



# EMPLOYMENT TRIBUNALS

**Claimant:** Maria Bata

**Respondent:** Elior UK Plc

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 09 and 10 December 2021

**Before:** Employment Judge Housego  
**Members:** Mr S Woodhouse  
Mrs G McLaughlin

## Representation

**Claimant:** In person  
**Respondent:** Katya Hosking, of Counsel, instructed by Astons Solicitors

# JUDGMENT

**The claim for age discrimination is dismissed.**

# REASONS

## Summary

1. Ms Bata worked at Barts Hospital as a catering assistant in the hospital's cafeteria, which was run by Elior. The pandemic drastically reduced the number of people using it. Elior decided on a redundancy exercise, and dismissed Ms Bata and others. She says her scores in the matrix for selection were too low, intentionally, to dismiss her as an older person. The Tribunal found this to be a genuine redundancy, and fair. Ms Bata's age had nothing to do with it. The Tribunal accepted that Ms Bata had tried to lodge her claim in time, so that while it was a few days late, it was just and equitable to extend time.

## Law and issues

2. Elior says that the claim is out of time. The Tribunal has to decide if it was

filed in time or not, and if not whether it is just and equitable to extend time. The best approach for a tribunal in considering the exercise of the discretion to extend time<sup>1</sup> is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay<sup>2</sup>.

3. Age is a protected characteristic<sup>3</sup>. Ms Bata asserts that her selection dismissal was direct age discrimination<sup>4</sup>.
4. Age is the one characteristic where such discrimination is capable of justification<sup>5</sup>. The Respondent does not rely on such a defence. Their defence is that this was a decision in which the age of Ms Bata played no part.
5. It is for Ms Bata to show reason why there might be discrimination<sup>6</sup>, and if she does so then it is for the Respondent to show that it was not. The test for direct discrimination is whether the Tribunal is satisfied that in no sense whatsoever<sup>7</sup> was the dismissal tainted by such discrimination.
6. It is necessary for a claimant to show a causal connection between the protected characteristic and the less favourable treatment. It is not enough to have the protected characteristic, and to have suffered detriment. The protected characteristic must be shown to be (at least part of) the reason the claimant suffered the detriment<sup>8</sup>.
7. The Tribunal applied the law about burden and standard of proof for discrimination cases set out by the Supreme Court<sup>9</sup>.
8. Ms Bata cannot claim unfair dismissal because she was employed for less than the two years required to make such a claim. Nevertheless, the Tribunal must consider the fairness of the dismissal, for if it was unfair that would be a primary fact which would have to be considered in deciding whether Ms Bata had shown facts from which an inference of discrimination might be drawn. The reason put forward by Elix is redundancy, which is a potentially fair reason for dismissal<sup>10</sup>. The starting point for the issue of fairness is the words of Section 98 (4) of the Employment Rights Act 1996 ("the Act")<sup>11</sup>. There is no burden of proof in deciding the issue of fairness, for it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer (such as whether Elix might have continued to furlough people – and they had sound reasons for not doing so).

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<sup>1</sup> Equality Act 2010, section 123 (1) (b)

<sup>2</sup> Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, paragraph 37

<sup>3</sup> S11 Equality Act 2010

<sup>4</sup> S13 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.

<sup>5</sup> S13(2) Equality Act 2010.

<sup>6</sup> Igen v Wong (above), Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

<sup>7</sup> Igen Ltd & Ors v Wong [2005] EWCA Civ 142, para 14 applying Barton v Investec Securities Ltd, [2003] ICR 1205 para 25.

<sup>8</sup> Law Society v Bahl [2003] UKCAT 1056\_01\_3107

<sup>9</sup> Royal Mail v Efofi [2021] UKSC 33

<sup>10</sup> S98(2) of the Employment Rights Act

<sup>11</sup> "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case"

9. Ms Bata accepted that there was a redundancy situation and that she was fairly selected to be placed at risk of dismissal by reason of that redundancy situation (because everyone who worked there was put at risk). The scoring method – the matrix for selection – was agreed with Unison and Unite, and Ms Bata does not say that the scoring system itself was unfair. She says the scoring was unfair, and that the reason for that unfairness was her age (64 at the time), because (she says) as she was 64 they thought she must be stupid, and so marked her down.
10. In considering whether Ms Bata’s selection for dismissal was fair, or not, the Tribunal must consider not only that selection but also whether there was a search for alternative employment. There is an obligation on the employer to make efforts to find the employee alternative employment. As *Harvey*<sup>12</sup> puts it: *“In order to act fairly in a redundancy situation, an employer is obliged to look for alternative work and satisfy itself that it is not available before dismissing for redundancy.”*

### Evidence

11. Ms Bata gave oral evidence with the assistance of a Romanian interpreter. Jennifer Lehane (General Manager of Ms Bata’s workplace) and Emma Lewis (of human resources) gave oral evidence for Elior. They marked the scores of all in Ms Bata’s team. All those who gave oral evidence were cross-examined.
12. There was an agreed bundle of documents of 104 pages.

### Submissions

13. Counsel for Elior submitted that the decision to put Ms Bata at risk of redundancy cannot be discriminatory because everyone was in the pool. As only three of eight remained, and the highest scores were far above that of Ms Bata her selection could not be discriminatory. There were clear issues with overall performance and a score of two was fair – she did not meet the criterion *“Meets expectation of role”*. However, Ms Bata challenged only two heads of marking where she was scored at zero.
14. There were good reasons for the zero marks – the skills mark was under a heading *“Yet to acquire / still acquiring the specific skills for the role”* and the two courses she had undertaken were no reason to say that she was the next level up *“Proficient at the specific skills for the role”*. The knowledge and experience mark was for *“Limited or basic knowledge”* and Ms Bata was not within the next grade up *“Sufficient knowledge of the role”*.
15. In any event Ms Bata could not have reached third place in the table had she been marked higher in each of those two categories. There was no realistic prospect of her being retained. Even had she got maximum marks in those two categories that would be another 10 marks (2 extra points x 5) and that would take her to 48 – she needed 66 to be level with the people second and third in the scoring.

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<sup>12</sup> The authoritative textbook on employment law

16. She had been given the same help to find alternative employment as everyone selected for redundancy.
17. There was nothing to show that Ms Bata's age of 64 was connected with the selection. The exercise had been over four sites, and two others aged 61 and 68 had succeeded in being retained.
18. The claim form had been sent in by email, and the form said how it should be done – by post or online, not by email. The Tribunal had told her so – on 23 January 2021 at 13:54, which was still within the time limit, but she had still not dealt with it until outside the time limit. It is not just and equitable to extend time in these circumstances.
19. Ms Bata felt it was very unfair that she was scored zero (of three points) in the skills section when she had passed two online courses run by Elior. She felt it was very unfair that she was also scored at zero for knowledge and experience, and only two in the overall performance section, these having the highest weighting in the matrix. (The other factors were all objective, so the scores were automatic.) She says she was unfairly marked down, so as to engineer her departure, and that as she was 64 at the time, that was the reason. She says that the letter she got thanked her for all her hard work, and she got another letter saying that she was a key worker. She had not compared her scores with those of others, because her scores were unfair. She says she was marked down because those marking her considered her “*a cretin*” and she says that they thought that because she was over 60.
20. Ms Bata said that she has a degree in psychology, obtained in France, and works hard to help Romanians who have been exploited abroad. She feels patronised by being considered less able. The way it was put in an internal email she found hurtful. She said that she now works at University College Hospital in a similar role, with no issues, 4 long days a week, so that the scores Elior had for her were simply wrong. She had 8 months out of work which had been extremely stressful.

### Findings of fact

21. First, the out of time issue:
  - 21.1. Ms Bata was dismissed on 10 September 2020.
  - 21.2. She started the Acas early conciliation process on 25 November 2020. That was within three months.
  - 21.3. The early conciliation certificate was issued on 25 December 2020.
  - 21.4. The three month period would end on 09 December 2020. That is within the Acas early conciliation period, and so limitation is extended by one month from its end.
  - 21.5. Therefore it expired on 25 January 2021.
  - 21.6. The claim was filed on 28 January 2021.

- 21.7. Therefore, the claim was filed 3 days late, and is out of time.
22. The Tribunal accepted that Ms Bata attempted to send the claim by email on 23 January 2021. She must have sent something as the Tribunal contacted her to ask her to submit it a different way, and she put in a paper document (it is rubber date stamped as received on 28 January 2021). She tried to do the form online, lost all her text, then downloaded the form, filled it in and emailed it to the Tribunal, and then printed it and handed it in. Email is not a way that claims are accepted, but it is understandable that the Claimant will not have appreciated this: the Tribunal accepts emails, the form can be done online and most people send documents by email these days.
23. Elior runs catering concessions. There was a group of four such concessions in London. Ms Bata worked at St Bartholomew's Hospital (Barts Health NHS Foundation Trust, and always called Barts). There were eight people working there as catering assistants. She started only a few weeks before the first lockdown. After a free food offer for staff ended, the pandemic greatly reduced the takings at all four concessions. In summer 2020 Elior decided to reduce its headcount. This varied with the sites. At Barts it was 8 catering assistants to be reduced to 3. Ms Bata accepts that there was a redundancy situation.
24. The pool for selection was everyone who was a catering assistant. Ms Bata does not say it was unfair.
25. The matrix for selection was agreed by Unison and Unite trade unions. Ms Bata does not say that it was unfair.
26. In the three categories that were subjective, Ms Bata was scored as having limited knowledge and yet to acquire, or still acquiring skills, and as "*inconsistent*" in overall performance (so 2 points of 4). The other categories were factual – disciplinary record (where Ms Bata got maximum points), attendance (maximum points) and length of service (the lowest as she had been with them less than a year). Her total score was 38.
27. The highest score for someone selected for redundancy was 62, and the three who were retained scored 66 or more. Of those dismissed, most were in their 20's. There were four operations with similar redundancy exercises. In others, two staff aged 61 and 68 were retained.

## **Conclusions**

28. While the claim was submitted out of time, the delay was short, and followed an unsuccessful attempt to send it by email, and after having tried to do it online, and losing all the text she had typed. It is understandable that someone might think it possible to send a claim by email, which is another form of online communication. While it is unfortunate that Ms Bata did not post it to the Tribunal immediately she got the email from the Tribunal, this is not a case of someone failing to take action in time. It was just the wrong action. There has been no prejudice to the Respondent in the short delay. It is just and equitable to extend time in these circumstances.

29. The Tribunal accepted the other submissions of Counsel for Elior.
30. Overall:
  - 30.1. There was a redundancy situation. Elior's need for employees doing the work done by Ms Bata had reduced, because of the reduced amount of business caused by the pandemic.
  - 30.2. The pool for selection was fair. It was all the catering assistants.
  - 30.3. The selection matrix was fair. Two major unions agreed it, and the Tribunal also thinks it was a fair scoring method.
  - 30.4. None of these matters have any connection to age.
  - 30.5. Part of the scoring is entirely objective. The part that required subjective assessment was appropriately weighted, and the scores were moderated (that is, it was not just the one manager scoring people). It is perhaps unfortunate that someone with a final written warning still scored 1 point in the discipline heading, but someone still acquiring skills would score no points in the skills section. The rating was 1, 2 or 3 and the weighting was 5. It might have been better (as it would not have offended someone like Ms Bata) if it had been weighted at 3 and the rating been between 1 and 5, or the marks been 1, 2 and 3 instead of 0, 1 and 2, but that is only an observation.
31. Elior has shown good reason why the scores in the two subjective categories about which she complains were zero, for the following reasons.
32. In overall performance, the categories were:
  - 32.1. Rarely fulfils the requirements of the role -1
  - 32.2. Inconsistent - 2
  - 32.3. Meets expectation of role - 3
  - 32.4. Exceeds expectation of role - 4.
33. Ms Lehane's opinion, from working with Ms Bata, was that she needed constant reminder to carry out tasks, lacked initiative, and was not strong in customer skills, and did not interface with colleagues well. Her view was well reasoned and backed up by contemporaneous internal correspondence. A score of 2 was not unreasonable.
34. The scores for skills were categorised:
  - 34.1. Yet to acquire / still acquiring the specific skills for the role - 0.
  - 34.2. Proficient at the specific skills for the role - 2.
  - 34.3. Expert in specific skills for the role – 3.
35. Ms Bata says that she had previous catering experience and after 7 months was not someone with zero skills. This is to miss the point which was that she was not considered good at what she did, and was fairly judged to have

been still “*acquiring skills*”. It is unfortunate that the scoring may appear to be a judgment that Ms Bata had no skills, as that was not the assessment.

36. The categorisation for knowledge and experience of job, customers, industry and the organisation was graded:
- 36.1. Limited or basic job knowledge – 0.
  - 36.2. Sufficient knowledge of the role – 1.
  - 36.3. Professional / expert knowledge of the role – 2.
37. It was not unreasonable to score Ms Bata as having basic job knowledge, if unfortunate that it appears as if she had zero knowledge.
38. The Tribunal found the witnesses for Elior to be credible and accepted their evidence as truthful. Ms Lehane said that she had asked about customer feedback and Ms Bata had responded that she was there to serve the food and use the till, and was not there to be nice, so requiring a conversation about customer service.
39. Ms Lehane’s view was set out in an email to her line manager, Charlie Vernon, on 01 October 2020<sup>13</sup> :

*“Reasons for low scores:*

- *Continuous mistakes on the till*
- *Complaints from customers that she was rude (when this was discussed with her, she took it on herself to ask the NHS staff why they thought she was rude!!)*
- *Constantly had to be told what to do, even simple things like making coffee/ wiping tables/ filling counters - she couldn't see what needed to be done, no initiative*
- *Her colleagues disliked working with her for the reasons above, she disliked working with them as she felt they were 'uneducated and not in a position to tell her anything' ...*
- *Didn't seem to understand anything, and would be rude and surly when picked up on it - e.g. I witnessed her one day (minutes after chefs daily briefing) check with the kitchen for a customer because she didn't recognise garlic bread”*

40. Ms Lehane was not expecting Ms Bata to read this, and in the hearing apologised for the way it was phrased, saying that she would have preferred this to have been more diplomatic. Ms Bata says this is indicative of dishonesty. The Tribunal finds the reverse – this was Ms Lehane’s unvarnished account of why the scores were low, at about the time of the scores: it is not constructed later. That email also stated: *“In truth, if it hadn't been for the pandemic and free food offer she wouldn't have passed her probation period.”* (The hospital had, for a period, given staff free food at the cafeteria, and there had been a lot of uptake of this offer, and so a lot to do.) The scores are the genuine assessment of Ms Lehane and Ms Lewis.
41. There was a letter stating that Ms Bata was a key worker, to which Ms Bata attaches significance. It was sent to everyone. That was because working

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<sup>13</sup> Page 84 in the bundle of documents

in a catering facility in a hospital is not a job that can be done from home, and it is necessary to have a catering facility in a hospital.

42. The same applies to a letter thanking Ms Bata for her hard work and professionalism during the process, was also sent to everyone. There is no contradiction between the letter and the decision to dismiss. Despite knowing that five of the eight would lose their jobs they carried on doing their work as well as they could, and that was why everyone was thanked.
43. Ms Bata says that she was not given the certificates for the courses she took, until human resources sent them to her after she requested them. She was indeed sent them after making such a request, but the Tribunal accepted the evidence of Ms Lewis that these were online courses and Ms Bata could have downloaded the certificates herself at any time. They were not concealed or withheld from Ms Bata.
44. Ms Bata's score resulting from the matrix was not in the top three, and all the five below the top three were all selected for dismissal.
45. As Counsel said, if Ms Bata had scored maximum marks in the two categories about which she complains she would get only to 58 points. Even if Ms Bata had scored one more mark in each of the three assessed categories, she would not have been in the top three. That would have given her an extra 15 marks (each of the three elements was given a weighting of 5). She scored 38. Adding 15 gives 53. She would have needed 66, which is another 13 points. Even taking account of the possibility that others were unfairly graded more highly than was right (which is not a point made by Ms Bata, who deigned to consider any score but her own) it is not conceivable that Ms Bata would have scored enough to be in the top three. To get into the top three she would have had to get maximum in *all* the three categories. This is not realistic. Therefore, her selection was fair.
46. If (and the Tribunal did not so find) those scoring Ms Bata found her to be of limited ability that was not a view related to her age. Those scoring Ms Bata had an opinion of her based on what she did, what she did not do, and on her attitude to work. That was not because she was 64, but because of their observation of her at work.
47. Ms Bata was given as much help as everyone else to get alternative employment, and the people she says were discriminating against her did not have control over the process of possible redeployment. Elixor does not have any issue with employing people over 60 – they recruited Ms Bata at 63, and retained two people aged 61 and 68.
48. Ms Bata has not shown facts that could lead to an explanation being required from the Respondent. Had it been necessary for there to be an explanation the facts supply it completely. This was a fair redundancy dismissal untainted by any form of unlawful discrimination.



49. Accordingly, the claim of direct age discrimination fails and is dismissed.

**Employment Judge Housego  
Date: 10 December 2021**