EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000453/2023

Held in Glasgow via Cloud Video Platform (CVP) on 27, 28 and 29 February 2024; 1 March 2024

Employment Judge P O'Donnell

Members Ms M McAllister and Mr AH Perriam

Mr Allan Stewart	**Claimant In Person**
Aberdein Considine & Co (a partnership)	**Respondent Represented by: Mr R Holland - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims of unfair dismissal and direct age discrimination are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The claimant has brought complaints of unfair dismissal and direct age discrimination in respect of his dismissal by the respondent.

2. The respondent resists the claims and argue that the claimant was fairly dismissed on the grounds of redundancy. They deny that the claimant's age had any influence on the decision to make him redundant.

Evidence

3. The Tribunal heard evidence from the following witnesses:

a. The claimant.

b. Greig Brown (GB) – the director of the respondent's financial service divisions who made the decision to dismiss the claimant.

c. Julie Cluness (JC) – who provided GB with HR support during the redundancy consultation process.

d. Ritchie Whyte (RW) – an equity partner of the respondent who heard the claimant's appeal.

4. There was an agreed bundle of documents prepared by the parties. A reference to a page number below is a reference to a page in that bundle.

5. This was not a case where the relevant facts were in any dispute. Parties were agreed as to the sequence of events leading to the claimant's dismissal including the various meetings held during the dismissal supported. These were supported by notes of these meetings created at the time and which parties generally accepted were accurate records of what was discussed.

6. The only real dispute related to a comment the claimant said he made when he first saw the redundancy selection criteria which was denied by GB and JC as well as not being recorded in the note of the relevant meeting. However, nothing turned on this comment being made and the Tribunal did not consider that it required to resolve this dispute between the parties in order to determine the issues in this case.

7. The Tribunal considered that all the witnesses were credible and reliable witnesses who gave what they generally believed was a true and accurate account of the events giving rise to the claim.

Findings in fact

8. The Tribunal made the following relevant findings in fact.

9. The respondent is a law firm originating in Aberdeen but now with branches across Scotland and in the north of England. It provides legal, estate agency and financial services.

10. The financial services department employed 15 mortgage and protection advisers in branches across Scotland as well as 8 support staff. There were also 3 managerial roles.

11. The claimant was employed as a mortgage and protection adviser (originally the job title was mortgage adviser but this was changed in February 2020 before the claimant's dismissal) at the respondent's Shawlands office in Glasgow. He commenced employment in August 2012 and was dismissed by reason of redundancy on 31 May 2023.

12. The claimant's role involved providing advice to clients on mortgages and mortgage protection insurance. The latter are a range of insurance products (such as life insurance, critical illness insurance and income protection insurance) which are designed to cover mortgage payments in the event of unforeseen events.

13. An adviser would provide advice on suitable mortgages and protection for the client's circumstances. They would then act as a broker for the client in applying for the mortgage and any related protection products which the client had chosen.

14. The protection products are a more lucrative income stream for the respondent as the commission paid by the insurance providers is higher than that paid in respect of mortgages. However, the protection products do not stand alone and go hand-in-hand with the mortgages.

15. There has also been an increased focus on protection products in a regulatory context. The Financial Conduct Authority (FCA) requires advisers to make recommendations on these products when advising on a mortgage. This is part of what is described as the "consumer duty" imposed by the FCA on advisers in the financial sector.

16. The advisers in financial services have generally been regarded as split between northern branches (that is, in the north-east of Scotland around Aberdeen and Aberdeenshire) and southern branches (that is, two branches in Glasgow, two in Edinburgh and one each in Stirling and Perth).

17. The respondent operates a financial year from 1 November to 31 October each year.

18. In the 2021/2022 financial year, the respondent's financial services department saw a shortfall on budgeted income of over £300,000. In the first five months of the 2022/2023 financial year, the department was operating at a loss of over £200,000 (p247). There were a number of factors adversely impacting on the housing market such as interest rates and rises in inflation which were causing a downturn in work for the respondent's financial services department.

19. GB was the director of the financial services department having been appointed in December 2020. He reported to the respondent's managing partner, Jacqueline Law (JL). They had discussed the losses being faced by the department and how to reverse these. The broad options were either to increase income or to cut costs. The former was difficult given the market conditions at the time and so GB had to look to cut costs.

20. He made some cutbacks on certain costs such as marketing but there was very little that could be cut back. The biggest cost to the department were staff costs. A decision was made to not replace any staff who were leaving the business; there were two resignations prior to the redundancy process with one resignation during it and none of these employees were replaced. None of the people who left were in the pool for selection for redundancy.

21. However, this was not sufficient to reverse the losses being faced by the department and so GB had to look at other measures. He considered moving advisers to part-time or job-share but felt that this would negatively impact on client relations; he considered that the nature of the job was such that clients needed consistency in their contact with the business and that there would be difficulties in managing workloads.

22. GB decided that there was no other option but to make redundancies. He discussed this with JL at a meeting on 13 April 2023 and confirmed to her that he had decided to proceed with redundancies.

23. The first matter which GB considered was the pool for selection. He wanted to ensure that everyone in the pool had the same role and he was satisfied that all the advisers had the same job description. He then gave consideration to issues of geography and what would be a reasonable commute. He did not consider that it would be reasonable to ask advisers in northern branches to cover southern branches and vice versa. For this reason he split the advisers into two pools, northern branches and southern branches.

24. He then looked at the performance of the advisers in the different pools. The figures (pp251-252) showed that the northern advisers were closer to meeting their targets on average than the southern advisers. On this basis, he concluded that the greater loss was in the southern branches and so, at that time, only the advisers in those branches would be part of the redundancy process.

25. GB decided to exclude the Perth branch from the pool for selection. He envisaged making two advisers redundant with the remaining advisers covering the same branches. Depending on who was selected, this could mean advisers from Glasgow or Edinburgh covering Stirling and Perth. GB felt that it was unrealistic to ask someone to travel to Perth from Glasgow or Edinburgh on a regular basis. For this reason, he decided to exclude Perth and the adviser based at that office from the pool for selection.

26. The pool included 5 advisers; the claimant aged 56; MB aged 53 or 54 (there was some dispute about this between the parties but nothing turns on the precise age of this person); KM aged 45; AK aged in his forties; CG aged 28; the adviser in Stirling aged 38. The claimant and AK were ultimately the advisers selected for redundancy.

27. GB consulted with HR about the selection criteria. It was explained to him that this was his decision but that the respondent always included length of service as one of the criteria.

28. GB decided on 11 criteria with each criterion scoring 1-5. A copy of the matrix appears at pp204-205 which sets out the criteria as follows:

a. Length of service. A score was based on the number of years' service with over 10 years getting a score of 5 and under 2 years getting a score of 1.

b. Percentage to target for the financial year 2022/2023. This represented the amount of income generated by each adviser as a percentage of their target for the financial year. GB considered that this was a fairer way of measuring performance than just the actual amount of income because different advisers had different targets based on how busy their branch was and the local housing market. GB felt that if the raw figures were used then this would benefit those in busy branches who have more opportunities and sales leads than others. The score awarded depended on the percentage with over 90% to target getting 5 and up to 60% getting 1.

c. Percentage to target for the financial year 2021/2022. GB considered that it was unfair to only use the 2022/2023 performance as this was only 5 months and might not give an accurate reflection of the adviser's performance. He, therefore, included the previous financial year as one of the criteria.

d. Clawback in the financial year 2022/2023. Clawback represents any re-payment of fees to insurance providers where a client cancels a protection policy. GB included this as it has a direct and immediate impact on the respondent's finances. The scores were based on the cash amounts clawed back in the relevant period.

e. Clawback in the financial year 2021/2022. GB included this for the same reason as he included the percentage to target for this financial year.

f. The percentage penetration of protection products to new mortgages. This represents the number of protection products sold to clients against the number of mortgages. There was a separate criteria for the three different types of product; life insurance, critical illness and income protections. These criteria were included because of the

importance to the respondent's income stream of selling protection products along with mortgages. Again, the scores depended on the percentage of mortgages for which a protection product was also sold.

g. Compliance. The financial services department is heavily regulated and advisers meeting the standards set in regulations was considered by GB to be important to protect the firm from risk and a crucial part of the advisers' role. The score was based on three factors; the outcome of file checks; the number of complaints received; suitability reports being issued on time and accurately. Suitability reports are letters issued to clients explaining the rationale for any recommendations made and are a requirement imposed by the FCA.

h. Customer reviews since May 2022. This criteria was scored on the basis of the number of Trustpilot reviews left by each adviser's clients. The firm had been looking to increase the amount of business generated from online sources and part of the strategy was to ask clients to leave reviews on Trustpilot rather than feedback letters or thank you cards. The reason for this is that the review is visible to potential clients as they can see it online whereas cards or letters are not. Advisers had been given guidance in May 2022 to ask clients to leave feedback via Trustpilot.

i. Attitude and commitment. GB accepted that this was more of a subjective criteria than the others but felt that it should be included as it was an important measure of assessing how advisers were performing. There were two factors to be assessed in this criteria; commitment to the firm and acceptance of change.

29. GB decided that he would hold what he described as a "town hall" meeting with all of the advisers who were at risk of redundancy to inform them of this and then hold four individual meetings with each adviser to take them through the process and allow for them to provide feedback and representations. JC was assigned to provide HR support to GB during these meetings.

30. The town hall meeting was held online on 4 May 2023. GB prepared a script which he read out to the advisers (pp146-148). He set out the reasons why redundancies were necessary explaining the financial loss facing the department. He stated that there would be an opportunity to apply for voluntary redundancy (in the event, there were no such volunteers). He went on to set out the anticipated timetable for all of the individual meetings. He explained that the scoring would be carried out by him and Darren Polson, his deputy. In the event, the final decision on scoring lay with GB and Mr Polson was there to provide a second opinion or check on the data to ensure no mistakes had been made by GB.

31. The claimant was invited to his first individual meeting by letter dated 4 May 2023 (pp152-153). The letter included information about the possibility of voluntary redundancy and set out the purpose of the meeting. It confirmed (as was confirmed in all the invitation letters) that the claimant was entitled to be accompanied by a trade union representative or work colleague.

32. The first meeting took place on 10 May 2023 and a note of the meeting is at pp155-158. The note is signed by the claimant at p158. The Tribunal makes the following relevant findings of fact about what was discussed at the meeting:

    a. GB repeated the reasons why redundancies had become necessary. He discussed some of the other options such as part-time working or reduction in salaries that had been suggested and explained to the claimant why these had not been considered suitable.

    b. GB went on to explain that, at the next meeting, the claimant would be given his scoring and this would be explained to him. There would then be a chance for him to take that away, consider it and make any queries or challenges to the scores.

    c. The claimant was informed of 11 criteria being used by the respondent.

    d. The claimant did not ask a lot of questions during the meeting. The main point raised by him was the absence of the number of new

mortgages as one of the selection criteria. He explained that he considered this to be a core part of the job and that he does a large number of these. He asked for it to be one of the criteria.

e. GB replied that he would look at this again but that he had already considered this and decided not to use it as a criterion. He explained that the reason for this was that it was fine for staff in busy branches but unfair to others in branches where there is not the same number of potential leads. They do not have the same opportunity to do a large volume of new mortgages.

33. By letter dated 12 May 2023 (pp159-160), the claimant was invited to the second meeting with GB. This meeting took place on 16 May 2023 and a note of this meeting appears at pp161-164, signed by the claimant at p164. The Tribunal makes the following relevant findings of fact about what was discussed at this meeting:

a. The claimant was provided with a document showing his scores for each criterion in the selection matrix (p165). GB then went through each criterion explaining how the score each of them had been awarded.

b. GB asked the claimant if he had any comments on the scores and he replied that, at first glance, he had no objections to the scores.

c. The claimant explained to GB that in terms of the customer review criterion he did not ask clients to use Trustpilot and suggested contacting a sample of his clients to ask for feedback. GB's response to this was that advisers had been asked to ask clients to use Trustpilot. There was a discussion about the claimant providing thank you cards from clients and GB explained that he did not doubt that clients were happy with the claimant but the criterion was about visibility of the feedback.

d. The claimant stated that he did not agree with some of the criterion being used but that the scores looked reasonably fair.

e. The claimant repeated his opinion that the number of mortgages should be used as a criterion because he considered this to be the core part of the job and produced figures about the number of new mortgages for each branch which showed his branch had the highest number.

f. GB explained to the claimant that he would now have the opportunity to consider the scores further and asked him to send any written representations by close of business on 18 May 2023.

34. The claimant did provide further representations in the form of an email objecting to his scores on attitude and commitment and customer reviews (p.166) as well as emails from certain mortgage providers confirming that he was one of their highest ranked brokers in Scotland in terms of the number of successful mortgage applications (pp167-171).

35. By letter dated 18 May 2023 (pp172-173), the claimant was invited to the third consultation meeting. The letter explained that the purpose of the meeting was to discuss the claimant's scores further and that no final decision had been made in respect of redundancy.

36. The third meeting took place on 22 May 2023 and a note of this meeting appears at pp174-177, signed by the claimant at p177. The Tribunal makes the following relevant findings of fact about what was discussed at this meeting:

a. GB noted that the claimant had raised issues relating to the volume of mortgages, compliance, client review and attitude/compliance. The claimant replied that he did not agree with the matrix but that he was not seeking to challenge the scores (although he felt that 3 out 5 for attitude/compliance had "hurt").

b. The claimant referred to the information from the mortgage providers about his volume of mortgages but stated that he understood that this would not change things.

c. GB explained that the volume of mortgages had not been used because of the difference in leads and opportunities between branches.

d. In terms of the compliance criterion, GB explained that this will become even more important under the FCA consumer duty and that he had had conversations with the claimant about compliance. The claimant replied that when he was dealing with the volume of mortgages which he had been then something would slip. GB replied that the claimant had to look at the whole of the job and that he would rather that the claimant do less applications and ensure his compliance was met.

e. In relation to attitude/commitment, GB explained that this was the criterion most people had issue with. He explained that the claimant's score of 3 was a good score with 4 being excellent and 5 being outstanding.

f. The meeting concluded by GB explaining that he did not see any basis to change the claimant's scores and so these would be used going forward. He went on to explain if the claimant was selected for redundancy then he would have the right to appeal.

37. By letter dated 26 May 2023 (pp178-179), the claimant was invited to the fourth and final meeting. The letter explained that one possible outcome of the meeting could be dismissal and repeated the claimant's right to be accompanied.

38. The fourth meeting took place on 30 May 2023 and a note of this meeting appears at pp180-181. The Tribunal makes the following relevant findings of fact about what was discuss at this meeting:

a. GB explained to the claimant that he was one of the bottom two in the pool for selection and had been selected for redundancy.

b. He went on to explain that the claimant's last day of employment would be 31 May 2023 and that he would be paid three months' pay in lieu of notice. The claimant was not required to work his notice.

c. GB set out the various payments which would be made to the claimant on the termination of his employment. There is no issue in this case that any of these payments are outstanding and the claimant accepts that he received everything to which he was entitled.

d. The claimant was unhappy with the outcome and indicated his intention to appeal as well as take legal advice. The claimant, for the first time, alleged that GB was protecting the employees whom he had recruited from redundancy.

39. The claimant's dismissal was confirmed by letter dated 30 May 2023 (pp182-183).

40. The claimant appealed the decision to dismiss him by letter dated 4 June 2023 (pp186-191). The letter stated that the claimant considered the matrix to be "horribly skewed" and that it had been designed to show him in a poor light by hiding what he was good at. It made reference to the fact that the claimant had had to build up the business in the Shawlands branch whereas newer recruits had walked into a fully functioning office. The claimant alleged that he had been *"discriminated against for working in a busy team".* Much of the appeal was focussed on the volume of mortgage work generated by the claimant and referrals to other parts of the business that this produced. An issue was raised about the exclusion of the Perth office from the pool.

41. The appeal letter, for the first time, makes reference to age discrimination. At p190, the claimant alleges that *"GB's game plan is to phase out the older workers"* but does not elaborate on this or provide any evidence. The claimant makes reference to GB recruiting people he has worked with before.

42. The claimant had sought legal advice around this time and his appeal letter was supplemented by a letter from his lawyers (pp193-195). This letter asserted that the claimant was not redundant because the mortgage work at the Shawlands branch was still being done. The letter also made criticisms of the pool being too wide by including the Stirling and Edinburgh offices given the geographical distances between them and the Glasgow offices. At the same time, the pool was criticised as being too narrow by excluding the Perth

branch. It was said that there had not been a proper consultation and set out the same criticisms of the selection criteria made by the claimant during his meetings with GB.

43. RW was appointed to hear the appeal. He is an equity partner in the firm based in Aberdeen. He had no previous involvement in the redundancy process and worked in a different department from financial services.

44. The claimant was invited to an appeal hearing by letter dated 9 June 2023 (p196) and the appeal was held on 15 June 2023. A note of this meeting appears at pp197-200. RW's approach to the appeal was to allow the claimant an opportunity to set out all of the issues he wished to raise and then consider his decision after the meeting.

45. The note of the meeting shows RW going through the points raised in the claimant's letter of appeal and the points raised in the letter from the claimant's lawyer. During the meeting, the claimant made reference to concerns expressed at unspecified earlier date by two advisers (it is not said whom) that GB planned to phase out older advisers and replace them. The claimant explained that he raised it with GB who had replied that older advisers had bigger client banks and run smoother process so why would he want to get rid of them. In his evidence at the Tribunal hearing, the claimant stated that he found this reply to be reassuring at the time it was made.

46. RW issued his decision by letter dated 23 June 2023 (pp201-202). He did not uphold the claimant's appeal. He was satisfied that the criteria used were balanced and objective. He considered that there was nothing in the allegations of discrimination against GB and, in particular, that age had no influence on the claimant's selection. He found nothing in the fact that work was still being done at the Shawlands office and considered that the exclusion of the Perth office was fair and reasonable.

Relevant Law

47. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA)

48. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is redundancy.

49. Redundancy is defined in s139 ERA and, for the purposes of this claim, the relevant definition would that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished.

50. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. It is worth noting that there is a neutral burden of proof in relation to this part of the test.

51. In assessing the fairness of a dismissal on the grounds of redundancy, the first question is whether there has been a proper pool of employees from which selection for redundancy is made.

52. The principles to be applied by the Tribunal in assessing whether a proper pool for selection has been used are set out by Silber J at para 31 of *Capita Hartshead Ltd v Byard [2012] IRLR 814*:

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83);

(b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

53. The Tribunal would then, normally, go on to consider the fairness of the selection criteria applied to the pool. The Tribunal are not entitled to substitute their own criteria for those of the employer and are simply to assess the fairness of the criteria used.

54. Any criteria used for selection must be capable of some degree of objective assessment (*Williams v Compare Maxim* above) but there is no absolute requirement for objectivity and criteria which have some degree of subjectivity such as performance or quality of work can be proper criteria (see, for example, *Graham v ABF Ltd* [1986] IRLR 90). In particular, in *Mitchells of Lancaster (Brewers) Ltd v Tattershall* UKEAT/0605/11 it was said that:

"Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be "scored or assessed" causes

us a little concern, as it could be invoked to limit selection procedures to box ticking exercises."

55. The Tribunal must be satisfied that the selection criteria has been genuinely and fairly applied to the individual employee bringing the claim of unfair dismissal. However, this does not involve the Tribunal in carrying out a detailed re-assessment of the claimant's score (*Eaton Ltd v King* [1995] IRLR 75, *British Aerospace plc v Green* [1995] IRLR 437).

56. In making the decision to dismiss, a senior manager is entitled to rely on any assessment made by a subordinate (*Eaton*, above). This is particularly the case where the decision maker has no reason to doubt the reliability of the information before them which is being used to make the decision (*Buchanan v Tilcon Ltd* [1983] IRLR 417).

57. In relation to the obligation to consult, the law was summarised by the EAT in *Mugford v Midland Bank* [1997] IRLR 208 at paragraph 41:

Having considered the authorities we would summarise the position as follows:

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of

termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

58. There is a requirement on an employer to make efforts to find alternative employment for a redundant employee (*Vokes Ltd v Bear [1973] IRLR 363*). *However, this duty is only to take reasonable steps and not every conceivable step to find alternative employment (Quinton Hazell Ltd v Earl [1976] IRLR 296).*

59. The Equality Act 2010 protects individuals from discrimination on the grounds of various protected characteristics. These include, for the purposes of this case, age.

60. The definition of direct discrimination in the 2010 Act is as follows:

13 Direct discrimination

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

61. These provisions do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is:

39 Employees and applicants

An employer (A) must not discriminate against an employee of A's (B)—by dismissing B.

62. The burden of proof in claims under the 2010 Act is set out in s136:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

63. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

64. Although the test for direct discrimination forms a single question, the caselaw indicates that it is often helpful to separate this into two elements; the less favourable treatment and the reason for that less favourable treatment.

65. In order for there to be less favourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

66. A claimant can rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment. There must be no material difference in the circumstances of the claimant and comparator (s23 of the Equality Act 2010). In deciding how a hypothetical comparator would have been treated, the Tribunal is entitled to have regard to the treatment of real individuals (see, for example, *Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124).

67. However, a difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; "something more" is required (*Madarassy v Nomura International* [2007] IRLR 246). The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

68. It is important to remember that unreasonable or unfair behaviour is not enough to allow for an inference of direct discrimination (*Bahl v The Law Society* [2004] IRLR 799).

69. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

Decision – unfair dismissal

70. The first question for the Tribunal in determining the unfair dismissal claim is whether there was a potentially fair reason for dismissal.

71. The Tribunal is satisfied that the respondent has demonstrated that the reason for dismissal was redundancy. The claimant did not particularly dispute this point but, even if he had, the Tribunal considers that the respondent had demonstrated that there was a reduction in the requirement for employees to carry out financial services work.

72. In particular, there was evidence that the financial services department had operated at a loss in the financial year 2021-22 and was facing similar losses in 2022-23. Certain costs had already been cut but to no avail and the respondent was facing a position where the only further cuts that could be made was in terms of staff costs. They had decided not to replace staff who had left but this was still not sufficient and so they made the decision to reduce the number of existing staff.

73. This clearly falls within the definition of redundancy as set out above. The fact that financial services work still needed to be done (either generally or in the specific office in which the claimant worked) does not mean that there was not a redundancy situation. It is the requirement of the respondent for employees to do that work which is relevant and, in this case, that requirement had reduced from 6 employees in 5 offices to 4 employees covering those offices.

74. The Tribunal, therefore, finds that there was a potentially fair reason for the claimant's dismissal, that is, redundancy.

75. Turning to the issue of the fairness of that dismissal, it is quite clear that the focus of the case is on the question of whether the claimant's selection for redundancy is fair.

76. The claimant's case can be summed up by the proposition that the respondent could have done something different in terms of the pool for selection and/or the selection criteria used. In this, the claimant is correct, the respondent could have chosen a different pool or used different criteria. However, this is not the test which the Tribunal has to apply and if it did proceed on the basis that the claimant's dismissal was unfair because the respondent could have done something different then the Tribunal would fall into the error of substituting its own decision.

77. Rather, the question for the Tribunal is whether, having applied their mind to the issues of the pool and the selection criteria, what the respondent actually did (and not what they could have done) fell within the band of reasonable responses. For the reasons set out below, the Tribunal is satisfied that the pool for selection and the selection criteria used did fall within the band of reasonable responses in this case.

78. It was quite clear that GB had applied his mind to the question of the pool for selection. He had clear reasons why he had separated the northern and southern branches and why the redundancy exercise proceeded for the southern branches. The claimant did not challenge this decision and the Tribunal considers that it was one which was within the band of reasonable responses.

79. In terms of the pool, the claimant's main challenge related to the exclusion of the Perth branch. There was some evidence heard about whether this branch was traditionally considered a northern or southern branch within the respondent but the Tribunal is of the view that this is something of a "red herring". The exclusion of the Perth branch was not based on its geographical grouping but, rather, GB's view on the difficulties in travel that

may be faced by staff in other southern branches if they were being asked to cover this branch.

80. Evidence was led by the claimant about the distances between the Glasgow branches and the Stirling branch as well as the distance between Stirling and Perth branches to make the point that there was no real difference in distance. The argument being made was that the Stirling branch would be able to cover Perth in the same way that Glasgow branches could cover Stirling.

81. However, this is to apply "20/20 hindsight" where it is known which employees survived the redundancy. GB did not know this at the time he decided to exclude the Perth branch and had to contemplate the possibility that the employees based at both Stirling and Perth could be selected for redundancy meaning that these branches would have to be covered from Glasgow and Edinburgh with the travelling that this would involve.

82. The Tribunal is satisfied that GB had properly applied his mind to this issue and that the decision to exclude Perth was one which fell within the band of reasonable responses.

83. Turning to the selection criteria, again, it was clear from the evidence that GB had applied his mind to these criteria and he had a clear and cogent explanation for why each criteria was used. There were a large number of criteria but the Tribunal does not consider that this was something that was outside the band of reasonable responses.

84. The criteria used were were capable of objective assessment. Indeed, it could be said that they were "brutally" objective in the sense that, with the exception of the "commitment/attitude" criteria, they were all entirely data driven with no scope for any subjective views to come into play. There is no question that any employee who was being scored under these criteria could have any doubt as to why they received a particular score and what evidence backed up that score.

85. The claimant's issues with the criteria were two-fold.

86. First, the claimant complained about the fact that there was not a criteria which reflected the number of mortgages each adviser generated. This is not strictly correct; whilst there was no separate criteria for this figure, the number of mortgages generated (more importantly, the income generated from these) contributed to the figures for percentage to target for each adviser in the relevant financial years.

87. In any event, it is not for the Tribunal to say that the respondent should have included a specific criteria as this involves substituting its own decision for that of the respondent. The Tribunal heard evidence from GB that he considered percentage to target as a fairer way of assessing advisers than simply the numbers of mortgages (or income generated) because the target takes account of the different markets in which each branch operated, in particular, the fact that busier offices have a greater opportunity to generate more business. This shows that he had applied his mind to this issue and the Tribunal is satisfied that the conclusions reached were within the band of reasonable responses.

88. Second, the claimant considered that the use of the number of Trustpilot reviews was unfair because his customers were less likely to use that as means of giving feedback. The Tribunal bears in mind that this criterion did not particular advantage or disadvantage anyone in the pool as the scores were almost all the same.

89. Again, it was clear that GB had given some thought to why this criterion was used. It was not in dispute that the respondent had sought to increase their online presence as means of attracting more business and that encouraging clients to leave reviews on the Trustpilot website was a part of that strategy.

90. Even if the Tribunal considered that it would not use this as a criterion, it cannot be said that this was outwith the band of reasonable responses. It is assessing the success of each adviser in advancing what the respondent considered to be an important part of its strategy to increase the amount of business generated from online sources and this is something a reasonable employer is entitled to look at.

91. The claimant also advanced a case that the criteria were used to either deliberately target him or to protect people hired by GB. This was not something which was part of the claimant's pled case and only emerged from his evidence and submissions. The Tribunal considers that there was no evidence whatsoever from which it could draw such an inference.

92. For these reasons, the Tribunal does not consider that there is any basis on which it could conclude that all or some of the selection criteria were outwith the band of reasonable responses. The respondent had clearly applied its mind to which criteria to use to assess matters important to the operation of its business and these were all capable of objective assessment.

93. In terms of the proper application of the criteria, the claimant did not dispute the scores he received. This is not surprising given, as set out above, that the scores are almost all data driven and there is no evidence that the underlying data was in error. The Tribunal, therefore, finds that the criteria were properly applied.

94. Turning to the issue of consultation, this was not something which the claimant challenged at the hearing. In his ET1, he pled a case that there was no proper consultation because the respondent ignored his input and did not deal with issues he raised. However, it was clear that GB did give consideration to issues being raised by the claimant during the process (such as the use of the number of mortgages generated) and the claimant's complaint was effectively that GB did not agree with him. As noted above, this was given consideration and was rejected for reasons which fell within the band of reasonable responses.

95. Overall, the Tribunal considered that the respondent gave the claimant more than adequate opportunity to engage with the process with four individual meetings as well as the initial "town hall" meeting. In the Tribunal's industrial experience, there were more opportunities for the employees to provide their input than in most redundancy consultations which, ignoring appeals and collective consultation with trade unions, generally involve one or two consultation meetings.

96. The Tribunal considers that there was nothing unreasonable in the consultation process followed in this case; there were multiple opportunities for the claimant to engage in the process, he was provided with all the information needed to engage in the process and he was given the right of appeal. The fact that the respondent did not take his suggestions as to alternative steps they could take does not render his dismissal unfair in circumstances where, as set out above, the respondent's decisions on matters such as the pool and selection criteria were within the band of reasonable responses.

97. Finally, there is the question of alternative employment. This was not a feature in this case but the Tribunal will address it for reasons of completeness. There was no evidence before the Tribunal of any alternative roles within the respondent which could have been offered to the claimant and so there is no basis on which the Tribunal can conclude that the respondent failed to offer alternative employment.

98. In these circumstances, the Tribunal considers that there is no basis to conclude that the claimant's dismissal was unfair. There was a potentially fair reason for dismissal (that is, redundancy), the pool for selection used by the respondent fell within the band of reasonable responses, there was an objectively fair selection criteria which was properly applied by the respondent and there was a fair consultation process which gave the claimant ample opportunity to comment on the selection process.

99. For all these reasons, the Tribunal considers that the claim of unfair dismissal is not well-founded and is hereby dismissed.

Decision – age discrimination

100. There is no question that the claimant was treated less favourably than other employees who were younger than him. It is not in dispute that he was dismissed by reason of redundancy whilst younger employees in the same pool were not dismissed.

101. However, this is not enough to satisfy the test for direct age discrimination and, as set out above, there needs to be "something more" that shows that any less favourable treatment was on the grounds of age. The difficulty for the claimant was that there was no evidence whatsoever that age had any bearing on his dismissal or the decisions made in the process leading to his dismissal.

102. There was certainly no direct evidence that the claimant was dismissed because of his age but the Tribunal has borne in mind that there is rarely such evidence and has considered whether there is any evidence from which it could draw inferences of discrimination.

103. For the following reasons, the Tribunal has concluded that there is no basis to draw any inference of age discrimination. The Tribunal should be clear that none of these are determinative on their own and have been taken together by the Tribunal in reaching its conclusion.

a. There was a genuine redundancy situation.

b. The respondent used selection criteria which were capable of objective application and the score under each of these was backed up by underlying data. There was no question that there was any error in this data.

c. Age was only a potential factor in one of these criteria, length of service, but this was to the benefit of the claimant who scored higher than every other employee in the pool under this criteria. None of the other criteria had any connection with the age of the employees in the pool.

d. Although the claimant was the oldest employee in the pool, the second oldest was only 2-3 years younger and was not dismissed. The other employee who was selected for redundancy was younger than both of them.

e. The only evidence of age being referenced by anyone prior to the claimant's dismissal was hearsay evidence given by the claimant

about advisers in northern branches speculating, without any apparent evidence, that there was an intention to dismiss older advisers and bring in younger advisers. When the claimant raised this with GB at the time, he denied that there was any such intention and the claimant accepted this at the time. The Tribunal put no weight on such hearsay evidence about what was no more than office gossip.

104. In these circumstances, there is simply no evidential basis from which the Tribunal could draw any inference that the claimant's selection for redundancy was in any way on the grounds of age.

105. The claim of direct age discrimination is, therefore, not well-founded and is hereby dismissed.

Employment Judge Peter O'Donnell
Employment Judge

18/3/24
Date 19 March 2024

Date sent to parties