EMPLOYMENT TRIBUNALS

Claimant: **Mrs Seyhan Kaya**

Respondents: **Turkish Bank UK Limited**

JUDGMENT having been sent to the parties and reasons having been requested in accordance with Rule 62(3) of Schedule 1, The Employment Tribunal Rules of Procedure of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

Background and the claim

1. The claimant was employed by the respondent, until she was dismissed by reason of redundancy on 12 June 2020. The claimant made a claim to the Employment Tribunal on 4 September 2020, which followed a period of ACAS early conciliation between 21 July 2020 to 5 August 2020. The claimant brought complaints of unfair dismissal, age discrimination, disability discrimination and pregnancy/maternity discrimination.

2. The claimant's complaints of disability discrimination were dismissed upon withdrawal on 11 January 2022 and following an *unless order* of Employment Judge Lewis of 11 January 2022. Judge Lewis confirmed on 23 March 2022 that the claimant's claims of pregnancy discrimination and harassment had been struck out. A list of issues had been identified by Employment Judge Alliott and was contained in the hearing bundle pages 44 to 47.

3. So far as the remaining claims made by the claimant, the claimant accepted that there was a genuine redundancy situation but asserted that there was unfair selection for redundancy and/or the real reason for her dismissal was her age (see issue 6.3). In her Claim Form the claimant's complaints of the redundancy process was that:

a. The respondent did not interview all of the branch staff, and this was required.
b. The claimant worked at the Haringey branch of the respondent, and this did not close.
c. The claimant also said that she had been working for the respondent for 12 years and that the respondent had found positions for recent joiners in the redundancy exercise.
d. The claimant said that she had been working for 3 years as a Senior Customer Service Officer ("SCSO") but did not get that position and that she also applied for a Team Leader position and the claimant said that another colleague had been given that position in preference to her.
e. The claimant also identified a complaint of "personal conflict" with her regional area manager Mr Resat Bilgin who, she said, had made inappropriate comments about her age and her pregnancy. The claimant 'said she raised his concerns with the human resources department in 2011. The claimant said that she believed, Mr Bilgin was involved in decision to make her redundant and he stated to the claimant "I am getting old because I was off work due to sickness". This led to the claimant belief that a manager was deliberately and intentionally discriminating towards her because of her age.

4. The Response contended that Turkish Bank had shifted its branch operating model to initially merge 2 branches (Lewisham branch and London Bridge branch) at the end of March 2020 thereafter the respondent proposed to merge the Dalston and Edmonton branches under Haringey branch. The Haringey branch was to be a "Super Centre branch" with all of the customer accounts of Dalston and Edmonton being transferred to Haringey along with customers from other branches. The respondent contended that the role of the Haringey branch fundamentally changed because staff undertook new and redesigned jobs. Consequently, the respondent said it made a business decision to include employees at Haringey within the pool of redundancy alongside employees at Dalston and Edmonton. The respondent contended that all affected staff were placed at risk of redundancy on 11 May 2020. The staff working in the north London branches, including the claimant, were given an opportunity to apply for available roles within the new structure. Consultation took place on a one-to-one basis and where this is not possible, because of the covid-19 restrictions, alternative methods were agreed with individuals, which included telephone or videoconferencing. The respondent said the claimant was individually consulted on 5 June 2020 and a second consultation meeting took place on 10 June 2020. All staff who were put at risk of redundancy, including the claimant, were provided with details of all available roles within the structure, along with other vacant positions at Head Office and given the opportunity to apply for these roles. The respondent said selection for available roles were done by way of interview and it contended that all appointment decisions were made on merit. The claimant applied for 2 roles within the new structure but was unsuccessful in both applications. The claimant sent a letter by the respondent making her redundant from her role of Senior Customer Service Officer on 14 June 2020 and the claimant appealed against this decision to make her redundant on 22 June 2020. The claimant's appeal hearing was held on 23 July 2020 and the outcome letter was sent on 6 August 2020, which upheld the decision to make her redundant. The respondent denied unfair dismissal and age discrimination

The relevant law

5. The relevant applicable law for the claims considered is as follows.

Unfair Dismissal

6. The claimant claims that she was unfairly dismissed in contravention of s94 Employment Rights Act 1996 ("ERA"). S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA.

7. The respondent contends that it dismissed the claimant for redundancy. This is a potentially fair reason pursuant to s98(2)(c) ERA. An employee is dismissed by reason of redundancy, within s139(1)(b) ERA, if the reason for her dismissal is that the requirement for employees to do work of a particular kind has ceased or diminished. This will clearly cover the situation where the dismissed employee's own job has disappeared through (actual or expected) lack of work; however, it also covers certain reorganisations and restructuring. In *Safeway Stores v Burrell [1997] IRLR 200* the Employment Appeal Tribunal ("EAT") held that the test to establish whether or not a redundancy situation existed under s139(1)(b) ERA, should be a 3-stage process:
   1. was the employee dismissed? If so,
   2. 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? If so,
   3. was the dismissal of the employee caused wholly or mainly by that state of affairs?

8. In determining at stage 2 above, whether there was a true redundancy situation, the only question to be asked is whether there was a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. This was approved by the House of Lords in *Murray and Another v Foyle Meats Limited [1999] IRLR 562*. *Safeway* and *Murray* gave little emphasis to the words "work of a particular kind" as the focus was on causation, so a dismissal is by reason of redundancy if it is attributable to the respondent's diminished or reduced need for employees to do work of a particular kind. This will cover the situation where, say, a bank requires fewer SCSOs.

9. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4) ERA:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

10. The s98(4) ERA test can be broken down to 2 key questions:

    1. Did the employer utilise a fair procedure?

2. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

11. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to its redundancy situation and the decision to re-organise or restructure its branch operating model. The case law guidance in redundancy dismissals, such as *Williams v Compair Maxam Ltd [1982] IRLR 83*, emphasized the importance of:
    a. The respondent giving as much warning as possible of impending redundancies to allow those affected the ability to find alternative solutions and/or employment.
    b. Consultation must occur when matters are at a formative stage.
    c. There should be an objective criterion for selection for redundancy.
    d. The respondent must follow a fair selection in accordance with such criteria.
    e. The respondent should make reasonable efforts in respect of alternative employment which could prevent a dismissal.

12. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did in fact chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

Protected characteristics

13. Under s4 EqA, a protected characteristic for a claimant includes age

Direct discrimination

14. S13(1) EqA precludes direct discrimination:

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

15. Less Favourable treatment is a wide concept; it covers any detriment or disadvantage, see for example *Jeremiah v Ministry of Defence [1979] IRLR 436*, *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830*.

16. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

The burden of proof and the standard of proof

17. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

18. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

19. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of age and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

20. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56 and the court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. race or sex, or age in this instance) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

21. Even if the Tribunal believes that the respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's age. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that the claimant would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained

> of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by The claimant for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

22. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

23. In the case of *Nagarajan v London Regional Transport [2000] 1 Mr Chircop 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

That analysis was in respect of race discrimination, by the analysis applies to any protected characteristic, including age.

24. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

The evidence

25. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the witness statements and the documents that had been identified for preliminary reading. The Employment Judge advised the parties at the commencement of the hearing that, as a matter of course, Employment Tribunals do not read the entire hearing bundle. If a document is important and relevant then that document needed to be referred to us, either in a witness statement or being specifically referred to the Tribunal at the hearing.

26. We heard direct (i.e. oral) evidence from the claimant, who gave her evidence through a Turkish interpreter. The claimant confirmed her witness statement and answered questions from Mr Magee (the respondent's counsel). The Tribunal also asked some questions for clarification. The claimant provided a witness statement from Ms Isil Can. Ms Can did not give evidence, so we attach less weight to her evidence

27. We heard from Mrs Nergis Eribac, who was a senior human resources manager with the respondent. We also heard from Mr Emre Kunduraci, who was the respondent's General Manager/Head of Business. The respondent witnesses confirmed the statements and were questioned by the claimant. Again, the Tribunal asked questions of clarification.

28. We considered a bundle of documents of 138 pages, including the witness statements.

Our findings of fact

29. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above.

30. In assessing the evidence and making determinations, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of events. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

31. On 11 May 2020 the claimant was given a letter entitled "Warning of Proposed Redundancy" [Hearing Bundle: page 77-78]. This letter referred to a meeting that day where the claimant was advised of the risk of her role becoming redundant following the decision to restructure the northern [i.e. North London] branches. The letter provided the claimant with the new branch operating model for the northern branches, a list of vacancies and a timeline. The letter said that whilst job titles remain unchanged many of the roles included new and additional responsibilities and job descriptions were available from the human resources department. The claimant was told she could apply for as many of those roles as she wanted.

32. On 2 June 2020 the claimant was sent a redundancy consultation letter [HB79]. She was invited to a telephone consultation for 5 June 2020 with Mr Kunduraci and Mrs Eribac. She was advised that she could bring a work colleague or trade union representative with her, and Mrs Eribac said to feel free to contact her with any questions or issues in the interim.

33. At the consultation interview of 5 June 2020 [HB80], Mrs Eribac informed the claimant of the outcome of her interview and said that the respondent would not be able to redeploy her in the position she applied for because of her "interview outcome". Mrs Eribac said that no further vacancies existed with the respondent, and when the consultation process was finished, she would invite the claimant to a further meeting to confirm the outcome. This was confirmed to the claimant in a letter dated 8 June 2020 [HB81].

34. The second consultation interview occurred on 10 June 2020 [HB82-83]. Present were Mr Kursat Asardag (Chief Finance Officer), Mr Kunduraci, Mr Bilgin (Head of Branches) Mrs Eribac and the claimant. The claimant queried the selection process and Mr Bilgin advised her that candidates were evaluated by panellists and selected according to their score at interview. Mr Kunduraci added that the same 5 questions were asked of each candidate which was scored and then ranked. The claimant said that she perceived older employees to have been selected for redundancy. Mrs Eribac disputed this and said that there were young employees who were not successful and added that the only criteria taken into account was the interview results, rankings and the current performance. Mr Kunduraci and Mr Asardag denied that any age-related criterion was used in the evaluation process. Mrs Eribac subsequently proceeded to make the claimant redundant. She said that the claimant's last day of employment would be 12 June 2020 and she confirm what payments would be due to her.

35. On 14 June 2020 Mrs Eribac wrote to the claimant to confirm her dismissal [HB84-87]. She said as follows:

> …We met with you on 11 May 2022 to explain the Bank's decision to restructure the Northern Branches to create a Super Centre at Haringey and a sub-branch at Palmer's Green and that as a result your role was at risk of redundancy.
>
> All staff are invited to submit applications for available roles within the new structure and interviews were held on 20th, 21st and 22nd of May 2020.
>
> We had a phone conversation with you following your interview for SCSO and Team Leader positions on 5 June 2020 to confirm that you have been unsuccessful in securing a role in the new structure and to give you feedback in respect of the same. We also informed you that as a result of not securing one of the available roles you had been provisionally selected for redundancy.
>
> On 10 June 2013 we had another phone conversation with you again to consult with you further regarding your provisional selection for redundancy.
>
> During our meeting you said that you do not think the right decisions have been made and that whilst you have always supported the Bank, you do not feel it has supported you during this difficult period by provisionally selecting you for redundancy.
>
> You asked about selection criteria and how other candidates have been selected. We confirmed that all candidates have been evaluated by the interview panel, were selected based on their interview scores and that all candidates had been asked the same questions. Senior managers from outside of the affected branches were involved in the interviews to ensure objectivity in the decision-making process. However, there are only limited positions available in the structure, which has meant the Bank has had to make some very difficult decisions.
>
> At our meeting you said you had perception that only older employees had been selected for redundancy. We assured you that this was absolutely not the case as a number of younger staff had also not been successful in obtaining a role in the structure.
>
> You also said you think the Bank is blaming longer serving employees for the failures. You said that you did not see good management and because of this redundancies have been made.
>
> We explained that the Bank had explored ways in which your redundancy could be avoided, and the possibility of alternative employment but that, unfortunately, it has not been able to identify any alternative employment for you or any way in which your redundancy could be avoided. As a result, we confirm that your position is redundant and your employment will terminate with effect from **12 June 2020**…

36. The claimant was informed of her right of appeal, which she exercised on 22 June 2020 [HB88-89]. The claimant appealed on the following basis:

> I believe the grounds for selection for redundancy dismissals were unfair.
>
> The reason I thought it was not fair because,
>
> As your explaining, Turkishbank close their two branches in North London (Haringey and Dalston branches) due to Covid 19 and other reasons and planned The new digital Transformation Program, which is scheduled to be reorganised, and the new technology system have not been openly available for staff who have been employed in the bank for a long time and no alternative job or training has been offered. The employees who have worked at the bank for a long time and who are over 40 years old have been chosen, like me. This situation caused **age discrimination**.
>
> London Branch staff, known as Branches in the bank's Head office building, did not enter the interview. This situation caused **staff favouritism**.…
>
> I also applied Team Leader Position. In these two positions, my colleagues who have less knowledge than me and had not done it before were promoted. But I've been working at the bank for 12 years, but I've been promoted very hard. Even it's been grievance 40 situation. Therefore, the situation **blocked equal opportunities for the staff**…

37. The claimant proceeded to ask questions of the redundancy scoring system.

38. On 17 July 2020, Mrs Eribac acknowledged the claimant's appeal and set a date for the appeal hearing [HB 90-91]. Mrs Eribac advised the claimant:

> **1) Team Leader Position**
>
> In total there were 6 applicants for this role, who were assessed by way of interview based on a maximum score of 300. There was only one Team Leader position available in the new structure and accordingly the bank selected the employee who scored the highest.
>
> The highest score was 253. The lower scores 93. The average of all scores was 168. Your score was 160.
>
> **2) SCSO Positions**
>
> There were six positions available in the new structure and in total there were 11 applicants. All were assessed by way of interview based on a maximum score of 300. The bank selected the six employees scored the highest.
>
> The high score was 253. The lowest score was 93. The average score was 180. Your score was 160.

39. The appeal hearing proceeded on 23 July 2020. Mr Andrew Cheetham (Head of Compliance) chaired the hearing. Also present were Mr Kunduraci, Mr Bilgin, Mrs Eribac and Ms Nicola Millard (an outside HR provider). The claimant attended with her trade union representative Mr Geoff Saunders. Notwithstanding the highest score and the lowest score for both selection processes were exactly the same, the claimant did not challenge the scores of other candidates, either at the appeal hearing or during the Employment Tribunal process. According to the respondent's minute, the claimant's trade union representative played an active role in the appeal.

40. The outcome of the appeal hearing was sent claimant on 6 August 2020 [HB94-95]. The respondent said that the chair considered the claimant's appeal points as follows:

- Why Haringey's Team Leader (TL) position was not included in the process and not at risk of redundancy? The reason that this position was not included was due to the new structure and requirements of the business moving forward; instead of reducing the TL position, there was an increase by 1 position, therefore the current TL position was not at risk of redundancy.
- Why London Branch staff were not included in the redundancy process? The reason why the London Branch staffs were not included was due to the customer profile, business strategy, business model and the new structure; therefore London Branch staffs were not included as the restructuring was for Northern branches only.
- The concerns that you raised in relation to your perceived view that that the selection process was unfair due to age were clarified during the Appeal Hearing, and you were informed that the assessment was based on a fair and objective assessment and that there was no age criteria, and there were 3 employees who were made redundant below 40 age as well as the employees over 40 years of age.

41. The claimant was told that the Chair therefore decided to uphold the original decision and that the original decision remained.

Our determination

42. Notwithstanding we dealt with our findings of fact in chronological order, so far as determining the claimant's claims for clarity we shall address these in the broad sequence that the allegations are set out in the list of issues.

Jurisdiction – time limits

43. The claimant was selected for redundancy dismissal on 12 June 2020. She issued proceeding on 4 September 2020 after a short period of ACAS Early Conciliation between 21 July 2020 and 5 August 2010. Her complaint of unfair dismissal and her age discrimination dismissal complaint were both brought within the appropriate time limits of s111 ERA and s123 EqA.

Unfair dismissal

44. The claimant was put on notice of redundancy situation on 11 May 2020. The respondent provided its business case, a list of vacancies and a timeline [HB77-78l].

45. The first issue was the London Bridge branch exclusion from the claimant's redundancy process. London Bridge branch and Lewisham branch had been merged in the first tranche of the New Branch Operating Model. This was a discrete process of redundancies which applied to these 2 branches. The process applied earlier in 2020 and it was completed by March 2020, some months before the claimant's redundancy process [HB78b]. That process was discrete. The respondent took a business decision that effectively ring-fenced the implementation of its business reorganisation in 2 stages. Various factors were raised. Geography was raised as a factor i.e. the proximity of the 2 branches, central London and inner South London. The respondent also said it wanted to stagger the changes, for legitimate business reasons, including tackling the work in smaller tranches and using the smaller exercise to lean lessons for the larger restructuring. The claimant's criticism of this decision may or may not have force, but these are criticism of the respondent's business rationale. The Employment Tribunal does not have the expertise or the experience to tell the respondent's how to run its business. We are not a party to business decisions. Our role is to review the process undertaken and (so far as it applies to the claimant's

employment rights only) to assess whether this was within a range of reasonable responses open to an employer of this size and type in such circumstances. There was a logic to the respondent's methodology, which was clearly rational and therefore legitimate. We are not entitled to substitute our views about the process that should be adopted for that which, in fact, the respondent chose. So, the claimant's criticism in respect of deferring one tranche and London Bridge/Lewisham employee's not joining her pool of selection for redundancy is rejected.

46. Second, non-inclusion of Team Leader role in redundancy pool; the claimant was not a Team Leader. There was an expansion from 1 Team Leader job to 2 Team Leaders in the north London branches. Therefore, the claimant had the opportunity to apply for this role alongside colleagues. FE was not put into the redundancy pool because her role was never going to be put at risk of redundancy. So, 1 job became 2 jobs. We did not accept that there was a need to put FE at risk of redundancy and then make her apply for her own job. The respondent did not treat that as a redundancy situation and that decision was within the range of reasonable responses that an employer might make in a similar position.

47. There was clearly a redundancy situation for the SCSOs. Prior to implementation of the New Branch Operational Model there were 6 SCSOs, following implementation this was proposed to be set at 2. There were 11 applicants for this role, and all of these were affected by redundancy. The applicants included staff more senior than the "old" SCSOs and staff more junior.

48. We had concerns about the selection criteria. We viewed closely a process whereby staff that wanted to avoid redundancy dismissal were required to apply for roles substantially similar to jobs that they have undertaken before and what they might reasonably perceive as their own jobs. This does not fit easily into the legal framework of an employer lead process set out in *Williams v Compare Maxam* described above. The process that the respondent used did not accord with that "usual" or expected process. That said, whilst most Employment Tribunals would dislike the process adopted, we are not entitled to impose what we regard as a fair(er) process to what the employer chose. It is sufficient for the employer to show that it set up a good system of selection and that this was fairly administered: see *Eaton Ltd v King [1995] IRLR 75*, *Bascetta v Santander [2010] EWCA Civ 351*.

49. We disagree with the respondent's contention that they utilised an objective selection process. All applicants were effectively required to pitch for a job, i.e., persuade a panel that they should be given a job in the new structure. This is permissible if employees are told to apply the available jobs and then the applications are considered properly and the exercise carried it out in good faith: see *Darlington Memorial Hospital NHS Trust v Edwards & Vincent UKEAT/678/95, S Morgan v Welsh Rugby union [2011] IRLR 376*.

50. A subjective selection process requires explanation. The respondent's process was not intrinsically unfair, the insistence on employees applying for jobs in the new structure is open to abuse or manipulation. We required a detailed explanation if we are to accept this as a fair process.

51. The claimant did not apply for the more junior role of Customer Services Officer ("CSO"). We make no criticism of this; we merely make this observation and explain why we do not consider the CSO role is relevant to our analysis.

52. There was a panel of 8 interviewers for jobs in the new structure. Candidates were assessed against the same criteria for one or more jobs. Of the 8 interviewers, 6 interviewed SESO applicants: panellist 2 interviewed 4 applicants; panellist 3 interviewed 2 applicants; panellist 4 interviewed 3 applicants; panellist 5 interviewed 3 applicants; panellist 6 interviewed 3 applicants; and panellist 7 interviewed 3 applicants. The claimant was interviewed by panellist 2, panellist 6 and panellist 7.

53. There were 4 standard questions and candidates were given up to 25 marks per question. The respondent's witnesses said, and we believe, that there was a meeting before the interview in which they discussed the questions, discussed the scoring and were told to keep notes. The panel was allocated at random and panellists 2 and 6 had not worked with the claimant before. The claimant said that that was a detriment in itself, but we reject this because the candidates were scored in respect of their answers only and not in respect of the interviewers' knowledge of their previous work.

54. It was panellist 7, i.e. Mr Bilgin, that the claimant complained of in these proceedings as she said that there was a history of antagonism between them. Even on the claimant's own case this purported antagonism was some time previously. However, more significantly, the claimant did not object to Mr Bilgin's involvement at the time nor did she raise this on her appeal against dismissal. This is hugely significant for the unfair dismissal case, at least, because our review rests primarily on what was said and done at the time and the claimant was represented at material times by a trade union official. In any event, Mr Bilgin gave the claimant her second highest, or the middle, score.

55. We were concerned with how the interviewers set about their task. There was a modulating meeting after the interviews, and we were concerned with the wide range of scores and the effect that this had on a supposedly objective process. The interviewers were given little or no proper guidance or framework to ensure consistency other than the perfunctory pre-meeting noted above. This seems to explain the wide discrepancy of the marks, which we attribute to poor management and/or managers as opposed to a conspiracy to obstruct one or more candidates.

56. When asked at the hearing, the claimant said that she had full confidence with panellist "ON", who was a senior female employee with a good reputation for fairness and efficiency. ON gave the claimant her highest score. ON interviewed for a variety of roles and was a consistent high scorer [HB137]. Even if we took the claimant's highest score and multiplied that by 3, the claimant would still not have achieved a score exceeding those appointed for the SCSO role. ON gave the claimant a score of 71, which was her joint lowest score of the 8 candidates she interviewed for various job. The claimant's score from ON was also ON's joint lowest score for her 6 SCSO interviews. So, by any analyses, the claimant did not meet the standard for her appointment through the interview process.

57. Having heard the claimant's criticism, we are not persuaded, on the balance of probabilities, that the interviews, i.e. the selection process, was not fairly administered.

58. Both in the list of issues and at the hearing, the claimant accepted that there was a genuine redundancy situation. So, the claimant was dismissed for a potentially fair reason, pursuant to s98(2)(c) ERA.

59. We are not permitted to substitute our own views on a redundancy selection process for the process the respondent actually undertook unless we determine that no reasonable employer could have adopted them or applied them in a way in which this employer did: see *Earl of Bradford v Jowett (No 2) [1978] IRLR 16*.

60. In answer to our 2 specific questions poised above, we are satisfied that the respondent utilised a broadly fair procedure in notifying the claimant of a redundancy process, inviting applications for all available jobs and in assessing those applications. We find that both the decision to dismiss the claimant by reason of redundancy and the procedure adopted were within the range of reasonable responses.

Direct Race Discrimination

61. The claimant's redundancy and the termination of her employment, as identified at issue 6.6.1, are obviously detriments. The list of issue notes that redundancy and dismissal amount to one single detriment with two aspects. It was the redundancy process that inevitably led to the claimant's dismissal.

62. The claimant applied for 2 roles in the redundancy process, that of Team Leader and SESO. The only potential comparators are those who were actually appointed to the roles that the claimant applied for, i.e. the successful candidates who were not dismissed by reason of redundancy. These comparators are those appointed to the one Team Leader's role and the two SCSO roles. The claimant was 41 years of age at the time of the redundancy process and her ensuing dismissal.

63. In respect of the Team Leader's role, FE is not the appropriate comparator, because she did a different job to the claimant at the time of the redundancy consultation. Specifically, FE was already a Team Leader and more senior to the claimant. FE was not part of the redundancy process. As stated above, there must be no material difference between the claimant and her comparator because if there is a material difference then we cannot attribute the less favourable treatment to the claimant's protected characteristic.

64. MM was appointed to the Team Leader's role. MM was a SESO and 35 years old, i.e. he was 6 years younger than the claimant. He is the correct actual comparator because he was in the same grade as the claimant a nd then appointed to the Team Leader job. He is outside the age comparator group identified by the claimant at point 3.7 of the list of issue as that group was identified by the claimant to be in their mid-20s to late-20s, which is considerably younger than this successful candidate So, as regards the claim of age discrimination MM is outside the age comparator group. Therefore, this complaint must fail; the detriment of redundancy and dismissal cannot be said to arise from less favourable treatment because of the claim's protected characteristic of age. So, whilst there is a detriment (which might amount to unfavourable treatment) there is no *less favourable treatment* as required to succeed in a complaint of direct discrimination under s13 EqA. For completeness, the burden of proof does not shift because the Tribunal cannot conclude that the respondent has committed unlawful discrimination.

65. For the SCSO roles there are 2 comparators: SG who was 5 years older (age 46) and EK who was 5 years younger (aged 37). Again, neither of the successful applicants were in the comparator age-group the claimant identified in her list of issues, i.e. staff in their mid- to late-20s. So, for the reasons set out above, we determine that there is no less favourable treatment because of the claimant's age and this claim must fail also.

66. So far as the comparator group identified, there were 4 applicants in their 20s and none were appointed to the 2 roles for which the claimant applied [HB137]. One candidate applied for the more junior CSO role and was successful, having failed to obtain a SCSO or the Team Leader role. One candidate was appointed to a HR role, for which the claimant did not apply. One potential candidate was on maternity leave, and she indicated that she did not want to return to work. One candidate was unsuccessful in her applications. Given that the claimant did not apply for the 2 roles obtained by applicants in their 20s, their success in obtaining roles that the claimant did not apply for cannot be regarded as a detriment to the claimant.

Employment Judge Tobin

Date: 2 February 2023

SENT TO THE PARTIES ON

2 February 2023

FOR THE TRIBUNAL OFFICE