EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Lynn Isham	**v**	Stanstead Abbotts and St Margaret's Village Club

Heard at: Cambridge

On: 10 & 11 May 2023, 24 October 2023 (Chambers discussion) and 8 January 2024 (Judgment and Remedy)

Before: Employment Judge Tynan

Members: Ms D Clarke and Mr S Holford

Appearances
For the Claimant: Ms C Urquhart, Counsel
For the Respondent: Mr T Hussain, Litigation Consultant

JUDGMENT

1. The Claimant's claim of unfair dismissal succeeds. The Claimant was unfairly dismissed by the Respondent.

2. But for the fact that she was unfairly dismissed by the Respondent, the Tribunal determines there was a twenty five per cent chance that the Claimant would have been dismissed by reason of redundancy in any event.

3. The Claimant's complaint that she was discriminated against on the grounds of age is not well founded and is dismissed.

REASONS

Background

1. The Claimant has brought a claim for unfair dismissal and direct age discrimination following her dismissal on grounds of redundancy from the Respondent. The claim is resisted by the Respondent. We apologise once more for the unavoidable delays that have arisen since the Hearing

in May last year and for any worry or uncertainty that this may have caused the parties or any witnesses.

2. The Claimant gave evidence in support of her claim. On behalf of the Respondent we heard evidence from: Trevor Barnwell, the Club's former Secretary who handled the Claimant's redundancy; Samantha ("Sam") Gay, Bar Manager at the Club and formerly the Claimant's Assistant or Deputy; and Declan Quinn, the Club's Treasurer.

3. There was a single agreed Hearing Bundle extending to 149 numbered pages with insertions. Any page references in the course of this Judgment correspond to that Bundle.

4. As the Respondent is a Club, its members do not enjoy the protection that limited liability confers. It is non-profit making and managed by four Officers and eight Committee Members, all of whom are unpaid. It employs bar staff and cleaners.

5. In making findings and coming to a judgement in this case, we have not allowed ourselves to be influenced by the fact that the Respondent comprises a group of community-minded individuals who are not motivated by any financial reward in volunteering to perform the roles which they do. We approach our task dispassionately, applying the Law as we would in any case. Of course, pursuant to Section 98 of the Employment Rights Act 1996, we have regard to the Respondent's size and administrative resources when considering whether it acted reasonably in the circumstances.

Findings of fact

6. The Claimant was employed by the Respondent as its Club Steward when her employment terminated on 14 April 2021. She has a long association with the Club dating back many years, though her most recent period of employment commenced on 12 January 2018 after the Club contacted her and actively encouraged her to return. She would have been nearly 55 years of age when her most recent spell of employment commenced. Having initially been employed as Deputy Club Steward, she was then promoted to Club Steward in July 2019 when she would have been 57 years of age. She was 58 when her employment terminated.

7. Ms Gay was employed as Assistant Club Steward on 12 July 2019, at or around the same time that the Claimant was promoted to Club Steward. Their respective job descriptions are at pages 69 – 71 and 79(i) – 79(k) of the Bundle. Ms Gay is 31 years of age and would have been 29 at the time of the 'redundancy' of that role. As Ms Gay's job title suggests and their respective job descriptions confirm, Ms Gay supported the Claimant in her role as Club Steward. The Claimant had a wider remit than Ms Gay: for example, she was responsible for ensuring that cash was kept safe and banked regularly, as well as primary responsibility in respect of health and safety issues. The differences in their responsibilities were reflected in their remuneration; the Claimant's effective rate of pay was £15.24 per

hour as against £11.17 per hour for Ms Gay. For the avoidance of doubt, although it has not been suggested otherwise, the Claimant would have been eminently capable of performing Ms Gay's role.

8. It hardly needs stating that 2020 and 2021 were an unprecedented time in the life of this country and indeed across the globe. On 6 January 2021 the UK entered its third national lockdown. Although a phased exit began in March that year, when face to face teaching resumed in schools, licenced premises were only permitted to re-open on 12 April 2021 and even then were only permitted to offer an outdoor service. It was not until 17 May 2021 that indoor hospitality resumed with appropriate social distancing in place. The Club was closed from 6 January 2021 to 17 May 2021 and, as it had done during the previous lockdowns, it took advantage of the Coronavirus Job Retention (or Furlough) Scheme to cover its staff costs while they could not work.

9. In or around early March 2021 the Club's Officers, namely the Treasurer, Secretary, Chairman and President, met with the Chair of the Bar Committee to discuss the Club's financial situation. We accept that they were seriously concerned as to the Club's financial viability and long term future. Even with the benefit of grants and funding through the Furlough Scheme, the Club was losing money. It did not have significant reserves to be able to sustain losses over an extended period.

10. We further accept Mr Barnwell's evidence that steps had been taken by the Club to reduce its outgoings, but that many of its overheads were fixed, leaving the Club with limited scope to achieve cost savings other than through a reduction in headcount.

11. As at March 2021, the Club was loss making and unless it could secure a reduction in its outgoings was likely to remain loss making. It is all too easy now, with the benefit of hindsight, to see how life began to return to normal over the summer of 2021, particularly as the roll out of the Covid vaccines gathered pace. But the picture and outlook as at March 2021 remained highly uncertain, exacerbated by seemingly daily changes of direction during that period. The vaccination programme was still in its early stages and there was no guarantee that 2021 would not follow a similar course to 2020.

12. The Club's Officers and the Chair of the Bar Committee resolved that both Club Steward roles should be made redundant, on the basis that they and the other Trustees and Committee Members would take on responsibility for all administrative and back of house activities. They provisionally identified the potential to create two new public-facing bar roles in place of the Club Steward and Deputy Club Steward roles. However, their thinking in this regard was not clearly or definitively formulated or articulated. We can understand how this happened. There was perceived to be a pressing need in March 2021 to reduce costs, but there was little or no clarity as to when the Club might eventually re-open and significant uncertainty as to what restrictions might be in place once it re-opened. The Officers and Chair did not know, for example, to what extent Members might be

deterred from returning to the Club as a result of any such restrictions, or because of their individual vulnerabilities and anxieties. If there was a pressing need to address the loss making situation in which the Club then found itself, there was perhaps a less immediately obvious need for the relevant decision makers to identify how things might look in the future. From their perspective, they could effectively wait and see how things developed. However, such an approach potentially overlooks that those at risk of redundancy may be left in limbo.

13. We find that the Officers and Bar Committee Chair between them effectively lacked a clear vision or strategy for the medium to long term, save that the Committee Members between them would take on various back of house responsibilities. They failed to put themselves in the shoes of the Claimant and Ms Gay who would understandably have been very concerned to know how things might look in the future.

14. Mr Barnwell was delegated by his colleagues with the task of implementing the redundancies of the Claimant's and Ms Gay's roles. By his own admission, he was inexperienced in such matters, though was guided by the principle that one should always follow due process. He was heavily reliant upon the Club's external HR Advisors, Croner for advice and guidance in the matter. On their advice he prepared a business case in respect of the proposed redundancies (pages 79(o) – 79(p) of the Bundle).

15. The business case includes details of the Claimant's and Ms Gay's dates of birth. Firstly, we find that this was on Croner's advice and, secondly, that in combination with the accompanying information regarding their start dates and salaries it was collated in order that their respective notice and redundancy pay rights could be calculated. We accept Mr Barnwell's evidence that there was no other reason why he might have been concerned with their ages. The significant differences in their ages would have been all too apparent to him.

16. What is potentially more relevant we think, is that Mr Barnwell went on to note that neither individual was believed to have any protected characteristics under the Equality Act 2010. We find that it did not occur to him, or indeed to Mr Quinn, that the Claimant or Ms Gay might have a protected characteristic by reason of their respective ages.

17. Mr Barnwell informed the Claimant and Ms Gay that they were potentially at risk of redundancy within a very short time of being authorised by his colleagues to proceed. Within these proceedings we are not concerned with whether any decision in that regard should have been referred to a full Committee. Mr Barnwell spoke with the Claimant on 6 March 2021 and to Ms Gay on 8 March 2021. Such initial discussions are never entirely satisfactory since the affected employees may be taken by surprise, or simply upset even though they may have anticipated a potential need for redundancies. The employer is communicating that the individuals are at risk and that a period of consultation is commencing, but otherwise the

employer cannot immediately begin consulting on the situation without risking infringing their legal rights in the matter.

18. We make no criticisms of Mr Barnwell for how he handled his initial discussions with the Claimant and Ms Gay. We are satisfied that he explained the basic rationale to them, including in the Claimant's case that certain elements of her existing role would be assumed by the Committee Members. We note, however, that Mr Barnwell did not email the Claimant or Ms Gay, or send them a letter, to confirm that they were at risk, the reasons why they were at risk or to outline the consultation process, including whether they were permitted to be accompanied to meetings by a workplace colleague. The first formal consultation meeting with the Claimant was on 11 March 2021. Mr Barnwell's minutes of that meeting are at pages 81 and 82 of the Bundle; the Claimant's comments on those minutes are at page 102. Although the Claimant had relatively few comments to make on the minutes, two matters stand out. Mr Barnwell recorded that the Claimant was somewhat ambivalent about any new role that might be created, noting that the Claimant had said she would have to think about it. By contrast, in her comments on the minutes, the Claimant stated emphatically that she would consider any new role. It does not matter whose recollection was more accurate because, by no later than 17 March 2021 when she provided her comments on the minutes, Mr Barnwell would have understood that the Claimant was committed to exploring opportunities for re-deployment. Secondly, the Claimant confirmed that she would be prepared to reduce her hours and wages. This is in the context that the Respondent had not, and indeed within these proceedings still has not, identified, the level of its financial losses as at March 2021 or the cost efficiencies it was seeking to achieve.

19. Rather than acknowledge the Claimant's offer to consider a reduction in her hours and wages and commit to exploring this further with her at their next meeting, or indeed invite the Claimant to indicate what reduction she might be willing to consider, Mr Barnwell merely committed to sending out amended minutes on the basis that whilst he could not recall the offer having been made, Maureen Burrows had. Mr Barnwell went on to say in his email response, at page 103 of the Bundle, that what he referred to as *"other discrepancies"* were refuted. The impression is that he was somewhat irritated at having received the Claimant's comments, even though it is entirely normal within a consultation process for the affected employees to be afforded an opportunity to consider and comment upon any meeting minutes.

20. In spite of what Mr Barnwell and Mr Quinn now say in their respective witness statements, we find that neither they nor anyone else at the Respondent explored this issue further with the Claimant. This is further confirmed by the minutes of the subsequent meeting on 16 March 2021 (pages 99 and 100 of the Bundle). They evidence that Mr Barnwell expressed his appreciation for the Claimant's willingness to consider a reduction to hours and pay, but not that he had actively engaged in further discussion with her as to what this might look like in practice. It reinforces

the impression we have that Mr Barnwell and his colleagues were focused on the immediate need to achieve cost efficiencies rather than how the Club would likely need to be staffed once it re-opened and, that even if this was somewhat uncertain, they seemingly failed to identify for themselves or to share with the Claimant details of the level of savings they were seeking to achieve in both the short term and over the longer term.

21. It seems that the Claimant spoke with the Club's President, Diane Jenner around this time, and told her that she felt Mr Barnwell did not like her. There is an issue as to whether she also said that she was being victimised. The Claimant denied that she had said this. What is relevant, we think, is that Mr Barnwell raised the matter with the Claimant early in their second consultation meeting on 16 March 2021. Once again, it evidences to us some irritation or annoyance on Mr Barnwell's part. By the same token, however, if the Claimant believed that she was being discriminated against on the grounds of age, this would have been an obvious opportunity for the Claimant to raise and articulate her concerns, for example with Ms Jenner if she felt she did not have Mr Barnwell's ear or that he was discriminating against her. Be that as it may, there is some weight to subsequent comments made by the Claimant's companion, Ms Lawton, in the course of the meeting, captured at the top of page 100 of the Bundle that, *"she felt Mr Barnwell was disregarding anything the Claimant was proposing"*.

22. In light of those concerns, Mr Barnwell seemingly agreed to have another look at the situation. However, he did not consult his fellow Officers or the Chair of the Bar Committee in the matter, and there is no evidence available to us that he actively reviewed the redundancy proposals themselves or the Claimant's suggestion that she might agree a reduction in her hours and pay. The future staffing arrangements remained fluid, as Mr Barnwell told the Claimant that the two previously mentioned bar positions were on hold due to the Club's financial situation. He said the Club might have to operate with part-time staff only.

23. Mr Barnwell told the Claimant on 16 March 2021 that if the Club was in a position to recruit into new positions the Claimant would be given the opportunity to apply for them. The meeting concluded apparently on the basis that the Claimant expressed her satisfaction with the process.

24. A third and final consultation meeting was scheduled for 24 March 2021. Whilst the parties' notes of the meeting are similar, as on 11 March 2021 the Claimant's notes evidence that she emphasised she would want to be considered for any job that became available. We accept that her note accurately reflects her communicated position during the meeting, which in any event is consistent with what she had previously said in writing.

25. Although a little late in the process, the Claimant received a written invitation to the 24 March 2021 meeting (p105 of the Bundle). It is in a form that accords with good practice. It is unfortunate that similar letters were not issued ahead of the earlier two consultation meetings. In his letter, Mr Barnwell acknowledged that counter proposals had been made

by the Claimant, though he went on to say that *"none appeared to satisfy the ongoing financial situation"*. It is difficult to know what, if any, analysis lay behind that statement given that, as we have noted already, the desired cost efficiencies were not spelled out and the Claimant's willingness to reduce her hours and pay was not explored further. The meeting minutes at page 117 of the Bundle reinforce the point. There is a general reference to counter proposals and a need to save money, but otherwise no further specific details. The minutes do record that Mr Barnwell had apparently had a meeting with Mr Quinn in his capacity as Treasurer, to go through the expected outgoings in depth to see if the position had changed financially. However, this meeting is not addressed further in Mr Barnwell's or Mr Quinn's respective witness statements so that we might have a clearer understanding as to what was discussed between them or how the situation then looked to them, particularly if the potential two new positions were then on hold. For example, there is no documented analysis of the impact of any reduction in the Claimant's hours and pay in combination with other potential cost efficiencies. The minutes document that the Claimant noted during the meeting that Mr Barnwell had not asked her what changes she was willing to consider in that regard. Even if he had been labouring under the belief until then that he had engaged with the points raised by the Claimant, and provided her with all relevant information, when she said he had not asked her what reductions she had in mind this was an obvious moment for him to pause and engage further with the Claimant. Instead, his own minutes record that he responded along the following lines:

> *"She had been asked for her counter proposals at both previous meetings and that all her views had been taken into consideration."*

In adhering to due process, as he saw it, Mr Barnwell regrettably failed to see the consultation 'wood for the trees'. It is telling that a silence then followed. The silence was broken by Mr Barnwell informing the Claimant that she was redundant and issuing her with notice of termination of employment. This was also confirmed in a letter to the Claimant dated 25 March 2021, which replicated parts of the minutes of the meetings. The Claimant was given three weeks' notice of termination and reminded amongst other things of her appeal rights.

26. We have an incomplete picture as to how Ms Gay was treated in comparison to the Claimant. It is clear that Mr Barnwell's initial discussion with Ms Gay followed the same format or structure as his conversation two days earlier with the Claimant. Ms Gay has depression and anxiety, conditions that cause her to ruminate and worry unduly and to assume the worst. We accept Mr Barnwell's evidence that he was cognisant of this when he spoke with and subsequently met Ms Gay and accordingly that he may have sought to compensate for her anxieties by seeking to reassure Ms Gay in terms that led her to believe that her future was secure.

27. The minutes of Mr Barnwell's first substantive consultation meeting with Ms Gay are in very similar terms to the minutes of his meeting with the Claimant. They evidence that Ms Gay readily accepted that the Club's situation was as described by Mr Barnwell and that she raised no issues in relation to the proposed redundancy of her role. They discussed the hours and pay for a potential new bar role. Mr Barnwell assured Ms Gay that the hourly rate of pay would not be less than what she was then being paid. Ms Gay expressed a keen interest to be considered for any new role and, as Mr Barnwell recorded, showed *"good constructive enthusiasm"* as to what could be achieved to turn the Club around. He went as far to say that the Club was receptive to some form of bonus arrangement as an incentive in that regard.

28. On Ms Gay's evidence, she came away from this initial meeting feeling relieved, as she believed that she would continue to work at the Club. Her evidence at Tribunal was that she left the meeting feeling safe in the knowledge that she would not be let go. Whilst the same cannot be said of the Claimant, it is clear from their evidence and from the similarities in the materials available to Mr Barnwell to guide him through the process, that Mr Barnwell was working to a scripted process and that he had embarked upon the consultation meetings with the intention that each meeting would be handled in the same way and that the two individuals should be treated consistently. We find that the meetings diverged in light of Ms Gay's ready acceptance of the situation and perceived enthusiastic response to what was potentially on offer, and the Claimant's perceived ambivalence and willingness to question, indeed even challenge, the Respondent's proposals. We find that Mr Barnwell perceived this as some personal slight, perhaps that he became overly defensive in his interactions with the Claimant because he was inexperienced in such matters.

29. The minutes of any further consultation meetings with Ms Gay are not in the Bundle. We were not told that they had been withheld. What we do have is a copy of a document which is a hybrid meeting minute /letter to Ms Gay dated 12 April 2021 confirming the redundancy of her role (though seemingly not giving notice to terminate her employment or her employment under her existing contract). The document also purports to record that she had verbally applied to provide bar cover at the Club with effect from 19 April 2021 under a zero hours contract. The document was annotated by hand to indicate that the envisaged April start date had changed to 14 May 2021, presumably in light of a decision not to re-open the Club at the point that licensed premises were permitted to re-open on the basis of a limited outdoor service only. The document also recorded that the arrangement would run until 12 June 2021, during which period Ms Gay and the Club would,

> *"discuss the framework of a new position we are creating of Bar Manager".*

Ms Gay was, again, given assurances that her remuneration would be unaffected.

30. There was no corresponding discussion with the Claimant who had been told on 16 March 2021 that the mooted new roles were on hold, a point effectively reiterated on 24 March 2021 and in the letter of 25 March 2021 confirming her redundancy. Whilst the letter to Ms Gay was written some three weeks later, and has to be considered in the context of the constantly, and often rapidly, evolving circumstances of the pandemic, we return in a moment to further representations that were made to the Claimant in the course of her appeal against her dismissal.

31. The Claimant appealed by letter dated 29 March 2021 (page 128 of the Bundle). Understandably, she said in her appeal, amongst other things, that her counter proposals had not been considered by the Club and that she had not been afforded the opportunity to apply for or be interviewed for any new role(s). The appeal was heard by Mr Quinn on 8 April 2021. His notes of the appeal hearing are at pages 130 – 131 of the Bundle. They evidence that as Mr Barnwell had done, Mr Quinn failed to explore with the Claimant what reduction in hours and pay she was willing to consider. His documented response entirely misses the second point she was making; in particular he told the Claimant and indeed apparently emphasised that there were,

> *"no active roles available at the moment"*

and

> *"neither of the two roles exist at the moment."*

Yet four days later, on 12 April 2021, Ms Gay was formally offered a zero hours contract and told the Club would discuss the framework of a new Bar Manager position that would hopefully be created by 12 June 2021. It is impossible to reconcile these conflicting communications just four days apart.

32. At Tribunal Mr Quinn accepted that the Club had not proactively approached the Claimant regarding any new role(s). Instead he saw it as her responsibility to apply for jobs, notwithstanding she said in her appeal that details of positions had not been made available to her and that she had not been given the opportunity to apply for them. She went further during the appeal hearing, telling Mr Quinn that she would be prepared to move to a zero hours contract on a lower salary/rate of pay.

33. Mr Quinn's appeal outcome letter is dated 13 April 2021 (page 132 of the Bundle) and was sent the day after Mr Barnwell had written to Ms Gay confirming her continuing employment. Mr Quinn did not address the Claimant's points of appeal, he merely stated that he was,

> *"of the opinion that the redundancy process was conducted in accordance with the prescribed procedure."*

It reinforces the clear impression given by the appeal hearing notes that Mr Quinn had not engaged in any meaningful way with the points raised on appeal.

The Law and Tribunal Conclusions

34. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer – section 94 of the Employment Rights Act 1996 ("ERA" 1996). It is not disputed that the Claimant qualified for that right.

35. S.98 ERA 1996 provides:

> 98. General
>
> (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) …
> (b) …
> (c) is that the employee was redundant,
> (d) …
>
> (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.

36. Where this is in dispute, an employer bears the burden of establishing that it had a potentially fair reason for dismissing its employee. In the course of her evidence, the Claimant seemed to accept that there was a redundancy

situation directly affecting her role. Although Ms Urquhart referred to the redundancy consultation process as a sham, we did not take from those comments that it was disputed that the Respondent had a potentially fair reason for dismissing the Claimant, rather that the consultation process was wanting. Ms Urquhart conceded, for example, "as a matter of fact", that there was less bar work, though we acknowledge she also went on to say that the need for bar staff had not diminished and, further, that the primary part of the Claimant's role remained. She also noted the provisions in the Claimant's contract regarding lay off and short-term working. In our judgment, those provisions are beside the point; they do not help answer the question of whether there is a redundancy situation within the meaning of s139 of the 1996 Act, specifically whether pursuant to s139(1)(b) the Respondent's requirements for employees to carry out work of a particular kind had ceased or diminished or was likely to do so. In that regard, the Respondent's requirements for the Claimant, to undertake the administrative or back of house elements of her role had either ceased altogether or had materially diminished. In which case, in the Tribunal's judgment, there was a redundancy situation affecting her role since, as her job description evidences, these aspects comprised a material part of her over job as Club Steward even if the greater part of her responsibilities were customer facing. In any event, it can additionally be said that the Respondent's requirement for bar work had either diminished or was expected to diminish, in so far as the Club was closed and there was no bar work at the point at which the Claimant was dismissed, and the Respondent was anticipating reduced footfall within the Club even once national restrictions were lifted and it was permitted to re-open. Its expectations in that regard were reflected in its proposal to engage Ms Gay on a zero hours contract, even if in the event it was able to provide a consistent number of hours to her.

37. On the basis we are satisfied that the Claimant was dismissed by reason of redundancy, the fairness or otherwise of her dismissal falls to be determined in accordance with well-established principles applicable in cases of redundancy related dismissals, including as laid down in Williams v Compair Maxam Ltd. [1982] ICR 156, and most recently by the Employment Appeal Tribunal in Haycocks v ADP RPO Ltd. [2023] EAT129.

38. The authorities set out the following guiding principles:

    a. An employer will normally warn and consult either the employees affected or their representative(s);

    b. A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given, along with conscientious consideration being given to any responses;

    c. The purpose of consultation is to avoid dismissal or ameliorate the impact;

d. A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable;

e. The Tribunal's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss;

f. It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; and

g. Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process, though the use of a scoring system does not make a process fair automatically.

39. The Employment Appeal Tribunal in Haycocks noted that, starting with Compair Maxam, the theme surrounding reasonableness in redundancy situations is that it reflects what is considered to be good industrial relations practice; that employers acting within the band of reasonableness follow good industrial relations practice. The substance of what amounts to good practice will vary widely depending on the type of employment, workforce and the specific circumstances giving rise to the redundancy situation. However, there are certain key elements which seem to appear. First amongst those is that a reasonable employer will seek to minimise the impact of a redundancy situation by limiting numbers, mitigating the effect on individuals or avoiding dismissal by engaging in consultation.

40. We do not agree with Ms Urquhart's submission that the redundancy process was a sham, certainly not if by that term she is suggesting that the Respondent had resolved from the outset to make the Claimant redundant and cynically went through a consultation process with her. We are satisfied that the Respondent embarked upon the process in good faith and with every intention of complying with its duties and responsibilities in the matter. However, as a result of its Officers'/Members' inexperience in such matters, compounded when they, or at least Mr Barnwell, reacted defensively when the Claimant began to raise questions at a very early stage in the process, they quickly lost their way, notwithstanding they were being guided in the matter by Croner. In short, as we have observed already, they 'lost sight of the wood for the trees'. However well-intentioned they may have been going into the process, it lacked substance, with the result in particular that conscientious consideration was effectively not given to what the Claimant had to say. It seems to us that the Respondent fell into error at an early stage in failing to write to the Claimant to confirm that it had embarked upon a consultation process and the reasons for this, including the proposals being consulted upon. Had the proposals, including the details of any potential new roles, been outlined in writing, this would have provided a clear structure for further and ongoing discussion, as well as the opportunity for the Claimant to consider her position and respond appropriately. In any event, by 17 March 2021, the Claimant had unambiguously stated in writing that she

was willing to explore opportunities for redeployment, including a potential reduction in her hours and wages, yet the Respondent failed to explore this further with her, even when she reiterated her position during the consultation process. In our judgment that was unreasonable and did not reflect good industrial relations practice, specifically the need for conscientious consideration of what the Claimant had to say. Mr Barnwell seems to have been slighted by or irritated with the Claimant, in contrast with Ms Gay who was more compliant in the process. He didn't fail to engage with the Claimant altogether, since he went back and looked afresh at the business case. However, consultation, as we have noted, is with a view to avoiding dismissal or ameliorating the impact; in which case, it was incumbent upon the Respondent to explore more pro-actively with the Claimant the potential cost savings that might be achieved through a reduction in her pay and / or hours, alternatively whether she could be redeployed. Its failure to do so, and the unfairness this gave rise to, was not corrected on appeal as Mr Quinn continued to fail to explore with the Claimant what reduction in hours and / or pay she might be willing to consider, notwithstanding this was one of her stated grounds of appeal. Furthermore, he ruled out redeployment even though just four days later Ms Gay was formally offered a zero hours contact and told that there would be discussion of the framework for a new Bar Manager position. Whilst it seems unlikely to us that he did not know about this impending offer when he heard the Claimant's appeal on 8 April 20221, if he was in the dark in the matter, then the right hand did not know what the left hand was doing. Either way, these were not the actions of an employer acting reasonably in relation to its employee.

41. In all the circumstances, notwithstanding this was a modestly resourced Club without an HR capability (albeit with access to advice through Croner), we conclude that the Respondent acted unreasonably within s.98(4) and that the Claimant's dismissal was therefore unfair.

42. Pursuant to s.123(1) of the Employment Rights Act 1996 where a Tribunal upholds a complaint of unfair dismissal it may award compensation as it considers just and equitable in the circumstances, having regard to the losses sustained by the claimant in consequence of dismissal. In accordance with the well-established principles in Polkey v AE Dayton Services Ltd. [1988] ICR 142, HL the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would or might have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a Polkey reduction is appropriate. In Software 2000 Limited v Andrews and Others the Employment Appeal Tribunal reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence including any evidence from the employee. The fact that a degree of speculation is involved is not a reason not to have regard to the available evidence unless that evidence is so inherently unreliable that no sensible prediction can be made. It is not an all or nothing

exercise, rather it involves a broad assessment of matters of chance. The decision of the Employment Appeal Tribunal in Contract Bottling Ltd v Cave and Anr. [2015] ICR 146, is illustrative of how a purely statistical chance of dismissal by reason of redundancy was adjusted to reflect the particular circumstances.

43. This case is not a case in which it is, in our judgement, too speculative an exercise to determine what would or might have happened. However, we have to do so having careful regard to the entirety of the available documentation and evidence in the case and mindful also that having treated the Claimant unfairly in the matter the Respondent now has a vested interest in asserting that it was inevitable or likely she would have left its employment.

44. Applying Polkey principles in practice requires an evidence-based approach drawing upon common sense and experience. In the final analysis any final decision must meet the requirements of justice and equity. Notwithstanding the relatively limited available evidence in this regard, we conclude that the most likely outcome had the Respondent consulted with the Claimant is that it would have gone ahead with its proposal to make the two Club Steward roles redundant and replaced them with a single Bar Manager role. It seems inherently unlikely to us that any reduction in hours and / or pay that the Claimant might have been willing and able to countenance would have been sufficient to bridge the gap in terms of the costs savings needed to be realised by the Respondent. We know that the two roles were removed and replaced with a single Bar Manager role. The Claimant was not replaced. Subject to any later increase in Ms Gay's hours and pay, the cost saving achieved by the Claimant's redundancy was her full salary. A fraction of that saving would have been achieved had the Claimant's hours and rate of pay reduced with her agreement. We are concerned with matters of chance and discount that outcome as a likely, realistic chance. Instead, the question to our mind is what chance the Claimant had of being appointed to the Bar Manager role had she been considered for it. Although the Claimant and Ms Gay were each eminently capable of undertaking the Bar Manager role, and accordingly on one view each had a 50% of being appointed to the role had there been an open, competitive appointment process, we have regard to Mr Quinn's evidence in the matter, He initially said that if the Claimant and Ms Gay had been in a competitive interview process, given their respective bar skills and experience they might have been equally matched. However, he went on to say that the Claimant would in reality likely have had the edge over Ms Gay once consideration was given to her broader skills and experience, even if these might not be required in the new role, certainly not in the short to medium term. Within a competitive interview process, it is possible that Ms Gay would have edged out the Claimant given her apparent enthusiasm both for the job and for the challenges that lay ahead, or even because she was perceived to be more compliant and therefore easier to manage. We approach the matter on the basis that the Respondent should be assumed to act reasonably in the matter, ie, that it would have appointed the best

candidate on the strength of an objective evaluation of their respective skills, experience and relevant attributes. Whilst we cannot be certain that the Claimant would have been appointed in preference to Ms Gay, as does Mr Quinn, we think it the more likely outcome. In our judgement, there was a 75% chance that the Claimant would have been appointed to the Bar Manager role had she been afforded a reasonable opportunity to be considered for it.

Section 13 of the Equality Act 2010

45. S.13(1) EqA 2010 provides as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

46. The operative causal test is *"because"*. In Nagarajan v London Regional Transport [2000], Lord Nicholls when giving Judgment in an appeal in a race discrimination case under the Race Relations Act 1976, said,

> "*Thus, in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."*

47. Nagarajan was referred to by the Supreme Court in R(E) v Governing Body of JFS(SC)(E) [2010]. In that case Baroness Hale observed,

> *"The distinction between the two types of "why" question is plain enough: one is what has caused the treatment in question and one is its motive or purpose. The former is important and the latter is not."*

48. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference can properly be drawn. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been said that a Claimant must establish something "more", albeit what is required to be established need not constitute a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.

49. In a s.13 complaints this is often done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not been a particular race, gender, religion etc.: Shamoon v RUC

[2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

50. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice or discriminatory comments. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, also suffice.

51. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable / unfair treatment. This is not an inference from unreasonable / unfair treatment itself but from the absence of any explanation for it. It is important not to conflate unfairness with discrimination, they are two different things.

52. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential or unfavourable treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ.33.

53. For the reasons already given, we do not consider that the consultation was a sham in the sense that the outcome was pre-determined. The Claimant and Ms Gay were of course treated differently, most obviously insofar as Ms Gay remained within the Respondent's employment at the end of the consultation process. However, we do not consider or infer that this was because Mr Barnwell or others wanted to appoint a younger Bar Manager to drive the Club's recovery following the pandemic.

54. The Club's Officers, or at least Mr Barnwell and Mr Quinn, did not have the Claimant's and Ms Gay's ages in mind at the relevant time. It did not occur to them that age is a protected characteristic. We conclude that is because they were not thinking about or influenced, whether consciously or otherwise, by the Claimant and Ms Gay's respective ages in their dealings with them or in any decisions that affected them.

55. The reason why Ms Gay was treated differently to the Claimant, was because the redundancy consultation process was handled unfairly, though partly also because Mr Barnwell wanted to reassure Ms Gay given her anxieties . The Respondent embarked upon the process fully

intending to adopt the same process in respect of each individual and, as the documents evidence, superficially it did so. However, Mr Barnwell lost his way very early on in the process and unfortunately failed to get it back on track even when he revisited the business case for the redundancies. We do not infer more from this unfairness, namely that it was a discriminatory process, specifically that Mr Barnwell or Mr Quinn were seeking to appoint a younger person as Bar Manager.

56. There is of course no explanation for the unfairness, but that is because, as it is entitled to do, the Respondent has resisted the claim for unfair dismissal. We regard the unfairness as having essentially resulted from Mr Barnwell, Mr Quinn and their fellow Members' inexperience in the matter. We do not infer from the Club's defence of the Tribunal claim that this is a Respondent which is seeking to conceal, or is in denial about, its discriminatory practices and treatment of the Claimant. The Claimant was both recruited and subsequently promoted when she was in her fifties. The employee data at page 147 of the Hearing Bundle evidences that the Respondent employed staff across a wide range of ages, up to age 69. There was no suggestion by the Claimant during the process, or indeed at any time during her employment with the Respondent that she had encountered discriminatory comments or behaviour, whether age related or otherwise, that might indicate a lack of awareness of or commitment to diversity and inclusion at the Respondent. Indeed, on her own evidence, the Claimant said that no one other than Mr Barnwell had discriminated against her. It was not put to Mr Quinn that he had discriminated against the Claimant, yet he was the decision maker at the appeal stage.

57. In our judgement, the consultation process was tainted by fundamental unfairness, but not by age discrimination. Accordingly, the Claimant's claim that she was discriminated against does not succeed.

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Employment Judge Tynan

Date: 9/1/2024

Sent to the parties on: 30/1/2024

N Gotecha
For the Tribunal Office.

which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/