# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D Wingeatt

**Respondent:** Progress Housing Group Limited

**Heard at:** Manchester Employment Tribunal

**On:** 08, 09 and 10 February 2022

**Before:** Employment Judge Mark Butler
Mr J Flynn
Ms S Khan

**Representation**
Claimant: Mr M Wingeatt (Claimant's husband)
Respondent: Dr E Morgan, of Queen's Counsel

# JUDGMENT

The unanimous decision of the tribunal is that the Claimant was not subject to either direct age discrimination or indirect age discrimination, and that those claims fail in their entirety. Consequently all claims in this case are dismissed.

# REASONS

Introduction

1. The Claimant presented her claim form on 25 June 2020, bringing a claim for age discrimination.

2. In considering this matter, we were assisted with a bundle that ran to 430 pages. In addition to this, the tribunal requested sight of additional information from the Respondent in respect of individuals that had been made redundant in previous years, and that were captured on the document at pp418-420 of the bundle. This concerned the proximity to the age of 55 (where the person was identified as being 54 at the time of termination) and the applicable notice periods of those persons. This was important, particularly given the tribunal was considering a claim of indirect discrimination, but also as it may have needed to consider the discriminatory effect of the decision in question, for the purposes of assessing objective justification. We were grateful that this information was provided to the

tribunal before the afternoon session on Day 2. The Claimant had completed her evidence by the time that the document was received. The Claimant was thus asked whether she wished to recall herself in order to comment on the document. However, she elected not to as she would not be able to say anything about the data that was contained in that document, as she had no knowledge of those that it concerned.

3. The Claimant gave evidence on her own behalf and called no further witnesses.

4. The Respondent called:

    a. Ms Amanda Van Duyvenvoorde (sometimes referred to as Mandy in the documents). She was the Claimant's direct line manager. Was responsible for the organisaiotnal changes to the IT team, and who chaired consultation meetings with the Claimant and made the relevant decision that is subject to the claim that is brought.
    b. Mr Andrew Speer. He is the Executive Director of Finance and Corporate Services of the Respondent and was authorised the PILON made to the Claimant
    c. Mr Bernard Keenan. He considered the Claimant's grievance appeal.

5. The tribunal was conscious throughout the case that although the Claimant was represented by her husband, neither were legally qualified. As such, the tribunal tried to be generous with time to allow the Claimant to present her case as best as she could, assisted with questioning where appropriate but without presenting the case on behalf of the Claimant, explained the process of the hearing and the different stages, avoided legal jargon where possible and invited the Claimant to seek clarity where it was needed, and ensured the Claimant had sufficient time in advance of closing submissions to be able to present final argument as best she could.

6. The tribunal was grateful for the way that both parties presented their case throughout the hearing. It enabled the tribunal to hear the evidence that it needed in order to reach a decision on this dispute.

Issues

7. The issues in this case were narrow. It concerned one matter, and that was the use of the PILON process. And whether the use of PILON was an act of either direct or indirect age discrimination.

8. In terms of the direct age discrimination complaint, the Claimant's case was that using PILON in the manner it was was the less favourable treatment. And this had a causal connection to her age. The Respondent denies this in its entirety. The Respondent denies that this reached the level of being less favourable treatment, and that there was any causal connection to age, as PILON was activated for business reasons that were unconnected to age. The Respondent also pleads that if the tribunal was to find direct age discrimination, then it would be justified on the following legitimate aim:

> 28.9 The exercise of the PILON provision supported a legitimate aim, namely: either alone or in conjunction with other contractual rights to preserve the financial and operational interests of R and its limited resources for application to the purposes for which its services were provided, namely: the provision of social housing for those most in need of protection on account of financial disempowerment or other social inequalities; and

9. In terms of the indirect age discrimination complaint, the Claimant's case is that the use of PILON is the Provision, Criterion or Practice, and that this put others that shared her characteristic as well as herself at a particular disadvantage. The Respondent again challenges this claim at each stage. And similarly, argues that any such indirect age discrimination would be justified, should the tribunal be finding such to have taken place.

10. The Claimant helpfully clarified in her oral evidence that her claim simply concerned the use of PILON, and was not concerned with the use of PILON for only part of her notice period. It was the use, rather than part-use that she brought her claim.

11. The Claimant confirmed before starting her evidence that she was not complaining about the grievance process. And no claim was brought concerning that. Further it was confirmed that there was no claim for unfair dismissal. That this case concerned the narrow issue of the PILON clause only. The parties were encouraged to focus on those matters relevant to that issue, and were directed to move on where questions went into areas not relevant to the dispute before the tribunal.

Closing Submissions

12. Dr Morgan, on behalf of the Respondent, produced and sent to the Claimant written closing submissions on the morning of the third day of the hearing. Importantly, this set out the legal submissions that the Respondent was going to make. Mr Wingeatt, and the Claimant, were given a reasonable amount of time to consider these written submissions in advance of making closing submissions. The Claimant also provided the tribunal with four cases on which she was seeking to rely. The initial plan was that closing submissions would be sent to the Claimant by 09.30 on the morning of day 3, and the tribunal would hear closing submissions from 11.30. However, there was a brief delay, explained below.

13. It was explained to the tribunal that there had unfortunately been a slight delay in sending the written closing submissions to the Claimant on the morning of day 3. This was due to Dr Morgan having had to have his IT account locked. In short, Dr Morgan had accidentally left his mobile phone in the tribunal room when the case broke for lunch on day 2 of the hearing. On realising this, with the room being and remaining unlocked over the lunch break, and on not being able to contact the tribunal clerk, the judge moved the mobile out of sight when he left the room to take lunch. To protect sensitive data on his mobile device, Dr Morgan took the precautionary step of having his IT account locked. This was not unlocked until the morning of Day 3. As the closing submissions of the Respondent had not reached the Claimant early on the morning of Day 3 as planned, the tribunal adjusted the timetable to ensure that sufficient time was given to the Claimant to read the closing submissions and prepare accordingly. In short, it was decided that the tribunal would hear closing submissions on behalf of the Respondent from 11.30. There would then be an extended lunch. And closing submissions would be made on behalf of the Claimant from 14.00. This enabled the Claimant to have the necessary time to prepare closing submissions, and benefitted her in that this could be done in full understanding of the closing submissions of the Respondent. The parties agreed to the suggested approach.

14. In addition the written closing submissions of the Respondent and the case law provided by the Claimant, the tribunal was assisted by oral closing submissions made on behalf of both the respondent and the claimant. We do not repeat any of those submissions here, but will make reference to such submissions if we consider them relevant and necessary. For the avoidance of any doubt they have been considered and taken into account when reaching this decision.

Law

*Direct Age Discrimination*

15. Protection against direct age discrimination is provided for at s.13 of the Equality Act 2010:

> (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.

*Indirect Age Discrimination*

16. Protection against indirect discrimination is provided for at s.19 of the Equality Act 2010:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> a. A applies, or would apply, it to persons with whom B does not share the characteristic,
> b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> c. it puts, or would put, B at that disadvantage, and
> d. A cannot show it to be a proportionate means of achieving a legitimate aim."

*Burden of Proof*

17. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

*Case Law*

18. In assisting the tribunal, we were taken to a number of relevant cases. Although we do not repeat all of this case, it has been considered by the tribunal when reaching this decision.

19. Notably, Dr Morgan took the tribunal to the following:

a. **CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439**:

> "33… Supplying information or opinions which are used for the purpose of a decision by someone else does not constitute participation in that decision. There may be cases where it is difficult to distinguish between the two situations, but the Tribunal was fully entitled to treat this case as one where Mr Gilmour did indeed make the relevant decision on his own. That would be clear enough even if one had regard simply to the sequence of events which it found, but there is in fact the additional point that Mr Gilmour made it clear in his evidence that because of the Claimant's eminence and long service the decision to terminate her contract was a matter for which he had to take sole responsibility: Mr McMullan had, as we have seen, not even recommended it….
>
> "36. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation."

b. **Pnaiser v NHS England [2016] IRLR 170, EAT**:

> "(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan…
> f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator…"

c. **Jesudasan v Alder Hey Chidren's Hospital NHS Foundation Trust [2020] EWCA Civ 73**, and although this is a Protected Disclosure case, it refers to the **Shamoon** case, which is relevant to this decision:

> "27. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a

detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In **Derbyshire v St. Helens MBC [2007] UKHL 16**; [2007] ICR 841, paras. 67-68 Lord Neuberger described the position thus:

> "67…. In that connection, Brightman LJ said in **Ministry of Defence v Jeremiah [1980] ICR 13** at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
>
> 68. That observation was cited with apparent approval by Lord Hoffmann in **Khan [2001] ICR 1065**, para 53. More recently it has been cited with approved in your Lordships' House in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

d. **Ishola v Transport for London [2020] EWCA Civ 112**:

> ''In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.'' [per Simler LJ]

e. **Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer [2012] UKSC 1**, the PCP must place those who share the protected characteristic at the relevant disadvantage.

20. Mr Wingeatt identified the following cases:

a. **Devon Care Trust v Readman [2013] EWCA Civ 1110**, which has limited relevance to the issues in this case as it is an appeal concerned with an unfair redundancy dismissal rather than an age discrimination claim. Although the decision has been read.

**b. Sturmey v The Weymouth and Portland Borough Council**

**UKEAT/0114/14/RN**

c. **The Mayor and Burgesses of the London Borough of Tower Hamlets v Wooster UKEAT/0441/08**

d. **Walsh v Tewkesbury Borough Council [2011]**, which is a an Employment Tribunal decision.

Findings of Fact

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

21. The Respondent is a social housing provider. It provides access to housing to individuals who are otherwise unable to access residential housing. The respondent is publicly funded and accountable. The Respondent is subject to the principles contained within the Accounting Direction (see p.233), the Value for Money Code of Practice (see p.421) and the Value for Money Standard (see p428).

22. Any member of the Local Government Pension Scheme ('LPGS'), which included the Claimant, would receive an enhanced pension if they were made redundant by the Respondent after the age of 55, and had satisfied other criteria. The Claimant satisfied all other criteria for the LPGS scheme at the point of termination.

23. The Respondent has been subject to investigation by the Regulator previously following pay outs on redundancy. This includes when multiple Directors, including Bernard Keenan, were made redundant at the same time. The regulatory action led to the Respondent being downgraded by the Regulator, which brought with it reputational as well as financial consequences. And further, it has been investigated in the past following a specific redundancy payment made to a director. No further action was taken in this case. However, it is against this background of scrutiny by the Regulator of such payments that the Respondent operates.

24. In deciding whether to investigate financial payments, the Regulator is not concerned with the seniority of the person to whom payments are made, but the level of the payments being made.

25. The Claimant's continuous service with the Respondent commenced on 28 November 1983. The Claimant during her time with the Respondent held a number of different roles. In each role, the claimant was given, and signed, a written contract. Since 1999, the Claimant's contract contained a Payment in Lieu of Notice clause ('PILON') (see p.71).

26. At the date of the Claimant leaving employment, she held the position of Housing Systems Development Manager (for this contract see p.50). As part of this contract, the claimant had a PILON clause (see p.51). This allowed for the following:

> The Employer reserves the right to terminate your contract without notice or pay in lieu of notice if you are guilty of gross misconduct/gross negligence or any other serious breach of company rules or your contract of employment.

> The Employer reserves the right to pay salary in lieu of any notice of termination of employment which it is required to give.
>
> Any payment in lieu of notice shall consist solely of the Employee's basic salary (at the rate applicable at the date notice is given) for the notice period or any unexpired period of notice and shall be subject to such deduction for tax and national insurance as the Employer is required to make.

27. The Respondent does regularly invoke PILON clauses when employment is being ended by reason of redundancy. Of 62 redundancies since March 2015 until the termination (but not including) of the Claimant's employment, there were 17 instances of PILON being used. However, proportionally this has increased since 01 October 2017. With PILON having been used in 6 of 8 cases since this date up until the Claimant's termination date (see pp.418-420). The ages of the 6 individuals that were made redundant and PILON was activated since 01 October 2017 up to but not including the Claimant's termination date were 52, 46, 48, 52, 43 and 44. Whilst the ages of those were PILON was not activated were 52 and 32.

28. In 2016, the Respondent planned a structural review of its IT Services provision. Following numerous delays, the review was delayed, and only commenced in June 2019 (for the proposal see pp.84-94). As part of the review, the Respondent undertook consultation with those affected. There was a total of 30 employees that would be affected by the review.

29. The proposal had an aim of rationalising the workforce. In essence, it was to reduce the number of direct reports, to remove duplication in terms of management and to introduce a more permanent structure. There were no redundancies planned in the new structure, with each individual being offered a role that followed a job-matching exercise.

30. The proposals were presented to the Respondent's various IT teams in a series of meetings on 25 June 2019, as part of the consultation process and with a view to gathering initial feedback from those in attendance. The proposed structure was presented at these meetings. It was also explained that depending on feedback and comments raised about the proposed structure, the next stage would be to match individuals against revised posts and holding individual consultation meetings. It was reiterated at this meeting that no redundancies were envisaged (see p.95). The claimant was in attendance at several of these meetings.

31. On 01 July 2019, the claimant provided the Respondent with some feedback on the proposed structure. Although being generally positive about the new structure, the Claimant did raise some queries around the role of the Business Systems Manager post, as well as queries around specific queries around particular roles. Ms Duyvenvoorde responded to these queries by email dated 02 July 2019, and invited the Claimant to let her know if she wanted to discuss these matters further (see p.97).

32. On 22 July 2019, the Claimant was invited to a meeting on 23 July 2019 (although it did not take place until 25 July 2019), as part of individual consultation (see p.99). This was to discuss proposed changes and potential variation of the Claimant's contract of employment. The letter made it clear that:

The meeting will be your chance to let us know how you feel about the proposed variation and will allow us to discuss:

- the reasons why we feel that it is necessary to make the variation;
- how it impacts on you as an individual; and
- any alternatives to making the variation.

33. On the 24 July 2019, there was a Staff Forum meeting (notes of that meeting start at p.100). The Claimant was aware of Staff Forum meetings. However, she did not attend this particular meeting. The IT/Digital Services restructure was agenda point 4 of that meeting, and was discussed.

34. On 25 July 2019, the Claimant attended at her first individual consultation meeting with Ms Van Duyvenwoorde (the notes of this meeting start at p.105. These notes were sent to the claimant after the meeting, giving the Claimant the opportunity to review the notes and suggest amendments where they were considered inaccurate. The Claimant at no point challenges the accuracy of these notes). Ms Dion Baugh, a Unison Representative, accompanied the Claimant at this meeting. Ms Parkinson, a People Services Manager, was also in attendance. At this meeting the following matters were discussed:

    a. That all affected employees had accepted the structure proposal

    b. The job-matching process, and that the claimant had been matched to the Business Systems Manager role (the job description for the role is at pp.109-113 and the job specification is at pp.114-116).

    c. That the Claimant could not understand why she was matched to the Business Systems Role as she only knew the QLx system. And that she did not consider the role to be feasible.

    d. That the focus in the job-matching was on the managerial side of roles. That nobody was expected to have technical knowledge across each of the systems used by the Respondent. And that the Respondent was putting in place a 12 month training plan to support the Claimant.

    e. There was no detriment in pay between the claimant's current role and the new role.

    f. Whether the Claimant could be considered against a temporary post. The Claimant under cross-examination expressed that this suggestion was put forward by her Union representative without her consent. There is nothing in the notes that suggest that the Claimant did not support such a suggestion.

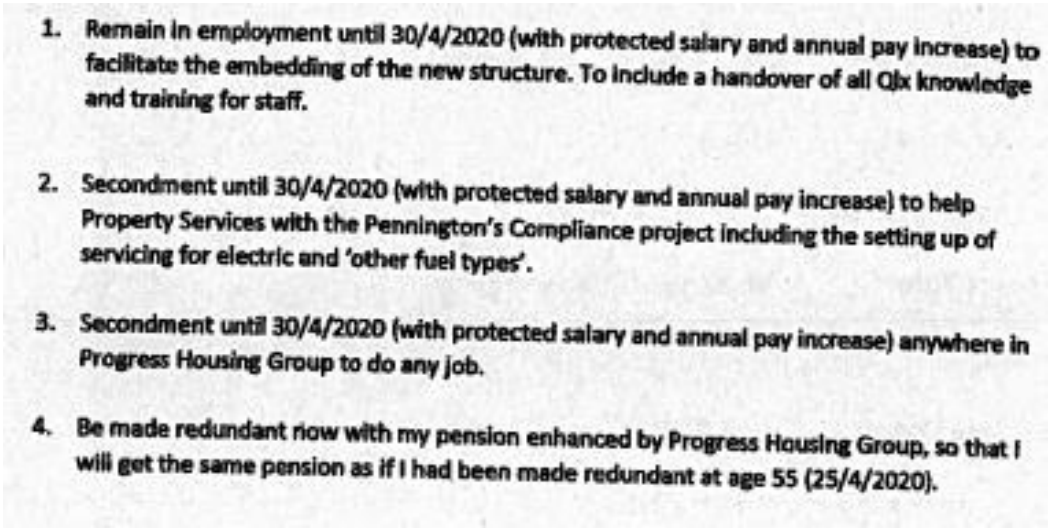
    g. The Claimant enquired as to what the outcome would be if she decided that she did not want to take up the offered role. Ms Parkinson replied by explaining that the Respondent would take on board any feedback. And asked the Claimant what she would like from the situation.

    h. It was reiterated that there was no redundancy situation.

35. The Claimant was invited, by email dated 01 August 2019, to send any questions or proposals regarding the restructure to Mr Van Duyvenvoorde by 05 August 2019 (see p.117).

36. In line with that suggested on 01 August 2019, and by an undated email, the Claimant sent four proposals to Ms Van Duyvenvoorde. The Claimant explained

that she would not be 'slotted' into the new role, and proposed the following alternatives:



1. Remain in employment until 30/4/2020 (with protected salary and annual pay increase) to facilitate the embedding of the new structure. To include a handover of all Qlx knowledge and training for staff.

2. Secondment until 30/4/2020 (with protected salary and annual pay increase) to help Property Services with the Pennington's Compliance project including the setting up of servicing for electric and 'other fuel types'.

3. Secondment until 30/4/2020 (with protected salary and annual pay increase) anywhere in Progress Housing Group to do any job.

4. Be made redundant now with my pension enhanced by Progress Housing Group, so that I will get the same pension as if I had been made redundant at age 55 (25/4/2020).

Notably, all four suggestion made by the Claimant were with a view to her qualifying for an enhanced redundancy pension. The first three suggestions would require the claimant to continue working until shortly after her 55th birthday, whilst the fourth suggestion would see the claimant be made redundant immediately, but be treated as if she was made redundant after her 55th birthday.

37. On 08 August 2019, the Claimant attended a second formal consultation meeting. Notes of that meeting were prepared, again these were sent to the Claimant for the purposes of agreeing them. The Claimant did not challenge their accuracy or suggest any amendments to them (the notes are at pp.118-119). Ms Van Duyvenwoorde chaired this meeting. Ms Parkinson was again in attendance. As was Ms Baugh, who accompanied the Claimant as a Trade Union representative.

38. The Claimant maintained in the meeting of 08 August 2019 that she was not interested in the role of Business Systems Manager. Other potential roles for the Claimant were also discussed in that meeting, with the Claimant asked whether she had identified any roles that she was interested in and that she considered to be better matches for her. The Claimant explained that she had considered the role of Head of Business Systems. However, the Claimant did not consider this to be suitable for her. However, the Claimant had not identified any other roles that she was interested in or that she considered to be a better match for her. In this meeting, the Claimant explained the following:

    a. That following some soul searching, she wants to leave

    b. That she struggled with the last change and does not feel it would be good for her

    c. That she feels it is time to go and feels she lacks the energy and enthusiasm for the Business Manager role

    d. That ideally she would like redundancy, and that she would like the option to stay until April, when she would turn 55.

39. Ms Van Duyvenwoorde reiterated that this was not a redundancy situation, but that she would go away and consider the proposal. Whilst, Ms Parkinson emphasised that delaying the Claimant's leave date to 55 could incur pension strain costs, and that this would need to be considered against the business

need, the need to get best value for tax payers, rent payers and customers, and that such a decision would be subject to scrutiny from the Respondent's Remuneration Committee and senior management.

40. The Claimant's four options were discussed in this meeting. The Claimant confirmed that her first proposal was in effect the Claimant remaining in her current post and leaving after she turned 55. Ms Duyvenwoorde explained that this would incur additional resource that had not been budgeted for, given that the Business Systems Manager role would still need to be filled.

41. It was confirmed in the meeting of 08 August 2019 that the rest of the structure changes, including confirming people into matched positions was to go ahead, but that the Business Manager role would remain vacant. The role was being left vacant whilst discussions and consultation continued with the Claimant. In effect, the role remained ring-fenced for the Claimant. The Claimant agreed with this course of action.

42. Following the meeting of 08 August 2019, so far as the Claimant was concerned, her role was redundant, and the only outstanding matters were: (i) when would her contract terminate by reason of redundancy and, (ii) what would be the terms of her departure from her role. This was accepted by the claimant under cross-examination.

43. Following the meeting of 08 August 2019, the Claimant remained in her previous role. And continued reporting to Ms Van Duyvenvoorde.

44. Consultation on the new structure with all other members of the IT team, save for the Claimant, had been completed by 14 August 2019, with new roles confirmed. This was the beginning of the transfer to the new structure (see para 32 of Ms Van Duyvenvoorde's witness statement and p.120). All new roles had been confirmed save for the Claimant, who had not agreed to a new role and an employee named Mary, who continued in her role supporting and reporting into the Claimant.

45. At the beginning of September 2019, all other members of the team, save for the Claimant and Mary, had migrated into the new structure. This was accepted by the Claimant under cross examination. The Claimant and Mary were the only individuals that operated out of this new structure between September and December 2019.

46. The new structure envisaged, and included, the Business Systems Manager reporting into Mr Warburg.

47. From September 2019, the role of Business Systems Manager role was effectively covered by others within the team. Whilst the Claimant continued to work in her old role, that no linger formed part of the new structure.

48. From September 2019, the IT team underwent a period of training to assist them with the transition into their new roles.

49. On 17 October 2019, the Claimant attended a third consultation meeting. Notes of that meeting were prepared, again these were sent to the Claimant for the purposes of agreeing them. The Claimant made two amendments to the note, but did not challenge the accuracy or suggest any amendments to the remainder of the notes (the notes are at pp.140-142). Ms Van Duyvenwoorde chaired this meeting. Ms Parkinson was again in attendance. As was Ms Baugh, who accompanied the Claimant as a Trade Union representative. In this meeting, the following were discussed:

a. There had been a delay in arranging this meeting, whilst the Respondent waited on pension information. Ms Van Duyvenwoorde explained that the pension strain was substantial and that it would not be considered.

b. It was explained to the Claimant that, from the Respondent's perspective, the role of Business Manager was still considered a reasonable suitable alternative and that there was no redundancy situation.

c. Ms Parkinson explained that there was no business rationale for delaying the Claimant's exit from the Respondent for some months simply to give her a beneficial pension, in circumstances given the high costs and that the Respondent considered that a suitable alternative role was available.

d. The claimant re-iterated an option of paying the pension in annual payments rather than as a lump sum.

e. The Claimant re-iterated that she did not consider the role to be a suitable alternative. This concerned the size of the role and having to work for Steve Warburg.

50. Ms Van Duyvenwoorde was absent from work will illness from November 2019 until 06 January 2020.

51. An email, with a letter attached, was sent to the Claimant form Ms Van Duyvenwoorde on 06 January 2020. This letter explained the position as it stood, following the meetings of 25 July 2019, 08 August 2019 and 17 October 2019. In effect, there was a restructure, the Claimant had been matched to the Business Systems Manager role and the Claimant had rejected the role as she considered it to be unsuitable. It was explained that the role remained open for the Claimant. However, the letter also made a concession, that the Claimant's role may be viewed as being at risk of redundancy, which would be discussed at a further consultation meeting, which was arranged for 10 January 2020.

52. The Claimant was absent from work with work-related stress from 10 January 2020. A sick note was provided that covered the period 10 January 2020 to 31 January 2020 (p.157). The meeting arranged for 10 January 2020 was cancelled.

53. Around the 10 January 2020, in light of the Claimant's absence, the Respondent increased the level of training for staff that had moved as part of the new structure. We accepted Ms Van Duyvenvoorde's evidence on this, and it is consistent with evidence given closer to the time (see p.222).

54. On 14 January 2020, a draft letter was produced by Ms Parkinson on behalf of the Respondent (pp.158-159). This letter was never sent to the Claimant. However, the contents of the letter indicated the following:

> We are conscious that our discussions and attempts to find a solution agreeable to both parties has been going on for some five months without success. At this point and to not delay matters any further, we are writing to confirm we are prepared to accept your role of Housing Systems Development Manager is at risk of redundancy.
>
> In normal circumstances we would meet to explore alternative roles, but we accept that you wish to exit the organisation and have indicated in previous discussions that you do not wish to consider further change / other positions. On behalf of the organisation I therefore confirm your position of Housing Systems Development Manager is now redundant and your employment will terminate on 28 February 2020 by reason of redundancy.

55. Within this letter, the Respondent also included that the claimant would work 6 weeks' notice and be paid 6 weeks' pay in lieu of (the remaining) notice.

56. By letter dated 15 January 2020 (see pp162-163), Ms Van Duyvenwoorde wrote to the Claimant with a rearranged date for the consultation meeting of 21 January 2020. This letter reiterated that the Claimant's role may be made redundant. Both parties expected the Claimant's employment to be terminated at this meeting. This led to it being explained in this letter that the role of Business Systems Manager would now be advertised and a recruitment exercise would commence. The Claimant was able to apply for this role, if she chose to. The Claimant did not apply for this role.

57. On 17 January 2020 (see p.169), Ms Parkinson informed the Claimant that the role of Business Systems Manager was now being recruited to. Ms Parkinson also forwarded to the Claimant the job description and person specification and a link to the internal advert should she choose to apply.

58. Interviews for the Business Systems Manager role took place on 28 January 2020. Mr Andy Crame was appointed into the role on 29 January 2020. MR Crame was identified as the best candidate for the role, who had extensive knowledge of the relevant systems and a technical background. The appointment of Mr Crame is dealt with in Ms Van Duyvenvoorde's witness statement, and was unchallenged, save for a suggestion of the Respondent panicking.

59. The final consultation eventually took place on 11 February 2020. Notes of this meeting are at pp.178-180, and which the Claimant has not challenged as being inaccurate. A discussion took place as to whether redundancy could be avoided. No solutions to avoid this were found. Ms Parkinson explained in this meeting that the Claimant would be entitled to 12 months' salary, and would be paid payment in lieu of notice. The Claimant disputed the use of PILON and expressed that her preference was to work the full 12 week notice period. The Claimant queried its necessity, and that by working notice the Claimant could ensure a good handover and pass on her skills and knowledge. Ms Parkinson explained that this was a business decision, that PILON has been applied in other cases and was not unusual, but that the Claimant's proposal would be considered. The Claimant threatened to go to the press if she were given PILON, and Ms Baugh suggested that the only reason for PILON was to avoid the enhanced pension. Ms Van Duyvenvoorde explained:

> AVD reflected that when she had looked at the Digital Service structure with the Team it was about delivering services in a better way and appreciating the talent within the Team. She genuinely saw no redundancy situation. It was done with respect and she did not see a redundancy situation. It was only through conversations with DW and understanding her objections, personal to DW, that the conversation moved to looking at different options. The proposal she put forward was done for genuine business reasons.

60. It was confirmed to the Claimant that an outcome would be sent to her in writing.

61. Ms Van Duyvenvoorde was the person who made the decision in respect of PILON and how it was to be applied to the Claimant. Although this decision required the approval of Mr Speer, given his role as Executive Director of Finance and Corporate Services, we are satisfied that the decision maker was Ms Van Duyvenvoorde. And that she was the sole decision maker who decided to activate the PILON clause. The evidence of Mr Speer and Ms Van Duyvenvoorde is consistent on this. Mr Speer was clear that decision-making in respect of the implementation of the new structure was left to Ms Duyvenvoorde, and that is clearly accurate in respect of the implementation of the structure itself. Further, the Claimant does not challenge this fact.

62. Ms Van Duyvenvoorde when making her decision to activate the Claimant's PILON clause took account of the following factors:

    a. The new structure, save for the Claimant and Mary, had been implemented since early September 2019

    b. That the team had been functioning under this new structure since that time

    c. That the team had undergone extensive training since the implementation of the new structure to help embed it

    d. That the only outstanding role, that of Business Systems Manager, had been filled by Andy Crame on 29 January 2020.

    e. That there were no risks to the service in not having the Claimant work her notice, as her responsibilities had been picked up by the team for a considerable time

    f. The team were operating without her at that time, as she was currently absent

    g. Prolonging her employment would delay the finalisaiton of the new structure even longer

63. Ms Van Duyvenvoorde met with Mr Speer on 11 February 2020 to seek authorisation to make a PILON. He confirmed his approval directly to Human Resources.

64. Mr Speer set out what was discussed with Ms Van Duyvenwoorde in the statement he produced as part of the grievance process, and what factors he considered when approving PILON (see p.261). Mr Speer had in mind the following:

    a. That there was no risk of business disruption within the IT team, due primarily to the training that had been implemented

    b. That additional resources had been arranged during th eClaiamnt's absence, which included Paul Fazakerley and a consultant.

    c. The delays that had taken place in implementing the system, and a need to conclude it as a soon as reasonably practicable

    d. That there was a potential for the Claimant to have further periods of absence, and that there were assurances that the team could cope with that.

    e. There had been sufficient knowledge transfer to protect the group without the need for the Claimant to work her full notice

    f. That prolonging the Claimant's work beyond her 55th birthday in these circumstances could lead to the Respondent incurring potential financial consequences of pension strain, which brought with it risk to reputational damage and/or regulatory censure. This factor was in Mr Speer's mind at the time, although it was not discussed with Ms Van Duyvenvoorde and so had no impact on her decision. And although in mind, we further find that this had no material impact on Mr Speer's decision to authorise PILON. The tribunal accepted Mr Speer's oral evidence on this, which was unchallenged by the Claimant, when he explained that he would

have to be aware of the financial impacts of any decisions the Respondent made, but it never got as far as needing to be considered, as there was a clear business case. So although Mr Speer was aware of this factor, and had it in mind, the tribunal was satisfied that it played no role in any of the decision making process. Either by Ms Van Duyvenvoorde, as this was never in her mind, nor in Mr Speer's decision to sanction Ms Van Duyvenwoorde's decision.

65. A decision letter was sent to the Claimant, dated 13 February 2020 (pp.183-184). This explained that the Claimant's role would terminate by reason of redundancy, along with the following:

> • your period of notice will commence on 17 February. You will be required to work a 4 week notice period to allow for a detailed handover of information and you will be paid in lieu of the remaining 8 weeks of your notice period in accordance with your contract of employment;

66. The Claimant's effective date of termination was 13 March 2020.

67. Following the Claimant having left the organisation, the team continued to operate effectively, and the year-end progressed without any disruption to service.

Conclusions

68. Turning first to the direct age discrimination claim. For this to succeed the tribunal needs to be convinced that there is both a detriment/less favourable treatment AND that this has a causal connection to the Claimant's age. The conclusion of this tribunal is that neither of those have been established in this case.

69. Although the Claimant's perception is important when assessing whether she has been subjected to a detriment, it must to be a perception that is a reasonable one to hold in the circumstances. This case concerned a Claimant who held the perception that activating her PILON clause to end her contract was a detriment. However, this tribunal concludes that this was not a reasonable perception given the following circumstances, amongst others:

    a. The Claimant had in her contract a clause which entitled the Respondent to make a PILON. The Claimant was aware of this, and had agreed to this clause.

    b. The Claimant had made up her mind that she wanted to leave the employ of the Respondent by the meeting of 08 August 2019.

    c. The Respondent implemented the new structure by 14 August 2019, and all members of the team, save for the Claimant and Mary who continued to report to the Claimant, were placed in their new roles under the new structure at the beginning of September 2019.

    d. During September 2019 to December 2019, the IT team underwent a period of training, to assist them in the new structure.

    e. Between September 2019 and January 2020, other members of the IT team filled the part of the role that the Claimant was not doing under the new structure.

    f. The Respondent kept the Business Systems Manager role open for the Claimant until the beginning of January 2020, however, this could only be left unfilled and ring-fenced for the Claimant for so long. This was some

5/6 months that this role had been left unfilled with the intention and hope of the Claimant accepting the role.

g. The Claimant went off ill at the beginning of January 2020. Further resources were brought in to the team to ensure that there was no service disruption.

h. Additional training was provided to the IT team during January 2020.

i. From September 2019 until the end of January 2020, despite the Claimant not being part of the new structure, and being absent during January 2020, the service was not disrupted.

j. The Business Systems Manager role was filled by Mr Crame on 29 January 2020, and was considered to be a suitable candidate who had extensive knowledge of all of the relevant systems.

70. It was an entirely appropriate action to take by the Respondent in those circumstances.

71. Had the tribunal considered that the claimant had been subjected to a detriment, it would have needed to then consider whether this was less favourable treatment/detriment because of age. The tribunal is satisfied that it was Ms Van Duyvenvoorde who made the decision to apply the PILON clause to the Claimant and that that this was done for business reasons only. We accepted Ms Duyvenvoorde's evidence on this matter, which was confirmed by Mr Speer in oral evidence. Both of which were consistent with interview notes made as part of the Claimant's grievance process. Given our findings above, this tribunal is satisfied that the decision to apply PILON to the Claimant was made on business grounds, that were unconnected to the Claimant's protected characteristic of age. The team was operating effectively without the Claimant, the team had developed knowledge through training, and the role of Business Systems Manager had been filled by an individual with extensive knowledge of the relevant systems. There was no business case to extend the Claimant's employment for the purposes of a hand-over. Further, supporting this conclusion is that the Respondent regularly applies PILON when there is a redundancy situation, irrespective of age. And has done so in 75% of the cases that took place between 01 October 2017 and the date of the Claimant's termination. And further, the Respondent was considering and was clearly intending on activating the PILON clause on or around 14 January 2020 (see the draft letter on pp158-159) had the consultation meeting planned for January 2020 gone ahead. And this was in circumstances whereby had the Claimant worked her full notice from that point, the 12 weeks working would not have taken her over the age of 55. This further supports that the Claimant's age played no role in the decision by the Claimant to activate her PILON clause.

72. Turning to the indirect age discrimination claim. The tribunal accepts that there is a PCP in this case. And this is the contractual provision that applies to employees of the Respondent. However, the Claimant has failed to adduce any evidence which supports that this provision has put or would put persons who share her characteristic at a particular disadvantage, which is the same disadvantage faced by the Claimant. Indeed the evidence that the tribunal does have before it supports that PILON is applied irrespective of age, and that those of a younger age are equally subject to activation of PILON clauses. There is simply no evidence to support that the PILON clause causes group disadvantage based on age. And that is a fundamental requirement to an indirect discrimination complaint.

73. For those reasons set out above, the claims of direct age discrimination and

indirect age discrimination do not succeed, and are dismissed.

74. Given our clear findings above, we do not consider it necessary, and it would be disproportionate, to consider matters relating to justification of either claim.

Employment Judge Mark Butler

Date: 25 February 2022

JUDGMENT SENT TO THE PARTIES ON

10 March 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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