EMPLOYMENT TRIBUNALS

Claimant: Mr M. Birkett

Respondent: Integral UK Ltd.

HELD AT/BY: Mold as a hybrid **on:** 4th – 6th April 2022

BEFORE: Employment Judge T. Vincent Ryan
Ms W. Morgan
Ms. M. Humphries

REPRESENTATION:

Claimant: Mr Birkett represented himself (a Litigant in Person)
Respondent: Ms S Chan, Counsel

JUDGMENT having been sent to the parties on 7th April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issues: In a situation where the claimant says that his dismissal, ostensibly by reason of redundancy was unfair and that the decision to dismiss him was discriminatory as to age and nationality, the issues in the case were identified and agreed at a preliminary hearing conducted by Employment Judge Roper on 28th September 2021 as follows:

Unfair Dismissal claim:

1. What was the reason for dismissal where the respondent asserts that it was a reason related to redundancy?

2. Did the respondent act reasonably in all the circumstances in treating the alleged redundancy as a sufficient reason to dismiss the claimant where the tribunal will consider:

2.1. was there a genuine redundancy situation?
2.2. if so, was the claimant's dismissal attributable to that redundancy?
2.3. did the respondent adequately warn, and consult with, the claimant?
2.4. did the respondent adopt reasonable selection criteria, including its approach to any selection pool?
2.5. did the respondent take reasonable steps to find the claimant suitable alternative employment?

3. Was the decision to dismiss a fair decision? That is was it within the range of reasonable responses open to a reasonable employer when faced with the facts at the material time?

4. Did the respondent adopt a fair procedure? The claimant accepts that there was a genuine consultation process and that the respondent's decision to have a pool for selection of all 5 employees working in the north of Wales doing the same work as him was reasonable, but otherwise challenges the fairness of the procedure and the dismissal in the following respects where he says:

   4.1. there was no genuine redundancy situation because there was plenty of work in the north of Wales;
   4.2. the respondent's selection criteria were unreasonable;
   4.3. the claimant selection for redundancy was both unfair and discriminatory;
   4.4. the respondent failed to offer the claimant reasonable alternative employment.

5. If the respondent did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

6. If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed alleged misconduct.

Direct Age Discrimination claim:

7. The claimant was born on 6th March 1970 and was aged 50 at the time of termination of his employment; he compares himself with the four other engineers in the north of Wales who were in the age group of about 30 and under.

8. The allegation of less favourable treatment amounting to direct age discrimination is limited to the selection of the claimant for redundancy and the act of dismissal.

9. Was that less favourable treatment? The tribunal will have to decide whether the claimant was treated less favourably than someone else was treated, that person being a comparator. There must be no material difference between the circumstances of this comparator and those of the claimant; the comparator can be an actual person or if there is no actual comparator than someone hypothetically, that is to say a hypothetical comparator whom the claimant says would not have been treated in the less favourable way in which he says he was treated. The claimant relies on four actual comparators, namely the other four engineers in in the north of Wales, all of whom were aged about 30 or under.

10. If the claimant did suffer less favourable treatment as alleged above was this because of his age?

11. The respondent disputes that there was any less favourable treatment on the grounds of age and does not seek to argue that there was potentially discriminatory treatment but that it was justifiable as a proportionate means of achieving a legitimate aim.

Direct Race Discrimination claim:

12. The claimant describes himself as being of English nationality. The allegation of less favourable treatment is limited to the selection of the claimant for redundancy and the act of dismissal.

13. Was that treatment less favourable treatment? The tribunal will have to decide whether the claimant was treated less favourably than someone else was treated, his comparator as described above. The claimant relies on the same four actual comparators as above, namely the other four engineers in the north of Wales, all of whom are Welsh.

14. If the claimant did suffer less favourable treatment as alleged above was this because of race, his English nationality?

The Facts:

15. The respondent (R) is a large employer in the business of facilities management. It has a professional HR department. It has documented policies and procedures.

16. R has for some time had an employee representatives group. It does not recognise any particular trade union for bargaining purposes and the like.

17. In 2020, with a view to potential redundancy procedures, it was decided to refresh that group, as it had not been used for a while. Part of the review and renewed interest in the group was specifically to review the redundancy procedure and the potential selection criteria that would be adopted if and when redundancies were to be considered. Even more specifically the intention was to reduce any subjectivity in the proposed criteria and to introduce a tiebreaker which prioritised certain categories in the marking scheme. R did all of this with the employee representatives group.

18. R's business was seriously adversely affected, as were so many businesses and sadly so many individuals, by the Covid19 pandemic. R locked down in March 2020. A number of its clients' buildings that were serviced by R were closed too. A large number of R's employees had to work from home, or were furloughed, and some reduced their hours of work.

19. All of this had a massive impact on the requirements of work of the types offered by R to its clients in facilities management, especially because of the number of building closures. R's requirements for operatives and engineers, including mobile gas service engineers, reduced drastically.

20. The tribunal accepts as fact the respondent's witnesses explanation and rationale for the redundancy exercise and that a redundancy situation existed; there was a reduction in the respondent's requirement of work of particular kinds including the work of mobile gas service engineers.

21. We heard evidence from Laura Roxburgh (HR Director at the material time), C. Brobin (a Gas Engineer and R's Operations Manager for the South West of England at the material time; he scored the claimant against the selection criteria), M. Edwards (Operations Director and the grievance officer in this case), and S. Betts (Head of Corporate Accounts, and the claimant's redundancy appeal officer). Each one of them gave clear, credible and plausible evidence. They were conscientious about their individual tasks and roles. We accept their respective statements as true accounts of R's position, corporate decision making and the parts they respectively played in this situation.

22. The claimant (C) is an experienced gas service engineer. At the material time he was aged 50. He is English. He commenced employment for the respondent in the north of Wales, referred to by R as its North Wales Region, on the 15th of January 2018 as a mobile gas service engineer.

23. Between March and May 2020 R became increasingly concerned about the effect of the pandemic and lockdown on its business. R carried out a review putting 1400 or thereabouts employees on furlough. Some employees agreed to reduce their hours of work on a temporary basis. These steps took place in the context of a UK wide review by R.

24. Ms Roxburgh was, as she described herself, the face of the company (R), during the procedures that were adopted to cope with the above effects on R's business in so far as they impacted employees. She was "front facing" the staff; she held meetings with them remotely via Teams, in some cases with several hundred employees at a time. Ms Roxburgh encouraged employees to accept furlough pay (the government scheme being state payment of 80% of wages to reduce the risk of redundancy). The stated aim of that scheme was to reduce the risk of redundancy, to try and keep jobs alive in the interim and during the initial disruption of the pandemic.

25. In so encouraging employees Ms Roxburgh did not guarantee that acceptance of furlough pay would mean that there would be no redundancies. We understand C's optimistic and wishful interpretation that if he accepted reduced pay, he would not be made redundant at any stage; it is understandable that an employee listening to R's message would think that redundancy would be avoided, however that was not stated in those terms. R's message was that acceptance of furlough pay may avoid some or all redundancies but that it was a mitigation measure to at least forestall and hopefully avoid the need for redundancies; that was R's aspiration but there was never a guarantee, promise or assurance of such.

26. We accept Ms Roxburgh's version as stated by her. Furthermore, on balance, it is highly unlikely that a professional HR officer would ever give a guarantee in circumstances such as pertained at the time (repeatedly and correctly referred to at large as "unprecedented") that there would never be any redundancies. That would be too risky an undertaking to give, and it would be an unlikely one in any

event, let alone coming from a prepared, conscientious and proficient HR Director as we found Ms Roxburgh to be.

27. R sought to minimise redundancies and it ran an informal procedure to identify employees who might be suitable for an offer of voluntary redundancy. This was to identify people who may be offered it, causing the least potential damage to R and perhaps further minimising the risk of, or even avoiding, compulsory redundancies. This was a scheme to see whether those approached would be amenable to volunteering for redundancy.

28. To affect this there was a scoring procedure that was indicative of what might happen in a compulsory redundancy procedure.

29. Approximately 200 employees UK-wide were identified as candidates for an offer of voluntary redundancy or at least to be sounded out as such. Of that group 100 people, including C, came forward to discuss the possibility of voluntary redundancy and of that 100 approximately 60 people subsequently opted for voluntary redundancy. C did not we so volunteer.

30. When C he received his letter asking about his possible interest in the voluntary scheme, he spoke to the other engineers in his cohort in the north of Wales to ask whether they had received the same approach from R. He was then curious as to why he had been approached but they had not been. The other four mobile gas service engineers were younger than C and all were Welsh.

31. When C first contacted Ms Roxburgh it was to inquire why he had, in his words, being singled out. We accept however that there then followed protected conversations; C's initial inquiry led onto discussions about potential terms for voluntary redundancy; there several subsequent phone calls and conversations between C and Ms Roxburgh that went beyond the "singled out" question but considered the proposal in more detail. Eventually it was concluded that they could not reach agreement on terms for voluntary redundancy. C therefore withdrew his interest.

32. The reason that C had been offered voluntary redundancy was that two managers in consultation were tasked to, and did, carry out informal assessments and marking of employees against objective criteria agreed with the refreshed employee representative group; they then discussed their results with Ms Roxburgh. A similar exercise was conducted throughout the organisation. It was an informal, provisional marking with a view to identifying where voluntary redundancy may be offered to those expressing an interest in it, regardless of age or race. By this process 200 employees were identified for approach on the question of voluntary redundancy, and it was on the basis of marking against R's revised and agreed skills criteria and performance criteria. It was an indicative procedure only, and not a positive selection for redundancy.

33. C suspects the hand of a colleague, DT, in the procedure described above. DT had no part in it and no influence on it. He is irrelevant to these proceedings.

34. Once those interested had volunteered for redundancy and those who were not had withdrawn their stated interest, such as C, R then commenced a formal redundancy procedure. In that procedure R pooled all the engineers such as C

with his four North Wales Region colleagues. For this formal procedure there was a separate assessment and marking exercise from the earlier one and no cross-fertilisation or inter-relationship.

35. As explained in more detail below (from paragraph 42), the formal compulsory selection exercise was conducted by Mr Brobin from whom we heard evidence. He did not know the outcome of the indicative marking for the voluntary process described above. These were two distinct procedures albeit using the same or similar data, and the same selection criteria.

36. DT (mentioned above) was the claimant supervisor, and they did not get on. DT, (who is Welsh and, we believe but are not sure, was younger than C) was made compulsorily redundant on 30th June 2020. He played no part in the indicative potential voluntary redundancy scheme affecting the claimant or the formal scheme that eventually led to the claimant's compulsory redundancy. DT had no contact with Mr Brobin; he had no input on the marks, the scoring, the consultation, or R's ultimate decision to declare C redundant.

37. On 7th June 2020 C sent an email to Ms Roxburgh alleging a breach of GDPR because, he alleged, his colleagues knew that he was at risk of redundancy, and they knew about the voluntary redundancy exercise.

38. We note C had to some extent alerted his colleagues to the fact that he had received a letter identifying him as someone who may be interested in voluntary redundancy because he contacted them to ask whether they had received such letters as he had. It was not therefore a complete surprise that his colleagues considered C more at risk than they were.

39. We did not hear evidence from the other members of the same pool as C, but it is probably safe to infer that once they were aware from C of the informal indicative marking, they may well have been a bit more relaxed about any formal marking procedure. They may have guessed that their scores would or could be better than C's on a second, formal, round of marking.

40. In his email of 7th of June (page 150) the claimant complained that others knew he was to be made redundant and he complained specifically about DT and his behaviour towards him; he complained about racism and anti-English sentiment. C's particular concern was over certain Facebook postings by H who was a friend of DT's; C felt that he bore the brunt of anti-English sentiment at work.

41. In response Ms Roxburgh confirmed that C had not been made redundant by the indicative procedure and she again explained that procedure, that to that date he had been given the opportunity to opt for a voluntary redundancy; she also asked him whether in the circumstances he wished to make his grievance formal.

42. On 15th June R made a formal announcement regarding redundancies and embarked on a formal redundancy process in which C was pooled appropriately with the other engineers in his cohort, marked competitively against them, and all of them (and in fact all of the employees at risk throughout England and Wales at least - we do not know about Scotland) were sent documentation explaining R's rationale and the procedure.

43. On 16th June C confirmed that he was proceeding with a formal grievance.

44. On 17th June Mr Brobin carried out the formal marking of those in the same pool as C. C scored the lowest of his peers in the mobile gas engineer group.

45. C's first consultation meeting took place on 23rd of June and that was between C and a Mr Craddock. C complained about his scores. In consequence of C's complaints and representations his scores were increased, Mr Craddock complying with R's policies and procedures. Notwithstanding the increase in scores C was still the lowest scoring of the five engineers in his pool. The Tribunal cannot re-conduct a marking exercise of C and his colleagues; we did not hear evidence from Mr Craddock, but it appears from the available evidence that Mr Craddock applied the applicable scheme appropriately and, on balance, it seems objectively. There is no evidence that DT or H had any input or influence on Mr Craddock.

46. C's grievance hearing was held on the 26th of June, conducted by Mr. Edwards. C concentrated on the alleged data breach; he perceived that others knew his confidential business; that was his primary concern and focus. Mr. Edwards played no part in the redundancy decision. He dealt with C's grievance conscientiously; he understood that his duty was to investigate the grievance and he asked for the names of colleagues who had allegedly told C that they knew he was to be made redundant in advance of any formal decision. That was the core of the grievance. C, acting honourably and in good faith to his colleagues as he says he promised them confidentiality, refused to divulge their names. That being the case Mr. Edwards was deprived by C of the opportunity to investigate his grievance about the breach of data protection any further; he did not have an opportunity before DT's dismissal on the 30th of June to question DT. Mr. Edwards required evidence to put to DT, but C did not give it. He then had insufficient time in any event to contact DT.

47. C's grievance was not upheld. C was given the right to appeal that outcome and he chose not to appeal that decision.

48. On the 15th of July 2020 C had his second consultation meeting. The meeting had been rescheduled from 9th July. The rationale for the redundancy was explained. The scoring was confirmed. The redundancy decision was confirmed as was the payment in lieu of notice and statutory redundancy pay.

49. The reason that C was dismissed was redundancy; he was chosen because he had scored the lowest of the comparator engineers in R's North Wales Region even following an adjustment of his scores on appeal. At that time there were no vacancies in the north of Wales or close to where the claimant could have been redeployed.

50. C exercised his right to appeal that decision and the appeal was heard by Mr Betts.

51. By the time of that hearing there was a vacancy for an engineer in Manchester. Mr Betts ensured that the claimant was interviewed for that post even though his employment had ended. The Tribunal feels, as does C, that credit was due to Mr

Betts as he did not accept initial reluctance from the Manchester site; he wanted it to be looked into as to why they were initially not prepared to interview C and he gave a guarantee there would be an interview. The interview was conducted and at least one of the two managers who interviewed C was complimentary about his work and quite properly gave him credit for his experience and expertise. We did not hear evidence from those managers as to why they did not ultimately appoint C. There is no evidence before us as to the age or race of the successful applicant for the post; we infer that being English was unlikely to have been held against C in Manchester. We find that R did its best, through Mr Betts, to ensure that C had every opportunity to seek alternative employment within the company.

The Law:

Unfair Dismissal:

52. Section 94 Employment Rights Act 1996 (ERA) establishes that an employee has the right not to be unfairly dismissed by his employer and s 98 deals with fairness. By virtue of s 98 (2) (c) redundancy is a potentially fair reason for dismissal and s 98 (4) requires that an employer relying upon a potentially fair reason acts reasonably in treating that reason as sufficient for dismissal, determined in accordance with equity and the substantial merits of the case.

53. s.139 ERA defines redundancy: "1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to…….(b) the fact that the requirements of that business-……(i) for employees to carry out work of a particular kind,... have ceased or diminished or are expected to cease or diminish."

54. **Safeways Stores plc v Burrell** [1997] ICR 523 and **Murray v Foyle Meats Ltd** [1999] ICR 827 show that there are three tests to be considered when deciding whether redundancy was the reason for dismissal under section 98(2) of the Act. The first is to ask whether the employee has been dismissed. The second is to ask whether the requirements of the business for employees to carry out work of a particular kind have diminished. The third is to ask whether the dismissal is attributable, wholly or mainly, to that state of affairs.

55. The EAT in **Williams and ors v Compare Maxam** 1982 ICR 156,EAT laid down guidelines that a reasonable employer is expected to follow and against which fairness or unfairness is judged and these guidelines have been honed and refined over the years since 1982. These basic matters must always be considered in redundancy cases and the tribunal must ask whether the respondent's actions and decision fell within the range of conduct which a reasonable employer could have adopted. The suggested factors are:

55.1 Whether employees were warned in good time;

55.2 Whether employees were consulted about redundancy, and to be meaningful any such consultation ought to take place before any final decision on redundancy is taken;

55.3 Whether any recognised trades union's view was sought;

55.4 Whether any selection criteria were objectively chosen and fairly applied;

55.5 Whether alternatives to redundancy were reasonably considered;

55.6 Whether reasonable consideration was given to the availability of alternative work.

Direct Discrimination:

56. Section 39 Equality Act (EqA) provides that an employer must not discriminate against a person in the arrangements for deciding to whom to offer employment, as to the terms on which the offer of employment is made or by not offering employment. An employer must not discriminate against an employee as to the terms of employment, the way access is afforded to opportunities for promotion, transfer or training or receiving any other benefit, facility or service or by not affording them, by dismissal or subjecting an employee to any other detriment.

57. Section 6 EqA lists protected characteristics as including age and race. Race includes colour, nationality, ethnic, or national origins.

58. Section 13 EqA 2010 defines direct discrimination. A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

59. A respondent cannot justify race discrimination by way of defence.

60. Uniquely amongst the protected characteristics, in cases of alleged age discrimination it is open to a respondent to seek justification and to defend the claim on the basis that its actions were a proportionate means of achieving a legitimate aim.

Application of law to facts: Both parties provided written submissions and exchanged them. Neither party wished to make oral submissions. The Tribunal considered all of the evidence and the applicable law, preferring (on the facts as found and the law as explained) Ms Chan's submissions, and we applied the law as described to the facts we found as above. We then addressed the agreed issues.

61. The Tribunal finds that the reason for C's dismissal was redundancy. There was a redundancy situation brought on by the pandemic and specifically the closure of buildings serviced by the respondent. C's dismissal was attributable to that situation, the reduction in R's need for the work carried out by mobile gas engineers (and others).

62. C was given sufficient prior notification of the risk of redundancy through two separate and independent exercises to understand the risk, take advice and to consider the implications, taking whatever precautionary or other steps he may have felt necessary. He was put on notice of the risk effectively by the voluntary redundancy informal approach in May 2020, and then formally on 15th June 2020 when he was sent documentation explaining the rationale, policy and procedure. The purpose of that notification is so that an employee is not caught unawares, and they

can consider the personal and social implications, take appropriate action and advice and be forewarned. We find that C was adequately forewarned.

63. There ought to be meaningful consultation too, again to assist employees in understanding, taking appropriate action, and safeguarding their position generally. There were two consultation meetings here but in addition to that Ms Roxburgh liaised closely with C and others throughout the period in question and was available for consultation, information and to an extent to give advice. Insofar as one can say it during the pandemic and lockdown she had "an open door", at least remotely and virtually. Her correspondence clearly indicated that she was available if anybody wanted to come forward and raise matters. C did so; he raised a number of matters both through an informal and a formal grievance procedure, through a grievance hearing and through appealing the decision to dismiss him. There was complete, adequate and thorough consultation throughout the procedure regarding the risk of redundancy, the effect of redundancy, and what could be done to stave it off.

64. The tribunal finds that the claimant's selection was reasonable. We accept Mr Brobin's evidence as being true, and that he considered the matter professionally and conscientiously; that unlawful discrimination played no part in his mind in the selection. It is not for us to re-mark or second guess a manager's honest and conscientious marking or to challenge the marks allocated because we do not know the other four engineers' qualifications, experience, expertise and performance. What we can say on the basis of the evidence is that there was not a shred of evidence that race or age played any part in Mr Brobin's assessment of C.

65. As regards proper consideration of alternative employment there was none in North Wales at the material time, but Mr Betts did ensure that C was interviewed for a Manchester post. R did its conscientious best to avoid compulsory redundancies and then to avoid C's continued loss of employment.

66. The tribunal finds that dismissal by reason of redundancy was within the range of reasonable responses of a reasonable employer. What we cannot do is say what we as a Tribunal, three panel members, would have done if we had been C's employer; that is not the question to be answered. The question is whether R acted fairly and reasonably in all the circumstances; we may have done something different or differently but that does not matter, and we have not considered what we would have done; we do not manage R's business. We find however that R acted fairly and reasonably in all the circumstances in treating redundancy as a reason for dismissal.

67. We find that you were not dismissed because of your age; age was not even a consideration; neither was race. C's selection for redundancy and dismissal was for all the reasons stated above and on the basis of the proper application of fair and objective criteria.

68. The Tribunal understands and accepts that C feels genuinely affronted by achieving his score when he felt that he deserved a higher score. We understand that it is very difficult for anyone selected in a redundancy exercise to receive that news. We also accept that C was genuinely affronted by what some call, but we try to avoid calling, "banter" at work. C was clearly upset by comments made by some colleagues about England and the English. We understand that. It is a sad fact of life that there is, often and in some workplaces, far too much of it generally; it goes both

ways anti-English and anti-Welsh sentiment, or indeed anti-any-race-bar-the-speaker's; that behaviour is not conducive to a happy and productive workplace. That said this is not a harassment claim in respect of either age or race. These claims relate to C's dismissal and there is no evidence of unlawful discrimination at all. I note, although we make no findings of fact in this regard absent more evidence, that it appears that the decisions here were made mostly by middle-aged Englishmen, with assistance from Ms Roxburgh who too is understood to be English. Whether that is the case or not (and those assumptions do not preclude the possibility of discrimination regardless) the fact is that there is no evidence to support C's allegations of discrimination. C's suspicions are unfounded. C was not discriminated against directly because of his age or race in and around his dismissal.

Employment Judge T.V. Ryan

Date: 25.05.22

JUDGMENT SENT TO THE PARTIES ON 27 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche