



EMPLOYMENT TRIBUNALS

Claimant: Mr R Fawdington

Respondent: Doosan Babcock Ltd

Heard at: Bradford
Leeds

On: 27 and 28 February 2018
29 March 2018
21 May 2018 (Reserved)

Before: Employment Judge Keevash
Mr Q Shah
Mrs L Hill

Representation

Claimant: In person

Respondent: Ms C Platts, Solicitor

RESERVED JUDGMENT

The complaints of unfair dismissal and age discrimination fail.

REASONS

Background

1 By his Claim Form the Claimant complained of unfair dismissal and age discrimination. The Respondent resisted the complaints. Among other matters it contended that the reason for dismissal was redundancy and that it acted reasonably. In the alternative, it contended that the reason was some other substantial reason.

Issues

2 The Tribunal noted that the issues for determination had been identified at a Preliminary Hearing on 29 November 2017.

Hearing

3 At the Hearing the Claimant gave evidence on his own behalf. Reginald Norman Rudd, former colleague, gave evidence on his behalf. Paul Francis Todd, Head of Nuclear Operations, Neil Harper, Director of Quality, and Christine Ann McLackland, HR Business partner, gave evidence on behalf of the Respondent. The Tribunal also considered a bundle of documents.

4 With the parties' agreement Mr Todd gave his evidence by way of video link because he lived in the United Arab Emirates.

Facts

5 The Tribunal found the following facts proved on the balance of probabilities:-

5.1 On 24 July 2007 the Claimant was employed by the Respondent as a Quality Manager. In 2010 he was promoted to Senior Quality Manager.

5.2 The Respondent is a power sector original equipment manufacturer, construction upgrade and aftermarket services Company which offers specialist services and technologies to the fossil fired and nuclear power generation industries and to the oil, gas and petrochemical industries.

5.3 On 11 December 2014 the Claimant submitted a flexible working application form. He proposed reducing his working week from five days to four days. He stated:-

"4 I am over 62 years old now and intending retiring at 64 or 65 at the latest ... [6] (c) It is sensible to have a successor in place for when I leave; for a period when I leave; for a period it will take time and increase my workload to achieve this. The successor, once trained, could provide the additional resource needed urgently to assist the day-to-day role and afford time to determine whether the current heavy workload is a long-term matter ...".

5.4 By a letter dated 27 January 2015 the Respondent informed the Claimant that his application had been granted. It was agreed that part of the Claimant's work would be passed to Mr Duffell as part of succession planning.

5.5 By an email dated 18 July 2016 Mr Harper informed the Claimant:-
"Conscious that we have talked about a plan for transitioning Adrian into your old role for a while now ... we need to make this happen and back you off from all things EDF/SUTQ etc. Easier said than done ... but it needs done (sic)!

Can you revisit our thoughts on this and give me a high level transition plan with dates etc. Once we have reviewed/agreed you should then take it to Paul Todd for agreement ...".

5.6 By an email dated 25 August 2016 Mr Harper sent the Claimant a reminder about the transition plan.

5.7 In or about November 2016 the Respondent's Executive Leadership Team ("ELT") were instructed by the Respondent's parent company (based in Korea) to make a cut of £30 million to its overheads budget. The ELT instructed the senior leaderships team of this directive which meant that there had to be a reduction in staff posts. Mr Harper was asked by the Respondent's Vice President to start looking at reducing overheads within the Quality Department Budget Centre for which he was responsible in order to contribute to savings.

5.8 As part of the at risk exercise Mr Harper was asked to score provisionally all staff members of the Quality team. He scored equally the Claimant and Mr Lawson, another Senior Quality Manager.

5.9 On 6 December 2016 the Respondent made its first formal announcement of potential redundancies.

5.10 On 16 December 2016 Mr Harper spoke to the Claimant on the telephone. He read from a script given to him by Ms McLackland and told him that his job was at risk. He told him to collect a letter from Ms McLackland.

5.11 On 16 December 2016 Ms McLackland gave the Claimant a letter addressed to him and signed by the Respondent's Vice President which stated:-
"I am writing to inform you that Doosan Babcock is in a position where we have to consider the possibility of redundancies. This is due to the lower demand for products and services, and an ever increasingly challenging market place. We must now take a difficult step and streamline our business to a more efficient platform to deliver our long range plan with the right size of skills, resources and infrastructure.

This has led the company to formally notify you that in line with the group wide at risk issued on Tuesday 6th December your employment is t risk of redundancy ...

As you now have been formally notified your role is now at risk you will be invited to a one to one meeting in as soon as possible to discuss your personal situation. The purposes of this consultation meeting is for us to discuss whether there are any suitable alternative roles available, the selection process, and to give you the opportunity to ask any questions you may have concerning the redundancy consultation procedure. Your input would be greatly appreciated, in particular with regards to steps that we might be able to take in an effort to avoid (or at least minimize) redundancies ...

Please be assured by receiving this letter does not mean that you will necessarily be made redundant and no final decisions will be made until 31st January in Renfrew and 15th January in all other locations ...".

5.12 After reading the letter the Claimant told Ms McLackland that he was not surprised that he had been placed at risk of redundancy as he had been expecting it given the recent developments within the business.

5.13 By a letter dated 22 December 2016 Mr Harper invited the Claimant to attend a formal consultation meeting. He advised that in accordance with its ISO27001 accreditation the Respondent had temporarily suspended his 'out of hours' remote IT access while he was at risk of redundancy.

5.14 By an email dated 4 January 2017 the Respondent's HR Director informed Ms McLackland (and others):-

"During consultation with the Trade union, Consultative Committees it was agreed that the criteria to be used should be as follows:

- Knowledge of job
- Qualifications
- Attendance

- Company Service

The criteria for this redundancy programme were agreed through our collective consultation processes and are to be applied consistently across all staff positions”.

5.15 By an email dated 4 January 2017 the Claimant informed Mr Harper:-

“ ...

My considered response is set out below but, fundamentally, I believe there are two mistakes. One, making me redundant when there is vital work to be done and, two, doing it without process or consultation ... as below:

I am sorry to have to write this email but I think I am not being treated properly.

I received a telephone call from my immediate line manager on Friday 16th December. Mr Harper very clearly informed me that my position had been made redundant and he gave me his condolences ...”.

5.16 Mr Harper forwarded the email to Ms McLackland together with his comments. He wanted her advice before responding to the Claimant and before meeting with him.

5.17 On 6 January 2017 the Claimant attended a consultation meeting which was conducted by Mr Harper. He was represented by Mr Rudd. Ms McLackland also attended. Among other matters Mr Harper informed the Claimant that during the consultation process the Respondent would ensure that its intranet was updated on a daily basis with the latest vacancies. He encouraged him to look at this on a regular basis.

5.18 By an email dated 11 January 2017 the Respondent’s Recruitment Programme manager invited the Claimant to take advantage of an outplacement service.

5.19 By an email dated 12 January 2017 Ms McLackland invited the Claimant to attend a consultation meeting.

5.20 By an email dated 19 January 2017 the Claimant informed Mr Harper and Ms McLackland:-

“Ahead of my 2nd Consultation meeting tomorrow, as the meeting is only scheduled for 30 minutes, I want to make the most of the time. So I thought it best to set out the following concerns that I plan to raise and give you the opportunity to respond at the meeting ...”.

He then listed five numbered points.

5.21 By an email of the same date sent to Ms McLackland Mr Harper commented on the points raised by the Claimant.

5.22 On 20 January 2017 the Claimant attended a consultation meeting which was conducted by Mr Harper (attending by video conference call). He was accompanied by Mr Rudd. Ms McLackland also attended. During the meeting among other matters Mr Harper addressed the Claimant’s points of concern. He again encouraged him to check the intranet for vacancies.

5.23 By an email dated 26 January 2017 Ms McLackland asked Mr Harper to telephone and inform the Claimant that had been placed on notice of termination. She attached letters which were to be sent to the Claimant.

5.24 On 26 January 2017 Mr Harper informed the Claimant that he had been placed on notice. He then sent a confirmatory email which attached a notice letter, payments schedule and a benefits resource schedule. The notice letter confirmed that consultation had closed and that his notice period of three months commenced with effect from that date.

5.25 By an email dated 31 January 2017 the Claimant informed Mr Harper that he had a problem with his back and that he had been advised not to drive or sit still for long.

5.26 By an email dated 13 February 2017 the Claimant informed Mr Harper about his back pain. Among other matters he commented that throughout the redundancy process he thought that was being treated unfairly. He asked for his redundancy package to be improved and for permission to leave the Respondent as soon as possible.

5.27 By an email dated 17 February 2017 Ms McLackland asked the Claimant to clarify whether his letter was an appeal. By an email dated 20 February 2017 the Claimant replied by suggesting that Ms McLackland could decide whether the letter was technically an appeal or not.

5.28 By an email dated 7 March 2017 Ms McLackland informed the Claimant:-
“ ...

I have reviewed your letter and whilst I understand your concerns for the future, I do not believe the letter outlines the grounds of any appeal. However, I have undertaken a check of the process which has been applied and I am satisfied that a fair and reasonable process has been followed.

I appreciate that you do not agree with the decision made by the company that your post is redundant, however that does not mean that the decision to dismiss is “unfair”...

If it is your intention that you wish to appeal, we will need to understand on what basis, this will need more detail than what is contained in your letter ...”.

5.29 By a letter dated 10 March 2017 the Respondent’s HR Director gave the Claimant three options:- pay in lieu of notice, garden leave or remain in the business working for the duration of the remaining notice period. The Claimant informed the Respondent that he wished to take a period of garden leave.

5.30 By an email dated 14 March 2017 the Claimant informed Ms McLackland as to the “main unfair dismissal points”.

5.31 By an email dated 11 April 2017 addressed to Mr Todd Mr Harper commented on the Claimant’s points.

5.32 On 24 April 2017 the Claimant attended an appeal hearing which was conducted by Mr Todd. Mr Murphy, HR, was also present.

5.33 By a letter dated 12 May 2017 Mr Todd informed the Claimant that the appeal was rejected.

5.34 At the material time the Respondent had a redundancy policy and business operating procedure which stated:-

“ ...

Selection for Redundancy

Where it is deemed operationally feasible by the Company, applications for consideration for voluntary redundancy will be invited. Acceptance of such applications will be dependent upon the needs of the Company to retain specific knowledge and skills and a balanced work force.

Where compulsory redundancies are unavoidable, selection will be based on the need to retain those who, in the opinion of management, have skills and experience related to the future business requirements.

Selection for redundancy shall be made after assessment against criteria essential for the business needs for the retained positions and alternative vacancies across the Company. They can include, but not be limited to, competence, performance, flexibility, availability and, where all things are equal, company service.

Where local agreements are in place these should be applied for redundancy selection ...”.

Law

6 Section 98 of the Employment Rights Act 1996 (“the 1996 Act”) provides:-

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
- (a) ...
 - (c) is that the employee was redundant ...
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case ...”.

Section 139 of the 1996 Act provides:-

“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

- (a) ...
- (b) the fact that the requirements of that business
 - (i) for employees to carry out work of a particular kind, or

- (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.”

Section 13 of the Equality Act 2010 (“the 2010 Act”) 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim ...”.

Section 39(2) of the 2010 Act provides:-

“An employer (A) must not discriminate against an employee of A’s (B) –

(a) ...

(c) by dismissing B;

(d) by subjecting B to any other detriment.”

Section 136 of the 2010 Act provides:-

“(1) ...

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

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

Submissions

7 The Claimant presented written submissions and made oral submissions. He referred to **Capita Hartshead Ltd v Byard** [2012] ICR 1256 EAT; **Thomas & Betts Manufacturing Co v Harding** [1980] IRLR 255 CA; **Barratt Construction Ltd v Dalrymple** [1984] IRLR 385 EAT. Ms Platts referred to **Kingwell and ors v Elizabeth Bradley Designs Ltd** 0661/02 EAT; **Thomas & Betts Manufacturing Co; Bascetta v Abbey National Plc** [2010] EWCA Civ 351 CA; **Polkey v AE Dayton Services Ltd** [1987] ICR 142 HL; **Inventec (Scotland) Corporation Ltd v Duffy** [2007] UKEAT 0021/07/0410 EAT; **Ayodele v Citylink Ltd** [2017] EWCA Civ 1913 CA; **Igen Ltd v Wong and ors** [2005] IRLR 258 CA; **Madarassy v Nomura International Plc** [2007] IRLR 246 CA; **Chagger v Abbey National Plc and anr** [2010] IRLR 47. Where appropriate the Tribunal has referred to these in the Discussion section of these Reasons.

Discussion

The Claimant’s email sent to the Tribunal on 18 May 2018

8 On the last working day before the Tribunal was due to reconvene for its Reserved Judgment the Claimant sent an email to the Tribunal attaching a document for its consideration. He stated that he had taken advice from a clerk and understood that he could “point up factual inaccuracies” in the Respondent’s submission. The email was timed at 09.05 and was copied to the Respondent’s solicitors.

9 The Tribunal began its deliberations by considering whether it should ask its clerk to contact Ms Platts in order to establish whether or not she consented to the Claimant’s request or read the document attached to the Claimant’s email. It decided not to take this course of action because it was not proportionate. It was

possible that Ms Platts was not in the office and would not be available to comment until lunchtime at the earliest (if she was appearing in another Tribunal). The Tribunal would then have to delay its deliberations until it received her comments. This opened up the possibility that there would then be insufficient time for the Tribunal to make a Judgment. An adjournment would inevitably cause further delay which was most undesirable.

10 The Tribunal decided not to read the document. In reaching that decision it took into account the overriding objective set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Claimant could have dealt with the “factual inaccuracies” when he responded to Ms Platt’s submissions on day 3 of the Hearing. If the Claimant only became aware of them after that day, he had ample opportunity to present his additional document earlier than 18 May 2018. He left it until very late before sending it and the Tribunal could not be certain that Ms Platts had seen it. In those circumstances it was not in the interests of justice to read the document.

The complaint of unfair dismissal

What was the reason for the dismissal?

11 The Tribunal noted that at the Preliminary Hearing an Employment Judge had recorded that the parties agreed that the principal reason for dismissal was redundancy. However, in his submissions the Claimant appeared to dispute that this was the reason. Although the Claimant had the benefit of legal advice before he was dismissed, he had been a litigant in person throughout these proceedings. The Tribunal decided that in the circumstances it was necessary for it to determine this issue based on the evidence and the law rather than relying on any admission made by the Claimant.

12 The Tribunal accepted the evidence of Ms McLackland. It found that in November 2016, following the decision of its Korean parent company not to approve the ELT’s plans, the Respondent had to make cuts to the overhead budget. As a result the Respondent decided that there was a need to conduct a redundancy exercise. 470 posts were put at risk.

13 The Tribunal considered the guidance of the Employment Appeal Tribunal in **Kingwell**. It found that the Respondent’s requirements for employees to carry out work of a particular kind, namely the senior layer of management including quality management, had ceased or diminished. Mr Harper was asked by his Vice President to look at reducing overheads within the Quality Department Budget Centre. He decided that the role of the Claimant (and that of six others in the Quality Department) was at risk. In all the circumstances including the financial background it decided that the reason for the Claimant’s dismissal was redundancy within the meaning of the definition of section 139(1)(b) of the 1996 Act.

Did the Respondent act reasonably or unreasonably?

Predetermined decision

14 The Claimant submitted that the Respondent (and, in particular, Mr Harper) knew from about June 2016 that there would be redundancies. The Tribunal accepted the evidence of Ms MacLackland and Mr Harper on this issue. It found that until the ELT’s plans were rejected by the parent company there was no decision to make redundancies. The Respondent’s decision to consider

compulsory redundancies was made shortly before the formal announcement was made on 6 December 2016.

15 The Claimant also submitted that in or about June 2016 he was instructed by Mr Harper to devolve some of his duties to Mr Duffell. This was done with the intention of relocating work for which the Respondent could recover its wage costs from its clients. Since posts with recoverable wage costs were less likely to be deleted during a redundancy exercise, this course of action made the Claimant's post more vulnerable. The Tribunal accepted the evidence of Mr Harper on this issue. It found that in 2014 the Claimant made a flexible working application. As part of that application he asked that the Respondent put in place a succession plan. The application was granted and the Claimant agreed to pass some of his work to Mr Duffell. By July 2016 little progress had been made towards the proposed transition. Mr Harper was prompted by Mr Todd to ask the Claimant to produce a plan. That request was not influenced by any knowledge that there would be redundancies.

Information and consultation

16 The Claimant submitted that the steps taken by the Respondent to inform and consult with him were inadequate. It did not enter into the consultation process with an open mind. He gave evidence that during the telephone conversation on 16 December 2016 Mr Harper said that he would be dismissed for redundancy. When he made that assertion in subsequent correspondence, Mr Harper did not deny it. The Tribunal accepted the evidence of Mr Harper on this issue. Mr Harper was provided with a script by HR and told to follow it; he did follow it even if probably he also spoke about other matters. He had previously conducted a similar exercise and understood the importance of sticking to the script. He did not reply immediately and deny the Claimant's assertion because he preferred to outline his responses in an email to Ms McLackland before the first consultation meeting. His evidence was supported by contemporaneous documents and the evidence of Ms McLackland. Importantly, she gave evidence as to what the Claimant said to her when he read the letter after his conversation with Mr Harper. Her evidence was not challenged by the Claimant. In answer to Tribunal questioning she confirmed the evidence in her witness statement; the Claimant told her that he was not surprised to have been placed at risk. He made no reference to his conversation with Mr Harper. The Tribunal was in no doubt that he would have immediately informed Ms McLackland if Mr Harper had told him that he would be dismissed. In making its finding of fact in relation to the telephone conversation on 16 December 2016, the Tribunal decided that the Claimant was mistaken in his recollection of his conversation with Mr Harper.

Pool of one

17 The Claimant submitted that he should have been placed in a pool with Mr Lawson. The Tribunal considered the guidance of the Employment Appeal Tribunal in **Capita Hartshead Ltd** where it held that the statement of Mummery J (as he then was) in **Taymech v Ryan** [1994] EAT/663/94 that "the question of how the pool should be defined is primarily a matter for the employer to determine" did not mean that an Employment Tribunal was precluded from holding that a decision by an employer was flawed so that the employee selected by the employer had been unfairly dismissed.

18 The EAT stressed that the starting point for considering the approach to this issue was the fundamental and the only statutory principle contained in section 98(4) of the 1996 Act. It endorsed four important principles which showed the

correct approach to this statutory test. Firstly, “it was not the function of the Tribunal to decide whether they would have thought it fairer to act in some way; the question is whether the dismissal lay within the range of reasonable conduct which a reasonable employer could have adopted” (see *Browne-Wilkinson J in Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT). Secondly, that principle applies to the approach to be adopted by an Employment Tribunal to the manner of the selection of a pool from which employees are to be considered for redundancy. Thirdly, an Employment Tribunal in determining how it performs its task of applying the statutory test is not bound by any rigid rules. Fourthly, an Employment Tribunal is an industrial jury and “in these cases Parliament has expressly left the determination of all questions of fact to the tribunals themselves ...” (see Lord Denning MR in *Hollister v National Farmers’ Union* [1979] ICR 542 at 552,553).

19 The Tribunal understood that the statement of Mummery J in *Taymech* only applied where the employer has genuinely applied his mind to the problem of selecting the pool from which the person was to be selected for redundancy. Where the employer has genuinely applied his mind to the selection of the pool, then his decision will be “difficult” but not impossible to challenge.

20 The Tribunal carefully considered the way in which the Respondent selected the pool. It accepted the evidence of Mr Harper. It found that he genuinely applied his mind to the issue before placing the Claimant in a pool of one. He believed that the delivery models for the Claimant’s role for Service and Mr Lawson’s role for Projects were distinct and as such the roles and skill sets required were different. He, therefore, treated them as stand alone posts. The Claimant disagreed with this approach among other matters on the basis that their grade and job titles were the same. Further Mr Todd gave evidence that they were both employed as Senior Quality Managers with a similar grade and that they were able to do each other’s job. The Tribunal found and decided that both Mr Harper and Mr Todd had reasonable grounds for their beliefs. Both were very experienced managers and knew the Claimant and Mr Lawson well. They reached different conclusions. However, in the Tribunal’s judgment both sets of belief were genuinely held and lay within a range of conduct which a reasonable employer could have adopted.

21 Applying the same principles the Tribunal also rejected the Claimant’s submissions that he should have been placed in a pool with the four team members he managed or with Mr Hart. The Tribunal accepted the evidence of Mr Harper. It found that he genuinely believed that this was inappropriate because the team members were at a lower grade and had less management experience than the Claimant. As for Mr Hart, Mr Harper genuinely believed that the roles were not comparable because he carried out a completely different role from the Claimant at a lower grade and salary. The Tribunal also accepted the evidence of Mr Todd who considered the matter during the appeal process.

22 Before leaving this issue the Tribunal also noted that at various stages the Claimant had argued that he should have been placed in a pool with others including Mr Moyles and agency workers. In dismissing that argument the Tribunal was satisfied that the Respondent had genuinely applied its mind to the selection of the pool and that there were reasonable grounds for placing the Claimant in a pool of one.

Custom and practice

23 Mr Todd dismissed the Claimant's appeal even though he disagreed with Mr Harper's decision to place the Claimant in a pool of one. He gave evidence that, if the Claimant and Mr Lawson had been pooled, the Claimant would still have been selected. Although their scores were tied, Mr Lawson would have been retained because he had greater length of service with the Respondent. Ms McLackland gave evidence that the Respondent had a practice agreed with the trade unions that in the event of a tie the employee with the longer service was to be retained.

24 The Tribunal understood that the requirement for the implication of terms into a contract of employment was that the custom and practice had to be reasonable, notorious and certain. The Tribunal accepted Ms McLackland's evidence. It found that there was a custom and practice. It had been applied on more than ten occasions in recent years; it was known widely throughout the organisation; it had been developed with the knowledge and approval of the trade unions and two thirds of the workforce were trade union members; the minutes of the meetings between management and trade unions were posted on works notice boards. The Tribunal found that the custom was fair and not arbitrary; it was well established and well known; it was clear-cut. It accepted that the Claimant was unaware of it but that was probably because he was not a member of the shop floor. Accordingly the Tribunal found and decided that, if the Claimant had been pooled with Mr Lawson, the outcome would have been the same.

Agency workers

25 The Claimant submitted that during the redundancy process the Respondent failed to review all roles which were filled by agency workers. He gave evidence that agency staff were retained in fully recoverable (ie billable) roles in posts he could and would easily have performed. In his view, there was only a slight risk of clients being disenchanted with the removal of an agency worker to make place for him. Further, during his notice period other agency staff were recruited to posts he could and would have performed.

26 Mr Harper gave evidence that he was unaware of any roles performed by agency workers which could have been suitably carried out by the Claimant. Agency workers already established in a fully recoverable role were retained because it would have been disruptive to the project. Agency workers were released as soon as they were not fully recoverable. Ms McLackland gave evidence that in November/December 2016 the Respondent put a ban on the recruitment of agency staff unless the position could not be filled by an employee who was placed at risk of redundancy. That was done to ensure that all those at risk were able to apply for all available roles. Agency staff were generally only used for fixed term periods when the Respondent needed to carry out work for a specific period of time. They were not generally used to fill permanent posts.

27 The Tribunal accepted the evidence of Mr Harper and Ms McLackland. The Respondent was entitled to conclude that there were no roles performed by agency workers which were suitable to be offered to the Claimant. During the redundancy process (and even during this Hearing) the Claimant did not identify any such roles.

28 The Tribunal also rejected the Claimant's submission that the Respondent acted unreasonably when failing to investigate the possibility of bumping another employee so as to create a vacancy for him. The Tribunal recognised that in some circumstances such failure could support a finding of unfair dismissal. However, in this case the Claimant did not identify a suitable potential vacancy (other than that of Mr Hart whose circumstances have previously been discussed). It was not, therefore, possible for the Tribunal to consider the two jobs and their similarities, the difference in remuneration, the relative length of service of the two employees and the qualifications of the employee who was to be bumped.

Alternative work

29 The Claimant submitted that the Respondent failed to try and find alternative work for him. It merely transferred its responsibility to him by helping him to update his CV and by asking him to check its intranet. He gave evidence that during the process he did not have remote IT access and he could only access the intranet when he was in the office. The Respondent ought to have taken additional steps to ensure he was kept updated with vacancy details.

30 Mr Harper gave evidence that on 6 January 2017 he asked the Claimant whether he could think of any ways to avoid redundancy. The Claimant replied that he had plenty of strings to his bow; he had worked in other areas eg procurement and asked that his CV be examined to see whether there was anything suitable. On 20 January 2017 Mr Harper again encouraged the Claimant to check the intranet for suitable vacancies.

31 The Tribunal decided that the Respondent did what it could do so far as was reasonable to seek alternative work. It put him in contact with its redeployment and outplacement officer. It also posted on its intranet details of vacancies on a daily basis. The Claimant did have limited access to the intranet particularly after he commenced his period of notice of sickness absence. However, at no stage did he ask the Respondent to send him vacancy details via another route, namely by post or his private email address. The Tribunal did not understand why he did not make such a request. It was not unreasonable to expect him so to do. If he had done so and the Respondent had failed to comply, that might arguably have constituted an unreasonable failure. However, in the absence of such request the Tribunal decided that the Respondent had not acted unreasonably.

Other matters

32 The Claimant criticised the Respondent's application of the selection criteria and, in particular, how he had been scored in comparison with Mr Lawson. In rejecting the Claimant's submission that this rendered his dismissal unfair, it found that the selection criteria were objective and that the assessments were carried out honestly and reasonably. There was no basis on which an inference could be drawn from the scoring that there was something unfair about the application of the selection process.

33 The Claimant also submitted that the dismissal was unfair because notice of termination was given to him before the date which had previously been intimated. Although as a matter of fact this was correct, the Tribunal decided that this provided no basis for a finding of unreasonable conduct such as to make the dismissal unfair. The Tribunal also rejected the Claimant's submission that the dismissal was unfair because the Respondent failed to give him the opportunity to appeal after Mr Todd rejected his appeal. The Respondent's Redundancy

Policy and Business Operating Procedure did not provide for a second appeal. Further, the Members of the Tribunal confirmed that in their experience it was not normal practice to offer a second appeal.

34 Accordingly the Tribunal decided that the complaint under this head failed.

Complaint that the Respondent treated the Claimant less favourably because of age when dismissing him

35 The Claimant gave evidence that his dismissal was tainted by age discrimination. As at the date of his dismissal he was 64 years old. Mr Harper instructed him to devolve some of his duties to Mr Duffell. When he did so, that made his post more likely to be deleted in a redundancy exercise. At the meeting on 20 January 2017 Mr Harper admitted that he gave the instruction because of the Claimant's age.

36 Mr Harper gave evidence that at no stage was age a factor in his decision making process. Mr Todd gave evidence that he did not find any evidence at all that age played a part in the decision making process.

Burden of proof

37 The Tribunal considered the provisions of section 136 of the 200 Act. It understood that the correct approach to the determination of this complaint was to apply the guidance of the Court of Appeal in **Igen** which had been approved by the Supreme Court.

38 The Tribunal reviewed its findings of fact as set out in paragraphs 14 to 16 inclusive above. It found that the Claimant himself had highlighted the need for a succession plan after he submitted his flexible working request. Mr Harper was seeking to put that in place. The Tribunal also carefully considered the notes of the meeting on 20 January 2017. It decided that it was necessary to keep in mind the context in which he spoke. The Claimant had made reference to the transition to Mr Duffell. Mr Harper responded by saying (according to the Respondent's notes) "you are well aware of this, you have said need to put in place some other arrangement as you are not getting any younger, part of DCM, consequence was to hand this particular part over to "Mr Duffell". The handwritten notes stated that in response to the Claimant's reference to the decision to remove fully bookable work Mr Harper said "You have to manage, moved onto a part of the role to [Mr Duffell] due to age". It was clear that Mr Harper did not admit that he issued his instruction to the Claimant because of age. He did so because he wished to take steps towards the provision of a succession plan which was required as the Claimant was approaching an age at which he had previously intimated his intention to retire.

39 In support of his submission that age was an important factor in the decision to dismiss him the Claimant relied on Mr Lawson as his comparator. The Tribunal was at a loss to understand how this supported his claim since at the material time Mr Lawson (who was retained) was older than the Claimant. The Claimant also relied on his four team members as comparators. However, it appeared that of the two who were made redundant only one was in the same age group as the Claimant. The other was the second youngest of the four. In the Tribunal's judgment that tended to undermine the Claimant's argument.

40 The Claimant also relied on the statistical information prepared by the Respondent which was included in the Hearing bundle of documents. This

showed that the highest percentage of staff made redundant (20.8%) was in his age range (60-69) and the second highest (20.0%) was aged 70 and over. Those percentages were significantly higher than any other age group. The under 60 age group made involuntarily redundant equated to 9.04% whilst his over 60 age group equated to 19.27%. He submitted that this demonstrated a skewed rate of redundancy based on the age of the employees. Hypothetical comparators who were younger were more likely to survive the redundancy process.

41 Ms McLackland gave evidence that as part of the redundancy process many senior roles were impacted and these tended to be occupied by members of staff who were in the 50/60 age bracket. Those roles tended to be held by older members of staff because they had more relevant experience. She addressed the statistical information and stated that the percentage of staff employed at the end of the process was slightly greater than that at the start of the process. She also stated that the age range of posts within the Quality team made redundant were (30 – 39) 2, (40 – 49) 3, (50 – 59) 1 and (60 – 69) 1.

42 The Tribunal accepted Ms Platts' submission that the Respondent had provided a non-discriminatory explanation as to why a higher number of roles in the Claimant's age group were made redundant. The reason was not age but rather the seniority of the roles which were selected in accordance with proper objective selection criteria. There was nothing in the statistical information on which an inference could be drawn that the Respondent unlawfully discriminated against the Claimant.

43 Accordingly the Tribunal decided that the complaint under this head failed.

Employment Judge **Keevash**

Date 21 June 2018