EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Keane		**Sands Plumbing & Electrical Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 12 & 13 April 2022
14 April 2022 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr RW White**
Mr JP Kelly

Representation
For the Claimant: **Mrs D Morton (Lay Representative)**
For the Respondent: **Mr S Jagpal (Consultant)**

JUDGMENT

The unanimous judgement of the tribunal is that:

1 The claimant was fairly dismissed by the respondent. His claim for unfair dismissal is not well-founded and is dismissed.
2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of direct and/or indirect age discrimination, pursuant to Section 120 of that Act, is dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Declan Keane who was employed by the respondent, Sands Plumbing and Electrical Limited, as an Electrician, from 23 November 2015 until 18 August 2020 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was redundancy.

2 By a claim form presented to the tribunal on 13 December 2020, the claimant claims that he was unfairly dismissed and that he suffered unlawful discrimination by reason of age. At the time of his dismissal the claimant was 49 years of age: he claims that by reason of his age he was selected for redundancy rather than a younger electrician JP who was aged under 40; and that an

apprentice TE in his 20s was excluded from the pool for selection again on the grounds of age. These were claims for direct age discrimination. In the alternative, the claimant purported to bring a claim for indirect age discrimination. This was put on the basis that the Provision Criterion or Practice (PCP) complained of was the respondent's preference for employing younger employees. At the outset of the hearing, we explained that this was not therefore a PCP applying to everyone; and a claim on such a basis was actually a direct discrimination claim.

3 The respondent's position is that the claimant was dismissed by reason of redundancy and that the dismissal was fair. The respondent denies any discrimination: maintaining that age played no part in the selection process; and that the age discrimination claim is fundamentally flawed.

The Evidence

4 The respondent presented its evidence first and called a single witness, Ms Victoria Stoddard – HR and Health & Safety Administrator. She provided evidence as to the reasons for redundancy and the process which was followed. The claimant gave evidence on his own account, he did not call any additional witnesses. In addition, we were provided with an agreed hearing bundle running to some 330 pages. We have considered those documents from within the bundle to which we were referred by the parties during the hearing.

5 There is very little by way of disputed facts in this case. The extent to which the claimant does not accept the evidence given by Ms Stoddard comes down to interpretation of the facts and degree of speculation on the claimant's part. We accept that Ms Stoddard was an accurate and honest witness upon whose account of the facts we can rely.

The Facts

6 the respondent specialises in the installation of mechanical and electrical equipment in new build residential homes and commercial premises its customers range from housing developers to local authorities GP surgeries schools and commercial clients

7 The claimant's employment with the respondent commenced on 23 November 2015. He was employed as an electrician. At the time of his dismissal he was earning £13.50 per hour.

8 Immediately before the claimant's dismissal, the respondent had nine employees: one Director; one Contracts Manager; one Gas Engineer; two Electricians (including the claimant); two Apprentice Electricians; one General Administrator; and Ms Stoddard - HR and Health & Safety Administrator.

9 The other Electrician employed by the respondent was JP, who at the time of the claimant's dismissal was earning £14.50 per hour. The two Apprentice Electricians were TE who commenced his apprenticeship in 2016 and completed the same on 25 January 2021; and JG who commenced his apprenticeship in 2018 and left the respondent's employment whilst still an apprentice in February 2021. Having qualified in January 2021, TE remains employed by the respondent working under supervision on both electrical and gas installations. JG left to complete his apprenticeship elsewhere.

10 The two Electricians and the Gas Engineer employed by the respondent were each supplied with a company vehicle for travelling to and from work and to customer premises during working hours. Habitually, they supplied many of their own tools and equipment which were left securely in their respective vehicles overnight.

11 On 24 March 2020, the claimant; the JP; the Gas Engineer and the two Apprentices were placed on furlough following the outbreak of the COVID-19 pandemic. Whilst its employees were on furlough, the respondent continued to receive a much reduced amount of work orders for which it employed external contractors. The alternative would have been either to decline the work (with the possible long-term loss of customer business); or to bring its own employees back from furlough (but there was an insufficiently consistent stream of work to justify this).

12 The ongoing pandemic and government restrictions which were put in place had a profound effect on the respondent's financial position and viability. By mid-2020, and following accountant's advice, the respondent's managers believed that it was heading towards a loss of turnover of the order of £250,000 (Ms Stoddard told us in evidence that the actual figure was somewhat higher than this). By June/July 2020 the respondents understanding of the position was that furlough was coming to an end and would be replaced by flexible furlough this would involve employers making a greater contribution towards which costs including national insurance contributions.

13 On 12 June 2020, the respondent called a meeting of the workforce at which the £250,000 loss of turnover was explained and the staff were warned of impending redundancies. Ms Stoddard explained that the likely reduction in workforce would be one of the two administrative staff and one of the two Electricians. This meeting was followed up by a letter dated 15 June 2020 addressed to affected staff explaining the position and opening a period of consultation.

14 The first consultation meeting with the claimant alone took place on 18 June 2020. Ms Stoddard reiterated the reasons why redundancies were being

considered and invited any ideas or suggestions from the claimant as to how this could be avoided. At this meeting, the claimant suggested a job-share between himself and JP, each working five days on and five days off. Such an arrangement would of course have required the consent of both the claimant and JP.

15 There followed meeting on 23 June 2020 conducted by Ms Stoddard with both the claimant and JP. At this meeting, Ms Stoddard discussed the proposed selection criteria which would be applied to a pool for selection comprising the claimant and JP. (One Electrician to be selected for redundancy from two Electricians employed by the respondent.) The suggested criteria were:

(a) Disciplinary record.
(b) Attendance record.
(c) Lateness.
(d) Performance.
(e) Length of service

Each criteria would be marked by managers using scores in the range of 1 – 5. The claimant and JP were invited to comment on the proposed criteria: the claimant suggested an additional criteria of “qualifications”; the respondent agreed to add this to the list of criteria used.

16 on 28 June 2020 Ms Stoddard wrote to the claimant and JP explaining that the company had now decided to reduce the number of electricians in its employment from 2 to 1 she reiterated the selection criteria adding the six criteria of qualifications as suggested by the claimant to the previous meeting

17 On 30 June 2020, Ms Stoddard wrote to the claimant and JP setting out in detail the respondent’s business case for making redundancies; explaining steps that had already been taken to try and reduce costs; and responding to the claimant suggestion of a job-share. The job-share proposal was not a viable option for the following reasons:

(a) It would require the consent of both electricians, and JP had made it quite clear that he could not operate on such a basis. In any event, the claimant had only indicated a willingness to do so on a very short-term basis.
(b) The job share would still involve the respondent carrying the cost of operating two vehicles - one of which would be unused during the five-day off-period. The alternative of the job-sharing electricians sharing vehicle was not viable because of the need to decontaminate the vehicle after each period of use and to transfer and store each Electrician’s tools and equipment whilst the vehicle was in use by the other. This would be a time-consuming and therefore expensive process.

18 Out of a possible 30 points available in the scoring process, the claimant scored 26, and JP scored 28. The claimant scored less than JP for attendance, performance, and length of service. He scored higher than JP for qualifications. For disciplinary record and lateness, they both scored the maximum.

19 On 2 July 2020, Ms Stoddard met the claimant and went through the scoring matrix with him. The breakdown of scoring was then sent to him in an email the following day. On 5 July 2020, the claimant contested the scoring and for the first time suggested that the Apprentice TE should have been included in the pool for selection.

20 Ms Stoddard addressed the claimant's concerns at a meeting on 13 July 2020 at which she was accompanied by the Contracts Manager TC. The claimant challenged one of the absences which had been used to calculate his attendance score - but accepted that, even if that absence were discounted, his score would remain unchanged and lower than that of JP. On performance, the claimant accepted that he did not have the same technical ability and expertise as JP; he accepted that this often led to delays whilst he obtained guidance by telephone. He was concerned that the respondent had taken account of some customer complaints which had not been raised with him at the time. It was explained that the respondent had not felt that the complaints gave rise to disciplinary issues - hence they were not raised at the time. But it would not be fair to ignore them while scoring during this process. Length of service was a matter of record which the claimant accepted.

21 Regarding the addition of TE to the pool for selection, the claimant was advised that TE was not comparable with him or JP. With his current level of qualifications and experience, TE offered a completely different resource to the respondent - able to attend site to assist either an Electrician or a Gas Engineer, but not qualified to attend site on his own in either discipline. TE did not have a vehicle and so no cost saving could be achieved there if he were selected for redundancy. And it was felt to be disproportionate to place him at risk of redundancy so close to the end of his apprenticeship. There was no obligation to continue to employ him once he was qualified.

22 At a meeting held by videoconference on 17 July 2020, Ms Stoddard informed the claimant that he had been selected for redundancy and would be dismissed. This was confirmed in writing by letter dated 22 July 2020. The claimant was told of a right to appeal against the decision, and invited to write to TC if he wished to pursue this option. The claimant did not appeal. The effective date of termination of the claimant's employment was 19 August 2020. This

23 During the consultation process, the claimant complained that he had been disadvantaged by the respondent's failure to promptly issue minutes of meetings. Sometimes there were occasions where the minutes were not

available before the next meeting was scheduled. It subsequently transpired that in fact the claimant had covertly recorded all of the meetings. He did this without the consent of the respondent and at no stage prior to his dismissal did he disclose to the respondent that he had the recordings and offer to make them available to the respondent to assist in the production of the minutes.

24 When TE qualified in January 2021 (some five months after the claimant's dismissal), his employment continued whilst the respondent reviewed its position. In March 2021, TE was given permanent employment. Although qualified, he still does not carry out the full range of duties of an Electrician or a Gas Engineer but is available to attend site to assist either. He does not have his own vehicle. Mrs Stoddard's evidence, which we accept, was that, by January 2021, there had been a significant upturn in gas engineering work - this would not have provided additional work opportunities for the claimant who was an Electrician, but TE was sufficiently flexible to be an able assistant to the Gas Engineer as required.

The Law

Age Discrimination

25 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics—

Age

Section 13: Direct discrimination

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

Section 19: Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if

(*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,

(*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(*c*) it puts, or would put, B at that disadvantage, and
(*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are

Age.

Section 39: Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(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.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(4) An employer (A) must not victimise 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 any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

26 **Decided Cases – Discrimination**

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg age) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Unfair Dismissal

27 **The Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) 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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) 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
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 139: Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

28 **Decided cases relating to the creation of a pool for selection**;

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair. Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of

pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

29 **Decided Cases relating to consultation and procedure**;

Williams and Others –v- Compair Maxam Limited **[1982] IRLR 83 (EAT)**
Polkey –v- AE Dayton Services Limited **[1987] IRLR 503 (HL)**
R –v- British Coal Corporation and anr ex parte Price **[1994] IRLR 72**
King and Others –v- Eaton Limited **[1996] IRLR 199 (CS)**
Graham –v- ABF Limited **[1986] IRLR 90 (EAT)**
Rolls-Royce Motor Cars Limited –v- Price **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will not normally act reasonably, unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment. The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed. Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.
If vague and subjective criteria are adopted for the redundancy selection there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

30 **Decided Cases – General test of fairness**

Iceland Frozen Foods Limited –v- Jones **[1982] IRLR 439 (EAT)**
Sainsbury's Supermarkets Ltd. –v- Hitt **[2003] IRLR 23 (CA)**

In applying the provisions of Section 98 (4) ERA the employment tribunal must consider the reasonableness of the employer's conduct, and not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to a given situation within which one employer might reasonably take one view, another quite reasonably take another. The function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band it is unfair. The objective standards of the

reasonable employer must be applied to all aspects of the question whether an employee is fairly and reasonably dismissed.

The Claimant's Case

31 In helpful closing submissions most ably made, Mrs Morton suggested that the claimant's dismissal was unfair in the following respects:

(a) She does not accept that there was a genuine redundancy situation. The respondent had suffered what was likely to be a temporary downturn in work and could have made temporary provisions such as extended furlough, flexible furlough, or job sharing. There was no need to consider dismissals by reason of redundancy.
(b) She argues that the respondent failed to adhere to the ACAS Code because some of the consultation meetings were held with more than one employee and were not therefore private consultations.
(c) She submits that the pooling was inappropriate and the TE should have been included in the pool for selection.
(d) She submits that the criteria of lateness was insufficiently robust because, as a general practice, the respondent relied on employees to report the time that they arrived on site and therefore effectively to self-report any lateness.
(e) She was concerned that the criterion of "performance" had been used unfairly - because the respondent had included complaints made by customers which had not been raised with the claimant at the relevant time.
(f) She argues that no adequate steps were taken to secure alternative employment for the claimant.
(g) She points to the fact that, following his qualification in January 2021, TE was retained as an employee. She suggests that this calls into question the rationale for redundancies.
(h) She argues that the claimant was not given an effective right of appeal. He was asked to present his appeal to TC who had been present at least one of the consultation meetings.
(g) She repeats the claimant's complaint about the respondent's failure to produce and have minutes available promptly after meetings.
(i) The overarching complaint is that the entire selection process was contrived to ensure that the claimant was selected for redundancy and that both JP and TE were protected. She argues that this was because the respondent operated a policy of seeking to employ younger employees because they were less expensive.

The Respondent's Case

32 On behalf of the respondent, in equally helpful and able submissions, Mr Jagpal submits that there was a clear need for the respondent to consider economies following the significant downturn in business and uncertainty as to the future which presented itself in June/July 2020. The respondent cannot be judged with the benefit of hindsight, and cannot even be judged by decisions it may have made some five months later in January 2021. The respondent could only act on the basis of information available in June 2020. There was no reason to suggest that the downturn in business would be temporary or short-term.

33 Mr Jagpal's case is that the respondent undertook a model process of consultation: it fully explained the pooling and the selection criteria; and listened to suggestions from the claimant as to how for example the selection criteria might be modified. As to who was included in the pool, that was a matter for managers and they gave clear conscientious thought to it. There was no basis to include TE in a pool for selection involving Electricians. There is no requirement in the ACAS Code for all meetings to take place in private; and the claimant did have a number of one-to-one meetings during the consultation process.

34 The claimant did not object to lateness as a criterion when it was discussed. Further, the respondent has no reason to suppose, and the claimant has no basis to suggest, that any employee has falsely reported his time of arrival on site.

35 The respondent accepts that the complaints made by customers were not discussed with the claimant at the time. They were not seen as disciplinary issues: the respondent's managers made a judgement at the time not to raise them. But there is no basis to suggest that this means they cannot be taken into account for entirely different purposes during a redundancy selection process.

36 The respondent is a very small organisation which at the relevant time employed nine people and was reducing its headcount to seven. The suggestion that there were alternative employment opportunities waiting to be explored is ludicrous.

37 The decision to retain TE in January 2021, is a decision which could only be judged by reference to circumstances applying in January 2021. Further he is not comparable to the claimant and hence was not included in the pool.

38 The claimant was offered a right of appeal: he was not informed that TC would be the appeal officer (although he might well have been). If the claimant had concerns about that, the appropriate steps would have been to lodge an appeal and then make appropriate representations.

39 The respondent submits that the complaint about the failure to produce minutes promptly is entirely contrived. The claimant was making covert recordings of every meeting and these were therefore available to him as and when required in between meetings. If the claimant had been acting in good faith, he would have made it known that the recordings existed and would have made them available to assist.

40 Mr Jagpal suggests that the claim that the redundancy process was contaminated by age discrimination does not bear scrutiny. The only reason suggested by the claimant for an alleged desire to retain younger employees was that they were less expensive. But JP because was more highly paid than the claimant. And the differences in consideration between the claimant and TE are such that any suggestion that age played a material part simply cannot be sustained.

Discussion & Conclusions

Age Discrimination

Direct Discrimination

41 In our judgement, the claimant has adduced no evidence before us which supports his claim for age discrimination. At its height, the evidence shows only that the claimant was treated less favourably than JP in that he lost out in the selection process and that JP is younger than the claimant. Arguably the claimant was treated less favourably than TE who was excluded from the pool for selection - and TE is younger than the claimant. But, applying ***Madarassy***, it is not sufficient simply to establish a difference in age and a difference in treatment: there must be some evidence connecting the two. The additional evidence may arise where there is no credible or logical explanation for the difference in treatment.

42 In the case of JP, we have seen evidence of a methodical selection process which was discussed with the claimant in advance which was modified at his suggestion and where in at least one of the selection criteria he scored higher than JP. It follows that there is a credible and logical explanation for the difference in treatment between them. The only basis upon which the claimant suggests that age may have come into play is his suggestion that younger employee are less costly. But in the case of JP this is not true, he was paid more than the claimant.

43 Turning to TE, in our judgement the respondent's explanation for excluding him from the pool for selection is clearly credible and logical. He was not a suitable employee to be included in a pool for selection where the object of the exercise was to reduce the number of Electricians employed by the

respondent from 2 to 1. TE was not a comparable employee because of the respondents perceived moral obligation to allow him to complete his apprenticeship; and, that although he was an Apprentice Electrician, whilst he was training, it was good experience for him to assist any qualified tradesman including the Gas Engineer. We are curious, and the claimant has offered no explanation, as to why he does not suggest age discrimination as between himself and JG who was also excluded from the pool for selection and continued in his apprenticeship until he left of his own accord in February 2021.

44 The claimant has not established facts before us facts from which we could properly conclude that age discrimination had occurred. Accordingly, applying Section 136 EqA, the burden of proof does not shift to the respondent. The claimant has failed to discharge the initial burden which is upon him.

Indirect Discrimination

45 After the initial clarification of the issues referred to in Paragraph 2 above, the claimant did not pursue the claim for indirect discrimination. For the avoidance of doubt however, we find that the claimant has not established that there was a PCP which applied to everyone but which placed individuals of the claimant age at a disadvantage. There is no viable claim for indirect discrimination.

46 In these circumstances, the claim for age discrimination must fail and is dismissed.

Unfair Dismissal

The Reason for the Dismissal

47 We are quite satisfied on the evidence adduced before us by the respondent, that the sole reason for the claimant's dismissal was redundancy. The Director had genuinely concluded that the requirement for qualified Electricians within the business had diminished (and was expected to diminish further). This assessment is one for the Director to make. It is not for the tribunal or for the claimant to seek to manage the respondent's business. The respondent does not have to establish that the reduction in workforce was the only possible response to the problem, simply that it was genuinely the way forward chosen by the Directors on this occasion.

48 The genuineness of the redundancy is not undermined by the fact that TE was retained in employment when his apprenticeship ended in January 2021. The respondent's actions must be judged as at June/July 2020; they cannot be judged with the benefit of hindsight. Further, we accept Ms Stoddard's evidence that it was gas engineering work which had picked up by January 2021, and the

principal reason for TE being retained was his ability to assist with this. TE was not retained as an Electrician, not a direct replacement for the claimant.

Consultation

49 We agree with Mr Jagpal's submission that the consultation process in this case was exemplary. The respondent began with a meeting of the entire workforce and then focused its consultation on affected employees with whom they met as a group and as individuals. The reasons why redundancies were being considered were properly explained; alternatives to redundancy as suggested by the employees were considered and were only dismissed after proper examination and with good reason; the pooling decision was properly explained; the selection criteria were discussed openly and transparently; as was the scoring.

Pooling

50 The composition of the pool for selection is very much a matter for the respondent. What it has to establish before the tribunal is that it properly applied its mind to pooling and could explain why certain employees were included and others were excluded. In this case, the respondent explained at the outset that the object of the exercise was to reduce the number of Electricians. Logically therefore, it was the Electricians who made up the pool for selection. When the claimant suggested that TE should be included, he was given a proper explanation for TE's exclusion.

Selection Criteria

51 Our judgement is that the selection criteria were entirely appropriate; they were openly discussed with the affected employees; and suggestions for improvement were taken on board. There is no basis for the claimant's suggestion that the selection process was deliberately skewed to ensure that the claimant was selected for redundancy and that JP was retained.

Scoring

52 Ms Stoddard was able to provide a coherent and clearly credible explanation for each and every score given both to the claimant and to JP. We have no reason to doubt that the scoring was done in good faith.

53 It is hardly surprising that the unsuccessful employee in these circumstances wishes to question how some of the criteria have been applied and some of the scores awarded. The claimant was given the opportunity to do this. His concerns were listened to, and he received proper explanations.

Alternative Employment

54 The respondent is a very small organisation which at the material time employed just nine people including its sole Director. Ms Stoddard explained, and we accept her evidence, that clearly there were no alternative roles open to the claimant. The object of the exercise was to reduce the headcount.

Procedural Fairness

55 We find that the respondent operated a conspicuously fair procedure, fully compliant with ACAS Guidelines.

56 In the circumstances, we find that the claimant was fairly dismissed by reason of redundancy. His claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge
30 June 2022