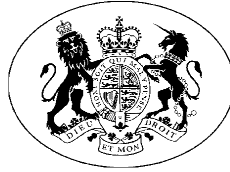
Case No: 1600071 / 2021



# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr A Yip**

**Respondent:** **Pendragon Motor Group Ltd**

**Heard at:** **Cardiff** **On:** **1-3 March 2022**

**Before:** **Employment Judge Brace**
**Non-legal members**
**Mrs M Humphries**
**Mr M Vine**

**Representative**
Claimant: Ms M Richards (lay representative/grand-daughter)
Respondent: Ms Crew (Counsel)

**JUDGMENT** having been sent to the parties on 4 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Background

1. The claims before the tribunal were of unfair dismissal arising from the dismissal of the Claimant on grounds of redundancy, direct age discrimination and holiday pay .

2. The tribunal heard evidence from the claimant and from Mr Brian Edwards, Head of Business for Evans Halshaw Vauxhall/Citroen on behalf of the respondent by way of witness statements which had been exchanged. The parties were given the opportunity to ask questions of the opposing party's witness and the tribunal asked questions

3. There was and agreed tribunal bundle of approximately 258 pages. References to page numbers in that bundle are indicated by [ ].The

tribunal informed the parties that unless we were taken to a document in the bundle we would not read it.

4. No reasonable adjustments were required.

5. An application was made by the Claimant to adduce texts between the Claimant and ex-employees he had recently exchanged which related to their conversations with the Respondent's witness. The individuals had not been called to give live evidence. The Claimant was not given permission to include them in the bundle.

6. A copy of the covert tape recording of the final consultation meeting, the transcript of which was included in the Bundle [190], between the Claimant and Mr Edwards, was disclosed to the Respondent's counsel on the morning of the first day. She was given the opportunity to listen to this after completion of cross-examination of the Claimant and to seek a recall of the Claimant and ask further questions of the Claimant following that opportunity. Having listened to the tape-recording, the Respondent's representative confirmed that she did not wish to further cross-examine the Claimant.

**Claims**

7. The Claimant was dismissed by reason of redundancy, a reason which is accepted by the Claimant.

8. On 12 December 2020 however the Claimant entered into early conciliation which ended on 14 December 2020 [1] and on 15 January 2021 he issued his ET1 Claim form in which he claimed unfair dismissal, age discrimination and holiday pay [2].

9. In his ET1 the Claimant complained that he wished to see his redundancy score matrix as he had a very good record for timekeeping, productivity, quality and attendance and his monthly 1:1 meetings had been acceptable. He did not believe that here had been any other issues regarding his service and therefore he could not understand why he had been selected when there were other less qualified/worthy candidates to chose from. He complained that despite making a SAR and complaining to the ICO, he had not been provided with his score matrix and that he had been unfairly dismissed because of his age and incorrect score matrix.

10. The ET3 pleaded that the Claimant had been dismissed by reason of redundancy following a proposed reduction of roles at the site at which the Claimant worked and that he had been placed in a pool for selection of all Service Technicians, that he placed in the bottom 5 of the 13 Service Technicians and was therefore at risk of redundancy. The Respondent asserted that at consultation meetings the Claimant was informed of selection criteria and at the consultation meeting on 8 September 2020 the Respondent shared the reasons for his selection including the scores of the rest of the selection pool. No suitable employment was available and the Claimant did not appeal the decision to dismiss. They denied unfair dismissal and discrimination or that they owed the Claimant any holiday pay,

**List of Issues**

11. At case management on 16 July 2021, the Claimant clarified that his complaint of age discrimination was that he was selected for redundancy and dismissed due to his age, relying on the age of the individuals selected for redundancy, that they were all older employees and the younger employees had been retained. He suspected that the selection criteria may have been discriminatory but that the Respondent had refused to tell them the criteria he was unable to confirm.

12. At case management Judge Moore ordered early disclosure of the selection criteria documents and gave the Claimant opportunity to confirm following disclosure what type of age discrimination claim he sought to bring. She also provided him with sources of advice information as a litigant in person.

13. There was case management discussion at the outset of this hearing when the List of Issues were discussed. At that stage, the parties were given time to discuss the holiday pay claim and before evidence was taken from the Claimant, the parties confirmed that they had reached agreement on the holiday pay claim and asked the tribunal to give a judgment by consent in respect of the holiday pay claim in the sum of £93.25 which was incorporated into the judgment.

14. The remaining issues were agreed to be as discussed and reflected by Judge Moore at paragraphs 2 and 4 of the List of Issues, the Claimant confirming again that he was not claiming indirect age discrimination.

15. It was agreed that the tribunal would consider liability first and that if the claimant was successful on all or any of his claims, the tribunal would then consider remedy. The parties were asked to make submissions however on any reductions to any compensatory award.

**Facts**

16. The Respondent is an automotive retailer employing approximately 7,500 employees across the UK across numerous sites. There are approximately 6 dealerships in South Wales.

17. The Claimant started his employment on 1 August 2013. At the time of his dismissal, on 16 October 2020 he was employed as a Service Technician at Evans Halshaw Vauxhall Cardiff site and was 65 years' old. He had held this post since the commencement of his employment and although for a period he was site manager for a period, he was not in this role at the relevant time of his termination of employment on 16 October 2020.

18. The Claimant did not possess any specific qualifications, such as City and Guilds, and had not received specific manufacturer training enabling him to undertake warranty work. He had however undertaken regular training to undertake MOT testing, which was refreshed regularly by the Claimant, as evidenced by the certificate of achievements included in the Bundle. He consistently achieved a high score. He had also undertaken routine

training, which was provided across the staffing at the Respondent on matters such as safe systems of work.

19. The Claimant received awards for being an experienced team member. He was a valued employee showing dedication and commitment to the role.

20. The Claimant was employed on terms and conditions set out in a contract of employment contained in the Bundle at page [45]

*Furlough*

21. On 27 March 2020 the Claimant agreed to be placed on furlough due to the Covid-19 lockdown restrictions. On 16 April 2020, the service manager asked volunteers to go back to work and the Claimant offered to return on 22 April 2020. It appears that a decision was then made by management not to open at that point. On 14 May 2020, the Claimant received a message at the workplace of a reopening with a limited workforce. The Claimant was not asked to return, despite being only one of two volunteers that offered to go back to work earlier in the year in April.

22. The Claimant was upset that he had not been asked to return to work, yet three other technicians had been. The Claimant makes no reference to the age of the other technicians, but does indicate that he felt as though the process of bringing people back to work was made unfairly and prejudiced. The Claimant was not questioned about this beyond asking if this background was relevant, which he confirmed it was not. Neither was Mr Edwards questioned on his decision-making process at this time.

23. There may be a myriad of reasons for such a decision and we do not consider this to be relevant to our decision on the claims of unfair dismissal or age discrimination whether by way of inference or otherwise.

24. The Claimant remained on furlough until the termination of his employment.

*Redundancy Announcement*

25. in July 2020, the company undertook a review of its operating model as a result of ongoing market pressures, accelerated by impact of the Covid-19 pandemic. An announcement was made “Transforming our Business” by way of the Respondent’s internal communications email on 30th of July 2020 [119 a)].

*Pools for selection, selection criteria and application of Scoring*

26. The Claimant was placed in a pool of thirteen Service Technicians, which consisted of all the Service Technicians at the Evans Halshaw Vauxhall site.

27. The selection criteria and set scoring to be applied for each criteria was provided to Mr Edwards by head office and included criteria of:

a. Disciplinary record;
b. Time and Attendance;
c. Time Keeping; and
d. Qualifications.

28. Scores were given of between 1-4 points for each criteria.

29. Mr Edwards and the Respondent's Service Leader applied the scoring to each technician. Copies of an early version of the selection matrices for each technician were provided in the bundle [127-134] with the Claimant's matrix at [129].

30. Scores for 'Qualifications' were based on the technician having certified evidence of City and Guild Level 2 qualification, or manufacturer training carried out on site and an example was given of training that enabled a technician to carry out warranty work for the manufacturer under the customer warranty. Other on-site training was not taken into account. Qualifications were verified by the Service Leader when scoring was undertaken.

31. A score of 1 was given if no such qualifications were held, a score of 2 if 'Part Qualified' and a score of 4 if 'Fully Qualified'.

32. As a result, the Claimant was given a score of 1 for 'Qualification' as he did not possess a City and Guilds nor was he qualified to undertake warranty work

33. In that exercise scores ranged from 17 down to 10 and the Claimant received a score of 13. This placed him in the bottom 5 scored of the pool of service technicians in that scoring exercise.

34. A 'Capability' criterion was referred to in those drafts matrices, but no specific scores were allocated for that criterion within the draft documentation.

35. This fifth criteria was related not to the individual's performance, in a general sense of how well they performed their job, but was based on whether the individual had other onsite training, over and above City and Guilds or warranty training, where the individual received a score of 1, if they were an MOT Tester and a score of 2, if they were PSA trained. We heard evidence from Mr Edwards that these scores were manuscript added to the draft matrices and then a typed version of the selection matrices were prepared which appear at pages [135-142] where the scores for MOT Tester and/or PSA Trained are shown with the specific scores allocated to the individual for each criteria and the total score.

36. The Claimant's selection matrix is at page [137] which reflects he received both a score of 1 for 'Qualification' and a score of 1 for being an MOT Tester resulting in a total score of 14.

37. Scores for the Service Technicians, reflected in those set of matrices, ranged from a top score of 17, down to a lowest score of 10. The lowest 5

scores ranged from 10 to 14. Again the Claimant was included in the bottom 5 of scores which still placed him at risk..

38. A copy of a further and final set of total scores had also been provided to us and contained in the Bundle [144]. This reflected that final scores ranged from 16 down to 11, reflecting a score for the Claimant of 13, not 14.

39. Mr Edwards and the Claimant in live evidence both agreed that an Excel spreadsheet, similar to the document a [144] and showing those scores had been shown to the Claimant and discussed on 8 September 2020. Both agreed that the ages of the individual technicians had not been included and the document differed to what had been on the screen that day only to that extent.

40. This was not a full selection matrix but a redacted list of all thirteen Service Technicians in rank order showing their final score. In that list the Claimant again was in the bottom 5 with a score of 13.

41. Mr Edwards' evidence on this issue was confused. Despite his witness statement evidence stating that the score of 14 on the selection matrix at page [137] was an error on the basis that the Claimant had been double-counted for his MOT score, in cross-examination Mr Edwards' live evidence was that a score of 13 was wrong, and that the Claimant's final score had in fact been 14, which would then have placed him with a number of others who had also scored 14, reducing the risk of redundancy as there would be a number of other associates with such a score.

42. This was at odds with the live evidence that he had already given, which was that the scores at [144] were the scores that had been shown to the Claimant on 8 September 2020 and discussed, evidence which the Claimant agreed with and evidence which was also reflected in the transcript of the covert recording the Claimant had undertaken that day, which reflects that both the Claimant and Mr Edwards referring to a score for the Claimant of 13, not 14.

43. We found that as a result and on balance of probabilities, based on the transcript of the meeting and the document at [144] that the Claimant's final score was 1, not 14, and that this placed the Claimant at risk in the pool for selection.

*First Consultation Meeting*

44. As the Claimant had scored in the bottom 5, on 31 July 2020 he was sent a letter telling him that he was at risk of redundancy and that a period of consultation would take place [120]. The Claimant was informed that there would be a process of collective consultation as well as individual meetings which could be arranged by request. Information was provided regarding the collective consultation and that during consultation the individual circumstances would be considered including possible deployment or redeployment opportunities in addition to other concerns or queries which could be raised during the collective process or in individual meetings. An FAQ document seems to have been produced although no

copy of this was in the Bundle before us. The Claimant was informed that current vacancies would be placed on the company's jobs website. The Claimant was asked to ensure that he had checked that for updated roles regularly during the consultation period.

45. The Claimant attended a consultation meeting with Mr Edwards on 20 August 2020 which was conducted by telephone when the Claimant was told that his scores against selection criteria meant that he was at risk of redundancy. He was asked if he had any questions. He did not. He confirmed that he was open to alternative employment and that he would look at the Respondent's intranet daily for vacancies. He expressed an interest in MOT tester or driving positions.

46. Mr Edwards gave evidence, which we accepted, that:

    a. he became aware of two technician positions that had become available at Newport the following day; and
    b. that he called all the at risk technicians from Vauxhall Cardiff including the Claimant; and
    c. that the Claimant indicated to him that he would look at the Respondent's intranet.

47. Mr Edwards live evidence was that he encouraged the Claimant to call Newport. This was not challenged and we accepted this evidence also. The Claimant was also told to look on the intranet and apply for any roles.

48. We accepted the Claimant's evidence, which we did not consider conflicted with Mr Edwards, that he did look on the intranet the following day but the roles were not advertised. He did not see any advertised post.

49. On 8 September 2020, the Claimant attended a further consultation meeting, this time in person [151]. The Claimant did not understand how he was in the bottom 5 of the Service Technicians and asked to see his score and how the score was arrived at. The Claimant was shown the final scores for all service technicians, his score and where he was placed. He was informed that it was based on his training records. It was confirmed that he received 1 point for his MOT training. The Claimant indicated that he did not agree and was informed that there was no right of appeal.

50. The Claimant was again informed of other sites in the Respondent group that were looking for technicians, including Newport, and was also provided with details of other roles that were available with third party employers at dealerships in Cardiff and Newport, including a post at Griffin Mill.

51. The Claimant gave reasons why any work in Newport was unsuitable – that it was too far for him to travel. He indicated that he might look at third party options at the end of his notice period.

52. The Claimant gave evidence that he made contact with Griffin Mill in around September 2020. That was reflected in the text exchange between the Claimant and Griffin Mill [153] in which the Claimant had

indicated that he had decided not to go back to work for the rest of the year. He did not consider other alternatives at that point in time.

53. The Claimant also gave evidence that around this time his health also started to fail.

54. On the basis of this evidence, we found that it was more likely than not that during his notice period the Claimant did not proactively look for alternative work. He did not proactively look at the Respondent's intranet for suitable alternative opportunities within the Respondent or for other opportunities outside the Respondent group at this time.

55. On 16 October 2020 the Claimant received a letter confirming his notice of termination would end on 19 October 2020 [154]. In that letter the Claimant was informed that if he wished to challenge the decision that had been made to dismiss him by reason of redundancy, he should do so within 5 working days of the end of his notice.

56. The Claimant did not appeal. He gave evidence that he did not because he had been told that he could not and he did not read the letter of 16 October 2020 properly.

57. The Claimant's employment ended on 19 October 2020 and he subsequently brought this claim.

**Issues and Law**

*Unfair Dismissal*

58. The tribunal have to determine what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"). The Respondent asserts that it was a reason relating to the Claimant's redundancy and it is for the Respondent to prove it was a genuine redundancy and this was the reason for dismissal.

59. The tribunal then have to consider whether the dismissal of the Claimant for that reason, was fair in all the circumstances under s98(4) ERA 1996.

60. Taking into account this is a redundancy case, the factors suggested by the EAT in **Williams and ors** v **Compair Maxam Ltd** 1982 ICR 156, EAT, that a reasonable employer might be expected to follow in making redundancy dismissals, are to be considered, being mindful that it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead we have to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

61. In **Polkey** v **AE Dayton Services Ltd** [1987] IRLR 503 the House of Lords held that in the case of redundancy, an employer will not normally be acting reasonably unless:

    a. employees were warned and consulted about the redundancy

b. there was a fair basis on which to select for redundancy which will include;
c. whether the selection criteria were objectively chosen and
d. fairly applied (**Compaire Maxam**)
e. whether any alternative work was available

62. Whether, if there was a union, the union's view was sought, is also a relevant consideration (**Compaire Maxam**)

63. In **Langston** v **Cranfield University** 1998 IRLR 172 EAT, (a case also involving a litigant in person) the EAT viewed it 'implicit' that unless the parties had agreed otherwise, an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, whether or not each of these issues was specifically raised before the employment tribunal.

*Age discrimination*

64. In the Equality Act 2010 ("EqA 2010), direct discrimination is defined in section 13(1) as:

    (1) A person (A) discriminates against another person (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others.

65. Age is a protected characteristic(s.5 EqA 2010).

66. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13, "there must be no material difference between the circumstances related to each case."

    Section 136 provides as follows:
    (2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.
    (3) But subsection (2) does not apply if A shows that A did not contravene the provisions.

67. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen** v **Wong** 2005 IRLR 258 as refined in **Madarassy** v **Nomura International Plc** [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

**Submissions**

*Respondent submissions*

68. The Respondent's representative submits that the Respondent used objective criteria and that on both sets of scores the Claimant ended in the bottom 5 of the service technician pool, that the Claimant in cross examination accepted that the criteria used were objective and it was clear from way the matrices were broken down how each awarded. She also reminded us that the Claimant accepted age had no influence on the criteria and that the selection matrix did not link into a person's age; that the Claimant had full marks for three out of the five criteria.

69. She invited us to conclude that one could see how scoring had arisen despite the two sets of scoring, but that no error had been identified. She accepted that Mr Edwards admits scoring of 13 was wrong, but invited us to find that the key point was that no error in scoring had been identified and that the Claimant had reluctantly accepted that the scoring is correct

70. She reminded us that the role of the tribunal was not to create criteria but review the Respondent's criteria. In the context of the Claimant raising his excellent performance, that is criteria the Respondent had not chosen but that this did not make the selection criteria that had been chosen, unreasonable.

71. In terms of consultation she says the Claimant was shown the scoring and suspected that he had not seen full matrix but redacted scoring and that there was no dispute that he had been shown that.

72. In terms of suitable alternative employment, she invites us to find that this was a large redundancy and not much opportunity for suitable alternative employment within the Respondent and that the only alternative was Newport.

73. In terms of procedure she reminded us that there was a right of appeal that the Claimant did not exercise and that if the Claimant had properly read the letter from the Respondent any confusion might have been cleared up.

74. With regard to the age discrimination claim, she submitted that the Claimant had been selected because of his lack of paper qualification and that others scored higher on work-place

75. She indicated that those made redundant were across a range of ages from 30-50 and that others scored more highly as part qualified on City and Guilds.

76. She submitted that the Respondent would argue that the burden of proof had not shifted but that if the tribunal considered that it had an explanation has been provided.

*Claimant submissions*

77. The Claimant's representative submitted that the Claimant was unfairly dismissed due to an incorrect matrix score which if corrected would not have placed him at risk.

78. She submitted that the procedure adopted was not adequate and reasonable steps had not been taken.

79. The Claimant accepted that the selection criteria was objective but did not accept that the criteria had been fairly applied.

80. The Claimant did not consider that the Griffin Mill role was suitable alternative employment due to an historic strained relationship with the Claimant and with regard to the Newport job, the Claimant had been told that this was on internet and this is how he would seek further employment

81. With regard to consultation, it was submitted that there was little evidence why the Claimant had been selected for redundancy; that he was shown a picture of score which was 13 and not only was this wrong score and he could not make decisions based on the score alone complaining that the Claimant had to complete a subject access request to gain further information which was not received until 8 months later.

82. It was further submitted that the Claimant had been dismissed due to direct age discrimination. She reminded us that Mr Edwards had confirmed that the Claimant was incorrectly scored and that 14 points would have put the Claimant in an more advantageous position. She also reminded us that the mean average scores displayed that those aged 40+ fell within the lowest category scored.

## Conclusions

Unfair Dismissal

*Reason for dismissal*

83. In applying our findings to the issues identified at the outset, we need to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal.

84. Whilst the Claimant has conceded that the Respondent dismissed for redundancy, irrespective of that concession, the tribunal was satisfied in any event on the documentary and witness evidence before it that the reason for dismissing the Claimant was redundancy.

*Overall Fairness*

85. Moving on to assessment of overall fairness, in considering the section 98(4) test in the context of **Compair Maxam** outlined earlier, we reminded ourselves that these are not principles of law but guidelines and a departure from these on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair. We made the following conclusions.

*Warning*

86. We accepted that the employees were fairly warned about the redundancies when the ‘Transforming our Business’ communication was sent to staff.

*Pool for selection*

87. There has been no challenge to the pool for selection of Service Technicians that included the Claimant but, in any event, we were satisfied that the Respondent had acted reasonably in pooling such technicians and the Claimant's inclusion in that pool was consistent with his role at the point of redundancy.

*Selection criteria*

88. There was no dispute from the Claimant that the criteria was objective but for clarity we agree that essentially in this case the criteria of disciplinary record, time and attendance and time-keeping were objective criteria.

89. Likewise we concluded that the criterion of 'Qualifications' used in this case, with reference to the City and Guild's qualifications and/or manufacturer training received was also an objective criterion.

90. Whilst the fifth criteria of 'Capability' was used, this in essence was a further qualification criterion, measuring not the individual's performance or meeting of targets, but what additional training and qualifications the individual received which included the MOT Tester and whether they were PSA trained. Again, we concluded that this was an objective criterion.

91. Whilst we understand that the Claimant naturally feels aggrieved that despite his good performance over the years for the Respondent and his commitment to the role, this type of performance was not taken into account. However the Respondent is entitled to use criteria that is reasonable and is not obligated to use performance as a measure of assessing who is to be selected for redundancy. The failure by the Respondent to use individual performance in the role as a criteria, does not lead to unfairness.

92. Likewise the fact that the Claimant may not been historically encouraged to take up such qualifications, does not render the selection criteria or process inherently unfair.

93. We therefore were satisfied that the selection criteria applied was clear and objective.

*Application of selection criteria*

94. Whilst the evidence from Mr Edwards on the scoring of the Qualification and Capability criteria was in some parts confused, we did not conclude that this had demonstrated or suggested an absence of good faith.

95. We concluded that the Claimant had ended with a score of 13, despite Mr Edwards' evidence on cross-examination that his statement, in which he had evidenced that the Claimant had a total score of 13, was wrong and that he had a score of 14 as reflected in the selection matrix.

96. Both Mr Edwards and the Claimant agreed that a document, similar to that at [144] was on Mr Edward's computer screen at the consultation

meeting on 8 September 2020 save that the ages were not included. The final score was 13 which placed him in the bottom 5.

97. Either way, when one compared the earlier matrices at [127] onward when the Claimant scored 13, or the later matrices at [135] onward when the Claimant scored 14, the scores for the Claimant compared to others in the pool placed him consistently in the bottom 5 and the issue of 'error' related to the question of whether MOT testing had benefited the Claimant not an error that would have resulted in the Claimant not being selected or suggested an absence of good faith.

98. Whilst we considered that the Claimant was unhappy that another service technician, referred to Associate 7, had not been selected for redundancy, there was no evidence that that person or indeed any of the Claimant's other colleagues had been awarded points for qualifications that they did not possess or that there had been any inappropriate application of the selection criteria, which would impact on unfairness or indeed which could in turn lead to an inference being drawn in relation to the age discrimination.

*Consultation including Suitable Alternative Employment*

99. There was a level of collective redundancy, which has not been challenged, as well as individual consultation.

100. The Claimant did have the benefit of the meeting on 20 August 2020 when it was explained to him that his scoring against criteria meant that he was at risk, and again on 8 September 2020 when both potential suitable alternative employment and an opportunity to discuss his selection scores arose.

101. At that meeting the Claimant was provided not only his score but also the scores of the other technicians and an explanation of why he scored lower than others.

102. Whilst we understand that the Claimant wanted to know the answer to the '*Why me?*' question when it came to his selection, and is aggrieved that he had not seen his selection matrix, there is no general rule that an employee is entitled to have necessarily details of his individual assessment or be provided with his selection matrix.

103. Following the first consultation meeting and at the second, the Claimant was informed of suitable employment opportunities within the Respondent group and of potential job opportunities outside of the Respondent group, despite the process that the Respondent had adopted of application for roles by the individual. We accepted that there were few roles available and that the Claimant was informed of a possibility of a role in Newport. Whilst there was an issue with regard to whether that was showing on the intranet, we concluded that the Claimant did not take steps to further enquire about the role available and in any event did not consider a role in Newport to be suitable due to the travel time.

104. In those circumstances, we were satisfied that the Respondent did engage in meaningful consultation, including consideration of suitable

alternative employment, at both the collective and individual consultation stages.

105. Roles at Griffin Mill outside the Respondent group was over and above the Respondent's obligation to consider suitable alternative employment and were not a relevant consideration to the fairness of the process.

*Appeal*

106. With regard to the Appeal, whilst we had found that the Claimant had been informed in the consultation meeting on 8 September 2020 that there was no right of appeal, and it was not made clear that this related to the specific scoring, we were satisfied the letter of 16 October 2020 did confirm the right of appeal against dismissal.

107. It is unfortunate that the Claimant did not read that letter carefully. If he had he might have appealed. Whilst the verbal discussions that the Claimant had with Mr Edwards on 8 September regarding 'appeal' might have led to unfairness, if no subsequent letter had been sent or if the letter that was sent subsequently, confirming the right of appeal, had not been so clear. As that letter was sent, which did clearly state the right of appeal, this corrected any unfairness in Mr Edwards' comments and there was no unfairness in the overall management of the right of appeal or in the procedure.

108. In all the circumstances of the case, we therefore concluded that dismissal was a reasonable outcome and that the Claimant's dismissal fell within the band of reasonable responses. In conclusion, it was the unanimous decision of the tribunal that the Claimant was therefore fairly dismissed and the unfair dismissal claim was not well founded.

<u>Age Discrimination</u>

109. The Claimant has brought a claim of direct age discrimination and made clear that he is not suggesting that any of the criteria were age discriminatory. Furthermore, there has been no suggestion in the evidence before us, either in the statements or in live evidence on cross-examination, that this is the Claimant's case.

110. The Claimant's case is that he was selected because of his age and compares himself to other technicians in the pool for selection, specifically an employee, who we will refer to as X, whose scoring matrix was provided in the Bundle at [138]. During the course of live evidence, it became evidence that the Claimant was also comparing his position with that of another employee, referred to as Associate 7, whose scoring matrix was provided in the Bundle [140].

111. We were satisfied that in both cases, indeed in relation to all of the technicians in the pool for selection, that the same selection criteria had been applied to all; that Associate X had achieved a higher score than the Claimant as he had a score of 2 for his City and Guilds' qualification; that

Associate 7 had achieved a higher score than the Claimant as he was part qualified on City and Guilds.

112. A Tribunal looks for something more than the fact that there has been less favourable treatment and that there is a different in protected characteristics which the comparator does not have, in this case age.

113. Whilst we had accepted that the Claimant was the oldest employee in his pool for selection, and held a belief that this was the reason for his selection, this is in itself was insufficient to establish a prima face case. As per **Madarassy**, a Claimant must establish more than a protected characteristic of age and difference in treatment.

114. Neither were we persuaded that the fact that 4 out of the 5 employees, dismissed by reason of redundancy out of the pool of technicians, were also 4 out of the 5 oldest technicians at the time of the redundancy process, was sufficient to infer that age may have been an effective cause of the Claimant's selection for redundancy.

115. Whilst the Claimant's representative, Ms Richards, has prepared statistics demonstrating the mean or average age of those selected, we would also say that this would also be our conclusion if we approached the issue using the average age of those selected for redundancy. We did not consider that this was sufficient basis from which to draw an inference of discrimination.

116. Neither, for the reasons provided in relation to the unfair dismissal, did we conclude that the differing scoring given to the Claimant of 14 and 13 infer discrimination. The Claimant, whichever selection exercise was considered, was in the bottom 5 on each occasion.

117. In those circumstances, we concluded that the Claimant had not proven primary facts upon which we could conclude or infer that the Claimant was selected because of his age. We concluded that the reason for the Claimant's selection was his lack of qualifications, such as City and Guilds and that others had scored more highly in the workplace.

118. On that basis, we also concluded that the claim of direct age discrimination was also not well founded and is also dismissed.

Employment Judge R Brace

Date 24 March 2022

WRITTEN REASONS SENT TO THE PARTIES ON 25 March 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche