EMPLOYMENT TRIBUNALS

Claimant: Mr Devon Orgill

Respondent: Jaguar Land Rover Ltd

Heard at: **Birmingham ET** **On:** **10,11,12,13 and 14 July 2023**

Before: **EJ Boyle**

Representation
Claimant: Mrs D Orgill
Respondent: Mr G Price (Counsel)

JUDGMENT having been sent to the parties on 14th July 2023 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant presented a claim with Midland West Employment Tribunal on 24 February 2022. ('ET1'). The claimant had earlier made contact with ACAS on 14 December 2021 and an Early Conciliation Certificate was issued on 25 January 2022.

2. In his ET1, he brought the following claims:

    a. Unfair dismissal

    b. Direct age discrimination

    c. Direct race discrimination

3. The Respondent lodged an ET3 dated 24 February 2021 denying all the claims

4. At the first Case Management hearing held on 31 August 2022, the Claimant clarified the claims he was also bringing which included a claim for indirect age discrimination regarding the respondent's policy of placing all those at risk of redundancy in a Displacement and Redeployment Process ('DRP').

5. Pleadings were amended by both parties, and, presumably following a disclosure exercise, the Claimant amended his claim again to add specific further acts of direct age and race discrimination (in relation to lack of offer of a handover and lack of a final performance appraisal.) A further Case Management hearing was held on 6 February 2023. An amended amended claim form was lodged by the claimant and an amended amended response was lodged by the respondent. All of the claimant's claims were denied by the respondent.

6. The case was well prepared with a joint bundle and witness statements prepared for the respondent and claimant . We also received a chronology, and the claimant's schedule of loss and supporting evidence.

7. In terms of the issues. It was agreed by the parties and set out in a document presented to the ET.

Issues

Unfair Dismissal

8. Was the reason or principal reason for the Claimant's dismissal a potentially fair reason within subsection 98 (2) of the Employment Rights Act 1996? The Respondent relies on redundancy.

9. 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:

    a. The respondent adequately warned and consulted the claimant;

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

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

    d. Dismissal was within the range of reasonable responses open to a reasonable employer; did the Respondent act reasonably in treating

it as sufficient reason for dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent) and in accordance with equity and the substantial merits of the case?

Direct Age Discrimination (s.13 EqA 2010)

10. The Claimant relies on the actual comparator (Gary Wren) in the same selection pool but who is younger than the Claimant (the Claimant was 57 at the time of his selection for redundancy. Gary Wren was 38 at the time of the Claimant's selection for redundancy.)

11. Did the Respondent treat the Claimant less favourably during the redundancy process by:

    a. giving the claimant a lower score as part of the redundancy process and/ or

    b. by virtue of the amended matters alleged in §§ 23 and 24 (the amended paragraph 24 is to be read in conjunction with paragraph 23 in terms of the timing), not offering a proper handover procedure? and/or

    c. By virtue of the alleged amended matters at paragraph 43, not being given an end of year performance review for 2021/22?

12. If so, was the Claimant's low score and/or by the amended matters alleged in paragraphs 23,24, lack of offer of a proper handover and/or by the amended matters in paragraph 43 the lack of an end of year performance review because of the Claimant's age?

13. If so, was the Respondent's low scoring of the Claimant during the redundancy process and/or lack of offer of a handover and/or lack of an end of year performance review a proportionate means of achieving a legitimate aim? The Respondent relies on:

    a. the efficient planning of the departure and recruitment of staff,

    b. Applying a fair and objective redeployment process:

    c. The efficient management of work transferred amongst staff, in particular the

    d. completion of offboarding and handover processes in accordance with business needs: and

    e. Having a consistent approach to performance review processes throughout the organisation.

14. The Respondent submits it was proportionate to:

    a. Apply an objective pooling system and selection process to achieve the legitimate aim of fairness in a redeployment process:

b. Assess whether a handover is required at all, or whether a more formal handover is required as part of an offboarding process to ensure the transfer of work amongst staff is managed in an efficient way and in accordance with business needs, which may in some circumstances require not completing a more formal handover process where it is considered the transfer of the work can be adequately completed: and

c. Not hold a formal performance review with an employee who is due to leave the business.

Indirect Age Discrimination (s19 EqA 2010)

15. Did the Respondent have a provision, criterion or practice (PCP) of,

    a. Placing the lowest scoring employees in a grade specific selection pool into the next stage of the Displacement and Redeployment Process;

    b. Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic of age or would have done so (i.e. younger employees under the age of 50)?

    c. If so, did the application of the PCP put employees of the Respondent with the relevant protected characteristic (over 50) at a particular disadvantage?

    d. Did the Respondent apply the PCP to the Claimant?

    e. Was the Claimant put at the particular disadvantage contrary to the EqA 2010?

    f. .If so, is the application of that PCP objectively justified as a proportionate means of achieving a legitimate aim? The Respondent relies on the aim of carrying out the redundancy process fairly and consistently.

Direct Race Discrimination (s.13 EqA 2010)

16. The Claimant relies on the actual comparator(s) of his colleagues, including Gary Wren, in the same selection pool but who are white in relation to 15(a) below. The Claimant relies on the actual comparator of Gary Wren in relation to 15 (c)(d) below and a hypothetical comparator in relation to 15(b) below.

17. Did the Respondent treat the Claimant less favourably during the redundancy process by:

    a) giving the Claimant a lower score as part of the redundancy process? and/or
    b) by virtue of the unamended matters alleged in §§ 17, 23 and 24? and/or

c) by virtue of the amended matters alleged in §§ 23 and 24 (the amended paragraph 24 is to be read in conjunction with paragraph 23 in terms of timing), not offering a proper handover procedure? and /or
d) by virtue of the amended matters alleged in paragraph 43, not being given an end of year performance review?

18. If so, was the Claimant's low score and /or by the unamended matters alleged in §§ 17,23 and 24 and/ or by the amended matters alleged in §§ 23,24, the lack of offer of a proper handover and/or the amended matters at paragraph 43, the lack of an end of year performance review because of the Claimant's race?

Remedy

19. What compensation, if any, is the Claimant entitled to?

20. if any sum is awarded to the Claimant for unfair dismissal, should there be any reduction in the award due to Polkey?

21. If any sum is awarded to the Claimant for unfair dismissal, should there any compensation be reduced on account of the Claimant's conduct

Procedure Documents and Evidence

22. We heard evidence from the claimant and Mr Gary Wren

23. We also heard from the respondent's witness, Adam Page and Martin Brown. The respondent had served a statement from Rob Scott. Mr Scott was unable to attend and the claimant said they had a number of questions for him, which they were not able to put. Therefore we have applied little weight to his evidence save where it confirms undisputed facts.

24. We were given a large bundle totalling 692 pages. At the start of the hearing the respondent asked for an additional document to be added to the bundle . As this was the scripts given to line managers to support them during the redundancy process, we found that this was a highly relevant document and should have been in the bundle in the first place. Therefore we allowed it to be included.

25. The claimant made an application for wider discovery from the respondent. This was in relation to the disclosure of company-wide information rather than the more limited information he had received to date which he believed would support his claim for indirect age discrimination. The respondent objected to this request as it could involve disclosure of up to 14,000 documents. This exercise would mean the ET could not proceed on the date and would be postponed. They said the claimant clearly already had sufficient information with regards his indirect discrimination claim. For the oral reasons given at the hearing this was refused.

26. We did not read every document in this bundle but did read documents that we were taken to in witness statements and during evidence.

27. At the conclusion of the evidence each party made an oral submissions. The respondent also submitted written submissions.

28. All witnesses were helpful to the Tribunal. They gave considered and thoughtful evidence. We had no reason to doubt the truthfulness of their accounts. There were a couple of areas of dispute and where these have occurred we have explained below why we have preferred one account.

29. The parties both made submissions at the end of evidence.

Fact Finding

After a careful consideration of all the evidence before the Tribunal yesterday we make the following findings of fact.

30. The claimant's employment with the respondent commenced on 20 September 2004 and he worked in various roles during his time included that of technical instructor and technical armour support manager.

31. Since 2015 the claimant had been working in the Prototype Development workshop (PDW) based in Gaydon as a Workshop Planning Co-ordinator (Grade C). He worked 40 hours per week. The claimant describes himself as Black British and at the relevant time of his dismissal was 57 years old.

32. R is large well-known organisation – with several thousand employees. It is a premium automobile manufacturer with manufacturing sites in the West Midlands.

33. The claimant's main tasks were set out in a C Grade Workshop Planning Co-ordinator document. It was accepted by the respondent in evidence that this was a document that was several years old and there were other tasks he fulfilled - but that the essence of his role is contained in them.

34. During 2020, the respondent undertook a large 'redeployment and displacement' experience – a collective redundancy process. We have seen the documentation regarding this process. Whilst the claimant complains that he was not part of this process, we find that the respondent undertook a collective consultation process during 2020 and early 2021 and the fairness of this process was not challenged by the claimant. The process, including selection criteria and its scoring and application was all agreed with the recognised trade union Unite. Whilst the respondent originally placed 2000 employees at risk, ultimately 546 left the respondent as redundant during 2021 including the claimant.

35. Adam Page joined the PDW team as Manager of the Engineering Workshops on 2 November 2020. He took over from the outgoing (retiring) manager, Simon Cort on that date, but Mr Cort remained in post until May 2021 in order to effect a handover.

36. Mr Page gave evidence that he started to hear about the respondent's Redeployment and Displacement Process (RDP) around 29 March 2021 as he was undertaking training sessions. He was informed that he needed to effect a headcount reduction from 17 to 14. Mr Page undertook a series of specific of training events organised by the respondent to support him in his role of selecting people for redundancy.

37. Mr Page undertook two selection process, but the one that concerned the claimant was a pool of C Grade employees in the PDW group GB03 Product Engineering Operations Test Completion and Analysis C . Mr Page was told he needed to lose 3 headcount (2 from C grade and 1 from B grade). Mr Page determined that there should be 5 people in this pool. Whilst there were 4 other grade C employees in PDW, Mr Page explained why they had not been put in the pool – Jason Clark and Andrew Barber were electrical engineers performing very different roles, Steph Clifton had a particular specialism with overseas trade and Simon Biddle worked at a different site.

38. Mr Page stated that the pool of 5 C Grade employees included 4 supervisors (GH, JA, PM Gary Wren and the claimant). The claimant objected to the classification of Mr Wren as a supervisor, but we can see from the organisation chart that Mr Wren's title was Tyre Stores Super. Mr Wren stated in his evidence that his job title was Wheel and Tyre Storage Coordinator. He confirmed he had supervisory responsibilities for some grade A employees. Whilst it is not clear why the claimant expressly challenged this, we find that the pool contained 4 supervisors and the claimant. The age range of the employees in question was between 38 and 62 (with 4 of the 5 being over 50). The claimant was the only black employee in the pool, all the others are described as white.

39. Mr Page undertook a scoring process involved the following criteria:

    a. Technical - 5 aspects were scored. One was company specific, but the 4 remaining were chosen by Mr Page in order to get the right technical skills for the future. He selected these in discussion with his line manager Richard Quarterman
    b. Behavioural – these are 6 company wide standards of behaviours
    c. Performance (based on an average over 3 years contained in performance appraisals excluding the year of the pandemic)

40. Mr Page undertook the scoring for the first two parts but the third part (performance) was undertaken by HR – using a agreed scoring process

based on the performance grade. With the performance rating, the claimant was assessed as a Developing performer (or 'on track' which was in the same category) for the 3 appraisal years considered (2017/18 2018/19 2019/20). This gave him a score of 2 for each year and therefore an average score of 2 also. The top possible score was 5 and the lowest was 1.

41. Mr Page gave evidence that he undertook his part of the scoring based on the knowledge he had gained of the employees in his department over the previous 6 months and also following discussions/sense check with Simon Cort and John Redfern. Whilst the claimant has complained that Mr Page didn't know him well enough to score him, the same can be said for everyone else in the pool. We accept Mr Page's evidence here that he was new to the team and did not know anyone else before joining in November 2020.

42. With the technical scoring – the C scored 2 in each overall category. We have seen a breakdown. The scoring range was 1-5, with no-one receiving a score of either 1 or 5. Therefore the claimant received a score of 10 out of 25.

43. With the behaviour score, the claimant received a score of 14 out of 30. There were 6 categories of company values with the lowest score being 1 and highest score being 5. In the claimant's selection group the scoring range was between 2 and 5.

44. With all 3 separate scorings a weighting was applied to give an overall score. Therefore the claimant's 'raw score' was 10 plus 14 plus 2 = 26. With weighting applied he received a score of 42.33 rounded to 42.

45. Within the pool – we have been provided with a breakdown for each person. The highest score was 64, next 63, next 54, next Mr Wren with a score of 48 and the claimant was lowest with 42. We find that there was a gap between the claimant's and Mr Wren's scoring and a considerable gap between the person who has the 3 highest score of 54.

46. A great deal of the claimant's very lengthy witness statement deals with an analysis of both his score and others scores. During cross-examination, Mr Page was cross-examined about the claimant's diagnostic skills. Mr Page was referred to previous Performance Reviews for the claimant. Mr Page was steadfast in his evidence that the comments in the claimant's performance reviews did not demonstrate any actual skill of the claimant and he based his assessments on his own observations based over 6 months and sense check conversations with Mr Cort and Mr Redfer. He also used the Performance Review score as a sense check and gave evidence that if his scoring on the technical and behavioural criteria had been out of line with this he 'would have looked at his scoring again.'

47. The claimant has complained that he was not informed about the selection exercise and that it was done in secret. We find that this applied to

everyone – all selections were done by managers without telling employees. We find that this is a common route in mass consultation exercises and avoids lots of uncertainty for people who are not selected for redundancy. We do not find anything strange or sinister about this common practice.

48. On 6 May 2021 a warning regarding redundancies was given to all employees affected. The claimant confirms he got this email – which refers to 'Nick's' communication on 16 April . This email from Nick was not in the bundle. Even if the claimant didn't know before this, he knew by 6 May2021 that his job may be at risk and that he would be informed between 12-27 May 2021.

Individual consultation process

49. On 11 May 2021, the claimant received an email from Mr Page. The claimant maintains that Mr Page became his line manager after Simon Cort, the outgoing manager, retired in May 2021. The respondent asserts that his line manager or supervisor was John Redfern. An organisation chart produced by the respondent, shows the claimant's name with a dotted line to John Redfern and John Redfern carried out the claimant's annual appraisals. We find that the claimant did report into Mr Redfern as his supervisor and that Mr Page was the manager of the entire PDW team.

50. On 12 May 2021 the claimant's first consultation meeting took place. The respondent supplied a script for this meeting and we find that Mr Page followed this script.

51. Therefore at the meeting Mr Page:
    d. Gave details of the company wide right size operation;
    e. How it would affect the claimant;
    f. That he had been impacted and placed in a selection pool where selection criteria had been applied;
    g. The selection criteria were technical, behavioural and performance based over last 3 years;
    h. That he had not been matched to a new role;
    i. He was therefore at risk of redundancy;
    j. He would be moved to a redeployment and displacement process with several options ;
    k. The process would take 90 days; and
    l. He was told his score of 42.

52. The evidence from the meeting notes of this meeting is that this was a two way meeting with the claimant engaged and asking questions about the process.

53. Whilst the claimant did not receive a breakdown of his score, we find that he did receive his score and the selection criteria headings at this meeting.

54. We accept Mr Page's evidence, that his advice from HR was not to provide a breakdown of the score at this stage.

55. On 13 May 2021, the claimant emailed Mr Page and asked for his score. Mr Page responded by email to give the claimant a breakdown of his score as follows:
    m. Performance score 2
    n. Behavioural score 14
    o. Technical score 10
    p. Total score 42.5

56. Also given were the headings of each assessed category under 'Behaviour' and also the 5 headings used for 'Technical'. He explained that Performance was based on previous end of year ratings (but not for 2021).

57. It is perhaps not surprising, with no reference being made to weightings that the claimant was a little puzzled by this scoring and he didn't understand how his score was 42.

58. On 14 May 2021, the claimant attended a further meeting with Mr Page. This time he was accompanied by his Trade Union Representative, Mr Steve Baker. We find that the claimant was fully engaged in this meeting and whilst the majority was taken up with questions regarding possible redeployment, he did ask about the pool (Mr Page confirmed this was only C grade employees doing similar roles to the claimant) and that he was scored against the criteria already given.

59. Following this meeting it was confirmed to claimant that he would proceed to the displacement process. The claimant has asserted that his 'low' score had an impact on applying for other roles. Mr Page's evidence is that hiring managers had no regard to the redundancy scoring and used normal recruitment principles for roles. We accept this evidence.

60. On 3 June 2021 following advice from his Union, the claimant requested the Displacement Assessment Criteria and scoring matrix from Mr Page.

61. There was a dispute here as to when and how this breakdown should be given. Mr Page asked the claimant to make his request through HR. He said it was his understanding that this was the process. How the Trade Union were aware of other managers sending these documents to individuals without going via HR. We find that Mr Page was following the procedure he believed applied here and that he was not been evasive by asking the claimant to follow this procedure. The claimant, apart from saying he raised the issue regarding scoring with HR, could not point to any documentary evidence that he had done so. He said that HR kept 'shutting down' his tickets.

62. A further meeting took place on 17 June 2021 to discuss job applications. The claimant asserted that Mr Page had been evasive in this meeting by not helping him understand the score he had received following two job applications.

63. The claimant showed us hiring manager guidelines regarding scoring. Mr Page's evidence was that the first time he saw the hiring manager guidelines was as part of this ET process. He was not a hiring manager at that time as there were no vacancies in his team. We accepted Mr Page's evidence here and that therefore he would not have been able to assist.

64. The claimant gave evidence that he had a direct HR contact for support during this process and we would have expected him to follow this up with HR if he was concerned about his scoring. It was not a surprise to us that Mr Page would not have been able to help with explaining another manager's scoring to the C.

65. On 23 July 2021, the respondent announced a month long extension to the RDP. The claimant said in evidence that he heard about this from his union and that Mr Page popped his head round his door at some point to tell him. The claimant made much in his evidence about the fact in the appeal procedure Mr Page told the appeal managers that he had told the claimant about this extension on 27 July 2021. We accept that this could not have happened on this date as the claimant was clearly on annual leave. Mr Page readily accepted in evidence that he had got the date wrong and that he had told the claimant earlier – probably around 21 July 2021 of the change. The claimant says this did not happen in a 1-1 meeting. Mr Page said that this didn't have to be a formal meeting and no notes were taken. We find that the claimant was told about the extension in good time and before his holiday.

66. On 10 August 2021, the claimant raised a request to HR about his scoring – this was authorised and on the same day Mr Page sent an email to the claimant with his detailed scoring breakdown. This is a detailed document and gave a breakdown for the technical and behavioural aspect of the scoring. The email had an attachment 'D Orgill Assessment Tool Output' - this was an extremely detailed assessment setting out the selection criteria for the technical part of the assessment. The email contained a breakdown of the behaviour score and confirmation of how the performance element of the score was achieved.

67. The C asserts that he did not have enough information for him to work out how he got the score he did. We find that by no later than 10 August 2021 he had more than enough information to see how he had achieved the scoring he did.

68. On 3 September 2021, the claimant was told by Mr Page of further extension to the RDP. The claimant told by Mr Page on 20 September 2021 that there would be no further extensions.

69. The claimant was told by his TU rep Dave Killick on 6 October 2021 that there was a possibility of age discrimination in the process as they were seeing many older people having appeals.

70. The claimant declined a voluntary redundancy package on 11 October 2021.

71. The claimant submitted an appeal against the decision to place him in the RDP (and therefore his selection for redundancy) on 14 October 2021.

72. A final consultation meeting with the claimant and Mr Page took place on 3 November 2021. The claimant was accompanied at the meeting by a TU representative Michael Smith.

73. By this time, the claimant had applied for 8 different roles – he was unsuccessful in each. He had 3 further roles in progress. Mr Page confirmed at this meeting that the claimant could not apply for any further roles.

74. At this meeting Mr Smith stated that the claimant was still fully engaged in his role and was questioning whether it needed to go? . Mr Page stated that since May, the claimant had not been required to undertake his role, and whilst he had been helping, that this was not required. He commented on how appreciative they were in the team of the claimant's support and conduct throughout this process. Whilst the claimant was concerned with the use of wording and the past tense, we accept Mr Page's evidence that the role was disappearing and was being absorbed by others, as was demonstrated by the new organisation chart. There is no evidence to suggest that Mr Page or the respondent were misleading the claimant here.

75. In a letter date 3 November the claimant's redundancy was confirmed.

76. The claimant says he was not offered a handover process – this was added latterly to his claim, presumably after disclosure and he saw reference to a handover process with outgoing team members in the line manager's training pack. Mr Page's evidence was that handover wasn't a strict requirement and was considered on a case by case basis. He said the claimant didn't need to do a handover as there were no particular aspects of his role or any shared documents/system that needed to be handed over.. He had offered to work since May but there had been no requirement to do so. Mr Page said that he felt that the claimant had benefitted from working whilst he was looking for new roles.

77. The claimant asserts that he did not receive an end of year appraisal for 2021/22. Mr Page says this did take place, but as the claimant had left by the time it was completed, he wouldn't have been aware of it. He says he was not given an objectives, because it was known by the time of the completion of the appraisal that he would be leaving the organisation.

78. An appeal hearing took place on 19 November 2021 chaired by Mr Robert Scott and Mr Martin Brown. The claimant's grounds of appeal were set out in his email dated 14 October 2021. There were 7 grounds of appeal.

79. Prior to the meeting Mr Scott and Mr Brown received the scoring matrix for claimant, notes of the claimant's consultation meetings, notes of his outcome meeting on 3 November 2021 and his appeal letter. These are all documents we would expect an appeal panel to have before them. From the notes of the meeting, and Mr Brown's evidence, we can see that the claimant was engaged in the appeal process. Whilst the claimant talks of 'discrimination' this was in relation to his low score and how this would affect him when applying for redeployment – he did not make any allegations of age or race discrimination at this hearing.

80. As part of the process the panel made it clear they were not there to re-score the claimant but to check the fairness of the procedure. After the meeting they met with Mr Page and discussed points raised by the claimant in his appeal. They used this information in their appeal findings.

81. The appeal outcome was given on 24 November 2021. The appeal panel addressed each of the areas of concern from the claimant. These are set out in the detailed appeal outcome letter dated 26 November 2021. The claimant's appeal was not upheld.

82. The termination of the claimant's appointment was confirmed and the claimant's last day of employment was 30 November 2021.

83. During evidence, the claimant confirmed that he had not experienced any acts of race or age discrimination during the 17 years of his employment with the respondent and did not want to believe he had been the victim of discrimination in relation to his redundancy exercise but could think of no other explanation for the acts he complains of.

84. The claimant says his job was advertised in May 2022 and then October 2022. Mr Page gave evidence that this was the same role, but more information was given in October 2022. He says that this was a different role to the claimant's as it was for advanced planning, it was not envisaged at the time of the redundancy of claimant and had emerged since then. This evidence was not challenged by claimant.

We have applied the following LAW to these facts

Unfair Dismissal

85. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111 ERA 1996. The employee must show that he was dismissed by the Respondent under section 95.

86. In this case the Respondent admits that it dismissed the claimant (within section 95(1)(a) of ERA 1996) and this is not in dispute.

87. Section 98 of ERA 1996 deals with the fairness of dismissals. There are two stages within section 98.

88. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

89. Redundancy is a potentially fair reason for dismissal under section 98(2) ERA 1996. Redundancy here has the meaning assigned to it by section 139 ERA 1996.

90. Section 98(4) ERA 1996 then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

91. The exercise required depends on what the employer reasonably believes, on the basis of what it reasonably knows, about the relevant matters. It requires a broad assessment of all the relevant circumstances. The correct approach is for the Tribunal to consider whether dismissal was an option that a reasonable employer could have adopted in the circumstances. The Tribunal cannot substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. See British Home Stores Ltd v Burchell [1978] IRLR 379 and Tayeh v Barchester Healthcare Ltd [2013] EWCA Civ 29. 103.

92. Specific guidance in redundancy situations is found in Williams v Compair Maxam Ltd [1982] IRLR 83. The Employment Appeal Tribunal (Browne-Wilkinson J) said as follows: "…there is a generally accepted view in

industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles: 1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. 2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria. 3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service. 4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection. 5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment. The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not the basis of personal whim".

93. These are not principles of law, but standards of behaviour. As such, in Williams it was said "..in future cases before this Appeal Tribunal there should be no attempt to say that an [employment] tribunal which did not have regard to or give effect to one of these factors has misdirected itself in law. Only in cases…where a genuine case for perversity on the grounds that the decision flies in the face of commonly accepted standards of fairness can be made out, are these factors directly relevant. They are relevant only as showing the knowledge of industrial relations which the industrial jury is to be assumed as having brought to bear on the case they had to decide".

94. It is well established that Tribunals cannot substitute their own principles of selection for those of the employer. They can only interfere if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did (see Earl of Bradford v Jowett (No 2) [1978]IRLR 16).

95. There is considerable caselaw regarding the use of subjective, rather than objective, criteria in a redundancy exercise. However, the fundamental issue remains that set out in the statutory wording of section 98(4) ERA 1996, namely that of overall fairness.

96. Tribunals should not conduct a forensic examination of a selection pool and employers have a good deal of flexibility as to how to define a pool for selection (*Thomas and Betts Manufacturing v Harding 1980*). They only need to show they have applied their minds to the problem and acted with genuine motives.

97. In considering the application of any selection criteria, the Tribunal will not carry out a detailed re-examination of the way in which the employer applied the selection criteria – it will be sufficient for the employer to have set up a good system for selection and to have administered it fairly (see Eaton Ltd v King [1995] IRLR 75)..

98. Whilst the employer can consider bumping – there is no general legal proposition that this must be consider in every redundancy situation.

99. If the reason for dismissal was not redundancy, The Tribunal would need to consider whether the dismissal was "for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" under section 98(1)(b) ERA 1996. If so, the question, again, becomes one of reasonableness in accordance with section 98(4) ERA 1996.

Discrimination law

Direct Discrimination under s13 Equality Act 2010

100. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of [a protected characteristic] than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

101. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristics. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as they were. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).

102. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act,had a significant influence on the outcome, discrimination is made out.(Nagarajan v London Regional Transport [1999] IRLR 572, HL).

103. Whilst it is not possible to justify (even for good reason) acts of direct discrimination, for age discrimination there is an exceptions. An employer can justify potential acts of age discrimination if they can show that their actions were a proportionate means of achieving a legitimate aim

104. The case law recognises that very little discrimination today is overt oreven deliberate. Witnesses can even be unconsciously prejudiced.

105. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for
doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

106. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision..

107. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

108. The Court of Appeal in *Madarassy*, a case brought under the then SexDiscrimination Act 1975, states:
‘The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

109. For example - false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.

Indirect Age Discrimination.

110. Section 19 of the EA 2010 provides

111. 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.

83. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Conclusions

Unfair dismissal

112. Has respondent shown on balance of probabilities a potentially fair reason for dismissal exists?

113. The burden of proof on the employer at this stage is not a heavy one. It requires a 'set of facts known to the employer or beliefs held by him which cause him to dismiss the employee'. However it is a burden for respondent to prove. The respondent says the reason for redundancy and said that the claimant's redundancy was part of a large collective 'resizing programme' it undertook in 2021 following the pandemic.

114. The reason for dismissal was challenged by the claimant. The claimant does not have to provide an alternative reason for dismissal. He does however challenge the redundancy on the following grounds:

a. He was still doing his role right up to the date he left the business in November 2021 – therefore how could it be redundant? and
b. His job was readvertised after he left in May 2022 and then in September 2022.

115. We have considered the respondent's evidence here. The evidence from Mr Page was the role was to be disseminated and was not

contained in the new organisation chart. The could have stopped doing his role in May 2021 when he was first told of his redundancy but Mr Page allowed him to carry on. This was not a requirement. From Mr Page's evidence this would appear to have been an act to help the claimant – he said he believed it would be good for his mental health. As the claimant was still working and being paid at this time, it makes sense that the respondent would have tried to use him productively in a role he knew. A person can be redundant even if they are doing their role up to their last date of employment. What is important is what happens next. We accept Mr Page's evidence that this role was gradually and then completely disseminated by end of November 2021.

116. As regards the advertised role - we accept Mr Page's evidence here that this was not the claimant's old role but a more advanced strategic planning role. This role was not envisioned at the time and was a response to a change in market conditions. This role was advertised first 6 months after the claimant's departure (we note the claimant's comment that if you add in his notice period, it makes it 3 months), however the claimant left the respondent's employment on November 30 2021. We accept Mr Page's evidence that the same role was advertised again but with more detail in September 2022 nearly a year after the C had left. We find that this was not the claimant's old role and even if there were elements, we accept that there had been a change and a new need identified for this role.

117. On balance, we find that the respondent has shown that there was potentially fair reason for dismissal and that this was redundancy.

118. We will now go on to consider fairness.

119. **Did the respondent act reasonably / unreasonably in treating that as sufficient reason to dismiss the claimant / Was that in the band of reasonable responses.**

120. Consultation is a cornerstone of a fair redundancy exercise. Without consultation, selection cannot be challenged, the actual reason for redundancy cannot be challenged, alternative to dismissal cannot be explored.

121. Here there were two phases of consultation – at collective level which the respondent was required under law to do because of the sheer numbers impacted, and secondly, at an individual level.

122. The claimant made no challenge to the collective process, save to say he should have been part of it. We find that the respondent acted correctly at collective level by engaging with their recognised Trade Union. There is no 'right' for an individual to be involved at this level. At collective level key aspects of a redundancy process can and were agreed here – including the use of agreed selection and scoring procedures and an extensive redeployment programme. We do not find it unfair that initial

selections of employees was done by managers in secret. This is a common route used in redundancy exercise and is not intrinsically unfair. This had in fact been agreed with the Trade Union and was to avoid unnecessary disruption for those not affected by the process.

123. Even if there has been collective consultation, this doesn't absolve the respondent to consider individual consultation. There are several aspects to this. There should be a warning that a job is at risk, consultation should be meaningful and allow the employee to engage and there should be consideration of alternative employment.

124. We found that by 6 May 2021 the claimant was aware of a redundancy programme and that he would be told if he was impacted in the coming weeks.

125. He was then consulted with by his manager on 4 separate occasions. We have found that these meetings were meaningful in that the manager gave information and answered questions from the employee. There was a two way exchange of information. Whilst the claimant's focus has been on his selection for the purposes of this ET claim, his main focus during these consultation meetings was about the possibility of securing alternative employment. Despite his best efforts, he was unable to secure alternative work.

126. As regards the selection pool – we have accepted Mr Page's evidence that he applied his mind fairly to this and that the pool which the claimant was place in was well within the discretion afforded to employees in this task. This was a pool of the same level of the employee and all doing similar types of work.

127. As regarding the actual scoring criteria -these categories were all agreed with the Union. These were not chosen to ensure people got a low score but were aligned to the needs of the business (and in this case) the PDW going forward.

128. The criteria were fairly split by including an element of past performance. This was based on an average rating of scoring for 3 previous appraisals. The claimant did not challenge his rating in the performance appraisal process at the time of the appraisals.

129. With the technical and behavioural scoring, the evidence is that Mr Page faithfully applied these criteria based on his knowledge of the 5 people in the pool. The claimant was not treated differently here as Mr Page did not know any of them well and had only been working with the team for 6 months. As a back up we accept that Mr Page did sense check these scorings with Mr Cort who had known claimant for longer. The claimant could not point to any misapplication of the scoring that suggested any bias against him.

130. As regards selection criteria – whilst there was a drip feed of information from Mr Page– we have found that by 10 August 2021, the claimant was in full receipt of a detailed breakdown of his scoring. He did not appeal his selection until November 2021 and therefore had more than enough time to consider this information. Our finding is that the claimant actually received more information than is normally given in a redundancy exercise.

131. Whilst the claimant has made a lot of the actual scoring, and reminding ourselves that we are not re-scoring the claimant, there was nothing in the evidence to suggest that the respondent had done anything other than apply a fair selection process, Based on the claimant's past performance and his being found to be a developing performer for 3 out of the last 4 performance reviews, his scores fell in line with this. If the claimant had been assessed as an outstanding performer and then been scored lowest, we may have had reason to question the scoring - but that was not the case here.

132. We find that the claimant's score was the lowest by a margin and even a minor increase by a couple of points (even with the weighting) in his scoring would have made no difference here.

133. We have looked at overall fairness – the claimant was permitted a 6 month period to look for alternative roles. He applied for over 11 roles. This is a more extensive redeployment scheme than you would normally see in the private sector. We accept Mr Page's evidence that the respondent didn't wish to lose skills and that they made every effort to match people with a suitable role. Whilst the claimant believes he missed meetings with Mr Page during this time, we find that Mr Page would have little influence on a potential new role for the claimant.

134. The claimant received HR support. Not all of the process flowed smoothly and we can see that the claimant was frustrated by some elements of it. This is perhaps understandable when one considers the size of the organisation and how many redundancies were being handled at this time. The respondent did offer the claimant a right of appeal which he took up. As expected, this was not a re-scoring exercise, but a review by more senior managers (experienced in undertaking redundancies) of the process.

135. The claimant's seven grounds of appeal were considered carefully and each responded too. The claimant said he was forced to appeal rather than bring a grievance. We find that the recognised route to challenging a redundancy dismissal is via an appeal not via the grievance process and therefore we find there was nothing inherently unfair about requiring the claimant to use the appeal process rather than a 2 stage grievance process.

136. For all the above reasons we find that the dismissal in these circumstances was fair and therefore that the claim for unfair dismissal is not well-founded and is dismissed

Direct Age Discrimination

137. We must first consider if the claimant was treated less favourably by being given a lower score in the redundancy process. Based on our findings above, we do not find that Mr Page deliberately gave the claimant a lower score than he should have received because of his age for any reason. We find that Mr Page faithfully gave the claimant the correct scoring based on his assessment and application of the selection criteria. Therefore we find that the claimant was not subjected to a detriment.

138. If we are wrong, we also consider if he was treated less favourably than his named comparator Mr Wren who was 38 at the time. Whilst the claimant did get a score lower than Mr Wren at the time, they were both pooled for redundancy and treated the same. If the claimant had in fact got a higher score than GW but came second from bottom, he would still have been made redundant (unless he found alternative employment). Therefore there was no difference in treatment.

139. We also find that there was no attempt by Mr Page to conceal the scoring from the claimant – he was given information when it was requested by Mr Page in accordance with the advice he received from HR.

29. We find that the claimant was not subjected to less favourable treatment in relation to a handover. Being forced to handover your role could be a detriment and less favourable treatment but not the other way round.

30. With regards to his final appraisal, we do not find any less favourable treatment here. The claimant did have a performance review but had left by the time it was completed. He was not set objectives and we accept Mr Page's evidence that the only reason Mr Wren was set objective was a mistake and he was not assessed against them. There is simply no evidence that this affected the claimant's final bonus payment which was smaller than previous years because it was pro-rated.

31. If we are wrong on this, we must still consider if the claimant has established on the balance of probabilities under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We remind ourselves of the *Madarrasy* principle here – that there must be something more than just a protected characteristics and a difference in treatment.

140. We find that the claimant has not established the something more here. There is simply no evidence of age discrimination – by the

claimant's own admission he had never experienced this in the past and there is no evidence from the application of the selection process that Mr Page had any ulterior motives. We note in passing that 4 out of 5 people in the pool were over 50 and therefore it was inevitable that at least one person (and possibly two) would have been over 50. It is relevant here that the other person selected was in fact the youngest person in the group. There was no evidence to suggest the burden should shift to the respondent to explain its actions – although we note that the respondent has provided a full non-discriminatory explanation that is in no way tainted with discrimination for all the complaints from the claimant.

141. Therefore we find that the claim for age discrimination is not well founded and is dismissed. Accordingly, we do not need to consider if the respondent could justify its treatment of the claimant as a proportionate means of achieving a legitimate aim.

Direct race discrimination

142. Whilst the claimant relies on the same alleged detrimental treatment as for age above, we have considered this separately.

143. For the same reasons set out above we do not find that the claimant was treated less favourably in relation to his scoring, the alleged lack of a handover or in relation to his final appraisal.

144. The claimant says he was treated less favourably by Mr Page's comment that he was 'helping out' and that he found this demeaning because he was doing his actual job. He says this was because of his race. Whilst we can understand the hurt the claimant might have felt about his position, we find that this comment was only intended in a kind way and to express gratitude to the claimant for his support and conduct during a very difficult time for him. On the evidence before us, we find that Mr Page would have thanked a white employee in exactly the same way here.

145. Even if we are wrong, and there was less favourable treatment, we find that the claimant has not discharged the burden of proof and has not established 'something more' here. The claimant confirmed in evidence that he had not been discriminated against because of race whilst working for the respondent. There was simply no evidence to suggest the burden should shift to the respondent to explain its actions – although we note that the respondent has provided a full explanation that is in no way tainted with discrimination for all the complaints from the claimant.

Indirect age discrimination

146. It was accepted that the respondent applied the PCP of placing all lower scored employees into a displacement process and that employees of both identified groups (over 50 and under 50) were placed in this group.

147. The claimant must then show that there was a particular disadvantage to his group (the over 50 group) compared with the under 50 group of being placed in this displacement procedure.

148. The claimant was not able to articulate the particular disadvantage to the claimant or his group. The claimant offered a suggestion it meant he was more likely to have a lower score and be made redundant. We didn't completely follow this and we did put questions to the claimant's representative about this.

149. Our finding is that there was no disadvantage either to the claimant or his group in being placed in the redeployment. In fact, in our view there was a distinct advantage in being placed in the group because the alternative would have been to have been made redundant immediately with no chance of redeployment. Therefore we find neither a group or an individual disadvantage to being placed in the displacement process.

150. If we are wrong on this, we have gone on to consider whether the practice of placing the lowest scoring people into a displacement pool is a proportionate way of achieving a legitimate aim.

151. We entirely accept the respondent's submission here that it would make no sense to place those with the highest scoring into a displacement pool as they have been identified (using a fair scoring system) as the person best placed to support the business going forward. To do otherwise would cause absurd results.

152. For these reasons the claim for indirect age discrimination fails and is dismissed.

153. For all the above reasons, all of the claimant's claims fail.

Employment Judge Boyle

Employment Judge Boyle

_____

Date

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE