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EMPLOYMENT TRIBUNALS

Claimant: Mrs Theresa Wilson
Respondent: Countrywide Group Plc
Heard at: East London Hearing Centre
On: 5, 6 & 8 November 2019 and (in chambers) 22 November 2019
Before: Employment Judge C Lewis
Members: Mrs W Blake-Ranken
Mr L O'Callaghan

Representation

Claimant: Mr H Davies (Counsel)
Respondent: Miss R Eeley (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant's claim of direct age discrimination fails and is dismissed.
2. The Claimant's claim of unfair dismissal fails and is dismissed.
3. The claim for unlawful deduction from wages is dismissed by withdrawal by the Claimant.

REASONS

1 The issues arising from the claims brought by the Claimant as set out in an agreed list of issues following a Preliminary Hearing before Employment Judge Goodrich on 4 February 2019. Those issues were as follows and the Claimant's claims of direct discrimination being the dismissal and the rejection of her appeal against dismissal.

Unfair Dismissal

2 The Respondent contends the Claimant's dismissal was for a potentially fair reason, namely redundancy. The Claimant disputes that redundancy was the reason or principal reason for dismissal and contends her dismissal was an act of age discrimination.

3 If the reason was redundancy, was the Claimant's dismissal for redundancy unfair on the basis that it was unreasonable within the meaning of Section 98(4) of the Employment Rights Act 1996 by reason of any of the following alleged conduct? In particular:

- 3.1 Did the Respondent fail to communicate with the Claimant in a reasonable way that her role was at risk of redundancy?
- 3.2 Did the Respondent provide the Claimant with misleading and inaccurate information in respect of her role being "safe" and subsequently renegeing on its communication with the Claimant?
- 3.3 Did the Respondent actively discourage the Claimant from applying for the role of IT Systems Trainer?
- 3.4 Did the Respondent failed to interview the Claimant for the role of IT Systems Trainer and/or was the Respondent aware during consultation that

this was the Claimant's first choice?

- 3.5 Did the Respondent make predetermined decision to select Ms Marini-Goodwin for the role of IT Systems Trainer over the Claimant without any fair or objective selection process being followed?
- 3.6 Did the Respondent failed to provide the Claimant with complete and accurate information regarding the role of preferences and interview process?
- 3.7 Did the Respondent failed to consult the Claimant over the selection criteria or the waitings given to the criteria when considering her application for the roles she applied for?
- 3.8 Did the Respondent failed to consider and/or failed to unreasonably accepts the Claimant's proposal for alternative roles in order to avoid her redundancy?
- 3.9 Did the Respondent failed to consider and/or offer the Claimant any suitable alternative roles that were reasonably available in order to avoid her redundancy?

4 If, which the Respondent denies, the Tribunal are to hold that the Claimant's dismissal was procedurally unfair, the Respondent would contend that the Claimant would or might have been fairly dismissed if their procedures had been followed.

Direct Age Discrimination

5 The Claimant was aged 55 at the date of the termination of her employment with

the Respondent. She compares her treatment to that of a colleague, Ms Marini-Goodwin who she understands to have been aged 22 [conceded as being 39] at the time, or alternatively she relies on a hypothetical comparator of a younger age group.

6 Did the Respondent treat the Claimant less favourably than it treated or would treat a relevant comparator? The following acts of direct discrimination are relied upon by the Claimant:

- 6.1 Ms Wilson informed the Claimant on 17 April 2018 that she did not believe it was worth the Claimant applying for the remaining IT Systems Trainer role;
- 6.2 The Respondent rejected the Claimant's job share with Ms Marini-Goodwin proposal on 19 April 2018;
- 6.3 The Respondent failed to interview and select the Claimant for the role of Systems Trainer and instead interviewed and selected Ms Marini-Goodwin;
- 6.4 The Respondent failed to consider the Claimant's further suggestion of a job share role with Tanya Kerrison and/or Nina Benson;
- 6.5 The Respondent failed to offer the job share role to the Claimant after it had been rejected by Mr Barry Lee in or around 3 May 2018;
- 6.6 The Respondent dismissed the Claimant by reason of alleged redundancy on 29 June 2018;
- 6.7 The Respondent rejected the Claimant's appeal against dismissal.

7 If so, was the less favourable treatment because of the Claimant's age, contrary to

the Equality Act 2010, or was it for some other reason?

Unlawful Deduction of Wages

8 Has the Respondent unlawfully failed to pay the Claimant her pension contributions for the 12 week payment in lieu of notice period if the Claimant has also not yet paid an amount representing her own pension contribution?

Remedy

9 What relief, if any, is the Claimant entitled to? In particular:

9.1 If the Claimant was unfairly dismissed, what level of compensation is the Claimant entitled to?

9.2 If the Claimant suffered discrimination, what level of compensation is the Claimant entitled to?

9.3 In relation to the claim for personal injury, the consideration expert evidence and the personal injury claim will be given if the Claimant's discrimination claim is successful.

The Evidence

10 The Tribunal was provided with a bundle consisting of two lever arch files and witness statements for the Claimant, Mr Trist on behalf of the Claimant and for the Respondent statements from Kelly Wilson, Paul Buckland-White, Lydia Armes, Amanda Bickell and a statement from Mr Bennett who was not ?? The Respondent's counsel handed up a cast list which was not disputed and a chronology which was disputed by the

Claimant which not accepted by the Claimant on day one but which was handed up on day two. At the end of the evidence the respective counsel exchange written submissions and each amplified those written submissions orally in submission to the Tribunal.

11 The Tribunal made the following findings of fact based on the evidence before it.

12 The Claimant was employed by the Respondent as an IT Systems Trainer within its learning and development team which in turn was part of the broader people team.

13 On 5 March 2018 the Respondent announced that due to challenging financial circumstances the business required restructuring, which would include a reduction in headcount across various division including the L&D Team. The Respondent also announced that it would entering a period of collective consultation with elected colleagues representatives relating to proposed redundancies. A briefing pack of relevant information was provided to all affected individuals on the same day.

14 A copy of that pack was provided in the bundle at page 133 – 134 the original proposal was that across the affected divisions of the company which included L & D there would be a net reduction of 35 people within the people team 44 roles were proposed to be removed and 9 roles introduced 15 of the 44 roles impacted were in IT. The consultation period would involve collective consultation then individual consultation and once the proposal was finalised then alternative roles would be looked at where a company could recruit into new and alternative roles and redundancy would be a last resort.

15 The Claimant was away in South Africa on 5 March and was contacted by colleagues to ask her if she had seen what was happening. The Claimant criticised the Respondent for holding an initial consultation meeting on 5 March with the rest of her

team despite the fact that she was away. However, we accept that the criticism was misplaced. The Claimant had gone on holiday a day early and was due to return a day early and her holiday had not been updated on the Respondent's system. She was contacted whilst she was away and we accept in the organisation the size of the Respondent there is always a possibility that an individual will be away when such an important announcement is made. The Claimant complained that she could not download the attachments which were the consultation pack document while she was away and that she could not nominate herself as an employee representative as a result. However, she accepted or confirmed that she had not wanted to be the representative she had wanted to vote for Mark Bennett. She was informed she could vote by email but believes that that vote was not counted. However, Mr Bennett was elected as the colleague representative.

16 We also accept that it is inevitable that an employee who is away is likely to find out through social media or a text message or otherwise from colleagues about such an announcement whilst they were away. However we accepts that her manager Trist phoned her and spoke to her and told his line manager Kelly Wilson that he had done this and that the Respondent did all it could to contact her directly and inform her of the announcement. It was not necessary for the Claimant to be able to access the full consultation pack whilst on holiday but she clearly could do so on her return.

17 The Claimant initially had suggested that she wanted to nominate her Manager or Head of Division London, Kelly Wilson which we note suggest there was no obvious animosity at that point. The Respondent arranged numerous conference calls with Mark Bennett as part of the consultation process. There were at least four opportunities to engage with that process. The Claimant told us that he was not able to attend all of those but she also said she did not necessarily take note of any email which was not directly addressed to her where she was simply copied in as part of a loop which is what

happened with the emails in respect of Mark Bennett's consultations he copied them to all the affected people within his group. At an initial stage whilst the Claimant was away on 7 March her Line Manager, Kelly Wilson, Head of Learning and Development London countrywide sent her an email on 7 March (page 97) apologising to her that she heard the news whilst on holiday and offering to speak to the Claimant. She also stated "if it offers any reassurance, there is a role secured for an IT Trainer under both retail and London which had been ear mapped for both you and Laura. I know this does not make the situation easier as I know you will also be feeling ill at ease for your colleagues but please don't let this spoil your holiday". We are satisfied that that information that offered was correct at the time that Ms Wilson wrote the email although the proposal later changed during the course of the consultation process.

18 Kelly Wilson wrote a proposal in that consultation process and at page 205 we find that she identified the need for one systems trainer in London and two outside London thereby covering both the Claimant's role and Laura Marini-Goodwin's role respectively. The Claimant's role being the IT Systems Trainer outside London. Again we find there is no evidence of any animosity towards the Claimant.

19 At the end of the consultation period however, the proposed new structure looked somewhat different. Dan Thompson the Group People Director sent an email to the relevant Line Managers and the employee representatives setting out the agreed structure following consideration of the counter proposals in the consultation process (251 – 253). The Systems Trainer was dealt with at page 252 "the decision was taken after considerable discussion to change the total number from three to one, covering London. This role therefore becomes pooled as opposed to mapped".

20 Pooling "all current L&D/Management Development Managers, Senior

Consultants, Consultants and System Trainers will be in one pool for the positions of: Management Development Consultant, L&D Consultant, L&D Partner, Assistance Trainer.

21 The process will be an interview alongside a preference form, scoring and moderation. We have agreed that management development experience is required for MD Consultant roles, systems experience required Systems Trainer role and Senior Consultant experience required for partner role. Further details on each role will be provided next week.

22 The Claimant's evidence was that on hearing the information contained in that email on 6 April she became very upset and she now realised that she had no role her belief was based on the description of the role as being the London role which she knew was currently filled by Laura Marini-Goodwin. On 11 April 2018 the Claimant was invited to a formal consultation meeting with Kelly Wilson having been sent a formal at risk letter (269 – 270) together with others in her division that is the division managed by Kelly Wilson included Laura Marini-Goodwin, Lee Trist and others. In her email of 11 April Kelly Wilson set out the at risk by which those in the pool would need to apply for the roles available confirming they would receive a preference form and would have a consultation meeting and that they would only be interviewed once for any of the preferences that they chose informing her team that the interviews would be carried out by herself and a person from HR. Ms Wilson also informed her team members or the affected members that she had received three roles which they might be interested in and those were:

22.1 LMS Admin Team Leader (Paul Buckland Whites team)

22.2 Attraction Supplier Team Leader; and

22.3 Management Development Manager.

23 The deadlines for those three roles was 17 April to apply by sending a CV to Amanda Smith whereas the preference forms was to be sent to HR Support by 19 April.

Meeting on 17 April

24 There was considerable dispute as to what was said at the 17 April meeting and this is the meeting which the Claimant relies giving rise to her claim for direct age discrimination. The Claimant suggests that Ms Wilson told her that it was not worth her applying for the IT Systems Trainer role as that was Laura's role and then discussed a number of packages or ?? that Laura was familiar with which the Claimant was not and that Laura was doing the role already and have been for a number of years. Ms Wilson's account was that it is the Claimant who suggested that it was not worth her applying for the IT Systems Trainer role as that was Laura's role. Ms Wilson told her not to think of it like that and that there was not such a thing as anybody's role anymore the roles having been pooled. Ms Wilson recalls the Claimant being reluctant to say she would apply and saying that she did not want to take Laura's role. She asked is it worth it in respect of applying and she thought it was Laura's job and she was already doing it. Ms Wilson again confirms that it was not anybody's role and that they had been pooled. We note that the Claimant's account of what was said in that meeting was not consistent. Her evidence about what was said changed in a number of way. The Claimant alleges that during that meeting Mr Wilson provided her with a financial statement confirming her redundancy pay and notice pay and repeatedly told her that she would receive an awful lot of money if she just accepted redundancy. The Claimant claimed that she was intimidated by this and extremely upset. It was being made clear that her redundancy was a fore gone conclusion and that Laura would be offered the remaining role. She alleges that Ms Wilson kept telling her that she should not put herself under any unnecessary stress and it would be best for her to opt for the easy option at her age.

25 The Claimant recalls asking Ms Wilson a number of questions including whether or not the one remaining Systems Trainer role could be undertaken as a job share between herself and Laura. That Claimant says she had a number of questions for Ms Wilson and that her lists of questions are those set out at page 296. The list of questions included questions about whether the London Systems Trainer role could be a job share. The Claimant set out a number of packages that she states Laura would have no knowledge of. Another question being if my redundancy package is negotiable, I need to achieve what I would have lost in my pension and a question about the part-time customer services consultant role for Hamptons based at nights Standon House ?? Business Development Manager in East London.

26 The Claimant states that the response she received from Ms Wilson was limited to the job share and she told the Claimant that this could not be considered because Laura could not afford to reduce her hours she was still living with her parents and saving to buy a house. The Claimant describes this as being very upsetting she felt the appraisal was being dismissed out of hand based on Laura's personal circumstances. The Claimant reads into the content of an email from Ms Wilson on 17 April, page 297 – 298 that she says "I will do while I can to find an alternative role for you" a demonstrating the decision had been made already in respect of the interview. The Claimant's evidence was that as a result of the information given to her on that meeting on 17th she felt uncertain about which order to place her role preferences for the remaining roles. She spoke to Lee Trist and he suggested that she did not put any numbers next to the roles so that she could be considered fairly for all the roles. He also told her he was looking to number the preferences on his own form so the Claimant did as he suggest put the roles down in the order they had been sent to her and not in any order of preference and did not put any numbers next to them.

27 Ms Wilson giving her account in her witness statement and in her evidence subject to cross-examination and questions from the Tribunal was consistent. She categorically denied that she had said to the Claimant it would not be worth her replying for the IT Systems Trainer role and asserted that she told her to apply for as many roles as she wished and that she should not think of any roles belonging to anyone. Ms Wilson told us that unknowing to the Claimant she had already had a consultation meeting with Laura Marini-Goodwin on 16 April and Laura had confirmed that her first preference was not the IT Trainer role she would be going for the L & D Consultant role so based on this information Ms Wilson was no way guaranteed that Ms Marini-Goodwin would be applying for or would get to the role under her team of IT Trainer and in those circumstances it would be odd for her to try and put off the only IT Trainer. She accepts that the Claimant mentioned the possibility of a job share with Laura and she did follow that up also in respect of other roles that the Claimant asked about. The Claimant was clear that she wanted to combine any job share with another part-time role.

28 On 19 April 2018 Kelly Wilson confirmed to the Claimant that she had spoken to Laura who was not interested in the job share. We do not find that Ms Wilson was delaying or failing to pursue this suggestion of a job share as had been suggested by the Claimant.

29 We do not find that Ms Wilson told the Claimant it was not worth her applying for the new IT Systems Trainer role and we accept that she told the Claimant to maximise her chances by applying for as many role she could or is interested in. We do not find that there was a discussion of the respective packages used in order to put the Claimant off or persuade her not to apply. We found that in evidence Ms Wilson was straightforward and readily accepted that either Laura or the Claimant could do the role each would need a bit of training to get up to speed on packages or software that they had not used before that

was the same in respect of both of them and we are satisfied that given her knowledge of what Laura had told her the previous day she was genuine when she told us that she wanted to encourage the Claimant to apply for the Systems Trainer role and when she told us that she thought the Claimant was very capable of doing the role we also accept that evidence.

30 Ms Wilson told us that it was the Claimant who raised the question of her age in that meeting saying that she felt she was too old to learn some of the new systems and Ms Wilson tried to reassure her that they would arrange training and not to let her put this off. We accept that her account is true. We are satisfied that it was the Claimant who expressed doubts in respect of her age which may well have been a factor in her own mind but was not raised by Ms Wilson. We also find that is consistent with the notes of her interview for the available roles which followed where she is recorded by separate individual (page 325 – 330) as seeming unconfident in her ability to learn new systems.

31 We accept Ms Wilson's denial that she made any reference to the Claimant taking the easy option of her age or accepting the package which was a lot of money and that when she told us that she knew that the Claimant's priority was to stay in the business to keep her pension which was on favourable terms that was her understanding.

32 The Claimant in her witness statement (paragraph 35) described how she had a response from Ms Kelly Wilson about the job share with Laura after a lot of chasing Kelly finally confirmed that the Respondent would not consider a job share between us because Laura could not afford to reduce her hours.... We have seen the text message (page 300) from 19 April in which Ms Wilson confirmed that she had spoken to Laura that morning and she said that the job share would not work for her and she needed to work full-time. We do not consider there to be a delay in the terms described by the Claimant in her

witness evidence between her meeting on 17 and Ms Wilson speaking to Laura on the morning of 19 April and this is an example of where the Claimant has read more reluctance and the delay into the response than is warranted. We accept that the Respondent looked into the question of a job share they asked Ms Marini-Goodwin about it and when she said she was not interested they could not pursue it any further and we find that reasonable in the circumstances. We accept it is not unreasonable not to pursue a job share with an unwilling job share partner. We do not find this is anything to do with the Claimant's age or Ms Marini-Goodwin's age nor was it evidence of the Respondent's promoting Laura financial situation over the Claimant. In her evidence the Claimant accepted that she had not realised quite how the job share would need to be approached that there would need to be a willingness on both sides. Also the Claimant confirmed that she was not asking to go part-time she wanted to have two roles in order to keep her full-time hours.

33 On 19 April 2018 as stated above the Claimant completed her preference forms for the pooled roles (page 304 – 305). The Claimant had also applied for the role of admin team leader on 15 April for sending her CV to Amanda Smith the dates that she was available for interview. This was before she had her meeting with Kelly Wilson on 17. We find this is also consistent with the Claimant's having doubts of her prospects of getting the IT Systems Trainer role at a competitive interview. The Claimant sets out four roles but without a preference. She sets out them in the following order, LMS Admin Team Leader London, L&D Consultant Greater London, L&D Consultant MK/Cambs/BSE, Systems Trainer London.

34 On 24 April Kelly Wilson informs the Claimant that the interview is going to be in Milton Keynes. The Claimant informed the Tribunal that she had received a phone call asking her to explain her preferences and that was from Lydia Armes who was in HR. Ms

Armes denied that she made the call although she said it could have been her colleague Granan West who was assisting with the interviews. We accept that that call was made by somebody in the HR Team. She was asked for the reasons for not putting down a preference or an order preference and explained that her manager Lee Trist had told her not to put a number so that she could be considered fairly for all the roles.

35 On 24 April Kelly Wilson contact the Claimant by text to let her know that she has been told that the interview will take place will take place at Milton Keynes and it is because her first options was a UK role so that it is important that the manager for that i.e. Mark Bennett held the interview and that he would be assisted by Granan West. The Claimant response that she thinks she has got the wrong info and that is not her first option she had spoken to Mark Bennett on Friday and he said that the interview would be with Kelly. We accepts the Respondent's rational as set out in the email from Lydia Armes (page 321) on 25 April 2018 headed "invites for interviews Terry Wilson" Ms Armes informs Ms Wilson that they were waiting for confirmation as the roles were outside of the pooling. Ms Armes confirmed that she would drop them a note including that Terry Wilson to let them know they will be interviewed by Mark and Paul Buckland-White in Milton Keynes on Thursday they will be assessed for all roles at the same time so they have combined the competences for both to ensure they can measure appropriately and asked Ms Wilson to make it clear to them that a team leader is in pooled so their first preferences considered to be the second one on their forms which is in Mark's team but they would still go forward for team leader role but this is an alternative and not as suitable except that that is a reference to the phraseology used in the context of the redundancy and the role being considered as an alternative i.e. not a pooled role as suppose to a suitable role which was within the pool. We accept that was a decision taken by HR and there is no single right answer or right way of dealing with it, it is not part of a plot by Kelly Wilson to

ensure that the Claimant was not successful.

36 We also accept on the evidence we had that the Claimant only told the Respondent at the interview that she wanted the IT Systems Trainer role as her first choice she was not being interviewed for that role by Mark Bennett and Paul Buckland-White that was being interviewed for by Kelly Wilson in London because that was a role underneath her line management.

37 In respect of the Claimant's allegation did the Respondent failed to provide complete and accurate information about the roles of preferences and interview process. We find that the Claimant knew that there would be one interview only. She was given adequate information on the process. She was told to put her roles in order of preference but declined to do so for her own reasons which itself led to some confusion and resulted in her being interviewed in Milton Keynes and not in London.

38 Question E: did the Respondent make a predetermined decision to select Ms Marini-Goodwin for the role of IT Systems Trainer over the Claimant.

39 We are satisfied the Respondent did not set out deliberately favour Laura Marini-Goodwin. The question was whether a fair and objective selection process was followed.

40 The Claimant and Ms Marini-Goodwin were asked different questions and there were some differences in the marking. We looked at the process for deciding the interviews and the questions overall were of similar type being competency based and future focused this in line with the Respondent's leadership programme. Each candidate was interviewed by two people and there was a further layer of moderation after the interviews at a moderation meeting at which there was a sense check and Kelly was not as the Line Manager although indirect Line Manager was there to input in respect of the

Claimant's scores. It was suggested that the moderation meeting was not moderation but simply an allocation exercise. However, having heard the evidence of Kelly Wilson in respect of the scores and the sense check that she provided we do not find that allegation is made out and together with the evidence of Lydia Armes we do not find that they were trying to mislead about the calibration and we accept that Ms Wilson looked at the marks and the respective marks for the Claimant and Ms Marini-Goodwin and could not find a reason to challenge them. Ms Armes was looking over the process as a whole and the allocation of the highest scorers to the available posts in the pool. We accept that the questions they were asked were not identical at the interviews were open questions and allowing each candidate to show their ability based on skills and competency and a post to demonstrate their ability based on their past experience and we note that this process was agreed as part of the consultation (page 241) on 28 March 2018 an email from **Ola** Mullins under the heading pool and competency based interview. In respect of pooled roles principles of selection process had been agreed that employees who were in a pool for a number of available roles would be asked to complete a preference form based on their specific pool and asked to indicate their preferred role to be followed by a competency based interview any role specific technical question will be added to this as part of the interview as required. Once all interviews had been completed there would be a resource forum to moderate all scoring and poor deploys will be ranked and appointed accordingly. There is a bit technical qualification would be taken into account as part of the process as well as any formal warnings, interviews would be conducted by the Line Manager along with a second independent party and would be scheduled either London or Milton Keynes. We are satisfied that is the process that was followed. We are satisfied that the questions asked of the Claimant were combined to test the competencies involved in the different roles she had applied for. We heard from Mr Buckland White who told us that although he had not been specifically trained for this particular exercise he had been trained in the

leadership programme tool and describe the scoring he approached to that. In his evidence he explained that he started on the scoring by looking at 4 which is the highest mark and looking for evidence to support a 4 and then worked his way down on that depending on the answers and the evidence provided the answers to the questions. The competencies were the same. There was then a situation when there was simply two people into one post each individual was able to apply for a range of different posts.

41 We are not satisfied that is a matter for the Respondent and was within the range open to a reasonable employer. It was suggested to us that the interview should have been adjourned and the Claimant offered a re-interview when it became apparent that she was not been interviewed for her first choice. We find that was not unfair in the circumstances the Claimant was still wishing to be considered for the L&D Consultant role which was under Mark Bennett and also Paul Buckland-White was the relevant manager to consider the job share the Claimant had been proposing with Nina Benson and which the Claimant had come ready to discuss. The Claimant accepted that she was happy to be interviewed by Paul Bennett who had known her work previously and we are satisfied that she was not disadvantaged by the different questions a position to Laura who similarly would not know the questions in advance and the questions were addressed at the range of hours that she had applied for.

Job share with Tanya or Nina

42 This was discussed at the interview. The interview pack noted (page 234) the order of preference (whether that was a job share part-time or full-time satisfy that this was something that was discussed at the outset of the interview. The Claimant in fact ranked her preferences from 1 – 6 on the basis of the job shares at 5 and 6. We are satisfied that the Claimant was proposing a job share with both Tanya and Nina her first

preference in respect of job sharing so if Tanya were to get the Learning and Development Consultant job for Milton Keynes, Cambridgeshire and Bury St Edmunds area and Nina were to be successful with job for Greater London she would then be happy to do part-time for both areas to cover full-time equivalent and it was clear the Claimant was seeking to keep her full-time hours. Mr Bennett told the Claimant he would make sure it was considered and we are satisfied that it was considered at the next stage but rejected as not being practical for two jobs to be shared between three people. The Respondent pointed to the difficulty with one person covering two job shares in respect of arranging holiday, sickness cover etc and we find that that was a reasonable decision for it to reach within the range open to it.

43 The Claimant said she presented a document (page 310) for job share and that Tanya presented the document at page 310 proposal for a job share although the Respondent denies receiving that. We find that Mr Bennett did write to the Claimant (page 299) on 19 April to let her know what would need to be addressed in respect of considering a job share and that page 310 was produced as a result. It was sent by Tanya to the Claimant it is not clear that it was submitted to the Respondent by Tanya. Ms Armes was clear that no formal job share proposal was seen by her. It was accepted that there was a mention or discussion of a job share with Tanya by another candidate who had scored higher than the Claimant and that candidate declined and then both Tanya and Nina who were the highest scoring candidates for their particular role had agreed to increase to increase their hours they had both been on part-time hours and so there was no need for a job share there was no formal proposal for a job share from either Terry or Nina as far as Ms Armes was aware. Ms Armes believed that at the time there were other attempts being made to find alternative employment for the Claimant that she was offered three full-time roles and that her notice period was extended and a role

adapted to give her a role in the meantime give her a greater opportunity of securing another job in the Respondent's organisation. The Claimant rejected each of the three jobs as not being suitable. The job in Maidstone the Claimant told us that the daily commute costs her £5.00 per day each way to cross the bridge or tunnel and that due to the traffic would take considerable amount of time.

44 The Claimant was unsuccessful in securing alternative employments having rejected the offers made and her employment came to an end. She appealed the dismissal on 5 July 2018 and Amanda Brickell conducted the appeal. She conducted an investigation to find out more information about matters raised by the Claimant before reaching a conclusion. Unfortunately the Claimant declined to attend an appeal and told Ms Brickell that she did not wish to speak to her so that Ms Brickell was left with the information she was able to obtain from the Claimant's appeal letter drafted by her solicitors and from speaking to witnesses or emailing them and receiving their written accounts. Lydia Armes provided an account of 6 July 2018 (page 415 – 416) which dealt with the question of job share and the lack of success by the Claimant in the interview for the Systems Trainer role. In respect of the job share with Tanya Kerrison and Nina Benson she deals with that at paragraph 11 saying that geography had a significant role to play in preferences and Mark Bennett consider other options for how to cover the geographies to his strongest L&D Partners who were working three days per week they were the highest scoring from the interview process. Barry was considered for a role in the Milton Keynes and the Midlands area unofficially but in the end two individuals agree to increase their hours to four hours per week and as they were the more experienced and located appropriately this was considered the most suitable solutions to business.

45 We accept the evidence of Ms Armes gave to us and that she put before Ms Brickell. We are also satisfied that Ms Brickell carried out a thorough going investigation

into the matters raised by the Claimant in her appeal and that she addressed the matters raised by the Claimant in her initial appeal letter of 2 July 2018 (page 407) and subsequent letter from her legal representatives on 5 July (page 410 – 415) and we are satisfied that the conclusion she reached were genuine and were based having thoroughly investigated as best she could and that those were the actions within the range of reasonable responses open to a reasonable employer.

46 We do not find that the Claimant's age had any bearing on her treatment by the Respondent. We note that the Claimant initially alleged that Laura Marini-Goodwin was 22 years old but then accepted in evidence that she was in fact 37 or 38.

The relevant law

47 Section 13 of the EqA 2010 Section 136

"Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the 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.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act."

48 We were provided with noted written submissions from both counsel and a number of authorities handed up. We were given copies of *Eaton Ltd v King*, *Bascetta v Santandar UK Plc*, *Stroud Rugby Football Club v Monkman UKEAT/0143/13/SM*. Mr

Davis confined his written submission in respect of age discrimination to the four issues agreed to be live that namely:

- (1) That the meeting of 17 April Ms Wilson inferred it was not worth the Claimant applying for the Systems Trainer role;
- (2) The decision not appoint the Claimant to the Trainer role and instead selecting Ms Marini-Goodwin;
- (3) The failure to offer job share with Tanya Kerrison and/or Nina Benson;
- (4) And the decision to make the Claimant redundant.

49 He referred to the case of *Based Children's Wear Ltd v Othsudi* [2019] EWCA CIV 1648 and submitted that a prima facie case had been made out and the burden shifted to the Respondent. Ms Eeley referred to *Madaras v Nomura International Plc* [2007] IRLR 246 in her submissions and contended that a difference in treatment and a difference in age alone are insufficient to shift the burden of proof under Section 136 and that any appropriate comparator of a different age would also have been treated in the same way as the Claimant and dismissed.

50 In respect of the unfair dismissal we were referred to *Williams v Compare Maxam Ltd* [1982] ICR 156, *Mitchells of Lancaster Brewers Ltd v Tatersall* EAT0605/11, *Morgan v Welsh Rugby Union* [2011] IRLR 376, *Sampson Electronics (UK) Ltd v Monte De'Cruz* EAT0039/11, *Canning v National Institute for Health & Care Excellence UK* EAT/02414/18 and *British Aerospace Plc v Green & Others* [1995] ICR 10006 and *Quinton Hazel Ltd v Earl* [1976] ICR 296.

Conclusions

Age discrimination – Allegation 1

51 We do not find that Kelly Wilson informed the Claimant that she did not believe it was worth her applying for the remaining Systems Trainer role. Even if such a comment had been made there was no evidence that this was because of the Claimant's age as opposed to the fact that Ms Wilson was more familiar with the work of Laura or that Laura had been carrying out the London Based role for a number of years for instance however we do not find that those matters were in Ms Wilson's mind.

52 We have not found that the suggestion of a job share with Laura was rejected because of the Claimant's age it was rejected because Laura was not interested in it and therefore it was not workable.

53 Failure to assert the Claimant of the IT Systems Trainer role. We find that the reason the Claimant was not selected was because of the scores at the respective interviews and her score was lower by a number of marks than that achieved by Laura. We find that this was nothing whatsoever to do with her age but rather based on the answers of the candidate at each interview. We do not find that Ms Wilson's failure to challenge the difference in the marks at the moderation or calibration meeting had anything to do with the Claimant's age and she believed that either candidate can do the job however she was not surprised that Ms Marini-Goodwin performed better at interview given that the Claimant said to her at the meeting consultation that her lack of confidence in learning new systems and how that was reflected in the interview notes.

54 Failure to offer a job share role with Tanya Kerrison and/or Nina Benson and there is nothing to suggest this had any link with the Claimant's age whatsoever and no evidence upon which we could properly draw an inference that it was. The Claimant

seeks to point a finger at Ms Wilson's supposedly views of the Claimant's abilities. However, it was not Ms Wilson who made the decision we are satisfied that Ms Armes provided the Respondent's explanation and they wish to appoint the highest performing candidates into the roles.

55 We are satisfied that the appeal against dismissal was not rejected because of the Claimant's age but after investigation because the majority of her grounds of appeal were not made out and that Ms Brickell was satisfied that the selection for redundancy was fair and dismissal was fair in all the circumstances.

Unfair dismissal

56 It was not disputed that there was a potential redundancy situation within the meaning of Section 139 of the Employment Rights Act 1996 that the Respondent's business had reduction in the need for employees to carry out work of a particular kind or a particular kind in the place where the Claimant was employed. We are to judge the question of reasonableness and fairness against the range of reasonable responses that applies throughout and we are not to substitute our own view for that of the employer. We had regard to the guidance in *Williams v Compare Maxam* and considered whether their selection criteria were objectively chosen and fairly applied. Whether employees were warned and consulted about the redundancy and whether suitable work that was available or alternative work was offered.

57 We accept that this was a situation where the employer reasonably decided to adopt a process pooling and requiring those in the pool to interview for the remaining available positions. The process was consulted on collectively and agreed within that consultation and the Respondent to adopt that process and to open up all available roles

to those in the pool.

58 We accept that it was within the range of reasonable responses for the Respondent to apply its skills based or competency based selection criteria whether it was rolling out through its leadership programme and that the process of combining questions where a candidate was interviewing for more than one post was a reasonable one for it to adopt in the circumstances. We are not here to substitute our own marks or remark the selection or the interview process and whilst there was always going to be the room for different markers to more highly or more harshly within that process we are satisfied that overall the process was a fair one and that the markers in respect of the Claimant adopted a fair approach to their task. We heard from Mr Buckland-White and we accept his evidence and we took into account the evidence of Mark Bennett and note that there was no suggestion of any hostility from Mr Bennett towards the Claimant indeed she had indicated that they had got on well together when she had previously been line managed by him. We accept that his account of the interview was honest and that the Claimant did express concerns that she was familiar with older versions of the software and Laura Marini-Goodwin was familiar with newer versions and that is consistent with what we find she also said to Kerry Wilson and we accept Mr Buckland-White's evidence in respect of that interview that the Claimant was not confident in respect of all the systems that she would be required to use and that the source of consistent with what was noted on the interview record. We are satisfied that the process adopted by the Respondent was a fair one and that it was applied fairly to the Claimant. We note that she was offered a number of alternative roles that her employment was extended whilst further roles were sought for her and that she was last of the pool of employees to be dismissed for redundancy. We are satisfied that the reason for dismissal was redundancy and that it took place as part of a company wide restructure with a significant reduction in head count that the consultation

was extensive and meaningful changes were made to the proposals during that process and the employees affected were informed of the original proposals had an opportunity to input into the proposals and were informed as to the outcome at the end of the consultation period and they were also informed as to the process by which any applications for the remaining or pooled roles were to take place.

59 If there was any disadvantage to the Claimant through failing the process it was in her own doing in failing to specify a preference or order of preference until she arrived at her interview which is what caused her to be interviewed in Milton Keynes as opposed to a London and by Paul Bennett as opposed to Kelly Wilson. Mark Bennett and Paul Buckland-White opposed to Kelly Wilson.

60 In respect of the proposed job share with Tanya Kerrison and/or Nina Benson again we accept that they were considered at the interview as a possibility and the evidence we heard it was raised at the moderation meeting however it was not the businesses preferred solution and we accept that that was a decision open to the Respondent to take and that it made that decision on reasonable grounds.

61 We do not find that the criticisms set out in the list of issues of the process were made out or any of them and we preferred the submissions of Ms Eeley and in conclusion we find that the Claimant's dismissal was within the range of reasonable responses open to a reasonable employer and was therefore fair.

Employment Judge C Lewis
Date 19 Feb 2020