

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: Mr C Walker
Respondent: Wm Morrison Supermarket Limited

Heard at: Leeds

On: 4, 5, 6 and 7 October 2022 and 12 October 2022 (in chambers)

Before: Employment Judge Deeley, Ms J Noble and Mr R Webb

Representation:

Claimant: In person (with assistance from his wife, Mrs A Walker)
Respondent: Mr O Holloway (Counsel)

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1. The claimant's claim of unfair dismissal under s98 of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant's claim of indirect age discrimination under s19 of the Equality Act 2010 fails and is dismissed.

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REASONS

INTRODUCTION

Tribunal proceedings

1. Employment Judge Buckley managed this claim at a preliminary hearing on 3 November 2021, attended by the claimant (representing himself) and the respondent's representative.
2. We considered the following evidence during the hearing:
 - 2.1 a joint file of documents and the additional documents referred to below;
 - 2.2 witness statements and oral evidence from:
 - 2.2.1 the claimant (including one additional statement, which the respondent had redacted – see below); and
 - 2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) Mr Darren Coker	Regional Manager (South)
2) Mr John Sampson	Shift Manager (Wakefield)
3) Mr Simon Akeroyd	Shift Manager (Wakefield)
4) Mr Edmund Walker	Shift Manager (Wakefield)

3. The parties provided further documents during the hearing. We considered the parties' objections to any documents before they were included in the hearing file.
4. We also considered the helpful oral and written submissions from the claimant and from the respondent's representative. Disclosure
5. The claimant provided documents relating to his search for alternative employment, which the respondent accepted were relevant to his claim.
6. The respondent provided several documents shortly before and during the course of the hearing, including three updated versions of a table of the Wakefield Team Managers prepared for this hearing (the "Wakefield Table").
7. We were disappointed by the volume of late disclosure of documents by the respondent. Many of these documents were clearly relevant to the claim and could have been disclosed and/or included in the hearing file at an earlier stage in proceedings. We note

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that the respondent is a large organisation with considerable resources and access to HR and legal advice.

8. We spent a considerable amount of time with the parties considering the additional documents and discussing any objections to their inclusion in the hearing file. This could have been avoided if disclosure had taken place at the time ordered by Judge Buckley.
9. The additional documents included:
 - 9.1 a letter placing the claimant at risk of redundancy (which the claimant had seen during his redundancy consultation);
 - 9.2 the 'briefing pack', including the respondent's business case for redundancy, and accompanying slides;
 - 9.3 update documents provided to employees during the collective consultation process (which the claimant had seen during his redundancy consultation);
 - 9.4 investigation notes relating to the claimant's allegations that two fellow Team Managers had shared the presentation briefing.
10. We ensured that the claimant had sufficient time to read any documents which he had not previously seen and that he had the opportunity to comment on these at the start of his witness evidence.
11. The Wakefield Table was a document prepared by the respondent for these proceedings. It contained an anonymised list of Team Managers with their age, salary, PDR, interview and presentation scores. The claimant identified some anomalies within the Wakefield Table at the start of the hearing. The respondent provided a second version of the Wakefield Table, with the initials of all Team Managers added at the Tribunal's request to enable the claimant to consider whether there were any other points he wished to raise.
12. During the course of the hearing, the respondent provided a further two versions of the table with corrections to the data provided in previous versions. The latest version was provided after the witness evidence had concluded. The respondent's representative apologised for the multiple corrected versions of the table, explained the mistakes that were made and offered that Mr Coker could provide witness evidence on the same.
13. We considered on the final day of the hearing whether it would be appropriate to order specific disclosure of a selection of the original documents on which the Wakefield Table was based in order that any further errors could be identified. The respondent objected to this suggestion on the grounds that the changes did not significantly impact the claimant's claims. The claimant (having been given an adjournment to consider his position) maintained that the data contained in the fourth version of the Wakefield Table was unreliable, but decided that he did not wish to view the original documents.
14. We decided not to make an order for specific disclosure for three key reasons:

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- 14.1 as noted in the Judgment below, the claimant's ability to secure a new Team Manager role was based on his own score rather than on the scores of any other Team Managers. This was because any Team Manager who scored below the benchmark of 53 points was not considered for a new Team Manager role. At the Wakefield site, there were fewer Team Managers who met the benchmark than there were new Team Manager roles;
- 14.2 as noted in the Judgment below, the claimant had not adduced any evidence during the hearing of the 'hidden criteria' that formed the provision, criterion or practice for his indirect age discrimination claim referred to in the list of issues; and
- 14.3 if we had ordered specific disclosure, this would have involved adjourning the hearing for such disclosure to take place and postponing submission and the Tribunal's deliberations. This would have increased the time and costs incurred by both the parties and the Tribunal in dealing with this claim.

Claimant's additional statement

15. The claimant's additional witness statement originally referred to settlement discussions. The Tribunal did not see a full copy of that statement because the respondent had redacted it before providing copies to the Tribunal. The claimant checked the redacted version on the morning of the first day of the hearing and confirmed that he was happy for the redacted version to be provided to the Tribunal.

Adjustments

16. We asked if either party needed any adjustments to the hearing. Both parties confirmed that they did not need any adjustments.

CLAIMS AND ISSUES

17. Employment Judge Buckley agreed the list of issues (or questions) raised by the claimant's claim at the preliminary hearing on 3 November 2021. We amended the list with the agreement of the parties as follows:
 - 17.1 time limit issues; and
 - 17.2 justification defence.
18. An updated copy of that list is at the Annex to this Judgment.

FINDINGS OF FACT

Context

19. This case is dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK)

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Ltd [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

20. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the Gestmin case:

“Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

21. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

22. The respondent is a national supermarket retailer, employing around 150,000 employees across the UK. The claimant was employed by the respondent from 3 September 1990 until he was dismissed in early April 2021. The date on which the claimant's employment terminated was a matter of dispute between the parties and is discussed in more details later in this Judgment.
23. The claimant's role at the time of his dismissal was that of Team Manager, based at the respondent's Wakefield logistics site (“Wakefield”). The claimant was well regarded by management at Wakefield and had worked at the site for around 30 years.
24. The respondent's staff based at Wakefield at the times referred to in the claimant's complaints included:

Name	Role at the relevant time
Mr Paul Mackay	Site Manager
Mr Ian Barratt	Warehouse Manager
Mr John Sampson	Shift Manager and elected employee representative
Mr Simon Akeroyd	Shift Manager

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Mr Jamie Sanderson	Shift Manager
Mr Eddie Walker	Shift Manager
Mr Paul Anderson	Team Manager and elected employee representative

25. Mr Bob Mackay was the Regional Manager for three of the respondent's sites, including Wakefield. Ms Sarah Howard and Ms Teresa Page were members of the respondent's HR team, who provided support to sites including Wakefield.

Respondent's existing management structure

26. The respondent's existing structure at its Wakefield logistics site included:

- 26.1 the Site Manager;
- 26.2 Warehouse Managers for different warehouse (including Fresh, Ambient, Freezer);
- 26.3 Shift Managers;
- 26.4 Team Managers;
- 26.5 Team Leaders; and
- 26.6 Warehouse operatives.

Restructure and redundancy proposals

27. The respondent announced that it was proposing to restructure its management teams at seven of its logistics sites, including Wakefield on 19 January 2021.

28. The redundancy proposal included:

- 28.1 reducing the total numbers of Shift Managers at each site, such that there would only be a maximum of one Shift Manager responsible for any particular shift;
- 28.2 reducing the total numbers of Team Managers at each site;
- 28.3 changing the working hours and patterns of managers, such that:
 - 28.3.1 managers would work 40 hours per week, rather than 45 hours per week; and
 - 28.3.2 managers would work four shifts of 10 hours each, rather than five shifts of 9 hours per week, thus reducing the number of days that each manager worked on site;
- 28.4 creating specialist roles (in areas such as Health and Safety and Backhaul);
- 28.5 removing the role of Team Leader at each site;
- 28.6 introducing handheld tablet computers for managers at each site; and

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28.7 broadening the management aspect of the Team Managers roles, with the intention that they would spend more time managing warehouse operatives and less time carrying out operative tasks (such as picking goods). This was in part so that Team Managers could cover more managerial tasks when there was no Shift Manager on site. The new Team Manager job description that the respondent was proposing placed far more emphasis on using technology and data to continuously monitor colleague performance than the previous job description. For example it stated:

“I’m responsible for...Process compliance across an area of responsibility including a team of colleagues, motivating them to deliver great service to store. I am accountable for daily performance and productivity, the flow of products during a shift and managing warehouse standards. I am able to use technology and data to manage the operation and can use tablets to monitor real time information during a shift. I deliver engaging communications and support my colleagues in a way which motivates and involves them to do their best work for Morrisons.

...

I am comfortable using systems, software and reports to manage the performance of my colleagues continuously throughout the Shift.”

29. The claimant accepted in his oral submissions at the end of this hearing that the trial introduction of new technology at Wakefield from February 2021 had freed up a lot of his time. He said that it was far easier to access data using work stations in the Fresh warehouse, than it had been previously. The claimant said that the use of technology gave him more time to manage staff and spend time on priority projects because managers did not need to ‘dig through information’.

30. The respondent proposed that there would be headcount reductions at the Wakefield site as follows:

30.1 a reduction from 11 Shift Managers to 9 Shift Managers; and 30.2 a reduction from 48 Team Managers to 45 Team Managers.

31. The claimant, along with all other Shift Managers and Team Managers at the seven logistics sites, were placed at risk of redundancy. The claimant received a letter dated 19 January 2021 confirming that he had been placed at risk of redundancy.

Collective redundancy consultation

32. The respondent arranged for the election of employee representatives for the affected managers at all sites. There were two employee representatives elected for each of the seven logistics sites affected by the proposals (fourteen representatives in total). Each site had one Shift Manager representative and one Team Manager representative. At Wakefield, Mr Sampson was the Shift Manager representative and Mr Anderson was the Team Manager representative.

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33. The respondent held eight collective consultation meetings with the elected representatives. The first meeting took place on 26 January 2021 and the final meeting took place on 30 March 2021.
34. The collective consultation meeting minutes record that the discussions across the eight meetings included:
 - 34.1 the reasons for the proposed restructure and the details of the proposed new structure;
 - 34.2 the proposed increase of managerial responsibilities for the Shift Manager and Team Manager roles, including:
 - 34.2.1 a standard structure across all of the sites' warehouses (previously on anyone shift there had been a varying number of Shift Managers and differing ratios of Team Managers to colleagues);
 - 34.2.2 a reduction in numbers of Shift Managers and Team Managers at each sites, leading to greater responsibilities being placed on the managers on shift;
 - 34.2.3 greater responsibility for the performance of their site, including key performance indicators and related staff costs (such as picking). For example, it was proposed that Team Managers would be held accountable for 'cases picked per attended hour', which was a measure of team productivity;
 - 34.2.4 the introduction of new technology (including handheld tablets) to enable managers to access key performance indicators and deal with administrative management requests, thus freeing up management time; and
 - 34.2.5 an expectation that managers would spend significantly less time carrying out warehouse operative tasks (e.g. picking products) and more time managing their teams.
 - 34.3 the process of scoring managers based on their mid-year and end of year performance reviews, plus assessing them via a presentation and interview;
 - 34.4 the benchmark score required for managers to be considered for the new Shift Manager (55 points) and the new Team Manager roles (53 points) and the rationale behind these benchmark score.
35. Mr Darren Coker (Regional Manager, South) was part of the team who designed the proposed new structure. He also chaired many of the collective consultation meetings. The Wakefield site was not part of Mr Coker's region and Mr Coker had not met the claimant during his employment with the respondent.
36. Mr Coker stated during his oral evidence that the collective consultation meetings included discussions regarding:

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- 36.1 the concerns raised by the employee representatives and the respondent’s amendments to the proposals, including:
 - 36.1.1 offering enhanced redundancy pay, rather than the statutory minimum redundancy pay, to all managers selected for redundancy. As a result, the respondent agreed to remove the cap on a week’s pay when calculating redundancy pay;
 - 36.1.2 the number of redundancies proposed at each site;
 - 36.1.3 the performance element of the scores for recent business recruits, for whom the respondent stated that they would treat as receiving a 2:2 score (i.e. 10 points) for each of the mid-year and end of year reviews;
 - 36.1.4 the method by which points would be awarded;
 - 36.1.5 the benchmark score for Shift Managers and Team Managers to be considered for the new roles; and
 - 36.1.6 why external recruitment had not been put on hold at an earlier stage before the restructure announcement;
- 36.2 the employee representatives’ suggestion that the respondent consider applications for voluntary redundancy, which the respondent subsequently refused.
- 37. Following each collective consultation meeting, the employee representatives circulated:
 - 37.1 the minutes of the collective consultation meeting; and
 - 37.2 an announcement which summarised the points discussed and provided a questions and answers document.
- 38. The claimant confirmed that he had received the minutes and the announcement by email following each of the meetings.
- 39. The collective consultation process ended at the final collective consultation meeting on 30 March 2021. The respondent decided to proceed with the restructure proposals.

Scoring criteria and claimant’s scores

40. The respondent scored all of the Shift Managers and Team Managers at six of the seven sites affected against the following criteria out of a possible total of 105 points:

Criteria	Maximum points	Benchmark score	Claimant’s score
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Performance review	50 (up to 25 points each for mid-year review and end of year review scores, including talent scores for each review)	22	27 (based on a mid-year score of 2:2 (10 points), an end of year score of 3:2 (15 points) and a talent score of 1 point for each review)
Presentation	25 (scored against 5 categories)	15	9
Interview	30 (12 questions scored against 6 categories)	18	16
Total	105 points	55 points (reduced to 53 points for Team Managers)	52 points

41. The respondent assessed the managers at its Willow Green site based on their presentation and interviews only. This was because the Willow Green site had recently been brought back under the respondent's management and had operated a different performance review system in the 12 months prior to the restructure.
42. The respondent did not initially set a benchmark for candidates to be eligible for the new Shift Manager and new Team Manager roles. They stated that they wanted to score all candidates first before deciding on a benchmark. After scoring had taken place, the respondent discussed the benchmark with the employee representatives and agreed a benchmark of 55 points for the new Shift Manager role and 53 points for the new Team Manager role.
43. Mr Coker stated that the rationale for choosing a benchmark score of 55 points for the new Shift Manager role and 53 points for the new Team Manager role was as follows:
- 43.1 the respondent started with a baseline performance score of 22 points, based on:
 - 43.1.1 10 points for each of the mid-year and end of year scores; and
 - 43.1.2 2 points for a talent score;
 - 43.2 a 'good fit' score of 3 points for each of the presentation categories would provide a score of 15 points; and

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- 43.3 a 'good fit' score of 3 points for each of the interview categories would provide a score of 18 points;
 - 43.4 the respondent accepted that Team Managers may have more difficulty in demonstrating the skills required than Shift Managers. The benchmark score for Team Managers was therefore reduced by two points to a benchmark of 53 points.
44. The notes of the collective consultation meetings describe the score calibration process carried out by the respondent. Mr Castle stated in the eight collective consultation meeting that:
- 44.1 HR based at each site checked all of the Shift Manager and Team Managers scores;
 - 44.2 separate calibration sessions were then held at different levels (including, as stated by Mr Coker, with Site Managers and with Regional Managers/HR). During this process, the respondent focussed on the highest scorers and the scores of those (like the claimant) who scored just above or just below the benchmark; and
 - 44.3 a third of the Team Managers' scores across all sites were spot checked centrally.
45. We note that the respondent treated each site as an individual site for the purposes of the selection pool. We accept that this was due to the fact that the sites were geographically distant from each other. For example, the nearest sites to Wakefield were Stockton (near Middlesbrough) and Gadbrook (near Manchester). The claimant lived in Goole and his evidence was that his commute to the respondent's Wakefield site took around 40 minutes. The respondent's Stockton and Gadbrook sites are both around 1.5 hours' travel time from Wakefield (and a similar travelling time from the claimant's home in Goole).

Claimant's individual consultation meetings

First consultation meeting – 10 February 2021

46. The claimant's first individual consultation meeting took place on 10 February 2021 with Mr Barratt. They discussed points including:
- 46.1 the restructure proposals;

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- 46.2 the training available for carrying out presentations;
 - 46.3 the scoring criteria and process;
 - 46.4 the claimant's projected end of year score of 3:2.
47. The notes of the meeting record that the respondent asked the claimant if he had any comments on the redundancy proposals. The claimant stated:
- “No i am fine with it all, can understand most of the reasons, my own feelings was too many shift managers and problems weren't dealt with. Can understand why it's happening at shift manager level.”
48. The claimant also stated regarding his end of year PDR score:
- “I'm pleased with that score.. I would grade myself around that too.”
49. The claimant later attended an upskilling session in preparation for his assessment and stated that it was 'very helpful'.

Claimant's assessment - presentation and interview

50. The respondent used a standard presentation briefing and interview questions for all Team Managers at each of the seven sites. Shift Managers at each site scored Team Managers out of five points with one point being the lowest score. The possible scores for each category were:
- 50.1 one point – 'poor fit';
 - 50.2 three points – 'good fit'; and
 - 50.3 five points.
51. We note that the collective consultation minutes record that the Shift Managers who carried out the claimant's assessment had already been told that they had scored 55 points or more and were therefore eligible to be considered for the new Shift Manager roles. They had not yet been provided with details of their areas and shifts for the new roles because the collective consultation process was still continuing at that time.

Claimant's presentation

52. The claimant carried out his presentation and was assessed by Mr Sampson and Ms Howard. Candidates were provided with the presentation briefing and given 20 minutes to prepare a presentation of what they would do to meet the respondent's goals (known as "Colleague Ambitions") in the first 30, 60 and 90 days of the new structure. There was also a 5 minute question session after the presentation, to enable the assessors to question the candidates regarding their presentations.
53. Mr Sampson and Ms Howard both took notes during the claimant's presentation. After the claimant's presentation ended, they discussed the claimant's performance and came to a joint score for each category. The claimant only scored one point for each of three presentation categories. Mr Sampson gave as an example the fact that the

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claimant did not mention the recognition programme available to thank colleagues e.g. starting a shift earlier or finishing a shift later (with pay) and free meal vouchers.

54. Mr Sampson also gave further example in relation to the 'opportunity to succeed' category. He stated that the claimant did not explain how he would support his team's development and provide opportunities for colleagues to grow. He noted that the claimant could have spoken about the recognised training pathway to assist Warehouse Operatives becoming Team Managers. He also said that the claimant did not refer to more general training opportunity available for Team Managers.
55. Mr Sampson said that HR had asked him to revisit the claimant's presentation score as part of the calibration process. He stated that he told HR that he was unable to increase the claimant's score, based on the answers that the claimant had provided during the presentation.

Claimant's interview

56. The claimant was interviewed by Mr Akeroyd and Ms Howard on 12 March 2021. The claimant was scored on his responses to 12 questions (two per category). He scored 3 points for each category, except for "Listening Hard, responding quickly" for which he scored 1 point. Mr Akeroyd stated in his oral evidence that in response to question 5, the claimant did not mention holding 121s with colleagues. Mr Akeroyd also stated that the claimant's example in response to question 6 did not highlight what actions the claimant took himself (rather than referring the colleague to HR etc.).
57. We also asked Mr Akeroyd what more the claimant could have done to score 5 points, rather than 3 points. Mr Akeroyd gave an example where the claimant referred to his approach to managing agency workers. Mr Akeroyd stated that claimant's answer related to working with an agency to get a "Red Amber Green" system in place. Mr Akeroyd said that he would have awarded 5 points if the claimant had given an example of a new system that could have been used in other warehouses on site or across the respondent's logistics sites (e.g. resetting the grids used for picking products).
58. We note that the claimant stated at paragraph 41 of his witness statement that he should have scored higher in the interview and the presentation. However, the claimant's statement did not provide any specific examples of points that he made during the presentation or interview which should have been awarded more points than he received. The Tribunal asked the claimant during his oral evidence to state under which categories he should have scored more and why, but the claimant was unable to provide any specific reference during his oral evidence.
59. We also note that both Mr Sampson and Mr Akeroyd were long serving employees of 28 years' and 39 years' service respectively. They were of a similar age to the claimant.

Second consultation meeting – 24 March 2021

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60. The claimant's second consultation meeting took place after he had been assessed. Mr Sanderson provided the claimant with a full break down of his performance, interview and presentation skills. They discussed key points including:

60.1 the claimant was provisionally unsuccessful for a Team Manager role;

60.2 possible options for the claimant including stepping down to hourly paid warehouse operative role (with 4 weeks' protected pay);

60.3 applying for additional roles such as backhaul, planning or stock and planning.

61. The claimant stated during the meeting that his mind had "gone blank". He asked for feedback from the interview and presentation.

Third consultation meeting – 29 March 2021

62. The claimant requested a further 121 with Mr Barratt and Ms Teresa Page (HR) by email on 25 March 2021: "just to focus my mind on what process I need to follow and to clear up any questions I may have...".

63. The claimant attended a third consultation meeting with Mr Barratt on 29 March 2021. During the meeting:

63.1 the claimant stated that he thought that the process was tainted by age discrimination:

"Looked around at people who have been made redundant – seems to be people older [long service] colleagues...the ones lost position highest paid with odd exception";

63.2 the claimant was aware that the respondent had been advertising externally for Team Manager roles;

63.3 the claimant initially asked for his scores to be reviewed, but later retracted that request before the meeting ended. The meeting notes record that Mr Barratt said:

"People speak highly of you - do not question your work ethic and obvious to me you care about the company - not questioning you - I find you committed and hands on loyal to the company process to follow - asked to review and I will look at scores and we will fit in another one to one with myself and Teresa.";

63.4 the claimant stated in response to the Tribunal's questions that he retracted his request for the score to be reviewed that:

"Prior to the meeting, Mr Barratt in the warehouse pulled me to one side and said if we asked you an interview question and you give me a suitable answer, we can raise your score.

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I went into the meeting – I said that I had not slept for 5 days etc. – at this time Teresa was working remotely. I said to him I'm not in a frame of mind to be interviewed.

Mr Barratt had a piece of paper in front of him – it stated that I should ask for my score to be reviewed – I saw the paper and asked for my score to be reviewed.

I was lost in the moment – I didn't know what Mr Barratt was asking me to do. I just thought at the end of it – thought why if review score, would that then mean still have redundancy on table? I asked for an adjournment and spoke with my wife. I was in a state of shock. We had a conversation – we were not happy with the way things had been handled.

I wanted to review my scorecard and feedback from presentation – to then be pressured into interviewed again, it didn't seem right. So after speaking to my wife we retracted the opportunity.”

- 63.5 the claimant did not ask Mr Barratt whether any feedback on his presentation and interview had been requested. The meeting notes record that the claimant stated: “heart says want the job but head says probably got doubt nobody wants me here”.
- 63.6 the claimant also raised allegations during this meeting that two Team Managers had cheated during the assessment process.
64. It was clear that Mr Barratt regarded the claimant as a good employee and was hoping that the respondent could offer him a new Team Manager role. Mr Barratt emailed Mr MacKay late on Friday 19 March 2021, stating:
- “Maddie tells me we can't change the scores for the managers we wanted to put through, is that right?
- One of them is [employee 3] who came in the day after [X]? And Colin Walker who is one of the good ones I want to keep
- I thought we said we could keep them?

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65. Mr MacKay responded, stating: “Needs to be you/the manager that review them. Let's review Monday”.
66. We note that the claimant's presentation score had in fact already been reviewed by Mr Sampson before the claimant's meeting with Mr Barratt on 24 March 2021 as part of the respondent's calibration process. This was confirmed in Ms Sarah Murray's email to Ms Page on 23 March 2021. Ms Murray stated:

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“Colins’ has already been revisited. Sarah Howard and John Sampson have reviewed his pack and there was no movement.”

67. Ms Murray then emailed Ms Austin on the same date stating: “Ian will be picking up with you on Colin Walker and [employee 3] as they have not got through the process. Sarah Howard has said she has already reviewed Colin Walkers with John Sampson and there was no movement on the scoring. I had not realised Colin's score had already been raised when I said to pick up with you.”
68. The claimant stated in his email of 31 March 2021 to the respondent: “I would like it to be minuted that I had quoted that ACAS states that redundancy cannot be made on the grounds of age. Although I understand age was not a given criteria for the selection process, it certainly appears that older colleagues (ie those with long term service/higher rates of pay) are proportionally over represented in the colleagues selected for redundancy”.
69. We also note that the respondent advertised externally for Team Manager roles based at Wakefield at around the time of the claimant’s dismissal. The claimant complained of this to the respondent in an email of 31 March 2021:

“The other item that I would like to have minuted is the fact that I raised the issue that Team Managers roles were being advertised on the Morrisons website. This I understand is illegal, as the role is not 60% different to my own”. Investigation meeting – 1 April 2021

70. Mr Barratt met with the claimant to discuss the claimant’s allegations involving two Team Managers. The claimant alleged that they had seen a copy of the presentation briefing in advance.
71. We were shown copies of interview notes with the two Team Managers and others. We note that the respondent investigated the allegations and decided that the two Team Managers had not seen a copy of the presentation in advance.
72. We also note from the collective consultation minutes that some of the Gadbrook Team Managers had shared the presentation brief. The respondent stated during the seventh collective consultation meeting that they were considering removing the presentation scores for all 35 Gadbrook Team Managers and introducing another assessment exercise for those managers.
73. The claimant suggested that if other Team Managers had ‘cheated’ and scored higher than they should have done during the assessment process, this could have led the respondent to artificially inflate the benchmark. However, we note that:
 - 73.1 there were 48 Team Managers assessed at Wakefield. Assuming a similar number of Team Managers at each of the six sites (excluding Gadbrook), there would be around 300 Team Managers in total across all sites;

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- 73.2 the two Team Managers at Wakefield whom the claimant alleged had cheated scored 11 points and 13 points respectively on the presentation, i.e. a total of 24 points ;
- 73.3 the 48 Wakefield Team Managers scored an average of 62 points each. Assuming that the average Team Manager score was around 62 points each, then the 300 Team Managers would have scored around 18,600 points in total. Twenty-four additional points out of 18,600 points would equate to an increase in the average score of around 0.1%. This would not have made a significant difference to the benchmark score.

Final consultation meeting – 6 April 2021

- 74. The claimant was invited to attend a final meeting on 6 April 2021, in an email dated 2 April 2021. The meeting was chaired by Mr Edmund Walker. During the meeting, the key points discussed included:
 - 74.1 the new management structure would 'go live' from 12 April 2021;
 - 74.2 the claimant's selection for redundancy was no longer provisional;
 - 74.3 whether the claimant wished to consider taking a warehouse operative role or apply for any other advertised roles.
- 75. The claimant confirmed that he did not wish to be considered for any other roles.
- 76. The notes of the meeting state that Mr Edmund Walker told the claimant that:

"You will be served notice on Friday 9th April and PILON will apply.

You will be expected to work until Friday 9th April and will be paid PILON for any outstanding notice.

Finalised redundancy payments will be posted to you w/c 12th April, as due to the way the pay period falls we are unable to issue these today."
- 77. The respondent posted a letter to the claimant confirming the termination of his employment dated 10 April 2021. That letter confirmed that the claimant had been made redundant and stated that the claimant's last day of employment would be 9 April 2021. The claimant stated that he received that letter on 12 April 2021. We concluded that the claimant's employment therefore termination on 12 April 2021.
- 78. The letter stated: "You have the right to appeal against this decision. Your appeal must be submitted via email to logconsult@morrisonspc.co.uk, clearly stating the grounds of your appeal and your requested outcome within 10 days of the date of this letter. Once received an appeal hearing with an independent Appeals Manager will be arranged."

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79. The claimant did not appeal against his dismissal. He received 12 weeks' pay in lieu of notice (£8,787.23), an enhanced redundancy payment (£26,243.23 which was equivalent to 33.5 weeks' pay) and his outstanding accrued holiday pay.

Advertisements for vacant Team Manager roles

80. The respondent had a number of vacancies for Team Managers at Wakefield as a result of the restructure. They advertised for vacant Team Manager roles at Wakefield in late March and during April 2021. The initial advertisement was placed before the claimant's redundancy was confirmed.
81. The respondent also asked the claimant if he wished to continue working as a Team Manager for a four week period to cover one of the vacancies. The claimant declined this offer.
82. The Tribunal noted that the claimant's score of 52 points was only one point below the benchmark score. We also noted that Wakefield lost more managers than was proposed under the restructure and advertised externally for Team Managers before the claimant's employment ended. The Tribunal questioned why training was not offered to the claimant to assist him to put him in a position where he could perform the new Team Manager role. Mr Coker and Mr Edmund Walker stated in oral evidence:
- 82.1 that the respondent had to operate a consistent process that covered all seven sites;
 - 82.2 the benchmark score of 52 points for Team Managers had been discussed during collective consultation with the employee representatives; and
 - 82.3 that any 'cut-off' point would inevitably result in some managers scoring just less than the cut-off point.
83. We accepted Mr Coker and Mr Edmund Walker's evidence. We noted that, for example, if the respondent reduced the cut-off point to 52 points then another Team Manager (TB) would have been in the same position as the claimant. This was because TB's score of 51 points would have been one less than the cut-off point. In addition, the benchmark score did not apply just to the Wakefield site; it applied to the other six logistics sites affected by the proposals.

'Hidden criteria'

84. The claimant states that the respondent operated a 'hidden criteria' for redundancy selection. He states that Team Managers with longer service, and therefore higher salaries, were deliberately scored lower by the respondent during the interview and presentation process.

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85. For the sake of clarity, we note that the claimant did not claim that the assessment process itself amounted to indirect discrimination on the grounds of age. This was not part of his claim form and was not identified as an issue during the preliminary hearing of this claim. In any event, we note that a number of older and long-serving employees scored significantly higher than the claimant. For example, the top scoring Team Manager at Wakefield was aged 50 and scored 87 points. The fourth highest scoring Team Manager at Wakefield was aged 51 and scored 81 points.
86. The claimant was earning around £5000 per annum in more than the average Team Manager salary at Wakefield, based on the information provided to us. We accept the respondent's evidence that Team Managers' salaries depended in part on the pay increments that they had received over their service and in part on their starting salary. For example, three recently employed Team Managers were earning £36,000£37,000 per annum.
87. In addition, the claimant stated that he received long service benefits such as a loyalty bonus.
We accept Mr Sampson's evidence that this consisted of a lump sum of £300 which was paid every five years to employees with over 15 years' service. The claimant was also entitled to additional holiday linked to his length of service.
88. The claimant stated during his oral evidence that the respondent instructed all Shift Managers, including Mr Sampson and Mr Akeroyd, to score him lower in the assessment process because of his level of salary and benefits. Mr Sampson and Mr Akeroyd both stated that they had not received any such instruction. Mr Sampson and Mr Akeroyd also stated:
- 88.1 they had both been told that they had met the benchmark for the new Shift Manager role at the time that they carried out the Team Manager assessments, although they had not yet been told which shifts or which areas that they would work going forwards;
 - 88.2 they did not have line management responsibility for the candidates that each assessed at the time of the restructure and the candidates marked did not work in their warehouse; and
 - 88.3 they did not know how much the claimant or anyone else outside of their shift teams were paid.
89. Mr Sampson also stated that he had assessed other Team Managers at Wakefield and that he:
- 89.1 had assessed the presentations of around five Team Managers and interviewed a further five Team Managers;
 - 89.2 did not have any prior knowledge of any of the scores of the Team Managers that he assessed or interviewed, including their PDRs, interview scores or talent

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- ratings. Mr Sampson stated that this was because he only had this information for his direct line reports (whom he did not assess or interview);
- 89.3 therefore did not know what scores the managers that he was assessing needed to achieve during their presentations and/or interviews. He stated that the Shift Managers carrying out assessment received training on bias and unconscious bias because many of the Shift Managers were long-serving employees who had worked alongside the Team Managers for some time.
90. Mr Akeroyd stated that he had assessed Team Managers during around six presentations and six interviews.
91. In addition, Mr Coker and Mr Edmund Walker denied that they had receive any such instruction from the respondent. Mr Edmund Walker stated that:
- 91.1 he had assessed around ten candidates in total (around five interviews and five presentations);
- 91.2 he did not have any discretion to amend the claimant's scores and that his decision to dismiss the claimant was based on the information available to him at that time including:
- 91.2.1 that the claimant's score of 52 was lower than the benchmark score of 53;
- 91.2.2 that the claimant did not wish to consider alternative roles, such as stepping down to a warehouse operative role or applying for a specialist role.
92. We also note that:
- 92.1 the Shift Managers had recently undergone a very similar assessment process to that of the Team Managers. We note that Mr Sampson, Mr Akeroyd and Mr Edmund Walker were of a similar age to the claimant. Mr Coker was in his late forties at the time of these events;
- 92.2 Mr Sampson was the elected employee representative for Shift Managers at the Wakefield site and participated actively in the collective consultation meetings. For example, he challenged the respondent's rationale around removing potential scores of 2 points or 4 points for the assessment criteria at the fifth collective consultation meeting. We accept Mr Sampson's evidence that if he had been instructed to 'mark down' Team Managers on the basis of the hidden criteria alleged by the claimant, he would have raised this at the collective consultation meetings;
- 92.3 Mr Anderson (the elected employee representative for Team Managers at the Wakefield site) stated in the eighth collective consultation meeting that: "Shift Managers have been very supportive throughout this process, really surprised by how much support received from Shift Managers."

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93. We have considered the table of information provided by the respondent relating to candidates' ages and scores. We note that this table was updated several times during the hearing (see the Introduction section of this Judgment for further details). We note that forty-eight Team Managers (including the claimant) were assessed and that:
- 93.1 Two thirds of the Team Managers at Wakefield were aged 45 or over at the time of the assessments (i.e. 32 out of 48);
 - 93.2 in terms of the forty Team Managers who met the benchmark of 53 points:
 - 93.2.1 81% (i.e. 26) of the 32 Team Managers aged 45 or over were successful in meeting the benchmark;
 - 93.2.2 88% (i.e. 14) of the 16 Team Managers aged under 45 were successful in meeting the benchmark.
 - 93.3 in terms of the eight Team Managers who did not meet the benchmark of 53 points:
 - 93.3.1 19% (i.e. 6) of the 32 Team Managers aged 45 or over were unsuccessful in meeting the benchmark (including the claimant); and
 - 93.3.2 13% (i.e. 2) of the 16 Team Managers aged under 45 were unsuccessful in meeting the benchmark.

RELEVANT LAW

94. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' submissions.

UNFAIR DISMISSAL

95. The right not to be unfairly dismissed is set out in s94 of the Employment Rights Act 1996 ("ERA"). The Tribunal must consider whether the respondent is able to establish a fair reason for that dismissal (as defined by s98 of the ERA). Section 94

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

Section 98

(1) In determining...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...a reason falling within subsection (2)...

(2) A reason falls within this subsection if it – ... (c) is that the employee was redundant...

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(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..."

96. Section 98 identifies redundancy as a potentially fair reason for dismissal. Redundancy is defined by s139 of the ERA as follows:

Section 139

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

...(b) the fact that the requirements of that business – (i) For employees to carry out work of a particular kind...

Have ceased or diminished or are expected to cease or diminish..."

97. If a redundancy situation exists, then the Tribunal must consider the fairness of the redundancy process followed. We note that the ACAS Code on disciplinary and grievance procedures explicitly states that it does not apply to redundancy situations.

98. In *Williams v Compair Maxam Ltd* [1982] IRLR 83, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). In summary, employers are obliged to consider taking steps to consult with employees regarding their proposals and to mitigate the hardship caused by redundancies including to:

98.1 give as much warning as possible of impending redundancies as possible, in order to enable the employees who may be affected to consider possible alternative solutions and, if necessary, find alternative employment within the business or elsewhere;

98.2 seek to agree objective selection criteria to be applied to the pool of employees at risk of redundancy;

98.3 seek to ensure that the selection is made fairly in accordance with these criteria and to consider any representations the regarding such selection (having first provided employees with sufficient information about the selection process, for example details of their scores against the criteria);

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98.4 consider suitable alternative employment, as an alternative to redundancy dismissals; and

98.5 offer a right of appeal against dismissal.

99. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. It is not for the Tribunal to decide whether the Tribunal would have dismissed the employee, as set out in the *Iceland* case at paragraph 24:

“(i) the starting point should always be the words of Section 98 for themselves; (ii) in applying the section the tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(iii) in judging the reasonableness of the employer’s conduct, the tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer (iv) in many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, another quite reasonably take another;

(v) the function of the tribunal as an industrial jury, 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 the dismissal is fair, if a dismissal falls outside the band, it is unfair.”

100. We also note that s98(4) requires the Tribunal to take account of the circumstances, including the size and administrative resources of the employer’s undertaking, in determining whether the employer acted reasonably or otherwise for the purposes of the unfair dismissal legislation.

INDIRECT AGE DISCRIMINATION

101. The provisions relating to indirect are set out at s19 of the Equality Act 2010 (the “EQA”):

- (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

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- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are - ...age...
- 102. Section 23(1) provides: “On a comparison of cases for the purposes of section ... 19 there must be no material difference between the circumstances relating to each case.”
- 103. The Supreme Court in *Essop v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice* [2017] UKSC 27 considered the law on indirect discrimination. Lady Hale identified the salient features of indirect discrimination:
“[24] The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation why a particular PCP puts one group at a disadvantage when compared with others

[26] A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various ... They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men

[27] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage
... ..

[28] A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence ...

[29] A final salient feature is that it is always open to the respondent to show that the PCP is justified – in other words, that there is a good reason for the particular ... requirement ... The requirement to justify a PCP should not be seen as placing an unreasonable burden on respondents. Nor should it be seen as casting some sort of shadow or stigma upon them.
There is no shame in it. There may well be very good reasons for the PCP in question ...”

Burden of proof

- 104. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof
...

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- (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.
- ...
- (6) A reference to the court includes a reference to -
 - (a) an employment tribunal;
 - ...

APPLICATION OF THE LAW TO THE FACTS

105. We will now apply the law to our findings of fact.

UNFAIR DISMISSAL

106. We have reminded ourselves that the question is whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses. The Tribunal must not substitute its own decision for that of the employer when considering a claim for unfair dismissal.

Reason for dismissal

107. We concluded that the reason for the claimant's dismissal was redundancy. We concluded that the existing Team Manager role was removed and replaced with a new Team Manager role. We also concluded that the new Team Manager role incorporated additional management duties, which had previously been carried out by Shift Manager. There was also a reduction in the number of managers at all sites, including a reduction from 48 existing Team Manager roles to 45 new Team Manager roles at the Wakefield site. This took place at the same time as a reduction in Shift Manager roles from 11 down to 9 Shift Managers at the Wakefield site.

Consultation

108. The respondent treated the restructure as a collective redundancy process, albeit that the managers affected were pooled on a site by site basis. The respondent arranged for elections for two employee representatives for each site affected by the restructure, one of whom was a Shift Manager and one of whom was a Team Manager. The respondent held eight collective consultation meetings, the minutes of which demonstrate that there was genuine two-way consultation on a range of issues including the proposed restructure, the scoring criteria, the assessment process for new roles and redundancy payments, as set out in our findings of fact.

109. The claimant and his colleagues received the minutes of those consultation meetings and an announcement document (which included a series of FAQs) following each meeting. The claimant had the opportunity to feedback (via his representative) any comments that he had on the proposals.

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110. The respondent also held four individual consultation meetings with the claimant where he was given the opportunity to comment on the proposals, as set out in our findings of fact. We note at the first individual consultation meeting, the claimant stated in relation to the proposals:

“No i am fine with it all, can understand most of the reasons, my own feelings was too many shift managers and problems weren't dealt with...”.

111. We concluded that the respondent carried out a thorough consultation process on the restructure proposals. We note that consultation does not necessarily involve reaching agreement on every detail of the proposals. However, we note that the respondent considered the feedback provided by the employee representatives and amended their proposals (e.g. in relation to enhanced redundancy pay).

Selection pool and decision

112. The claimant did not challenge the pool for selection, i.e. the existing Team Manager population at Wakefield. We note that the respondent treated each site as an individual site for the purposes of the selection pool and accept that this was reasonable due to the large geographical distances between the sites.
113. The claimant requested feedback from his presentation and interviews at his second 1:1 meeting. He did not receive that feedback. However, he did not ask again for that feedback during the remainder of the consultation process.
114. The claimant also stated during his third 1:1 meeting that he would like his scores to be reviewed. He withdrew that request, after the meeting was adjourned and he had spoken with his wife. However, we note that Mr Sampson had already reviewed the claimant's presentation scores before that meeting.
115. The claimant's witness statement did not provide any examples of areas in his presentation and/or interview where he stated he should have received a higher score. We appreciate that these events took place some time ago and that the claimant was having some difficulty remembering the discussions that took place. However, Mr Sampson and Mr Akeroyd were both able to provide clear examples as to why the claimant was awarded the scores that he received, as set out in our findings of fact.
116. The claimant referred to other Team Managers whom he believed had 'cheated' during the assessment process. However, we note that there were more vacancies at the Wakefield site than there were existing Team Managers who achieved the benchmark of 53 points. As a result, even if those other managers had cheated during the process, this did not affect the claimant's ability to obtain a new Team Manager role. If the claimant had scored one more point and achieved the benchmark of 53 points, there were sufficient vacant new Team Manager roles that he too could have been appointed to a new Team Manager role.

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117. We accepted the respondent's explanation as to why a benchmark of 53 points had been chosen for Team Managers, as set out in detail in our findings of fact. The respondent had to choose a cut off point and we accepted that any benchmark chosen would inevitably mean that some employees scored just below that level.
118. The claimant suggested that if other Team Managers had 'cheated' and scored higher than they should have done during the assessment process, this could have led the respondent to artificially inflate the benchmark. However, we have explained in our findings of fact why this would have not made a significant difference to the benchmark.
119. We also note that the claimant was offered the right of appeal against his redundancy in the letter terminating his employment. He chose not to appeal.
120. We concluded that the pool for selection and the respondent's selection of the claimant for redundancy was reasonable. Ultimately, this was not a situation where the claimant would have been 'saved' if one other Team Manager had scored fewer points than him. The claimant noted that the respondent advertised externally for new Team Manager roles before his employment ended. If the claimant had achieved the benchmark score of 53 points, he too could have been successful and appointed into a new Team Manager role.

Suitable alternative employment

121. The claimant was aware of the options for alternative employment, including: 121.1 stepping down to a warehouse operative role (with four weeks' protected); 121.2 applying for other vacancies, including specialist roles.
122. The claimant chose not to step down to a warehouse operative role. In addition, he chose not to apply for any specialist roles.
123. The claimant contended that he should have been offered the opportunity to undertake a 'trial period' in the new Team Manager role. We concluded that the respondent did not act unreasonably by failing to offer this as an option. This is because the claimant had undergone the same assessment process for the new Team Manager role as the rest of the Team Managers across the respondent's seven sites affected by the restructure. Unfortunately he had not met the benchmark required for the new Team Manager role.
124. We concluded that the respondent had considered options for suitable alternative employment for the claimant.

Band of reasonable responses

125. We therefore concluded that the claimant's dismissal due to redundancy was in the band of reasonable responses open to the respondent.
126. The claimant's claim for unfair dismissal therefore fails and is dismissed.

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INDIRECT AGE DISCRIMINATION Was there a PCP?

127. The claimant's claim was that the respondent's practice was that :

“There was a hidden criteria for selection for redundancy that people with long service and therefore higher incremental wages would be the ones selected for redundancy”.

128. During the hearing, the claimant qualified this criteria by stating that employees with long service usually had higher salary (due to previous salary increments) and better benefits than those with shorter service.

129. However, the claimant failed to provide any evidence that the respondent had any such hidden criteria. We noted the absence of such evidence in our findings of fact, including:

129.1 the claimant contended that all Shift Managers assessing Team Managers' presentations and interviews had been instructed to 'mark down' longer serving employees. However, all of the respondent's witnesses who were involved in the assessment process denied having been given such instruction;

129.2 Mr Sampson, Mr Akeroyd and Mr Edmund Walker were of a similar age and length of service to the claimant and had just been subject to a similar assessment process themselves. In addition, Mr Sampson was an elected Shift Manager representative for the collective consultation process. We accepted their evidence that they would have raised significant concerns if they had been instructed to apply such criteria;

129.3 in addition, we note that there would be very little costs savings to the respondent in dismissing long serving Team Managers. This was because the respondent introduced significant enhancements to the statutory minimum redundancy pay. For example, the claimant received 12 weeks' pay in lieu of notice (£8,787.23), an enhanced redundancy payment (£26,243.23 which was equivalent to 33.5 weeks' pay). He was earning around £5000 per annum more than the average Team Manager salary at Wakefield. At that rate of pay, it would have taken around seven years for the respondent to have "saved" the difference between the claimant's salary and the average Team Manager salary. If the respondent had wished to save money, they could have dismissed Team Managers with shorter service who were not eligible to receive redundancy pay.

130. For the avoidance of doubt, we note that the claimant did not claim that the assessment process itself amounted to indirect discrimination on the grounds of age. This was not part of his claim form and was not identified as an issue by Judge Buckley during the preliminary hearing of this claim.

131. The claimant's claim for indirect age discrimination therefore fails and is dismissed.

CONCLUSION

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132. The claimant's claims of unfair dismissal and indirect age discrimination fail and are dismissed.

Employment Judge Deeley
19 October 2022

JUDGMENT SENT TO THE PARTIES ON

Date: 21 October 2022
AND ENTERED IN THE REGISTER

Linda Shackleton
FOR THE TRIBUNAL OFFICE

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ANNEX – LIST OF ISSUES

~~1. Time limits [Respondent conceded that there are no time limit issues]~~

~~2. Unfair dismissal~~

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or some other reasonable reason.

2.2 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.2.1 The respondent adequately warned and consulted the claimant;

2.2.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.2.3 The respondent took reasonable steps to find the claimant suitable alternative employment;

2.2.5 Dismissal was within the range of reasonable responses.

~~3. Remedy for unfair dismissal [Please refer to Employment Judge Buckley's list of issues prepared at the Preliminary Hearing]~~

4. Indirect discrimination (Equality Act 2010 section 19)

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- 4.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:
 - 4.1.1 There was a hidden criteria for selection for redundancy was that people with long service and therefore higher incremental wages would be the ones selected for redundancy.
 - 4.2 Did the respondent apply the PCP to the claimant by manipulating the scoring for the interview and presentation?
 - 4.3 Did the respondent apply the PCP to or would it have done so?
 - 4.4 Did the PCP put the claimant at a particular disadvantage when compared with people not in his age group in that people in his age group (from late 40s upwards) were more likely to have long service and therefore higher incremental wages.
 - 4.5 Did the PCP put the claimant at that disadvantage?
 - 4.6 ~~Was the PCP a proportionate means of achieving a legitimate aim? [Respondent withdrew its justification defence]~~
 - 4.7 ~~The Tribunal will decide in particular:~~
 - 4.7.1 ~~was the PCP an appropriate and reasonably necessary way to achieve those aims;~~
 - 4.7.2 ~~could something less discriminatory have been done instead;~~
 - 4.7.3 ~~how should the needs of the claimant and the respondent be balanced?~~
5. Remedy for discrimination [Please refer to Employment Judge Buckley's list of issues prepared at the Preliminary Hearing]