EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100484/21 (V)

Held on 19, 20 & 21 July 2021

Employment Judge N M Hosie
Members Mr K Pirie
Ms L Taylor

Mr R Miller	**Claimant** **In Person**
Eastern Airways (UK) Ltd	**Respondent** **Represented by** **Mr J Latham,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is dismissed.

REASONS

E.T. Z4 (WR)

Introduction

1. The claimant, Ronald Miller, brought complaints of unfair dismissal and age discrimination. The respondent admitted the dismissal but claimed that the reason was redundancy and that it was fair. The age discrimination complaint was denied in its entirety.

The evidence

2. We heard evidence first from the claimant. We then heard evidence on behalf of the respondent from:-

    - Sue Parkinson, Head of HR and Payroll
    - Keith Earnden, Engineering Director and Maintenance Manager

    Each of the witnesses spoke to written statements.

3. A joint bundle of documentary productions was also submitted ("P").

The facts

4. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact. The respondent Company is a regional airline based at Humberside International Airport. It operates commercial and private charter flights to various locations in the UK and mainland Europe. It employs approximately 223 staff in the UK. The claimant was employed by the respondent as a Licensed Aircraft Engineer at Aberdeen Airport. He commenced his employment on 27 June 2007. He was initially employed as an "Engineer Liaison/Ramp Co-ordinator". His Statement of Terms and Conditions of Employment was one of the documentary productions (P.50-54). He was dismissed, allegedly by reason of redundancy. The effective date of termination of his employment was 6 February 2021. The claimant has extensive experience as an Aircraft

Engineer. At one time he was the Director of his own Company, Saltire Aircraft Services Ltd. At the time of his dismissal he was 74 years of age.

5. In March 2020, the aviation industry was heavily impacted by the Covid-19 Pandemic. The respondent only operates passenger flights, not cargo flights, and there was a significant drop of some 90% in passenger numbers due to the restrictions in people not travelling. Many of the respondent's aircraft could not operate and this meant they had to furlough staff. The claimant was furloughed from 1 April 2020 until 11 July 2020. The respondent operates the following passenger aircraft at Aberdeen Airport:-

- SAAB 2000
- Jetstream 41
- Embraer 145 A

6. At the outset of the Pandemic, all flights around the UK were suspended, with the exception of one daily flight between Humberside Airport and Aberdeen Airport carrying only one passenger and, on occasion, no passengers at all. The respondent's contract with BP, which operates from Aberdeen, was suspended from the start of the Pandemic until July 2020 when the claimant was taken off furlough leave. The respondent's IAC contract was also terminated and flying stopped from 1 July 2020 which further impacted on the trade at Aberdeen. As a consequence, Aberdeen Airport was only able to operate the J41 aircraft. All the Company's locations were similarly affected across the board. The respondent, therefore, had no choice but to review its business needs.

7. As fewer planes were flying in and out of Aberdeen, the respondent carried out a review which highlighted the reduced need for Engineers at this location Redundancies were necessary, therefore, including two *"B1 Licensed Engineers"* at Aberdeen.

8. The respondent was required to make redundancies at other locations and in other job categories too, as well as Aberdeen. Due to different aircraft operating at different airports, the specific and distinct work that was needed at each location and the significant distances between them, each location was assessed separately and required different consideration for potential redundancy selection. For example, Humberside Airport, as the respondent's base, involved more heavy-duty mechanical work than line stations such as Aberdeen.

Claimant at potential risk of redundancy

9. On 10 August 2020, Sue Parkinson, the respondent's "Head of HR and Payroll" wrote to the claimant to advise him that, *"2 x B1 Licensed Engineers"* positions had been placed at risk of redundancy and that there would be a period of consultation (P.67).

Consultation meeting on 17 August 2020

10. The claimant was invited to a consultation meeting, by telephone conference call, on 14 August 2020. The meeting was rescheduled for 17 August. Minutes of that meeting were produced (P.68-70). We were satisfied that these were reasonably accurate. During the meeting the claimant was advised that all 6, "B1 Engineers" based at Aberdeen Airport had been pooled together and that it was the respondent's intention to reduce that number by 2. All 6, B1 Engineers, including the claimant, were advised that they were at risk of redundancy and all were consulted.

11. The respondent received a request for voluntary redundancy from Barry Campbell, one of the 6 Engineers in the pool on 20 August 2020. This was accepted by the respondent and Mr Campbell's employment ended by reason of redundancy on 31 October 2020. All Engineers had been made aware that they were eligible for and could apply for voluntary redundancy.

12. As a consequence, there was only a need to pool the remaining 5 Engineers with a view to scoring and selecting one further employee for redundancy.

Selection criteria and scoring

13. At the consultation meeting on 17 August, the claimant was informed of the selection criteria to be used:-

- Length of service
- Bradford factor score
- Relevant licensed qualifications on the aircraft operated by the Company (P68)

14. These criteria were used by the respondent in relation to redundancies made at other airports. The scoring specifically included points for licensed qualifications held by Engineers on aircraft used at Aberdeen and to be used in the future. The claimant did not object to the proposed scoring criteria.

15. The claimant scored a total of 32 which was the lowest scoring in the pool and he was provisionally selected for redundancy (P.74/75). However, in August 2020, due to changes with the Pandemic and an apparent improvement in the respondent's business prospects, including the fact that passenger numbers appeared to be increasing slightly, the respondent decided that the claimant's position, as well as the position of the other 4 in the pool, was no longer at risk.

16. However, the respondent's optimism proved unfounded. Passenger numbers failed to increase by any significant amount as had been hoped for and further scheduled flights which had been planned for restart were suspended. This included flights in and out of Aberdeen Airport. This meant that the respondent's, *"the short term business confidence was severely impacted".*

17. Due to further lockdown restrictions throughout Autumn 2020, including a national lockdown in England, the respondent's passenger numbers significantly decreased again, flight routes continued to be shut and fewer Engineers were required as a result. As there was minimal revenue coming in, the respondent's financial position did not improve as had been hoped. The respondent was required, therefore, to revisit the redundancies which had been proposed previously, as well as several additional redundancies in other parts of the business and a large number of pilots undertaking unpaid leave.

Credibility and reliability of the respondent's evidence

18. We wish to record, at this stage, that the Tribunal was of the unanimous view that both of the respondent's witnesses gave their evidence in a measured, consistent and convincing manner and presented as credible and reliable. In many respects their evidence was corroborative.

Claimant's redundancy

19. On 4 November 2020, the claimant was again informed that he was at risk of redundancy, by way of a telephone call from Keith Earnden, Maintenance Manager, and a follow-up letter from Ms Parkinson (P.76). As Graham Spicer, who had been involved in the previous redundancy consultation, had intimated his resignation, Keith Earnden, the new Maintenance Manager, took up the consultation process. Mr Earnden was the claimant's new line manager and a Head of Department.

Consultation meeting on 6 November 2020

20. Minutes of the meeting were produced (P.77-79). We were satisfied that these were reasonably accurate. During the meeting, the claimant asked if Richard Lake, the owner of the respondent Company, was aware that he was

at risk of being made redundant and said that he was going to call him. The following are excerpts from the Minutes:-

"*RM – Is it just me or are other engineers being made redundant?*

KE – As you will recall, your position was placed at risk of redundancy in August of this year but fortunately the position was saved due to a perception that the situation may improve. At that time, we used a scoring matrix which resulted in your position becoming redundant. One other engineer volunteered for redundancy at that time.

Unfortunately the situation hasn't improved as we had hoped and has continued to deteriorate. As a result, we need to reduce the number of B1 Engineers at Aberdeen by one. We have referred back to the criteria that we used at that time and as the score remains unchanged, unfortunately your position remains with the lowest score.

RM – Does Richard Lake know that you are making me redundant?

SP – Richard Lake is aware of all of the consultation meetings which are currently taking place and is advised of all decisions which are being made.

RM – I don't believe you. Richard Lake would not want me to leave the Company.

SP – Unfortunately these are very difficult times and I'm sure RL would want to retain everyone in the business had the situation been different. However, I can confirm that RL is aware that this meeting is taking place today.

RM – Well I don't believe you. Is RL in today?

SP – No, RL is not in the office.

RM – I want to ask him if he knows about this meeting.

SP – RL wouldn't become involved in any of the consultation meetings which take place; this remains the responsibility of the Heads of Department.

RM – When RL found out I was going to be redundant last time he got involved and I wasn't redundant.

SP – I am not aware that that took place, however, as stated, RL is aware of this meeting and of all meetings.

RM – How are you going to manage in Aberdeen with no engineers?

SP – We will still have engineers, but unfortunately the number has to reduce as we just won't have the same amount of aircraft in Aberdeen.

RM – Why can't I just stay on furlough?

SP – This question is asked a lot and we believe that the furlough scheme is in place to avoid redundancy. However, the impact on our industry is such that we don't anticipate an increase in passenger numbers for the foreseeable future. It's becoming apparent that our business will be a lot smaller than it was at the start of the pandemic and therefore we have to reduce the number of staff that we employ.

RM – You won't have enough engineers in Aberdeen, and most of them don't even live there.

SP – We believe that the numbers which remain will be sufficient for the amount of work which will come through Aberdeen. It's also irrelevant to where the engineers live when they are not working, as long as they are in commuting distance to the airport when they are on shift.

RM – I think you are making a mistake.

SP – We're hoping not but we appreciate that these are unprecedented times and we have to make decisions based on what we know now.

RM – You won't cope with the workload.

SP – Do you have any questions you would like to ask?

RM – No, I am going to ring Richard Lake and tell him what's going on.

SP – RL is aware of what's going on.

RM – Well, I'll ring him anyway.

SP – Explained the Personal Statement Document and what RM would be entitled to should his position become redundant. Confirm that a copy of the Personal Statement would be e-mailed to RM.

SP – Advised RM that no decisions had been made and that KE would review all of the documentation. Once a final decision had been made, RM would be informed by telephone and also in writing. A final decision would be made as soon as possible.

Do you have any further questions or suggestions to reduce or avoid the risk of redundancy?

RM – No, I think you are making a mistake and I'll speak with RL.

RM – ended the call."

21. It was explained to the claimant at the meeting that the same pooling and selection criteria would be used as had been used in August 2020 (P.74/75). He was advised that his score was the lowest of the Engineers based in Aberdeen (P.77) and that if, on review, his score remained unchanged, he would be made redundant.

22. The claimant raised a number of queries at the meeting. All of these were discussed with him.

23. At the first consultation meeting, the claimant had enquired about pay cuts and job sharing as ways to avoid redundancies (P.69/70). It was explained that job sharing would be difficult due to shift patterns. Pay cuts were already in place as well as the furlough scheme. For example, staff earning above £45,000 had a 10% pay reduction and staff earning above £85,000 had a 20% pay reduction from 1 April 2020 and this was extended to staff earning over £21,000 in October 2020.

24. Before any decisions were made, Ms Parkinson and Mr Earnden checked and reviewed the previous scoring exercise to ensure that the scores were still correct, given the passage of time from August to November. As they were satisfied that they were, Mr Earnden decided that the claimant would be made redundant, based on the previous scoring matrix, as the claimant had scored eight points lower than the other four engineers in the pool.

25. Accordingly, on 6 November 2020 Ms Parkinson wrote to the claimant to confirm that his "*position License Engineer B1 at Aberdeen Airport will be redundant with effect from today, 6 November*" (P.80). He was further advised that he would not be required to work his contractual notice of three months and that the effective date of termination of his employment would be 6 February 2021.

26. Around that time, the respondent made a number of redundancies across various airports and departments. Each airport has different fleet sizes, aircraft models (requiring different maintenance approvals) and staffing and

maintenance requirements, and, therefore, each airport was treated separately as part of the redundancy process. Mr Earnden was involved in consultation exercises for redundancies made in Cardiff, Leeds, Teesside and Humberside.

27. Following confirmation of his redundancy, the claimant sent a large number of letters and e-mails to Managers at the respondent Company all of which were responded to by HR (P.91, P.104, P.1037, P.139, P.150-151, P.154).

Keith Earnden's telephone conversation with the claimant on 27 November

28. Mr Earnden had a "telephone meeting" with the claimant on 27 November which was attended by Joe Clyne from Human Resources. A Note of the meeting was produced (P.109-120). We were satisfied that the Note was reasonably accurate. This meeting followed the claimant writing to the respondent's Managing Director, Tony Burgess, raising concerns (P.101).

29. The claimant alleged, amongst other things, that he had been "targeted" because of his age and maintained that he was more capable in his job than his colleagues. However, Mr Earnden explained to him that due to his long service, his age was actually an advantage to his scoring (P.109).

30. Mr Earnden also explained to the claimant that there were several "Company approvals" that he did not have, that these were "a regularity requirement" and that it was not sufficient for an employee to hold a qualification without the Company approval. Further, it was necessary for Engineers to have the approvals for what was required at the time as well as in the foreseeable future. Ms Parkinson had advised the claimant of this in a letter which she sent to him on 17 November (P.91/92).

Parties' submissions

31. The respondent's solicitor and the claimant made oral submissions at the conclusion of the hearing.

Respondent's submissions

32. The respondent's solicitor submitted that the claimant had, *"failed to prove his case"* and that it was *"fundamentally flawed".*

33. In the course of his evidence, the claimant had accepted the respondent's matrix and that age was not a factor in the matrix. Further, the issue which he raised in relation to "ATR licensed approval" was not in the matrix and there was no disadvantage to him.

34. So far as the age discrimination complaint and the allegation that he was not invited to gain accreditation in ATR was concerned, there was no specification of timing in this regard and no evidence that this was raised timeously.

35. Further, it was submitted that, "*it appears the claimant might be relying on unfair dismissal in a general sense but he failed to prove unfair dismissal.*"

36. Although the claimant did not accept that there was a genuine redundancy situation it was submitted that, "*the entirety of the rest of the evidence is against him on that point especially having regard to the impact of the pandemic.*"

37. Further, although the claimant maintained that a number of staff which the respondent laid off had safety implications, "*that is irrelevant to this case*".

38. The respondent's solicitor submitted that the case "*turns on it's facts*" and that the respondent's witnesses had provided statements which were, "*well*

ordered, detailed and bear all the hallmarks of a redundancy selection process which was fair at a difficult time."

Claimant's submissions

39. The claimant submitted that his claim went *"back to the first stage"* when the respondent did not make him redundant as they knew they were going to need Engineers in Aberdeen.

40. He submitted that the respondent had failed to follow the ACAS Code by not having "face-to-face meetings". Nor did the respondent attempt to relocate him or consider part-time work or work sharing.

41. The claimant also submitted that the respondent had failed to send him on the "ATR Course" and claimed that the aircraft wasn't there when it was.

42. Further, although his "C Licence" had expired, he could have gone down to Teesside to get it.

43. He further submitted that, "*If they'd followed the rules and regulations and been a bit more fair it would have made a big difference.*"

44. Further, he maintained that Ms Parkinson had told him that if he was made redundant they would not have to pay his National Insurance but she disputed this.

Discussion and decision

Unfair dismissal complaint

45. In every unfair dismissal case where dismissal is admitted, s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(2), or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is that the employee was redundant. That was the reason the respondent claimed was the reason for Mr Miller's dismissal. However, he disputed that there was a genuine redundancy situation. Accordingly, that was the issue which we considered first.

46. The statutory definition of redundancy is to be found in s.139(1) of the 1996 Act. Sub-section (1)(a) deals with the situation where an employer has ceased or intends to cease to carry on business. That does not apply in the present case. The relevant provisions are in sub-section (1)(b) which read as follows:-

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

(a) ……

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

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

(ii) for employees to carry out work of a particular kind in the place the employee was employed by an employer, have ceased or diminished or are expected to cease or diminish."

47. We were in no doubt that the circumstances of the present case fell fairly and squarely within that definition and that this was a genuine redundancy situation. Due to the effect of the pandemic, there was a significant diminution in the respondent's business across the board, including Aberdeen Airport, where the claimant worked, and a marked deterioration in the respondent's financial position.

48. Giving the leading speech of the House of Lords in ***Murray & Another v. Foyle Meats Ltd*** [1999] IRLR 562, Lord Irvine, the Lord Chancellor, thought that the wording of the relevant statute was: "*simplicity itself*". In his Lordship's view, the language of the section asks two questions of fact. The first is whether the requirements of the employer's business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal was wholly or mainly attributable to that state of affairs. This is a question of causation. So far as the present case was concerned, we had no difficulty in arriving at the unanimous view that the requirements of the respondent's business for Licensed Engineers – B1 at Aberdeen Airport had diminished and that was the reason for the claimant's dismissal.

49. Accordingly, we decided, unanimously, that the claimant was dismissed by reason of redundancy which is an admissible reason.

50. Having reached this decision, the remaining question which we had to address under s.98(4) of the 1996 Act, was whether the respondent had acted reasonably in treating the reason for dismissing the claimant as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case. In doing so, we had regard to the authoritative starting point for Tribunals assessing the fairness of a redundancy dismissal, namely the guidance of Lord Bridge in ***Polkey v. A E Dayton Services Ltd*** [1987] IRLR 503:-

"*The employer will not normally act reasonably unless he warns or consults any employees affected or their representatives, adopts a fair basis on which*

to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

51. We were also mindful of the guidelines which a reasonable employer might be expected to follow in making redundancy dismissals which were laid down by the EAT in ***Williams & Others v. Compair Maxam Ltd*** [1982] IRLR 83.

52. Also, the objective standards of the reasonable employer must be applied to all aspects of the question of whether an employee was fairly and reasonably dismissed (***Sainsburys Supermarkets Ltd v. Hitt*** [2003] IRLR 23).

Warning and consultation

53. The respondent warned the claimant in good time that his job was at risk. There followed consultation meetings, in August and November 2020, when the claimant was advised of the criteria and his scoring and afforded the opportunity of making representations on his own behalf. He did so and at some length.

54. As we recorded above, the respondent's witnesses both presented as credible and reliable and we were satisfied, on the basis of their evidence and the relevant documentary productions, that the claimant's representations were considered carefully and the procedures which the respondent followed were conducted in good faith and were meaningful. We were satisfied that the respondent considered all the points raised by the claimant in the course of the consultation meetings as a reasonable employer would have done.

55. The claimant complained that he was not afforded a "face-to-face meeting". While this possibly would have been preferable, in the circumstances prevailing at the time and in particular having regard to the effect of the Pandemic, we were satisfied that the conduct of the consultation meetings by telephone was one which a reasonable employer could have adopted. There

was nothing to suggest that the claimant was prejudiced in any way by the meetings being conducted in that manner.

56. We were satisfied, therefore, that the procedures which the respondent followed were fair. They were procedures which a reasonable employer could have adopted.

57. Indicative of the respondent's good faith and desire not to make the claimant redundant, if at all possible, was when it appeared, in August 2020, that the prospects for their business might improve they did not make him redundant although the redundancy process was at an advanced stage and the claimant had the lowest total marks in the pool, by some margin. However, when their optimism proved to be misplaced, the respondent had no alternative other than to engage in a further redundancy process.

The pool

58. We did not understand the claimant to be challenging the pool in which he was included. However, we record, for the sake of completeness, that we were satisfied that the pool which the respondent identified was within the band of reasonable responses open to a reasonable employer.

Selection/marking

59. When considering this particular issue we were mindful of the guidance on "unfair selection" in a number of cases. In the Court of Appeal case, ***British Aerospace Plc v. Green & Others*** [1995] IRLR 433, LJ Waite said this: "*In general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.*"

60. The Court of Session expressed a similar view in ***Buchanan v. Tilcon Ltd*** [1983] IRLR 417:

"*Where an employer's only complaint is that he was unfairly selected for redundancy and no other complaints are made, all the employer has to prove is that their method of selection was fair in general terms and it was applied reasonably in the case of that employee. In doing so, it is sufficient to call witnesses of reasonable seniority to explain the circumstances in which dismissal of the employee came about.*"

61. ***Dabson v. David Cover & Sons Ltd*** EAT/0374/10 is also authority for the proposition that when assessing the fairness of selection for redundancy, the marks awarded in the selection exercise should only be investigated by a Tribunal: "*in exceptional circumstances*" such as *"bias"*, or where there is "*an obvious mistake*".

62. There was no "*bias*" or "*obvious mistake"* in the present case. We did not consider there to be "*exceptional circumstances*" which would require an investigation of the marks awarded. The system of selection was "*fair in general terms"* and was *"applied reasonably"* in the case of the claimant. His selection was based on objective criteria which applied to each employee in the pool.

Alternative employment

63. We were also satisfied that the respondent took reasonable steps to ascertain whether or not there was any suitable alternative employment which they could offer to the claimant, but there was none. That was hardly surprising in light of the significant downturn in business the aircraft industry had experienced as a consequence of the Pandemic. The claimant maintained that he could have been appointed Maintenance Manager, rather than Mr Earnden. However, in her evidence, Ms Parkinson explained why that would not have been appropriate. We were satisfied that her explanation was well-founded (paras. 44-48).

Furlough rather than dismissal

64. The claimant maintained that he should have been "furloughed", as an alternative to dismissal. However, this was considered by the respondent and we were satisfied that their decision not to place the claimant on furlough, but rather to dismiss him on the ground of redundancy was within the range of reasonable responses open to the respondent in the particular circumstances of the case. Ultimately, the decision to furlough or keep on furlough is a matter for the employer. There is no obligation to do so. At the time of the claimant's dismissal, it was reasonable for the respondent to conclude, in the prevailing circumstances, that there was no prospect of improvement in its business in the foreseeable future, that passenger numbers would not be increasing and that the lack of need for Engineers at Aberdeen Airport was unlikely to be a temporary one. The respondent had to have regard to the future viability of its business.

65. In the course of the redundancy selection process and during his notice period, the claimant raised numerous other issues, made complaints and requested information. The respondent's responses were comprehensive. They addressed all of the matters he raised in a reasonable and satisfactory manner.

Appeal

66. There was no provision in the respondent's redundancy procedure for an appeal. It was not clear whether the claimant maintained that this was unfair. However, for the sake of completeness, we record that that was reasonable in the particular circumstances of the present case. It did not render the claimant's dismissal unfair. An appeal will normally be part of a fair procedure, but not invariably so. It is necessary to take account of all the relevant circumstances. There were no grounds for an appeal against the claimant's dismissal. Any appeal procedure would have been futile.

67. We were of the unanimous view, therefore, with reference to s.98(4) of the 1996 Act, that the respondent had acted reasonably and that the claimant's dismissal fell within the band of reasonable responses which a reasonable employer might have adopted. Accordingly, the claimant's dismissal was fair and his unfair dismissal complaint is dismissed.

Age discrimination complaint

68. As we understood it, the claimant brought a complaint of direct discrimination. S.13(1) of the Equality Act 2010 ("the 2010 Act") is in the following terms:-

> "***13. Direct Discrimination***
>
> *(1) A person (A) discriminates another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

Burden of proof

69. A complaint of discrimination requires a claimant first to establish facts that amount to a *prima facie* case: the claimant has the initial burden of proving, on the balance of probabilities, facts from which the discrimination can be presumed. The statutory basis for this so-called "*shifting the burden of proof rule*" is to be found in s.136 of the 2010 Act which applies to all discrimination complaints. S.136(2) provides that if there are facts from which the Court or Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the 2010 Act, the Court *must* hold that a contravention occurred. However, s.136(3) provides that s.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

70. Guidance on the application of these provisions was given by the EAT in ***Barton v. Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205. These guidelines were explicitly endorsed by the Court of Appeal in ***Igen Ltd v. Wong*** [2005] IRLR 258.

71. The guidelines in ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

72. That point was further emphasised by LJ Mummery, giving the Judgment of the Court of Appeal in ***Madarassy v. Nomura International Plc*** [2007] IRLR 246:-

> "*For a prima facie case to be established it will not be enough for a claimant to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So, the bare facts of a difference in a status and a difference in treatment – for example, in a direct discrimination claim the evidence that a female claimant had been treated less favourably than a male comparator – would not be sufficient material from which a Tribunal could conclude, that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of.*"

Present case

73. What then of the present case? We had no difficulty arriving at the unanimous view that the manner in which the respondent treated the claimant was not tainted in any way by his age. As we recorded above, the respondent's witnesses both presented as credible and reliable. They both denied that age was a factor. There was nothing in the redundancy procedure or in the matrix which suggested that it was. Indeed, as the respondent drew to the claimant's attention, when it came to the scoring his length of service was to his advantage. Further, as we recorded above, the respondent did not want to lose the claimant. He had worked for them for a number of years and was a valued employee. If the respondent had wanted to dismiss the claimant because of his age they could have done so in August 2020, following the first consultation meeting.

74. The respondent also produced, as directed by the Tribunal, the demographics of those made redundant which Ms Parkinson had collated as follows:-

"*Between 4 June 2020 and 20 March 2021 a total of 13 engineers or technical or maintenance staff were made redundant, across 4 sites: Aberdeen, Humberside, Teesside and Warton. Those made redundant varied in age with Mr Miller being the oldest at 74 and Carl Lee (a Licensed Engineer – B1), based at Teesside being the youngest at 30 – additionally, 2 Licensed B1 Engineers aged 74 and 75 respectively, took voluntary redundancy*" (P.49).

75. We only found in fact, the *"bare facts of a difference in status"* (the claimant was 74 years of age) and "*a difference in treatment"* (the claimant was dismissed). The claimant only established, therefore, the "*possibility*" of discrimination having occurred. In accordance with the guidance in the case law, that was insufficient to shift the burden to the respondent. He failed to discharge the initial burden of establishing a *prima facie* case.

76. We were of the view that the redundancy procedures which the claimant adopted were robust and fair. The claimant's age was not a factor. It was not a factor in the manner in which he was treated by the claimant in any way. We arrived at the unanimous view, therefore, that the claimant's complaint of age discrimination was not well-founded and it is dismissed.

77. Accordingly, the claim is dismissed in its entirety.

Employment Judge **N M Hosie**

Dated **9 September 2021**

Date sent to parties **9 September 2021**