EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101640/2022

Hearing held in Glasgow on 6 to 9 September 2022

Employment Judge R Mackay

Tribunal Member L Taylor

Tribunal Member L Millar

Mrs K Irving	**Claimant** **In Person**
TUI Airways Ltd	**Respondent** **Represented by** **Mr T Merck** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant succeeds in her claim for unfair dismissal. No basic or compensatory award is payable.

2. The claim of indirect age discrimination succeeds and the respondent shall pay to the claimant injury to feelings of **SIX THOUSAND POUNDS (£6,000)**.

3. The claim of indirect sex discrimination, having been withdrawn by the claimant, is dismissed.

4. The claim for breach of contract succeeds and the respondent shall pay to the claimant the sum of **FIVE HUNDRED AND NINETY FOUR POUNDS AND SIXTY NINE PENCE (£594.69)** (gross). Appropriate deductions for income tax and national insurance require to be made from this sum and remitted to HMRC.

REASONS

Background

1. The respondent is an international travel operator. The claimant was employed as cabin crew. Her employment commenced on 25 February 2022. During her employment she worked from the Respondent's Glasgow base. She was dismissed on 31 October 2021 following a redundancy exercise implemented by the respondent.

2. Following a case management preliminary hearing on 23 May 2022, it was established that the claimant brought the following complaints:

   a. Unfair dismissal under section 94 of the Employment Rights Act 1996 ("ERA").

   b. Indirect discrimination under sections 19 and 39(2)(c) of the Equality Act 2010 ("EqA"). At that time the claimant relied on the protected characteristics of age and sex, but during the course of the hearing, she withdrew the claim relating to sex. The PCP relied upon was the application of certain selection criteria to those placed at risk of redundancy and detriment alleged was selection for dismissal.

   c. Breach of contract in relation to a shortfall in the payments received on termination. During the course of the hearing, it was clear that the shortfall alleged related to payment in lieu of notice.

3. The Tribunal heard evidence from four witnesses for the respondent: Ms Maria Briscombe (Regional Manager); Mr Alex Loft (Inflight Retail Performance Manager); Mr Dave McCabe (People & Performance Manager); and Ms Jenny Scott (Regional Manager). The claimant gave evidence on her own behalf.

4. An agreed bundle was lodged by the parties; a number of additional documents were added by agreement during the course of the hearing.

Observations on the Evidence

5. The Tribunal was satisfied that each of the witnesses sought to give their evidence in an honest manner. It had no concerns whatsoever about the credibility or reliability of the claimant. In relation to the respondent's witnesses, however, each was, to some extent, hampered by a lack of direct involvement in certain of the matters over which they gave evidence. This sometimes related to the fact that they were giving second hand evidence about the activities of others. In other instances, and more troublingly, there were instances where in giving evidence of their own involvement, their knowledge of the subject matter was lacking. For example, Mr McCabe who handled the individual consultation process with the claimant, was unable to give even a rough idea of the number of affected employees in Glasgow.

6. Mr Loft, who heard a union grievance relating to the redundancy process, had a distinct lack of knowledge of the detail of the process and the terms of his own outcome letter. The same can be said of Ms Scott who heard the claimant's appeal against dismissal. She gave evidence about the effect of the application of the selection criteria to others which was not borne out by the facts.

7. Moreover, a common theme across the respondent's witnesses was their failure to address or even acknowledge a crucial aspect of the case as it related to the use of length of service as a criterion in the redundancy selection matrix. This is covered more fully in the *Findings in Fact* section which follows, but it was striking how each of the witnesses failed to give meaningful explanations for their failure to deal with the issue. There was a common theme for all of the witnesses with the exception of Ms Briscombe of "*not being privy*" to relevant information with no explanation as to why the information was not sought.

8. The Tribunal was left with the impression that the witnesses played a somewhat passive role in the processes they managed, and that that was the reason for the deficiencies in the evidence as opposed to any deliberate attempt to mislead or be unhelpful.

Findings in Fact

Background

9. The respondent operates from a number of bases in the UK. There are 18 in total, the largest being Gatwick and Manchester Airports. The claimant was based at Glasgow Airport being one of the respondent's smaller long-haul flight bases.

10. Whilst it was a matter of agreement that the claimant had been provided with a contract of employment at the start of her employment, no contract was produced before the Tribunal and no evidence was led as to specific terms of the contract.

11. At each base, the respondent employs cabin crew who work on board flights. It also employs ground staff. The cabin crew population is divided between regular cabin crew (such as the claimant) and cabin managers who perform a supervisory role in-flight.

12. Cabin crew are required to seek feedback from their cabin managers on a regular basis. The feedback is recorded in *"flight reviews"* which rate performance on the flight. It is the responsibility of cabin crew to instigate the reviews and a failure to do so is viewed negatively by the respondent.

13. Although cabin crew occasionally operate from airport bases other than their home base, that is not the norm and they work predominantly from their base location.

14. The nature of the respondent's business is holiday travel. As such, its activity levels are much higher during the summer months. Activity levels over the winter months are significantly lower. This is particularly so for the respondent's smaller short-haul airports. Although Glasgow has some long-haul winter flights, the overall activity levels there are much reduced in the winter months.

15. The respondent employs cabin crew on different types of contract. The claimant was a permanent salaried employee such that she remained

employed throughout the year. Other employees are engaged on fixed term contracts to cover peak periods. Other employees are engaged on what the respondent calls Permanent Part Year ("PPY") contracts. These individuals are engaged continuously throughout the year but work principally during the summer months with the opportunity for winter work only as and when available.

16. Given the seasonal fluctuations, the respondent has moved towards fixed term and PPY contracts in recent years. Only long serving members of staff tend to be on permanent contracts. Glasgow Airport had a large number of long serving employees engaged on such contracts.

17. Each base of the respondent is generally managed by a base manager who has administrative support. As a result of a restructuring at Glasgow in the months leading up to the claimant's dismissal, there was no base manager or dedicated administrative support. The claimant was appointed to perform a dual role at this time known as *"multi-skilled crew"*. In this, she combined her role as cabin crew with office administration. She held the key to the office where the staff records were kept.

18. The respondent recognises BASSA trade union in respect of its UK cabin crew employees. It has a number of policies agreed with the trade union including a Promotion Policy which sets out criteria to be used in determining promotions and Opportunity Selection Criteria which are used to select for such things as extra work or permanent contracts.

19. Both of these documents have an agreed process for selection which has three stages. The first stage is to review disciplinary or performance warnings and attendance records (the latter focussing on whether absence triggers have been met). The second stage is to assess the cabin crew member's compliance with the flight review requirements. Stage three is the consideration of length of service (called *"seniority"* by the respondent). The first two stages operate to exclude candidates. Length of service is used as the deciding factor if more candidates than roles remain.

20. The respondent has a redundancy policy which applies to all UK staff. It does not specify selection criteria. It has a policy of paying enhanced redundancy terms.

Redundancy Process

21. In or around June 2021, the respondent met with trade union representatives to discuss winter staffing levels. Whilst it had typically operated during winter months with surplus staffing, the financial impact of the Covid pandemic caused the respondent to look at cost savings. By email of 24 June 2021, the respondent's Director of Customer Delivery wrote to all cabin crew staff outlining the commencement of a formal redundancy consultation process. It was made clear that the Glasgow base was one of those at which redundancies were likely to be required.

22. Following consultations with the trade union, the respondent devised a selection process. This was described as a *"productivity tool"* and included an analysis of individual productivity, attendance records, length of service and live sanctions. The union had pushed for the inclusion of length of service in the process. The respondent also opened a voluntary redundancy process which led to a reduction in the ultimate numbers of compulsory redundancies.

23. By email of 29 July 2021, employees were advised of the proposed headcount reductions (following the voluntary redundancy applications). At that time, the overall surplus identified was 16 cabin crew managers and 36 cabin crew. This was broken down by base, each of which was a separate pool and at Glasgow, 1.5 cabin crew managers and 17.5 cabin crew were said to be surplus.

24. In seeking to implement the productivity tool, a number of challenges arose. These principally related to inconsistency in data which meant that the outcomes were unreliable. As a consequence of that, the respondent agreed alternative selection criteria:

    a. Triggered sickness absence (in line with the respondent's absence policy);

b. Live sanctions (of a disciplinary or performance nature); and

c. Length of service.

25. The sickness absence triggers were in accordance with the respondent's attendance policy. Rather than looking at individual absences, the criterion reflected the meeting of certain triggers over a six-month period. In dealing with employees who had absences, the respondent put in place a mechanism to ensure that absences related to, for example, maternity, disability or health & safety reasons were excluded from the calculation.

26. The respondent put in place a revised timetable for applying these alternative criteria. They were applied to the claimant at the Glasgow Airport base. By this stage, the respondent was looking to reduce cabin crew employees by 15. There were 37 cabin crew members in the pool, 5 having volunteered from the initial pool of 42.

27. There was a lack of clarity as to who applied the criteria. Ms Scott suggested it was Mr McCabe. He gave evidence that it was not him.

28. A similar exercise took place at 4 other bases. The need for redundancies at certain others was removed as sufficient employees had by this time volunteered for redundancy.

29. Following the application of the selection criteria, the claimant was identified as being at risk of redundancy and was invited to a formal consultation meeting. This was chaired by Mr McCabe who was based in Birmingham. The meeting took place remotely.

30. It was made clear to the claimant that she had the option of a PPY contract as alternative employment. It was not classified as suitable alternative employment. Regular updates about vacancies were provided by the respondent.

31. The meeting took place on 8 September 2021. The format was largely a rehearsal by Mr McCabe of the process leading to the claimant's provisional selection. During the course of the meeting, the claimant stated that she felt

discriminated against on the grounds of age given that the reliance on length of service meant that she could never be safe from redundancy and that all those who were safe were over the age of 45. Mr McCabe responded to the effect that the parameters applied were not just length of service but also attendance and live sanctions. The claimant gave evidence to the Tribunal (which was not challenged and which was accepted) that none of the employees in the pool at Glasgow had been scored down for live sanctions and none had met the attendance triggers meaning that length of service was the sole criterion which had any bearing on the selection.

32. The individual consultation process was paused to deal with a collective grievance raised by the trade union. The key feature of the grievance was that whilst 3 selection criteria were in place, very few employees had live sanctions and very few met the absence triggers, such that decisions were being taken overwhelmingly on the basis of length of service alone.

33. A number of other criticisms of the process were raised in the grievance.

34. A grievance meeting took place on 23 September 2021 chaired by Mr Loft. During the course of the meeting, the trade union representative stated the belief that only 2 or 3 of the employees being scored were triggering the absence criterion. Whilst it was accepted that seniority (length of service) was used by the respondent in, for example, promotions, the union's position was that it should only be used as a tiebreaker after other criteria were applied.

35. One of the union's other challenges was that the data used by the respondent in identifying live sanctions and absences were not reliable or up-to-date.

36. At the end of the meeting, the union sought clarity on the numbers of employees whose selection was influenced by absence or live warnings and whether at any base the decision was taken solely on seniority.

37. Following the grievance meeting, Mr Loft conducted remote meetings with 2 colleagues. He did not address in any meaningful way the key complaint about the use of length of service; nor did he investigate further the extent to

which length of service had in fact become the sole or predominant factor at the bases concerned. He did not provide the data requested by the union.

38. The outcome of the grievance was communicated by letter of 30 September 2021 from Mr Loft. He gave evidence that he was the sole author of the letter. It became apparent, however, that much of the material in it was supplied by an HR colleague.

39. In response to the complaint that those placed at risk were primarily based on length of service, he stated that the complaint was not upheld. He stated that length of service was used as 1 of 3 scoring measures and referred to seniority being applied in other policies used by the respondent. He failed to address the question as to whether, in practice, the absence of employees being scored down on the other 2 criteria meant that length of service was the sole or predominant criterion in the vast majority of cases.

40. In response to the challenge as to the reliability of the data used, Mr Loft stated in the letter that he had reviewed the data sources. The Tribunal did not accept that he had done so. First, on being asked what documentation he reviewed before reaching his decision, he made no reference to having reviewed the data sources. Moreover, in relation to the Glasgow base, the claimant was the sole keyholder for the relevant files and gave evidence, which was accepted, that no one had visited to conduct any review.

41. The union was given the right to appeal against the decision. It did not do so.

42. It was accepted by Ms Briscombe that 16 employees had absence triggers. Once excluded absences were taken into account, only 3 across all bases had a negative scoring against this criterion.

43. There was no evidence before the Tribunal from any of the witnesses that any employee at any site had a live disciplinary or performance sanction which influenced the scoring. Across the 5 bases of concern, therefore, length of service was the sole criterion other than in the case of potentially 3 individuals whose scoring was affected by attendance triggers. None of the 3 employees who fell into that category was based at Glasgow. Across the

5 bases, 242 employees were pooled for the purposes of the redundancy process, 180 cabin crew and 62 cabin managers.

44. It was a consistent feature of the evidence of the respondent's witnesses that length of service was a criterion to be used as a tiebreaker. They appeared to close their mind to the fact that by using 2 other criteria which had little or no bearing on the selection, length of service became the sole or predominant factor.

45. The claimant took part in a second individual consultation meeting on 8 October 2021. The claimant raised a number of questions about the process.

46. In particular, she raised concerns about the impact of Edinburgh staff covering Glasgow flights and the fact that trainer roles which she might have wished to apply for were not offered to at risk cabin crew.

47. A third individual consultation meeting took place on 20 October 2021. The format of this meeting was to a very large extent the reading of a script by Mr McCabe outlining the decision to dismiss the claimant. The claimant had decided not to apply for a PPY role or for a transfer to another base. It was explained to the claimant what payments she would receive. In relation to payment in lieu of notice, Mr McCabe identified that payroll had provided a calculation based on 3 months' gross earnings. Ignoring months where payments had been affected by, for example, COVID deductions, this led to a figure of £7,730.09 gross which the claimant accepted.

48. The redundancy dismissal was confirmed by letter of 20 October 2021. The claimant was given the right to appeal. She chose to exercise that right and put forward a number of grounds of appeal. These included the following:

    a. The poor management of the process and the time taken.

    b. Her concerns over the selection criteria and the de facto reliance on length of service. She highlighted the fact that all those safe at Glasgow had more than 25 years service which is a level she could not have met given her age.

c. She questioned the use of crew from other sites being used at Glasgow, undermining the need for the headcount reductions.

d. She claimed that it had not been clear that applying for training roles might have secured winter work.

e. She criticised the respondent's rejection of cabin crew agreement to accept pay reductions to mitigate the surplus headcount.

f. She challenged the way in which alternative roles were offered.

49. An appeal hearing took place on 4 November 2021, chaired by Ms Scott. The claimant was given an opportunity to expand on the points raised. In relation to the selection criteria, she described herself as being one of the "*inbetweeners*" in that she was not senior enough to avoid redundancy and was not in a position to take a PPY role like many younger employees.

50. By letter of 11 November 2021, Ms Scott confirmed the outcome of the appeal to the effect that the redundancy remained in place.

51. In relation to the selection criteria, Ms Scott indicated that she was "*satisfied that length of service was not used as the sole criteria* [*sic*]". Like all of the other witnesses from whom the Tribunal heard, she failed to address the substance of the point. She stated that even if the claimant had not been scored down for the other factors "*others would have been".* She did nothing to investigate the issue, however, and had she done so would have discovered that her assertion was incorrect as it related to Glasgow and possibly other bases. She stated that the data had been validated by cross-checking personal files. For the reasons previously given, this was not in fact done.

52. In relation to the claimant's concerns about staff from other bases operating Glasgow flights, she highlighted that this was a rare occurrence and was in accordance with normal practice.

53. So far as the opportunity to apply for cabin crew trainer role was concerned, she stated that this had been open to the claimant and that winter work was not in any event guaranteed. The other challenges were rejected.

54. Following the termination of her employment, the claimant received an enhanced redundancy payment in accordance with the respondent's agreed scheme. This amounted to £19,896. Her statutory redundancy payment amounted to £11,152. She received less than the notice payment mentioned during the individual consultation meeting. She challenged this which led to her receiving an additional payment. There remained a shortfall of £594.69 (gross). This figure was agreed between the claimant and the respondent's counsel to assist the Tribunal.

55. The claimant found the whole redundancy process to be very stressful creating a lot of uncertainty. She was particularly aggrieved at the respondent's approach to length of service and its failure to address her concerns. She felt that Glasgow was somewhat abandoned given the lack of onsite management.

56. Findings in fact as they relate to remedy are set out in the *Remedy* section which follows.

Relevant Law

Breach of Contract

57. An employee is entitled to notice of the termination of their employment (or payment in lieu of such notice). Where an employer does not provide the correct notice, an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.

Unfair Dismissal

58. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to

carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (**s139(1) ERA**).

59. In ***Safeway Stores plc v Burrell*** [1997] IRLR 200 the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

(a) Whether the employee was dismissed?

(b) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

(c) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

60. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (**s98(4) ERA**). In applying **s98(4) ERA** the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

61. The House of Lords in ***Polkey v A E Dayton Services Ltd*** 1988 ICR 142 held that "*in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation*".

62. In a unionised environment, ***Williams & Others v Compair Maxam Ltd*** [1982] IRLR 83 provides further guidance as to the assessment of fairness as it relates to the role of the recognised trade union.

Indirect Age Discrimination

63. Section 19 of the Equality Act 2010 (EqA) states:

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

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

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

b. it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

c. it puts, or would put, B at that disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.'

64. S23 EqA states:

'*On a comparison of cases for the purposes of section…19 there must be no material difference between the circumstances relating to each case.*'

65. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS*** [2010] IRLR 136:

'*Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.*'

66. In the case of ***Essop v Home Office; Naeem v Secretary of State for Justice*** [2017] IRLR 558 SC, at [25] Lady Hale stated:

'*Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.*'

67. The Equality and Human Rights Commission Code of Practice on Employment (the EHRC Code) at paragraph 4. 5 states as follows:

'*The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied - as well as a 'one-off' or discretionary decision.*'

68. *"Particular disadvantage"* essentially means something more than minor or trivial. That was determined in ***R. (on the application of Taylor) v Secretary of State for Justice*** [2015] EWHC 3245 (Admin) where the following comments were made:

'*The term 'substantial' is defined in section 212(1) to mean 'more than minor or trivial'. I do not perceive any significant difference between the phrase 'substantial disadvantage' and the phrase 'particular disadvantage' used in section 19 of the Act.*'

69. Paragraph 4.17 and 4.18 of the EHRC Code state

'*The people used in the comparative exercise are usually referred to as the 'pool for comparison'. In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either*

positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider.'

70. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (***Land Registry v Houghton and others*** UKEAT/0149/14). There is, in this context, no *"margin of discretion"* or *"band of reasonable responses"* afforded to respondents (***Hardys & Hansons v Lax*** [2005] IRLR 726, CA).

Submissions

71. On behalf of the respondent, Mr Merck submitted that all of the witnesses were credible and had done their best to assist the Tribunal.

72. In relation to the breach of contract claim, he submitted that there had been no intention to vary the contractual notice and whilst pointing to the evidential difficulty arising from the absence of the contract itself, he submitted that the correct notice was 12 weeks rather than 3 months.

73. So far as age discrimination is concerned, he pointed to the union's support of using length of service as a criterion. He referred the Tribunal to the case of ***Rolls Royce plc v Unite the Union*** [2009] EWCA Civ 387. He reminded the Tribunal that that case was considered in the High Court and that it was important for the Tribunal to assess the evidence in the round. He pointed to the existence of other criteria which were applied. He highlighted the legitimate aim of rewarding loyalty and asked that the Tribunal find that the approach of the respondent was a proportionate means of achieving that.

74. In relation to unfair dismissal, Mr Merck submitted that dismissal was clearly due to redundancy and that the approach of the respondent met the ***Polkey***

standards. He reminded the Tribunal that there is a range of reasonable responses in this context.

75. He submitted that if the Tribunal found the dismissal to be unfair, reductions should be made for contribution and ***Polkey***. For injury to feelings, he invited the Tribunal to make an award at the lowest level in the event that age discrimination was satisfied.

76. On her own behalf, the claimant made a short submission inviting the Tribunal to find in her favour in respect of all of her claims.

Discussion & Decision

77. The Tribunal first considered the claim for breach of contract. It was a matter of agreement that the claimant was entitled to notice of termination of her employment. The dispute centred around whether there was a shortfall in the sums paid.

78. No contract of employment was placed before the Tribunal and no witness gave any evidence as to what contractual notice, if any, had been agreed at the outset of the employment.

79. What is clear, however, is the commitment made by the respondent to the claimant in the course of her third individual consultation meeting that she would receive a sum equivalent to 3 months notice. The precise figure of £7,730.91 was offered. The claimant accepted that calculation. The Tribunal was satisfied that a contractual right to notice in that amount was created. The Tribunal rejected Mr Merck's argument that there was no intention to vary the contract. The problem with his approach was, first, that there was nothing before the Tribunal to suggest what the original agreed notice was and, secondly, even if there had been a contract with a lesser period of notice, there was nothing to prevent the parties from agreeing a longer period.

80. On that basis, the breach of contract claim succeeds and the claimant is awarded the shortfall in the agreed sum of £594.69 gross.

81. The Tribunal then considered the claim for unfair dismissal. It considered, first of all, whether the respondent had presented a potentially fair reason for dismissal and had no hesitation in finding that the dismissal was for the potentially fair reason of redundancy. There was no question that a redundancy situation existed. The respondent had a genuine business reason to deal with winter overstaffing issues and the claimant was dismissed as a consequence of that state of affairs. This was not disputed by her.

82. The Tribunal then went on to consider the fairness of the dismissal. It was mindful of the fact that the respondent is a large employer with significant resources.

83. Looking at the ***Polkey*** guidelines, the Tribunal was satisfied that there was quite substantial advance warning to the employees and the union representatives about the proposed redundancies. A detailed consultation process took place involving the trade unions. There was also individual consultation with the claimant over a series of meetings. In one material respect, however, the quality of the consultation was lacking and this related to the application of the selection criteria. Both the trade union and the claimant raised concerns about the criteria deployed and the fact that length of service became the sole or predominant criterion in identifying employees from the relevant pools. The respondent failed to engage meaningfully with either the claimant or the union on this point. As outlined in the *Findings in Fact* section above, during both the union grievance and the individual consultation, the respondent failed to address the issue head on, and ignored the fact that length of service was not, as intended, a tiebreaker but instead was de facto the sole criterion in the vast majority of cases (and in relation to the Glasgow pool, the sole de facto criterion).

84. This criticism of the respondent's approach leads in to the second aspect of the ***Polkey*** guidelines: the basis of selection. The Tribunal was satisfied that appropriate pools were identified by the respondent. It was clear that each airport base had its own group of employees and whilst there was limited overlap, employees were clearly assigned to those places of work. The concern of the employment Tribunal was again the reliance on length of

service. For the reasons outlined below, the Tribunal found this approach to amount to unlawful age discrimination. It was mindful of the fact that due to the different tests which apply, a dismissal tainted by discrimination may nonetheless be fair. The Tribunal concluded, however, that it was not within the range of reasonable responses for the respondent to persist with the application of a selection process which was manifestly discriminatory without attempting to address the concerns raised, to identify any alternative criteria which may have been applied, or at least seek to provide objective justification.

85. The stated position of the respondent's witnesses was that using length of service was appropriate as a tiebreak and that is consistent with the approach in its promotion and opportunity policies. They rigidly maintained the fiction that that was the effect of the approach to the redundancy selection criteria in circumstances where the contrary was true. The Tribunal concluded that the selection process was unfair by virtue of that approach. Moreover, the Tribunal had material concerns over the approach taken by the respondent to verifying information as part of the selection process. It accepted the claimant's evidence that no reference was made to employee files in Glasgow. Whilst it is not clear that doing so would have made a difference to the ultimate outcome, the respondent's failure to do so, particularly in circumstances where it erroneously stated that it had done so, was not the action of a reasonable employer in the circumstances.

86. The Tribunal went on to consider the respondent's approach to suitable alternative employment and was satisfied that no unfairness arose in this context. The claimant was regularly made aware of vacancies which arose and she had an opportunity to apply for them. She also had an opportunity to apply for a PPY role which would have given her some security of employment. The respondent did not penalise her for failing to do so.

87. Having regard to the additional elements of reasonableness which flow from ***Williams*** the Tribunal found that the consultation with the trade union had been extensive. It fell down, however, at the grievance stage where the issue over length of service was raised. Whilst Mr Merck sought to persuade the

Tribunal that it was the trade union who were focused on the use of length of service as a criterion, the Tribunal was satisfied that the union's intention was that it should be used as a deciding factor rather than the sole or predominant factor. As was made clear by the trade union during the grievance process, they no longer supported the use of the criterion in light of the effect it had in practice and the respondent failed to address that.

88. In all these circumstances, the Tribunal found the dismissal to have been unfair.

89. As noted, the Tribunal also considered the claim of age discrimination to be well founded.

90. In this context, the PCP relied upon was the application of the selection criteria in selecting those to be dismissed for redundancy. The claimant pointed to the PCP having a disproportionately adverse impact on younger people and in particular, those under the age of 45.

91. The disadvantage alleged by the claimant was selection for redundancy which is clearly a material issue.

92. The PCP was applied to all cabin crew within the selection pool for redundancy at Glasgow (and indeed at other bases). It was applied equally to all and the Tribunal was satisfied that it put those, like the claimant, who were under 45 at a particular disadvantage. It was also satisfied that as a matter of fact, the claimant was put to that disadvantage. She gave unchallenged evidence that all of those retained in Glasgow were over the age of 45 with service of at least 25 years. The Tribunal accepted that given the claimant's age, she could not have accrued length of service such as to have been successful in retaining her job. At the time of her dismissal, she was 42 and had just over 20 years service.

93. The Tribunal then went on to consider whether the respondent had shown that the PCP was a proportionate means of achieving a legitimate aim. In terms of evidence, very little was led from the respondent on this point. The only witness who was asked was Ms Scott who referred to rewarding loyalty

as the legitimate aim. Nothing was advanced as to whether in the circumstances of the case, the PCP was a proportionate means of achieving that aim.

94. The Tribunal had regard to the decision of the Court of Appeal in ***Rolls Royce Plc***. Lord Justice Wall made clear at paragraph 100 that the inclusion of length of service as a criterion can be a proportionate means of achieving a legitimate aim. He identified the legitimate aim as being rewarding loyalty and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection. He went on to state that the proportionate means was demonstrated by the fact that the length of service criterion was only one of a substantial number of criteria used in that case and was not determinative. He also stated that the younger employees in that instance accepted the criterion. Lady Justice Arden (paragraph 166) stated that a length of service criterion can be a legitimate aim especially where it is part of an agreement freely come to with representatives of the vast majority of the workforce.

95. Against that background, the Tribunal proceeded on the basis that it is a legitimate aim to reward loyalty, retain a stable workforce and reward experience. Although not clearly articulated by the respondent in those terms, the Tribunal considered those points to be self-evident and in accordance with the Court of Appeal guidance.

96. The question for the Tribunal then became whether the PCP was a proportionate means of achieving that aim. It concluded that it was not.

97. In contrast with ***Rolls Royce Plc***, length of service was not one of a number of criteria for measuring suitability. As noted, it became the predominant (and in the case of the claimant's pool, the sole deciding factor). Although using length of service as a criterion was initially supported by the union, it is clear that when the impact of applying the criteria became apparent, the union challenged the approach. Although it did not appeal the grievance, there was nothing before the Tribunal to suggest that the union ultimately agreed with the use of the length of service criterion as it was applied. Moreover, it is

evident from the evidence of the claimant that she as a younger member of staff was aggrieved by the issue. She gave evidence that others felt the same way, and that is evident from the approach taken collectively by the union.

98. A key difficulty for the respondent in seeking to advance an argument of proportionality is that it failed during the redundancy process to address the issue at all. It was not in a position to show that the PCP was a proportionate means of achieving its legitimate aim as it stuck rigidly to the line that length of service was only one of a number of determining factors in circumstances where that was manifestly not the case. Had it been the case that length of service was in fact a tiebreaker, the position might have been different. The respondent did not, and could not, show that the use of length of service as the de facto sole or predominant criterion was proportionate because it did not accept the premise that it was.

99. Even if they had sought to do so, the Tribunal would have struggled to be persuaded on proportionality in circumstances where other criteria might well have been applied to reduce the impact of length of service – not least the rating of flight reviews which falls within their own policies on promotion and selection.

Remedy

100. The payment of lieu of notice received by the claimant was £7,136.22 (a shortfall of £594.69). This shortfall is awarded for breach of contract. It is a gross sum from which deductions should be made.

101. The enhanced redundancy payment received was £19,896. The statutory element is £11,152, giving an excess element of £8,744.

102. Having received a statutory redundancy payment, and redundancy being the reason for dismissal, the claimant is not entitled to a basic award.

103. In terms of loss of earnings, the claimant produced a schedule of loss. Since the termination of her employment, she has received income from a temporary role (£1,276) and now works part-time at a lower rate of pay (£260 per week).

104. The respondent's representative submitted that the Tribunal should not award losses beyond a period of 12 months from dismissal (such period covering past and future losses).

105. The claimant gave evidence that she did not wish to work in the airline industry again given the experience she had during the redundancy process. She did not give meaningful evidence as to why she had not applied for full time positions or for higher paid roles. Whist it might be argued that she failed to mitigate her losses further, the Tribunal was prepared to proceed on the basis of considering losses of 12 months from the date of dismissal.

106. The claimant's gross weekly pay with the respondent was £594.69. Whilst the parties did not produce a net figure, the Tribunal calculated this to be £476.

107. Based on the claimant's net weekly pay of £476, 12 months' pay with the respondent amounts to £24,752. The Tribunal awarded loss of statutory rights of £500 in addition giving a starting figure of £25,252. From this requires to be deducted the following sums:

a. Notice pay received - £7,136.22;

b. Excess enhanced redundancy payment - £8,744;

c. Income from temporary role - £1,276;

d. Income from new role - £8,580 (33 weeks at £260).

108. Those deductions result in a negative figure of - £484.22. As such, the claimant has not suffered past loss or future loss on the basis of the 12-month calculation. No compensatory award is therefore due.

109. In considering compensation for unlawful age discrimination, for the reasons outlined in relation to unfair dismissal, the Tribunal did not consider it appropriate to award any loss of earnings.

110. It went on to consider the level of injury to feelings. It was clear to the Tribunal that the redundancy process and the manner in which it was conducted

created distress and anxiety for the claimant. She was aggrieved at the time the process took, the lack of personal contact as well as the use of the length of service criterion and the respondent's approach to her complaints about this. Mindful of the need to focus on the injury which flows from the discriminatory act itself as opposed to other non-discriminatory factors, the Tribunal determined that the claimant should be awarded a sum around the middle of the lower Vento band. It determined the figure of £6,000 to be appropriate in the circumstances. The discriminatory act was a one-off process and there was no evidence of harassment or deliberate unpleasantness relating to the issue. It was nonetheless an issue which caused the claimant distress which contributed to her feeling that she did not wish to work in the airline industry again.

Employment Judge: Ronald Mackay
Date of Judgment: 25 October 2022
Entered in register: 26 October 2022
and copied to parties