EMPLOYMENT TRIBUNALS

Claimant: Mr Wayne Norman

Respondent: Lidl Great Britain Ltd

Heard at: Sheffield

On: 10-14 and (deliberations only) 17 June 2024

Before: Employment Judge Maidment
Members: Ms P Pepper
Mr D Crowe

Representation
Claimant: Mr T Shepherd, Counsel
Respondent: Mr J Boyd, Counsel

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded and succeeds. Any compensatory shall be reduced by a factor of 50 per cent to reflect the chance that the claimant would have been fairly dismissed in any event.

2. The claimant's complaint of indirect age discrimination arising out of the inclusion in the redundancy selection criteria of having a degree or construction qualification is well founded and succeeds.

3. The claimant's complaint of direct discrimination based on his managers putting in place a requirement that a degree was required for job vacancies to prevent the claimant from being able to apply for them is dismissed on his withdrawal of it.

4. The claimant's remaining complaint of indirect age discrimination, his complaints of direct age discrimination and age-related harassment fail and are dismissed.

5. A remedy hearing shall be listed with a time estimate of 1 day. The parties are referred to the tribunal's findings as to the application of the redundancy scoring criteria had there been no act of indirect discrimination.

REASONS

Issues

1. The claimant brings a claim of unfair dismissal. The respondent maintains that he was fairly dismissed by reason of redundancy.

2. He then brings a complaint of direct age discrimination in him being selected for redundancy and dismissed in March 2023. The claimant has identified himself as being in the age group of those over 60 and compares his treatment to that of Mr Farcas and Mr Simpson, who were two individuals in a pool of selection for redundancy, who were at the material time in their 30s. He relies on a hypothetical comparator. In submissions, it was confirmed, on behalf of the claimant, that he was no longer pursuing a complaint of direct discrimination based on his managers, Mr Schofield and Mr Beaumont, putting in place a requirement that a degree was required for job vacancies to prevent the claimant from being able to apply for them.

3. Complaints of indirect age discrimination are pursued reliant on the PCP of, firstly, the inclusion in the redundancy scoring criteria of having a degree and, secondly, a requirement to have a degree in order to be eligible for any of the available vacancies.

4. The claimant produced statistical evidence of a range of qualifications possessed by the population of the UK broken down by age which illustrated that those in their 60s were less likely to have a degree qualification than those in their 30s. The tribunal noted this to be unsurprising and said that it was an issue upon which judicial notice could be taken. This was accepted on behalf of the respondent, which does not seek to challenge that evidence. It was noted, on behalf of the claimant, that the respondent had not pleaded any legitimate aim it might rely on to justify any indirect discrimination, but it was confirmed that the respondent will say that, by applying any alleged practice, it was seeking to ensure that whoever was appointed to a position was the most competent. Ultimately, no justification defence was put forward by the respondent in submissions.

5. In submissions, the tribunal did raise with Mr Shepherd that claimant was relying on a requirement to have a "qualification" rather than a "degree". The claim identified in the case management process and as it would seem to be set out in the grounds of complaint referred simply to a degree. Mr Boyd, on behalf the respondent, said that the respondent had approached the case throughout on the basis that the PCP relied upon encompassed qualifications wider than a degree and that there was no prejudice to the respondent if the PCP was to be construed with that breadth. Mr Boyd is to be commended for his approach which demonstrated an integrity and sense of fairness beyond his recognised duty to the court.

6. Finally, the claimant brings a number of complaints of age-related harassment. Firstly the claimant complains of Mr Simpson referring to him as "grandad" in the office during the latter half of 2022, secondly, that Mr Schofield referred to the claimant as the "youngest oldest man he knew" in the canteen in Doncaster around autumn 2022, thirdly, that Mr Rafferty, Mr Simpson and Mr Hanrey ridiculed the claimant about the large font size on his mobile phone by laughing and making comments about his eyesight before and during property meetings for around 18 months – two years prior to the termination of his employment and, fourthly, that Ms Tacas told the claimant around November 2022 in the Doncaster property office that she would have his job when he retired. A fifth complaint of harassment is in respect of Mr Schofield including a degree qualification in the redundancy scoring.

Evidence

7. The tribunal had before it a bundle of documents numbering 731 pages. Having identified the issues with the parties, the tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documents. The tribunal then heard firstly from the claimant followed by his wife, Penny Crawford. There number of the respondent the tribunal heard from Kirsty Anne McIntyre, in-house solicitor, Gary Rafferty, previously a senior consultant acquisition, Mark Simpson previously a senior construction consultant and now a facilities consultant, Marie Goodburn head of regional HR Marie Goodburn head of regional HR Liam Schofield, regional head of property based in the Doncaster property office, Robert Beaumont, regional property director,

8. Having considered all relevant evidence, the tribunal makes the factual findings set out below.

Facts

9. The respondent is a discount supermarket operator whose day-to-day operational functions are divided into geographical distribution areas. Each major area has its own administration centre and warehouse/distribution centre known as the regional distribution centre ("RDC"). At its head office in Surbiton are located central functions such as the head property office and an employment law team. There are 13 regional property offices.

10. The claimant was employed in the respondent's RDC in Doncaster as a senior construction consultant in the regional property office there (together with Mr Farcas and Mr Simpson). As such, the claimant was responsible for overseeing the construction, alteration and refurbishment of the respondent's stores in the region. Within the office there was a separate acquisitions team tasked with identifying sites for future stores, negotiating and completing transactions and making necessary planning applications. They worked closely with the senior construction consultants. Others worked in a facilities team, responsible for maintaining stores and managing external contractors once they were operational.

11. It is clear from all of the witnesses, including the claimant, that the employees in the Doncaster RDC generally got on with each other very well and that relationships at times went beyond purely the workplace with them feeling that they were very much part of a family. A number of the claimant's work colleagues joined him at his 60th birthday a few years before the

redundancy exercise described below and the claimant accepted that this reflected the mutual ease with which they all got on. The claimant reported to the head of property at the RDC, Mr Schofield. The claimant described him as affable and easy to get on with. He accepted that, if he ever had an issue at work, he could raise it with Mr Schofield, although if he had an issue with a colleague, he would raise it directly with that individual first, describing that is being an important part of working together as a team. Certainly, he had the confidence to raise any concerns with Mr Schofield, he said. The claimant recognised that Mr Schofield had acted with care and sympathy when the claimant was having to deal with illness and bereavement relating to his parents. The claimant said that he thought that Mr Schofield was a strong family man himself.

12. One of the claimant's allegations is that Mark Simpson, another senior construction consultant, referred to him as "grandad" in the office during the latter half of 2022 until the claimant told him to stop sometime before Christmas. In examination in chief, the claimant said that the Simpson was leaning against the office wall and standing next to Mandy Clark, one of the property secretaries. He then shouted: "Oi grandad" across the room towards the claimant, who described himself as "completely annoyed".

13. In the claimant's witness statement, he had described being repeatedly called "grandad" by Mr Simpson, yet he seemed now to be referring to only one instance. The claimant clarified that he believed he had been called this more than half a dozen times over a 3-4 month period towards the end of 2022. However, the incidence he raised specifically now as a complaint was where the term had been shouted across a room, the claimant suggesting that he was happy to tolerate the comment when just said to him directly, one to one. He told the tribunal that usually he did not have a massive issue with the comment if it was not made publicly. When asked if the claimant was immediately offended when the term was shouted across the room he replied: "not at all". He regarded Mr Simpson as someone who was quite flamboyant and loose with a lot of comments who had had to be warned about how he spoke to a lot of people. The claimant said that when the term was shouted across the room he thought that he had probably smiled at Mr Simpson in response. He said that he and Mr Simpson had worked closely for some time. He said that they had an excellent relationship.

14. The claimant said that after Mr Simpson had shouted the words across the room, the claimant had spoken to him. He thought that Mr Simpson was taken aback and embarrassed. He apologised and said he wouldn't call the claimant "grandad" again. The claimant said that Mr Simpson was, thereafter, true to his word.

15. Mr Simpson described the claimant as a very close colleague of over 8/9 years. The claimant supported him through his own family tragedy. He denied that he had shouted the word "grandad" and that the claimant had called him up on it.

16. The claimant complains that Mr Schofield referred to him as the "youngest oldest man he knew" in the canteen in or around autumn 2022. In examination in chief, he clarified that the comment was said, he thought, around September/October 2022 after a property meeting when they normally had lunch together. He said that he was in the queue in the

canteen with Mr Schofield and was telling him about pain he had in his hips and knees and that he did not think he would be able to go on a planned hike. He described Mr Schofield as turning around and saying that the claimant was the "youngest oldest man I know".

17. In the claimant's witness statement, he had described the context of this alleged comment as being that he and Mr Schofield were talking about Mr Schofield's father who Mr Schofield said was the same age as the claimant. The claimant clarified before the tribunal that the comment had only been made once and that it was in fact in the context of a reference to hip and knee pain. When asked why he had not referred to hip and knee pain in his witness statement, he said there was a lot of information to put in and he couldn't include everything.

18. When asked how he had reacted to this alleged comment the claimant said: "Nothing in particular… I was not offended at the time… I interpreted him saying that I was old and still young enough to participate in certain sports". He did not at the time consider that the purpose or effect of the comment was to create an offensive or humiliating environment. He did say that the comment displayed that Mr Schofield thought that he was an old man.

19. Mr Schofield told the tribunal that he recalled a conversation with the claimant about Mr Schofield's father around the time that the claimant's own father was unwell. Mr Scofield recalled referring to him having lost his grandparents 20 years previously and said to the claimant that, in comparison to his own father, the claimant had had an extra 20 years of experiences and memories with his dad. He said that he was trying to give the claimant comfort. When put to him that he had made the alleged comment, inferring that he viewed the claimant as old, he responded: "not at all". He said that he had a fantastic relationship with the claimant and he never felt anything inappropriate had been said by himself or others.

20. The claimant says that his colleagues, Gary Rafferty, Mark Simpson and Thomas Hanrey, had ridiculed him about the large font size on his mobile phone by laughing and making comments about his eyesight before and during property meetings for around 18 months to 2 years prior to the termination of his employment. On questioning, the claimant said for the first time that similar comments had also been made about his laptop screen. The claimant said that Mr Rafferty and Mr Hanrey picked up his phone and laughed at the size of the font. The claimant said: "I'd allow it to play out, but it hurt." He said that he told them that he struggled seeing the screen and that they would laugh. He said that he would "suck it up" until the next time. He subsequently said that it was hurtful to have this "ridicule" When asked how that reaction fitted with the claimant's evidence that he would take an individual to task if he had a concern, the claimant then said that he "would speak to them and it would stop for a while". He said that he had not raised a grievance because he thought he could handle the issue himself and did not want to put other people's careers in jeopardy. The claimant told the tribunal that he had worn glasses since the age of 14 and couldn't see the phone properly without his glasses.

21. Mr Simpson's denied making comments about the font size on the claimant's phone. He said that he had not seen the claimant's phone much. He talked about there being a great team spirit within the group and

described them as an extended family. Mr Rafferty recalled seeing the claimant's mobile telephone, but only once or twice and said that he may well have made a comment about, about the font size which was large. He said that this had nothing to do with age and was purely about the size of the font. He said that any remark was not in any way intended to be offensive, but would be consistent with the good-natured working relationships that they had. He had no recollection of seeing the font on the claimant's laptop. He had never witnessed anyone else making an age alleged comment towards the claimant. He said that if the claimant had been offended by anything, he knew him well and would have expected the claimant to speak to him.

22. The claimant agreed that he had a close relationship and got on well with Mr Rafferty.

23. The claimant says that a recent graduate entrant, Ms Tacas, told the claimant around November 2022 that she would have his job when he retired. In cross-examination, he said that the head of facilities, Mr Smallman had actually told him that Ms Tacas was "bandying it about the office" that she would have his job when he retired. When asked whether anything said had the effect of humiliating or offending him, he said that it certainly provoked conversation around the office and: "I felt a little bit unsure about my age… I felt she probably wanted my job."

24. The claimant sent a message to his colleagues, including the aforementioned individuals who he has accused of age-related comments on 2 September 2022 thanking them for flowers they had sent following a family bereavement. He stated: "Great team and I'm proud to be a member of it. Can I say once again thanks for your support checking in with the old dude…". This was followed by a smiley face emoji. In cross-examination the claimant described this as a very emotional time and that this was not how he would normally refer to himself. He said he was trying to make light of the situation he was in.

25. The claimant in evidence referred to him having raised some time ago, when he was in his early 50s, with his previous line manager, Mr Burr, that he might be interested in undertaking a degree qualification. He said that Mr Burr had said that they were too busy and queried why the claimant would need one at his age. The claimant's evidence was not disputed. There is no evidence, however, that Mr Beaumont was aware of this as was suggested to Mr Beaumont when he was cross-examined.

26. In early 2023, Richard Taylor, central services board director, proposed the restructuring of the head office and regional property offices due to a reduction in new store openings and store redevelopments following a budget reduction. The number of proposed new store openings was reducing from 65 to 12 and refurbishment projects from 41 to 5.

27. Within property, employees were divided between and involved in either the acquisition of new store sites, the construction or refurbishment of stores or the management of services (facilities management) provided to stores once operational.

28. The proposed new structure was to reduce the number of senior acquisition consultants to a maximum of 2 per regional property office, reduce the number of senior construction consultants to a maximum of 1 per property office, reduce the number of property secretaries to 1 per property office and make redundant the roles of consultant acquisition, construction and junior consultant acquisition and construction, graduate acquisition and construction. It was further proposed that the facilities manager role would be made redundant and new positions of facilities team manager and facilities consultant created.

29. The respondent's employment law team, including Ms McIntyre, was involved in the development of the implementation of this restructure and, in conjunction with head office and regional property directors, developed the timeline, process, selection criteria, managers' guidance and communication plan for a redundancy process. A similar process was to be followed in each of the regional property offices. Relevant documentation was issued to each regional head of property and the head of property at each RDC, without any specific training or other instruction. Whilst there had been store closures and the closure of a single RDC in Lutterworth in 2018, this was the first time the respondent had implemented this type of redundancy exercise including a need to reduce the number of staff carrying out work of a particular kind.

30. As a result of the exercise, approximately 40 employees were made redundant. Each property office was treated as a separate establishment and consultation did not take place at a collective level.

31. A presentation document was prepared outlining the justification for the proposed reorganisation and its effect on employees.

32. A remote Teams briefing of senior managers took place on 27 January 2023 after which an updated Q&A document was provided to them together with the presentation it was proposed that Mr Taylor would deliver to all property staff the following week.

33. At this stage, the anticipation was for a consultation process with affected individuals to be finalised by early March, with the new structure in place by 1 April 2023. A separate consultation timeline document was produced. This envisaged consideration by the respondent of any proposals received from employees by 3 February prior to the announcement of the final proposals. Any selection assessments were then to be completed between 13 – 17 February, whilst ring-fenced roles for potential alternative employment became available for application. First individual consultation meetings with employees selected for redundancy and interviews for roles ring-fenced as potential alternative employment were to take place from 20 February to 3 March. A second individual consultation meeting and the issuing of notices of redundancy/ confirmation of alternative employment was to take place between 6 – 10 March.

34. The employees within the Doncaster property office were invited to what was termed as a business update meeting taking place on 30 January 2023. Employees were unaware of any redundancy proposals until the meeting itself. The respondent wanted to have the same message delivered to everyone personally at the same time so as to ensure consistency. It also

wished to avoid a situation where employees were simply informed by email and then individually raised questions with their managers before a full explanation could be provided to the entire group at one time.

35. The property team at Doncaster listened to Mr Taylor's video presentation. This was followed by a further explanation given by their head of property, Mr Schofield. He was provided with a script to go through and stuck to it. At the end of the meeting, the employees were given to take away a letter of confirmation, the proposed timeline together with a template matrix to be used in scoring individuals potentially at risk of redundancy. A separate more detailed timeline document had been provided to the managers leading the process.

36. The claimant suggests that, at the end of the meeting, Mr Schofield spoke to some of his colleagues concerned about their at-risk status individually, but that he was ignored. The tribunal accepts Mr Schofield's evidence that there was a period of silence at the end of his presentation. People were in a state of shock. Gradually, people then asked questions and he answered them across the table where they were all sat. Mr Facas said that the claimant had 23 years of experience in the business questioning effectively whether he would have a chance of being retained in the business. Mr Schofield referred him to the selection criteria. Mr Simpson initially left the room, but returned before the end of the meeting. Mr Smallman asked about his facilities manager role and was told that he could apply for both of the newly created facilities positions.

37. Subsequently, the claimant approached Mr Schofield and asked for clarification regarding the selection pool, apparently (mis)understanding that anyone in the country might be considered for a position. The claimant was then aware that he was included in a total pool of 3 senior construction consultants, with only one available role in the new structure. He asked if there would be interviews for the remaining senior construction consultant position, but was told by Mr Schofield that there would not, there would be a scoring exercise and the decision would be final. Mr Schofield also referred the claimant to correspondence which had been issued which referred to the process.

38. The claimant and his colleagues were given until Friday 3 February to provide feedback on the redundancy proposals. The respondent's plan was then for a decision to be communicated to employees on the redundancy proposal by 10 February. Ms McIntyre told the tribunal that she envisaged individuals having the right to challenge their scores and if this resulted in the score's changing any other employees then at risk would be given a period of consultation and an ability to apply for alternate roles. The main aim in providing for an initial deadline for application for alternative roles was to schedule in interviews for people who might be applying. This did not close the door on an ability to discuss alternative roles and to be considered for them. The tribunal accepts that this reflected the respondent's genuine intentions.

39. The claimant, as referred to, was provided with the scoring matrix. It included firstly the criterion of experience. A number of aspects of experience to be assessed were set out in bullet points, including experience of multi-project delivery, of the tender pack/appointment

process, of construction site management, of construction administration and stakeholder/project team management. Scores of 0-4 were available with a score of 4 denoting excellent experience of the key areas and being able to undertake them without support and a score of 3 reflecting sufficient experience to undertake the key areas with some support. An employee would score 4 for experience if they had worked within the respondent and the wider industry and gained significant experience of the key areas to enable them to undertake those areas independently without any support.

40. The next criteria of knowledge was stated to involve an assessment of knowledge of the respondent's specification, knowledge of stakeholders within the industry, knowledge of the respondent's processes and procedures, relevant construction qualifications and knowledge of the full development process. A score of 4 points was defined as a display of excellent knowledge in the key areas where the employee could answer accurately almost all enquiries thoroughly and unaided where others within the team often seek their expertise. A score of 3 points denoted a display of sufficient knowledge where the employee could answer accurately most enquiries unaided. A score of 2 points reflected some knowledge, and ability to answer accurately some enquiries, but after researching answers. 1 point denoted a few areas of key knowledge, but with clearly identifiable gaps, whereas a score of zero would reflect insufficient knowledge required.

41. The criterion of skills involved an assessment of communication, negotiation, problem solving, showing initiative, organisation/time management, budget control and quality control. A score of 4 reflected excellent skills and an ability to undertake them without any development required. 3 points reflected a need for some development.

42. A further scoring was anticipated reflecting the talent management (appraisal) score if the employee had been through the process in their current role for the year 2021/2022. However, this was only to be used if all of the employees within the pool had such an appraisal. In the case of the Doncaster RDC, Mr Simpson had had no appraisal in his role for the relevant year. An alternative method of assessment was then provided for. This identified key areas as: achieving deadlines and managing workload, delivering results, entrepreneurial actions, team player and attention to detail. A score of 3 points recognised that an employee had met, most of the time, the key areas of performance with work that was consistently thorough with little or few errors. To achieve a score of 4 points required meeting and exceeding the key areas of performance completing work in advance of deadlines to high quality and with no errors. 2 points in contrast would have applied to an employee who had met key performance requirements some of the time, completing work within timescales the majority of the time, but sometimes missing deadlines and that, whilst work was correct most of the time, it contained errors.

43. Disciplinary record was also assessed with a maximum score of 4 applicable if there had been no disciplinary issues. That applied to all of the individuals in the pool.

44. At the end of the matrix explanatory notes were provided for managers. These included that length of service might be used only as a deciding factor when two employees were scored equally. Brief examples of scoring were

given where an employee would score 2 for knowledge if they had some knowledge across key areas but would often seek guidance and input in relation to the respondent's processes and specification. An employee would be awarded 4 points for experience if they had worked within the respondent and the wider industry and gained significant experience of key areas to undertake them independently without any support.

45. The general guidance given to managers on the scoring process instructed them to ensure that they disregarded any circumstances that had come about because of an employee's protected characteristic. It also stated that, whilst scorers could make a personal note to assist them, "this must be deleted/shredded after the scoring process." Employees were to be scored separately by, for instance, the head of property and regional property director with there then being a moderation meeting with HR to assist in the arrival at a final agreed score under each criterion. Scorers were advised to have clear and relevant examples/information to substantiate their scoring and for the moderator to ensure consistency and that the scores were robust, understandable and would withstand scrutiny and challenge.

46. Mr Schofield and Mr Beaumont separately scored the claimant against the aforementioned criteria. They then attended a Teams meeting with Mr Witkowski of HR on 14 February to seek to arrive at an agreed score for each senior construction consultant. The claimant obtained a total of 17 points with 4 points awarded for experience, 3 for knowledge, 3 for skills, 3 for overall performance and 4 for disciplinary record. Mr Schofield and Mr Beaumont had come up with identical scores for him save that Mr Schofield had scored him with only 2 points for overall performance. He accepted in the moderation discussion that this was harsh and that the score ought to be 3. Mr Schofield destroyed notes he had made in his initial scoring. Mr Beaumont destroyed the matrix upon which he had made some notes during his own initial scoring. No notes were taken of the moderation meeting. It was simply left Mr Schofield to finalise the matrix for the claimant with the insertion of the agreed scores.

47. Mr Farcas was given a total score of 18. The only difference in his scoring to that of the claimant was that he attained 4 rather than 3 points under the criterion of knowledge. Mr Simpson was the lowest scored in the pool, significantly adrift from the score attained by his colleagues. That was understanding given the length of time he had spent in the ole and that his background was in facilities management.

48. A standard form of letter was sent to the claimant from the respondent's employment law department on 15 February 2023. This referred to what had been said at the 30 January group meeting. After the intervening period of consultation, it was said, the claimant's role remained at risk. Based on scoring against a set of selection criteria, the claimant was informed that he had been provisionally selected for redundancy. His completed scoresheet matrix was enclosed. As described, this was essentially the template already provided with the numerical scores awarded to the claimant against each criterion, but without any additional comment or explanation as to how that score had been arrived at or any indication upon what it was based. In cross-examination Mr Schofield confirmed that it was not part of the process to explain how scores were arrived at. Mr Facas received a letter with his

scoring confirming that at this point he had not been selected for redundancy.

49. The letter to the claimant stressed that this was only a provisional decision and that there would be consultation with him and a continuing attempt to identify ways in which his redundancy might be avoided, including by the respondent trying and identifying any alternative position which might be appropriate for him. The claimant was then invited to a formal consultation meeting on 20 February to be conducted by Mr Schofield and a note taker also to be present. The claimant was given the right to be accompanied by a colleague or union representative. It was said that this meeting was to discuss the reasons for the redundancy, any comments the claimant might have upon the application of the selection criteria, whether there were any alternatives, any employment opportunities and the terms of any redundancy. After the meeting it was said that the respondent would consider any representations that he made and that it might be determined that his role would no longer be at risk. However, if he remained at risk, they would continue to explore any ways of avoiding the claimant's dismissal.

50. The tribunal accepts that the claimant was contacted by colleagues within the business and external contractors who believed that the claimant was to be made redundant. Before receiving his scores, he was unnerved by a WhatsApp message from a colleague in head office construction wishing him all the best. After receiving his scores, he received a telephone call from Mr Farcas who appeared irate about his own scoring. The claimant thought that this perhaps meant that they were tied in the scoring. The claimant knew that, in those circumstances, length of service would be in the claimant's favour.

51. On 16 February the claimant was emailed with links to a list of roles which had been ring fenced for him to apply for. The roles were to be "live" until midnight on Sunday 19 February and it was said that he would be contacted when he had submitted any application in order to book him in for an interview.

52. The information provided included the job description for a facilities team manager and separate facilities consultant position. Further job profiles for those roles were issued on the morning of 17 February. It was said that the postholder would be degree educated in a technical/building services discipline or possess an equivalent qualification or significant experience relating to facilities management.

53. The claimant confirmed to Mr Schofield in an exchange of messages on 17 February that he would see him, as arranged, at the meeting the following Monday. The claimant then received a call from a senior construction consultant, Michael Fishwick, based in Newton Aycliffe At 11:04 that morning. He told the claimant that he had been unsuccessful despite scoring a point more than the claimant. He said that his colleague had already been confirmed in post despite there having being no consultation meeting yet. When the claimant said that he was going to challenge his own scores, as he thought that he had tied with Mr Farcas, Mr Fishwick told him that Mr Farcas had got the job.

54. This information prompted the claimant to telephone Mr Schofield to find out what was going on. He put Mr Schofield on speakerphone and the claimant's wife, Mrs Crawford, made notes of what was said.

55. Mr Schofield clearly had difficulty in recollecting the exact content of the conversation. Mrs Crawford's handwritten notes do appear to have been taken contemporaneously and in a shorthand which she has convincingly explained to the tribunal. They accord with the claimant's own recollection of the conversation and their version of that conversation is accepted.

56. The claimant told Mr Schofield that he had heard that the job had gone to someone else as people have been ringing him. He asked if the job had been given to Mr Farcas. Mr Schofield replied that he couldn't talk about other people. The claimant pressed him, asking him to confirm 'yes' or 'no' whether he had given the job to someone else. Mr Schofield replied that he had and letters were going out. The claimant then raised that he didn't agree with the scores and asked if he had a chance to challenge them at the meeting scheduled to take place on the Monday. Mr Schofield replied: "No. Sorry Wayne".

57. The claimant, in a state of some panic and stress telephoned Mark Simpson, to enquire if he had been offered the job. He replied that he hadn't and that his score was 11. He said that he did not expect to score well given his lack of experience, but said that he would be looking to go back into facilities management. The claimant then telephoned Mr Farcas who said that he had been successful with a score of 18, 1 point higher than the claimant. Later that same morning, the claimant received a call from the operations director of one of the respondent's contractors, who referred to the claimant having being made redundant. He said that he had been told this by his own subcontractor and that he also understood that Mr Farcas had been awarded the remaining position.

58. Mr Schofield messaged the claimant at 3:09pm to see if he had received the email about the ring-fenced roles noting the time limit for expressing an interest.

59. The claimant worried about the situation over the weekend and did not feel that he could speak to Mr Schofield. He said that, since he knew there was no opportunity for him to challenge the scores, there was very little point in him attending the Monday meeting. The claimant was extremely stressed and was concerned about his ability to cope with the meeting.

60. On Monday 20 February at 11:48 the claimant emailed Mr Schofield to say that he would not be attending the consultation meeting as: "I simply cannot see the point." He referred to having already been told that he was not allowed to discuss his scores and questioned why he should be when Mr Farcas had been confirmed in the one remaining role the previous Wednesday.

61. On receipt of that email Mr Schofield telephoned the claimant asking why he was not attending the meeting. The claimant reiterated that it was because he could not challenge the scores. Mr Schofield referred to the alternative facilities roles and a new advert for a head office warehouse construction role. The claimant said that that was not appropriate as it was

based in London with national travel required. Mr Schofield made no suggestion that this would be an easier role for the claimant with reference to it involving less physical activity. That was never an issue in the claimant's performance of his existing role. The claimant expressed a wish to stay in his current role. The claimant terminated the call. Mr Schofield emailed him at 12:34 thanking him for taking his call. He said: "As discussed the purpose of the consultation meeting is to discuss the scoring matrix, and to allow you the opportunity to challenge any of the scores you did not agree with – which as you confirmed last week you intended to do." He said that there would also be a discussion regarding any alternative available roles stating, however, that the claimant had mentioned that he did not want to apply for the other roles except for construction. At 2:39pm, Mr Schofield emailed Ms McIntyre attaching the recent thread of communications showing how he had responded to the claimant and expressing disappointment that the claimant had "refused" to attend that day's meeting.

62. Mr Schofield telephoned the claimant again on the morning of 21 February. He asked if the claimant had looked at the alternative roles sent to him. The claimant said that he had, but that the portal was closed. Mr Schofield said that he could get the vacancies reopened on the system. He asked if he would reconsider applying for the national warehouse construction role and the facilities roles describing the facilities manager role as more of a pure management role. The claimant maintains before the tribunal that Mr Schofield was seeking to suggest that the role was more suitable for the claimant as it involved less physical activity. The tribunal rejects that. The claimant reiterated that he wanted to undertake his current senior construction consultant role. Mr Schofield said that they could discuss the claimant's scores, but he thought that the marking would not change. The claimant responded that Mr Schofield had already emphatically told him that the scores were not open for discussion. Mr Schofield sought to encourage the claimant to attend a re-arranged consultation meeting, but the claimant expressed the view that he still did not believe there to be any point in the circumstances.

63. On the afternoon of 21 February Mr Schofield emailed Ms McIntyre with a further update following the aforementioned telephone conversation. He said that the claimant had reiterated that he would not be applying for any other roles. He said that the claimant "advised he will attend a meeting if there is an opportunity for him to challenge and change his scores on the matrix, to retain his position. Especially given Wayne's length of service I feel it only right to give him the opportunity to sit down and discuss, however there are clearly complexities with this now. Given where we are in the process with interviews next week for alternative roles and the close nature of the scoring between candidates (and the successful construction colleague from the matrix, obviously not applying for any other roles etc)." He asked whether it was now acceptable to set up a further meeting for the claimant on Monday 27 February as it would potentially delay the entire process.

64. Ms McIntyre responded on 22 February saying that they needed to give the claimant the opportunity to have the meeting asking that, as this could have implications for the scoring process, whether the meeting could be early on the Monday morning. She said that if there was a change to the scoring after the claimant's representations, then they would need to notify the other

employee as soon as possible and allow them an opportunity to interview for any alternative positions. She asked for an update if, after the meeting, there was any change to the scoring which impacted Mr Farcas.

65. The claimant was sent an invitation to a meeting at 8am on Monday 27 February. The claimant responded referring to him feeling distressed and not feeling he could attend the meeting. He said that whilst the meeting was referred to as a consultation, it was not, because "that ship has sailed" referring to people within and outside the business already knowing the outcome. He said that Schofield had told him that the decision had been made to give the post to someone else and that he could not challenge or change his scores. He said the meeting would only be "yet another opportunity for me to be humiliated and further distressed". Mr Schofield responded expressing his understanding that the consultation process was not easy. He continued: "As I have said before the purpose of the meeting is to provide you with the opportunity to challenge your score, where you may disagree with it, and discuss next steps." He urged the claimant to reconsider attending. Mr Schofield forwarded this correspondence to Ms McIntyre questioning what else he could do at that stage. Ms McIntyre said that she would draft a response to the claimant to make it clear that Monday was the last opportunity to comment on the scores. She provided the text of a further message to be sent to the claimant that afternoon saying that if he did not attend the meeting, it would proceed in his absence. This came after an explanation of the consultation process with reference, amongst other things to it allowing the opportunity to discuss and challenge any scores. She said that whilst other employees in the pool had been informed that they had not currently been selected for redundancy, it had been made clear to them that this decision was only provisional and subject to change. That was because of the opportunity for selected employees to challenge their scores during consultation. No roles for continued employment were being confirmed until all employees had had an opportunity to challenge their scores because other employees might become at risk following such challenge. This was sent to the claimant by Mr Schofield later that afternoon.

66. The claimant replied on 24 February confirming that he would attend the meeting on 27 February.

67. The meeting duly took place on 27 February and lasted for 52 minutes. The claimant asked if the meeting was about him being able to challenge the scores and Mr Schofield responded in the affirmative. The claimant said that he had no faith in the process but said that he would challenge his scores and asked what he needed to achieve. Mr Schofield confirmed that one individual in the pool had scored 18 against the claimant's score of 17. The claimant explained that he had written up an outline of the basis for increasing his score. The claimant then read through a lengthy and detailed summary of experience he had in his role and key achievements/skills exhibited. Mr Schofield did not interrupt or ask any questions. At the end, he said the amount of stores the claimant had been involved with over the years was "an incredible achievement".

68. Mr Schofield then reverted to a pre-prepared script explaining the basis of the redundancy exercise and the respondent's earlier consideration of whether there were any alternatives. The claimant was asked if he had any

further points in relation to the redundancy proposals. The claimant said he did not.

69. Mr Schofield continued that the claimant had been given an opportunity to comment on the selection matrix before the scoring. He sought to explain the scoring. He stated: "For knowledge: you were marked down for not having "relevant construction qualifications" in that you do not have a construction degree. You have demonstrated over the number of years you have built numerous specification builds. This year, there has been a few misses and the overlap between the development and fit out specification in regard to Chapeltown there was a gap."

70. The claimant queried whether he had been made aware before of the criticisms in his work. Schofield's account was that he said that he had whereas the claimant contends that Mr Schofield admitted that he had not. Mr Schofield referred to the Chapeltown store and said that the claimant had missed that it was not included in the developer's specification to install external wall mounted lighting. This was then missed from the fit out specification, such that there needed to be a variation in works at a cost to the respondent. The claimant said that this had never been discussed with him. The issue had been picked up by him and that was going to be a cost anyway – there wasn't any additional cost. Schofield noted that, but said that it was a variation to the contract.

71. On balance, day to day issues such as this one and ones on other stores were likely to have been the subject of discussion at the time with the claimant. He was certainly not, however, warned about them or made to feel that they might be held against him.

72. On skills, Mr Schofield said that the reason for a score of 3 rather than 4 was down to budget control. He explained that there were 3 projects where the final accounts had to go to a third party to be reviewed. The claimant submitted that this was part of the normal process. The claimant commented that Mr Schofield was "grasping at straws".

73. In terms of overall performance, the score was a '3', Mr Schofield referring to some suggested misses/discrepancies at particular stores.

74. Mr Schofield then reverted to his script with an explanation of their willingness to consider alternative positions. The claimant commented that all the advertised positions had a degree requirement, but Mr Schofield said that he did not believe that was the case. The claimant then stated: "As far as alternative employment, none of them are appropriate. I want my job as an SCC this region."

75. Mr Schofield explained the financial terms applying on any redundancy. He said that they would be holding further consultation meeting in the week commencing 6 March following which a decision would be made. The claimant asked Mr Schofield to confirm his understanding that he would not move his scores at all. Mr Schofield responded: "At present the marking criteria is clear and the reasons for the marks is clear… No."

76. The respondent wrote to the claimant on 1 March 2023 inviting him to a further consultation meeting on 10 March to be conducted by Mr Beaumont

accompanied by a note taker. He was warned that the outcome of the meeting may result in the termination of his employment. In that context he was asked to take any equipment in his possession to the meeting.

77. The claimant visited his GP on 2 March reporting feeling very stressed and struggling to sleep. He was prescribed medication to assist.

78. In advance of the second consultation meeting, Mr Schofield prepared a memo that Mr Beaumont requested, so that he had an overview/aide memoir of the claimant's case. Mr Schofield included comments on the claimant's scoring where he listed points which had been clarified at the first consultation meeting. As regards the score of 3 for knowledge, he simply noted: "relevant construction qualifications". As regards the skills score, he referred to budget control and then listed reviews of the final accounts in respect of the Harrogate, Driffield and Chapeltown stores. As regards his overall performance score of 3 points he referred again to the examples of perceived failings and budget control and a lack of attention to detail in respect of work done at the Harrogate and Kingswood stores.

79. The second consultation meeting took place on 10 March. The claimant was significantly surprised and unnerved by the attendance at that meeting of Mr Schofield and Mr Witkowski in addition to Mr Beaumont. The meeting lasted for 6 minutes before an adjournment. The majority of the time was taken up by Mr Beaumont reading from a script for the meeting. Mr Beaumont summarised the process and raised that the points of disagreement between the claimant and Mr Schofield were regarding the Harrogate store and the timing of when the minutes would be issued. The claimant said that the timing was not an issue. Mr Beaumont then referred to the reason for the redundancy, asking the claimant if he had any further points to make. The claimant said that he would do so at the end. Mr Beaumont then referred to alternative employment and not being aware that the claimant had applied for any ring fenced roles. The claimant confirmed that he had done nothing at all and was not in the right state to. Mr Beaumont then reiterated the financial terms of any redundancy and asked if there was anything else to add. The claimant replied in the negative.

80. After a 6 minute adjournment, Mr Beaumont asked the claimant to confirm that there was nothing else to say regarding the meeting to date. He then confirmed that the decision was to terminate the claimant's employment with effect from that day. The claimant was told that he had the right to appeal the decision.

81. The claimant said that he had not finished and read a statement he had prepared in advance, a copy of which he gave to Mr Witkowski. That statement expressed a lack of faith in the genuineness of the process and the devastating effect of dismissal on the claimant.

82. The termination the claimant's employment was confirmed by letter of 30 March 2023 which repeated his right of appeal. The claimant lodged an appeal on 16 March asking for someone independent to look at matters of fresh and saying that he believed he should have been scored higher. He said that, as the respondent would be aware, he had been considerably distressed and upset by the process and could not take part in another

meeting. He was therefore happy for the appeal to be considered on the papers.

83. By letter of 21 March the claimant was asked to detail any specific concerns he had in respect of the process and clarify in which areas he felt he should have been scored more highly and why. The claimant responded on 24 March saying that he had been told that the scores were not up for discussion before his first individual meeting and that he felt he should have scored more highly under the criteria of knowledge, skills and overall performance. He referred to him being away from 1 – 16 April.

84. Marie Goodburn wrote to the claimant on 4 May asking him to reconsider attending a meeting and raising some "initial questions" seeking further details of the claimant's issues.

85. The claimant wrote to the respondent on 11 May withdrawing his appeal. Nevertheless, he went through the redundancy process as it applied to him. He said that the first consultation meeting the response to his written challenge to the scoring amounted to one sentence and he was told he had been scored lower "because I do not have a degree". He referred to the comments as hurtful and discriminatory due to age given the proportion of people of his age group who had degrees. He continued: "This behaviour only continued the course of discriminatory conduct I have been subject to during my employment with you, with derogatory comments about my age such as "Grandad", "you're the youngest, oldest man I know" and ridicule of my large mobile phone font size repeatedly being made by various members of the team. At no point have steps being taken by you to address this behaviour." This was the first occasion when the claimant had raised such concerns with the respondent.

86. The evidence given to the tribunal by Mr Schofield and Mr Beaumont regarding the rationale for the scores they awarded to the claimant was problematical in that it was a recollection some significant time after the event without the benefit of any notes they took at the time and with quite limited references to the basis of the claimant's scoring in any contemporaneous document.

87. Mr Schofield accepted that the claimant was highly experienced. Having undertaken around 77 construction projects in his lengthy period in post. He accepted that no one in the pool came close to that level of experience from an internal management point of view. He accepted that the claimant had been responsible for at least a significant element of Mr Farcas' training but disputed that, by the time of the redundancy exercise, Mr Farcas was "completely under his wing" as maintained by the claimant.

88. From his reaction, at the first group meeting to warn of the redundancy exercise, it is clear that Mr Farcas felt himself to be vulnerable to selection in a pool containing the claimant.

89. When asked if the claimant's lack of a construction qualification and the issue regarding the specification of the Chapeltown store was why the claimant was scored 3 rather than 4 under knowledge, Mr Schofield said: "that's all that is here" with reference to what the claimant was told that the consultation meeting. On discussion of the Chapeltown issue in cross-

examination, he referred to it being the claimant's responsibility for making sure that there were no gaps in the specification for the building and he believed that the claimant was responsible for a gap in the relevant specification. He then referred to the specification in this case being relevant to a leasehold property, an arrangement which the respondent had only been using since 2016.

90. In Mr Schofield's witness statement he referred to lack of knowledge of the specification being demonstrated by an issue relating to the depth of tread in the stairs at the Harrogate store, a sign being in the wrong position at Harrogate and the transom height at a store in Driffield not being in accordance with the specified ceiling height of the store. He had raised none of these with the claimant during the consultation meeting. Whilst he maintained that errors in the aforementioned projects amounted to evidence of a lack of knowledge, the tribunal considers that these were examples of alleged poor performance. The claimant knew what was required. He had simply missed, on Mr Schofield's view, what was required on particular projects. The claimant did not require any additional knowledge to have completed the projects to the respondent's satisfaction. The tribunal does consider these examples to be an after the fact justification for the score in circumstances where almost random day-to-day occurrences were being used as justification for the claimant's knowledge score. Mr Schofield, in his witness evidence, did not refer to the Chapeltown store at all despite this being the example given to the claimant when they discussed the scoring of his knowledge on 27 February.

91. Mr Schofield's evidence as to the significance of a qualification or lack of it was not wholly consistent. He said that the claimant's lack of degree played no part in his scoring and, if he had had any qualification in place, it wouldn't have affected his scoring. When put that he had stated in the consultation meeting that the claimant had been marked down for not having a qualification "in that you do not have a construction degree" he said that he was considering here the knowledge that derived from qualifications which did add value and in circumstances where the claimant agreed that Mr Farcas brought skills which the respondent would not otherwise have. Mr Farcas, he said, was able to review certain aspects of store construction without relying on external consultants. It was his engineering knowledge and experience working with contractors which enabled him to review the contractors' work himself and save money for the respondent.

92. He noted that Mr Farcas had taken the lead in providing specification updates whilst with the respondent saying that he had never witnessed any presentation of specification updates from the claimant, including at national meetings where again Mr Farcas took the lead.

93. When referred to the note he prepared for Mr Beaumont referring solely to "relevant construction qualification" as a reason for the claimant score under the criterion of knowledge, he maintained that this was an error and that it was "not the only reason".

94. Mr Schofield said that it would not have made any difference to Mr Farcas' scoring if he had simply possessed only one rather than the numerous qualifications Mr Beaumont had set out in his witness statement.

95. As regards experience, Mr Schofield referred to Mr Farcas having gained a lot of relevant experience by being a construction site manager for a contractor building the respondent's stores. This would have provided him with a lot more technical knowledge and he was trained to do engineering skills.

96. When asked again whether the claimant not having construction qualifications was part of his decision to award him 3 points, he said it was "not solely that". He said that each factor set out in the matrix under the heading of knowledge formed a part of the overall score. What he was interested in was the knowledge Mr Farcas had gained from his qualification. He clarified that it was the lack of knowledge gained from a qualification which had caused him to score the claimant 3 rather than 4 in contrast to Mr Farcas - it was his understanding of the qualification and the knowledge it brought to the role. The claimant didn't bring any additional "skill set to knowledge" although Mr Schofield then agreed that that was because of his lack of qualification.

97. Mr Beaumont said that Mr Schofield's summary of the scoring prior to the second consultation meeting on 10 March was an error carried over from the notes of the first consultation meeting. He said that he knew there was more to the claimant's scoring under this criterion than a lack of qualification.

98. Mr Beaumont had been part of Mr Farcas's interview process. His experience of Mr Farcas at work was that he continually pushed for changes in the building specification and he was always knocking on Mr Beaumont's door to "drive speed and cost" and express ideas regarding the construction specification. Mr Beaumont said that he knew more than others the value of the knowledge which Mr Farcas was bringing to the business. He considered Mr Farcas to be an exceptional individual when compared to most senior construction consultants and that the type of qualifications he had meant he could act with speed and save money for the business.

99. Whilst listed in full in Mr Beaumont's witness statement, the tribunal does not believe that either Mr Schofield or Mr Beaumont paid particular attention to the exact qualifications Mr Farcas had achieved and their level. It is noted that Mr Farcas had Romanian qualifications with an equivalent to a BSC in civil engineering covering a range of applications as well as an equivalent to a Masters in energy modernisation in the built environment. He was the only qualified civil engineer in the northern region. Their primary consideration was that Mr Farcas had a knowledge and understanding of civil engineering which benefitted the respondent.

100. Both Mr Farcas and the claimant were awarded the maximum score under the criterion of experience. Mr Beaumont and Mr Schofield recognised that the claimant had more experience of the construction of the respondent's stores than anyone else in the selection pool in terms of the significant number of projects completed over a number of years. Mr Farcas had undertaken to completion 3 projects in his time with the respondent and had been involved in the site management of the construction of the respondent's stores in his previous employment with a small contractor where he had therefore a wide range of responsibility. They considered that his experience was substantial enough to achieve a top rating.

101. The claimant oversaw Mr Farcas' initial training from May 2020 and the tribunal accepts that references in subsequent appraisals to the claimant being involved in the training of a senior construction consultant was a reference to Mr Farcas. An attempt by Mr Schofield to suggest that senior construction consultants from other regions had been placed at the Doncaster RDC for periods to enhance their experience (and that they were what the appraisals referred to) was non-specific as to person and time. Undoubtedly, Mr Farcas did look to the claimant at times after an initial training period of around 12 weeks for advice, particularly in terms of the respondent's specification and internal processes with which he was inevitably less familiar than the claimant. The claimant's own evidence as to Mr Farcas abilities does not, however, suggest that Mr Farcas was acting effectively as a trainee or the claimant's subordinate and the tribunal notes the collaborative working environment where people would share knowledge and seek second opinions from all colleagues.

102. Mr Schofield awarded both the claimant and Mr Farcas a score of 3 in respect of skills. The tribunal does not consider that the detailed information set out in witness statement evidence as to the performance of particular projects against budget was before the assessors, but accepts that there were genuine questions as to budget control and time management which were considered as relevant in the claimant not receiving the highest available score. Examples were given by Mr Schofield of variations against budget and delays in providing information. Mr Beaumont had noted on site visits deviations from specification. In no sense was the claimant being evaluated as deficient, but a genuine assessment was made that he felt short of a score which required the display of excellent skills without development required, albeit it would be surprising if any employee did not require development in some areas to enhance their skills. This was considered to be a high bar to achieve.

103. It was considered that Mr Farcas' focus on costs had been illustrated by the aforementioned continual questioning of construction specifications and his productivity in bringing ideas to Mr Beaumont. However, it was considered that Mr Farcas' soft skills, particularly in terms of communication required addressing/improvement such that he could not be assessed as achieving what was considered again to be a high bar in order to be awarded 4 points under this criterion.

104. In terms of overall performance both the claimant and Mr Farcas were considered to merit a score of 3 points which indeed matched the descriptor given in prior appraisals which could not be taken into account given Mr Simpson's presence in the pool and his lack of service. Again, neither individual was regarded as appropriate to be assessed in the highest point score category.

105. It is noted, from the completed scoring matrix, that the claimant would have been awarded a score of 2 points reflecting the appraisal assessment of "meets requirements" had the most recent appraisal been used That indeed was the claimant's appraisal rating where under the appraisal scheme a score of 3 points would have been applied if the assessment had been that he partially exceeded requirements and a score of 4 if he significantly exceeded them.

106. The claimant has suggested that his appraisal score had in fact been artificially suppressed by agreement with previous managers so as to avoid a higher score which would have put the claimant at risk of being considered for promotion or a change in role, which he did not desire. The claimant's own evidence, however, was that he had not reached any such agreement with Mr Schofield or his previous line manager, Mr Burr. The tribunal does not accept that the claimant's rating was lower than it ought to have been in circumstances where the appraisal system clearly on its face envisages the ability to assess performance entirely separately from career development, recognising that a person could score very highly but be assessed as being in the right job without being put forward for a move or promotion.

107. In terms of scoring, the claimant agreed that he had assumed, when the redundancy process was announced, that he would be the person to prevail. He elaborated that he assumed that both he and Mr Farcas would score equally, but that he would prevail because of his length of service being the deciding factor. He did think he had more experience than Mr Farcas, but nevertheless agreed that it wouldn't have surprised him if they had scored equally. The claimant said that he was aware that Mr Farcas had prior experience in his previous employment of constructing the respondent's stores. He agreed that Mr Farcas was highly qualified technically. He believed that Mr Farcas was prominent in presenting specification changes at meetings, because the claimant had suggested that he focus on that as part of his training. The tribunal accepts Mr Schofield and Mr Beaumont's evidence and concludes that Mr Farcas' involvement went beyond merely a tool for his personal development.

108. The claimant agreed that Mr Farcas could review plans and cladding and other calculations which the respondent sometimes otherwise got other professionals to do. He agreed that Mr Farcas brought "something else" to the respondent and that this was knowledge they did not otherwise have in-house. The claimant's position was that Mr Farcas did not, however, have such depth of knowledge of the respondent's processes and these were tasks the claimant had taught him on. The claimant disagreed with how he himself had been scored, but told the tribunal that he was not challenging the scores awarded to Mr Farcas. When taken to Mr Beaumont's evidence that, whilst the claimant had extensive knowledge, his knowledge was not as great as that of Mr Farcas, the claimant said that he couldn't challenge that his knowledge was not as great.

109. The claimant, in evidence, in the context of alternative employment, said that he had no significant facilities management experience whatsoever. He said that he wouldn't have had the experience to do the facilities' roles available.

Applicable law

110. Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides that it is for the employer to show a potentially fair reason for dismissal. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the ERA. Redundancy itself is defined in Section 139(1) of the ERA to include a reduced need for employees of a particular kind.

111. In **Murray –v- Foyle Meats Ltd 1999 ICR 827** the House of Lords considered the test of redundancy and Lord Irvine suggested that tribunals should ask themselves two questions. Firstly, does there exist one or other of the various states of economic affairs mentioned in the section? Secondly, was the dismissal wholly or mainly attributable to that state of affairs?

112. Section 98(4) of the ERA provides:

> *"(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) –*
>
> *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*
>
> *shall be determined in accordance with equity and the substantial merits of the case."*

113. The tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years, but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where employees were represented by an independent union. In the Williams case it was stated:

> *"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
> *2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
> *3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the*

person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

114. Provided an employer's selection criteria are objective, a tribunal should not subject them or their application to over minute scrutiny – see **British Aerospace plc v Green 1995 ICR 1006**. It is sufficient for the employer to show that it set up a good system of selection and that it was fairly administered. The tribunal is not entitled to embark on a reassessment exercise. In **Swinburne and Jackson LLP v Simpson EAT 0551/12**, the EAT stated that: "in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness." However, where there is clear evidence of unfair and inconsistent scoring the dismissal is likely to be unfair. An employer still needs to demonstrate that it established a good system of selection which had been administered fairly.

115. Whilst the question of what constitutes fair and proper consultation will vary in each individual case, consultation involves giving the employee a fair and proper opportunity to understand fully the matters about which he/she is being consulted on, to express his views on those subjects, with the consultor thereafter considering those views properly and genuinely. It was suggested in **John Brown Engineering Ltd v Brown 1997 IRLR 90 EAT** that a fair process would give an individual employee the opportunity to contest his/her selection which would involve allowing him/her to see the details of his/her individual redundancy selection assessment.

116. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

117. According to the guidance in **Software 2000 v Andrews [2001] ICR 825**, there will be circumstances where the employer's evidence is so unreliable that the tribunal may take the view that the whole exercise of

seeking to reconstruct what might have happened is so uncertain that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal. The tribunal should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits the extent to which it can confidently predict what might have been and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. Even if the tribunal considers that some of the evidence or potential evidence is too speculative to form a sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that employment may have come to an end when it did, or alternatively would not have continued indefinitely.

118. The claimant complains of direct disability discrimination based on age – with reference to him being in an age group of employees aged 60 years and over. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(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."* In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".*

119. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".*

120. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

121. It is permissible for the tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof.

At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

122. The tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the tribunal should apply what is effectively a two-stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

123. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

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

124. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

> *"(1) A person (A) harasses another (B) if -*
> *a. A engages in unwanted conduct related to a relevant protected characteristic, and*

b. the conduct has the purpose or effect of—
c. violating B's dignity, or
d. creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
the perception of B;
the other circumstances of the case;
whether it is reasonable for the conduct to have that effect."

125. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

126. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

127. Where the claimant simply relies on the "effect" of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the claimant's point of view. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect. The fact that the claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist.

128. Applying the legal principles to the facts as found, the tribunal reaches the following conclusions.

Conclusions

129. The tribunal considers firstly the complaint of age-related harassment.

130. The tribunal has not been able to conclude on the balance of probabilities that Mr Simpson shouted "Oi Grandad" across the office directed towards him in September/October 2022 as alleged. The claimant's evidence before the tribunal was a somewhat unsatisfactory expansion of what he said in his witness statement. There is no basis for impugning Mr Simpson's straightforward denial.

131. It is possible that Mr Simpson may have called out in this way in circumstances where the tribunal might accept that he was, what the

claimant has described as a "gobby" and demonstrative individual, but the claimant's own evidence is that he asked him to stop and such behaviour was never repeated. The evidence of the working relationships between the claimant and his colleagues enables the tribunal to conclude that nothing was ever said with the purpose of causing the claimant upset. The tribunal also considers the necessary effect which an act must have to constitute an act of unlawful harassment and the claimant's own evidence indicates a reaction far short of the creation of an offensive or humiliating environment. He suggested that the "Grandad" comment had been made privately to him and he did not have a massive issue with that. Even when the comment was allegedly made across the room, the claimant told the tribunal that he was certainly not immediately offended by it. He said that he had smiled at Mr Simpson. If the claimant was affected by such a comment to the extent necessary to form an act of harassment, it was not reasonable for it to have that effect.

132. In all of these harassment complaints arising out of alleged comments made to or about the claimant, the claimant's message, where he referred to himself as the "old dude" with a smiley face emoji is illuminating. It does not suggest a sensitivity on the claimant's part to him being regarded as an old member of the office and reflects him being at ease with both his age and likely also any comments made in jest in that regard. The claimant's assertion of there being an increasingly ageist atmosphere in the office has no evidential basis. The claimant never raised any complaint in that regard in circumstances where his relationship with his colleagues was certainly one where he could have a quick word without any fear of creating an uncomfortable working environment for him or his colleagues. The tribunal can only conclude that no complaint of age discrimination would have ever been brought to the tribunal were it not for the claimant's dismissal and his disbelief at being the person chosen for redundancy. Believing that redundancy to be age-related, he has reconstructed past events in a way which might support that proposition. If age-related comments were made, they were, within this group of colleagues, being made in all innocence and without the proscribed effect at the time the claimant heard them. These considerations are relevant also to the further complaints of age-related harassment.

133. The tribunal is then in any event unable to accept that Mr Schofield referred to the claimant as the "youngest, oldest man he knew" in the context now put forward by the claimant which again is markedly different from that set out in his witness statement evidence. Mr Simpson firmly denied making such comment.

134. If anything of this nature was said, there is clearly nothing inherently offensive in such a comment and Mr Schofield certainly would not have said anything with the purpose of causing offence and upset to the claimant. Again, these were two individuals who got on well and where Mr Schofield showed empathy as regards the claimant's bereavement. The tribunal noted that Mr Schofield had no issue with the claimant needing to take time off. He was kind to the claimant. The tribunal is unable to conclude that any comment made by Mr Schofield of the nature alleged by the claimant can have had the necessary proscribed effect so as to constitute an act of harassment. The claimant told the tribunal that he was not offended at the time.

135. The third allegation relates to alleged ridicule about the large font size on the claimant's mobile phone. Again, this was an allegation which expanded in evidence to include the claimant's laptop. Such expansion of evidence does not assist in a positive assessment of its reliability. Mr Rafferty was an impressive witness who had noticed the large font size of the claimant's phone but without witnessing any ridicule. His own denial was convincing. Whilst the tribunal has not heard from Mr Hanrey who has left the respondent's employment, the tribunal considers it likely that any of the team would be aware if an issue had arisen. Again, if anything was ever said in this group of colleagues, it was not said with the purpose of creating the necessary proscribed environment. Nor did it have that effect, the tribunal can confidently conclude. In any event, the tribunal has no basis for concluding that any comment which might have been made about the font size of the claimant's phone was related to age rather than eyesight. Whilst there may be a correlation between age and failing eyesight, a huge number of people younger than the claimant need assistance to read the text on a mobile telephone. The claimant has worn glasses since childhood.

136. The tribunal can, on the evidence, accept that, at one point, Ms Tacas referred to having the claimant's job when he retired, although the claimant's evidence is not that this was said directly to him. The context was of Ms Tacas hoping to be permanently employed by the respondent after a graduate placement and of the claimant, on his own account, planning to retire in the relatively short term. The tribunal does not conclude that anything was said with the purpose of causing the claimant upset. Whilst the claimant might have regarded Ms Tacas' comment, coming from such a junior employee, as being inappropriate and cheeky, the suggestion that it had the necessary proscribed effect on the claimant at the time cannot be accepted. All that the claimant could tell the tribunal was that it made him feel a little bit unsure about his age.

137. The tribunal considers then the final complaint of harassment relating to his redundancy scoring alongside the separate complaint of direct discrimination.

138. Given the tribunal's conclusions, any age-related comments do not amount to facts from which the tribunal could reasonably conclude that the claimant's selection for redundancy and dismissal was because of his age, the tribunal appreciating that age only need be a material influence in the decision for such a claim to be made out. Mr Sheppard puts particular reliance on the alleged "youngest, oldest man I know" comment of Mr Schofield. The tribunal's conclusions in this freestanding complaint of harassment are of no assistance to the claimant. Again, the claimant's evidence was problematical in terms of context, but if anything was said along lines the claimant maintains it appears to be more likely to be a recognition of the claimant's physical capacity regardless of his age. The claimant appeared to agree. The tribunal has not concluded that there was a suggestion of an alternative role being suitable for the claimant on the basis of it being more sedentary. The tribunal is unaware of the claimant having any real or perceived difficulty in carrying out the physical aspects of his senior construction consultant role. Nor has the tribunal been able to conclude that Mr Beaumont was involved in any refusal to allow the claimant to pursue a degree qualification in or around 2014 as suggested.

139. Whilst the scoring assessment of the claimant might be challenged, as addressed below, the tribunal accepts that the determination by Mr Schofield and Mr Beaumont that the claimant ought to be selected for redundancy was genuinely based on their assessment of his abilities unrelated to his age. There is no evidence that they had in their minds at all any view as to the claimant's likely longevity in his role or how his current or future performance might be affected by his age. The tribunal accepts that they made a genuine attempt to assess the claimant against Mr Farcas, where the choice was always going to be marginal, in circumstances where they genuinely considered Mr Farcas to be the person to be retained on the basis of his individual abilities. Mr Schofield was not responsible for including having a degree qualification in the redundancy scoring criteria. The most that can be said is that Mr Beaumont was amongst a group of regional directors who thought that knowledge might be assessable with reference, amongst other things, to qualifications. This was not a decision related to age or with the intention of setting up criteria which would disadvantage older employees. Whilst the requirement to have a relevant construction qualification might have a discriminatory impact on those of the claimant's age group, it was not necessarily discriminatory in the sense of shutting out from consideration people of any particular age. Again, the possession of a qualification was something to be potentially considered in an assessment of an employee's knowledge but not something against which an employee necessarily had to be marked up or down. The complaints of direct age discrimination and age-related harassment, including in relation to the redundancy scoring, must fail.

140. Turning to the separate complaint of indirect age discrimination, the second PCP relied upon is of there being a requirement to have a degree in order to be eligible for any of the available vacancies. The facilities roles have been highlighted, but it is clear from the job descriptions that a person might be able to demonstrate the necessary experience in this area through their work and without the need for that experience to have been gained through the award of a relevant degree. There was no such requirement and this claim must fail.

141. The primary complaint of indirect age discrimination relates to the inclusion in the redundancy scoring criteria of having a degree (or other qualification). The respondent did include this as something which might be taken into account when assessing the score to be awarded to the employees in the pool of senior construction consultants. It was in that sense applied to the claimant and to the 2 other individuals in the pool who were in their 30s.

142. Such conclusion is inescapable in circumstances where Mr Schofield and Mr Beaumont both accept that Mr Farcas achieved a higher score for knowledge materially influenced by him possessing one or more relevant qualification. The claimant may have scored more highly had he had a qualification, though, the tribunal finds, that that would have depended on what was felt to flow from any qualification.

143. Neither Mr Beaumont nor Mr Schofield, in fact, gave any material consideration to the type of qualifications Mr Farcas possessed. Whilst they were listed in witness statement evidence, it is absolutely clear that the

assessment process did not involve that degree of analysis of any of the employees in the pool of selection. What Mr Schofield and Mr Beaumont regarded as of material importance was that Mr Farcas possessed knowledge in the field of civil engineering which meant he was able to undertake tasks ordinarily carried out by external consultants and which enabled him to provide an informed assessment of the work of external contractors. He brought something to the respondent, or at least certainly to its northern region, which no one else did. The claimant accepts that Mr Farcas could carry out tasks no one else could. That is what they were assessing as meriting Mr Farcas a higher score under the knowledge criterion.

144. The application of the redundancy selection criteria, as will be further described below, was at times cursory and not clearly based upon objective evidence. Mr Schofield and Mr Beaumont did not fully understand the nature of the task they were being asked to complete or the degree of analysis it might perhaps be subjected to if challenged. They saw the inclusion of qualifications in the factors relevant to knowledge as effectively a neat shorthand and a way in which they could recognise the additional knowledge Mr Farcas brought to the respondent beyond the other senior construction consultants. Had he had the same abilities without having gained a qualification, the tribunal is certain that they would have upgraded and scored him at the highest level under the criterion of knowledge in any event. The respondent's witnesses have at times sought to articulate a distinction between a qualification and knowledge gained from it to suggest that the possession of the qualification itself was irrelevant and not considered. This was a difficult task in circumstances where a lack of qualifications was recorded as a reason for the claimant's scoring in the first consultation meeting and Mr Schofield's note produced prior to the second consultation meeting gave this alone as the reason for the scoring allocated. On the evidence it is an inescapable conclusion that the pleaded PCP was applied. However, it was, on the tribunal's findings, the actual additional knowledge which Mr Farcas could apply in his role which was the point of differentiation in his scoring as against that of the claimant. Had the indirectly discriminatory factor been absent, they would have still (without any unlawful discrimination) have awarded the same scores to the claimant and Mr Farcas under the criterion of knowledge.

145. Indeed, it is accepted that those over the age of 60 were less likely to have a degree or indeed other qualification than those in their 30s. No defence of justification is pursued. The claimant suffered therefore indirect age discrimination.

146. The tribunal turns now to the complaint of ordinary unfair dismissal. This was a genuine redundancy exercise. There was a reduced need for senior construction consultants and the claimant was dismissed for that reason. The respondent gave the claimant warning of its intentions – it would have had to have come as a shock when first and howsoever announced. Doing so at the group business update meeting was not unreasonable. A brief period was given for feedback which may have altered the respondent's proposals. The claimant was aware of the proposed method of selection of employees should a selection exercise be necessary.

147. The claimant was reasonably placed in a pool of 3 senior construction consultants potentially at risk of redundancy. Their work was distinct from that undertaken by the members of the facilities team and others. The respondent's operations were regionally divided.

148. The respondent put together a plan for the implementation of redundancies which was capable of achieving a fair outcome. Whilst there was a self-imposed time pressure placed on those conducting the exercise, it was capable of achieving fair redundancy dismissals not least in circumstances where the respondent was open to the potential of extending periods in the process including where an individual provisionally selected for redundancy might justify a higher scoring which might place others at risk. This also applied to alternative employment. Whilst there was again a tight timescale in which employees were expected to register an interest at a time when they had not commenced individual consultation on their selection for redundancy, time to express an interest in available positions was and would have been extendable. The respondent did take reasonable steps to identify alternative employment. The claimant was unsurprisingly focused on retaining his own position, but otherwise would have considered local positions only. He had an opportunity to be considered for alternative facilities roles, but clearly recognised during the process that he did not have the requisite facilities experience. He did not wish to explore those alternatives further and the respondent did not act unreasonably in not making greater efforts to explain the nature of the positions and/or to encourage the claimant to rethink. The reality indeed was that these were not jobs where the claimant had the relevant skills whether derived from any qualification or work experience.

149. The respondent issued a quite surprising instruction to those conducting the assessments to destroy their notes of any scoring. That has not assisted the respondent's witnesses in explaining their scoring to this tribunal. Nevertheless, it is not a factor such as to, in itself, render dismissal unfair in circumstances where it was quite possible for a reasonable selection exercise to be carried out by two managers who knew those in the pool, scoring them independently and coming together in a meeting with a member of HR as a moderator before arriving at an agreed score.

150. The employees in the pool might have been reasonably scored against the criteria chosen in a manner which would stand up to challenge. Similarly, whilst again a tight timeframe was proposed with only an initial consultation meeting and a second one at which employees were to be informed of the outcome, it is far more relevant to the question of reasonableness to consider the quality of consultation rather than the amount of time spent within such a process.

151. The tribunal does not consider that Mr Schofield and Mr Beaumont had a sufficient awareness of their roles including the need to be able to objectively justify their decision-making. At the meeting when they came together to discuss their scores there is no evidence of any effective moderation. Guidance was produced for the decision-makers, but it was lacking in terms of advice both as how to provide scores which were demonstrably evidence-based and the level of challenge those scores might be subjected to. Mr Schofield gave the claimant messages which suggested an inability to challenge scoring which was not reflective of the respondent's

intentions as evidenced in the standard form documentation to be issued at each stage. The way in which the process was operated is perhaps indicative of a business which in its relatively short history within the UK has been on a steady upward trajectory. There may have been the odd store or warehouse closure, but not a need to reduce a number of job functions within the organisation.

152. The claimant attended two consultation meetings. However, at no stage did he know the basis of the scores awarded to him. He was aware of factors which could be taken into account under each criterion and what each score was meant to represent, but he had no knowledge of what had been considered against each individual criterion in his case. There was no additional column on his matrix where the assessor, for instance, might have provided an explanation of the scoring. In such circumstances, the claimant was never in a position whereby he could reasonably challenge his scoring and have his representations properly considered. The claimant managed to put together a detailed presentation as to why he thought he merited particular scores under each criterion, but he did so blind and only able to guess at what might have been held against him. His presentation was effectively ignored. Mr Schofield said that he listened to it, but it was detailed and when he said at the end of the claimant's presentation that he had heard nothing which justified a change in the claimant's score, he cannot possibly have been able to reasonably evaluate what the claimant had just said.

153. Mr Schofield went into the first consultation meeting without any notes of his scoring rationale and unprepared to provide an explanation. In terms of knowledge, he referred to the claimant's lack of qualification, but the reference to the lighting at the Chapeltown store was a spur of the moment reaction and an example of how he had scored the claimant which did not even carry through to his witness statement evidence. It is doubtful whether and if so to what extent the claimant's actions on this project actually amounted to knowledge rather than an issue of performance or a demonstration of an insufficiency of skills. In Mr Schofield's mind, there was simply a need to complete the matrix as instructed and his lack of understanding as to the process is reflected then in his calls to the claimant on 17 and 21 February. Even after the claimant had been advised that he would have an opportunity to discuss his scores, Mr Schofield had given no thought to preparing a cogent explanation which could be presented for the claimant for his consideration.

154. In any event, the claimant was not in a position to react to the matters raised on 27 February. Whilst he should reasonably have been provided with an explanation of the scoring in advance of the first consultation meeting, any reasonable explanation from the respondent and indeed representations from the claimant necessitated proper consideration during an adjournment and more likely the arrangement of an additional consultation meeting.

155. The second consultation meeting on 10 March was not a consultation meeting at all. It was the respondent seeking to go through a prescribed script and to confirm the outcome. It has been described on behalf the claimant as a "tick box meeting" to exit him promptly from the respondent and it is difficult to disagree with such a description of a 6 minute meeting

before the adjournment and afterwards the decision given to terminate his employment.

156. There was no reasonable consideration of the stress the claimant was placed under and how he was likely to perceive a meeting attended by managers he was not expecting to see.

157. The failure to conduct a reasonable process of consultation is sufficient in this case to render dismissal unfair.

158. Further, whilst the respondent had set up a potentially fair method of scoring and criteria against which an objective assessment could have been made, the tribunal cannot conclude that the method of scoring was fairly and reasonably applied in the claimant's case. Again, Mr Schofield and Mr Beaumont have significantly struggled to explain what they relied upon in coming to their assessments and have given information to the tribunal which was of a detail which was certainly not in their minds at the time they made the assessment. That applies to the detail of Mr Farcas' qualifications as well as to examples regarding specification misses in the construction of individual stores and budget shortfalls where it has been admitted that some of those figures were only available after the claimant had already left employment.

159. Nevertheless, the scoring of the claimant against the criteria of experience was reasonable. Having scored top marks in this category, the claimant would not seek to say otherwise. The claimant had been involved in the construction of a very large number of stores over a long period and so had experience both in terms of quantity and type of construction. Mr Farcas' scoring of top marks under this criterion was not, however, perverse as has been submitted.

160. The claimant did have to train Mr Farcas on the respondent's processes and procedures when he joined. However, whilst the claimant having trained him was recognised in subsequent appraisals covering periods some time after Mr Farcas joined, the initial training period was actually a matter of a few months in circumstances where thereafter Mr Farcas was able to operate autonomously and would simply raise queries, often inevitably with the claimant, if he came across something he was unsure about. This is not suggestive of a material lack of experience in circumstances where the claimant and his colleagues worked collaboratively sharing knowledge and seeking opinions from each other as part of the day-to-day job. Mr Farcas had been involved in the construction of far fewer stores than the claimant, but had, by the time of the redundancy, significant experience of the respondent and effectively built on experience he already had when he had worked as a site manager for one of the respondent's contractors. This indeed had given him a different perspective and enhanced experience of the contractor's perspective when working for the respondent. It cannot be said that he had to have completed the same number of projects for the respondent as the claimant for it to be reasonable to allocate to him a top score under the criterion of experience.

161. The claimant and Mr Farcas were reasonably assessed under the area of skills as displaying the key skills required with some development required. There was evidence of the claimant's projects diverging from

budget and of organisational/time management issues. It was reasonable to conclude that development was required which would be the case for perhaps almost any employee. Similarly, Mr Farcas was reasonably judged as someone who could not justify a top mark in scoring when he needed to improve his communication skills.

162. The assessment of both the claimant and Mr Farcas in terms of overall performance was reasonable recognising that they had met most of the time the key areas of performance, rarely missing deadlines with work consistently thorough with little or few errors. Whilst the scores from previous appraisals were reasonably not utilised in circumstances of all employees within the pool not having had an appraisal in the role in the last year of appraisal assessment, the score achieved under performance by both the claimant and Mr Farcas represented that they had met requirements rather than that they deserved a higher rating of partially or even significantly exceeding requirements. That was consistent with both of their most recent appraisal ratings. The claimant agreed his rating and it was agreed on the tribunal's findings as an accurate assessment of his year's performance rather than a deliberately suppressed mark to avoid him being put forward for promotion or an alternative role. It is difficult in the circumstances to argue that, to be reasonable, the score for performance for the claimant or indeed Mr Farcas ought to have been the top score available. Disciplinary record was mathematically assessed and gave all of those in the pool of selection a top score.

163. The key criterion in this exercise was that of knowledge where the claimant was rated with a score of 3. As already referred to, the respondent's witnesses struggled to explain this scoring and have not convinced the tribunal that they acted reasonably in how they assessed the claimant. The claimant was awarded a score of 3 points, one short of the top score awarded to Mr Farcas under this criterion. This was the score which separated them by one point in the overall assessment. The respondent's witnesses have sought to give to the tribunal examples to justify the claimant not being able to achieve a top score. However, again, the Chapeltown example appeared to be a spur of the moment reaction to the claimant seeking an explanation of his scoring at the first consultation exercise, given that it does not merit a mention in Mr Schofield's witness evidence. The examples he does give appear to the tribunal to be little more than the dredging up of job defects which would be part of the day-to-day life of any senior construction consultant. Furthermore, they constitute a blurring of knowledge with performance/skills in that they involve the claimant allegedly failing to recognise something rather than not knowing what he was meant to recognise.

164. Whilst this dismissal was unfair, the tribunal considers that it is possible and appropriate to engage with the principles set out in the case of Polkey which has indeed the wide scope described above. This redundancy exercise was not a sham to ensure that Mr Farcas survived in his employment regardless of his qualities as against those of the claimant. There was a genuine attempt to assess each individual against relevant criteria. This was certainly not a case where the respondent was looking to straightforwardly get rid of the older worker.

165. As described, there were significant defects in the consultation process such that the claimant had no opportunity to understand how he had been scored or to argue for an uplift in his scores on an informed basis where he could give relevant examples and have them considered. He might have persuaded the respondent that a score of 4 was appropriate, not least in circumstances where factors to be assessed included knowledge of the respondent's specification and processes and procedures where the claimant had certainly worked for much longer and carried out more construction projects for the respondent than anyone else.

166. Factors to be considered, however, also included knowledge of stakeholders within the construction industry and of the full development process were Mr Farcas had the benefit of viewing the construction of the respondent's stores from the contractor's perspective. As has already been described, he also had knowledge of civil engineering processes and had knowledge which enabled him to interrogate the work of contractors and drive projects in terms of cost and speed in a way in which none of the other senior construction consultants in the northern region were able to. As the tribunal has concluded, the reference by Mr Schofield and Mr Beaumont to qualifications was in reality no more than a route through to recognising those additional areas of expertise in circumstances where they would have recognised that deeper and broader knowledge regardless of whether or not Mr Farcas had a formal qualification.

167. The question the tribunal must ask is to what degree of certainty it is able to conclude that had a fair process of consultation and selection been adopted the claimant could and would have been reasonably selected by the respondent for redundancy. Given Mr Simpson's inevitable deficit in terms of knowledge/skills/experience, this was inevitably always going to be a two-horse race. That should not however translate to an automatic statistical calculation that there was a 50% chance that the claimant would have been dismissed in any event.

168. On the evidence, that is, however, the tribunal's assessment. The tribunal considers that Mr Beaumont was genuine and accurate in describing Mr Farcas as an exceptional senior construction consultant. The claimant himself said that he was not seeking to challenge Mr Farcas' scores or to say that Mr Farcas' scores were unreasonably inflated. His position is that he himself should have been scored more highly on an objective assessment.

169. For the claimant to have survived the exercise he was, given the tribunal's comments on the assessment under the other criteria, having to maintain that he ought reasonably to have been given a score of 4 points under the criterion of knowledge. He was arguing that he ought to have been scored level with Mr Farcas in circumstances where his length of service would then have saved him as the tiebreaker the respondent had determined to adopt in the case of an equal points score. Whilst the claimant told the tribunal that he was also arguing for an additional point under the criterion of skills that is more difficult to rationalise and the tribunal notes that at the time of the redundancy process the claimant thought, at most, that he should have been scored the same as Mr Farcas and certainly would have been satisfied to achieve the 18 point score of Mr Farcas.

170. The competition between the claimant and Mr Farcas was, therefore, on the evidence always extremely finely balanced. The claimant may have been able to persuade the respondent and justify a higher score under knowledge had he had a chance to address the respondent's concerns and argue against them, but it is equally possible that he would not have been so able. The additional knowledge which Mr Farcas possessed was unique to him in the region and of genuine and obvious value to the respondent going forward with only one senior construction consultant in place rather than a team of 3.

171. In those circumstances the evidence does suggest that, had the respondent adopted a fair process, there was indeed a 50% chance that the claimant would have been fairly dismissed in any event and this must be reflected in any assessment of a compensatory award.

Employment Judge Maidment

Date 12 July 2024

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