IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Combined Cases Nos: 4114960/2019, 4114961/2019 and 4114962/2019 (Multiple 9251) Heard at Edinburgh on the 26th, 27th, 28th, 29 July 2021

10 **Employment Judge J G d'Inverno**
Tribunal Member Ms Martha McAllister
Tribunal Member Mr Trevor Jones

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William Blount	**1st Claimant** **Represented by:** **Mr I Burke, Solicitor**
Agnes Dair	**2nd Claimant** **Represented by:** **Mr I Burke, Solicitor**
Thomas Yates	**3rd Claimant** **Represented by:** **Mr I Burke, Solicitor**
Wood Group Industrial Services Limited	**Respondent** **Represented by** **Mr D Hay, Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is:

40 **(First)** That the First and Second named claimants' complaints of Direct Discrimination because of the protected characteristic of Age are dismissed.

(Second) That the First, Second and Third named claimants' complaints of Unfair Dismissal are dismissed.

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REASONS

1. These combined claims called for Final Hearing, in conventional "In Person" form, before a full Tribunal at Edinburgh at 10 am on the 26th, 27th, 28th and 29th July. All 3 claimants were represented by Mr Burke, Solicitor. The Respondent Company, Wood Group Industrial Services Limited, was represented by Mr Hay, Advocate.

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The Claims

2. The case is one in which:-

   (a) all 3 claimants present complaints of Unfair Dismissal in terms of section 98(4) of the Employment Rights Act 1996; and,

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   (b) and the 1st and 2nd named claimants present, in addition, a complaint of Direct Discrimination, because of the protected characteristic of Age, in terms of section 13 and 39(2)(c) of the Equality Act 2010.

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      (i) The 1st and 2nd named claimants give notice of relying primarily upon named comparators and, in the alternative, upon a hypothetical comparator;

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      (ii) The alleged less favourable treatment relied upon is that of their inclusion in the pool of

affected employees at risk of redundancy, and their subsequent dismissal.

The Response

3. The respondents resist all claims asserting:-

   (a) that the claimants were dismissed for the potentially fair reason of redundancy; and further,

   (b) that they operated a fair selection process and procedure in reaching a decision to dismiss for reason of redundancy and including,

   (c) acting reasonably in the identification of the selection pool, and

   (d) that, in all the circumstances of the case they acted reasonably in treating the claimants' selection as a sufficient reason for dismissing them.

4. The respondent denies that they directly discriminated against the 1st and or 2nd claimants in terms of section 13 and or 39(2)(c) and (d) of the Equality Act 2010; asserting that "Age" played no part in the composition of the pool or in the decision to dismiss.

   (a) They put the claimants to their proof in respect of the relevance of identified comparators.

   (b) They deny that they treated the claimants or any of them less favourably than any hypothetical or actual comparator identified;

   (c) They deny, let it be assumed that there was any less favourable treatment, that it occurred because of the claimants' age.

(d) On an *esto* basis, and in the alternative, they maintain, let it be assumed that any such age connected less favourable treatment occurred, that the same was a proportionate means of achieving a legitimate aim and thus, that they did not discriminate against the claimants.

The Issues

5. In the course of Case Management Discussion conducted prior to the Final Hearing parties agreed and submitted, and the Tribunal approved and had recorded, a list itemising the Issues requiring investigation and determination in the case at Final Hearing, viz;

"AGREED LIST OF ISSUES

THE COMPLAINTS

1. The Respondent understands that the Claimants have brought complaints of Unfair Dismissal and that Mr Blount and Ms Dair have also brought claims of Direct Age Discrimination under s13 and s39(2)(c) Equality Act 2010. The Respondent resists all of the claims.

LEGAL ISSUES

UNFAIR DISMISSAL

1.1 What was the reason for the dismissal?

1.2 Was the reason for the Claimant's dismissal potentially fair within the meaning of section 98(1) and section 98(2) of the Employment Rights Act 1996 ("ERA")?

1.3 Did the Respondent act fairly in treating that alleged reason as a sufficient reason to dismiss the Claimant?

1.4 Was the dismissal within the range of reasonable responses that a reasonable employer could choose to adopt?

5 1.5 Did the Respondent follow a fair procedure in reaching the decision to dismiss the Claimant, including whether the selection pool used for the Claimant was fair and reasonable?

1.6 Did the Respondent and the Claimant follow the ACAS Code
10 of Practice on Disciplinary and Grievance Procedure?

15 **DIRECT AGE DISCRIMINATION**

Sections 13 and 39(2)(c) and (d) Equality Act 2010: Direct Discrimination because of Age

2. Who is the Claimant's real or hypothetical comparator whose circumstances must be materially the same as the
20 Claimant's?

2.1 Was the Claimant treated less favourably that the comparator would have been?

2.2 If so, was the reason for the treatment the Claimant's age?

2.3 If so, was the less favourable treatment a proportionate means
25 of achieving a legitimate aim?"

Sources of Oral and Documentary Evidence

Documents

6. Parties lodged a Joint Bundle of Documents extending to some 306 pages, to which, each party added a supplementary bundle at the outset of the Hearing; for the claimants' supplementary pages 1 to 36 and for the respondent pages 37 to 42, and to some of which the Tribunal was referred in the course of evidence and submission.

Oral Evidence

7. For the respondents the Tribunal heard evidence from:

   (a) (1) Mr Paul Leneghan, Head of Human Resources for the United Kingdom and Ireland (formerly the respondent's Employee Relations Manager)

   (2) Mr Mike Pott, Senior Project Manager, and who functioned as the Appeal Officer in the claimants' internal appeal against dismissal

   (3) Mr Benny McConnachie, the respondent's Operations Manager and Line Manager of the claimants, and who was the Dismissing Officer,

   (4) Mr Alan Westhall, the respondent's Business Manager who gave evidence in answer to the allegation of discrimination

   For the Claimants

   (b) Each of the claimants, Mr William Blount, Mrs Agnes Dair and Mr Thomas Yates, gave evidence on their own behalf.

8. All witnesses gave their evidence either on oath or on affirmation. In the case of Mr Paul Leneghan and Mr Mike Pott each witness gave their evidence

remotely, via the Cloud Based Video Platform. The remaining witnesses gave their evidence in person.

9. At the pre hearing check Case Management Discussion, the parties' representatives were asked to revisit the witness timetable with a view to ensuring that the Final Hearing would be able to conclude within the 4 days allocated to it. Parties' representatives had complied with that Direction and the Tribunal records its appreciation of the professional and effective manner in which both representatives managed the eliciting of relevant evidence from the witnesses, while adhering to timetable.

Findings in Fact

10. On the oral and documentary evidence presented and on the submissions made, the Tribunal unanimously made the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the Issues.

11. Each of the 3 claimants were, at the material time for the purposes of their complaints, employed by Wood Group Industrial Services Limited.

12. The 1st named claimant is Mr William Blount who presents complaints of Unfair Dismissal and of Direct Age Discrimination.

13. The 2nd named claimant is Mrs Agnes Dair who presents complaints of Unfair Dismissal and of Direct Age Discrimination.

14. The 3rd named claimant is Mr Thomas Yates who presents a complaint of Unfair Dismissal.

15. The respondent provides industrial services globally, both offshore and onshore, across a number of industries including; oil and gas, petrochemical, pharmaceutical, power generation, marine, utilities, transport, infrastructure

and building construction and refurbishment of sea going craft, including naval vessels.

16. The core services provided by the respondents include: scaffolding, rope access, thermal insulation and industrial painting, electrical control and instrument expertise, and cleaning (amongst others).

17. As at the Effective Date of Termination of the claimants' employments, the Respondent Company, Wood Group Industrial Services Limited, was a subsidiary of Wood Group Plc.

18. On 6th of February 2020 the Respondent Company became part of the Kaefer Group.

19. The respondent employs employees across 16 sites in the United Kingdom and currently less than 100 employees at Rosyth where the claimants were all based.

20. At the time of the onset of the 2019 redundancies in which the claimants were dismissed, the claimants were based at Rosyth the respondent employed approximately 300 people at Rosyth.

21. The claimants were originally employed by Pyeroy Limited which was acquired by Wood Group Plc in July 2013. The claimants' employment was subsequently transferred to the respondent around January 2014, at which time the respondent was called Pyeroy Group Limited, the respondent's name changed to Wood Group Industrial Services Limited in January of 2015.

22. The claimants' employment contracts, which were originally entered into with Pyeroy Limited, all provided that:-

"*Place of work will be at our offices in Rosyth. However the employee may be required to work at such other locations within the UK as the employer may require".*

5 23. Rosyth based employees' new contracts with the respondent, which came into effect for those who accepted them on 1st April 2019, all provide that the employees work location is Rosyth.

24. The new contracts also contained a mobility clause in the following terms:-

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"*You may be required to work from any reasonable Work Location as may be determined by the Company from time to time to suit reasonable operational requirements and/or as the Company considers necessary for the performance of your duties, including but*

15 *not limited to working offshore facilities or on site*".

25. The respondent, formally Pyeroy Limited, then Wood Group Industrial Services Limited and now (Kaefer Limited) operate business from, amongst other locations, the former naval dockyard in Rosyth.

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26. The work carried out by the respondent has included the manufacture, repair or refitting of boats and ships including, but not restricted to, naval vessels.

27. That work was traditionally carried out through a business unit internally

25 referred to as "Marine", with staff at Rosyth being flexibly deployed as required across contracts ongoing there and, from time to time at other locations, including Faslane.

28. Contracts, of which a number may have been running at the same time,

30 started and ended at different times.

29. When a contract came to an end the historical practice in Marine, for a number of years prior to the contract from the assembly of the aircraft carriers HMS The Queen Elizabeth and HMS The Prince of Wales, had been:-

(a) to place all of the workforce engaged on contracts within Marine at Rosyth into a single pool of labour at risk of redundancy,

(b) scoring the whole labour force under a redundancy matrix and ultimately, insofar as it was not possible to reallocate the whole of the workforce amongst the continuing contracts,

(c) selecting a number for redundancy and dismissing them for that reason.

30. Often, during the period when that practice had been followed, other contract work had been secured such as to obviate the need for large scale redundancies.

31. All 3 of the claimants worked at Rosyth within the Marine Unit of the business. By 2007 all were Industrial Cleaning Supervisors. Industrial cleaning work is not as specialised as painting or scaffolding, both of which require specific training and qualifications.

32. In around 2008 the respondent secured a contract for work connected with the construction of the 2, Queen Elizabeth Class ("QEC"), aircraft carriers, "HMS Queen Elizabeth" and "HMS The Prince of Wales". The contract came to be referred to as the ("QEC") contract. Parts of each of the 2 ships were constructed at a number of differing sites across the United Kingdom. Those constructed elements were then transported to Rosyth where each of the vessels was assembled.

33. While in part similar to other marine contract work, the size and duration of the QEC contract was substantially greater in both size and duration, than any Marine contract undertaken by the respondents previously.

34. Between 2010 and 2011 Pyeroy Limited entered into a joint venture, named "Ships Support Services Limited ("SSSL")", with Cape Industrial Services Limited. SSSL bid for and won the painting and scaffolding contract on the Queen Elizabeth Class aircraft carriers ("QEC"). Within the joint venture Cape Industrial Services Limited were responsible for the scaffolding work and Pyeroy Limited were responsible for painting services on the contract.

35. With the exception of one individual, so employed for purposes of arm's length objectivity, SSSL did not employ individuals directly.

36. At or about the same time the respondent's Marine business tendered directly for and secured the contract for provision of cleaning services and of fire sentries to the QEC contract. That contract came to be and was known as, the "Composite Services Contract".

37. The QEC contract formed a substantial part of the respondent's work at Rosyth from 2011.

38. At or about the same time, the respondent's marine work in Rosyth was being reduced by its main client "Babcock". All 3 claimants were working on the respondent's other marine work at Rosyth at that point and the requirement to increase manning levels on the QEC contract work, on the one hand, combined with reducing scope of other marine work, on the other, resulted in the decision on the respondent's part to move the claimants, and many other individuals, across to work on the QEC contract, which decision resulted in their continued employment in Rosyth.

39. Non QEC marine work continued to be carried out at Rosyth concurrently with the QEC contract but, by 2017, 2018 and 2019 it had progressively and significantly decreased.

40. The QEC contract work ultimately was valued in tens of millions of pounds.

41. The manpower requirements for the QEC contract project substantially increased shortly after its commencement and included a requirement for substantially greater numbers of fire sentries.

5 42. All of the Industrial Cleaning Supervisors and all but a few of the blue collar cleaning staff who, at or about 2011, were working in the respondent's marine business were assigned to work on the QEC.

43. The assignment of staff from Marine to the QEC contract was not expressed
10 as a formal variation of contract. No such variation was required it already being the case that the claimants' terms and conditions of contract and of employment did not provide that they would, and conferred no right upon them to, work only within the Marine business unit.

15 44. The completion of the first of the two aircraft carriers triggered a diminution in the requirement for employees to perform work at Rosyth of the type carried on in the QEC contract.

45. That diminution, in 2017, resulted in the initiation of a redundancy process
20 amongst the workforce who at that time were assigned to the QEC contract, with all of the workforce in that category being put at risk of redundancy. In the event none of the Composite Services Supervisors were made redundant, with the exception of 2 individuals who volunteered for redundancy, as all were needed to work on the second aircraft carrier HMS
25 The Prince of Wales. Some other employees in the pool were made redundant at that time.

46. The historical practice of pooling employees working on all contracts at Rosyth was departed from on that occasion in 2017 and the non QEC
30 workforce were not included in the pool.

47. A continuing diminution of non QEC marine contract work triggered a similar redundancy process within the Marine business unit in 2018. The previous historical practice of pooling employees working on all contracts at Rosyth

was again departed from in 2018 with those employees working on non QEC marine contract work being pooled as at risk in the 2018 marine redundancy process. None of the workforce who, in 2018, were assigned to and working on the QEC contract, which included the claimants, were pooled as at risk of redundancy in the 2018 marine redundancy process.

48. In the event, the requirement to make redundancies in the 2018 marine process was avoided by a combination of measures including, the placing of some affected employees in alternative work which was being undertaken in locations other than Rosyth viz, Faslane and at Portsmouth, and reassignment, at that time, of 12 non QEC marine labour force to work on the QEC contract.

49. The completion, in 2019, of the second aircraft carrier, HMS The Prince of Wales, and what would be the associated cessation of the requirement to carry out work on that contract, triggered a further redundancy process.

50. By 2019 other marine work undertaken by the respondent's at Rosyth, that is to say non QEC marine work, had diminished such that the non QEC marine workforce had reduced from 300 in 2011 to less than 50 in 2019.

51. That diminution has continued since 2019 resulting, at the last day of Hearing (29 July 2021), in a total workforce of 19 including only 3 blue collar cleaning staff who were supervised by a Painting Supervisor. No Cleaning Supervisor or Senior Supervisor posts have survived. That diminution, in non QEC marine work, resulted from a failure, on the part of the respondent's principal client "Babcock", to bring to fruition their plans for having in place alternative work streams to that of ship building.

52. At Rosyth, the respondents recognised "Unite the Union" for collective bargaining and consultation purposes.

53. None of the 3 claimants were members of Unite the Union.

54. The interests of the 3 claimants were represented, in the collective consultation by their chosen representative Mr David Green.

55. At the outset of the 2019 redundancy process, the respondent's Managers who were charged with taking forward individual consultations, were advised by the respondent's P&O, ("Persons and Organisation") ("HR") Department, that it had been agreed between Management and Unite the Union in collective consultation, that all of the labour force working on the QEC contract at that time were to be pooled as at risk of redundancy and that that pool not include the non QEC marine workforce, that is those employees engaged in working, not on the QEC contract but rather, on other non QEC marine contract work, and who had for their part been pooled for redundancy in the previous year 2018.

56. Following the completion of the collective consultation in the 2019 QEC contract redundancy process, individual consultations were held with each of the affected individuals, including with each of the 3 claimants.

57. In the course of consultation, affected individuals were referred to the internal vacancy list available on the respondent's intranet, and accessible remotely via the internet, upon which occurrent vacancies across the respondent's whole Group, in all UK locations in which they carried out work, were listed; the same, with a view to their identifying potential suitable alternative employment and thus avoiding the need for redundancies.

58. The 1st and 3rd named claimants did not look at those lists. They attempted to do so on more than one occasion, from the hot desk computer in the business office, but for one reason or another, including IT connectivity difficulties, they did not succeed in accessing the list.

59. The claimants wished to be provided with refresher and reskilling training as part of the redundancy process.

60. The respondent's aspiration and intention was to provide refresher training but, because of budgetary constraints, restricted to the refreshing of any previously held qualification which an individual was utilising in their current role.

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61. At the outset of the consultation process one of the respondent's Operations Managers, Mr McConnachie, had himself misunderstood the restricted scope of the training support that the respondents aspired to provide and in non-consultative discussions with the claimants, amongst others, had initially

10 communicated the mistaken belief that training support would be broader in scope than it was actually ever intended to be.

62. Although some of the claimants held some relevant certificates which would have qualified within the narrow refresher training scope, in the event they did

15 not receive refresher training in those disciplines because, by the time the position had been clarified, there was no longer a budget available from which such training could be funded and or because they were unable to attend an arranged course due to family illness.

20 63. As at each of the claimants' Effective Dates of Termination, the respondent's non QEC marine staff at Rosyth, had reduced to a total of 19, which number included no Cleaning Supervisors and only 3 blue collar cleaning workers whose supervision was discharged by a Painting Supervisor.

25 64. With the exception of one clerical member of staff and a small number who were able to re-deploy to other internal vacancies, all of the QEC contract staff at risk in the 2019 redundancy process, were made redundant. The evidence of the respondent's witnesses, who had involvement in the 2019 redundancy process, was consistently that age had played no part in the

30 decisions relating to the population the pool or in the decisions to make all but one of the members of that pool redundant.

65. Although affected individuals were scored according to a matrix against the contingency that there might need to be selection in the event of phased

redundancies, that requirement for selection did not arise and it was not necessary to resort to individuals' matrix scores in the course of their being selected for redundancy.

66. Each of the 3 claimants was dismissed for reason of redundancy which is a potentially fair reason.

67. At the time of the 2019 redundancy process the 3 claimants were the only employees of the respondent, then working on the QEC contract, who had not been recruited directly to work on it but rather had been transferred to it from other marine contracts upon which they were working at the time of their transfer.

68. When responding to the claimants' proposition that they should have been excluded from the pool of employees at risk and transferred back to the "Marine Business Unit" from which they considered they had been seconded to work on the aircraft carriers in 2011, the respondent advised the claimants that because they had been working on the aircraft carriers for in excess of 7 years, their transfer to work on the QEC contract had been retrospectively deemed by the respondents to be permanent.

69. The transfer of the claimants in or about 2011 from working on other marine contracts, as they then were, to working on the Composite Services element of the QEC contract were not permanent transfers.

(a) No formal process was followed when giving effect to the transfers.

(b) They triggered no change to the claimants' terms and conditions of employment, it already being a condition of their employment that they could be deployed to work on any contract being operated by the respondent.

(c) Had the respondents wished to engender and to give effect to a permanent transfer of the claimants to working

on the QEC contract only, the respondents would have required to specifically engage with each of the claimants and to have secured their agreement to such a variation in their terms and conditions of employment.

5 (d) No such process had been engaged with and no such agreement had been achieved.

70. But for its duration, the Composite Services Contract upon which the 3 claimants were working as at the Effective Date of Termination of their 10 employments, had no specific status which differentiated it from previous marine contracts.

71. Upon termination of their employments for the asserted reason of redundancy the 1st , 2nd and 3rd named claimants William Blount, Agnes Dair, Thomas 15 Yates respectively received statutory redundancy pay of £15,750, £14,437.50 and £9,187.50.

72. Having already received redundancy payments, in the event of their complaints of Unfair Dismissal succeeding, the 1st, 2nd and 3rd named 20 claimants have no entitlement to a basic award.

73. The 1st named claimant, William Blount, was continuously employed by the respondents from 8th August 1994 to 17th September 2019. His date of birth is 10th October 1954. He was 64 years of age as at the Effective Date of 25 Termination of his employment at which point he had accrued 29 complete years of service.

74. As at the Effective Date of Termination of his employment the 1st named claimant's gross annual salary was £45,072 per annum, his gross monthly 30 salary was £3,756 per month, his gross weekly salary was £867 per week, his net weekly salary was £648 net per week.

75. In addition to his salary, the 1st named claimant received benefits in kind being a 5% employer's contribution to a defined contribution pension scheme at a rate of £43 per week.

5 76. In the 6 month (26 week) period which elapsed from the Effective Date of Termination of the 1st claimant's employment, the 1st claimant experienced a loss of earnings of £16,848 after tax (26 weeks x £648), from which potential loss there falls to be deducted the sum of £5,917 being income earned by the 1st named claimant from his new employment which commenced on
10 6th January 2020.

77. The 1st claimant suffered loss in the same 26 week period, of employer's pension contributions in the sum of £1,118 being (26 x £43 per week).

15 78. The 1st claimant also suffered the loss of his statutory rights.

79. The 1st named claimant took a conscious decision not to actively look for alternative employment at any point prior to his Effective Date of Termination and for a further period thereafter.

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80. The 1st named claimant secured alternative employment with "Aquatec" on the 6th of January 2020.

81. The 3rd named claimant also secured employment with Aquatec, in the same
25 role as the 1st claimant at or about the same time, in January 2020.

82. The 1st and 3rd named claimants' employment with Aquatec provides them with remuneration at a rate less than that at which they were paid while in employment with the respondents producing a net loss of earnings going
30 forward.

83. Shortly after obtaining their new employment with Aquatec, the 1st and 3rd named claimants formed the view that they wished to remain in that employment notwithstanding its lower rate of remuneration.

84. They took a conscious decision not to look for alternative employment which might pay them at a higher rate. They stopped looking for alternative employment once they had secured employment with Aquatec in which employment they each continued as at the date of Hearing.

85. The 2nd named claimant, Agnes Dair was continuously employed by the respondents from the 23rd of May 1998 until the 16th of September 2019. Her date of birth was the 8th of November 1962. She was 56 years of age as at the Effective Date of Termination of her Employment at which point she had accrued 11 complete years of service.

86. As at the Effective Date of Termination of her Employment the 2nd named claimant's gross annual salary was £35,616, her gross monthly salary was £2,968 per month, her gross weekly salary was £684 per week and her net weekly salary was £532 net per week.

87. In addition the 2nd named claimant received benefits in kind being a 5% employer's contribution to a defined contribution pension scheme at a rate of £34 per week.

88. In the 6 month (26 week) period which elapsed from the Effective Date of Termination of the claimant's employment the claimant experienced a loss of earnings of £13,832 after tax (26 weeks x £532), from which potential loss there falls to be deducted the sum of £2,817, being income earned by the 2nd named claimant from her new employments the first of which she commenced on 18th November 2019.

89. The 2nd named claimant suffered loss in the same 26 week period of employer's pension contributions in the sum of £884 being (26 x £34 per week).

90. The 2nd named claimant also suffered the loss of her statutory rights.

91. The 3rd named claimant Thomas Yates was continuously employed by the respondents from the 4th of October 2003 until the 11th of October 2019. His date of birth is 7th May 1973. He was 46 years of age as at the Effective Date of Termination of his Employment at which point he had accrued 16 complete years of service.

92. As at the Effective Date of Termination of his Employment the 2nd named claimant's gross annual salary was £35,772 per annum, his gross monthly salary was £2,981 per month, his gross weekly salary was £688 per week and his net weekly salary was £534 net per week.

93. In addition to his salary the 3rd named claimant received benefits in kind being a 5% employer's contribution to a defined contribution pension scheme at a rate of £34 per week.

94. In the 6 month (26 week) period which elapsed from the Effective Date of Termination of the 3rd named claimant's employment, the 3rd named claimant experienced a loss of earnings of £13,884 after tax (26 weeks x £534) from which potential loss there falls to be deducted the sum of £5,992 being income earned by the 3rd named claimant from his new employment which he commenced on 6th January 2020.

95. The 3rd named claimant suffered loss, in the same 26 week period of employer's pension contributions in the sum of £884 being (26 weeks x £34 per week).

96. The 3rd named claimant also suffered the loss of his statutory rights.

97. In the circumstances presented it was reasonable to expect the 1st, 2nd and 3rd named claimants to secure new employment within 6 months of their redundancy and, in the event that his complaint of unfair dismissal had succeeded, loss of earnings and associated benefits experienced by them beyond that date would not fall to be regarded as resulting from the conduct of the respondent.

Applicable Law

98. The Tribunal was referred to the following authorities which, in so far as relevant to the Findings in Fact made, it found instructive and of assistance.:-

(1) ***James W Cook v Tipper*** [1990] ICR 716 *per Neill LJ at 729 E – G*

(2) ***Williams v Compair Maxam Limited*** [1982] IRLR 83 EAT

(3) ***Langston v Cranfield University*** [1998] IRLR 172 EAT

(4) ***Thomas & Betts Manufacturing Limited v Harding*** [1980] IRLR 255

(5) ***Capita Hartshead Limited v Byard*** [2012] ICR 1256 at para [31]

(6) ***NC Wathing v Richardson*** [1978] ICR 1049

(7) ***Eaton Limited v King*** [1995] IRLR 75 EAT

(8) ***Mugford v Midland Bank*** [1997] IRLR 208 EAT per Judge Peter Clark at para [41] – IRLR Report pages 406 to 407

(9) ***Quinton Hazel Limited v Earl*** [1976] IRLR 296 EAT at para 7

(10) On its own initiative during deliberation the Tribunal also considered *Wrexham Golf Co Limited v Ingham* UKEAT/0190/12/RN, which is authority for the proposition that the band of reasonable responses test applies to an employer's composition/selection of a pool of persons at risk of redundancy

Age Discrimination

99. The statutory elements which must be established if a complaint of Direct Discrimination is to succeed are encapsulated within the terms of section 13 of the Equality Act 2010 ("EqA"), which is in the following terms:-

"**13 Direct discrimination**

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

5 (6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

10 (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5
15 (work)."

100. It can be seen, on the face of section 13, that amongst others one essential element is the proof, implied, that the less favourable treatment, let it be assumed that the complained of treatment is so established, which a claimant
20 suffers at the hands of a respondent, occurred because of the protected characteristic (in the instant case, because of Age). That causal connection, absent which a complaint of Direct Discrimination must necessarily fail, may be established expressly on the balance of probabilities or through the proof of primary facts upon which the Tribunal would be entitled to conclude, in the
25 absence of an alternative explanation, that the motivation for the treatment was discriminatory (see section 136 EqA (Burden of Proof)) that latter circumstance, the burden of proof switches to the respondent to establish, on the balance of probabilities, that the actual reason for the treatment which occurred was a reason unrelated to the protected characteristic.

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101. The statutory provisions relating to the constitution of a redundancy dismissal and of unfair dismissal are to be found respectively in sections 139(1)(b)(ii) and sections 98(1), (2) and (4) of the Employment Rights Act 1996. The terms of those provisions were well known to both representatives and to the

Tribunal and are readily accessible on the internet. They are accordingly not rehearsed at length in this Note of Reasons but rather their effect is summarised together with the ratio of the case authorities to which the Tribunal was referred, by a reiteration of the respondent's representative's adumbration of them with which the claimant's representative was and the Tribunal is in agreement viz:-

(a) Redundancy is a potentially fair reason for an employee's dismissal under **section 98(1) and (2)** of the Employment Rights Act 1996 (ERA).

(b) A redundancy dismissal occurs where the dismissal is wholly or mainly attributable to amongst other things, the fact that the requirements of the employer for employees to carry out work of a particular kind in the place where the employee was employed, has ceased or diminished. – **section 139(1)** ERA, specifically **section 139(1)(b)(ii)**.

(c) The burden is upon the employer to prove such diminution in order to establish the reason for dismissal in terms of section 98(1) and (2) ERA.

(d) In considering whether the employer has made out a genuine "redundancy situation", it is not for the Tribunal to sit in judgment of the particular business decision to make posts redundant apart from whether the decision was genuine and based on proper information.

- ***James W Cook v Tipper*** [1990] ICR 716 *per Neill LJ at 729E – G paragraph 99 where the above is done, thereafter the issue before the Tribunal is whether, having regard to the reason shown by the employer, the dismissal is fair or unfair, having regard to the reasonableness of the actings of the employer in treating the reason as a*

*sufficient reason to dismiss and falls to be determined in accordance with equity and the substantial merits of the case – **section 98(4)** ERA.*

5 (e) The section 98(4) test, in redundancy cases, focuses on the following topics (***Williams v Compare Maxam Ltd*** [1982] IRLR 83 EAT; and, ***Langston v Cranfield University*** [1998] IRLR 172 EAT):-

10 (i) whether there was a reasonable pool of employees drawn from which to select the redundant employee;

(ii) whether the selection criteria used to select from
15 the pool were reasonable

(iii) whether those criteria being reasonable, were applied fairly;

20 (iv) whether there was individual consultation or warning with the affected employee;

(v) whether there have been sufficient efforts to find alternative employment

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102. In relation to selection of the pool, ***Thomas and Betts Manufacturing Limited v Harding*** [1980] IRLR 255 is authority for the proposition that if an employer has applied its mind to the pool and its composition and has not done so unreasonably that should be sufficient ***Capita Hartshead Limited v***
30 ***Byard*** [2012] ICR 1256 at para [31]. It also encourages Tribunals to scrutinise pools of one with care particularly when there might readily be other individuals who could have been included in such a pool.

103. Regarding the reasonableness of selection criteria, ***NC Wathing v Richardson*** [1978] ICR 1049 is authority for the proposition that the appropriate test is not for the Employment Tribunal to substitute its own criteria but to consider whether the criteria used were such that no reasonable employer would have adopted them.

104. In relation to whether selection criteria were applied in a reasonable way, **Eaton Limited v King** [1995] IRLR 75 EAT informs Tribunals at first instance that the appropriate question to ask is "was the scoring done in a reasonable way". The Tribunal is not to undertake a detailed reassessment of the scores. It is sufficient to satisfy this topic for the employer to show that a reasonable system for selection had been set up and it had administered it fairly.

    (a) Eaton also held that a Manager is entitled to rely on the assessments made by his/her subordinates of employees in the pool and not be required to adduce such evidence at the Tribunal, subject to there being no reason to doubt the reliability of the information received.

105. Regarding whether reasonable warning/consultation has occurred ***Mugford v Midland Bank*** [1997] IRLR 2008 EAT, per Judge Peter Clark (para 41) (IRLR Report at pages 406 to 407, is authority for the proposition that it is a question of fact and degree whether consultation with the individual employee was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result rather, the overall picture must be viewed up to the date of termination.

106. In relation to efforts made to find alternative employment ***Quinton Hazel Limited v Earl*** [1976] IRLR 296 EAT, at para [7], is authority for the proposition that the employer is not required to make exhaustive searches or efforts in this regard but rather only that which would be reasonable for the particular organisation.

Summary of Submissions

107. Each party's representative addressed the Tribunal in submission, firstly identifying those material Findings in Fact, relevant to the determination of the Issues before the Tribunal, which they each contended were supported by the evidence and which they respectively invited the Tribunal to make; and thereafter, each made submissions in law, predicated upon the Findings in Fact which they respectively invited the Tribunal to make and, on an *esto* basis in the alternative let it be assumed the Tribunal were not to make some of the proposed material Findings.

108. The helpful submissions made by parties' representatives were fully noted by the Tribunal and considered by it. They are accordingly not set out *ad longum* but rather are summarised here.

Submissions for the Respondent

109. Mr Hay, for the respondent, invited the Tribunal to find on the evidence that there had existed within the respondent's business at Rosyth Dockyard in 2019, a genuine redundancy situation, precipitated by the completion of the last of the 2 aircraft carriers upon which the vast majority of the respondent's employees at Rosyth were working.

110. The respondent's representative invited the Tribunal to dismiss, as wholly unsupported by any evidence of causal connection, the proposition that claimants 1 and 3 were dismissed for reason of their age. Although the 1st named claimant, Mr Blount, had asserted in evidence that remarks made to him by the respondent's Mr Westhall included a statement along the lines of "*Put your feet up and leave the work to the younger guys*" which statement Mr Westhall, for his part, denied making, let it be assumed that the Tribunal were to hold that Mr Westhall had made that remark and further that the comparators relied upon by the claimant were relevant comparators for the purposes of section 13, all of which was denied, there was no evidence before the Tribunal that went to establish that the less favourable treatment

complained of by the 1 and 2 claimants, namely their dismissal, was because of their age, or in any way related to the remark attributed to Mr Westhall.

111. *Per contra*, there was evidence before the Tribunal, unchallenged in cross examination, that Mr Westhall had no involvement whatsoever in the 2019 redundancy process including in the determination of the composition of the pool of "at risk" employees. He was not a decision maker in that regard. Further, such evidence as the Tribunal had heard from decision makers was unanimously to the effect that age played no part in any decision taken in the redundancy process. On that ground alone, submitted Mr Hay, the claim was to be regarded as having not succeeded and fell to be dismissed.

112. That being the case, the appropriate finding as to the reason for dismissal was that the claimants had each been dismissed for reason of redundancy which was a potentially fair reason.

113. The focus, in terms of the challenge to the reasonableness of the respondent's actings was directed by each of the respondents to their inclusion in the pool of "at risk employees" on the one hand and or the non-inclusion of the residual marine workforce in that pool, on the other. In Mr Hay's submission the decision to include in the pool all of the QEC workforce working on that contract at the material time and to exclude the residual marine workforce who were working on other contracts, was reasonable because:-

(a) It was a decision taken following collective consultation between the employer and recognised Trade Union Side,

(b) It made sense and was inherently logical and reasonable to include in the pool all those employees working on the aircraft carriers in work of the type which was diminishing and which, as a matter of fact, would cease with the approaching cessation of the contract, and not to include in the pool employees who were not so engaged.

(c) The fact that in the past, prior to the securing of the QEC contract for the assembly of the aircraft carriers, the respondents had followed a practice of pooling the whole workforce, across all of the contracts being taken forward at Rosyth, when one of those contracts was coming to an end had no consequence in law.

(d) On the evidence presented that practice had been followed in the expectation that in the normal course of business a further contract of a similar size to that which was terminating might be secured and onto which a roughly equivalent number of employees might be assigned, thus avoiding the need for redundancy.

(e) That was an approach which had helped to avoid some redundancies pre the QEC contract but it was not a matter which, of itself, precluded the respondents from taking a different approach in what, in Mr Hay's submission, were significantly different circumstances; and nor did it render the approach which was taken unreasonable.

114. The QEC contract was exponentially larger and longer in duration than any of the other, and by that time (2019), other marine contracts upon which the respondents had employees working had substantially diminished. There was no prospect of another such contract being secured in the normal course of business. Indeed, the contrary was likely to be the case given that the respondent's main client "Babcock" was seeking to move away from the ship construction business and into alternative business areas albeit that their business plan to achieve that had failed.

115. The fact that the respondents had, in different circumstances, some 10 years earlier followed a different practice did not result in it being unreasonable not to do so in the 2019 QEC redundancies and, *per contra*, it was reasonable to do as they had done, because of the logic of so proceeding including, not

least the fact that the particular composition of the pool had been agreed through collective negotiation with the relevant recognised Trade Union, albeit accepting that that of itself was equally non-determinative of the matter.

116. Regarding consultation, while recognising that in circumstances of the completion of a very large contract such as the assembly of the aircraft carriers, there may be a sense of inevitability about the occurrence of redundancies, and that that sense might have the potential to colour the manner in which consultation was taken forward, in Mr Hay's submission all the elements of a reasonable consultation were present and there was no obvious unreasonableness in what had been done or in the process followed viz:-

(i) All affected employees had received written notice of the fact that they were at risk of redundancy

(ii) There had occurred collective consultation meetings

(iii) Each affected employee had been invited to a first and then a second individual consultation meeting. Opportunities were given to all employees, including to the claimants to make the points that they wished to make in the redundancy process including at appeal. All were directed to the respondent's internal list of vacancies in the search for alternative employment albeit it was recognised by both the respondents and the affected individuals that for many, the list of vacancies was unlikely to include opportunities for them to secure alternative employment.

(iv) That although some or other of the claimants had variously complained about the issues around the non-provision of reskilling training, and refresher training, all had recognised the reality of the position and ultimately stood upon the fact that "as a point of principle", they should have been excluded

from the pool of those at risk or, in the alternative and if they were to be included, given that they had formerly worked on other marine contracts, that the whole of the residual marine workforce should also have been included. That was a substantive point of criticism with which they challenged the reasonableness of the process and that was a point to which they all, ultimately, received a response and explanation.

(v) The fact that the respondent's explanation for including them, namely that the respondents had retrospectively deemed the transfer onto the QEC contract to be a permanent transfer after the passage of some 7 years, was not reflected as a Finding in Fact and in law in these proceedings, did not result in the respondent's decision, taken in the circumstances then pertaining, being unreasonable.

(vi) Separately, had the claimants been exceptionally removed from the pool they would have then formed a part of the respondent's residual marine workforce for which, and absent their addition to it, there was already insufficient work, certainly at Rosyth.

(vii) Neither claimants 2 or 3 had identified on the internal list, upon their subsequent consideration of it, any vacancies which they would have been able to fill.

(viii) Although Mr Yates had asked Mr Westhall to provide him with the security registration form for potential work at Faslane, there was no evidence before the Tribunal that went to establish that there was work at Faslane upon which Mr Yates could have been employed.

(ix) *Per contra*, the evidence of Mr Westhall was that there was no such work within "his business" that is across the residual

marine contracts. He had stated in evidence "*If I could have employed them in my business I would have*".

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(x) Although the 1st named claimant, Mr Blount, had stated, in evidence for the first time, that he would have applied for the Painting Supervisor's positions at Portsmouth, which did appear on the list, had he been aware of them that would have required him to accept a reduction of around £10,000 in his salary and his moving to work at the other end of the country. The adoption of that position by him now and in retrospect appeared inconsistent with the explanation advanced by him in evidence for his having taken no steps to look for other employment during the redundancy process and which was, that he expected that he would be placed in a Rosyth based alternative employment before his notice of redundancy expired which was what he wanted to happen.

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(xi) All 3 of the claimants had recognised in evidence the real possibility, had they been transferred out of the pool back to the residual marine workforce, that they might well have had to undergo, along with that residual workforce another redundancy selection process. By that time there were no Cleaning Supervisors' vacancies at all in the residual marine workforce and although there were a small number of Painter Supervisors' posts these were filled by qualified and current Painting Supervisors and the 1st named claimant Mr Blount and or the 3rd named claimant Mr Yates, if being considered for such jobs in a redundancy process, would be competing with those existing Painter Supervisors from a position of not themselves having engaged in any painter work or supervision of it for several years. The evidence did not indicate in the circumstances, that had the claimants been removed from the pool and reassigned to the residual marine workforce that they would, on the balance of probabilities, have survived what was

likely to have been a further redundancy process there triggered by their reassignment.

(xii) On the balance of probabilities, submitted Mr Hay, each of the 3 claimants, let it be assumed they had been excluded from QEC workers "at risk" pool and had been transferred back to residual "Marine" work force, would in any event have been dismissed for reason of redundancy at or soon after the Effective Date of Termination of their respective employments.

117. Mr Hay primarily invited the Tribunal to hold that in deciding to dismiss the claimants for reason of redundancy when they did, the respondent had acted reasonably in treating the circumstances pertaining as sufficient reason to dismiss the claimants. He invited the Tribunal to find that the dismissals were fair in terms of section 98(4) and to dismiss the complaints of Unfair Dismissal.

118. In the alternative, let it be assumed that the Tribunal were to find one or more of the dismissals unfair, Mr Hay submitted that:-

(a) it would not be just and equitable in the circumstances to regard loss sustained by the claimants in consequence of the dismissal, beyond the period of 6 months from the Effective Date of Termination (26 weeks), as loss which was attributable to action taken by the employers; and

(b) that it would be just and equitable for the Tribunal to separately make a *Polkey* reduction.

Polkey Reduction

119. Mr Hay submitted, let it be assumed that the Tribunal found the dismissals to be unfair that had the respondents done as the claimants assert they ought to have, that is to say either included the then residual marine workforce in the

pool of persons at risk of redundancy, including themselves, or alternatively removed the 3 claimants from the pool and reassigned them to the residual Marine workforce where they indicated they would have been prepared to undergo a separate redundancy process, that all 3 claimants, in those contingent circumstances, would have been dismissed in any event

(a) As far as claimants 1 and 3 were concerned the only supervising jobs which then existed in the residual marine workforce were Painting Supervisors' jobs in circumstances in which the 2 claimants, neither of whom had carried out painting work nor supervised painting work in recent years, would have been competing with the then current Painting Supervisors who were in those posts.

(b) As far as the 2nd named claimant was concerned there were no Cleaning Supervisors' posts in the residual marine workforce.

120. Mr Hay urged the Tribunal, in those alternative circumstances, to make a substantial *Polkey* reduction, as much as 50%.

Submissions for the Claimants

121. Mr Burke for the claimants first identified:-

(a) those Findings in Fact which had been proposed by Mr Hay and which he was likewise satisfied the evidence would support,

(b) those which he agreed with in part but submitted ought to be varied or added to based upon the evidence, and,

(c) the additional Findings in Fact which, in his submission the evidence supported the making of and which he invited the Tribunal to make.

122. Thereafter, on behalf of all 3 claimants he submitted as follows:-

(a) That it was not in dispute between the parties that as at the point of the 2019 redundancies, the 3 claimants were the only individuals then working on the QEC contract who had not been recruited directly to work upon it but rather, had been assigned to that contract from other marine contracts upon which they were at the time already engaged.

(b) By reason of that distinction, unique to the 3 claimants, they should have been treated differently either by their being removed from the pool of QEC contract working employees at risk, and reassigned to the residual marine workforce where, he and the claimants all accepted, they would require to have taken their chance in any subsequent redundancy process within that residual group.

(c) Alternatively, the respondent and Unite the Union (the management and Trade Union Sides in collective consultation,) ought not to have agreed to restrict the pool to only those employees of the respondent then working on the QEC contract but rather should have included in the pool all of the residual marine workforce then employed at Rosyth regardless of which contract they were working on and by that route avoided treating the claimants unfairly.

123. It may be the case, there being no direct evidence that went to the matter, that as at the time of agreeing with the Trade Union side the composition of the pool for the 2019 redundancy the relevant decision takers may have been unaware of the claimants' unique employment history. When that matter was brought to the respondent's attention, however, by each of the claimants, in the course of individual consultation and undisputedly in the course of their appeal hearings against the decision to dismiss them, the respondent should have applied "its mind as an employer to what should happen" and, in order

to act reasonably and fairly in relation to the 3 claimants, ought at that point to have removed them from the pool and reassigned them to the residual marine workforce.

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124. While not departing from the other criticisms which had been explored in evidence and which the claimants directed against the general fairness of the manner in which the consultation process had been conducted, Mr Burke succinctly focused for the Tribunal the principal issue of fairness as stating that it effectively came down to whether or not the Tribunal was persuaded, in all the circumstances of the case, that the 3 claimants were entitled to be treated differently due to their prior service on non QEC contract work and if so, that in failing to treat them differently, in the circumstances, the respondents had acted unreasonably in terms of section 98(4) of the ERA.

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125. In relation to the complaint of age discrimination, Mr Burke confirmed, for the purposes of removing any ambiguity which may have arisen from the terms in which the 1st claimant had given his evidence, that the only less favourable treatment relied upon by the 1st and 2nd named claimants was that of failure to treat them differently in relation to their inclusion in the pool of those at risk of redundancy and their subsequent selection for dismissal for reason of redundancy.

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126. As had been recorded by Judge Macleod at paragraphs 4 and 5 of the Note of Output issued by him following Closed Preliminary Hearing which proceeded in the case on 17th April 2020, there was no standalone complaint of discrimination because of the protected characteristic of age being given notice of by the claimants in the case before the Tribunal. No such complaint, Mr Burke confirmed, was pled and he made no submission in respect of any such perceived complaint.

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127. Turning to the evidence given by the witnesses in the case, Mr Burke invited the Tribunal to regard Mr McConnachie as the best of the respondent's witnesses and as an individual who appeared to be genuinely trying to tell the

truth, albeit that he seemed to encounter some difficulty in doing so. The evidence of Mr Leneghan and Mr Pott on the other hand was, submitted Mr Burke, to be regarded as unreliable both having changed their positions in cross examination and, in the case of Mr Pott, appearing to be attempting to avoid answering questions put to him. He invited the Tribunal to regard the evidence of each of the claimants as both credible and reliable and to accept it on all material matters of fact which were in dispute between the parties.

128. In relation to the consultation process, vis a vis the claimants this appeared to be characterised by what was a general sense of inevitability. Each of the individual consultation sessions was brief and, the notes of them were in template fashion which while, of itself, perhaps understandable given the number of affected individuals, did not account for the fact that as between one claimant and another the wording of communications attributed in the course of the consultations to not only either the respondent's Manager who was conducting them, but also the differing claimants, were similar on some occasions and on other occasions, almost identical. This, he submitted, was indicative of the respondent's not genuinely considering the claimants' positions and request to be removed from the pool once it had been sharply focused for them.

129. There had, he submitted, been no genuine attempt to find alternative employment for the claimants internally. He reminded the Tribunal that the 1st named claimant had stated in his evidence at the Hearing that he would have applied for the Painting Supervisor jobs in Plymouth had he been aware of them and that the 1st named claimant's position was that those job opportunities should have been specifically brought to his attention and he should have been proactively invited to apply for them at the time of their arising and their being filled by other employees.

130. Turning to remedy and, under reference to the updated Schedules of Loss, Mr Burke confirmed that the proposed calculation date, in respect of all 3 claimants should be read as being the 27th of July 2021.

131. While recognising that the issue of the extent, if any, of continuing loss should be allowed was a matter ultimately for the Tribunal, Mr Burke submitted, let it be assumed that the Tribunal were to conclude that the dismissals were unfair in terms of section 98(4) of the ERA, that there was insufficient evidence before the Tribunal to allow it to reach any meaningful view in respect of a *Polkey* calculation. In order to do so the Tribunal would require to speculate to a degree which would be greater than that normally encountered in such a contingent consideration. He urged the Tribunal therefore, in the event that they found the dismissals unfair, to make no *Polkey* deduction on the basis that it was unable to do so on the evidence presented.

132. Mr Burke concluded by reminding the Tribunal that the issue ultimately came down to whether or not the Tribunal considered, in the circumstances, that the claimants were entitled to be treated differently and, if so, whether, in determining the composition of the pool of employees at risk in a manner which included the claimants, the respondents acted unreasonably.

Respondent's Reply

133. Exercising a limited right of reply, Mr Hay responded to the matters focused in Mr Burke's submissions:-

(a) That while it can often be seductive to consider such matters in terms of winners and losers, the Tribunal should remain focused on the fact that the question to be answered was whether, in the circumstances, the respondents acted reasonably or unreasonably, including in collective consultation with the Trade Union Side, in composing the pool as they did and in not agreeing to the claimants' subsequently made request to remove the claimants from it.

(b) That although it had been averred on the claimants' behalf that the respondents had adopted the "custom and practice" of

including all marine contracts in previous redundancy pools, in his submission the claimants had not come close in evidence to establishing a "custom and practice" in that regard. "Custom and Practice" was a term of art and once established their flowed from it certain contractual rights and obligations. That was not the position here. The evidence, at its highest, was that in the past, insofar as the experience of the various witnesses extended in that regard, there had been a practice of including employees engaged in all marine contracts in an at risk of redundancy pool as each individual contract came to a conclusion. The explanation for that had been that it was done in the hope and expectation, and often the reality, that a new contract, similar in size and capacity to that which was coming to an end would be secured and thus there would be scope for redistributing the labour force amongst ongoing contracts and avoiding or at least minimising, the need for redundancy. The historical occurrence of such a practice, however, did not confer upon the claimants any contractual rights, or upon the respondents any reciprocal obligation, to be so treated or to so act in relation to future redundancy situations. The reasons for the respondents departing from that previous practice in the 2019 redundancies was, submitted Mr Hay, clear on the evidence namely, that the QEC contract was unique in its size and duration and that there was absolutely no prospect of a further contract of any type with a similar capacity being secured. The respondent's decision, agreed with the Trade Union Side in collective consultation, to compose a pool of all those then working on the QEC contract was a business decision that fell properly within the respondent's remit to make and in so making it they acted reasonably, in the circumstances. There was no requirement in the circumstances for them to make a special case, at that point, to deal with the claimants.

(c) Regarding Messrs Leneghan and Pott, and the criticisms advanced by Mr Burke against their body language when giving evidence, Mr Hay urged the Tribunal to bear in mind that they gave their evidence remotely over a video link with all the limitations associated with that process and those means.

(d) Regarding criticisms directed at the individual consultation process and the recording of that detail, Mr Hay reminded the Tribunal that at the end of the day the substantive point of criticism advanced by all 3 claimants and upon which their claims chiefly proceeded, was that of their being included in the redundancy pool rather than being allowed to return to the residual marine workforce. They had all been afforded the opportunity to make that point in the course of the consultation process, including at their appeal; and, they had all done so. That point had been listened to and the respondents had provided each of the claimants with a response. The response communicated was that after the passage of 7 plus years of assignment the respondents had deemed the claimants to have been permanently assigned or "transferred out of the residual marine workforce into and onto the workforce engaged on the QEC contract. The fact that the Tribunal was unlikely to find in fact that the transfer had been formalised as a permanent transfer, did not render unreasonable the respondent's decision not to remove the claimants from the pool retrospectively.

(e) In relation to the comparison made with Paul Allum, Mr Hay submitted that his circumstances fell to be distinguished from those of the claimants because at the time of his reassignment back to Marine there was work to be done at Marine which he could do whereas, in 2019, there was no work to be done at Marine which the claimants could do without other employees being first displaced and the claimants then changing from Composite Services to painting work.

(f) Regarding remedy, while it was open to the claimants and in particular the 1st and 3rd named claimants to accept the particular job with Aquatec which they had accepted in January of 2020 and to fairly immediately thereafter each decide that it was a job which they enjoyed and wished to remain in notwithstanding the lower level of income derived from it and, in consequence to stop looking for any alternative employment going forward, the consequence of that was that it was not just and equitable that any continuing losses should be regarded as loss attributable to the actions of the respondents in not removing them from the redundancy pool. In Mr Hay's submission and, under reference to the counter Schedules of Loss, it was reasonable to have expected each of the claimants to have found alternative employment after a period of 6 months following their dismissal for reason of redundancy, and loss beyond that point should not be compensated.

Discussion and Disposal

Age Discrimination

134. The Tribunal unanimously concluded that the complaints of Direct Discrimination because of the protected characteristic of Age which were advanced by the 1st and 2nd named claimants in terms of section 13 of the Equality Act 2010 ("EqA"), fell to be dismissed. The evidence of the 1st named claimant Mr Blount on the one hand and that of the respondent's Marine Business Manager Mr Westhall, on the other, directly conflicted on the issue of whether or not, in the course of a supportive, casual conversation, remarks made by Mr Westhall included the words "… *leave the work to the younger men*". Each witness was ultimately clear that there was no confusion for their part in their recollection of matters, with Mr Blount on the one hand stating that Mr Westhall had used that phrase and Mr Westhall, on the other, stating that he had not.

135. In the event, it was not necessary for the Tribunal to choose between these versions, which would have involved it determining that one or other of the witnesses was not being truthful, and it has made no Finding in Fact in relation to whether those actual words were used.

136. The Tribunal accepted the submission in law made by Mr Hay, which was not disputed by Mr Burke, that in order to succeed, a party alleging direct discrimination in terms of section 13 of the EqA must, among other essential matters, prove on the balance of probabilities and on the preponderance of the evidence, either directly or indirectly through the operation of section 136 of the Act (burden of proof), that the less favourable treatment complained of was because of the protected characteristic, in this case, “age”.

137. All of the evidence before the Tribunal went to support the Finding in Fact which it has made to the effect that Mr Westhall had no direct involvement in the 2019 redundancy process and that he was not a decision maker, in that regard, including in relation to determining the composition of the pool, or hearing and considering points made by the claimants in the course of their individual consultations, or in the internal appeal processes pursued by them.

138. Let it be assumed that Mr Westhall had made the alleged remark, the Tribunal considered that the 1st and 2nd named claimants had failed to discharge the burden of proof in respect of the necessary causal connection between the protected characteristic of age possessed by them on the one hand and the decision to include them in and subsequently not to remove them from, the pool and to dismiss them for reason of redundancy on the other.

139. As said by Mummery LJ, as he then was in ***Nomura***, to prove the possession of a protected characteristic on the one hand and the occurrence of less favourable treatment on the other is to only establish the possibility of discrimination. “Something more is required”. The evidence presented did not disclose “something more” and, the 1st and 2nd named claimants having

failed to discharge their onus of proof, the complaints of discrimination because of the protected characteristic of age are dismissed.

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Unfair Dismissal (section 98 of the Employment Rights Act 1996)

140. The Tribunal unanimously found in fact that there was in existence, at the respondent's Rosyth site, as at the Effective Date of Termination of the claimants' employment in autumn of 2019, a genuine redundancy situation and further has found that all 3 claimants were dismissed for reason of redundancy, which is a potentially fair reason in terms of section 98 of the Employment Rights Act 1996.

141. The Tribunal accepted, in what were the unique circumstances of the QEC contract for the assembly of the 2 aircraft carriers HMS Queen Elizabeth and HMS Prince of Wales coming to an end with no prospect of any contract of a similar size and or capacity put in place, that the conduct of the redundancy process may well have been infected with a sense of inevitability. The Tribunal further accepted that, from the perspective of each of the 3 claimants, there were aspects of the personal consultations in which they participated which they found unsatisfactory including; the lack of clarity which persisted for a period as to the scope for and extent to which any refresher training might be made available, the accuracy of certain entries in their individual training records and the IT related difficulties encountered by the 1st and 3rd named claimants in attempting to access the respondent's global internal vacancy list.

142. Notwithstanding, and in standing back and looking at the whole process, including the internal appeal stages, the Tribunal was satisfied on balance and accepted the respondent's representative's submission which was to the effect, that all of the elements of a reasonable consultation were present and

that there was no obvious unreasonableness in what had been done or in process followed.

143. On the evidence presented the Tribunal was satisfied that those individual criticisms advanced variously by the claimants when taken and considered in the context of the whole process including the internal appeals procedure, were insufficient to taint the process followed with unfairness. There was no serious challenge advanced to the selection criteria identified within the selection matrix and, in any event, there was ultimately no requirement to utilise the matrix scoring for selection purposes in that all those in the pool, with the exception of one clerical employee, were made redundant.

144. As had been succinctly focused by Mr Burke in his submissions, the principal matter relied upon by the claimants as rendering their dismissals unfair was the respondent's departure, in respect of the 2019 QEC contract redundancies, from a previous practice of including, in the pool of those at risk of redundancy, on the termination of any marine contract, the whole work force employed across all then ongoing marine contracts. (In 2019 that departure had involved the exclusion from the pool of the then residual marine work force employed on non-QEC contract marine work); Which failing and in the alternative, they relied upon the respondent's failure to give effect to their subsequent request that they be removed from the pool of persons at risk and transferred back to the residual QEC contract Marine Business Unit and thus be no longer at risk of redundancy.

145. The basis for their adoption of that position was that as at the time of the 2019 redundancies, the 3 claimants were, uniquely, the only members of the large group of employees working upon the QEC contract who had not been recruited directly to work on the aircraft carriers but rather, as at the time of their transfer onto the QEC contract, that is in or about 2011, had been already employed working upon other marine contracts.

146. It was asserted on behalf of the claimants that that previous practice had in effect amounted to the establishment of an adopted "custom and practice"

and thus effectively incorporated into the terms and conditions of all employees including those of the claimants.

147. The evidence presented of the historical practice of pooling the whole work force across all contracts fell short, in the Tribunal's consideration, of that which would be required to establish a change of conditions by custom and usage of trade or "custom and practice". In the Tribunal's consideration, the practice was no more than that, a practice which had been at a previous time and for a period of time followed by the respondents for the good and proper reasons which were spoken to in evidence, with a view to and often successfully achieving, the avoidance of redundancies and their retention of a skilled and semi-skilled work force. It had not translated into a matter of contractual force. It conferred no right on the part of employees, including the claimants, to have such a practice followed and no obligation on the part of the respondents to follow such a practice. Separately and in any event, 2019 was not the first occasion on which the respondents had departed from that previous practice. In 2017/18, the potential requirement for redundancies arose in the residual marine work force that is those working on non-QEC contracts. At that time the respondents restricted the pool to those employees working on non-QEC contracts that is the residual marine work force. They excluded from the pool all those who at that time were working on the QEC contract, including the claimants, none of whom were placed at risk in that other process. The size and associated impact of the conclusion of the QEC contract was such that a return to the previous practice in 2014 had it been adopted would have carried no realistic prospect of significantly avoiding the need to make the vast majority, if not all, of the QEC contracts labour force redundant.

148. Additionally, the composition of the 2019 pool was a matter which was the subject of collective agreement between the respondents and the recognised Trade Union. While that of itself is not conclusive as to the reasonableness or unreasonableness of such a decision, it is a significant part of "all the circumstances of the case", which go to inform the consideration of that issue and a factor which points towards reasonableness.

149. Although it is implicit in the wording of section 98(4), the EAT have confirmed in ***Wrexham Golf Club Limited v Ingham*** UKEAT 25 September 2012, that the band of reasonable responses test applies to the actings of employers in deciding on the composition of the pool of those to be placed at risk of redundancy. The Tribunal accepted that, in addition to the fact of its agreement with the recognised Trade Union side, the decision to include in the pool of those at risk of redundancy all those employees working on the aircraft carriers in work of the type which was diminishing and, as a matter of fact would cease with the cessation of the contract, and the decision not to include in the pool, employees who were not so engaged, was inherently logical and in the circumstances reasonable. In so concluding the Tribunal is conscious that in approaching the application of section 98(4) it is not for the Tribunal to substitute its own view for that of the employer but rather to ask whether the employer's decision fell within the band of reasonable responses available to an employer acting reasonably in the circumstances. While the Tribunal accepted that some reasonable employers might have decided to include the residual marine work force in the pool, it could not be satisfied on the evidence presented, that no reasonable employer, acting reasonably in the circumstances, would have decided, as the respondents did, not to do so but rather to compose the pool as they did. The Tribunal unanimously concluded that the business decision taken by the respondents in relation to the composition of the pool, fell within the band of reasonable responses.

150. In the alternative, the claimants argued that the existence of their employment history, by 2019 unique amongst those other workers in the pool and being that they had not been recruited directly to work on the aircraft carriers but rather had been transferred or seconded from other contract work within Marine to do so in 2011, having been brought to the respondent's attention, the respondents should have then applied their minds to what was to be done in respect of the 3 claimants and, having done so and if acting reasonably, would have treated them differently by removing them from the pool of those at risk and transferring them back to, and employed them within, the residual Marine work force.

151. While not without sympathy for the predicament in which the 3 claimants found themselves, the Tribunal considered that they had not established any right in law to be treated differently because of that difference in their employment history and further, that the respondents were under no obligation to treat them differently in the way that they requested. The respondents did apply their mind to that matter and request once it had been focused for them by the claimants and ultimately declined to treat the claimants differently by removing them from the pool. They communicated to the claimants, as an explanation for that, their view that after the number of years, in excess of 7, which had elapsed since the claimants' transfer out of other Marine contract work to work on the QEC contract, and after their having continued to so work substantially throughout that period, the respondents deemed that their transfer had become permanent. While the Tribunal has found in fact that the transfers were not permanent, in any legal sense, that is to say has not found that there had occurred a consensual variation in the claimants' terms and conditions of contract such that they were obliged to and entitled to work only on the QEC contracts, that error or misconclusion in law on the part of the respondents does not, of itself, render unreasonable their decision not to intromit with the composition of the pool in the course of the redundancy process by removing the claimants from it. As stated above, the band of reasonable responses test applies to that decision and while the Tribunal was unable to conclude that no reasonable employer would have agreed to retrospectively treat the claimants differently and remove them from the pool, it was equally unable to conclude that no reasonable employer, acting reasonably in the circumstances, would have declined to do so. Particularly so when those circumstances included the fact that there was, at the material time, no work available at Rosyth, within the residual marine contracts, upon which any of the claimants could be employed without first displacing existing employees who were engaged on that work or generating a further redundancy process within the Marine Business Unit from which there could be no guarantee that the claimants would not be among those dismissed for reason of redundancy in any event. The Tribunal accordingly concluded that the decision not to retrospectively

vary the pool by removing the claimants from it and transferring them back to employment on the residual Marine contract work, fell within the band of reasonable responses available to the respondents in the circumstances.

152. The Tribunal has unanimously concluded that the dismissals of the 1st, 2nd and 3rd named claimants, for the established reason of redundancy, fall to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996 and accordingly, that the complaints of unfair dismissal advanced by each of the claimants fall to be dismissed.

Remedy

153. The Tribunal having dismissed the complaints, the requirement to determine remedy, including whether a *Polkey* deduction should be made and in what amount, falls away. In recognition of the careful and helpful submissions made by both the claimants' and the respondent's representative, however, the Tribunal records that had it found the complaints of unfair dismissal established, it would have also found that it was reasonable, in the circumstances, to expect the claimants to have found alternative employment within a period of 6 months of their respective Effective Dates of Termination and would have limited any compensatory award accordingly. In relation to the 1st and 3rd named claimants, in light of their respective decisions, taken shortly after the commencement of their current alternative employment in January 2020 to the effect that they would cease looking for higher paid employment preferring to remain in that employment for the foreseeable future and, notwithstanding her greater efforts to find alternative employment in relation to the 2nd named claimant.

154. Regarding the making of a *Polkey* reduction, the Tribunal attached little weight to the 1st named claimant's assertion, made for the first time when giving his evidence, that he would have accepted a £10,000 reduction in salary and moved from Dunfermline to Plymouth to work as a Painting Supervisor, had the existence of that vacancy been proactively brought to his

attention by the respondents and offered to him on a priority basis rather than it being simply advertised on the internal vacancy list which he ultimately did not access. Notwithstanding, had the Tribunal found the dismissals to be unfair and, subject to what is said above about compensation being limited to 5 a 26 week period, the Tribunal would have declined to make a *Polkey* deduction on the ground that the limited evidence presented in that regard did not provide a sound basis for assessing and quantifying, in an appropriate amount, the deduction to be made.

10 Employment Judge: Joseph d'Inverno
Date of Judgment: 19 August 2021
Entered in register: 30 August 2021
and copied to parties

15 **I confirm that this is my Judgment in the cases of Blount and others v Wood Group Industrial Services Limited and that I have signed the Judgment by electronic signature.**