EMPLOYMENT TRIBUNALS

Claimant: Mr P Cocks

Respondent: EI Group Limited

Heard at: Birmingham **On:** 13-17 June 2022

Before: Employment Judge J Jones
Ms S Outwin
Mr R Moss

Representation
Claimant: in person
Respondent: Miss G Rezaie (counsel)

JUDGMENT having been sent to the parties on 17 June 2022 and written reasons having been requested by the respondent on 24 June 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim and the issues

1. By a claim form presented on 1 January 2021, following a period of ACAS early conciliation between 24 November and 22 December 2020, the claimant brought claims for unfair dismissal and age discrimination following his dismissal for redundancy by the respondent on 31 October 2020 from his position as a Loss Prevention Manager.

2. The claims were considered at a preliminary hearing on 25 June 2021 when case management orders were made for case preparation and the parties were ordered to agree a list of issues. That agreed list was before the Tribunal (page 39-40 in the file of documents – see below). In summary, the claimant's case was that he had been unfairly selected for redundancy and that his selection was the result of direct age discrimination. The respondent's case was that age played no part in the claimant's selection, which it said was reasonable and lawful.

3. In discussion about the issues in the case at the outset of the hearing, the claimant confirmed that his claim of age discrimination was based on his comparison with another employee, Craig Houdley (CH), who was 52 years of age at the date of the

redundancy exercise. The claimant said he should have scored higher than CH in the scoring process and that CH should have been selected for redundancy in his place. The claimant confirmed after a full explanation by the Tribunal, that he did not rely in the alternative on a comparison with an hypothetical comparator.

The hearing

4. The hearing took place in person during evidence and submissions. The Tribunal gave oral judgment in person but provided a CVP link for witnesses to attend remotely.

5. The parties provided an agreed file or bundle of documents running to 279 pages. Two documents were added to the bundle by agreement and/or at the request of the Tribunal. These were a copy of the comparator's redundancy scoring matrix (p280-p283) and a copy of the document at p283 (added as p283A) incorporating the ages of the others in the pool for redundancy selection. References in these reasons to pages are references to the pages of that file unless otherwise stated.

6. The Tribunal heard oral evidence from the following witnesses (in the following order):

    - The claimant
    - Demelza Staples – former Director of Loss Prevention
    - James Pearson – former Head of Loss Prevention
    - Steven Carter – Senior Quality & Compliance Manager
    - Darren King – Director of Commercial Property & Revenue
    - Greg Parkes – Director of Estates

    Each witness produced a written statement as their evidence in chief.

7. The Tribunal received written submissions from counsel, supplemented orally, and Ms Staples made oral submissions on the claimant's behalf.

Findings of fact

8. Based on this evidence, the Tribunal made the following findings of fact on a unanimous basis:

Background

8.1 The respondent is a national pub chain.

8.2 The claimant is a 79 year-old man with a long career history in the hospitality business. He was a police officer before he began to work in the hotel and pub trade.

8.3 The claimant joined the respondent on 18 May 2015 as a Loss Prevention Manager. At the time of his recruitment, the claimant's daughter, Ms Demelza Staples, also worked for the respondent in the senior role of Director of Loss Prevention until August 2020 when she left the business. Ms Staples alerted the claimant to the vacancy in her team but was not involved in assessing his suitability for the role, or appointing him in anything other than

an administrative capacity, by arranging for the relevant appointment processes to be completed.

8.4 As Director, Ms Staples was a member of the Senior Leadership Team and led the team that the claimant worked within but was not his direct line manager. From September 2016 this was Mr Steven Carter, who was a Senior Loss Prevention Manager at the time. His job title has since changed.

8.5 The respondent operated its pubs on a tenanted basis under agreements with the publican tenants which made them what are often referred to as "tied houses". This meant that the publicans were contractually bound to purchase beer for sale on the premises from the respondent. Some of the pubs were also tied for the purchase of wines, spirits and minerals (WSM) and packaged goods such as bottled beers. This tied arrangement was integral to the respondent's business model as its profitability was heavily linked to its volume of beer sales. At times some publicans would breach these contractual obligations with the respondent. There was an incentive to purchase stock "out" if it could be sourced cheaper than from the respondent. The Loss Prevention Team's role was to monitor the purchase of beer and WSM from the respondent to ensure that publicans adhered to their contractual obligations to the respondent and to catch them if they were in breach and issue "charges" which were provided for by the contracts they held with the publicans.

8.6 The Loss Prevention Team at the time of the events which are the subject of this claim comprised 9 Loss Prevention Managers led by Steven Carter and Dan Neely. The country was split up into regions and each manager covered the premises in their region. Steven Carter and Dan Neely also worked day to day in loss prevention on a geographical patch as well as managing the team members in the South and North of the region respectively. Due to the nature of the business, together with the history of its growth through acquisition and merger, the team's portfolios differed greatly. For example, a largely urban patch in the North of England might encompass upto 600 premises situated close together that were tied for both beer and WSM. The claimant lives in Cornwall and his patch was Cornwall and the South West. He was responsible conversely for 240 premises which were spread out geographically and which had a smaller number of premises that were tied for WSM than some of the other regions. This was because of the history of the area which had involved an acquisition of a pub chain whose model did not include the supply of those products under the contractual arrangements that the respondent inherited.

8.7 Whatever the nature of a Loss Prevention Manager's patch, however, the principles and processes involved in the role were much the same. The managers were tasked with visiting their sites regularly on an unscheduled basis. This was to increase the respondent's visibility and act as a deterrent to publicans to "buy out" for fear of being caught with non-tied product on the premises on one of these spot check visits. There was some anecdotal evidence from the claimant's region that this practice worked in reducing loss, but there was no hard research data into landlord's behaviours and motivations in this respect.

8.8 The second aspect of the role involved the monitoring of beer sales via use of a system called "Bru-lines". This system would log the kegs of beer delivered

to a particular premise. By means of an on-site measurement mechanism, the system would then measure the volume of beer being consumed and create an alert if the indication was that more beer was being consumed/sold than had been supplied by the respondent to that premise. These alerts were known as “red reports” and the Loss Prevention Managers were tasked with following them up. This would entail an unscheduled visit to the premises in question, an inspection to see if product that had not been supplied by the respondent was in situ and a conversation with the landlord to explain the concerns that had been raised. Sometimes there was an easy answer – the Bru-lines measurement system might need calibration – the Loss Prevention Managers carried that out on site. At other times, the publican would be caught in breach of his or her agreement with the respondent and the Loss Prevention Manager would need to carry out an exercise to estimate the volume of “foreign” (i.e. non-respondent-sourced) beer that had been sold so as to calculate and issue a charge to the publican.

8.9 Where the premises were tied for WSM, there was no equivalent of Bru-lines reports to assist with the detection of contract breaches. Loss Prevention Managers had to be more wily and use their knowledge of the premises, the likely volume of sales of a particular product, the volume of purchases of that product from the respondent and their findings on inspection of the cellars. It was harder to detect breaches with this category of stock and was referred to by the respondent accordingly as the “unseen” aspect of the potential losses.

8.10 Another part of the role of a Loss Prevention Manager was to detect tampering. This was where the publican would seek to circumvent the Bru-lines monitoring equipment on site so as to avoid detection when he or she sold “foreign” beer. Investigating such conduct could take a long time and involve particular skills and knowledge of the systems and the ways they could be manipulated, but a patient and specialist Loss Prevention Manager could detect a breach that had been ongoing for a long period of time and thus the charges that were apt at the end of such an investigation could run to thousands of pounds.

8.11 Emotions could run high when Loss Prevention Managers visited premises. The premises were often the homes of the landlord and his or her family and may have been for many years. They could be a family heavily embedded in the community. The suggestion of impropriety might be most unwelcome and the potential for significant financial penalties or the risk to the future of a tenancy could create a highly charged environment ripe for conflict. Loss Prevention Managers had to navigate these sometimes choppy waters by building good relationships with their publicans over time and also using good interpersonal skills to communicate with them on visits with tact, consideration and diplomacy. If conflict occurred, Loss Prevention Managers needed skills in conflict management to assist them to de-escalate the situation. Indeed, the Tribunal heard from Ms Staples that she had insisted that the team were all trained in conflict management. This followed a couple of situations that had arisen which caused the respondent to reflect and consider that its staff needed to be skilled in this area not least to protect their own health and safety.

8.12 Ms Staples also introduced a requirement during the claimant’s employment for Loss Prevention Managers to carry out a BTEC (level 2, 3 or 4) course in Security Management. She did so in an effort to future-proof her team in light of impending mergers or acquisitions of businesses who operated a managed

house model where loss prevention involved a different skill set to that required when working with tenanted premises.

8.13 Loss Prevention Managers would discuss their work and performance with their line manager (Steven Carter in the claimant's case) on an as and when required basis – often by telephone as both parties were in field-based roles. There were such 121 conversations or, on occasion, meetings, regularly but they were not always fully documented. At times, the respondent's 121 performance review template was used to record the discussion. The Tribunal saw 2 examples of these that were prepared by Mr Carter after discussions with the claimant – dated 30 May 2019 (p130) and 7 February 2020 (p133). Mr Carter also carried out approximately bi-annual visits with his direct reports. This involved him effectively work-shadowing them for a day and attending licensed premises with the team member, watching how they communicated with the publicans, handled investigations and calculated and issued any consequent fines. It was Mr Carter's practice to give informal verbal feedback to his team member after such joint visits.

8.14 The Tribunal found that the claimant enjoyed a good working relationship with Mr Carter prior to the events that led to his dismissal. He made no complaints about Mr Carter's management and found no cause to do so prior to this time.

8.15 More formal appraisals occurred annually towards the end of the October-September financial year. There were also mid-year performance reviews documented in or about April each year. The respondent provided template documents to managers and employees to complete together during such appraisals. These template documents, and the system for uploading and completing them, changed after the 16/17 appraisal year when the process and documentation had been fully completed via an on-line portal. Managers and HR found this portal clunky and the business moved to a more paper-based process from 17/18 onwards. The result of the system issues in the 16/17 appraisal year meant that the claimant's fully completed appraisal document for 16/17 was not available either to the Tribunal or to Mr Carter when he came to score the claimant during the redundancy process in 2020. The appraisal document for 17/18 was available, as completed at both mid and end of year (p99-105). The appraisal document for 18/19 was available but only as completed at the mid-year point in approximately April 2019 (p120-126). In places, this document still read "17/18" but the Tribunal was told, and accepted, that this was because Mr Carter had over-typed the previous year's template and forgotten to change the date.

8.16 From 2017/18 onwards the appraisal process would lead to an overall score being given by a manager to an employee that was arrived at by considering both the individual employee's performance against his or her personal objectives for the year, plus their adherence to the company's values. The scores ranged from 1-6 (with 1 as high). A fully performing and competent team member was expected to achieve a 3 defined as "meeting requirements – overall performance in line with expectations exceeding in some areas".

8.17 The Loss Prevention Team were eligible for bonuses annually which were awarded on a discretionary basis, taking account of the annual appraisal score. Finance would provide a spreadsheet to senior managers to fill out with their proposals for their team's bonuses for the previous financial year. This was impregnated with formulas which meant that if finance wanted to

alter a proposed cash bonus figure for a given employee, they might have to overwrite the appraisal grading to achieve the desired result. This did not alter that individual's appraisal grade for the year but it meant on occasion that documents could exist within the business which showed a different appraisal grade for an individual for a given year that had been created for bonus purposes.

8.18 The Loss Prevention Team met on average 4 times per year. In advance of such meetings, team information would be produced and shared similar to that which was provided to the Tribunal at p127. This document summarised the number of visits carried out and the charges issued (for beer, WSM and packaged products) by each team member over a period of time. The Tribunal was not provided with clear evidence as to the period of time that was covered by p127. The parties agreed, however, that team members were expected to carry out approximately 8-10 visits a week and that the claimant was a high performer from the point of view of this particular metric. Page 127 showed the claimant as having carried out 95 visits. The Tribunal concluded that these were most likely to have been quarterly statistics (considering also page 1 referring to quarterly performance figures) – or at most 6 monthly. Whilst there were a number of measures of performance for Loss Prevention Managers, high scores for visits and for charges were seen as positive indicators by the respondent.

Reorganisation and Redundancy

8.19 In or about March 2020 EI Group merged with Stonegate Pub Company. The Board planned that, as a result of this merger, there would be cost-savings possible in support functions. A management consultancy was commissioned to investigate and make recommendations to the Board.

8.20 Hot on the heels of this development, the UK government ordered the closure of all licensed premises with effect from 20 March 2020 in response to the Covid-19 pandemic. There was for a long time no information within the respondent's business as to when it might be possible for it to trade again. This caused the respondent's Board to further review its cost-base and seek savings. This also led to the claimant, and the rest of his team, being placed on furlough leave.

8.21 The outcome of these joint reviews was that, on 24 August 2020 the respondent's Chief Executive, Simon Longbottom, sent an email to all staff, including the claimant, announcing a programme of reorganisation and restructuring that "may result in up to 300 roles being made redundant across our support teams" (p134-5). The email explained the business rationale behind the proposals. Staff were advised that a collective consultation forum was to be elected, following which a 45-day consultation period would commence on 10 September 2020.

8.22 On 8 September 2020 senior managers were briefed on the process that was to be followed and they were provided with guidance and scripts to be used for consultation meetings (pp136-147). At or about this time Darren King, then Director of Special Projects, was given the responsibility of overseeing the restructuring of the Loss Prevention Team, Ms Staples having by this point

left the business. He was advised that the Board had determined that, for reasons of cost and efficiency, the team of Loss Prevention Managers would need to reduce from 9 to 6. Stonegate operated largely managed houses with a different model for dealing with loss prevention so the merger did not lead to a duplication of roles in the claimant's team, although it did in others.

8.23 Mr King invited the claimant and the rest of his team to an online briefing session about the proposals to take place on 14 September 2020. The Tribunal found that an invitation to that session was sent to the claimant. There was a dispute of fact as to whether or not the claimant attended. He said that he did not attend but Mr King believed that he saw him there. There was no independent evidence to assist with this issue one way or the other and the Tribunal did not consider it necessary to determine it one way or the other for this reason. Whether it was by attendance at the on-line briefing or via a separate personal telephone call from Mr King (as the claimant alleged) the information was imparted to him that there was to be a reorganisation within the business primarily to save cost in the support functions and that this was to result in the loss of 3 posts within the Loss Prevention Team. This was followed up by an email to the claimant on 16 September 2020 (p148) from the HR Director, Mr Tim Painter, confirming that the claimant's role was at risk of redundancy, and why. The email confirmed the process that had commenced for collective consultation and that, if selections became necessary, they would be done by the application of selection criteria which would be the subject of collective consultation. The claimant was advised that individual consultation would commence on 7 October 2020.

8.24 Mr King and the other senior managers were briefed again on 18 September 2020 and provided with guidance on the selection process to be used and the timeline that was to be followed for each step. They were advised that the proposed selection matrix was on the intranet for staff to consider and feed back to their employee representative and that it would be finalised at the Employee Forum scheduled for 24 September 2020 (p150-155).

8.25 On 25 September 2020 the selection matrix documents were circulated to senior management, as agreed at the Employee Forum (p156-165). These included a template Selection Matrix with Guidance Notes for completion. The selection matrix included scoring guidance so that managers were guided as to what sorts of considerations would lead to a score in each bracket. So, for example, when assessing an employee under the criterion "skills", the manager should award an employee who did not have the relevant technical and practical skills required for the role 1 or 2, but an employee who has all the relevant technical practical skills for the role 9 or 10, with variants in between to justify scores between 3-5 and 6-8. Different weightings were given to different criteria, and a place on the matrix form was provided for manager's comments. The accompanying guidance notes for managers on completion of the matrix were a 4-page "how to" guide including advice such as "*in order to ensure as much impartiality to this process as possible, two line managers should complete the scoring together*" (p162).

8.26 Mr King briefed Mr Neely and Mr Carter on these documents and the other information he had been given about the process to be followed. They were

also advised at about this time that their own role of Senior Loss Prevention Manager was not at risk.

8.27 It was agreed that Mr Neely and Mr Carter would complete the scoring matrix for each of the managers in their teams in the North or South. Mr Carter therefore completed the matrix for the claimant (p166). He awarded him the following scores for each of the criteria used. The criterion of "relevant qualifications" was excluded from consideration as being not relevant for this team.

Skills	6/10
Job Performance	6/10
Experience	8/10
Potential	5/10
Flexibility & Attitude	8/10
Disciplinary record	5/5

After relevant weightings had been applied, this gave the claimant a total score of 66.

8.28 Mr King, Mr Neely and Mr Carter then held a meeting over Teams or Zoom to consider the scores that had been given to each team member. Mr King's role in this meeting was to witness the discussions of the two scoring managers to ensure that they followed the respondent's procedures and only took account of relevant matters. The role of Mr Neely and Mr Carter was to present the scores they had given their team member, justifying them objectively and to act as moderator for the scores given by their counterpart.

8.29 The meeting followed this process, with the score for each person being considered against each criterion. The output of those discussions was a series of scores across the national team that spanned 48 to 91. The breakpoint in the scoring was 75 with the claimant at 66 being ranked 7th out of 9 in the group. The claimant was therefore provisionally selected for redundancy. The claimant's comparator in his age discrimination claim, Mr Craig Houdley (CH) scored 75.

8.30 On 6 October 2020 the claimant was telephoned by Mr Carter, advised that he had been provisionally selected for redundancy and invited to an individual consultation meeting to take place the following day. This was confirmed in writing in an email (p180-181) to which was attached a copy of the claimant's matrix.

8.31 The claimant attended the individual consultation meeting on 7 October 2020 with Mr Carter and Mr King. Mr Carter had been given a template to complete whilst carrying out this meeting, and a script, which caused the meeting to take the form of a somewhat rigid question and answer process. This irritated the claimant who wanted a free-flowing discussion to enable him to launch his challenge to the scores he had been given by Mr Carter. The claimant displayed anger in this meeting for which he was later to apologise to Mr Carter. He made sarcastic remarks such as asking if he was being interviewed under caution and stating that he was not "stupid or senile". He

ended the meeting by stating that he would not be holding any punches and that there would be "blood on the table" after the meeting. The Tribunal accepted the evidence of Mr Carter that he found the claimant's behaviour in this meeting quite intimidating.

8.32 Mr Carter took account of the claimant's feedback about his scores and reviewed them after this meeting, in consultation with Mr Neely. Unfortunately, he did not re-date the matrix and he overtyped the matrix again when he changed the scores a second time later on. The Tribunal found, however, that the matrix at p187-190 was the version of the matrix for the claimant as it existed at the time of his dismissal. After the meeting on 7 October 2020, Mr Carter increased the claimant's score to 8 in the category of Job Performance which, after a applying a weighting of 2, increased his score to 70 (p191). This was fed back to the claimant in a further consultation meeting on 9 October with Mr Carter and Mr King. This meeting comprised a further detailed discussion of the claimant's scores and the reasons for them. It was at this meeting that that claimant apologised to Mr Carter and said he "shouldn't have got angry" at the previous meeting.

8.33 Mr Carter reviewed the claimant's scores a third time after this meeting and increased his score for Experience further to 9/10, taking his final score to 72. The revised matrix was sent to the claimant on 13 October 2020 (p196).

8.34 On 19 October 2020 the claimant was invited to a formal redundancy meeting on 26 October 2020 with the potential outcome that he could be confirmed as redundant (p210-211).

8.35 On 25 October 2020 the claimant lodged a grievance with Mr Carter (p212). This criticised Mr Carter's scoring of him and concluded that he was submitting the grievance "based on ageism" which he alleged was the reason for his selection for redundancy.

8.36 The claimant's redundancy meeting went ahead on 26 October 2020 with Mr Carter and Mr King. The claimant chose not to be accompanied. He was confirmed as dismissed for redundancy and this was followed up in writing on 28 October 2020 (p220). The claimant's effective date of termination was 30 October 2020. He was paid his redundancy payment, pay in lieu of notice, outstanding bonus and accrued holiday pay. The claimant made no criticism in these proceedings with the payments he received on termination.

8.37 On 1 November 2020 the claimant sent an email to Mr Carter (p221). It included some personal criticisms of him such as *"I have to say Steve that your performance to date has been nothing less than poor*" and "*you moved into your current position as far as I could see with little or no management experience*". It ended with "*shame on you Steve!*" and "*try now to become a manager and act professionally*".

8.38 The claimant appealed against his dismissal and agreed that this should be determined along with his grievance dated 25 October 2020. Mr Greg Parkes was appointed to deal with both matters. There was no criticism by the

claimant of Mr Parkes' impartiality and the Tribunal found him to be an independent-minded manager who engaged with his task with an open mind.

8.39 Mr Parkes met with the claimant on 18 and 24 November 2020 to better understand his grounds for complaint and hear his appeal and grievance. He spoke with Mr Carter and Mr King and examined the claimant's matrices and the team's appraisal documents. He created his own spreadsheet of the team's scorings which the Tribunal considered evidence of the thoroughness with which he approached the task he had been given. Having carried out his investigations and listened to the claimant, Mr Parkes upheld the decision to dismiss the claimant as redundant. This was confirmed in writing to him in a letter dated 30 November 2020 in which he explained his rationale both on the redundancy appeal and in connection with the grievance alleging age discrimination for which he had found no evidence.

8.40 By way of final finding, the Tribunal heard that when the claimant commenced employment he was not admitted to the claimant's pension scheme nor was he provided with access to the death in service or medical schemes. In relation to this, the Tribunal found that this was indeed the position. The reason for these exclusions was outlined in an email chain at p106-109, namely that the insurers/providers in each instance would not admit a member of the claimant's age. The respondent made good the claimant's lost pension contributions and amended his contract to provide for him to receive the equivalent cash benefit after he raised the matter in 2018 (p114). It was common ground that Mr Carter played no part in these discussions.

The law

9. The starting point when considering a claim of unfair dismissal is section 98 Employment Rights Act 1996 (ERA) which provides as follows.

98 General

(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) …

(b) …

(c) is that the employee was redundant,

> (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.

10. It follows from these statutory provisions that where, as here, the employer admits dismissing the employee, the burden is on it to satisfy the Tribunal with credible evidence of its reason for doing so and to show that it is one of the potentially fair reasons falling within section 98(2). As Cairns LJ said in **Abernethy v Mott Hay and Anderson** [1974] IRLR 213, [1974] ICR 323: 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. An employer who fails to cross this hurdle will not be able to satisfy a Tribunal that its dismissal of the claimant was fair.

11. If the Tribunal is satisfied that the employer has established a potentially fair reason, the Tribunal must then go on to consider whether the dismissal was fair or unfair applying the test in paragraph 98(4) above. The Tribunal should consider whether dismissal was "within a range of reasonable responses open to a reasonable employer"[1], recognising both that there is often more than one reasonable position to take in response to a set of facts and that it is not for the Tribunal to substitute what it might have decided if faced with those facts in place of the employer. This can often be frustrating for employees, who want to know what the Tribunal, a truly independent observer, would have done faced with the situation they found themselves in. The law is clear, however, that is not a matter for the Tribunal to consider. We must solely review the employer's decision, holding management to account simply as acting within a reasonable range of fair behaviours.

12. In a case such as this one, where the employer claims that the reason for dismissal was redundancy, the Tribunal must consider whether the facts proved satisfy the definition of redundancy in section 139(1) of the ERA. This states:

> **139 Redundancy**
> For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
> (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

[1] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT*

(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.

13. Referring to the application of this definition of redundancy, Lord Irvine LC in **Murray v Foyle Meats Ltd** [1999] ICR 829 stated:

> "*My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation*."

So it is that the Tribunal must consider two questions – first, whether there was a redundancy situation within the statutory definition; and, secondly, whether that was the operative reason for the dismissal.

14. When going on to consider fairness, the Tribunal reminded itself of the seminal decision on redundancy of **Williams v Compair Maxam Ltd** [1982] ICR 156. The first principle derived from this decision of the Employment Appeal Tribunal is that it is not the function of the Tribunal to decide if it would have been fairer to act in some other way, a point to which we have already made reference above. Secondly, in a redundancy case the EAT went on to set out the principles which a reasonable employer will usually work within in the context of good industrial relations stating that:

> *"Reasonable employers will seek to act in accordance with the following principles:*
>
> *1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
>
> *3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*

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

15. These are not principles to be applied slavishly in such a way as to detract from the overriding question which is whether the employer behaved reasonably. A reminder to this effect was issued by the Employment Appeal Tribunal in **Boal and Another v Gullick Dobson Ltd** [1994] Lexis Citation 2232. The relevant passage in that decision is on page 4 when Judge Hull QC states:

"When one goes through these cases and considers them, as we have, with the assistance of Counsel, one must remind oneself always that it is one question that has to be asked: is section 57(3) complied with? Or, to put it another way, has the employer acted reasonably? The guidelines may be very useful but, overwhelmingly, what is important is that the Industrial Tribunals should look fairly and squarely at the conduct of the employers as illuminated by the evidence given. In addition to the guidelines and, perhaps, much more important, they must ask themselves, "Was this manager sincere and honest in the way that he applied the marking? Was he guilty of favouritism? Do we think he has given his evidence honestly?" These questions, in most cases, will be far more important than the questions raised by the guidelines, although I am not for one moment suggesting that the guidelines should be overlooked."

16. When looking at the issue of consultation, the Tribunal took account of what the Court of Appeal reminded us in **King v Eaton (No1)** [1996] IRLR 199 quoting from **R v British Coal Corporation and Secretary of State for Trade and Industry ex p Price** [1994] IRLR 72 with approval that:

"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; (d) conscientious consideration by an authority of a response to consultation."

17. When looking at fair selection criteria we took account of the need for as much objectivity as possible and also considered the words of Underhill P in **Samsung Electronics v Monte Cruz** UKEAT/0039/11/DM -

*"27. We take first the reference to subjectivity. "Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement, and certainly not in the context of an interview for alternative employment: cf. the observations of HH Judge Smith in **Ball v Balfour Kirkpatrick Ltd** (EAT/823/95) quoted in **Morgan** at para. 32 (p. 381). Given the nature of the Claimant's job, we see nothing objectionable in principle in his being assessed on "subjective" criteria. Although the Tribunal says that it would have been better to use the person specification as the basis of assessment we are unclear how that would have avoided subjectivity.*

28. We see more force in the criticism that the particular criteria adopted were nebulous. We would be hard put ourselves to assign a clear meaning to some of the terms used in the assessment (itemised at para. 4 above). But lawyers must be wary of assuming that terms that look to them like mere management–speak have no meaning to their regular users. Most large modern businesses have adopted systems

> *of appraisal, often with the active co-operation of employee organisations, which, it must be assumed, they find valuable but whose language would not score highly in an essay competition. Tribunals must not allow a disdain for such terminology to lead them into treating such systems as necessarily worthless.*

18. On the fairness of selection we found assistance in the decision of the Court of Appeal in **British Aerospace v Green** [1995] ICR 1006. It held:

> *"[I]n general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.*
>
> *The Tribunal must not embark on a re-assessment exercise. I would endorse the observations of the Employment Appeal Tribunal in Eaton Ltd v King and others [1995] IRLR 75 that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based."*

19. The Tribunal also took account of the additional authorities cited to us on this point by counsel for the respondent, namely **Mitchells of Lancaster (Brewers) Ltd -v- Tatersall** [2012] 5 WLUK 842, in which the EAT said at [21]:

> "*The Tribunal in this case also criticised the criteria adopted by the Respondent because they were not "capable of being scored or assessed or moderated in an objective and dispassionate way". Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises."*

Further, in **Swinburne and Jackson LLP -v- Simpson** [2013] 11 WLUK 660, a differently constituted EAT stated at [26]:

> *… The simple fact is that in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgment and a degree of subjectivity. It is well settled law that an Employment Tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness. …"*

Discrimination

20. The definition of direct discrimination is to be found in section 13 Equality Act 2010 (EqA), which provides that "a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

21. Where the protected characteristic is age, as here, the respondent may offer a justification for any less favourable treatment found, but that issue did not arise in this case.

22. Recognising that evidence of discrimination is often very hard to find, the EqA goes on to allocate the burden of proof between the parties in this way (in section 136)

> "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".
>
> The section does not apply if the respondent employer proves that discrimination did not occur.

Conclusions

23. What was the reason for dismissal?

The Tribunal found that the reason for dismissal was that the Board of the respondent had identified a need to reduce headcount across the support areas of the business in order to reduce cost and rationalise the support functions post-acquisition. In particular, it had been identified that there was a reduction in the need for Loss Prevention Managers of 3, the post which the claimant held. This set of circumstances fell squarely within the definition of redundancy in section 139(b)(i) ERA because there was a reduction in the need of the business for employees to carry out that work. The reason for dismissal was therefore redundancy.

24. Did the respondent act fairly?

Selection for redundancy
There are a number of considerations here – consultation, selection and alternative employment. The Tribunal considered especially closely the method of selection applied by the respondent in this case, so we will start there.

As the Tribunal has found, the claimant was placed within a pool which included all 9 Loss Prevention Managers, regardless of the geographical location within which they worked. This was reasonable and not challenged by the claimant.

25. Secondly, the 7 criteria that were devised for selection were based on their face on a desire to keep within the business those staff whom the respondent most wished to retain taking account of the likely future of the business and its intended direction of travel. These criteria were focused on skills and abilities – not health, attendance or other personal attributes. The criteria were discussed and agreed with the employee representatives. Detailed guidelines were provided to guide managers as to what each criterion meant, and how it was to be used. There was also a key provided on the Redundancy Selection Matrix as to what the managers should be looking for to justify a score in each of the 4 brackets 1-2, 3-5, 6-8 and 9-10. The Tribunal considered that these were the hallmarks of an employer seeking to introduce as much objectivity and consistency

into the process as possible and to try and exclude opportunities for managers to be influenced by unfair or unlawful factors in the scores they gave to their team members.

26. Of course, such attempts are not always successful and much turned in this case on the Tribunal's assessment of Mr Carter, the claimant's line manager, who was the person who scored the claimant and who, the claimant said, was therefore responsible for under-scoring him for reasons related to his age, or otherwise.

27. The Tribunal found Mr Carter to be a measured, thoughtful and honest witness. His evidence gave all 3 of the Tribunal members the clear impression that he was a diligent person who took his work responsibilities seriously, and who was certainly alive to the very serious impact that scoring his team in this redundancy exercise could have upon individuals' livelihoods. When challenged about a particular score that he had given to the claimant for one criterion or another, Mr Carter responded with an evidence-based explanation.

28. An example of this was under the criterion of Job Performance. Initially, Mr Carter scored the claimant 6/10 under this criterion. He later agreed to increase this to 8/10 following consultation with the claimant. Mr Carter was consistent in his evidence that he believed that the claimant did have a good range of skills for the role but he felt that there were two areas in particular in which his performance was lacking.

29. The first of these areas was in relation to the claimant's work in loss prevention in relation to WSM. The second was in relation to his inter-personal skills in dealing with both publicans and, on occasion, colleagues. The Tribunal considered that there was independent documentary evidence to support this witness' assertions in this respect. In the case of WSM loss prevention, it was a formal performance objective for the claimant to improve his knowledge in this area in the financial year 2017/18 (page 101). Mr Carter's feedback for that year showed that the claimant still had work to do on that area and it was therefore carried forward as a developmental objective for 2018/19 (p104; p122). At his mid-year review in 2018/19 the claimant himself identified that he could have looked more closely at bottles and WSM. On 3 May 2019 the claimant's personal development review referred to him carrying out a WSM-focussed project and by 7 February 2020 he was still to "push on and see more charges across other categories" despite generally good performance in the year in other areas.

30. In relation to inter-personal skills, the Tribunal accepted that Mr Carter had a genuine belief that the claimant needed to adopt a less confrontational and abrasive style with publicans, and further that the claimant had not accepted Mr Carter's feedback in this respect. The Tribunal saw first-hand the claimant's communication style which it would describe as very confident and assertive. The Tribunal could see how the claimant's references to his extensive "50 years" of work and management experience in the hospitality trade (evident on a number of occasions during his evidence) could be interpreted as inferring that he knew more than the person he was talking to and had nothing left to learn. By far the most powerful evidence to support the genuineness of Mr Carter's concerns about the claimant's lack of emotional intelligence or empathy on occasion, however, was in his email to Mr Carter himself on 1 November 2020. Although the claimant might have been upset or frustrated in the redundancy consultation meeting on 7 October 2020, this email was a calculated written communication which the Tribunal found was unnecessarily rude and arrogant in tone and contained quite personal criticisms of Mr Carter which were not in the Tribunal's judgment merited. The Tribunal concluded that the claimant was capable of ill-chosen words and behaviours towards others as Mr Carter said he had observed on occasion when he was out in the field working with him.

31. The Tribunal also took account of the very positive evidence in the bundle about the claimant's performance in the role of Loss Prevention Manager in the form of comments from colleagues (e.g. Mr Hire at p108), appraisal scores and comments and statistics showing his very high visit rates. In the Tribunal's view, however, this evidence did not alter the reasonableness of Mr Carter's approach to the scoring of the claimant. The Loss Prevention Team was a high performing team and Mr Carter was positive about the claimant's performance in a number of respects. The claimant was good at his job and neither the respondent nor Mr Carter sought to suggest otherwise. However, the Tribunal reminded itself that this was not a performance management process and that, with the possible exception of Mr Horemans, the team as a whole, including the claimant, scored highly against the agreed criteria. It was most unfortunate that the claimant, with a score as high as 72, including 8s and 9s for some criteria, stood to be selected for redundancy, but that was the unfortunate outcome of the exercise.

32. The Tribunal considered the specific points made by the claimant as follows. First, the removal of the criterion of "qualifications". The claimant argued that this was done deliberately to ensure that CH scored higher than him to meet Mr Neely's desire to ensure that CH was retained because of a personal connection or preference which he forced upon Mr Carter. The Tribunal found no evidence to support this assertion. On the contrary, Mr King and Mr Carter were both unshakeable in their evidence that the scoring exercise was conducted transparently, that no pressure was applied to Mr Carter to score in a particular way and that the reason for removal of the criterion of qualifications was simply because there were no essential qualifications for the role. The Tribunal found that this was consistent with the agreed guidelines for managers (p163).

33. Secondly, the Tribunal considered the claimant's argument that more appraisal data should have been considered to inform the scoring process. The Tribunal accepted the respondent's evidence that two years' appraisal documents were considered for all team members because such information was available from HR and that it was deemed appropriate by Messrs Carter, Neely and King to consider relatively recent performance in role only. This was a reasonable decision and was not done to disadvantage the claimant.

34. Accordingly, the Tribunal concluded that the claimant's selection was genuinely based on his score against the agreed criteria for selection and that Mr Carter carried out the scoring exercise fairly giving the claimant the scores he believed to be right based on his assessment of the claimant's skills and abilities over 3 years of managing him. This genuine assessment was not, in the Tribunal's judgment, tainted by unfair or unlawful considerations.

Consultation

35. The Tribunal found that the respondent also behaved reasonably in the way in which it consulted with staff during this large reorganisation and redundancy exercise. Collective consultation requirements were satisfied by the election of employee representatives and discussions with an Employee Forum, the minutes of which were shared with all staff affected.

36. In relation to the claimant individually, he was informed of the information he needed to know in order to enter consultation on or about 14 September 2020. He was then invited to a 121 meeting to discuss his scoring on 7 October 2020 and given a copy of his matrix beforehand. His observations were considered and led to a change in his score on two occasions, which was evidence of meaningful consultation. In total he participated in 3 individual consultation meetings and 2 meetings with an independent senior manager, Greg Sykes, to consider his grievances about Mr Carter's approach and his appeal against dismissal. The respondent carried out sufficient and satisfactory consultation, in the Tribunal's judgment.

37. There was little if any attention given during the hearing to the issue of suitable alternative employment. This was because the claimant was clear in his evidence that he received notification of vacancies across the business but did not wish to apply for any of them. In the event, he found alternative work very quickly which he started the day following the termination of his employment with the respondent, albeit at a lower remuneration.

38. Applying the law that the Tribunal must adhere to, and considering the facts as found, the Tribunal concluded that the respondent's decision to dismiss the claimant for redundancy fell within a range of reasonable responses and was therefore fair.

Age discrimination

39. The claimant demonstrated that he was treated less favourably than his comparator, CH, in that he was scored 72 in the redundancy selection process and CH was scored 75, leading to his dismissal.

40. The claimant also proved that he was in a different age bracket to CH at the time of his dismissal. He was 77 at that date whereas CH was 50.

41. The Tribunal was not satisfied, however, that the claimant had proved facts from which it could conclude that the reason for the difference in treatment was the protected characteristic of age. There was evidence that CH had in the past been the subject of a performance improvement programme (PIP) that was successful. There was also evidence that CH's performance had been discussed at Team Meetings and that the Director of the Loss Prevention Team, Ms Staples, thought his performance was a problem, sufficient to justify a second PIP. CH had been absent from the business following a heart attack but the Tribunal was given no evidence of the dates of this absence or of the detail of the medical condition which led to it. Mr Neely's scoring of CH did, however, reflect certain issues in relation to performance and also highlighted areas in which he was felt to be a strong performer. In relation to a number of the criteria (Experience, Flexibility & Attitude, Job Performance) the claimant scored the same as or higher than CH. The Tribunal found no evidence to suggest that the scores given to either the claimant or his comparator, CH, were so out of kilter with their actual performance as to give rise to the inference that some other issue must have been at play.

42. Furthermore, and a significant problem for the claimant's age discrimination claim, was that of those who were retained in the business following the selection process, one (AD) was also over the age of 70 (p238A). The ages of those made redundant were 77, 35 and 51 and of those retained over an age range of 43 to 71. This did not give rise to a potential inference of age discrimination, absent an adequate explanation from the respondent and the burden of proof did not therefore shift to the respondent to explain the difference in treatment.

42. Accordingly, the claims of both unfair dismissal and age discrimination fail and are dismissed.

Employment Judge J Jones
3 August 2022