



EMPLOYMENT TRIBUNALS

Claimant: Miss H Salih

Respondent: Mytime Active

Heard at Ashford

On: 15-19 May 2023

Before: Employment Judge Corrigan
Mr S Corkerton
Mr S Huggins

Representation

Claimant: In person

Respondent: Ms A Niaz-Dickinson, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The Employment Tribunal has not found a contravention of s120(1) Equality Act 2010 in respect of age discrimination. This claim is therefore dismissed.

REASONS

1. The claimant brings claims of unfair dismissal and direct age discrimination.

Claims and issues

2. The complaints and issues are set out in the Case Management Order dated 9 August 2022 (at pages 42-45 of the bundle).
3. The tribunal raised the issue of indirect age discrimination with the claimant and the fact it was not pleaded or covered in the list of issues (given that she was relying on one reason for her selection as being her pension contributions being higher and the relationship between those and her age). The claimant was given time overnight on the first day to consider whether she wanted to make an application to include this. It was anticipated that the respondent would resist this. She confirmed at the outset on day 2 that she was happy to proceed on the basis of direct age discrimination and the list of issues set out at pages 42-45.

Hearing

4. The Tribunal heard evidence from the Claimant on her own behalf. The tribunal also heard evidence from Ms J Kersting (Centre Manager) and Mr T Alvani (Former Regional HR Business Partner). The tribunal read a witness statement prepared by Ms Welman (Assistant Regional Manager) on the claimant's behalf.
5. Ms Welman was living in Austria at the time of the hearing and the claimant requested she be allowed to give evidence by video link. The Employment Judge explained the steps required for Ms Welman to be able to give evidence from abroad (which had not yet commenced) and the claimant decided to rely on the written statement only.
6. On behalf of the respondent we heard from Ms Louise Carroll (Head of HR), Mr J Stanton (Operations Director) and Ms Rhona Mason (HR Director). Where other personnel of the respondent are referred to they are referred to by job role or similar description rather than name as these reasons will be published online and be publicly available.
7. There was a 360 page bundle. There were also some additional documents produced by the respondent during the hearing.
8. Both parties prepared written submissions and had the opportunity to make oral submissions.
9. Based on the evidence heard and the documents before us we found the following facts.

Facts

10. The claimant had originally been employed by London Borough of Bromley from 1 April 1989. In about 2004 that employment TUPE transferred to Mytime Active. She had had a number of different operational management roles over the years. Mytime Active is a leisure and lifestyle business operating leisure facilities across the UK.
11. In 2017 the claimant was employed as a Halls Manager when that role was removed during a restructure. She was given a trial role as an Assistant General Manager but she decided not to continue in that post due to the shift work involved.
12. The claimant had remained on Local Government pension terms. At the time of this 2017/2018 redundancy situation the respondent's liability to the London Borough of Bromley in respect of a pension deficit was £3.6 million to be paid once the last of the 4 remaining Mytime employees in the scheme left the business for any reason. The claimant was one of the 4 such employees. With this in mind a decision was made to seek to retain the claimant by creating a useful role acceptable to her and suited to her interests. This was the Apprentice and Volunteer Manager. The claimant only became aware later that this role was created especially for her because of the pension issue. The claimant started in this position in August 2018 and remained in this position until she was made redundant in 2020. The position was part of the HR team.
13. In 2019 the respondent renegotiated their arrangement with London Borough of Bromley and entered into a lease on the premises. One consequence of the new arrangement was that employees were no longer eligible to be ongoing members of the Local Government pension scheme. As part of the negotiations the respondent entered an agreement to pay the £3.6 million in annual instalments of £600,000 and this was no longer linked to the ongoing employment of the relevant staff.
14. The respondent also entered negotiations with the affected staff, led by the claimant, in respect of compensating them for their future pension loss. This led to enhanced pension contributions of 23% in comparison to the 4% most of the respondent's staff received, and a 10% salary uplift.
15. The claimant has since drawn her Local Government pension. At the time of the 2020 redundancy process the claimant had an outstanding grievance about the above situation. The details were not known to Ms Mason.
16. In November 2019 Ms Carroll was appointed on a fixed term contract as Resourcing Manager in the HR Team. Two weeks or so later Ms Mason was appointed as HR Director. Around the same time the Head of HR (to

which the Resourcing Manager reported according to the job description) left and was not replaced (we note that there is a reference to the Director of HR post replacing that post in the minutes on page 269 but we were not told this in evidence). About two weeks after that an HR administrator was also appointed on a fixed term contract.

17. At this time the structure of the HR team was roughly as per the diagram labelled current HR Structure provided late in the hearing by the respondent (at our request) though it does not have the head of HR role (perhaps because it had been removed as per page 269). We have numbered the diagram p 380.
18. Within that structure the Resourcing Manager role was at the same level as 3 Business Partner roles, all of whom reported to the Director of HR. The claimant reported to the Resourcing Manager as did 2 People Services Coordinators, a L & D Advisor and an HR & L&D Administrator.
19. The Resourcing Manager job description was focused on recruitment and on-boarding through to the end of the probation period. This included setting up the Core HR System (staff database which linked to payroll). She also line managed the administrative team. The business partners reported direct to the Director and were responsible for the wider HR function and the employee relations casework. The Claimant was responsible for recruitment and on boarding of apprentices and volunteers. Any member of the HR team could deal with an HR query.
20. By the time of the 2020 redundancy two of the Business Partners had resigned. The remaining Business Partner was Mr Alvini.
21. Ms Mason and Ms Carroll quickly established a close working relationship and Ms Mason found Ms Carroll an invaluable resource as she settled into her own role. This was based on her qualification and experience rather than the role she did. It does not appear that she had the same rapport with Mr Alvini, the one remaining Business Partner. Her view when she started in the role that the existing HR team that included the claimant were not as qualified as she would have liked, with the claimant coming from an operational role and two others being in the early stages of their career (see Ms Mason's witness statement, paragraph 5).
22. In March 2020 at the start of the pandemic the respondent had to close its businesses and furlough the majority of staff. The precise number of affected staff varies in Ms Mason and Mr Stanton's statements but we accept a small proportion of staff continued to work during lockdown.
23. The claimant and most of the remaining HR team were furloughed but Ms Mason retained Louize Carroll, the Pay and Reward Coordinator and the Administrator to continue working during lockdown. Ms Mason retained Ms

Carroll, despite her nearing the end of her fixed term contract and despite the fact there was not a need for resourcing at that time, as she believed she had demonstrated her skills better and was more of a support to her personally than Mr Alvini, the Business Partner with 7 years employment with the company. She said in evidence that having worked with both of them since November 2019 he would not have been as effective for the work required during lockdown. She also said that Ms Carroll was starting work on the Core HR System and furlough was an opportunity to give that an overhaul. She also retained the Administrator who was also nearing the end of her fixed term.

24. Ms Carroll and the Administrator's contracts were extended on 8 April 2020 for a further 6 months.
25. At paragraph 13 of her witness statement Ms Mason said "Ms Carroll, who was a qualified HR professional, had been invaluable to me since the beginning of my employment with Mytime, and I required her support to navigate the numerous HR queries on the back of the decision to offer staff furlough leave, not just in my team but across the business. No other employee had the level of senior managerial experience required to support me, hence why I extended Ms Carroll's fixed-term contract".
26. Mr Alvini is also educated to a Masters level and has 20 years' experience in HR. He was at the same level as Ms Carroll and was responsible for the wider HR function and casework, with 7 years experience in the business. Either he or Ms Carroll could have dealt with the covid related HR work. We find in addition to the Core HR system the factor that influenced the retention of Ms Carroll in preference to him was Ms Mason's personal preference for working with her formed over the very short period they had both been in the business.
27. Due to covid the business went from profit making and an income of £2.3 million per month to zero income and £600,000 costs per month. The business needed to urgently save staffing costs and commenced a redundancy process. The need was to save £1million. Ms Mason looked at what the minimum staffing need was for a basic level of service (which she referred to as a bronze level).
28. Although the pre-existing structure had contained 10 HR roles there had been a recruitment freeze and Ms Mason took the starting point as being the 6 remaining staff. The decision was to reduce the team to 4 roles.
29. We were shown slides created by the Directors in thinking through the "bronze" service. That was to be a very scaled down transactional service providing guides and templates to managers and telephone support.

30. The initial proposed structure was to be the Director of HR, the Head of Organisational Design & Development and two Administrators.
31. On 25 June 2020 the claimant and the remaining HR staff were sent the letters at pages 177-180 warning them of the redundancy situation. The letters said no decisions had been taken yet, nor will they be made until consultation has concluded. It did not mention job matching but did mention selection criteria and that employees would have an opportunity to comment. They were invited to a group meeting on 1 July 2020.
32. The proposed structure shown to staff at that meeting is at page 199 and now included the Resourcing Business Partner between the Head of Organisational Design & Development and the two Administrator roles at a salary of £35,000 (p176) (with all three roles reporting direct to the Organisational Design & Development role). There was a timeline (p200) which said that new job descriptions and selection criteria were to be communicated that day. There were to be individual consultation meetings the weeks commencing 5 and 12 July 2020 and then from 19 July 2020 there was to be a selection process and interviews with the end date being 30 July 2020. Again no mention of job matching. The team were then sent the relevant job descriptions which were described as drafts and a redeployment questionnaire which they were asked to complete before the 1:1 meetings.
33. There was no mention in the documentation of the Management of Change Policy and Procedure and the details of the job matching stage/ criteria set out in that policy.
34. The Head of Organisational Design & Development role (referred to at paragraph 30) was a leadership role with much wider responsibility than the current Resourcing Manager role based on the job descriptions. The Resourcing Business Partner (paragraph 32) was to be responsible for delivering, managing and transforming the recruitment aspect of HR but did not have the same leadership responsibilities of the Resourcing Manager role (again based on the job descriptions).
35. The team then had the opportunity to have individual consultations with Ms Mason. In the meeting there was an opportunity to feedback on the structure. Further information was given about the "selection process" to be done once the structure had been finalised. The other fixed term contracted employee did not have an individual consultation. We were told she declined to have one.
36. In her individual consultation the claimant was informed there would be a job matching exercise to determine whether any roles were a match and the individual could be slotted in. If roles were not a match they could be

redeployment opportunities and there would be an objective process to determine the most suitable candidate (if more than one individual) (p221).

37. The Claimant confirmed her preference for the Resourcing Business Partner role which she said absorbed some of her existing role. She was told about operational roles and said that she had enjoyed her operational career but it would depend on the type of role available. She mentioned not being interested in Halls Management due to the time commitment. She was told to inform Ms Mason if she was interested in any of the roles. She did say that her preference was the Resourcing Business Partner role and if that was not available then redundancy would be the best outcome. She also said in her redeployment questionnaire that she would not consider a lower salary than £31,704 plus the enhanced uplift (referred to at paragraph 14) (p224).
38. Others provided feedback in their individual consultations that the structure was missing a more generalist role in addition to the Resourcing Business Partner. One of the existing People Services Coordinators said she was looking to progress in the HR profession. Ms Mason asked her about where she saw her career going and whether she wanted to be an HR Director one day. The claimant has pointed out that that individual was told at the outset of her consultation that “This is a formal meeting, but ideally have a chat, nothing to worry about, but do need to go through some formalities.”
39. In his one to one consultation on 9 July 2020 Mr Alvani, the remaining HR Business Partner, offered voluntary redundancy, which was accepted. He gave evidence and told us his reasoning was that he could see “the writing on the wall” as Ms Carroll had been retained whilst he was furloughed and she was involved in the change management whereas that formerly would have been his role. There was also no obvious role for him though he did also give the feedback in his consultation that the structure lacked the generalist role. He also queried whether the Organisational Design & Development role was the right role.
40. The last consultation meeting was on 10 July 2020. There was no formal consultation with Louize Carroll although there was an ongoing catch up on 8 July 2020.
41. Once it had been decided to accept Mr Alvani’s voluntary redundancy Ms Mason offered Ms Carroll a role. This had been done around 13 July 2020 (the Monday after the consultations ended). This was not the Organisational Design & Development role but a Head of HR role.
42. On 14 July 2020 the remaining team members subject to consultation were informed of a revised structure (the revised structure attached to the current HR structure which we give page number 381). This had the Head of HR role, an HR advisor role and divided responsibilities between the

Administrator roles, creating HR L&D Administrator and HR & Apprentice Administrator. Again they were told there would be job matching as the first step.

43. No job matching had been done in respect of Ms Carroll's Resourcing Manager role versus the Head of HR role. We find she was offered that role because Ms Mason considered her invaluable and believed she had the experience and skills to do the job. By this time she was the only suitable person potentially interested. The decision was not based on her current job description. The HR Business Partner's offer of voluntary redundancy was accepted without informing him of the decision to respond to his feedback by creating a Head of HR role. He said in evidence that had he known about that role he might have applied for it though he did not wait to find out what the final structure would be. Looking at the two job descriptions there was little change apart from the job title.
44. The HR Advisor role incorporated some of the claimant's existing role in respect of Apprentices and Volunteers and the Resourcing Business Partner role but was also a wider generalist HR advice role. There was also a change to the Administrator roles with one of them labelled HR & Apprentice Administrator going forwards. The salary for HR Advisor role was £25-28,000. In addition to the feedback about a more generalist role the reason for the removal of the Resourcing Business Partner role was that it was not anticipated there would be much recruitment in the short term (p 262).
45. On the same day, without seeking or awaiting any further feedback on the new structure, Ms Mason sent her job matching results to Ms Carroll stating "I have completed the job matching but need a second – could you do the honours please.

I have established: HR Advisor – none of the existing roles match. Potential for redeployment. HR Administrator...[the existing Administrator's] role is a match, none of the others are, potential redeployment for [the two People Services Coordinators]

This would leave [the claimant at risk]

...

Perhaps we can discuss tomorrow in our 1:1?" (p254)

It is note worthy that only the claimant was identified at risk despite the other roles also not being matched to a new role.

46. Louise Carroll said her scoring was a mix of scoring and checking. She said she did her own notes in a notebook but these had not been disclosed to the claimant in these proceedings and are not in the bundle. Hers was not an objective job matching exercise independent of Ms Mason's.

47. The respondent has a job matching policy at page 66 which provides that a 75% match between two job descriptions is a "slot in" and a 60% match is suitable alternative employment with a trial period as long as the individual meets the minimum requirements and there is no substantial change in the the level of responsibility and salary level. Where there is less than a 60% match the at risk employee can apply for the role.
48. The HR Advisor role's job matching grid is at page 255. The claimant noted that she was given 2.5 for main duties/responsibilities and if that had been a 3 she would have been given 60%, applying the process set out in the grid. The scoring set out below the grid only refers to scores of whole numbers (as opposed to numbers involving fractions like 2.5). We note that all the roles were marked consistently, with the same mark across all the criteria, except for that one difference in the Claimant's role. Although we were shown other job matching exercises where the scores were more varied and there was other use of a 0.5 in the scores. We note the enclosure of names and salaries in the job matching exercise do not assist with giving the appearance of an objective job description matching exercise.
49. Nevertheless the claimant's role was the closest match to the role of HR Advisor and very close to the 60% needed for it to be suitable alternative employment with a trial period. Her salary was also taken into account in the comments but the claimant was in a specific position of having been employed by London Borough of Bromley and had her salary protected in the past.
50. It was decided there was no match but depending upon individual qualification it could be a redeployment opportunity.
51. The HR Administrator role was a match for the HR Assistant role but that left one other Administrator role at that point.
52. On 20 July one of the People Services Coordinators expressed an interest in the Advisor role although she was told it was a higher role than Ms Mason saw her in at present but she was able to apply and an interview was set up.
53. The claimant had her next meeting on 22 July 2020. She anticipated that she was not going to be offered anything and was being pushed into operations (p264).
54. She was told she was no match for either role. She asked for the scoring to be sent. She was told the salary was £28-30 k though this was later

corrected and she accepted in evidence this was a mistake. She expressed concern the structure was engineered to remove her but was told this was not the case. She said she did not think the operational roles were suitable but that she might like to apply for the HR Advisor role but referred to a colleague being a better fit (we note the colleague concerned had told her (incorrectly) that he had been matched to that role in a WhatsApp exchange at page 264). Unfortunately the meeting then ceased due to poor internet connection. In an email on that date the claimant was sent the matching for her role but not the whole matching exercise. The lower salary was also confirmed.

55. The meeting resumed on 24 July 2020 and the claimant was told she could redo her redeployment questionnaire and that there would be a selection interview as at least one other person wanted to be considered for the role. The claimant said she would let Ms Mason know if she wanted to apply for the HR Advisor role.
56. The claimant was not shown the results for the other roles and so her misunderstanding that the other role had been matched to the HR Advisor role was not corrected at this stage.
57. On 24 July 2020 Ms Mason wrote to one of the People Services Coordinators saying due to the other individual consultations not being wholly complete, she was unable to make a decision on the final structure that day and would need to go into the next week.
58. The other People Services Coordinator had her interview for the HR Advisor role on Friday 24 July 2020. This was with Ms Mason and Ms Carroll. It was decided not to appoint her. The rationale notes say as follows: "This is the next step up for [the person] in her career and she would require significant support if placed into this role. I believe she is ready for development but due to the current set up of the team and limited resource she would be set up to fail if placed into this "stand alone" role. Ideally she should go into a trainee HR Advisor role first to get wider exposure".
59. Ms Mason then decided by the Monday to change one of the Administrator roles into a trainee HR Advisor role. She said this was independent of that note in the interview but we do not accept that evidence. She clearly had in mind the possibility she was going to change the structure again in her communication with the other affected staff member and had been discussing this employee's career progression throughout. We find that the role was adapted with this employee in mind.
60. The claimant also completed her consultation meeting on 24 July (p 281). She noted that at the previous meeting she had queried the fact that fixed

term contract staff were being treated more favourably. Ms Mason's response was that they were being treated the same. Ms Mason said that if the claimant wanted to apply she would happily undertake a selection process. The claimant said she believed her role had been targeted which Ms Mason said was not true. She asked whether her pension was a factor. She said she believed it wasn't worth applying which Ms Mason said was not true. The claimant agreed to reconsider over the weekend whether she wished to be considered for the HR Advisor role. It was confirmed there was no pay protection.

61. The claimant after reflection responded to the notes of her consultation meeting and the issue of the HR Advisor (p290). The claimant argued that because elements of her role were retained in the new roles that it was not a genuine redundancy. She felt the intention was to remove her because of her enhanced terms and that the fixed term contract holders had been treated more fairly.
62. She said she would not apply for the role and gave her reasons. She was disappointed her management experience and experience coaching managers had not been included in the job-matching exercise and continued to say she understood the role had been matched to another colleague in the team (again a reference to the messages at p264).
63. She also cited salary and that it was not the career path she wanted. The message was sent at 4.27pm. At 4.48pm on 27 July Ms Mason wrote to the People Services Coordinator stating she had given the structure one final review. She wanted to be fair to both People Services Coordinators and had upgraded one of the Administrator posts to become a "trainee" post for the HR Advisor role. This was to be at a slightly higher salary. She said this recognised their current contribution is more than administrator and provided a succession path.
64. Ms Mason then replied to the claimant at 5.15pm. She said that the restructuring was based on the needs of the business and not individuals and all team members had been treated with fairness and objectivity. At this point she did correct the claimant's misunderstanding about another role being matched to the HR Advisor role. She said she did consider the role a redeployment opportunity for the claimant and others within the team who are at risk. This gave the impression other colleagues could still be competing for that role whereas in fact the claimant was the only person left who was a potential candidate as by 5.15pm on 27 July it had been decided not to appoint the other candidate. She made no mention of the change to the structure and the opening up of the trainee HR advisor to the other two colleagues meaning the claimant, if interested, was the only person left to

be considered for the HR advisor. She did however invite the claimant to come back to her if she changed her mind about the HR Advisor role.

65. The 2nd People Services Coordinator expressed interest in the trainee role and was interviewed. The first People Services Coordinator's interview for the HR Advisor role was taken into account with respect to the trainee position and she was offered the position and retained her existing salary which was £1000 per annum above the advertised rate. Ms Mason said she was able to exercise her discretion as it was such a small difference.

66. The Head of HR was formally confirmed in post from 1 August 2020.

67. On 3 August 2020 after confirmation of her redundancy entitlements the claimant queried her package and Ms Mason asked Ms Carroll to look into it. In doing so she said "at least it sounds like we won't get an appeal!".

68. On 6 August 2020 the claimant appealed. The grounds for appeal are that:

68.1 the respondent deliberately failed to follow a fair process.

68.2 The decision to select the claimant was unfair.

68.3 The HR Advisor role should have been a "slot in".

68.4 The respondent made no reasonable efforts to find suitable alternative employment.

69. The claimant said in the hearing before us that she did not take issue with the appeal. She was invited to a meeting on 21 August 2020. In the appeal she said she had withdrawn from the HR Advisor selection process because she thought the decision was already made. She said that when she was told the structure might be a temporary structure she decided it could be an appropriate position. She was hoping to raise this in a final meeting but there was no final meeting.

70. She was asked if she wanted the HR Advisor role. She said there was a complete breakdown in trust but had an offer been there during consultation she would have said yes. Mr Stanton said in evidence, and we accept, that if the claimant had still been interested he would have considered whether it was still a possibility.

71. We note that the explanation of how the job matching exercise was carried out in the appeal was not what we were told in evidence (p 327). Ms Mason and Ms Carroll did not score completely independently and we were not told of any meeting where they collaborated to reach one score. Ms Carroll said she did not change anything in respect of Ms Mason's scores.

72. The claimant attempted her own job matching exercise but this was not shared in the redundancy process. The claimant says that the job description did not match her role as it was out of date. There was no step to check the existing job descriptions were correct as part of the process but the claimant did not raise this as an issue during the process.
73. The HR Adviser post was advertised externally on 13 August 2020 at the salary the claimant had been told of £26-28,000. Ultimately the respondent failed to recruit at that rate. They only filled the position in April 2021 after increasing the salary to £30,000.
74. The other People Services Coordinator complained in his appeal that he had been interested in the Administrator role yet the other person on the fixed term contract was slotted into that role.
75. The claimant was 58 at the time of her dismissal and compared herself to her comparators who she said were 25-40 years old. In fact Ms Carroll was 47 years old.
76. The claimant did not put to the relevant witnesses that any of the decisions were made because of her age. Her position during the hearing was that they were made not because of age per se but because of her entitlement to enhanced pension contributions, which she said was inherently related to her age.
77. Ms Mason said that she had not considered the specific question of salary matching in the claimant's case as the claimant chose not to apply for the HR Advisor role. This being a different question as to whether the salary matching policy was being applied (which it was not).

Relevant law

Unfair dismissal

78. The law in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

(2) A reason falls within this subsection if it-

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

(3). . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
- (b) shall be determined in accordance with equity and the substantial merits of the case.**

79. In deciding whether a dismissal is reasonable for redundancy the relevant considerations are set out in *Williams and others v Compair Maxam Ltd* 1982 IRLR 83 as follows. Whether the employees were reasonably warned and consulted about redundancy, whether the selection criteria were objectively chosen and fairly applied, and whether there was reasonable consideration of alternative work.

80. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the process as to the substantive decision to dismiss.

81. The respondent's representative referred us to the cases of *British Aerospace plc v Green and Ors* [1995] ICR 1006 and *Nicholls v Rockwell Automation Ltd* [2012] UKEAT/0540/11/SM and the principle that it is

sufficient that an employer set up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness. It is not for the tribunal to critique individual selection scores in those circumstances. The respondent's representative also referred to Lincoln and Louth NHS Trust v Cowan EAT 895/99, in which the EAT indicated that the way in which an employee considers a suitable offer and responds will be a relevant consideration in the assessment of reasonableness.

Direct age discrimination

82. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic (including age) A treats B less favourably than A treats or would treat others. In the case of less favourable treatment because of age there is no discrimination if the treatment in question is a proportionate means of achieving a legitimate aim.
83. Section 23 Equality Act 2010 provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances of the Claimant's case and any comparator's case.
84. The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that s 13 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

Conclusions

Unfair dismissal

What was the reason or principal reason for dismissal?

85. We are satisfied the reason was redundancy, as asserted by the respondent. There was a genuine redundancy situation arising from the catastrophic impact of the pandemic on the business and the urgent need to scale the HR function down to basics. The claimant's specialist post was deleted during that restructuring process. We are satisfied that the claimant's pension package and the cost of employing her as a result of her long service predating the TUPE transfer from London Borough of Bromley was not the reason she was selected for redundancy or her post removed. Although it was listed in the list of issues the claimant confirmed during her hearing that she was not asserting that she was dismissed because of her age itself.

Did the respondent act reasonably in all the circumstances?

Did the respondent adequately warn and consult the claimant?

86. The respondent did warn the claimant and did invite her and other affected staff to a group consultation and to subsequent one to one consultation meetings. Important misunderstandings, such as about whether a colleague's role had been matched to the HR Advisor role, were eventually corrected in that process.

87. Correctly the respondent sought feedback on the initial proposed structure and adapted it in response to staff feedback. The respondent did not invite further feedback on the revised structure.

88. The final structure (a further revision of the revised structure to include the trainee role) was not communicated to the claimant even though she was communicated with about other matters after that decision. Although the claimant had answered the consultation in such a way that she was unlikely to consider the trainee role it nevertheless impacted her situation in respect of the HR Advisor role and whether any other colleagues were still interested in that role. None of the employees had the opportunity to comment on the final structure that was implemented.

89. The claimant did have an opportunity to comment on the job matching grid in respect of her role and the HR Advisor role.

90. Staff were told there would be no final decisions until the consultation had concluded but that was not adhered to. For example Louize Carroll was given the Head of HR role by 13 July 2020 well before the end of the consultation.

91. Best practice would be to resolve the new structure through consultation first as a separate step before considering job matching and whether any posts are a match either for "slot in" or an automatic offer of suitable alternative employment.

92. Once there is clarity on the new roles after consultation, then consideration should be given as to which employees are at risk because their posts will no longer exist; how to select between them if necessary; and whether there is suitable alternative employment available for that individual (based on the 60% job match or otherwise).

93. Here the structure was fluid and changed three times concurrent with both the job matching decisions and selection decisions between employees being made. Whether intentional or not (and whether justified or not) this gave the employees the understandable impression that jobs were being created or modified to suit favoured individuals. Moreover they had been

told there would be no decisions before the end of the period but then decisions and at least one appointment were made prior to that, again feeding into that concern. In fact we find individuals like Ms Carroll and the person who was given the trainee HR advisor role were favoured during the process and the concern that the process was not being conducted fairly was justified. The fluid and changing process also led to misunderstandings between the concept of matching roles, and considering whether the individuals were suitable for particular roles.

94. Looking at the consultation process overall, it does not need to be best practice, only reasonable, but we find this confused and changing process was unreasonable and impacted negatively on whether employees, including the claimant, had trust and confidence in the process. For example the claimant believes she was scored by Ms Carroll while she was also at risk of redundancy.
95. We also note that there was no consultation with the postholders about the job descriptions being used for the job matching exercise prior to the exercise being carried out. Given Ms Mason and Ms Carroll had been in the roles such a short time prior to the start of furlough and the selection exercise we consider this a very significant omission. The claimant does not agree that her job description accurately reflected her role and this omission is particularly significant given how near the claimant's job description was to being a match to be given a trial period in the HR Advisor role.

Did the respondent adopt a reasonable selection decision including its approach to selection pool?

96. The respondent argues that selection was done on a pure job matching exercise limited to information in the job descriptions. Those whose roles were not a match (either as a "slot in" or as suitable alternative employment with a trial) with any of the new roles were then at risk unless alternative work found. The new opportunities were potential alternative roles and selection was based on interviews of interested candidates.
97. However in fact we find Ms Carroll was placed in her new role without a job matching exercise based on Ms Mason's preference for her to do the Head of HR role based on her opinion of her skills and experience. There was no job matching exercise between her old and new roles. Had a job matching exercise in respect of Ms Carroll's role been carried out strictly based on job descriptions we find it likely it would not have been a match. According to the job description the Head of HR role was higher status and a much wider role than the Resourcing Manager role. Some substantial leeway was therefore given in offering her that role without a job match or indeed a selection interview.

98. We find that the trainee HR Advisor role was created to retain the People Services Coordinator in an attractive role when she was not successful in her application for the HR Advisor role. This was in preference to the other People Services Coordinator who was also interested in the trainee role. This was because Ms Mason wanted to retain her as she saw the potential for her career to progress. The way that job emerged did not create a fair opportunity for both candidates, as in our view there was clearly a preconceived preference for the candidate for the HR Adviser role.
99. We find there was subjectivity and inconsistency in how the selection process was approached for different employees in the HR team and it was based on the person and not a simple job matching exercise followed by selection interviews. Certain employees were clearly favoured.
100. In contrast to the two examples above, the claimant's role's score in the job match exercise was very close to the required 60% for a trial, being just 0.5 away in actual score terms. In those circumstances a reasonable employer would give careful consideration to the job matching exercise and whether to exercise some leeway. However here, contrary to what the appeal officer was told and the respondent's procedure required, there was no independent scoring by Ms Carroll and Ms Mason in the job matching process and no moderation meeting between them. Instead there was a strong steer from Ms Mason to Ms Carroll (who had just been offered her new post) to confirm Ms Mason's scores. If Ms Carroll has evidence of scoring the claimant's role against the HR Adviser role separately as she claimed to us she has not disclosed this, despite being a very experienced HR professional, and despite how close the claimant's role was to being matched as suitable alternative employment with a trial period.
101. The approach to the claimant, unlike the two examples above, was to stick strictly to Ms Mason's scoring just under the 60% threshold when there was evidently room for discretion given how close the role's score was to the threshold for the HR Advisor role to be offered on a trial basis.
102. We accept it is not our place to re-score the job matching process and make no comment on whether or not the score is correct however we do not find that the respondent was applying a fair and consistent approach to all affected employees in the process. This was in the context that Ms Mason had already built the team she preferred to work with through her furlough decisions relating to long term staff (whom she did not consider sufficiently qualified) and the extension of fixed terms for Ms Carroll and the administrator.
103. The respondent argued that how others were treated is not relevant but we do not agree that the claimant's treatment should be considered in isolation to the others. We find that this was not a fair and objective process looking at it globally and that has impacted claimant's trust in the process

and it is at least one of the factors in her decision not to put herself forward to be interviewed for the HR Advisor role. We find that given the fact the decision maker had only been in role about 4 months and was dealing with a team with such long service, especially in the claimant's case, a reasonable employer would make sure the selection was independent, objective and fair whereas here the opposite perception was created by the actions of the respondent.

104. It was therefore not a reasonable selection process.

Did the respondent take reasonable steps to find the claimant suitable alternative employment?

105. The Respondent did suggest that the HR Advisor role was a potential role for redeployment even though the claimant's role was not matched to it. The Respondent went through the motions of encouraging the claimant to apply but did demonstrate more encouragement and support to others as set out above. The claimant was not told about the final structure including the trainee position. She was not told that she was the only remaining potential candidate within the team for that position as alternative employment. Indeed she was given the opposite impression (paragraphs 55 and 64 above).

106. The respondent also discussed with the claimant whether she would consider an operational role. The claimant was clear she did not want to move back to an operational role.

107. Ultimately the claimant herself chose not to apply for the HR Advisor role. This was in part because she felt the decision had already been decided to dismiss her and there was a breakdown in trust. We find that the above issues with the consultation and the selection, with some being treated more favourably than others, contributed to the claimant's lack of trust and confidence in the exercise.

108. Looking at all of the above circumstances we do not find the dismissal within the range of reasonable responses.

Is there a chance that the claimant would have been fairly dismissed any way?

109. We considered what the position would have been if the respondent had first finalised the new structure following reasonable consultation; then consulted on the accuracy of the existing job descriptions with the post holders; then done a job matching process in the manner as had been described to the appeals officer. We consider given how close the claimant's role was scored to the 60% mark that there is a possibility the outcome would have been that the HR Advisor role was considered suitable alternative employment with a trial period for the claimant's role, especially

if the same flexibility was applied to this decision as we have seen in relation to other decisions with respect to other posts.

110. However we also recognise the respondent was concerned that the claimant's role was more specific and did not have the HR skill requirement and it still might not have reached the 60% threshold. We cannot say it was more likely than not that the claimant would have been offered the post as suitable alternative employment with a trial at the job match stage.
111. We also considered what the claimant's position would have been if the respondent had adopted the above approach and the claimant had known she was the only candidate for the alternative role and/or she had known about the final structure with the trainee position. We find there is still a possibility the claimant would not have applied, given the comments she also made about the salary level and that it was not the career path she wanted. However we do think there is a possibility she would have continued with her application if the respondent was following a fairer more consistent process as set out above. She had initially expressed an interest in the post and the breakdown in trust was a considerable factor in her withdrawing.
112. There is a chance that had she applied that she would not have been successful as she did not have the wider experience in HR specifically. However we also find there is a chance she would have been successful, especially if she was shown the same flexibility the respondent demonstrated to Ms Carroll and the person appointed to the trainee role. Ms Mason acknowledged in evidence that it was possible the claimant would have been successful. Although the claimant did not have the wider experience in HR she had moved into a very specialist HR role from an operational role and shown flexibility and transferability of her skills. She also had many years of management experience to draw upon.
113. We also note that there was flexibility shown to another staff member with respect to salary and that ultimately the respondent was not able to recruit at the salary level assigned to that role so there is a possibility that had the claimant been successful and been treated fairly there would have been some flexibility on the salary offered and a possibility that her salary would have been near to or matched her existing salary.
114. We will consider at the remedy hearing what the appropriate award is taking account of all the above possibilities. We will also consider whether there is a possibility that the claimant would not have continued indefinitely in the role even if she was given a trial period or successful in being redeployed into the role.

Age discrimination

Did the respondent do the following things:

Dismiss the claimant;

Select the claimant for redundancy;

Fail to consider the claimant for alternative roles within the respondent;

Adopt a future business/team structure with role definitions that was designed in such a way as to deliberately exclude the claimant;

Refuse to apply a salary match that was included in the claimant's terms and conditions by reason of TUPE transfer terms to the alternative employment potentially available to the claimant?

115. The claimant was dismissed and her post was selected for redundancy. Her post was matched at 58 % and the claimant turned down the alternative roles (in the circumstances that she did not have trust in the process as described above). We have not found that the business/team structure had role definitions that were designed to deliberately exclude the claimant. However we have found that some decisions about the structure deliberately favoured others (for example Ms Carroll and the person who was given the trainee role) due to Ms Mason's positive views about them and desire to retain them in the business over others.
116. The respondent did not apply pay protection as part of the redundancy process. This was in theory applicable to all but in fact one person at least did retain their existing higher salary. This was decided once it had been decided that she would have the role of Trainee HR Advisor. The claimant did not pursue the application for HR Advisor and therefore did not reach the stage where her salary was considered on an individual basis.
117. There was less favourable treatment in the approach to the claimant with the strict adoption of the matching of her post at 58% just under the requisite 60% in contrast to the retention of Ms Carroll in her new role without any job matching exercise.
118. There was more favourable treatment of Ms Carroll and the person who was given the trainee role in that Ms Carroll was given a role without job match or interview and the trainee role was created with the postholder in mind in order to retain her in an attractive position, and she was not required to do a further interview for that role. In contrast the claimant was not informed that she was the only person remaining potentially able to do the role she was interested in and the 58% was strictly maintained requiring the claimant to apply for the role.
119. The other comparator listed by the claimant was also made redundant.

120. The claimant did not persist in running a direct discrimination case based expressly on age per se. When asked whether she was saying the reason for her treatment was her age she was clear that she did not consider it was her age but rather her enhanced pension contributions. There was no evidence that the claimant was treated as she was, or that others were treated more favourably, because of pension. In fact, her pension entitlement had been the reason she was treated more favourably in the previous redundancy exercise, when a post was created for her to avoid her dismissal potentially triggering the requirement to pay a substantial sum to Bromley Council. Those reasons no longer applied in this redundancy process.

121. Moreover age and pension are two different things. If pension was the reason (and we do not accept it was) then the claim might potentially be an indirect discrimination claim if those who had the higher pension rights were in a particular age group, but not a direct age discrimination claim. The claimant expressly opted not to pursue indirect discrimination but in any event we do not find that the claimant's pension was the reason for the treatment.

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Employment Judge Corrigan
23 January 2024

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