EMPLOYMENT TRIBUNALS

Claimant: Mr M Nelson

Respondent: Sefton Metropolitan Borough Council

Heard at: Manchester (by CVP) **On:** 10-14 January 2022

Before: Employment Judge Phil Allen
Mr AG Barker
Mr S Husain

REPRESENTATION:

Claimant: In person
Respondent: Mr T Kenward, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent.

2. Applying the principles from the case of **Polkey** there was a 50% chance that the claimant would have been fairly dismissed had a fair procedure been followed.

3. The claimant was not treated less favourably by the respondent because of his age. The claim for age discrimination does not succeed and is dismissed.

4. The respondent did make unauthorised deductions from the claimant's wages when it did not take account of the claimant's car allowance when determining the claimant's remuneration when making payment in lieu of the claimant's accrued but outstanding annual leave.

The above Judgment having been confirmed in writing on 17 January 2022 and sent to the parties, and written reasons having been requested, the written reasons are provided below as requested.

REASONS

Introduction

1. The claimant was employed by the respondent with continuous service dating from January 1982. As part of a reorganisation, two pension roles, that of the claimant and a colleague, were to be replaced by one, a Pension Manager role. The claimant and the other employee were given the opportunity to apply for the role. On the day of the competitive interview, 28 May 2019, the claimant commenced a period of ill health absence from which he did not return. The respondent ultimately proceeded with a selection process which resulted in the other candidate being appointed to the Pension Manager role. The claimant was issued notice on 19 August 2019, which was received and effective on 20 August 2019, and which expired on the 11 November 2019 when the claimant was dismissed. The claimant's 55th birthday was 1 December 2019 and had he been dismissed after that date in these circumstances he would have received significantly enhanced benefits (which would have had a significant cost for the respondent).

2. The claimant claimed unfair dismissal, direct age discrimination, and unlawful deduction from wages (regarding the payment for annual leave made to the claimant). The direct discrimination claim was that had the claimant been younger or older (that is not about to reach age 55), the claimant alleged that elements of the process would have taken place later, and /or he would have either been selected for the Pension Manager post, or he would have been made redundant at a later date.

Claims and Issues

3. A preliminary hearing (case management) was previously conducted in this case, on 19 August 2020 by Employment Judge Slater. At the preliminary hearing the issues were identified as being: unfair dismissal; direct age discrimination; and unauthorised deduction from wages in relation to failure to pay the correct holiday pay on termination of employment. A List of Issues was identified and recorded in the case management order (A36). That order recorded that if the list did not accurately record such matters the other party was to be notified promptly. No such notification was identified by either party.

4. At the start of this hearing it was confirmed with the parties that those issues remained the ones which needed to be determined. The respondent confirmed that was the case. The claimant was unsure and therefore was given the time whilst the Tribunal undertook the reading required, to review the list and confirm if there were any omissions or errors identified in it. The Tribunal identified that there was a potential issue of jurisdiction/time arising from the direct age discrimination allegations. The respondent's representative explained that had been included in the respondent's agenda for the preliminary hearing. As a jurisdiction issue, the Tribunal confirmed that was also something which needed to be determined. After lunch on the first day of hearing the claimant confirmed that he was arguing that the acts of discrimination amounted to a continuing act which culminated in dismissal. He did not identify any other errors with, or omissions from, the list of issues.

5. In this Judgment the Tribunal has determined the liability issues only. It was confirmed at the start of the hearing that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimant succeeded in his claim. The one exception identified and confirmed at the start of the hearing as

being an issue which was strictly one of remedy but which would be determined alongside the liability issues was the question of whether or not the claimant would in any event have been fairly dismissed (that is the issue known as **Polkey**).

6. The liability issues as identified in the case management order were as follows (A36-38):

Unfair dismissal

1. Has the respondent shown that the dismissal was for a potentially fair reason? The respondent relies on redundancy or some other substantial reason (being a reorganisation). The claimant accepts that there was a redundancy situation, but argues that his selection was unfair.

2. If the Tribunal finds that the dismissal was for a potentially fair reason, did the respondent act reasonably or unreasonably in dismissing the claimant for that reason, in all the circumstances?

3. The claimant will argue that his dismissal was unfair because he was selected for redundancy because of his history of challenging the respondent; and that his dismissal was an act of direct age discrimination; and the process followed, of using the claimant's expression of interest form rather than waiting for him to be fit to attend an interview and not allowing him sufficient time to amend the expression of interest from, was not fair.

Direct age discrimination

4. The claimant relies upon the following as acts of direct age discrimination:

    a) Using the expression of interest form to assess the claimant, rather than waiting to interview him, so the dismissal was earlier than it would otherwise have been.

    b) Not allowing the claimant more time to submit an amended expression of interest form to be used to assess the claimant for the role of Pension Manager.

    c) His failure to be selected for the post of Pension Manager and, therefore, his selection for redundancy.

5. Where the act relied upon is not dismissal, was the claimant subjected to a detriment by this treatment?

6. Did the respondent treat the claimant less favourably than it treated or would have treated others in the same material circumstances by dismissing him or subjecting him to the other detrimental treatment relied upon? The claimant relies upon an actual comparator in relation to his dismissal, being the other candidate for the post of Pensions

Manager, alternatively a hypothetical comparator. He relies on a hypothetical comparator for the other alleged acts of discrimination.

7. If so, was this less favourable treatment because of age?

8. If the respondent has treated the claimant less favourably on grounds of age, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Unauthorised deduction from wages – holiday pay

9. Should the respondent have included the car allowance in calculating holiday pay?

7. In addition, and as identified, the Tribunal needed to determine whether or not the claim was entered at the Tribunal within the time required by section 123 of the Equality Act 2010 and related issues. The date the claim was entered was 27 March 2020. ACAS Early Conciliation was between 31 January 2020 and 1 March 2020. In terms of the primary time limit, any claim which pre-dated 1 November 2019 could potentially be out of time. The Tribunal also needed to consider whether the alleged discrimination was part of a continuing course of conduct and, if so, when that course of conduct ended. It also potentially needed to consider whether or not it would be just and equitable to extend time.

8. The other issue to be determined not identified in the above list, was: if the claimant was unfairly dismissed, would the claimant have been dismissed in any event if a fair procedure had been followed by this respondent and/or what were the percentage chances that the claimant would have been fairly dismissed or when would he have been dismissed? That is the issue known as **Polkey**.

9. In terms of the legitimate aims relied upon by the respondent in its defence of the claims for direct age discrimination, these were recorded in paragraph 45 of the grounds of resistance (A28) and were:

1. The desire to bring the redundancy process to a close;

2. The impact of the delay in the process on others;

3. The position with work in having a position unfilled;

4. The lack of direction in relation to pensions;

5. Not being prepared to allow the claimant a windfall to which he was not entitled;

6. The respondent was required to meet a savings target arising out of the restructure; and

7. The additional costs if the claimant were to receive an unreduced pension.

Procedure

10. The claimant represented himself at the hearing. Mr Kenward, counsel, represented the respondent.

11. The hearing was conducted entirely by CVP remote video technology. Shortly before the hearing it was converted from an in-person hearing to be a CVP hearing for the first day, following an application made by the respondent. On the first day of hearing the parties confirmed that they had no objection to the case being heard by CVP remote video technology throughout. Accordingly, both parties and the representatives, all witnesses, and the members of the Tribunal panel (except for the Employment Judge), all attended remotely by video. Had the hearing been conducted in-person it would have been held at Liverpool Employment Tribunal, but as it was conducted remotely it was conducted from Manchester Employment Tribunal.

12. An agreed bundle of documents was prepared in advance of the hearing. The electronic bundle ultimately ran to 406 pages. The bundle used numbering which included a letter and a number, as each section was numbered independently. Where a reference is included in brackets in this Judgment it refers to the page number in the agreed bundle. Two pages were added to the bundle by the claimant at his request during the hearing (being an extract from a far lengthier document). Two letters regarding the successful candidate for the Pensions Manager post (who will be referred to as Mrs A in this Judgment) were also provided by the respondent and added to the bundle. The Tribunal was also provided with an agreed list of key people and a chronology (for which it was confirmed that the dates included were agreed, albeit the claimant believed that some dates which should have been included had been omitted).

13. The witness statements were included at the back of the bundle. The Tribunal read the witness statements, and the documents in the bundle which were referred to in those statements or to which the Tribunal were directed by the parties. The witness statements were provided from; the claimant; Mr Stephan Van Arendsen, an Executive Director of the respondent; and Ms Andrea Watts, also an Executive Director of the respondent. The latter two witnesses were called on behalf of the respondent.

14. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal.

15. Taking account of their availability, Ms Watts gave evidence first before Mr Van Arendsen, albeit that chronologically it would normally have been the case that the witnesses' evidence would have been heard the other way around. Each of the two witnesses who gave evidence for the respondent, were cross examined by the claimant, and were asked questions by the Tribunal.

16. The claimant suffers from stress related illness and was not familiar with Tribunal proceedings. He identified this at the start of the hearing, and it was agreed that regular breaks would be taken and that either party could request a break at any time. As agreed, regular breaks were taken during the hearing, and the Tribunal was mindful to ensure that the hearing days and sessions did not become too long and

that unnecessary pressure was not placed on the claimant to complete questioning within time limits that were too restrictive.

17. After the evidence was heard, each of the parties were given the opportunity to make submissions. The claimant requested an extended period to prepare for his submissions, and that time was granted (with the Tribunal not sitting during the afternoon of the fourth day). It was agreed that both parties would deliver their oral submissions on the morning of the fifth day. With his agreement, the respondent's representative provided his written submissions early in the afternoon of the fourth day. The claimant provided his written submissions prior to 9 am on the fifth day. The Tribunal read both parties written submissions prior to oral submissions being heard. Oral submissions were made at the start of the fifth day of hearing.

18. The Tribunal provides the Judgment and reasons outlined below.

Facts

19. The claimant commenced employment with the respondent on 25 January 1982. The claimant's evidence was that he worked his way up from a junior role with the respondent. By 2019 he was a pensions expert. The claimant emphasised his exemplary attendance record throughout his employment.

20. In 2008 the claimant TUPE transferred to a private company, together with a significant part of the respondent's services. It was the claimant's evidence that at the time of the transfer he had not applied for a role which would have remained with the respondent, because he thought and was told that it was for the best for the Council's services. The claimant's perception of events in 2019 was seen partly from the viewpoint that the claimant believed he had always acted in the respondent's, and its service's, best interests.

21. During his time with the private company the claimant was: appointed to Payroll & Pension Manager with effect from 4 January 2009 (E1); and confirmed in the regraded post of Service Development & Pensions Manager with effect from 1 April 2011 (E5). The claimant was also given a car allowance of £3,000 per annum whilst employed by the private company; the claimant's evidence being that this was given to him instead of a salary increase as was a standard practice within that company.

22. One exchange of emails with the claimant and a corporate HR officer at his employer between 30 May and 5 June 2013 was provided in the bundle (C1). In an email, Ms Perry stated that providing the claimant with a car allowance was deemed appropriate given the amount of travel the claimant had been doing. It explained that the organisation had to review such expenditure to ensure that the provision of a car allowance was the more cost-effective method.

23. The claimant transferred back to the respondent on 1 October 2018, as part of a TUPE transfer which included a large number of employees and a number of services.

24. It was the claimant's case that during his time with the private sector company there had, on occasion, been events which had caused conflict with the respondent

(who was at that time the claimant's employer's client). The Tribunal was provided with some documentation which evidenced that the claimant had, in particular, had some conflict with one particular employee of the respondent. On returning to the respondent, and at the time of the reorganisation, a significant concern for the claimant was whether he would need to report to, or work with, that person.

25. The Tribunal was not provided with the claimant's contract of employment nor was it provided with any policies and procedures operated by the respondent, save for two pages which detailed the appeal process. Neither party placed any reliance upon (or indeed even referred in evidence to) any specific part of any policy or procedure which the respondent applied.

26. The respondent's undisputed evidence was that it needed to make substantial savings and that one way in which some of those savings were identified was from the services which transferred back to the respondent. Mr Van Arendsen's evidence was that the need for such savings and the amount of money which needed to be saved, was agreed by the Council and therefore was identifiable from publicly available documents, whilst employees (including the claimant) were still employed by the private sector employer. Steps were taken at the time to provide information to the staff and their trade union representatives regarding those savings and the impact it might have upon the staff (post-transfer).

27. Mr Van Arendsen's evidence was that he wanted to implement the required reorganisation and make the savings in Q4 for the 2018/19 year. That did not prove possible and therefore consultation on the restructure began on 25 March 2019. That collective consultation continued to 2 May 2019. There was no dispute that the collective consultation included both the recognised trade unions and individual employees. The claimant personally met with Mr Dale on 10 April 2019 to discuss concerns about the restructure (a meeting which was both preceded by, and followed with, correspondence). The Tribunal was provided with a detailed document regarding the restructure, which included additions made to reflect what had been raised in consultation, called "the proposals concerning the Council's payroll, transactional, HR, establishment control and pensions function – organisation and resource" (G17)

28. That document included a detailed glossary of terms which recorded what was meant by terms used in the method of implementing redundancies. Importantly the Expression of Interest was defined at G26.

29. A section of that document concerned the pension function (G30) and detailed the background and current structure of the pension function and what was proposed. This included the part which impacted upon the claimant. In summary, the two existing posts with incumbents (being the posts filled by the claimant and Mrs A) were to be deleted, and a vacant post was also to be deleted, and instead be replaced by a new post of Pensions Manager (with an indicative grade included in the document for that role). The new post was to be ring fenced to the claimant and Mrs A.

30. Within that document, post-consultation, it included a revised timeline and the document stated that this would apply. That confirmed that consultation had commenced on 25 March and would end on 2 May, with final proposals being

considered at a joint meeting with the trade unions on 8 May, and proposals being circulated to staff on 9 May. At risk status was to be confirmed to individuals by 10 May. Expressions of interest in respect of new roles were to be requested by 13 May and closed by 24 May. The Pensions Manager interview was to take place on 28 May. On 31 May the document stated there was to be a consultation period of one week with displaced individuals, followed by twelve weeks' notice. The last date in the timeline was 1 June.

31. The document described who would be at risk. Regarding Expressions of Interest (G50), it stated that such a document would be required, not a standard application form. The sheet would ask the following question: "*Given the job description and person specification and the requirements of the post within Sefton Council, how do you feel you would be best placed to successfully carry out the role?*". All those wishing to be considered for the new roles would be invited to submit an Expression of Interest. They were to be limited to two sides of A4 "*and should address how the candidate meets the essential requirements of the role*". It was emphasised that being pooled did not guarantee an interview, candidates would still be required to demonstrate that they fulfilled the essential criteria of the role. The document went on to identify that an assessment of the Expressions of Interest might identify whether skill gaps could be reasonably eliminated, if skill gaps existed.

32. The document also described interviews. Those who would conduct the interviews were named. Support for interviews was identified. Nothing further was said about how interviews would be conducted or how assessment of the candidates would be undertaken. It was not in dispute that the document did not explain that Expressions of Interest might be used as part of the interview (albeit neither did the document say they would not be).

33. In the initial correspondence and consultation with the claimant, amongst other things, one issue with which he was unhappy was the indicative grading for the new Pensions Manager role. It was not in dispute that taking the role would result in the claimant suffering a significant drop in pay (if the grade was assessed the same as had been indicated). At the time the claimant's statement was that the drop in salary would be £4,873 and he would also lose his car allowance. There was no dispute that the respondent's pay protection policy meant that the claimant would suffer no reduction in pay in the first year in which he fulfilled the role, but his pay would reduce thereafter.

34. The claimant was provided with that report. He was also informed in an email on 9 May (B18) that he was at risk of redundancy and had been ring fenced for the Pensions Manager post with the other role-holder who was at risk. He was invited to provide an Expression of Interest, with a deadline of 24 May. The question to be addressed within it was confirmed. In a separate email (B17) a meeting was proposed for 13 May, but the claimant was unable to attend due to his 30th wedding anniversary (B17).

35. A letter was sent to the claimant on 13 May from Mr Dale (B23). It was confirmed that the claimant was at risk. The claimant was told he had been placed on the at-risk register. The claimant was told that he could complete an application form and submit it on-line for the redeployment scheme.

36. The claimant was subsequently informed of the date (28 May) and time for the interviews for the Pensions Manager post before he submitted an expression of interest. That was in an email from Mr Cunningham sent on 22 May (B41) in which Mr Cunningham said he was assuming that the claimant was intending to submit an Expression of Interest for the role. The claimant confirmed he would, in an email of 23 May.

37. There was various correspondence with the claimant around that time, the content of which does not need to be included in this Judgment. However, of relevance, on 23 May in an email to Mr Dale (B26) the claimant said that he could not conceive of a scenario where his reward for the decisions he'd taken in 2003 would be to face the potential, based upon the current timetable, of being made redundant less than nine weeks short of being eligible for early retirement. He went on to say:

> "*If the option to retire aged 55 was open to me I would not be applying for the role, I would retire with the dignity I believe my career has earned me..The situation feels even more unfair as the person I am asking the above of, is about to interview me for a role that I am telling him I would not be applying for had this waited just 2 more months"*

38. The Tribunal was provided with the Expression of Interest which the claimant did submit (G2). The document was two and half pages of small and closely spaced text. The claimant's evidence was that he reduced the font size and spacing to ensure that it was closer to fitting within the two-page requirement. He was very busy at the time with his duties for the respondent (including year-end and what was described as the triennial evaluation). As the claimant knew that he was to be interviewed for the Pensions Manager role, he did not put in the same time as he would have done in preparing the document had he thought it necessary in order to obtain an interview (nor indeed as he would have done had he known his interview would be undertaken based purely upon its content). The claimant's evidence was that he decided that he did wish to be considered for the Pensions Manager post and, if he was successful, he would use the year during which pay-protection applied in order to seek alternative employment. In his submissions the claimant emphasised that by submitting his Expression of Interest and when he did so: he demonstrated that he wanted the role; and he made it clear that he wanted to be interviewed.

39. On 28 May 2019, the claimant was unable to attend work due to ill health. He visited his GP and was advised that he had a high blood pressure. He was signed off work on ill health grounds. His evidence was that the GP advised him to have four weeks away from everything to do with work. He did not attend the interview arranged for that day. Mrs A did attend her interview, was asked the nine questions identified, and was assessed by the panel against the scoring criteria. No appointment was made, and therefore both the claimant and Mrs A were left in a position where they did not know whether they would be appointed to the alternative role available or made redundant.

40. On 13 June it was confirmed to those affected that the new operating structure would take effect from 1 July 2019. The restructure was, by that time, complete for all except: the claimant; Mrs A; and a third individual. The role for the third individual had been confirmed but some other issues remained outstanding until

his resignation and departure (according to the claimant) on 20 October 2019. From 1 July Mrs A was appointed to the Pensions Manager post but on an interim basis. It was Mr Van Arendsen's evidence that she suffered from ill health as a result of the uncertainty and was referred to occupational health and undertook counselling. There was accordingly some pressure to complete the process for the benefit of Mrs A, who remained in a position where she might be made redundant if the claimant was successful in his application for the Pensions Manager post, even though she was fulfilling the role on an interim basis.

41. The claimant attended an appointment with the respondent's occupational health advisor on 4 July 2019. The appointment had been arranged for 26 June (E9) but was re-arranged as a result of the claimant's request for the appointment to be at a different location. The Tribunal was not provided with, and had not seen, what was provided to occupational health prior to the appointment.

42. The claimant was provided with a draft occupational health report (E22a). He had a number of comments about it and it was his evidence that he spoke to the occupational health advisors about the amendments he requested, but only one was made (a "not" had been omitted in error). The report was subsequently provided to the respondent (E17). One question and answer in the draft report had been omitted without explanation in the final report and some other minor amendments had been made. The claimant was critical of these changes. The Tribunal heard no evidence from anyone who could explain them. The respondent's witnesses from whom the Tribunal heard had only seen the final report (E17) at the time when decisions were made.

43. It was not in dispute that the report recorded that: the claimant had initially been signed of with a diagnosis of work related stress; he was signed off at the time due to hypertension, which was a physical symptom of stress; his GP had advised that the claimant should have had no contact for four weeks because the stress was not conducive to his physical and mental well-being; the claimant felt agitated, could not relax and was in low mood; the claimant remained unfit for work; and the OH advisor felt that no further appointments were required. The report also recorded that the claimant was aiming to return to work in early September and that, once he did so, the claimant should be able to deliver a regular level of service.

44. The interpretation of the report and what it meant for the claimant's fitness to attend an interview, was something which was in dispute before the Tribunal. It has to be said that the content of the report was not necessarily as clear as it could have been, or even particularly consistent in what it said. In answer to the question "*Is the employee fit to attend formal management meetings?*" the answer given was "*Yes*". In answer to a subsequent question, the report clearly recounted what the claimant had advised the occupational health professional "*Mike stated, that he does not feel emotionally fit to return to work, nor attend any interview process for the ringfenced role. He stated, that he could not attend even with any adjustment to the process*". As a conclusion, there was an entry which commenced by reflecting what the claimant said, but where it was unclear whether the same was true of the second sentence, it said "*Mike has stated, that he wishes to be contacted by Mr. Paul Cunningham only and any communication must be put in writing by him. At present the process will continue to be delayed, until Mike is emotionally and physically fit to proceed with this and agree to comply"*. Aside of the reference to the claimant's own

perception of his ability to attend any interview process, nothing in the report expressly addressed the advice being provided on the claimant's ability to attend an interview and nothing in the report endeavoured to advise upon any disconnect between what the claimant was recorded as saying and the advice being provided.

45. The claimant's evidence was that the advisor told him during his appointment with occupational health, that they only advised that someone was not fit to attend formal management meetings if they were sectioned (or something equivalent). The Tribunal did not hear any evidence from anyone else who had attended that appointment/meeting.

46. The witnesses for the respondent from whom the Tribunal heard evidence, viewed an interview to fall within the wording formal management meetings. The claimant's evidence was that he did not believe that it did so, explaining that he felt that if someone was not fit to work, they would not be able to attend an interview which would be innately more stressful. The Tribunal does find that there is a distinction between an employee being able to attend a formal management meeting (when, for example, they would normally have the right to be accompanied) with being able to attend an interview to decide whether they have a job and remain in employment, based upon what is said in that interview (when they normally would not be accompanied). The report provided did not give any express assistance about whether the claimant was fit to attend an interview, whatever it was the advisor was asked.

47. Following receipt of the report, Mr Cunningham wrote to the claimant a letter dated 16 July (B48). That letter referred to the claimant's stated aim, to return in early September. It stated that Mr Cunningham did not believe that it was an overall acceptable situation to wait until September to resolve issues and stated that Mr Cunningham wished to meet with the claimant as soon as possible "*so that I can try and agree with you a way forward in terms of resolving the issues as soon as possible*". A time on Tuesday 23 July was provided for the proposed meeting and it was confirmed that the claimant could bring a trade union representative with him.

48. Mr Cunningham in his letter spelt out four, what he described as, "*factors in play*", which in his view meant that the resolution could not wait (B48). It was not in dispute that the other individual referred to was Mrs A. Reference was also made to that other person and the needs of the business, later in the letter.

49. The letter also spelt out three options to consider: whether the claimant would be able to be interviewed, with or without adjustment; whether some other method of selection was appropriate and the example of scoring the expression of interest rather than utilising an interview was given; or any other method which would help the council draw a conclusion on the issue of selection. In this letter Mr Cunningham did not identify what would happen if the claimant did not reply.

50. It was Mr Van Arendsen's evidence to the Tribunal that he was intrinsically involved in all of the decisions taken and actions of Mr Cunningham after the claimant's ill health absence commenced, save for the decisions made at the "interview" on 7 August itself and one specific email which he identified. The Tribunal accepts Mr Van Arendsen's evidence as explaining the reasons for and rationale behind this letter and the decisions reached. He emphasised in his evidence that his

wish to conclude the matters, at least by mid-August, was driven by the need to conclude the restructure which had already taken twice as long as had been envisaged; and in balancing the interests of the two employees affected by this appointment, where the other employee was receiving occupational health support, partly as a result of the ongoing uncertainty.

51. On Thursday 18 July the claimant responded by email (B50) asking to delay the meeting because: his trade union representatives were both on leave; and he was due to see his GP on 5 August. He also sought an alternative venue.

52. One of the trade union representatives and Mr Dale exchanged emails on Monday 22 July (B52). The emails confirmed that the trade union representative: had returned from leave that day; did not think the meeting was still on as the claimant had asked for it to be rearranged due to the representative's absence; and wanted to speak to the claimant on one of his facility days as it would be a lengthy conversation. Mr Dale suggested arranging something the following week. The trade union representative concluded by saying he would speak to the claimant on Thursday (presumably being 25 July).

53. Following this exchange, the respondent ceased proposing a meeting to discuss matters with the claimant and instead moved straight to stating that the interview would go ahead on 7 August. The Tribunal was shown no evidence about why this changed happened following the email trail described.

54. On Thursday 25 July 2019 Mr Cunningham wrote to the claimant (B54). The letter referred to the previous letter of 16 July and the claimant's email of 18 July but did not address anything said within it. The letter asked when the claimant would reply substantively to the letter. It confirmed that it was intended that the claimant would be interviewed for the post of Pensions Manager at 2pm on Wednesday 7 August and details were provided and the claimant was asked to confirm his attendance. As an alternative it was stated "*If you are unable to attend the interview, a decision will be made on the basis of the expression of interest that you have already submitted*". The letter said that the respondent was open to consideration of any adjustments to the method. It said: "*there does need to be a decision as to the appointment by the end of the week ending 9th August 2019*". The letter referred back to the earlier letter as having provided the reasons why there was a necessity to resolve the restructure. It also referred to cost pressures in the restructure. The letter did suggest that Mr Cunningham was happy to discuss matters in a meeting before the scheduled interview time.

55. On 29 July the claimant's trade union representative emailed Mr Cunningham (B56) to state that the Union's view was that what was proposed would place the claimant in a disadvantageous position. It was explained that the Union had advised the claimant not to attend the interview on health and safety grounds. It was also explained that the Expression of Interest document was not as full as it could have been. The Tribunal heard no evidence of any response to the Union from the respondent, nor was there any evidence of any attempts by the respondent to discuss with the union the approach to be used at the "interview".

56. On Wednesday 31 July the claimant emailed Mr Cunningham (B57) explaining that he was not at all happy with the Expression of Interest being used in

the way proposed and explaining why that was the case (the claimant having assumed when it was completed that he would have the opportunity to fill in any gaps or questions with the panel at the pre-arranged interview). He stated that he would follow the advice of his union and would not attend the interview for the reasons the union had given.

57. A letter dated 1 August (that is a Thursday) was sent by Mr Cunningham to the claimant (B59). It invited the claimant to provide any additional information he wished for the interview or to submit a new Expression of Interest. It said, what was provided would be considered on 7 August. It also suggested any other adjustments to the interview would be considered. Suggestions were sought by Monday 5 August.

58. The claimant had provided an email to him from his union representative sent at approximately 1 pm on 5 August (B71). That set out the union's view of the respondent's position (not reasonable) and the risk of not attending if the interview went ahead. It also stated that Mr Cunningham had told the Union representative that he was on leave for two weeks after that week and the panel would not therefore have been able to meet for a while after that week. The Tribunal heard no evidence which contradicted: this account of the implications of the interview being delayed; or that the impending leave was a factor in the respondent insisting on the interview going ahead on 7 August.

59. At 5.02 pm on 5 August the claimant emailed Mr Cunningham (B67) expressing his disappointment and stating that he felt the determination had been made without a response being awaited. The claimant also addressed some of the reasons given for not wishing to see any further delay, including highlighting that Mrs A was fulfilling the role on an interim basis. The claimant was not, of course, aware of Mrs A's health issues. Within his email the claimant also stated that did not have access to his emails and therefore did not have his original Expression of Interest, the person specification, or the job description, to be able to work on a new submission. The claimant's evidence was that the original submission had been prepared in the office and, as he was by this time absent on ill health grounds, he did not have the documents available to him at home. Mr Van Arendsen's evidence was that most employees prepared such documents from home and therefore would usually be assumed to have the documents available to them from home.

60. A brief email was sent to the claimant by Mr Cunningham 25 minutes later on 5 August (B65). That provided a copy of the claimant's Expression of Interest. It did not provide the job description or the person specification. It was stated that, at this stage, Mr Cunningham would not provide a fuller response to the email. It was this exchange of emails for which Mr Van Arendsen's evidence was that he did not recall seeing or being involved in making decisions about, unlike the other correspondence (which presumably reflected the need for a rapid response).

61. The claimant did not immediately see Mr Cunningham's email as he was absent on ill health grounds at the time and not reviewing email. He also spent some time in the evening/night of 5 August in A&E due to family illness. The claimant emailed Mr Cunningham on Tuesday 6 August explaining this (B71a) and provided a fit note which signed the claimant as being not fit to work until 12 August due to stress at work.

62. On 7 August the three individuals who had interviewed Mrs A met and considered the claimant's Expression of Interest. The Tribunal heard no evidence from anyone who attended. There was no evidence which explained how the approach to be undertaken had been determined nor indeed what that approach was. Save for the documents referred to below, there was no evidence which established how an outcome had been reached. Neither of the respondent's witnesses were able to give any evidence about what occurred when the decision was reached. What was not in dispute, was that the outcome was that the Pensions Manager post should be offered to Mrs A and not the claimant.

63. The Tribunal was provided with a template sheet which recorded the questions to be asked of the candidates for Pensions Manager on Tuesday 28 May (G53a). That sheet was never provided to the claimant (prior to these proceedings) and the claimant was not made aware of the questions which were to be used or were used to assess his expression of interest. None of the questions were the question which was asked when the Expression of Interest was prepared. The questions were set out in that sheet.

64. The Tribunal was provided with a score sheet for the post of Pensions Manager (G54). Whilst the Tribunal heard no evidence about how it was compiled or what it showed, it appeared to show each of those undertaking the interviews having given a score (between A and E) for each of the questions to each of Mrs A and the claimant. Those scores were then used to provide a score for each question based upon those scores. The table recorded what each letter meant, falling between: A – excellent; and E – totally unacceptable.

65. The claimant and Mrs A were both scored B (very good) for question 1, and C (acceptable) for questions 2, 7 and 9. The candidates scored differently for each of questions 3-6, when in each case Mrs A was scored B (very good) and the claimant was scored D (not applicable/below). For question 8 the scores also differed, with Mrs A scoring very good (B) and the claimant acceptable (C). The Tribunal was not provided with any other evidence which identified how the scoring was undertaken or what had led to those scores. It was not provided with Mrs A's expression of interest. As the claimant highlighted, the failure to retain any such record of the scores appeared to be in breach of the respondent's document retention procedures under which the records should have been retained for six years. In his submissions the claimant contended that Mrs A was allowed the opportunity to show herself face to face at her best, and to demonstrate her softer skills, her personality, humour, and to relate herself personally to the panel. In answer to a question asked of him, Mr Van Arendsen accepted that had the claimant had the opportunity to answer one of the questions in the way advanced by the claimant at the hearing, it would have been likely to have elevated his score from a D.

66. The Tribunal finds, based upon the documents provided, that the two candidates were compared based upon the answers which they had provided to the questions recorded on the scoring sheet. Mrs A's scores resulted from her explicitly being asked the relevant questions in the course of the interview, and her providing her answers. The claimant's scores resulted from consideration of his Expression of Interest (which was drafted to answer a question which was not one of the questions on the score sheet), and the extent to which it answered a series of questions which he had not been asked and knew nothing about. Unsurprisingly, such an approach

resulted in the claimant being scored not applicable or below in his answers for four of the nine questions, being questions to which he was given no genuine opportunity to respond (unless he had happened to record an answer to that question in his Expression of Interest).

67. The Tribunal was also provided with a document headed analysis of Expression of Interest, for the claimant. Mr Van Arendsen assumed the document had been prepared by one of the interview panel, but it was not clear to the Tribunal when it had been prepared and for what purpose. That document critiqued the Expression of Interest and the extent to which the various requirements of the role had been identified. The Tribunal did not find this document of much assistance in identifying why the claimant was not appointed to the Pensions Manager role, when the reasons themselves seemed to be recorded on the scoresheet and involved assessment of the extent to which a series of questions had been answered.

68. Mr Van Arendsen wrote to the claimant on Thursday 8 August informing him that, following the selection process, he had not been selected for the post (B72). It was confirmed that the claimant was potentially redundant from his existing post and said it was now necessary for Mr Van Arendsen to potentially provide the claimant with notice on the grounds of redundancy. The claimant was invited to a meeting on 14 August with details provided. The purpose was for Mr Van Arendsen to potentially give notice to him.

69. The claimant received the letter on Saturday 10 August. He emailed Mr Van Arendsen in response at 11.08 am on Monday 12 August (B76). He detailed his criticism of the process which had been undertaken. He sought more time to take advice from the trade union. At 9.34 am on Tuesday 13 August the claimant sent a further email (B78). In that email he referred to the fact that he said a named employee (or former employee) of the respondent had informed him that there was an unwritten rule that no one so close to being eligible to draw their pension would be terminated in this way. He stated that, whatever Mr Van Arendsen decided in respect of delaying the meeting, it would not enable the claimant to attend. He highlighted that he was being made redundant three weeks before his 55th birthday. He asked for the meeting to go ahead with the union representatives. In evidence to the Tribunal the claimant confirmed that he intended that the meeting could proceed with his representative present, but not with him present.

70. Mr Van Arendsen emailed the claimant at 12.26 on 14 August (B80). He noted that the claimant was not able to attend the meeting which had been arranged and he identified that it had been explained that was due to the availability of the trade union representative. A re-arranged meeting was offered for midday on the following day, 15 August.

71. On 15 August at 9.49 the claimant responded to Mr Van Arendsen (B82), having only just seen the email of the previous day. He explained that he would not be able to attend due to the short notice and the fact that a close relative of the claimant had been taken to Clatterbridge and diagnosed with cancer. The claimant stated that if notice was served, he would appeal the decision immediately. The claimant also referred to his age and asserted that was the driving factor for the approach the respondent was taking.

72. On 19 August a letter prepared by HR, but checked approved and signed by Mr Van Arendsen, was sent to the claimant (B84). The letter served the claimant with notice of termination of employment by reason of redundancy. The claimant was given twelve weeks notice, which the letter stated would commence on 19 August, but in any event concluded on 11 September. The letter provided some standard details about redundancy. The letter addressed the claimant's non-attendance at the arranged meetings and quoted what had been said about non-attendance in the claimant's email. In terms of the allegation of age discrimination, the letter stated that the entire restructure had been completed a number of weeks before, the Pensions Manager post was stated to be the only one remaining to be dealt with, and it was said that the circumstances detailed in Mr Cunningham's letter dated 16 July had prevailed. Mr Van Arendsen denied that the claimant had been treated unfavourably because of his age and made the assertion that it seemed to Mr Van Arendsen that the claimant had sought to delay matters. The letter did not provide the usual information about how to appeal, but instead explained that the claimant had indicated that he would like to appeal and explained that any appeal would go to another head of service. Mr Van Arendsen stated that he would ask for this to be scheduled. Mr Van Arendsen in evidence confirmed that the decision to dismiss the claimant was his decision.

73. The Tribunal found Mr Van Arendsen to be a credible witness and accepted his evidence about the reasons why he had dismissed the claimant and why he wished to bring the restructure process to a conclusion. The Tribunal accepted that the cost of the claimant being made redundant at a later date than he was, was not a factor in Mr Van Arendsen's decisions (albeit that the respondent was aware of what those costs would be). The Tribunal would observe that Mr Van Arendsen's understanding of the issues would have been enhanced had he received recent training in equality and diversity matters; his rather surprising evidence being that he had not received any equal opportunities training during his time being employed with the respondent.

74. Mr Van Arendsen's evidence was that he believed Mrs A was informed of the outcome of the interview verbally at the time. The Tribunal was shown a letter formally offering her the Pensions Manager role on 12 December 2019 (that is only after the claimant's appeal had been decided).

75. After returning from two weeks annual leave, Mr Van Arendsen wrote to the claimant on 2 September asking for the claimant's availability for an appeal hearing. In subsequent emails it was confirmed to the claimant that he needed to provide his grounds of appeal, but there was no specific format in which they needed to be provided. The grounds of appeal were sent to Mr Van Arendsen, something which was requested because Mr Van Arendsen was the Executive Director responsible for HR. Whilst appeals regarding other services would usually be sent to a senior HR person, as he was the senior person responsible for the claimant's service, the appeal in this case was unusually to be sent to the decision-maker.

76. The grounds of appeal were provided on 6 September (D9). It is not necessary to reproduce the claimant's grounds of appeal in this Judgment. The claimant asserted that age was the driving factor in the speed of what had happened and that, but for the claimant's age, the appointment of the Pensions Manager role could have waited until the claimant was fit to return to duty in September. The

claimant's evidence was that, even had his appeal have been successful, he would not by that time have been willing to accept the role of Pensions Manager in the light of what had occurred.

77. The claimant provided a further fit note on 5 September 2019 which stated that he was not fit to work until 30 November 2019, meaning that the claimant did not in fact return to work on the date which he had earlier indicated he thought he would. The appeal hearing did not take place until 15 October 2019. The Tribunal heard evidence about the reasons for this delay, which included the time required to arrange for the decision-maker to be available, and the dates when the claimant's trade union representative was away, and the representative's wish for time to prepare after his return. The claimant was critical of the delay in the appeal taking place, which meant that it was only heard and determined shortly before the claimant's period of notice expired. The claimant felt that opportunities to progress the appeal had, in particular, been missed immediately after the decision to dismiss had been made.

78. The appeal hearing was conducted by Ms Watts, an Executive Director from a different service. The Tribunal was provided with some notes of the appeal hearing (D25d), albeit they were clearly not detailed notes. Mr Van Arendsen attended and presented the management case. The claimant's trade union representative attended and represented the claimant. At the start of the hearing the claimant and his representative presented the case and explained why they believed the decision had been unfair.

79. The notes of the appeal hearing recorded that the claimant, or his representative, explained that the claimant had not had the opportunity to add to his Expression of Interest prior to the interview because he had neither the job description nor the person specification supplied to him. Ms Watts' evidence to the Tribunal was that she was told by the claimant's representative that the claimant had been given the opportunity to submit a revised Expression of Interest. Her evidence was not consistent with the notes provided and was not accepted by the Tribunal.

80. Ms Watts' evidence was that she had seen the scoresheet and questions used when determining whether the claimant would be appointed to the Pensions Manager role. Mr Van Arendsen's evidence was also that he had seen that documentation. The documentation was not provided to the claimant prior to, or during, the appeal. The notes of the appeal record the claimant's union representative as having explained that he was not aware of how the decision had been made for the other candidate.

81. Mr Van Arendsen was given the opportunity to present the management case at the appeal. Questions were asked. The meeting concluded and Ms Watts said that a decision would be provided within 10 days, albeit in fact a longer period was taken to provide an outcome (the claimant was informed of this in an email on 28 October).

82. Ms Watts' decision was that the appeal would not be upheld. The decision was provided in writing on 5 November 2019 (D28). The letter provided details of the reason for the outcome.

83. Within her decision letter Ms Watts stated that the claimant had admitted to seeking to get the process delayed, which she stated she presumed was to ensure he got access to his pension benefits (being the enhanced benefits). She focussed on the fact that the claimant had not provided an alternative method for determination of who should be offered the Pensions Officer post throughout the process. She accepted that the process followed was not dealt with in any policy and had not occurred before; the factors being unique. Reference was made to Mrs A being affected as being part of the reason for the process not being further delayed. Mrs Watts concluded that the contact made with the claimant was reasonable and it was not unreasonable for the respondent to act as it did. The appeal was not upheld. Ms Watts expressly accepted that matters were not perfect, but she stated that she did not believe they were unreasonable.

84. Within her decision letter Ms Watts stated the following: "*It is true that one factor in not waiting was the additional capital cost that would be incurred by waiting and delaying but this was just one factor in many (when you were seeking to delay)*". When asked what this statement was based upon, Ms Watts stated that it had been put forward as part of the management case. When he was asked about it, Mr Van Arendsen referred to his perception that the claimant was trying to delay matters, and to the correspondence in which the claimant had referred to a wish to leave after 55 with the enhanced benefits, and he put the comment in the context of responding to the claimant's own wish to leave early.

85. There was no dispute that the claimant did not register for redeployment at any time and he took no steps to seek to be considered for any other alternative employment available. The claimant's evidence was that he did not do so before the outcome of his appeal because it was not explained that doing so would not be without prejudice to his application and appeal, and he did not wish it to be seen as being an acknowledgement of weakness in his appeal. No specific role or roles for which the claimant might have applied or sought (except the Pensions Manager role) were identified by the claimant at the hearing. The claimant was a pensions expert and accepted that there would not have been any other equivalent pensions roles for which he might have applied.

86. The claimant's employment terminated on 11 November 2019. He was paid a redundancy payment which is not in dispute in these proceedings. The claimant reached 55 years of age on 1 December 2019.

87. Following termination, the claimant was paid in lieu of accrued but untaken annual leave. It was common ground that the claimant was paid for annual leave at a rate which reflected his normal rate of pay and which did not take into account his car allowance. The car allowance was taken into account when the redundancy payment was calculated, albeit expressly as a result of the exercise of Mr Dale's discretion.

The Law

Unfair dismissal

88. For the claim for unfair dismissal, as in all such claims, the starting point is section 98 of the Employment Rights Act 1996.

> *"***In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or if more than one, the principal reason) for the dismissal."**
>
> **"A reason falls within this subsection if it…is that the employee was redundant."**
>
> **"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – 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 shall be determined in accordance with equity and the substantial merits of the case.**"

89. Section 139 of the Employment Rights Act 1996 defines redundancy:

> **"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."**

90. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on the business decision to make redundancies.

91. In **Williams v Compair Maxam Ltd [1982] IRLR 83,** a case highlighted in the respondent's submissions, the Employment Appeal Tribunal set out the standards which should guide the Tribunal in determining whether a dismissal for redundancy is fair under section 98(4). The respondent emphasised that the Judgment was authority for the fact that the test was whether the respondent's decision was one reached within the range of reasonable responses. It was not for the Tribunal to impose its standards and to decide whether the respondent should have behaved differently. Browne-Wilkinson J, expressed the position as follows:

> *''… there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*
>
> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant*

facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

(2) The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

(3) Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."

92. The respondent's submissions identified the principle laid down in **Langston v Cranfield University [1988] IRLR 172**, in which the EAT held that so fundamental are the requirements of selection, consultation, and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

93. The criteria referred to in **Williams** apply to selecting employees who are made redundant from within an existing group. The position in this case was different, as there was a new, different, role to be filled. That role falls within point 5 of **Williams** regarding alternative employment and, more specifically within the guidance given in **Morgan v Welsh Rugby Union UKEAT/0314/10** (a case which the Tribunal highlighted to the parties and which is referred to in the respondent's submissions). The Employment Appeal Tribunal explained this distinction:

"*Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas* Williams *type selection will involve consultation and meeting,*

> *appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion"*

94. In the same Judgment, as emphasised by the respondent's counsel, the EAT explained what a Tribunal should consider when assessing such an exercise:

> "*To our mind a tribunal considering this question must apply s 98(4) of the 1996 Act. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s 98(4)"*

95. It is, of course, important that the Tribunal must not substitute its own views for that of the employer in determining whether the dismissal was fair, something which the respondent rightly emphasised. The Employment Appeal Tribunal in **Samsung Electronics (UK) Ltd v Monte-D'Cruz EAT/0039/11** emphasised this point in the context of a reorganisation and competitive appointment such as occurred in this case, when finding that the Tribunal in that case had wrongly substituted its own view of the claimant's suitability for the alternative role, for that of the respondent. Within that Judgment the EAT said:

> "*It is trite law that an employer is not to be held to have acted unreasonably merely because the tribunal thinks that another course would have been better.*"
>
> and
>
> "*What assessment tools to use in an interview of this kind – which is not, we should repeat, a redundancy selection exercise – is prima facie a matter for the discretion of the employer.*"

96. The claimant internally placed some reliance upon the Judgment of the Employment Appeal Tribunal in **The Council of the City of Newcastle Upon Tyne v Ford and others UKEAT/0358/13**, during the respondent's own processes. That was a case which involved a situation which was broadly similar to this one, being a case in which there was a restructuring and a competitive interview for an alternative role. However, in that case, the employer had failed to tell the candidates that no account would be taken of the expressions of interest which they had completed (which had resulted in the claimant and others performing badly in interview because they had not been aware that was the case). The dismissal was, as a result, found to be unfair (but subject to a **Polkey** deduction). That decision was upheld by the EAT.

The proposition drawn by the claimant was that the Judgment emphasised the importance of an employee being aware of the procedure that was to be followed.

97. Section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case.

Polkey

98. The application of **Polkey** in this case required a difficult decision. In **Polkey** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) may be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. In applying a **Polkey** reduction the Tribunal has to speculate, to some extent, upon uncertainties.

99. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** the Employment Appeal Tribunal explained the exercise to be undertaken applying **Polkey** as follows:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."*

100. That Judgment emphasised that the issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances. A Tribunal may decide that although the dismissal would have occurred in any event, it would have been delayed had fair procedures been followed. In those circumstances the compensatory award ought to reflect the additional period for which the claimant would have been employed had the dismissal been fair. The **Polkey** principle may be applied where the Tribunal is satisfied that the claimant would or could have been fairly dismissed for a different reason than that for which they were dismissed.

101. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the claimant. In reaching its decision the Tribunal must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict

what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence or for applying a **Polkey** reduction (**Software 2000 Ltd v Andrews [2007] IRLR 568**).

Direct discrimination

102. The claim relies on section 13 of the Equality Act 2010 which provides that:

> **"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."**

103. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include age.

104. In this case the respondent will have subjected the claimant to direct discrimination if, because of his age, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**). It is not a requirement that the situations have to be precisely the same.

105. Age does, of course, differ from the other protected characteristics in that section 13(2) provides that direct discrimination can be justified (that is it is not unlawful) if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim

106. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

107. In short, a two-stage approach is envisaged:

a. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However it is not enough for the claimant to show merely that he has been

treated less favourably than his comparator(s) and that there is a difference of a protected characteristic between them; there must be something more.

b. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

108. The respondent's counsel relied upon the guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, that in order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race or other protected characteristic, and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. In **Madarassy v Nomura International PLC [2007] ICR 867** Mummery LJ said:

> **"***The court in* Igen v Wong *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it…The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.***"**

109. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36; Bahl v The Law Society [2004] EWCA Civ 1070.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different age would have been treated reasonably.

110. The protected characteristic does not have to be the only reason for the conduct provided that it is an effective cause or significant influence for the treatment.

111. The respondent's representative quite correctly submitted, relying upon **De Souza v Automobile Association [1986] ICR 514**, that detriment means "*disadvantage in the circumstances and conditions*" of work and that "*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*". **Shamoon** emphasised that a sense of grievance which is not justified, will not be sufficient to constitute detriment.

112. The Tribunal highlighted to the parties the decisions of the EAT and Court of Appeal in **Woodcock v Cumbria PCT 2012 IRLR 491** and **2011 IRLR 119**, which involve facts with some potential similarities to this case and address whether something is a proportionate means of achieving a legitimate aim (and in particular the difficult issue of whether cost alone can constitute such a justification). That case involved a Chief Executive who was given notice before redundancy consultation with him was undertaken, primarily in order to ensure that his termination occurred prior to his 50th birthday when enhanced termination arrangements would otherwise apply. That would have involved the Trust in substantial additional cost. The approach to, and timing of the, notice to be given was found on the facts of that case to be a proportionate means of achieving a legitimate aim. Importantly in that case, the claimant's substantive role had in fact been redundant for some time before notice was given (with there having been a year's extension to the period when he would normally have been expected to have been given notice).

113. As the respondent's representative cited in his submissions, the Court of Appeal in **Woodcock** said the following:

> *"If the trust's treatment of the claimant is correctly characterised as no more than treatment aimed at saving or avoiding costs, I would accept that it was not a means of achieving a "legitimate aim" and that it was therefore incapable of justification. It would fall foul of the limitations upon justification explained in cases such as Hill v Revenue Comrs [1999] ICR 4. On the unusual facts of this case, I would not, however, regard that as a correct characterisation. The dismissal notice of 23 May 2007 was not served with the aim, pure and simple, of dismissing the claimant before his 49th birthday in order to save the trust the expense it would incur if he was still in its employ at 50. It was served, and genuinely served, with the aim of giving effect to the trust's genuine decision to terminate his employment on the grounds of his redundancy. The appeal tribunal had no doubt that the dismissal of an employee on such grounds is a legitimate aim: "It is an entirely legitimate aim for an employer to dismiss an employee who has become redundant." I agree; and it cannot in my view cease to be a "legitimate aim" simply because, if there is no dismissal, the employer will continue to incur costs that such dismissal is directed at saving. I also agree with both the employment tribunal and the appeal tribunal that it was a legitimate part of that aim for the trust to ensure that, in giving effect to it, the dismissal also saved the trust the additional element of costs that, had it not timed the dismissal as it did, it would be likely to have incurred. In considering the timing of the steps it needed to take towards dismissing the claimant for redundancy it was*

> *obviously legitimate for the trust to have that consideration in mind, as it clearly did as early as March 2007. It would, in my view, have been irresponsible of the trust not to have done so."*

114. The Tribunal also found some assistance from what was said in the Judgment of the EAT in **Woodcock**, where Underhill LJ said the following:

> "*An employer is certainly not obliged by the age discrimination legislation to defer steps which he would otherwise be entitled to take, simply so as to allow an employee to attain an age-related milestone …; but nor is he entitled to cut procedural corners, at least where the procedures are designed for the protection of the employee, in order to achieve dismissal before such a milestone is reached. The fact is that the cards can fall unluckily, in terms of the timing of birthdays, for either employer or employee."*

115. The claimant in his submissions relied upon the EAT's Judgment in **Sturmey v Weymouth and Portland Borough Council UKEAT/0114/14** (a case with facts not dis-similar to this one), as authority for the fact that the Judgment in **Woodcock** was not intended to lay down any general principal as to whether omitting or eliding stages in a redundancy process to save pension costs will always be a proportionate means of achieving a legitimate aim. The EAT in **Sturmey** emphasised that the conclusion of the Court of Appeal in **Woodcock** had been expressly recognised as depending on very particular circumstances and cannot be read across to all other circumstances. Notably, in that Judgment, the EAT also emphasised that if an employer wished to omit or elide stages in a redundancy process because of age, what must be justified was the discriminatory treatment and not the redundancy itself ("*It is not the game it must justify; it is the moving of the goalposts*").

Time limits/jurisdiction (discrimination)

116. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

117. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] ICR 530** makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably.

118. The respondent's counsel highlighted **Hendricks** and cited two passages from it in his submissions. He also relied upon **South West Ambulance Service NHS Foundation Trust v King UKEAT0056/19** in emphasising that if any alleged

acts are not established or found to be discriminatory, they cannot be part of any continuing act.

119. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

120. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Those factors are:

- the length of, and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the relevant respondent has cooperated with any request for information;
- the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
- the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

121. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

122. As the respondent's representative emphasised in his written submissions, **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. It said, of exercising the discretion, *"There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule".* The onus to establish that the time limit should be extended lies with the claimant.

Unlawful deduction from wages

123. The claim was brought as one for unlawful deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right not to suffer unauthorised deductions from wages under section 13. Section 13 of the Employment Rights Act 1996 provides that:

> "*An employer shall not make a deduction from the wages of a worker employed by him unless:*
>
> *(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or*
>
> (b) *The worker has previously signified in writing his agreement or consent to the making of the deduction*."

124. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to a deduction from a worker's wage made by his employer where the purpose of any deduction is the reimbursement of the employer in respect of an overpayment of wages. Under section 27 "wages" includes any bonus or commission.

125. Regulation 16 of the Working Time Regulations 1998 provides for payment of annual leave to be at the rate of a week's pay. The meaning of a week's pay is set out in Chapter 2 of the Employment Rights Act 1996, which (in a summary of a very complex provision) for this case, would be the claimant's remuneration for employment in normal working hours

126. In his submissions the respondent's counsel relied upon two well known holiday pay authorities (**British Gas Trading v Lock [2017] ICR1** and **British Airways plc v Williams [2012] ICR 847**) and an older case about redundancy pay (**S and U Stores Ltd v Wilkes [1974] ICR 645**). In summary he drew a distinction from those authorities between payments intended to exclusively cover ancillary costs or expenditure, with normal remuneration. In particular, he highlighted a first instance Tribunal decision **Collins v SES Engineering Services Limited 1805194/20** as being one in which a Tribunal had found that a car allowance was a genuine estimate of the expense incurred by the employee in obtaining, maintaining and insuring a vehicle and that did not count as remuneration. In her Judgment Employment Judge Armstrong asked first whether the car allowance was a reimbursement for expenses and, second, whether it amounted to a profit or surplus in the claimant's hands or a genuine estimate of the expense incurred. The Tribunal is, of course, not bound by that decision in the same way as it is by appellate decisions.

Conclusions – applying the law to the facts

Unfair dismissal

127. The first question in the list of issues was: what was the reason for the claimant's dismissal? The claimant, in answer to a question asked during his submissions, accepted that the reason was redundancy.

128. The second question the Tribunal was required to ask under the list of issues was the question outlined in section 98(4) of the Employment Rights Act 1996: whether the dismissal was fair or unfair (having regard to the reason shown by the employer) – 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 the reason as a sufficient reason for dismissing the employee, and it shall be determined in accordance with equity and the substantial merits of the case.

129. Question three within the list of issues identified the specific ways in which the claimant had said at the preliminary hearing he would contend that his dismissal was unfair. The first of those contentions was that the claimant argued that his selection was unfair because he was selected for redundancy because of his history of challenging the respondent. The evidence in support of this contention was rather weak. It was clear that there had been some issues, particularly between the claimant and a particular employee of the respondent. However, the Tribunal did not find that any such issues had any impact upon the claimant being identified as at risk of redundancy, the process followed, or him ultimately being dismissed. The Tribunal found that those steps were undertaken for the reasons evidenced by the respondent's witnesses and not due to any historic issues.

130. In terms of the restructure exercise generally, the identification of the claimant's role as being at risk of redundancy, and the consultation and process followed up to the claimant's ill health absence on 28 May 2019, the Tribunal found the process followed by the respondent to have been entirely fair and reasonable. Applying the factors outlined in the case of **Williams**: warning was given of impending redundancies; consultation with the unions was undertaken with a view to conducting the exercise fairly and with as little hardship as possible; selection was fair; and arrangements for consideration of alternative employment were put in place.

131. After the 28 May, the Tribunal understood and appreciated the difficulty which the respondent faced in wishing to bring the process to a conclusion, and in balancing fairness and the impact of delay on the claimant and Mrs A, while the claimant was not fit for work. It was necessary for the respondent to consider and, ultimately to follow a process to determine, which of them was (or was not) to fill the role. It was not a process identified or outlined at the outset (so the process needed to be changed). The Tribunal also did not find that the respondent was obliged to wait for the claimant to be fit and able to engage in work, for any subsequent dismissal to be fair.

132. In reaching its decision on the fairness of the dismissal, the Tribunal focussed on the process by which the claimant's application for the Pensions Manager role was considered on 7 August and how it was determined who should be offered that role between the claimant and Mrs A. The Tribunal reminded itself that it must not decide whether it would have taken an alternative approach. It took account of the respondent's representative's submissions and noted the importance of considering whether the decision was within the range of reasonable responses which a reasonable employer could reach. The Tribunal was mindful of what has already been identified from the cases of **Morgan** and **Samsung Electronics**. However, it was still important for the Tribunal to determine whether the claimant's dismissal was fair in the light of the process followed.

133. As has been explained in identifying the facts of this case, the way that the interview was conducted on 7 August was not one which was fair. The panel were simply comparing apples with pears; they were not comparing like with like. The panel scored nine questions comparing the answers given by Mrs A, when she was asked the question, with a document prepared by the claimant to answer an entirely different question without any knowledge of the questions for which answers were being sought. It would have been very very surprising had the outcome of that process been anything other than that Mrs A would be successful. The process was unfair and, arguably, non-sensical. It was simply unfair to compare the two candidates and to select from them in that way. The Tribunal found that was not an approach which any reasonable employer could, or would, have taken.

134. Having reached that decision, it was not necessary or appropriate for the Tribunal to identify what alternative approach might have been adopted or which might otherwise have been fair. However, the Tribunal would observe that if the respondent had undertaken a process where both parties written Expressions of Interest were considered to determine the successful candidate, with an assessment based upon the requirements of the job or an assessment solely based on the two documents, it is likely that the approach could have been fair. Similarly, if the claimant had been provided with the questions and had been given the opportunity to answer them, that also might have been fair. However, what led the Tribunal to its decision was not a comparison or consideration of alternatives (indeed the Tribunal has been warned against doing that), but rather the decision that it was not fair to compare answers to explicit questions with whether a document might contain the answers to those questions when they had not been asked of the writer (and then to undertake a scoring process against each of the questions which had been asked of one of the candidates, but had not been known to the other).

135. Having found that the dismissal was unfair because of that part of the respondent's process, it was not necessary for the Tribunal to consider each of the other elements of the process followed. However, as the claimant placed particular emphasis upon it, the Tribunal would record that it would not necessarily have been unfair to use the Expression of Interest forms to determine who should be appointed to the Pensions Manager role if that had been the approach used (but it was not), and it was not necessary for a fair dismissal that the respondent waited for the claimant to be fit to return to work before concluding the exercise.

Age discrimination

136. Issue four was the claimant's allegation of direct age discrimination. The claimant relied upon three specific acts and his dismissal. The Tribunal considered the specific allegations recorded at issues 4(a)-4(c). In summary, the claimant's age discrimination complaint before the Tribunal was that the respondent had progressed and not delayed the process for appointing to the Pensions Manager role beyond the 7 August 2019, he alleged because of his age and his impending 55th birthday. The alleged acts all relate to that contention being: using the Expression of Interest form to assess the claimant for that role, rather than waiting to interview him in September 2019 (or later); not allowing the claimant more time beyond 7 August 2019 to submit an amended Expression of Interest form to be used in the assessment process; and the failure to be selected for the post of Pensions Manager and therefore him being made redundant.

137. The Tribunal finds that, for the claimant, progressing the process and not delaying the process, was a detriment. The claimant did suffer a detriment in all the ways alleged at issues 4(a)-4(c).

138. The Tribunal did not find that the claimant was treated less favourably than a hypothetical comparator who was younger or older would have been. The Tribunal found that Mr Van Arendsen's evidence about why he took the decisions which he did (including the decisions to use the Expression of Interest, to not allow more time beyond 7 August for the interview, and to ensure the decision was made on 7 August) was truthful and the decision was not made because of the claimant's age, impending 55th birthday, or the potential costs of retirement after that date. Mr Van Arendsen was focussed on bringing the restructure process to a conclusion, as it had already continued well beyond the dates originally identified, and he was balancing the wishes of the claimant with the issues arising from the delay for Mrs A. He identified the 7 August as being the date when the decision needed to be made and was not willing to vary that date for those reasons and not because of the claimant's age. Accordingly, a hypothetical comparator otherwise in materially the same circumstances as the claimant, would have faced the same decisions from the respondent/Mr Van Arendsen.

139. Mrs A was an appropriate comparator for the claimant in terms of non-appointment to the role. Albeit, her circumstances were in some ways materially different to the claimant's (she had attended the interview and was fulfilling the role on an interim basis).

140. The Tribunal did not find that the reason for any of the treatment about which the claimant complained including issues 4(a)-(c) was because of his age. The reasons for the use of the Expression of Interest form, not allowing more time beyond 7 August, and the refusal generally to further delay the process, were those evidenced by Mr Van Arendsen and not the claimant's age (or the date of his 55th birthday).

141. The reason for the difference in treatment between the claimant and Mrs A, that is her being appointed to the role and him not, was not because of the claimant's age but because of the panel's scoring of the interview process. Even though unfair, the Tribunal did not hear any evidence which suggested, showed or proved that process followed was because of the claimant's age or that would have shifted the burden of proof.

142. Having reached that decision, it was simply not possible for the Tribunal to determine whether it would have found that any such less treatment would have been found to have been a proportionate means of achieving a legitimate aim, had it needed to determine that issue. The aims relied upon by the respondent included a number of aims which were legitimate (where the aims listed were genuinely aims and not issues related to those aims). However, the proportionality of the approach taken was not something the Tribunal was able to determine in the light of the findings made (nor did it need to do so).

143. It was also not necessary for the Tribunal to determine the question of jurisdiction and time limits having addressed the substantive merits of the discrimination claim. However, it is likely that had the Tribunal needed to have

considered the issue it would have found that the matters were part of a continuing act which concluded within the primary time limit (when the dismissal was effective). The Tribunal would also have found it to be just and equitable to extend time had it needed to do so. Any delay in entering the claim was not significant, the balance of prejudice involved balancing the claimant being unable to pursue potentially meritorious claims with the effects of delay on memory (and the relevant period would have been the delay in entering the claim, not the issues arising from the delay in the case being heard, upon which the respondent's representative relied), and the respondent had in practice been able to put forward its defence to the claim. Even where there was an absence of an explanation from the claimant for the delay and taking account of the importance of time limits, the Tribunal would have found it just and equitable to extend time had it needed to do so.

Unauthorised deduction from wages

144. The unauthorised deduction from wages claim was somewhat complex. In summary, the Tribunal considered whether the car allowance paid to the claimant was reimbursement of expenses and, if it was, whether it amounted to a profit or surplus in the claimant's hands, or a genuine estimate of the expense incurred.

145. The claimant's evidence was that the car allowance was effectively salary and was not a reimbursement of expenses. The Tribunal accepted the claimant's evidence. He was found to be a truthful witness. The email relied upon by the respondent (C1) was noted, but the Tribunal did not find its content sufficient to disprove the oral evidence of the claimant, or to prove that the fixed set amount of car allowance was a genuine estimate of the expense incurred. Accordingly, the Tribunal found that the car allowance paid to the claimant was part of a week's pay, was part of his normal remuneration, and should have been used to calculate his holiday pay when he was paid in lieu of outstanding accrued annual leave at the termination of his employment.

Polkey

146. The final issue which the Tribunal needed to determine was that of **Polkey**. The Tribunal did not find it easy to undertake the exercise required on the facts of this case. It was very difficult, in particular, to undertake an assessment of the claimant's prospects of being appointed to the Pensions Manager post had a fair process been followed. This was a case where a significant element of speculation was necessarily involved.

147. The Tribunal noted that what needed to be assessed was what were the chances of this employer fairly dismissing the claimant had a fair procedure been followed. In considering that issue, the Tribunal took account of the questions which were used to determine which candidate should be appointed. Those questions were generally not about strategic issues or about outlining pensions expertise, they were about providing factual and practical examples of the matter sought in the questions. The outcome to such a process was difficult to predict even in circumstances where the claimant had previously been more senior than the other candidate. The Tribunal did not find that the claimant would certainly have been appointed to the role had a fair procedure been followed, as the claimant submitted. The Tribunal's finding, on the basis that there were two candidates, was that there was a 50% chance that the

claimant would have been appointed to the Pensions Manager role and therefore not have been made redundant, had a fair procedure been followed.

148. It will be a matter to be addressed at the remedy hearing, what impact that 50% chance has upon the remedy due to the claimant. The Tribunal did consider whether or not it was appropriate in this case to identify a time period in which a fair procedure would have been completed, as can be determined in some cases. On the facts of this case and in the light of what the Tribunal found to be unfair about the process followed, the Tribunal found that it was not appropriate to identify such a timescale, as the decision reached was not about the speed of or timing of the process followed.

Summary

149. For the reasons explained above, the Tribunal found that the claimant was unfairly dismissed (with a 50% chance that he would have been dismissed had a fair procedure been followed, applying **Polkey**). The age discrimination claim did not succeed. The unauthorised deduction from wages claim also succeeded.

Employment Judge Phil Allen
10 May 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

12 May 2022

FOR THE TRIBUNAL OFFICE