable prospects of success."

51. Costs are therefore the exception in the Employment Tribunal, and not the rule. Costs do not follow the event as in, for example, the county court where a 'winner' may be entitled to the payment of some or all of their costs of the proceedings.

52. The Tribunal considered whether this case was an exceptional case which demands an award of an amount of preparation time costs under rule 76. The Tribunal did not consider that this was a case where it could be said that the response had no prospects of success, although the Tribunal considered that the prospects of success in relation to the unfair dismissal complaint, with the benefit of hindsight, were limited. However, the age discrimination complaint was such that evidence needed to be heard, because that complaint was fact sensitive – there was a considerable dispute of fact between the parties - and so the response could not be said to have no reasonable prospects of success.

53. The claimant submitted that the respondent, through its representative, had conducted the proceedings in a manner that she considered to be vexatious and unreasonable. The claimant's representative said that the respondent had sent letters to the claimant that she and the claimant felt were intimidating

and threatening. The Tribunal was not shown copies of any such letters and so had no evidence of the respondent's apparently vexatious or abusive conduct. On that basis, the Tribunal declined to make any findings as to the respondent's behaviour or conduct of the proceedings. The application is therefore refused.

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Employment Judge Batten
Date: 18 January 2021

REASONS SENT TO THE PARTIES ON

19 January 2021

FOR THE TRIBUNAL OFFICE