Case Number: 2200065/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Rowan	**v**	**DWFS Services Limited**

Heard at: London Central (by video) **On**: 29 – 31 March, 1 and 12 April and 17 May 2022

Before: Employment Judge E Burns
Ms H Craik
Dr V Weerasinge

Representation

For the Claimant: Tim Dracass, Counsel
For the Respondent: John Ratledge, Counsel

JUDGMENT

(1) The unanimous judgment of the Employment Tribunal is as follows:

(a) the Claimant's claims of direct age discrimination fail and are dismissed; and

(b) the Claimant's claim of unfair dismissal succeeds.

(2) By a majority, Employment Judge E Burns and Ms Craik have additionally decided the Claimant's compensatory award for unfair dismissal should be reduced by 80% under the principles in Polkey v AE Dayton Services Limited [1988] ICR 142

(3) Dr Weerasinghe's minority decision is that there should be no Polkey deduction Polkey deduction to the Claimant's compensatory award.

REASONS

THE ISSUES

1. This is a claim arising from the Claimant's dismissal by the Respondent on 11 August 2021. The Claimant claimed that his dismissal was unfair and discriminatory because of age. The Respondent defended the claim, saying the Claimant was fairly dismissed for redundancy and denied any age discrimination.

2. The agreed issues to be determined were as follows:

"Section 13: Direct discrimination because of age

The Claimant was born on 29 June 1961, and was aged between 58 and 59 at the time of the matters complained of and at the effective date of termination. He relies on being within the age group of "late-50s".

1. Did the Respondent subject the Claimant to the following treatment namely:

1.1. Upon the appointment of Dan Tyerman as Chief Executive of the Respondent, David Wylde, the Respondent's Managing Director, told the Claimant that his reasoning behind appointing Mr Tyerman rather than the Claimant was that Mr Tyerman was "younger and more energetic", as set out at paragraph 12(a) of the Grounds of Claim.

1.2. That, shortly after the above comment, Mr Wylde told the Claimant that neither of them were "getting any younger", as set out at paragraph 12(a) of the Grounds of Claim

1.3. During the redundancy consultation process, Mr Wylde told the Claimant that "younger" employees were not being considered as part of the redundancy process, as set out at paragraph 12(b) of the Grounds of Claim.

1.4. Removing certain responsibilities and roles from the Claimant, and undermining his position, as set out at paragraph 11(a) of the Grounds of Complaint.

1.5. Excluding the Claimant from important business pitches being made to clients as set out at paragraph 11(b) of the Grounds of Complaint.

1.6. Failing to pay the Claimant on time as set out at paragraph 11(c) of the Grounds of Complaint.

1.7. Challenging legitimate expenses claims made by the Claimant as set out at paragraph 11(d) of the Grounds of Complaint.

1.8. Excluding the Claimant from a number of meetings and decisions (such as the appointment of new directors) which he would previously have

been asked to attend/been consulted about, as set out at paragraph 11(e) of the Grounds of Complaint.

1.9. That the Claimant was selected and/or dismissed as set out as paragraph 12 of the Grounds of Claim.

2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on other employees of the Respondent who were not in the age group of "late-50s" as comparators, and specifically Mr Tyerman.

3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Unfair dismissal

5. What was the principal reason for dismissal?

The Respondent asserts that it was for the reason of redundancy or, failing that, a substantial reason of the kind to justify the dismissal of the Claimant, which are potentially fair reasons for dismissal under s.98(2) of the Employment Rights Act 1996. The Claimant contends that his dismissal was pre-determined and the Respondent's redundancy process was a sham.

6. Was there a genuine redundancy situation arising from the amount/type/location of work carried out by the Respondent?

7. If so, did the Respondent follow a fair procedure in respect of the Claimant's redundancy:

7.1. Was there adequate / appropriate consultation?
7.2. Were the pooling / criteria / selection process appropriate?
7.3. Should the Respondent have considered bumping?
7.4. Did the Respondent make adequate enquiries in respect of suitable alternative employment?

8. If there was no redundancy situation, what was the reason for the Claimant's dismissal?

9. Was this a fair reason?

10. Did the Respondent follow a fair procedure in relation to dismissal for this alternative reason?

Remedy

11. What remedy, if any, is the Claimant entitled to?

12. Should there be any deduction pursuant to *Polkey/Chagger?*"

THE HEARING

3. The hearing was a remote hearing. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.

4. The Claimant gave evidence.

5. For the Respondent we heard evidence from:

   - David Wylde, Managing Director
   - Daniel Tyerman, CEO
   - Joanne Tyerman, independent HR consultant
   - Nicholas Ross, appeal

6. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

7. There was an agreed trial bundle of 716 pages and a supplemental bundle of 3 pages. Some additional documents were added to the bundle during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

8. We explained our reasons for various case management decisions carefully as we went along. The main one being to extend the hearing into 1 April so that there was additional time for the evidence and to reserve our judgment.

FINDINGS OF FACT

9. Having considered all the evidence, we find the following facts on a balance of probabilities.

10. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

11. The parties will also note that there are some matters contained in the finding of facts where there was not unanimous agreement amongst the Panel. In relation to some facts, the Panel members have disagreed as to their finding of fact. In relation to other facts, the disagreement concerns the relevance of the fact and not the fact itself. Where Dr Weerasinghe has

added his own comments, these are shown in italics to reflect the fact that he has drafted them himself.

The Respondent's Business Model

12. The business of the respondent involves providing financial advice and services to a clients in relation to various commercial projects. It is a small business with currently around only 20 employees. It does not have any internal HR function, but buys external HR consultancy services as and when needed.

13. The business was started by David Wylde over 20 years ago. It began as a boutique firm providing specialist financial advice to clients bidding for PFI/PPP projects with the public sector.

14. The original business model was purely financial advisory work. The business employed highly qualified and experienced financial advisers who were supported by financial modellers. Some, but not all financial advisers started work as modellers and then progressed to becoming financial advisers.

15. Income was based on project success fees. This meant that a large amount of work was carried out on a contingency basis. When projects were successful, the fees were considerable, but it could take many years for projects to complete. In addition, sometimes projects were aborted and the work that had been carried out was not converted into fees.

16. Initially the work of the business was concentrated on various building and infrastructure projects, but the profile changed over the years to include waste management projects and student accommodation projects. An important client in the early days of the business was Jarvis Plc. The business had an exclusive mandate to advise Jarvis at one point, but this came to an end in around 2007/2008. Jarvis went into liquidation in 2010.

17. In order to move towards a more sustainable income model, the business looked to develop income streams that were not based on contingency fees with a long lead in. This led to it acquiring an existing team of Financial Auditors and Modellers in 2017. In addition to supporting the work of the Advisors, this team was able to generate its own income with a much shorter lead in time. Some Advisors also sought to secure work that was non-contingent including project-refinancing work. This was a particular area of speciality for Mr Tyerman.

18. The business was significantly adversely affected when the UK Government ceased to support the PFI/PPP funding modules in 2018.

The Relevant Corporate Entity

19. The business originally sat in DWPF Limited. DWPF Limited went into administration in May 2019, however, followed by a creditors' voluntary liquidation in October 2019. The administration led to the sale of the business to the respondent, another company owned by Mr Wylde. The

transaction was a pre-pack. All of DWPF's staff transferred to the respondent including the Claimant. Mr Wylde continued as MD of the Respondent.

20. It is notable that Mr Wylde did not consider making any employees redundant at this point in time.

21. Although the transaction meant that the business could continue as a viable business moving forwards, there continued to be significant financial concerns in the new business particularly as there continued to be a significant debt owed to HMRC.

22. There were no company financial accounts in the bundle. Because it was not disputed by the Claimant, the Panel are satisfied that following the reorganisation, the Respondent's financial position continued to be uncertain. Although the Financial Audit and Modellers team was generating sufficient income to pay for itself, cash flow remained precarious and the same was not true for the Advisory team. The contingency basis for billing Advisory work, which was embedded into the Respondent's business model continued to contribute to cash flow problems.

23. The Respondent was making losses, however, the extent of those losses was not shown by way of company financial accounts.

24. It was not in dispute that as a result of the cash flow concerns, salaries were paid late from time to time. In the case of the Claimant, he was paid late on two occasions as follows (587 – 588):

- 4 December 2019 – Claimant's November salary paid
- 4 May 2020 – Claimant's April salary paid

25. Mr Wylde told us that when cash flow meant that not all salaries could be paid in any particular month, he prioritised payment for the employees earning the least first. As the Claimant was the highest paid employee, he was paid second to last, with Mr Wylde being last. This was because he perceived that the employees earning the least would be least able to manage receiving a slightly late salary payment.

Structure of the Respondent

26. At the material times for our purposes, the Respondent's business was divided into two teams: an Advisory Team and a Financial Modelling and Audit Team. The Financial Modelling Team was made up of around 14 members of staff.

Structure of the Advisory Team

27. In addition to Mr Wylde, six employees undertook advisory work:

- The Claimant
- Dan Tyerman
- Mark Haslehurst

- Simon Johnson
- Jason Withers
- Ramon Sequeira

28. It is not in dispute that at the time of the redundancy the Claimant was 59 and Mr Wylde was 69 and all of the other advisors were younger. We were told by Mr Wylde that he did not know their specific ages, but he believed Mr Withers to be in his early fifties; Mr Tyerman to be in his mid-forties, Mr Johnson and Mr Hazlehurst to be in their late thirties / early forties and Mr Sequeira to be in his thirties.

29. It is also relevant to note that the Claimant was the highest paid advisor by some way. His basic salary was £284,000. We were not told the exact amounts paid to the others, but based on the evidence we heard, the others were paid between around £150,000 and £200,000 per annum.

30. The Claimant told us that in October 2019, during a one to one office meeting with Mr Wylde, he had mentioned completely out of context that the Claimant was the highest paid employee at the Respondent by some margin, a comment he had found to be rather odd. He was not challenged about his evidence on this.

The Claimant

31. The Claimant had begun employment with DWPF Limited on 4 September 2000. He was already an experienced adviser when he joined and was attracted to do so by the exclusive mandate with Jarvis.

32. For the first decade or so of his employment the Claimant was primarily engaged with Jarvis projects. Because of the exclusive mandate he did not have to undertake business development activities to seek out work. After Jarvis went into administration the position changed.

33. To counteract the loss of his main income stream, the Claimant developed an expertise in the area of waste management projects. He successfully acquired project work with a number of clients, including WTi, which is dealt with further below.

34. At the time of the events with which we are concerned however, he was undertaking very little work on projects he had initiated. Instead, the projects had been allocated to him by Mr Wylde. Mr Wylde told us that he believed that this was largely because the Claimant's traditional workstreams had dried up when the decision was taken to stop PPP/PFI project funding.

Mr Tyerman

35. Mr Tyerman had joined the business in August 2005. He joined at an earlier stage in his career than the Claimant, but by the time of the redundancy exercise was an experienced advisor. He had developed particular experience in refinancing projects.

36. On 25 November 2019, Mr Wylde had announced to everyone employed at the respondent that he was appointing Mr Tyerman as CEO of the respondent. This was a newly created role. According to Mr Wylde, he created the role in anticipation of him stepping back from the business. He wanted someone to assist him in running the business and identified Mr Tyerman as the best candidate.

37. Unlike the Claimant, who had a reputation of being somewhat aloof and focussed on his own projects, Mr Tyerman had shown an interest in getting involved in other areas of the wider business and introducing new workstreams.

38. The Claimant was unhappy about the appointment of Mr Tyerman as CEO. He felt that he should have been made CEO particularly because Mr Wylde had, in early 2018, discussed the possibility of him, Mr Tyerman and another employee, Graham Bloomfield forming an executive team of three. This had not however been created and no changes had been made to the management structure before the administration.

39. Because of his unhappiness, the Claimant asked Mr Wylde if they could meet to discuss the appointment. The did so on or around 27 / 28 November 2020. The Claimant says that, at that meeting, Mr Wylde told him that the reason he had appointed Mr Tyerman as the CEO was because he was "younger and more energetic" and also said that neither he nor the Claimant were "getting any younger."

40. Although Mr Wylde adamantly denied making these comments, we find that he did make them.

41. Our reasons are that it was entirely plausible that the words were said given the context of the conversation. In addition, we find that both men were used to making references to age in the workplace. As the examples below demonstrate, it was part of their culture of communication and neither considered such language to be offensive or inappropriate.

42. Mr Wylde told us that he considered himself to be quite a sensitive man and was sure he would have chosen his language carefully at the meeting because he knew the Claimant was unhappy about his decision. However, we find that the comments were said without Mr Wylde having given them much, if any conscious thought, and this is likely to explain why he cannot recall them. Given these two men had worked together for several years with no disputes, we find Mr Wylde's words were an attempt to soften the blow for the Claimant as to why he was not being appointed to the role of CEO.

43. In reaching this conclusion we have additionally relied on the following evidence:

    - Mr Wylde admitted that he had observed to the Claimant that they were not getting any younger on previous occasions.

- We know from the transcript of the first consultation meeting that Mr Wylde referred to the members of the Modelling and Audit Team as the "younger modellers" (380)

- We know from emails sent by the Claimant that he referred to the members of the Modelling and Audit team as the "boys doing the modelling" (265) and "younger employee[s]" (638)

- We note that the Claimant did not raise a concern about the comments until his submitted an appeal against his redundancy on 10 June 2020. We find this was because he was not offended by the comments at the time they were made and did not, at that time, consider himself to have been discriminated against on the grounds of age.

- Mr Wylde saw that the Claimant had raised a concern about age discrimination in his redundancy appeal. Notwithstanding this he took no steps to inform the appeal handler, Mr Ross that he has not said the comments.

44. It is also relevant for us to note that at the meeting, the Claimant told Mr Wylde that he wished to continue to report to him rather than Mr Tyerman. The Claimant did not attend team meetings that were arranged by Mr Tyerman. Although Mr Wylde was unhappy about this, he told us that he did not consider it to be a significant enough issue to seek to address at that time. However, upon questioning by the Panel, he said after his full retirement, the situation would be untenable.

45. There was no public announcement of Mr Tyerman's change in role and his status on the respondent's website was not changed. He also received no increase in remuneration to reflect his new role. He did, however, take on a range of new responsibilities including:

    - Line management of the Advisory Team
    - Running Team meetings
    - Sorting out the new lease
    - Developing strategy
    - General management/administration
    - Resource allocation / conflicts – modelling
    - Increased Sales role
    - Reviewing terms and conditions
    - New IT structure

46. Our finding is that the promotion was genuine and that Mr Tyerman's role did change significantly after 25 November 2019. It took some time for Mr Wylde to share the full financial details with him, but as he learned more about this, Mr Tyerman was keen to introduce better administration and financial management at the Respondent and not to allow the company to get into the same position as its predecessor organisation.

Mr Withers

47. Mr Withers was the next longest serving employee after the Claimant and Mr Tyerman, having worked for the respondent and its predecessor company since 2014. His area of speciality was renewable energy projects. His background was as a financial modeller.

Mr Johnson

48. Mr Johnson joined the respondent in July 2019. Both Mr Wylde and Mr Tyerman had known him in a professional capacity for many years prior to him joining the business. Mr Wylde told us that Mr Johnson was recruited largely to take over leading on student accommodation work. This was an important area of work for the respondent which had been previously led by Mr Bloomfield before he left in June 2018.

49. Mr Wylde accepted, when giving evidence, that he had not consulted the Claimant about Mr Johnson's recruitment. He told us that there was a culture of ensuring new recruits were interviewed by all in the early days of the business. This was because the business was so small and there was a need to ensure that the *'fit'* was right. He did not think this was necessary in Mr Johnson's case because he had known him for so long.

Mr Haslehurst

50. Mr Haslehurst joined the respondent in October 2019. Mr Hazlehurst had previously worked for DWPF Limited as a new graduate in its financial modelling team for several years. He left in 2012 however, when was offered and accepted the role of FD at one of DWPF's clients, Wheelabrator (part of the WTi group). His role came to an end when Wheelabrator was to be put up for sale, in the first part of 2019.

51. When Mr Tyerman became aware that Mr Haslehurst was leaving Wheelabrator, he mentioned this to Mr Wylde. Mr Wylde contacted Mr Haslehurst and offered him a position with the respondent. Mr Hazlehurst was specifically tasked with securing a mandate to act from a potential bidder for Wheelabrator. The Claimant was not involved in the decision to recruit Mr Haslehurst. Mr Wylde told us that he saw no reason to consult him.

52. In the Claimant's statement, he said that Mr Tyerman "sponsored" Mr Haslehurst. Dr Weerasinghe considers the Claimant's statement to mean the recruitment of Mr Haselhurst was important to Mr Tyerman. *He finds that Mr Tyerman was partial to Mr Haslehusrt*. This view is not shared by Employment Judge E Burns and Ms Craik who find that although Mr Tyerman had spoken to Mr Wylde about Mr Haslehurst, Mr Tyerman was not particularly vested in Mr Haslehurst's recruitment and ultimately it was Mr Wylde's decision.

53. It is relevant to note that the Claimant had secured the original waste management project work with WTi and was also aware that the company was due to be put up for sale. Prior to Mr Haslehusrt re-joining the Respondent, he had contacted various potential bidders, on behalf of the respondent, to try and use his own knowledge and experience of the WTi to obtain a mandate to act.

54. The efforts by the Claimant were not successful, but Mr Haslehurst did obtain a mandate from a potential bidder. He also negotiated a substantial contingency fee for the work. It transpired that although the respondent's client's bid came close to succeeding, the bid was rejected. The outcome of the bidding process was known in the summer of 2020.

55. It is relevant to note that Mr Haslehurst did not involve the Claimant in his pitch to the potential bidder. He also did not involve the Claimant in a pitch to another new client. We were told by Mr Wylde that when he had been the FD at Wheelabrator, Mr Hazlehurst had asked Mr Wylde to remove the Claimant from a project he was working on because he felt the Claimant was patronising him. Mr Wylde did not tell the Claimant about this and the Claimant continued working on the project until it completed in December 2016.

56. Upon questioning, Mr Wylde, accepted at the hearing that there had been friction between the Claimant and Mr Haselhurst at the time. Employment Judge E Burns and Ms Craik note that there was no evidence before us that the Claimant was aware of the friction at the time or that it continued several years later. More significantly, they do not consider it influenced any of the Respondent's later decisions.

57. Dr Weerasingle considers it is relevant to note that Mr Wylde did not say that the friction had abated after Mr Haslehurst joined the company.

Ramon Sequeira

58. Mr Sequeira was in a different position to the other advisers as his main role was the role of Head of Financial Modelling. In this role he was responsible for training and mentoring the Respondent's modellers, as well as reviewing their output across a wide range of modelling projects. He had started to take on some advisory work as his career developed, however.

Changes to Working Practices

59. The Claimant gave evidence that two changes to the Respondent's working practices occurred in late 2019 / early 2020 that had an impact on him.

60. On 12 December 2019 he was questioned by Mr Wylde's PA, who held the role of Office Manager, about a claim for an oyster top up payment of £20 (283). He told us that he had never previously been questioned about such payments. We note that there was no issue with reimbursement of the particular amount once he had explained it, but that he was later told in February 2020 that claims for general travel top ups would no longer be

accepted and instead he would need to provide an Oyster card journey print out and claim for the particular journeys undertaken (347).

61. The second change concerned the carry-over of holiday leave into the next leave year. Rather than allow unlimited carry over, the Respondent decided that only 5 days carry over would be permitted in future. This applied to the entire company.

Secondment

62. On 17 February 2020, it was agreed that the Claimant would be seconded to Evergreen Global Ventures Ltd. The secondment continued until the end of the Claimant's employment. The Claimant was able to continue to undertake work on many of the same projects while on secondment, because Evergreen Global Ventures Ltd was involved with those projects as a potential funder.

63. Evergreen Global Ventures Ltd was owed a significant debt by the Respondent, which Mr Wylde had personally guaranteed. Rather than recover the Claimant's salary costs from Evergreen Global ventures Ltd during the secondment, it was agreed that the debt would be reduced by this amount for each month the Claimant worked there.

Pandemic

64. From late February 2020 onwards the Covid pandemic began to have an impact in the UK. We note, that the UK Government announced that non-essential travel and contact should cease on 16 March 2020. The first full national UK lockdown was announced on 23 March 2022 with immediate effect.

65. Although disputed by the Claimant, Employment Judge E Burns and Ms Craik are satisfied that the evidence shows that the pandemic had an early adverse impact on the Respondent's financial position. This was because:

- A number of refinancing projects had been put on hold. This is recorded by the Claimant himself in an email to Mr Wylde on 23 March 2020 (363)

- The Respondent was particular concerned about a particular student accommodation project. The project had been due to complete at the end of 2019 with a substantial fee due, but had been delayed. The Respondent was now finding that the university involved was not responding to correspondence about the project because it was prioritising its resources in dealing with the pandemic.

- My Tyerman told us in his unchallenged oral evidence that the future of a range of infrastructure projects looked very uncertain. There was an understandable reluctance for construction companies to enter into fixed price contracts with fixed delivery dates when there was huge uncertainty at this time.

- Mr Wylde refers to the Respondent having a savage cash flow crisis and a possible need to make redundancies in an email to the Claimant dated 23 March 2022. Specifically, he says:

  "At the moment we are in a savage cash crisis due to the Coronavirus. I am doing everything we can to manage this position but it may result in some redundancies." (362 – 363)

66. Employment Judge E Burns and Ms Craik are satisfied that the financial deterioration led to Mr Wylde and Mr Tyerman discussing, from mid-March onwards, ways of saving costs with more urgency. This included reviewing the Respondent's staffing and property costs. We accept their evidence that, given that the Modellers and Audit Team were generating cash flow and working profitably it did not make good business sense to target this team and instead they focussed on the Advisory Team. +

67. We (the majority) find that this led to Mr Wylde and Mr Tyerman approaching Mr Tyerman's wife, an HR consultant for advice on a possible redundancy process. We find that Mr Wylde and Mr and Mrs Tyerman considered there was a genuine redundancy situation. We find that a decision was taken to commence a redundancy process from a pool containing the Claimant, Mr Haslehurst, Mr Johnson and Mr Withers.

68. The minority, Dr Weerasinghe accepts that there would have been an impact because of the pandemic, but the Respondent has not shown the extent of that impact by way of company accounts, which was not a difficult thing to do. Dr Weerasinghe notes also that the majority of the cited projects were delayed and not cancelled.

69. On 24 March 2020, Mrs Tyerman emailed Mr Wylde to provide him with a pack that contained:

- The email inviting the team to the first informal group meeting
- A step by step redundancy process
- The draft letters of invitation to the first formal individual meetings that need to go out straight after the informal meeting

70. Neither the email nor any of the attachments say anything that suggests that Mr Wylde or Mr and Mrs Tyerman had identified at this point that the Claimant would be the employee who would be dismissed for redundancy.

71. We note the following additional facts which we consider to be significant:

72. In her email, Ms Tyerman had indicated that she was working on the selection criteria. In fact, as was known to Mr Wylde, she was doing this in consultation with her husband who was primarily responsible for the development of the selection criteria. We consider it is significant that Mrs Tyerman sought to create a paper trail that did not reflect the true involvement of her husband.

73. Although Mr Tyerman was the CEO and had become the line manager of three out of four of the members of the at risk group and involved in developing the selection criteria, the respondent decided that Mr Wylde should lead the redundancy consultation process. This meant that any appeal would need to be considered by someone external. Mr Tyerman and Mr Wylde told us that they ruled out the option of Mr Tyerman leading the process and Mr Wylde conducting the appeal because of concerns that the Claimant would not take kindly to Mr Tyerman leading the process. They also ruled out the possibility of Mr Tyerman and Mr Wylde conducting the exercise jointly.

74. The draft 'at risk' letters and the redundancy process created by Mrs Tyerman envisage throughout that one employee will be made redundant from the pool.

75. Although the redundancy process was being driven by financial concerns and a need to save costs, there was no costing exercise underlying this conclusion. The Respondent did not calculate what costs could be saved taking into account the salaries being paid to the 'at risk' group net the costs of making them redundant. In fact, during a consultation, the Claimant did ask how much costs are aimed to be saved, see below.

Redundancy Process

76. On 26 March 2020, Mr Wylde emailed the 'at risk' group to invite them to an "informal meeting to discuss some restructuring proposals for the financial advisory team." (364)

77. On 27 March 2020, Mr Wylde rang the Claimant to give him a "heads-up" that he was to be invited to a zoom meeting later than day and would be put at risk of redundancy along with other members of the advisory team. Mr Wylde did not telephone any of the other four employees that were put at risk in advance of the zoom meeting. He told us that the reason he did this was because he had worked with the Claimant for a long time. During the call Mr Wylde told the Claimant that he thought he would need to make one or possibly two redundancies.

78. Between that phone conversation and the first redundancy meeting, a normal team meeting took place by zoom. There was no discussion of the redundancy situation and instead, a previous discussion about pay increases for members of the Modelling and Financial Audit Team was revisited with the suggestion being that these would proceed as previously planned.

79. At 5:00 pm Mr Wylde held a zoom meeting with the 'at risk' group to inform them that their positions were at risk due to redundancy. No notes were taken of the meeting.

80. Following the meeting, on 31 March 2022, Mr Wylde sent each of the 'at risk group' a formal letter inviting them to a "first consultation meeting". The same letter was sent to each of them and informed them that a virtual

meeting would take place with Mr Wylde who would be accompanied by Ms Tyerman.

First Consultation Meeting - 3 April 2020

81. The meeting with the Claimant took place by zoom on 3 April 2022. The Claimant confirmed that he was content to attend unaccompanied. The meeting was recorded and a copy of the recording was provided to the Claimant at the time. For our purposes a transcript was provided in the bundle (378 – 385). Meetings also took place with the other members of the pool.

82. The meeting was simply an introductory meeting designed to give Mr Wylde the opportunity to explain the rationale for the redundancy situation and explain the process that would be followed.

83. At the meeting Mrs Tyerman explained it was proposed that one member of the Advisor Team would be made redundant. She maintained this position when challenged by the Claimant who said that Mr Wylde had told him that at least one redundancy would definitely need to be made and possibly two. This was because this was what Mr Wylde had told him in the phone call earlier that day. Both Mrs Tyerman and Mr Wylde emphasised that the proposal was not a final decision and that Mr Wylde was genuinely open to any suggestions and counter proposals.

84. Mr Wylde explained the rationale for the redundancy proposal as follows:

> "…. the whole logic of where I'm coming from is that we need to lose some costs from the business and I've looked across the business and, on, starting with the model audit people I mean obviously they're generating income and really sustaining the business, so there's absolutely no point in making any of them redundant. As far as the younger modellers are concerned, if we were to do that then we'd have to take too many of them out to make a significant difference to our costs base and therefore that would be counter-productive and so I've looked at this and said well the only way I can do this is to make someone senior in the business redundant and reduce the costs that way." (380 - 381)

85. The Claimant asked Mr Wylde when he had begun the process of reviewing the costs, given that he had recently recruited two new people into the Advisory Team. Mr Wylde explained that his reason for recruiting Mr Johnson and Mr Hazlehurst was because he wanted to bring people in with particular contacts and expertise which was not in the business at the time in order to try and enhance the amount of new business the Respondent could generate. He commented that "its [meaning the recruitment] not had a quick enough effect on our bottom line" (381).

86. Following the meetings, Mr Wylde sent letters to each of the members of the pool inviting them to a second consultation meeting. The letters were in a similar format, but were tailored to address any specific comments each had made in the meetings.

87. The Claimant also emailed Mr Wylde to ask him what level of costs he needed to save. Mr Wylde replied saying:

> "I do not have a particular revenue figure I am targeting. The issue is rather that we currently do not have sufficient income producing and profitable work to ensure that the Financial Advisory team in their current numbers are all productively busy. There does not seem to be sufficient profitable business currently being generated." (407)

Second redundancy consultation meeting - 14 April 2020

88. The second meeting with the Claimant took place by zoom on 14 April 2022. He had been provided with a copy of the draft selection criteria ahead of this meeting. The Claimant again confirmed that he was content to attend the meeting unaccompanied. The meeting was recorded and a transcript provided in the bundle (410 - 419). Meetings also took place with the other members of the pool.

89. The Claimant did not seek to make any counter proposals to avoid the redundancy situation. He referred back to his email saying that it was difficult for him to do so without having an idea of the target costs saving Mr Wylde was aiming for. The Claimant expressed concern about the pay review process that had been discussed. He was informed by Mr Wylde that there would not be any increases in pay and later a decision was taken to freeze pay and reverse an earlier decision that certain members of the Modelling and Audit Team would receive pay rises.

90. The Claimant raised the following concerns at the meeting:

91. First, having been sent the draft selection criteria ahead of the meeting the Claimant asked about them. His key concern was the timeframe for measurement of some of the criteria and how the difference in length of service between him and the newer advisors would be addressed. It is notable that Mr Wylde did not have a copy of the draft selection criteria to hand at the start of the meeting. Additionally, Mr Wylde was unable to answer this question or provide a rationale for the choice of timeframe. He said that it would become clearer once the relevant information had been added.

92. The Claimant also suggested an addition of mentoring, which was subsequently adopted by the Respondent in the form of a new criterion, namely Teamwork and Mentoring. Mr Hazlehurst had made a similar suggestion.

93. Overall, the Claimant said that he thought the criteria were appropriate, but expressed concern about the information that would be used for scoring purposes.

94. Second, he questioned the choice of the pool and in particular why it excluded Mr Tyerman and Mr Sequeira despite the fact that they both undertook advisory work. Mr Wylde told us that he considered this, but remained satisfied with his decision that the pool should exclude Mr

Tyerman and Mr Sequeira. His reasoning for this was that both Mr Tyerman and Mr Sequeira's roles were different from the other members of the Advisory Team. In Mr Tyerman's case, this was because he undertook additional responsibilities as CEO and in Mr Sequeira's case because of his role as Head of Modelling.

95. Mr Wylde sent a follow up letter to each member of the pool after the meeting summarising the discussions at the meeting. In the letter to the Claimant Mr Wylde explained the rationale for excluding Mr Tyerman and Mr Sequeira from the pool (434 – 435). Mrs Tyerman had drafted the letters for Mr Wylde but left him to explain his decision for leaving Mr Tyerman out of the 'at risk' group. In her cover email she informed Mr Wylde that if decided to proceed with Mr Tyerman in the pool, she would have to cease to provide HR support meaning someone else would need to take over (420).

96. In addition, the Respondent sent the revised selection criteria to each member of the 'at risk' group at this stage. The final selection criteria were as follows:

- Business Development - scored out of 5 with a 'X7' weighting
- Client Handling / Feedback - scored out of 5 with a 'X3' weighting
- Modelling - scored out of 5 with a 'X2' weighting
- Project Management – scored out of 5 with a 'X3' weighting
- Teamwork – scored out of 5 with a 'X2' weighting
- Technical – scored out of 5 with a 'X3' weighting

97. The overall score, when the weightings were taking into account was out of 100. The selection criteria template set out clearly how each criteria was defined and what evidence would be relied upon (442).

Dr Weerasinghe notes the necessity to score overall out of 100 and the rationale for the arbitrary selection of the two specific criteria Project Management and Technical in order to reduce the weightings had not been explained. His view is that the weighting for each criterion was independent of each other and therefore it would have been possible to normalise the overall score back to 100. P444 Moreover, the reduction of the weighting for Technical would have had a disproportionate effect on the Claimant because that was his area of strength.

98. Employment Judge E Burns and Ms Craik note that the Claimant did not raise any concern about the way the scoring matrix was adjusted to accommodate the new criterion.

99. Each of the members of the pool were also sent financial data for themselves on 17 April 2020 to review. The data had been collated by Mr Tyerman and captured how much each had invoiced during the financial years for 2018, 2019 and 2022 and whether any of the invoices remained unpaid. The Claimant was provided only with his own data (227 – 230).

Third redundancy consultation meeting - 21 April 2020

100. The members of the pool were invited to a further consultation meeting. The transcript of the Claimant's meeting was included in the bundle (455 – 463).

101. Mr Wylde and Mrs Tyerman explained that the purpose of the meeting was to give each member of the pool a final opportunity to comment on the redundancy proposal and the proposed criteria before the scoring exercise would be undertaken.

102. The key areas of discussion with the Claimant were as follows:

103. The Claimant raised a concern about the amount of data he had been sent. He said that he thought there would be more data. He could see that the data on income supplied was relevant to the Business Development criterion, but wondered what data would be used for the other criteria. The Respondent said that the data was the same for everyone.

104. The Claimant requested that the respondent supply him with all the income received in the Advisory team for the relevant period so he could check that nothing had been missed. Mr Wylde agreed to provide this and did so subsequently later that same day (453).

105. Mr Wylde then explained that when scoring the Business Development Opportunities criterion, account would be taken of all the projects each person had which would be likely to result in fee income in the next twelve months. He said he would send a list of projects to the Claimant and asked that he provide him with details of the project including the latest status of the project, the current mandate status and an indication of the probability of the project completing in the next 12 months, with projected fee income.

106. Mr Wylde then asked the Claimant about £65,000 due to the company form one of its clients, Broad Environmental. The Claimant explained that the last he knew was that Mr Wylde was issuing legal proceedings to recover this this debt.

107. There was then a discussion as to whether the Claimant wished to submit any evidence to be considered under the heading 'Positive Client Feedback Received." The Claimant explained that it was not something he had sought in the past, although he had it verbally. He said he was not aware of any negative feedback as he was sure that had there been any, Mr Wylde would have raised this with him. Mr Wylde agreed with this, despite being aware that he had not informed the Claimant of negative feedback he had received about the Claimant from Mark Haslehurst when he had been a client.

108. The Claimant then made some comments as to his views on the value of the experience of Mr Johnson and Mr Haslehurst.

109. Following the meeting, Mr Wylde emailed the Claimant with a list of projects he believed the Claimant was working on. In his email he said the following:

"Please check to ensure that I have picked up all the income you have generated since 1st January 2018.

On the list of deals please check that this is complete and then go through and give me a status update and probability of the deal closing in the next 12 months. Could you also detail the fee for each deal and the status of the mandate?

Additionally, before Friday 24th April 2020 please can you respond on the following:

- Confirm whether or not you have any further counter-proposals which you wish me to consider on the proposal to reduce headcount within the Advisory team.
- May I have your comments regarding whether you feel you have had the opportunity for reasonable input into the proposed selection criteria and if you have anything further to add.
- Confirm if you have any final comments or questions for me to address regarding the proposed criteria or proposed selection process before I close the consultation." (456 – 457*)*

110. On 24 April 2020, Mr Wylde sent a letter to all those in the redundancy pool to formally close consultation with a view to making the selection the next day (470 – 471). The letter asked for any further evidence etc by 5:00 pm that same day and said:

"At the next meeting those who are not selected will be informed that they are no longer at risk of redundancy and that their employment will continue as normal. If they wish to be made aware of their own information used within the criteria this will be shared. The individual selected will be taken through the data used for their own selection, placed into notice of the termination of their employment by reason of redundancy, and informed of the right to appeal (and on what grounds any appeal may be submitted)."

111. The Claimant did not respond to Mr Wylde's email.

112. Mr Wylde undertook the scoring exercise during the course of the next week. He sent his provisional scores to Mr Tyerman to sense-check them. Mr Tyerman made a number of suggestions to the scores, but no changes were made by Mr Wylde as a result of Mr Tyerman's feedback.

Meeting – 30 April 2020

113. The next meeting with the Claimant took place by zoom on 30 April 2020. A transcript was provided in the bundle (659 – 667).

114. At the meeting, Mr Wylde explained to the Claimant that he had scored the lowest and went through the scores with him. It is notable that the Claimant was not sent the scores in advance of the meeting and was not provided with a copy during the meeting. He was told where he was the lowest scoring employee and the next score above him and given information about the

rationale for the scoring. The Claimant was also told that he would be given a week to review and consider the scores and raise any concerns.

115. Mr Wylde also spoke to the other members of the pool on 30 April 2020 and told them they were no longer at risk.

The Claimant's Scores

116. Following the meeting, on 1 May 2020, Mr Wylde emailed the Claimant with detailed information about his scores, which were as follows:

- Business Development – 2/5 x 7 = 14
- Client Handling / Feedback – 2/5 x 3 = 6
- Modelling – 2/5 x 2 = 4
- Project Management - 2/5 x 3 = 6
- Teamwork – 2.75/5 x 2 = 5.5
- Technical – 5/5 x 3 = 15

Giving a total score of 50.5 / 100

117. Mr Wylde's email requested that the Claimant please look at his comments and scores and get back to him with any queries or anything which he felt may be unfair by close of business 6 May 2020. The Claimant was told there would be a further meeting a week later, on 11 May 2022 (491). The Claimant was not provided with the next best scores in writing nor any other information about the scores of the other members of the 'at risk' group.

118. On 4 May 2022, Mrs Tyerman prepared a draft termination letter for the Claimant. She sent it by email to Mr Wylde copying in her husband. The cover email envisaged them needing to discuss matters relating to the Claimant's termination such as Pilon or garden leave (510).

119. The Claimant emailed Mr Wylde asking him a number of questions about his scores on 6 May 2022 (488 – 489). Mr Wylde replied to the points on 9 May 2022 (487).

120. The Claimant then sent Mr Wylde a further email on 10 May 2022 (486) attaching a document which contained further very detailed comments on his scores.

121. Mr Wylde responded the following morning saying:

"Thank you for your email yesterday. You have raised a number of things which you should have raised during early consultation for example relevant dates for income.

We can discuss this this morning.

I am writing now to ask you if you be open to a without prejudice, protected conversation under section111A of the employment rights act?

This means that the conversation - and any further discussion on this basis - could not be referred to within a tribunal. Would you be open to having this type of discussion as a part 2 of the notice meeting this morning? Jo would leave the meeting and the without prejudice discussion would not be recorded.

Please let me know prior to the meeting at 9.30 am." (485)

Relevant Facts about the Scores

122. When asked about the choice of criteria at the hearing, Mr Tyerman told us that the criteria were designed to ensure that the skills the business needed to retain were retained. Both he and Mr Wylde acknowledged before us that the final scoring criteria used were not entirely objective, but that some of the scores involved Mr Wylde making a subjective assessment.

123. Mr Wylde told us that his knowledge of the business and experience of working with the individuals in the pool, when considered together with the information collated by Mr Tyerman meant that he was well placed to make that assessment.

124. This assertion was somewhat contradicted, however, when Mr Wylde admitted at the hearing that he was surprised that the Claimant and to a degree, Mr Withers, had scored so badly. He described the scores as a "*real eye-opener"* and said that he felt that he "*taken his eye off the ball*" when it came to the Claimant.

125. The Claimant acknowledged before us that the scoring criteria were not discriminatory on the grounds of age.

126. In his attached document, the Claimant suggested his scores should have been as follows:

- Business Development – 3/5 x 7 = 21
- Client Handling / Feedback – 3.5/5 x 3 = 10.5
- Modelling – 3.5/5 x 2 = 7
- Project Management - 3/5 x 3 = 9
- Teamwork – 2.75/5 x 2 = 5.5 (no difference)
- Technical – 5/5 x 3 = 15 (no difference)

giving a total score of 68/100.

127. The key points that the Claimant raised about his scores in the emails and document he sent to Mr Wylde are set out below, together with the Respondent's explanations in response, some of which were provided to the Claimant in Mr Wylde's email and some of which we were told during the hearing. Mr Wylde told us that the Claimant's self-assessed scores had "no bearing on reality." We have also considered what the Claimant said at the appeal stage and during the course of the hearing.

Business Development

128. This criterion was scored in four parts, each part having equal weighting. The parts were:

- Net fee income for 2018 – 2020
- New opportunities and likelihood of resultant fee income in the next 12 months
- Appropriate screening of opportunities to ensure resources focussed on projects that are, or highly unlikely to be, profitable.
- Client networking, marketing, and lead generation, resulting in new relationships.

129. The Claimant was unhappy with his scores for all parts except the last part. The difference between the respondent's scores and his scores were as follows:

	R's score	**C's Score**
Net Fee Income	3	4
New Opportunities	2	3
Screening	1	4
Client Networking	2	3
Total	8/20 = 2/5 = 14	12/20 = 3/5 = 21

130. The Claimant said that he still did not understand how Mr Wylde had "factored into the scoring the time at the company". In addition, the Claimant said that the time frames adopted (2018 to early 2020) excluded historical fees he had generated, pointing out that in 2017 he had generated fees of £374,000.

131. Mr Wylde explained in response that he gave greater importance to the more recent income. Before us, Mr Wylde explained that 2018 income was weighted x 1, 2019 income was weighted x 2 and income for the first three months of 2020 was weighted x 3.

132. Mr Wylde explained that his total income figure for the 2018, 2019 and the first three months of 2020 was £260,000, but he had two disputed invoices. One was for £65,000 and one for £90,000 which had been discounted leaving an income figure of £105,000. The Claimant objected to the use of net income. He expanded upon this point under the heading Client Feedback saying:

"I am responsible for concluding mandates. The Accounts department is responsible for the invoicing and receipt of fee income." (595)

133. He also disputed that his personal fees were in dispute. We understand his position to be that all of his invoiced income should be taken into account whether paid or unpaid.

134. The Claimant acknowledged that his fee income for the relevant period was less than previous years, but said that this was due to his substantial

involvement on Mr Wylde's deals that had affected his ability to undertake new business generation.

135. With regard to his score for new opportunities, the Claimant's assessment of the fees he would generate in the next 12 months was considerably more buoyant than the Respondent's. Mr Wylde told us that he considered the score he gave the Claimant was overly generous in relation to this criteria because there was serious doubt that the projects would produce any income in 2020.

136. In addition, in this section, having been scored down for failing to appropriately screen projects, the Claimant queried the process for screening and setting fee income for mandates and allocating resource. Mr Wylde replied in his email that the setting of engagement fees was largely up to the Directors responsible for selling the work as they were the individuals best placed to judge the level of resourcing required to deliver the work and the level of fees that could potentially be secured. According to Mr Wylde's, the Claimant was not screening any opportunities and was also not ensuring he had a written mandate in place before undertaking work. This created risk for fee generation.

Client Handling / Feedback

137. The following were measured in this section:

- Client complaints or fee disputes
- Repeat business secured
- Positive client feedback secured

The Respondent gave the Claimant 2/5 for this criterion, which was categorised as "performance below expectations". The scoring notes record that two invoices he had raised had not been paid. These were the same invoices that were deducted from his net income. The Claimant commented again that he should not be penalised for this.

138. The Claimant also said he had not received any negative feedback in his 20 years of working for the Respondent and its predecessor. He assessed his own score as 3.5 / 5 for this criterion.

139. Mr Wylde told us that the issue was not simply that the invoices had not been paid, but that the Claimant had continued to undertake work for clients who had not paid invoices.

Modelling

140. The Claimant also asked Mr Wylde to reconsider his score of 2/5 for Modelling. He said in his email that he felt this score was a "real shock" to him because he had independently reviewed literally hundreds of models, managed both senior and junior modelling resources and their output while providing guidance.

141. Mr Wylde replied that "The Modelling criteria was not solely on the ability to review the outputs of a financial model – as per the selection criteria it was also on the ability of an individual to manage junior resource's modelling output and to provide them with guidance in this area. I am not, therefore, suggesting that you do not review outputs thoroughly, but that support from other senior modelling resource regarding model development is required for the projects you work on. This is not the case with the other individuals in the pool which I am sure you can understand. It is also worth noting that this area is weighted less highly than the others as I do not consider this as important a skillset for the advisory role." (490)

142. Mr Tyerman told us that the other members of the advisory team could do their own modelling when required, but this was not true for the Claimant. In his view, the ability to undertake one's own modelling was part of the role of an Advisor.

143. Both Mr Tyerman and Mr Wylde told us they considered the Claimant's score to be correct. Mr Wylde gave the same score to Mr Johnson who could not undertake his own modelling.

144. We note that although the Claimant did not challenge it at the time, he says in his witness statement that modelling was not part of his job description.

Project Management

145. Finally in his email, the Claimant asked about the scoring for the Project Management criterion. The Claimant's performance in this area was assessed as below expectations (i.e. 2/5) whereas he assessed it as 3/5.

146. Mr Wylde replied explaining that the measure was looking at the ability to run projects to time and ensure scope is managed to ensure profitable outcomes. He reiterated his view that the Claimant was not doing this effectively. The Claimant disagreed with the examples used by the Respondent for the purposes of scoring.

Teamwork

147. The Claimant did not make any comments in relation to the Respondent's scoring of him under this category.

Technical

148. The Claimant did not make any comments in relation to the Respondent's scoring of him under this category.

Everyone's Scores

149. Although not shared with the Claimant at the time, the final scores (with notes) for the entire pool were included in the bundle (614 – 626). The Tribunal panel could therefore see that the final scores were:

	JW	MH	C	SJ
Business Development	21	21	14	22.75
Client Handling/ Feedback	7.5	9	6	12
Modelling	8	8	4	4
Project Management	6	9	6	12
Teamwork	13	18	11	18
Technical	9	12	15	12
Total	**58**	**68**	**50.5**	**71.75**

150. Had the Claimant's scoring been accepted, this would have meant he would not have been the lowest scoring member of the pool. His overall score would have matched that of Mr Haselhurst and put him above Mr Withers.

151. The background financial information for the entire pool which was used to score the criterion of net income and new opportunities within the Business Development section was also included in the bundle (711). Mr Wylde was asked in cross examination about the score allocated to Mr Johnson for net income. Mr Wylde was unable to explain why Mr Johnson was given a score of 4 out of 5 based on this financial information.

152. Mr Wylde also accepted when giving his evidence that some of the scores given to Mr Johnson and Mr Haslehurst were somewhat speculative. They could not be based on work that they had carried out for the Respondent, but on his impressions of them having worked with them in different capacities. The Client Handling /Feedback scores are a good example of this. In other areas too, his explanations as to why Mr Johnson and Mr Haslehurst scored appeared to lack a solid foundation.

153. Dr Weerasinghe wants to note the following points at this stage of the judgment, some of which are touched upon earlier:

a. *During the 2nd consultation meeting, p 410, the Claimant asked Mr Wvlde to elaborate on the rationale for choosing the time frame. Mr Wylde's reply was: "Umm, it just seemed a reasonable period of time". In paragraph 42.5 of his witness statement, the Claimant says that by excluding 2017, a sum of 200k – 300k was not considered.*
b. *The Claimant then asked how the length of service is going to be factored in. Mr Wylde did not have an answer at the time but later said that he would use a weighting of 1, 2, and 3 for the first and most recent year in the range. The rationale for this choice of weightings was not explained.*
c. *The weightings for Project Management and Technical were arbitrarily selected and reduced to 3 to make room for a new category. This reduction had a disproportionate effect on the Claimant because Technical was his area of strength.*
d. *Whereas Mr Wylde was scoring comparatively, the Claimant was unable to challenge not being aware of his comparators scores, see para 64 of the Claimant's statement.*

Meeting on 11 May 2020

154. Despite what Mr Wylde had said in the email he sent to the Claimant on the morning of the meeting on 11 May 2020, there was no further discussion about the scores at the meeting with him that morning. We can see from the transcript (552 – 553) that the Claimant was simply told that Mr Wylde had considered his comments, but was satisfied that his scoring was accurate, fair and reasonable.

155. The Claimant was told that his employment was being terminated with three months' notice but that he would have the right to appeal against this decision. He was informed that the appeal would be conducted by Nick Ross, the Managing Director of Iona Capital Ltd. Mr Ross was independent of the Respondent. He was known to the Claimant because Iona Capital Ltd had shared the same offices as the Respondent. The Claimant did not raise any concerns about Mr Ross hearing his appeal. The Claimant was also told that he could send the material he had sent to Mr Wylde that morning to Mr Ross to be considered as part of any appeal he wished to pursue.

156. The termination of the Claimant's employment was subsequently confirmed in writing in a letter dated 28 May 2020 (524). The short delay was because of settlement discussions, the detail of which was not part of the evidence before us. (512)

Appeal

157. The Claimant submitted an appeal against the decision to dismiss him for redundancy on 10 June 2020. In his appeal letter (531-533) he raised the following concerns, each of which he expanded upon:

- The selection pool should have included Dan Tyerman and Ramon Sequeira

- The selection criteria and scoring method employed were neither fair nor objective

  In relation to this point, his letter said:

  "Whilst I accept that I was given the opportunity to comment upon the selection criteria, I was not provided with sufficient information regarding the background to the process, nor the requirements of the business, to be able to properly challenge or influence the criteria used.

  My questions raised in respect of the reasoning behind matters such as the timescales referred to within the criteria, and what evidence was to be used, were not answered in a manner which assisted in providing useful feedback on those criteria – for example, the timescale used in respect of 'Business Development' was decided on the basis that it "just seemed like a reasonable period", suggesting that no proper thought had been given to those criteria.

Further, it is clear that a number of criteria were subjective in nature and no objective scoring method was used to ensure balance in respect of such criteria. It was confirmed that such scoring was undertaken without any form of independent check, it having been confirmed by David Wylde, in relation to who undertook the scoring process, "when I say we, it's I".

I remain unable to reconcile the scores provided to me with what I consider to be accurate, and the method of informing me of the 'next' nearest scores was entirely confusing and did not allow me to participate properly in the consultation process by being able to adequately challenge the scoring." (531)

- The company failed to follow its own policies / terms in relation to redundancies

- The 'redundancy' and consultation/selection process were not genuine and the outcome was pre-determined.

- The decision to make him redundant was tainted by age discrimination. The Claimant referenced the comments made by Mr Wylde that we have set out in this judgment to support this argument.

158. Mr Ross emailed the documents to Mr Wylde and Mrs Tyerman on 15 June 2020 (534). He received two detailed responses from Mr Tyerman later that same day dealing with all the points made by the Claimant and attaching various background documents. The only point that Mr Tyerman did not address in his email was the allegation regarding the age-related comments said to have been made by Mr Wylde (677 – 680). Mr Ross did not question Mr Wylde about any aspect of the Claimant's appeal.

159. Mr Ross met the Claimant on 25 June 2020 to enable the Claimant to share more information about his appeal with him. We understand the Claimant expanded on the concerns set out in his letter, but we were not provided with any notes from the meeting.

160. On 2 July 2020, Mr Ross informed the Claimant in writing of his decision not to uphold the appeal (549 - 550). He concluded that:

- There was a valid reason for the redundancy, namely that: "The Business Advisory team, in recent times has not generated sufficient revenues to cover its overheads and therefore had a final requirement to reduce its operating costs. In addition, the market in which it operates had deteriorated further in March due to the Covid 19 lockdown." He noted that this had been explained to the Claimant during the redundancy consultation.

- He considered that the exclusion of Mr Tyerman and Mr Sequeria from the pool was reasonable

- In relation to the selection criteria and scoring methodology he said the following:

  "Point scoring mechanism

  The criteria and weighting formula for the point scoring process was discussed with the candidates in the pool who in turn were given opportunities to suggest changes and amendments. I note that you suggested only one change which was subsequently implemented by the Company. Therefore, I consider that the weighting formula template was widely discussed and fairly arrived at.

  The most significant weighting in the point scoring was given to historic income generation. The time period selected was from the 1st January 2018 to 31st March 2020 which I consider was a reasonable period in which to assess the candidates. One of your complaints is that the time period lookback should have been greater, however I note that you were presented an opportunity to raise this in the consultation process but failed to do so. I also note that the longer the lookback the less relevant the data for the purposes of the exercise. I have also looked into your comments that certain other income was pending or was waived in the hope of continuing with a more significant contingency fee. However, I am satisfied that the methodology used, invoices paid, was consistently applied to all of the candidates in the pool and that the time period and weighting adjustment was a fair process."

- Mr Ross rejected the suggestion that the company's policies were not followed and gave reasons why he considered this to be the case.

- Mr Ross rejected the allegation of age discrimination, saying that the point scoring methodology meant that age was not taken into consideration.

- Finally, he rejected the suggestion that the outcome of the redundancy exercise was predetermined saying that whilst he understood that the Claimant may not have agreed with the scores allocated to him there had been a fair system that was applied to all candidates.

Termination Date, Early Conciliation and Claim

161. The Claimant's last day of employment was 11 August 2020 at the end of his notice period. The Claimant commenced early conciliation with Acas on 7 November 2020. That process concluded on 7 December 2020 and he presented his claim to the tribunal on 6 January 2021.

Recruitment of Andrew Wood

162. The Claimant had not been replaced by the Respondent as at the date of the hearing. By the time of the hearing Mr Hazlehurst had left further reducing the size of the Advisory Team. He had also not been replaced. We were told that the financial position of the Respondent was still precarious.

163. We note that the Respondent employed a new employee with the title Director in July 2021. This was not a replacement for the Claimant. Instead, this was a new senior member of the Financial Audit and Modelling team.

LAW

Direct Discrimination because of Age

164. Age is a protected characteristic by of section 5 of the Equality Act 2010 which allows employees to argue they have been discriminated against by reference to a particular age or to a range of ages.

165. Section 39(2) of the Equality Act 2010 says

> (2) An employer (A) must not discriminate against an employee of A's (B) -
>
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.

166. In subsection 212(1) of the Equality Act, a detriment does not include conduct that amounts to harassment. It must be one or the other – it cannot be both.

167. When considering whether conduct amounts to a detriment, the test to be applied is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337)

168. Section 13(1) of the Equality Act 2010 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'.

169. In order to establish less favourable treatment it is not necessary for a claimant to show any sense of reasonable subjective grievance or injustice (*Deer v University of Oxford* [2015] ICR 1213).

170. It is possible, but rare for less favourable treatment not to constitute a detriment. Elias LJ, as he then was, said the following in the case of *Deer* at paragraph 26:

> *'….. although the concepts of less favourable treatment and detriment are distinct, there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely*

to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences. That is perhaps more starkly the position in cases of discrimination on race or sex grounds where it can be readily seen that the act of discrimination of itself causes injury to feelings. ……. It is perhaps possible that there may be evidence showing that in fact in a particular case the claimant did not suffer any sense of grievance or injustice notwithstanding less favourable treatment, but the normal inference would surely be that he or she did."

171. Section 13(2) adds that: "If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim." This section is not relevant in this case, because the Respondent has defended the case by arguing that there was no age discrimination. It has not argued, in the alternative, that any age discrimination was justified.

172. Under section 23(1), where a comparison is made for the purposes of section 13, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

173. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence. In addition, allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. We must "*see both the wood and the trees*": *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79

174. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

175. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of age. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

176. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied in discrimination cases.

177. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, the provisions setting out the burden of proof require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

178. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258* and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the existing guidance in these cases applies under the Equality Act 2010.

179. When the burden of proof is engaged, a two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

180. The Court of Appeal in *Madarassy*, states:

'*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*.' (56)

181. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

182. The tribunal's focus "*must at all times be the question whether or not they can properly and fairly infer… discrimination*": *Laing v Manchester City Council and others* [2006] IRLR 748 EAT at paragraph 75.

Time limits – Discrimination Cases

183. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

184. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

185. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

186. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

187. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

188. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (*Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548; The tribunal in *Lyfar* grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

189. A refusal of a request, where it is repeated over time, may constitute a continuing act (*Cast v Croydon College* [1998] IRLR 318).

190. A distinction needs to be drawn between a continuing act and a one-off act that has continuing consequences (*Barclays Bank plc v Kapur and others* [1992] ICR 208;). This distinction will depend on the facts in each case. (*Sougrin v Haringey Health Authority* [1992] IRLR 416*, CA)*

191. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

192. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach is for the tribunal to *assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of British Coal Corporation v Keeble* [1997] IRLR 36 set out below, as well as other potentially relevant factors:

- The extent to which the cogency of the evidence is likely to be affected by the delay.

- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

193. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule **(***Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

Unfair Dismissal

194. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. We are concerned first with whether there is a fair reason for the dismissal and, if so, whether dismissal was fair and reasonable in all the circumstances of the case.

Reason for Dismissal

195. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

196. Redundancy is a fair reason for dismissal by virtue of section 98(2)(c).

197. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The key provision which is relevant for the purposes of this claim is as follows:

"*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 [the employer's] business -

(i) for employees to carry out work of a particular kind …

…….

have ceased or diminished."

198. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial rationale behind the redundancy situation. This does not mean, however, we must always take the employer's stated rationale for the dismissal at face value. We are entitled to look behind the reason given in cases where the redundancy appears to be a sham, whether

for discriminatory or other reasons. The fact that a redundancy situation exists does not automatically mean that an employee is dismissed for redundancy.

Fairness

199. Under section 98(4) of the Employment Rights Act 1998 '… 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.'

200. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us, the Tribunal, to substitute our own decision.

201. The range of reasonable responses test applies to all procedural and substantive aspects of the decision to dismiss a person from his employment.

202. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including any appeal stage (*Taylor v OCS Group Limited* [2006] EWCA Civ 702; *West Midlands Cooperative Society Ltd v Tipton [1986] ICR 192, HL.)* However*, each case* will turn on its own facts. A procedural failing in the appeal process can, but will not necessarily, displace the fairness of the dismissal at the dismissal stage. Similarly, but the other way around, earlier procedural failings can be remedied at appeal.

203. Different fairness considerations apply when considering section 98(4) depending on the reason for the dismissal. The leading case on the fairness requirements in redundancy cases is the EAT decision in *Williams v Compair Maxam Limited* [1982] IRLR 83. This says that reasonable

204. In cases of redundancy, it is well-established law that an employer will not normally be deemed to have acted reasonably unless he warns and consults any employees affected, adopts objective criteria on which to select for redundancy which are fairly applied and takes such steps as may be reasonable to minimise the effect of redundancy through consideration of redeployment opportunities. This latter point was not relevant in this case as there were no redeployment opportunities.

205. An employer first needs to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer has genuinely applied his mind to the problem. (*Capita Hartshead Ltd v Byard* 2012 ICR 1256 (EAT)).

206. Having identified the pool, the selection criteria applied by the employer to employees in the pool are relevant. The more objective criteria, the fairer the selection process. However, the fact that selection criteria may require a degree of judgment does not necessarily mean that they cannot be assessed fairly and objectively.

207. The Court of Appeal decision in *British Aerospace plc v Green and ors* [1995] ICR 1006) warns tribunals that we should not subject selection criteria or their application to minute scrutiny. Our task is to satisfy ourselves that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. We must view the exercise undertaken by the employer through the reasonable range of responses lens rather than substitute our own views.

208. In *R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price)* [1994] IRLR 72, Glydewell LJ approved the following test of what amount to a fair consultation: "Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation."

209. We take from this that fair consultation involves ensuring that the person consulted has a fair opportunity to understand fully the matters about which he is being consulted and to express his views and the person consulting him is obliged genuinely to consider, though not necessarily to accept, those views.

210. Fairness demands that there are several matters in respect of which the employer should consult employees faced with the possibility of being dismissed for redundancy. The precise scope of the consultation will depend on the facts of the case, but usually the following are relevant:

- the reason for the redundancy situation;
- whether there is a way of avoiding the redundancy situation;
- the selection pool;
- the selection criteria;
- the selection method (i.e. who will be conducting the selection and based on what information);
- each affected employee is entitled to understand and challenge the scores they have been given; and
- in some circumstances, there may also need to be transparency in relation to the scores of other employees involved.

The critical thing is that any employee selected for redundancy should be given a fair opportunity to challenge their selection and they cannot do this unless they understand the basis for that selection (*Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508, EAT)

Polkey/Chagger Principle

211. In accordance with the principle established in *Polkey v AE Dayton Services* Ltd [1988] ICR 142, if we decide the dismissal was unfair, we are required to consider the possibility that the respondent would have been in a position to fairly dismiss a claimant and reduce the compensatory award by an appropriate percentage accordingly. This includes considering both whether and when a fair dismissal by this respondent would have been able to take place (*Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division*) [1993] IRLR 512).

212. The same principle applies to the possibility that the Respondent would have been in a position to non-discriminatorily dismiss the Claimant, by virtue of the case of the Court of Appeal's decision in the case *of Chagger v Abbey National* [2009] EWCA Civ 1202.

ANALYSIS AND CONCLUSIONS

Age Discrimination

First and Second Detriments

213. We have made a factual finding that Mr Wylde told the Claimant that a factor in his reasoning behind appointing Mr Tyerman as the CEO rather than the Claimant was that Mr Tyerman was "younger and more energetic" and that as part of the same conversation Mr Wylde told the Claimant that neither of them were "getting any younger".

214. However, our decision is that the Claimant's claims in relation to these comments fail and are dismissed.

215. The Claimant is not pursuing a claim of direct age discrimination in relation to the promotion of Mr Tyerman. His claim is that the making of the comment was a directly discriminatory detriment pursuant to section 39 of the Equality Act 2010.

216. No actual comparator is relied on for the purpose of this claim. In our judgment, Mr Wylde would not have made the same comments to a younger hypothetical comparator in the same position as the Claimant. This was less favourable treatment towards the Claimant because of age.

217. As indicated in our factual findings, in our judgment the Claimant was not upset by the references to age in comments. He was upset that Mr Wylde had decided to appoint Mr Tyerman as the CEO and that Mr Wylde had described Mr Tyerman as more energetic than him.

218. Applying the *Deer* case referred to above, the fact that the Claimant was not upset about the age-related comments does not prevent the making of them constituting less favourable treatment. It does, however, prevent the treatment amounting to detriment. We consider this is the rare case when less favourable treatment does not amount to a detriment.

219. A further reason for dismissing this claim is that it is significantly out of time. The meeting was on 27/28 November 201, but the Claimant did not commence the Acas early conciliation process until 7 November 2020. It was a one-off act rather than a continuing act. We do not find the Claimant's explanation as to why this complaint was not brought in time does not explain the substantial time delay and therefore do not grant a just and equitable extension.

Third Detriment

220. The Claimant's third detriment claim fails on the facts.

221. Mr Wylde did not, during the redundancy consultation process, tell the Claimant that "younger" employees were not being considered as part of the redundancy process. What Mr Wylde actually said is set out above at paragraph 84 above.

222. Mr Wylde did say that members of the Audit and Financial Modeller team would not be considered for redundancy. He also referred to them as being young. He did not, however, saying anything connecting the age of the employees to their exclusion from the redundancy process. He explained that the reason they were being excluded was because there was no financial rationale for including them.

223. For the sake of completeness, we consider this claim, had it not failed, would be in time. We consider the redundancy process commenced on 25 March 2020 was the beginning of a course of conduct relating to the redundancy process that ended with the delivery of the Claimant's appeal outcome. Had we held the third detriment to constitute unlawful discrimination, it would have formed part of that course of conduct.

Fourth Detriment

224. The fourth detriment claim in the list of issues is a duplication of the fifth and eighth detriments so is dealt with there.

Fifth Detriment

225. In our judgment, this detriment claim also fails on the facts.

226. There was no evidence before us that the Claimant was excluded from important business pitches being made to clients. It is factually correct that the Claimant was not involved in the pitches made to Equitrax or Amey. The Claimant was not leading the pitches. They were being led by other Directors as was normal when pitches were being made. In our analysis, the Claimant was not excluded from them because he never sought to participate in them.

227. A further reason for dismissing this claim is that it is significantly out of time. The pitches took place more than three months before the Claimant commences the Acas early conciliation process.

Sixth Detriment

228. The sixth detriment claim also fails.

229. We have found that the Respondent did fail to pay the Claimant on time on two occasions. His November 2019 salary was not paid until 4 December 2019 and his April 2020 salary was not paid until 4 May 2020.

230. The Respondent explained that the reason for this was because the Claimant was one of the highest paid employees and when cash flow meant that salaries could not be paid on time, the lower paid employees were paid first. The Claimant was not the only person who was affected by this. Selecting him for late payment had nothing whatsoever to do with the Claimant's age.

231. In any event, the claims in respect of both occasions are out of time.

Seventh detriment

232. The seventh detriment claim also fails.

233. The Claimant's expenses claims were challenged on two occasions. This was because Mr Wylde's new PA was asked by him to ensure all expenses claims were fully scrutinised. The increased scrutiny did not prevent him from being paid the amounts he had claimed. Instead, he was simply asked to provide more specific information about his work journeys rather than claim general Oyster card top ups.

234. The Claimant was not the only person to whom this change was applied. It was understandable, given the financial difficulties of the Respondent's predecessor, that increased care would be taken in relation to basic financial matters at the Respondent. He has produced no evidence to suggest that his age had anything whatsoever to do with the change.

235. In any event, the claim is out of time.

Eighth Detriment

236. The eighth detriment claim also fails.

237. Mr Wylde acknowledged that although the Claimant had been involved in recruitment decisions previously, he did not involve the Claimant in meetings with Mr Johnson or Mr Haslehurst prior to their appointment or ensure that he was part of the decision making process that led to their appointment.

238. Mr Wylde explained that the Claimant had previously been consulted over recruitment decisions to ensure, that in a small company, they did not bring anyone in that would not fit in, but this had changed as the company grew larger with the introduction of the Financial Audit and Modelling team. He further explained that because he and others had known and worked with Mr Johnson for many years and because Mr Haslehurst was a former

employee, he did not need to reassure himself that they would fit in by asking them to meet with others, including the Claimant.

239. We are satisfied that the reason why the Claimant was not involved with the recruitment decisions was nothing whatsoever to do with his age.

The Claimant's Selection for Redundancy and Dismissal

240. The Claimant was selected for redundancy and dismissed where his younger colleagues were not. This was less favourable treatment when compared with those younger colleagues. However, the unanimous judgment of the Panel is that the Respondent's decision to select and dismiss the Claimant for redundancy had nothing whatsoever to do with his age. This claim for direct discrimination because of age therefore also fails.

241. We have found that Mr Wylde made age-related comments to the Claimant when explaining why he had promoted Mr Tyerman to the role of CEO. He also made an age-related comment when discussing the redundancy situation with the Claimant at the first consultation meeting when he referred to "younger modellers." In our judgment, the initial comments were isolated and made by Mr Wylde in an entirely different context, namely the promotion of Mr Tyerman several months before the redundancy exercise. We consider we are unable to infer from them that Mr Wylde then discriminated against the Claimant because of age.

242. The Panel have also made findings, on a majority and minority basis, that the Respondent unfairly dismissed the Claimant, the reasoning for which is set out in detail in the section below. An unfair dismissal will not always also be a discriminatory one, even one where the outcome is predetermined. Other than being able to point to the isolated comments, the Claimant has not proved facts which, in our view, link the basis for his selection for redundancy and dismissal with his age. The Claimant accepted in evidence that there was nothing about the selection criterion which was inherently discriminatory because of age.

243. None of the members of the panel consider the above facts shift the burden of proof on to the Respondent to disprove age discrimination in this case. However, in any event, we consider the evidence shows that there was a non-discriminatory reason for the Claimant's dismissal.

244. The majority, Employment Judge E Burns and Ms Craik, have found that Claimant's dismissal was for the fair reason of redundancy. Although we have concluded that the dismissal was unfair this was not for any reasons that have any link to the Claimant's age whatsoever. In our judgment, there was a genuine redundancy situation. The Respondent's reasons for selecting the Claimant were solely related to his performance, albeit we have found that it stepped outsider of the range of responses of a reasonable employer in relation to its decision to dismiss him.

245. For the minority, *there were other non-discriminatory compelling reasons as found by Dr Weerasinghe, below*.

Unfair Dismissal

The Reason for Dismissal

Majority decision

246. Employment Judge E Burns and Ms Craik are satisfied that the Respondent has shown, on the balance of probabilities, that the principal reason for the Claimant's dismissal was redundancy.

247. They have given careful consideration to this question as there was evidence before them that there were other reasons involved and so they have sought to determine the principal reason.

248. The Respondent had been in financial difficulties previously and had not considered redundancy as an option. However, a significant change between the previous situation and the current situation was Mr Tyerman's appointment as the CEO.

249. This change was significant for several reasons. As noted above, we found that Mr Tyerman was keen to introduce better financial management at the Respondent and not allow the company to get into the same position as its predecessor organisation. The Claimant's income generation in recent years had diminished significantly, despite the fact that he was the highest paid employee. This gave rise to a potential capability issue. There was also a potential conduct issue brewing in relation to the Claimant's refusal to report to Mr Tyerman.

250. Although Employment Judge E Burns and Ms Craik consider these matters were in Mr Tyerman's mind, the significant event that led to the Claimant's dismissal was the pandemic and the need to respond to it.

251. The Respondent's financial position as a result of the pandemic became more precarious than before. In addition, there was an immediate diminution in the number of projects being worked on because several projects were put on hold.

252. Neither Mr Tyerman nor Mr Wylde was able to tell us which of them suggested the redundancy route first. We have found it unnecessary to resolve this factual question. We are satisfied that together they adopted a plan that enabled them to legitimately resolve the capability and conduct issues by removing the Claimant on the ground of redundancy. There was both a genuine need to make savings through headcount reductions and less work available for members of the Advisory team.

253. Having satisfied ourselves that there was a fair reason for dismissal, Employment Judge E Burns and Ms Craik have gone on to consider if the dismissal was fair (see below).

Minority decision

254. The minority, Dr Weerasinghe, finds that the Respondent has not shown a genuine redundancy situation. His conclusion is based on the following reasons:

- *The redundancy of the Claimant's role has been predicated by a purported need to reduce costs. If that is the case, then it is particularly pertinent to show the extent of the losses by way of company accounts which is an easy matter to do. In particular, the impact of the discontinuation of the PPI scheme and the pandemic will have to be shown instead of mere verbal statements. Moreover, the extent of the impact will have to be shown to be over and above the normal attrition rate given that the Respondent company was at all material times operating at a loss. It seems to Dr Weerasinghe the primary cause of the loss was to do with delayed payments which appears to be embedded into the Company business model. Dr Weerasinghe notes also that the majority of the cited projects were delayed due to the pandemic and not cancelled.*

- *There were other compelling reasons for the dismissal; an issue of insubordination in relation to the Claimant's refusal to report to the newly appointed CEO, Mr Daniel Tyreman and the refusal to attend team meetings called by the said CEO. Upon questioning by the Panel, Mr Wylde said after his retirement, the above situation would be untenable. The other issue is a possible capability issue in relation to the apparent diminution of income generation by the Claimant, particularly in the latter years.*

- *The recruitment of Mark Haselhurst (October 2019) and Simon Johnson (July 2019) into the Advisory Team thereby, incurring substantial expenditure. No consideration was given to employ Mr Haselhurst on a temporary consultancy basis to pursue the Wheelabrator project.*

- *It was accepted that there was friction between the Claimant and Mark Haselhurst and that Mark was brought in by Mr Tyerman.*

- *The rationale for substantial matters in the selection/ scoring process that had a disproportionate unfair impact on the Claimant was not explained in contemporaneous documents*

- *The Respondent said it had no clear idea of the costs savings that it needed to make from the redundancy exercise.*

- *Joanna Tyerman drafted the dismissal letter before the completion of the redundancy process*

255. Dr Weerasinghe concludes the claim for unfair dismissal is well founded because the Respondent has not shown a genuine reason for the redundancy and had predetermined the Claimant's dismissal. He had not therefore gone on to consider the fairness of the dismissal.

Fairness of the Dismissal

256. In the judgment of the Employment Judge E Burns and Ms Craik, the outcome, of the redundancy process was pre-determined to a degree. By this we mean that from the start Mr Wylde and Mr Tyerman were of the view that the Claimant would and should end up being the employee selected for redundancy.

257. The evidence that leads us to reach the conclusion that the outcome was predicted from the start is as follows:

(a) the redundancy proposal from the start, as set out in the initial letters sent to the 'at risk' group, was to reduce the Advisory Team by one rather than left more flexible

(b) The Respondent said it had no clear idea of the costs savings that it needed to make from the redundancy exercise. This leads us to conclude that the Claimant, with his high salary, was the target of the exercise.

(c) Mr Wylde conducted the process alone, deliberately keeping Mr Tyerman away from the consultation meetings, even though Mr Tyerman was in a far better position to answer any questions about the selection criteria than he was. In addition, the Respondent did not reveal that Mr Tyerman was helping Mr Wylde nor that he had created the selection criteria. By the time of the appeal, the evidence shows that Mr Wylde was no longer leading the process and instead it was Mr Tyerman who was answered the questions raised by Mr Wylde.

The Claimant was the only member of the pool in respect of which there was a sensitivity in relation to Mr Tyerman. If the Respondent had genuinely been open to the idea that any of the four people in the pool would be selected, it made far more sense for the Respondent to be more transparent about Mr Tyerman's involvement.

(d) Mr Wylde rang only the Claimant to give him a heads up about the redundancy exercise. This suggests that he had in mind that the Claimant would be the employee most adversely affected by the proposal

(e) The fact that as soon as the scoring exercise had been undertaken, the other three members of the redundancy pool were told that they were no longer at risk

(f) The Respondent did not engage with the Claimant's comments in relation to his scores.

258. Although the decision was pre-determined to a degree, the Respondent did try and adopt a fair process and in a large number of respects. The selection method and the early stages of the consultation process followed by the

Respondent fell within the range of reasonable responses of a reasonable employers.

259. All of the employees in the 'at risk' group had the opportunity to raise points in the early meetings (at which they could be accompanied) and in writing. The employees were invited to comment on the redundancy proposal and offer alternatives.

260. We note that the Claimant made no alternative suggestions at the time, but was given plenty of opportunity to do so. He did not, at any time, challenge the need for the redundancy exercise.

261. We consider that the choice of the pool was a reasonable one. The Respondent's decision to leave Mr Tyerman and Mr Sequeira out of the pool was fully justified and within the range of responses of a reasonable employer. The two employees were not purely focused on Advisory work.

262. The Respondent also behaved reasonably when it provided the 'at risk' with the draft selection criteria during the consultation process. Adjustments were made in light of comments made by the Claimant and Mr Haslehurst. In addition, the Respondent provided the 'at risk' group with the financial information it intended to use to undertake the scoring exercise and gave them an opportunity to check that it was complete and to supplement it if anything was missing. The 'at risk' group were invited to make any final comments on the selection criteria before the scoring exercise was completed.

263. We consider that the selection criteria used were fair and reasonable in the circumstances. In reaching this conclusion we were mindful of the need not to subject the scoring process to undue minute scrutiny, but to consider whether the criteria fell within the range of responses of a reasonable employer.

264. The selection criteria used were not objective. This was accepted by the Respondent. However, the type of employees involved and the nature of the work they did meant that solely using objective criteria such as absence and disciplinary records would not have been helpful. We consider that there was a genuine attempt by the Respondent to choose criteria which reflected the role of the Advisors and the behaviours and skill-sets that the business needed to retain.

265. The only concern of substance raised by the Claimant about the selection process at this stage how the Respondent could fairly compare the newer employees with the longer standing employees. He did not, prior to the scoring exercise, challenge any of the selection criteria or the timescales used.

266. In our judgment, because the scoring exercise relied on Mr Wylde's subjective assessment, fairness demanded that the 'at risk' employees should be given a full opportunity to understand their own scores and challenge them. The Respondent failed to provide the Claimant with this

opportunity. The Claimant raised a number of specific concerns about his scores, but there was never any detailed discussion of his scores with him.

267. In addition, in light of the difficulties presented by having employees with such different with different lengths of service pooled together, this was a selection exercise where greater transparency than normal was required.

268. When the Claimant had questioned how the Respondent intended to compare the long standing employees with the two much newer employees, he was told that this would become clear once the scoring exercise was completed. Because there was no further engagement with him on the scores once the scoring had been completed, the position remained unclear. It remains unclear even after the hearing. For example, in relation to net income because Mr Wylde was unable to explain why Mr Johnson scored so highly for net income. His explanations as to why Mr Johnson and Mr Haslehurst scored as they did in other areas lacked foundation and therefore, in our judgment, credibility.

269. Mr Wylde says he did consider the Claimant's document and felt it bore no resemblance to reality, but the truth is that the Respondent had no intention of revisiting the scores once the scoring exercise was undertaken. It told the other employees who had higher scores than the Claimant that they were no longer at risk as soon as the scoring exercise was completed and before the Claimant had even seen his scores in writing. As far as the Respondent was concerned the consultation process ended and the decision was made when the scoring exercise was completed.

270. Although the Claimant was offered an opportunity to appeal against his dismissal, the appeal was at a cursory level only and the procedural defect in relation to the lack of consultation about his scores was not remedied.

271. In the judgment of Employment Judge E Burns and Ms Craik, the predetermination of the outcome of the redundancy process led the Respondent to close its mind to the consideration of the valid arguments the Claimant raised. This included his general argument regarding the difficulty of comparing the positions of the new and old employees and the specific arguments regarding his own scoring. There was both procedural and substantive unfairness and we therefore conclude the Claimant's dismissal was unfair.

Additional Conclusions

Majority Polkey Decision

272. Having concluded that the Claimant's dismissal was unfair, Employment Judge E Burns and Ms Craik have considered the chances of the Respondent being in a position to dismiss the Claimant fairly.

273. To remedy the procedural defect we have identified, the Respondent would have needed to extend the consultation period to enable it to discuss and consider the Claimant's points about his scores. There was, however, already a delay between the Respondent ending the consultation period and

issuing the Claimant with notice. We consider that the additional period of consultation would not have extended this period and therefore would not have added any further time on before the Claimant was given notice.

274. It is more difficult for us to assess the impact of the substantive unfairness that arose from the failure to allow the Claimant to challenge his scores. This has necessitated some scrutiny of the scores in light of the challenges he tried to make. We have not strayed into any areas that the Claimant did not seek to challenge during the process or the hearing. This includes his scores for Teamwork and Technical and the weightings.

275. One challenge made by the Claimant concerned the omission of 2017 income and his concern about comparing the older employees with the newer employees. We do not consider the income period was chosen to deliberately target the Claimant. There was a clear business rationale for focussing on recent income and it was not inherently unfair to exclude 2017 income. We are however still unclear how the weighting system for recent income worked, but note that this affected only a very small proportion of the scores overall.

276. The Claimant also complained about the use of net income rather than gross income. This too seemed to us to have a clear business rationale and was not inherently unfair on the Claimant or deliberately adopted to cause him disadvantage.

277. We take a similar view that it was not unfair for the Respondent to also take account of the unpaid invoice issue under Client Feedback. Although the two newer employees had spent less time with the Respondent and therefore had less opportunity to have clients refuse to pay their invoices, this was not true for Mr Withers. We can appreciate that the fact that the Claimant continued to undertake work for non-paying clients was an understandable concern for the Respondent. The same was equally true in relation to him working and incurring fees without having a signed mandate in place as was reflected in the Project Management Score he was given. Finally, we are satisfied that the score given to the Claimant for modelling was substantiated.

278. According to the evidence we have seen, the Claimant was the poorest performing member of the Advisory Team at the time of the redundancy exercise in a large number of respects.

279. Had the Respondent not curtailed the consultation process and had a more open mind to the points the Claimant was making, there is in our judgment a very strong chance that he would nevertheless have been selected for redundancy. It seems most likely to us that his scores might have been adjusted upwards a little, but not so far as to displace Mr Withers, the next best scoring employee.

280. However, given the speculative nature of this exercise and the findings we have made, we reject the Respondent's contention that a 100% reduction should be applied. The unfairness was not only procedural, but substantive

too. We have therefore settled on a figure of 80% which we consider takes into account the ongoing unknowns about the scores that persist even after the tribunal hearing.

Minority Polkey Decision

281. Dr Weerasinghe disagrees with the majority determination of 80%.

282. He has asked himself what are the chances of there being a fair reconstruction of the redundancy process, devoid of any procedural or substantive unfairness. His view, in light of his conclusions that there were other compelling reasons for the Claimant's dismissal and it was entirely pre-determined, is that there is no chance at all. His decision is therefore that there should be no Polkey deduction to the Claimant's compensatory award.

Employment Judge E Burns
18 May 2022
Amended – 01/06/2022

Sent to the parties on:

01/06/2022.

For the Tribunals Office