EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

MEMBERS **DR S CHACKO**
MS V STANSFIELD

BETWEEN: **Mr M PECKHAM** **CLAIMANT**

AND

MAGNOX LIMITED **RESPONDENT**

ON: **7, 8, 9, 28, 29June and (in chambers) 12 and 14 July 2017**

Appearances

For the Claimant: **Ms S Bowen, counsel**
For the Respondent: **Ms C Davis, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

(i) The Claimant was not unfairly dismissed.

(ii) The Claimant's claim that the Respondent discriminated against him because of his age when it failed to appoint him to the role of head of facilities management is not well founded.

(iii) The Claimant's claim that the Respondent discriminated against him because of his age by the application of the "clawback" provision in the Respondent's contractual redundancy scheme is well founded. The Respondent has failed to discharge the burden of showing that this provision is objectively justified.

(iv) The issue or remedy will be dealt with on 4th December 2017.

REASONS

1. This is a claim for unfair dismissal and direct and indirect age discrimination. The issues were agreed and set out (42) in the bundle. The Claimant was dismissed during a large scale redundancy process and claims that the reason why he was dismissed related to his age. He also claims, if the reason for dismissal was in fact redundancy, that the dismissal was in all the circumstances unfair in that
    a. the Respondent failed to take reasonable steps to find him alternative employment;
    b. consider him for potentially suitable roles on the list of unfilled vacancies;
    c. discuss any potentially suitable roles that would have given rise to a potential reduction in spot point/grade; and
    d. offer a potentially suitable role to the Claimant instead of offering it to someone not at risk of redundancy.

2. The Claimant claims that the Respondent directly discriminated against him because of his age when they: –
    a. failed to appoint him to the role of Head of Facilities Management; and
    b. applied a clawback to an entitlement which he would otherwise have had to contractual severance.

3. The Claimant also claims that the application of the clawback provision amounted to indirect discrimination. The application of the clawback was a PCP that put employees over 62 or, in the alternative 63, at a particular disadvantage compared with those who were younger. The Claimant referred to a Ms Bradley as a comparator. Ms Bradley was 55 and no clawback had been applied to her severance payment.

Evidence

4. The Tribunal heard evidence from the Claimant and on his behalf from Ms Weir, who was the Claimant's trade union representative. For the Respondent we heard evidence from:
    a. the Claimant's line manager Ms MaGuire;
    b. Mr R Anyon, Head of Employee Relations;
    c. Mr A New, Head of Procurement and Supply Chain;
    d. Mr Mainwaring, Regional Programme Delivery Manager; and
    e. Ms S Landi, HR Business Partner.

    We also had two lever arch files of documents and a number of additional documents were produced during the hearing.

Findings of relevant fact

5. The Respondent is a management and operations contractor responsible for safely managing 12 nuclear sites and one hydroelectric plant in the UK working for and funded by the Nuclear Decommissioning Authority (the NDA).

6. The Claimant began employment with the Respondent with effect from the 16th April 2007. Initially he was employed as a sub contract Team Leader within the commercial department based at the Dungeness A power station. At the relevant time he was employed as Principal Contract Specialist at spot point 54 (grade 8) and reported to the Commercial Manager Karen MaGuire.

7. In 2012 the Respondent notified its employees that the Dungeness Site was to begin the decommissioning process. In 2015 a companywide organisational restructure was proposed which included the Commercial and Supply Chain Function, of which the Claimant formed part. The restructure affected the whole of the Respondent's business and all its employees and took place over a period of many months beginning in May 2015. The restructuring process was a subject of collective extensive consultation and agreement with the Respondent's recognised Trade Unions and the end result was the reduction of staff from 4,500 (including 500 agency workers) to 3000. Instead of 12 autonomous sites, each separately funded, the Respondent would operate via central funding and cross-site programmes.

8. The redundancy process which the Respondent had negotiated with the Trade Unions involved a number of different pools for selection. The restructure was done in stages with the process for different pools for selection beginning at different times. The process also involved distinct stages. Initially employees were asked whether they wished to take voluntary redundancy and, if not, which roles, in their pool for selection in the new structure, they would be interested in.

9. Secondly, an exercise was undertaken entitled "Best Fit". HR and managers sought to match employees against roles in the new structure. All employees were scored by their line manager against specific criteria to obtain a "SCAF" score out of 45. These SCAF scores were subject to moderation by a joint management/trade union panel before being shared with the employee. Once the score has been obtained an employee would be matched to an appropriate role in the new structure. Individuals were allocated to roles according to their SCAF score, in descending order.

10. If the employee was not allocated a role at the Best Fit stage, a further matching exercise was undertaken where employees who had not been allocated to a role were considered against any roles which had not been filled as "suitable alternative employment."

11. The Claimant was considered as part of the "Integration, Procurement and Supply Chain, Commercial and Finance" pool. There were 236 employees in this selection pool. The Claimant completed an Individual Consultation Form (ICF) (131) in which he stated that he did not wish to be considered for voluntary redundancy and indicated an interest in the role of Commercial Change Manager at spot 54. This was a role in the correct pool and at his grade. Ms MaGuire advised the Claimant that he could only apply for roles at his spot/grade. This was wrong as the Claimant could have applied for lower graded roles. Ms MaGuire's evidence was that the Claimant would not have been interested in lower graded roles. In a separate box the Claimant also indicated that he would be interested in a role of Head of Facilities Management. This role appeared in the Site Structure chart but there was, as yet, no Broad Role description or grade for it. The Claimant could not be Best Fitted to this role as it was not within his pool or yet available.

12. The Claimant achieved a SCAF score of 27. This score has not been challenged. The Claimant was not allocated the role of Commercial Change Manager as this was allocated to another employee who had a SCAF score of 36. He was however considered for other roles in his selection pool and was advised that he had been considered potentially suitable for two roles, Category Lead and Supply Chain Manager. In respect of these roles there were three available positions, one Supply Chain Manager and two Category Lead positions. Four candidates were identified as suitable for these three positions as a Best Fit and in line with the Respondent's procedures, the Claimant and the other three candidates were required to attend a tie-break interview. The Claimant however decided that he did not wish to be considered for those roles, and accordingly the three roles were allocated to the three other employees. The Claimant attended a meeting on 15th December 2015 with Mr M. Taylor (Ms MaGuire's line manager) and Ms MaGuire by way of feedback of the Best Fit exercise. The Claimant was told that a more closely matched candidate had been best fitted to the Commercial Change manager role and was not an option for him. We do not accept that the Claimant did not receive reasonable feedback. The result was communicated to him by letter dated 18th December.

13. The Claimant was informed on 13th January 2016 (144) that following the Best Fit exercise he had not been allocated a role. He had 14 days to appeal but the Claimant did not do so. After the appeal period had expired, on 9th February he was informed that the Respondent would review all unfilled roles against employees who had not been allocated a role at the Best Fit stage. On 12th February the Claimant was given 12 weeks' notice of termination. He was advised that the Respondent would inform him of any suitable alternative positions which became available during the notice period. Employees were also encouraged proactively to

look at the list of unfilled roles on the intranet and contact HR in respect of any roles for which they felt they might be suitable. (145) The Claimant did not contact HR in this respect.

Suitable Alternative Employment

14. Although the Claimant had been given notice of termination, in accordance with policy the Respondent was required to continue to search for suitable alternative employment for the Claimant. The Respondent's procedures provided as follows:

> "The Site/Programme/Function Director and HRBP will undertake a paper-based job match of candidates against the requirements of available vacancies. HRBP's can obtain information on qualifications, previous experience etc from Agresso as required. SCAF scores may be used, but the information should be used with caution when comparing data from different selection pools (as no cross selection pool moderation has taken place). The line managers of potential candidates may be consulted on performance and suitability." It also provides "Where there is more than one potentially suitable candidate – or where more clarification is required in relation to "SQEPness" or "trainability" for the role – informal discussions with individuals may take place. Individuals will not be subject to any competitive process of vacancies in accordance with the SAE guidelines cited above. The vacancy will be offered to the most suitable candidate in accordance with the judgment of the director/HR based on all available evidence. However where there are two or more candidates who appear equally suitable, we may need to agree a suitable method of selection e.g. in formal interview.

15. It is of note that the process at this stage is primarily paper-based and that there is no requirement to consult line managers or to interview an individual unless two candidates are considered equally suitable.

16. Where there is a match, the employee will be offered suitable alternative employment in accordance with the "Suitable Alternative Employment" Guidelines cited above. An employee who unreasonably refuses an offer of Suitable Alternative Employment might lose their right to a redundancy payment

17. On 28 April 2016 Ms MaGuire considered the Claimant's suitability for the role of Ponds Project Manager but ultimately she and the relevant manager did not consider the Claimant to be a suitable match. The Claimant was unaware that this was a role for which he was being considered.

18. The Respondent was aware that the Claimant had expressed an interest in the role of Head of Facilities Management (HFM). Although the role appeared on the organisational structure chart, the Respondent had not produced a Broad Role description for the position. This meant that the role could not be recruited to. Ms Landi sought to chase this. She had brought the matter to the attention of the organisational restructuring team via their dedicated electronic mailbox in December 2015, raised it with two

of the senior HRBP's in December 15 and March 2016 and Paul Marsh, the Asset Management Programme Manager in February and March 2016 she raised it again with the Head of Organisational Change in March 2016 (137A- 137 C).

19. On 14th March Ms Weir emailed HR noting the vacancy on the structure chart and querying why it had not yet been advertised. She referred to the fact that there was an individual currently working out his notice who was interested in the vacancy (165). HR responded on 16th March that they had "sorted it now" (168) and the role would be placed on the intranet as an unfilled role from that date at spot 46. The Respondent needed to go through the process of looking for any displaced individuals at spot 46 who could do the role and, if not, if there was anyone at a higher grade who was suitable.

20. Mr Mainwaring was appointed to the role of Infrastructure Manager as part of the reorganisation from 1st April. It was to this position that the HFM role reported. He drafted a Broad Role description in early April for subsequent formal approval. The Claimant had not expressed an interest in the role directly to Mr Mainwaring although Mr Mainwaring was in fact aware of the Claimant's interest. He discussed the Claimant's suitability for the role with Ms MaGuire and other members of the site management team (Paul Wilkinson, Ian Cuthbert, Stephen Locke and Wil Morris). As a result of those discussions he determined that the Claimant was not suitable. It was his evidence that, as a result of those informal discussions, he had determined by 18th April that the Claimant was not suitable for the role. While he had access to the version of Claimant's CV which appeared of the HR file he did not place any weight on it, preferring to consider the opinion of his line manager. He did not take into account the Claimant's pre Magnox experience in making that determination.

21. On 18th April Mr Mainwaring sent an email to a trade union representative (Mr Todd) saying that HR did not have a broad role yet and so he proposed to offer a secondment to the role to an underutilised resource at the site in order to cover the gap. (182). Mr Todd's response was that this would not be appropriate as the Claimant should be offered the role as suitable alternative employment.

22. Ms Weir also queried with Mr Mainwaring why the position could not be offered to the Claimant saying that he already carried out all of the duties of the HFM role. Mr Mainwaring did not respond.

23. Mr Mainwaring accepted that by this date he had already determined that the Claimant was not a suitable candidate for the new role. He denied that the Claimant was already effectively doing the job. He said that the Claimant's previous role of Principal Contract Specialist covered 30- 40% of the HFM role. He told the Tribunal that the Claimant's role had been to

manage contracts whereas the HFM role required the management of contractors. The Claimant's job had been to write the technical spec and to manage the contract. The HFM role on the other hand required someone who had experience of being in the field, supervising and delivering the work and someone who had experience of managing a team and with people skills. The Claimant had not managed anyone while working at the Respondent (almost 10 years). In his current role the Claimant had fallen out with two project managers and alienated colleagues. This was very unusual at a senior level. It was also his evidence that the Claimant had a tendency to rely heavily on email rather than communicating face to face with individuals. It was proposed in approximately two years' time that the HFM role would be combined with a project manager role. A previous assessment of the Claimant against a Project Manager role suggested he would need two years to become suitably qualified for such a role.

24. Shortly thereafter an employee who had been working in the planning department, Nathan Gill (who was a spot 46) was proposed for the role. Mr Gill was also at risk of termination. (The Claimant challenged this fact but we accept that Mr Gill was also displaced.) Mr Mainwaring considered Mr Gill for the HFM role and determined that he was a suitable candidate.

25. After the event the rationale for his decision not to appoint the Claimant was documented by Ms Gilbert of HR (196 -199) in an email dated 4th May. The Claimant's strengths and weaknesses are assessed against the broad role requirements and a number of shortfalls in skills and experience were identified. While the assessment was documented after the decision had been made, the Tribunal accepts that the identified strengths and weaknesses of the Claimant as against the broad role requirements reflected the discussions that had taken place with Ms MaGuire and others who had been consulted. Mr Mainwaring also set out his rationale for considering Mr Gill to be suitable for the role in an email dated 5th May. We concluded that those reasons reflected genuine assessments of the Claimant and Mr Gill by Mr Mainwaring and the respective line managers.

26. The Claimant was not informed and was not aware prior to the termination of his employment that he had been considered, and rejected, for the role. The Claimant's employment came to an end on 6 May. On 8 June Ms Weir requested an explanation as to why the Respondent did not consider the HFM role as suitable alternative employment for the Claimant. This explanation was provided the same day using a truncated version of the document prepared on 4th May. Mr Gill was offered the role on 9th May.

27. After the Claimant had left the Respondent he received text message from Mr Morris (previously Head of Day Production Infrastructure who had been made redundant in the reorganization and who had left at the end of March) which included the following "I am disappointed that Paul Wilkinson didn't deliver on his promises, I was convinced that you would be Head of

FM." The Claimant said that he had been told by Mr Wilkinson the Site director that he "was the only person for the job" and that he had been led to believe by Mr Morris that Mr Morris would "sort it".

Clawback and contractual severance terms

28. The Respondent operates a contractual severance scheme. This has been negotiated with the Unions and is set out in a Collective Agreement known as the Employee Agreement (416 – 419). The Employee Agreement is negotiated with the Unions and amended from time to time. Any changes to the Employee Agreement need to be approved by the NDA. The terms of that scheme provide for enhanced benefits on redundancy significantly in excess of any statutory entitlement. They provide for payment of up to 12 months' salary, increasing with service up to a maximum of 12 years. When the Claimant was made redundant his final pensionable salary was £71,077 and he received a statutory redundancy payment of £6,466. (641) Had it not been for the operation of clawback he would have been entitled to a severance payment of £53,303.

29. Historically the severance scheme had been more generous. In the case of employees who were in service before 2007, the maximum severance payment was 22 months salary. In 2010 the scheme in relation to those employees had been amended to provide that such employees who lost their jobs through redundancy would either get their entitlement as at 31st December 2010 or the amount which would be provided under the amended Employee Agreement, whichever was the greater. (75) Worked examples showed that an employee on the Claimant's salary with 30 years' service (and no clawback) would be entitled to a severance payment of £120, 985.

30. Mr Anyon told us that the aim of the generous severance scheme was to

    a. encourage loyalty by giving employees comfort that they will be adequately recompensed and have sufficient cushion to enable them to find alternative work in the event that they are made redundant
    b. ensure staff harmony by avoiding undue concerns around the prospect of redundancies and unnecessary competition between employees as a result; and
    c. encourage volunteers for redundancy when redundancies are needed so as to minimise the disruptive and unsettling impact of compulsory redundancies.

31. However the scheme also provides for a clawback for members of particular pension schemes including the Electricity Supply Pension Scheme (ESPS) of which the Claimant was a member. The clawback provision restricts members of the relevant pension scheme from

receiving more in combined payments under the severance terms and from drawing down their accrued pension benefit under the scheme than they could have earned had they remained in employment until the age of entitlement to full pension. The provision has been the subject of discussion, and agreed with, the trade unions.

32. Pursuant to the terms, the amount by which the severance payment will be clawed back is equal to the amount by which the sum of:

a. the severance payment, including the statutory payment; and

b. the annual pension capitalised to age of entitlement to pension benefits,

exceeds

c. the total salary at current value payment to the age of entitlement a full accrued pension, less any employees and National Insurance and normal superannuation contributions but including 90% of the maximum payable under the employees' applicable bonus scheme.

33. The rationale for the clawback was set out in paras 28 and 29 of Mr Anyon's witness statement. It is worth quoting from this in full. Mr Anyon said this: –

> "By applying this clawback we believe that we can appropriately compensate redundant employees for their loss of employment and provide the comfort referred to above, while obtaining best value for the use of public money which funds Magnox. Given the way in which we are funded (through settlements from the NDA) we have finite resources and it is important for the ongoing success of the business, and thus the interests of all our employees, that our resources are appropriately utilised in rewarding and providing benefits to employees, and the relative needs of employees at different stages of their careers and with access to different sources of income (including any pension entitlements) are recognised and taken into account in the provision of severance benefits. In essence, it ensures that the cushion provided to employees losing their job by the enhanced severance payments, offered by Magnox is focused on those most in need of that cushion. This is expected by the NDA who approve the business case for redundancies and the associated costs and expect severance to be in line with the Employee Agreement.
>
> If we did not apply this principle, we would effectively be providing a windfall to employees who had a lesser need for that cushion. If a redundant employee was to receive a full severance payment at the point where they could also receive their full accrued pension benefits, then we would be compensating them for loss of earnings which they would not have experienced in any event. Even if, like Mike Peckham, they plan to continue to work after that time, the fact that they had the option of drawing a full accrued pension means they would still be less in need of the cushion provided by the enhanced severance payment than another employee who did not have that option."

34. In the ESPS the age of entitlement to full accrued pension is 63. It followed that any employee who was 63 when their employment terminated would receive no severance payment beyond the statutory minimum. For those in the ESPS who joined after 2007 clawback would

start to bite at the age of 62.2 on a tapered basis until, at 63, no severance was payable above the statutory entitlement. Employees who had joined before 2007 would generally have a right to a larger severance payment (see above). In their case clawback would begin to bite at a younger age. For example, an employee with 38 years' service might begin to see the effect of clawback applying at 59.25 years of age and the contractual element of the redundancy payment reducing to zero at 62.58 years. (R2)

35. Employees who joined the ESPS before the end of January 2003 had more generous pension terms in the event that they were made redundant. Those employees had a right to full accrued pension from the age of 50 based upon service up to the date of termination. Mr. Anyon told the tribunal that those members would be entitled to up to 22 months severance plus immediate pension. (172) He also told us that some 70% of the workforce had joined before 2003. (There was some evidence of other protected arrangements but we have heard no details of these). (597).

36. Some longer serving employees of the Respondent were members of a different pension scheme the Combined Nuclear Pension Scheme (CNPS). The CNPS has a retirement age of 60. We also understood from tables produced on the last day of the hearing that some longer serving women in the ESPS had a retirement age of 60 (R2) but we had no further details The Tribunal did not hear evidence of the operation of the clawback provision for those members.

37. As Mr Anyon told us, the clawback is a long-standing part of the severance terms. When the clawback provision was introduced the aim was to prevent employees from receiving a windfall. At that time employees who had reached the contractual retirement age were obliged to retire. It followed that if they received a full severance payment in the period immediately before their contractual retirement age then that employee would receive more by being made redundant than he or she would have received had they continued to work for the company until retirement. It can readily be seen that this would be a genuine windfall. A formula was therefore devised to prevent an employee receiving more through the severance scheme than he or she would have received if she had worked until the age when he or she was required to retire.

38. In 2006 age discrimination legislation was introduced. The Respondent changed it terms and employees were permitted to work past normal pensionable age to age 65, when they were required to retire. In line with this change, the terms of the clawback provision were amended to make age 65 the relevant trigger point for clawback (and thus no longer directly linked to the age of entitlement to unreduced pension benefits). Mr Anyon told the tribunal that "whilst this diluted the effect of clawback to an

extent, on the basis that it compared earnings to age 65 with severance plus capitalised pension to age 65, the logic associated with the avoidance of a windfall was preserved."

39. The default retirement age was removed in 2011. This meant that employees were entitled to continue to work beyond 65. This prompted further discussion of the clawback provision. At the time when the discussion with the Trade Union about this took place there was real pressure on the Respondent to reduce costs. The severance scheme had been identified as a target in that respect. There was a "risk of external intervention if appropriate steps were not taken". Mr Anyon told us that the aim of the clawback was "to direct compensation for loss of office to those most affected with the funds we have available." There was however no specific budget for severance as the Respondent did not know who might be leaving in any reorganisation.

40. The issue was discussed at a meeting of the Magnox Transition Agreement Working Group in January 2011. As a result the clawback provision was changed again. This time the trigger point for clawback was reduced from 65 to the pre 2006 position, effectively to age 63. The clawback was referable to the age at which the employee in question was eligible for "a full accrued pension". For those in the ESPS this was 63 (although women who had joined the ESPN's prior to 1988 were entitled to full entitlement to pension at 60).[1] There was no evidence that other options were considered at that time, though we accept that the unions understood the change and agreed it.

41. The revised arrangements were introduced with effect from 1st April 2013 and, in a Joint Statement, the Company and the Trade Unions agreed that the delay in introducing this change was objectively justified to "enable employees potentially affected to by the change to review their career plans." (75 to 87). Footnote 2 also stated that the Company and the unions considered the protected severance terms to be objectively justified and that compliance with legal requirements regarding age discrimination were met.

42. Claimant's grievance. On 25th February the Claimant submitted a grievance that he had been disadvantaged in respect of the clawback because of his age. He said that the default retirement age had been removed in 2010 and it was his intention to continue to work and to seek further employment. He should not be expected to utilise pension income payable at age 63 to facilitate the move to new employment. In accordance with the Respondent's policy a stage one grievance meeting was held on 7th March 2016. Ms MaGuire's position was simply that the clawback was a term of the Employee Agreement and she was not in a

[1] We have had no evidence about how the clawback works for those individuals.

position to change or amend the clawback to allow a different outcome. The Claimant was informed that the Respondent considered that the clawback was objectively justified.

43. The Claimant appealed the grievance outcome to stage 2 and that grievance was heard by Mr Mainwaring. The Respondent's response was the same - that this was a feature of the severance terms which it was not in a position to change. The rationale provided to the Claimant noted that "where there is a windfall the excess is clawed back until such time as the Statutory Redundancy Scheme level is reached. The clawback had been agreed collectively between the Respondent and the recognised Trade Unions and was believed to be objectively justified representing a reasonable approach to compensation for loss of office, bearing in mind the need to demonstrate best value for the use of public money."

44. When the Claimant left employment he had 9 years' service but 17years' pensionable service. He was entitled to an immediate pension of £15,103 and to lump sum of £45,000 plus an AVC lump sum. He had been intending to work, and to accrue additional pension, for a further 3 years to age 66. He received only statutory redundancy.

The relevant law

Unfair dismissal

45. Section 139(1)(b)9i) of the ERA provides that:-

> "An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to "… the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish."

46. By virtue of section 98 of the ERA, it is for the Respondent to show the reason for the dismissal and that it is a potentially fair reason for dismissal within the terms of section 98(1)(b). A dismissal for redundancy is a potentially fair reason for dismissal within the terms of that section.

47. Once an employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason "… 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 that question shall be determined in accordance with equity and the substantial merits of the case." (Section 98(4) of the ERA).

48. In cases of redundancy, it is well-established law, following the case of *Williams v Compair Maxam 1982 ICR 156*, that an employer will not normally

be deemed to have acted reasonably unless he warns and consults any employees affected, adopts criteria on which to select for redundancy which so far as possible do not depend solely on the opinion of the decision maker but can be objectively checked and which are fairly applied. A reasonable employer should also seek to minimise the effect of redundancy by redeployment within his own organisation. If an employer fails to warn or consult, a dismissal will be unfair unless the employer could have concluded, in the light of circumstances known to him at the time of dismissal, that consultation or warning would be utterly useless.

49. In *Morgan v Welsh Rugby Union 2011 IRLR 376* the EAT considered the *Compair Maxam* propositions and noted that in some reorganisations an employer is not assessing a number of employees against known jobs. Instead in some cases an employer has to appoint to newly created roles. In such cases "the employer's decision must of necessity be forward looking. It is likely to centre upon an assessment of the ability of the individual to perform the new role. An employment tribunal considering whether appointment to a new role is fair, simply has to apply section 98(4)." In Morgan the EAT said that a tribunal should keep "carefully in mind that an employer's assessment of which candidate will perform best in new role is likely to involve a substantial element of judgment. A tribunal is entitled and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98 (4)."

Age discrimination

50. Direct discrimination. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment. Section 13 defines direct discrimination as follows:-

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

Age is a protected characteristic. By section 13(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.

51. Section 5(1) of the Equality Act states that a reference to a person who has the protected characteristic of age is "a reference to a person of a particular age group" and "a reference to persons who share a protected characteristic is a reference to persons of the same age group" Section 5(2) defines an "age group as a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.".

52. Indirect age discrimination. Section 19 of the Equality Act 2010 provides

> "(1) 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.
>
> (2) For the purposes of subsection (one) a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if
>
> (a) A applies would apply it to persons with whom B does not share the characteristic,
> (b) 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,
> (c) it puts, would put B at that disadvantage and,
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Both direct and indirect discrimination can be objectively justified (section 13(2) and 19(2) (d)). In *Seldon v Clarkson Wright and Jakes 2012 ICR 716* the Supreme Court noted that the approach to justification of direct discrimination was not identical to the approach to justification of indirect discrimination. Justification of direct discrimination required "social policy objectives of a public interest nature" and not simply individual reasons particular to the employer's situation.

53. In *Loxley v BAE Systems Land Systems 2008 ICR 1348* a summary of legal principles relating to the test of justification is set out by Elias J (as he then was) "The burden of proof is on the respondent to establish justification once a prima facie case of discrimination is established. The classic test was set out in [Bilka-Kaufhaus]…. The Court of Justice said that the court or tribunal must be satisfied that the measures must correspond to a real need… are appropriate with a view to achieving the objectives pursued and are necessary to that end". This involves the application of the proportionality principle…. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary". The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it."

54. *In Dansk Jurist –og-Okonomforbund v Indetigs-og Sundhedsminteriet 2014 ICR 1* the ECJ held that held that a law which excluded employees over 65 from "availability pay" because they were entitled to receive a pension went further than was necessary to achieve the relevant employment policy and labour market objectives. On the other hand in *Ingeniorforeningen I Danmark v Tekniq* the ECJ found that it was justified to exclude those who had reached state retirement age from entitlement to a severance allowance amounting to between one and three months salary because it did not go beyond what was necessary to achieve the legitimate aim. In the latter case the ECJ found that the legislature had properly weighed the protection of younger workers against the protection of older workers.

Submissions–Unfair dismissal

55. For the Claimant Ms Bowen submitted that the real reason for the Claimant's dismissal was his age in that it was more cost-effective to dismiss him than another individual, because of the clawback provisions. She submits that the process utilised by the Respondent in reaching a decision to dismiss the Claimant was so flawed that redundancy cannot have been the principal reason for his dismissal.

56. In the alternative, she submits that the dismissal was unfair under section 98 (4). The Claimant had indicated an interest in the HFM role but during the consultation period and up to his dismissal there was no consultation or feedback to him in respect of that role. He also did not obtain feedback in relation to the commercial change manager role.

57. The delay in considering the Claimant for the position of HFM was unreasonable. Ms MaGuire did not support the Claimant in seeking alternative work and provided the Claimant with misleading advice when she told him he could only apply for spot 54 roles.

58. There was no interview or other attempt to obtain a reasonable assessment of the Claimant suitability for the role. Although the case of Morgan allowed employers an element of judgment in selecting employees for new roles, the level of subjectivity in this case was unreasonable and the conclusions reached by Mr Mainwaring were outside the actions of a reasonable employer. The Claimant was not advised either of the fact of, or result of, his assessment for the HFM role until June after he had left employment.

59. <u>For the Respondent</u> Ms Davis submits that principal reason for the Claimant dismissal was redundancy. The Claimant had advanced no evidence that Mr Gill was entitled to a severance payment and would have been more expensive to dismiss. Further there was no evidence that the Claimant's age and/ or entitlement to severance payment played any part in their assessment of the Claimant for the role of HFM.

60. As to the fairness of the procedure she submits that the process was entirely fair. The best fit stage was properly completed and the Claimant was appropriately considered for suitable alternative employment. The process collectively agreed with the Trade Unions was that there would be no competitive formal process for unfilled roles. The Claimant was not deemed suitable for that role.

<u>Conclusions- unfair dismissal</u>

61. The Tribunal finds that the principal reason for the Claimant's dismissal was redundancy. We do not accept, as the Claimant submits, that the principal reason for his dismissal was because he was cheaper to dismiss than other employees. The Tribunal has had no evidence which

would support that proposition. There was no evidence that the Claimant's severance cost or his age was an operating factor on the mind of Mr Mainwaring or Ms MaGuire.

62. As to the overall fairness of the process we find that the Claimant was properly consulted at the Best Fit stage. The reasons for the restructuring and the process to be adopted was disseminated across the organisation. The Claimant attended an outcome meeting with Mr Taylor and Ms MaGuire at which he was told he had not been best fitted to the Commercial Change manager and informed about the roles to which he had been fitted. The Claimant has not challenged his SCAF score. Although he complains that he was not properly informed as to why he did not get the Commercial Change manager role he did not challenge his SCAF score or ask for further details of the individual who had been best fitted to the role. He had a right of appeal, in which he could have sought further information, and chose not to exercise it.

63. The Respondent accepted that the Claimant had been advised to apply for roles at his spot/grade – and that he could in fact have applied for lower grade roles. However, the purpose of the ICF was simply to indicate a preference, it was not an application as such. The process which the Respondent undertook was in fact to consider him against all roles for which he might be suitable including lower grade roles. In fact of the two roles against which he had been "best fitted" one was at spot 54 and the other at a lower grade, spot 46. Ultimately the Claimant was not disadvantaged by having only applied for a role at spot 54.

64. The Claimant's main challenge to the fairness of his dismissal is that he should have been given HFM role as suitable alternative employment. It is his case that the Respondent deliberately delayed the finalisation of the Broad Role for the job to prevent him obtaining the job. We do not accept this. Ms Landi gave clear evidence that she had been pressing for the role to be finalised for some time. Once Mr Mainwaring was appointed to the role of Infrastructure Manager he drew up a draft Broad Role but this needed to go through a series of approvals including review and approval by the Magnox's Joint Council (of management and trade union representatives) before it could be released as a finalised role. The role also had to be graded and the grade approved. In fact, as it happened the role was advertised as a draft role profile before final approval had been obtained. The Change Managers were dealing with a significant number of roles and it is not credible to believe that there was a conspiracy against the Claimant by delaying the finalisation of this particular role.

65. The Claimant complains that during the consultation period and thereafter there was no managerial support to him by Ms MaGuire to assist him to seek alternative work. However, the Claimant had access to

the list of vacancies, sat next to Ms MaGuire and could have sought support if he needed it. This is a relatively senior manager who was aware of the process

66. It was accepted by Mr Mainwaring that he considered and rejected the Claimant for the role before Mr Gill came into the frame. The Claimant contends that this is unfair and that he should have got the role. He also contends that the process of assessment by which he was considered and rejected for the role was entirely subjective and unfair. He was not interviewed or invited to put forward why he might be suitable for the role. The assessment by Mr Mainwaring and Ms MaGuire was subjective and based on assumption and misconception. In particular the rationale which they gave referred to vague references to historic relationship difficulties and overuse of email. They did not take into account his pre Magnox experience.

67. The Tribunal considered this carefully. The process by which the Claimant was considered and rejected was informal. There was no interview process as in Morgan. The Claimant was also not informed that he was being assessed for the role so that he could put forward "his case".

68. On the other hand, what the Respondent did was in line with their own process as set out in paragraph 14 above. This makes it clear that at the second stage, the suitable alternative employment stage, there will be a paper-based job match of candidates against the requirements of available vacancies. Line managers may but do not have to be consulted on performance. If there is more than one potentially suitable candidate, or when more clarification is needed as to their suitability, informal discussions with individuals may take place. This process was outlined in the Employee Communication dated 9th February 2016 (145) which also made it clear that it was important that affected individuals proactively looked at the list of unfulfilled roles on the intranet and, where they felt that they might be suitable, contact the HR team. The Claimant did not contact either Mr Mainwaring (once he was in role) or HR to put his case at to his suitability, although he had indicated it as a preference in his ICF and had clearly been talking to Ms Weir and the Trade Union about it.

69. In this case the Respondent found that the Claimant did not match the requirements of the role. The Respondent's evidence was that there was no comparative assessment of the Claimant and Mr Gill. Rather the Claimant was assessed and rejected prior to any consideration of Mr Gill. It was not the Respondent's normal procedure to inform individuals potentially selected for redundancy when they had not been matched to a particular role. We do not accept, as submitted by Ms Bowen for the Claimant that "the comparative assessment of the Claimant and Mr Gill for the position of HFM illustrates that the decision was made

capriciously, or out of favouritism or otherwise on personal grounds". Mr Mainwaring was clear in evidence as to why he had rejected the Claimant for the role and the rationale was documented as set out above. We find that this was a genuine assessment of the Claimant's strengths and weaknesses, some of which was based on subjective Judgment (communication issues) and some of which was not - lack of project management experience and lack of team leadership experience since he had been at Magnox. (Mr Mainwaring was candid in accepting that although the role was at a lower grade than the one that the Claimant enjoyed, he had not regarded that as a bar to being matched to the role and that had he considered the Claimant to be suitable, he anticipated that he would have been able to obtain pay protection.)

70. We have some sympathy for the Claimant because he wanted the job, and was not kept in the loop. It would undoubtedly have been better for the assessment to have been shared with the Claimant so that he could challenge it. However, the Respondent's process was clearly set out and communicated and at that stage did not involve an interview or input from employees unless there was a tie between 2 candidates. Mr Mainwaring told us that the Claimant worked close by and could at any time have come to him to "make his case" but he had not done so. Neither Mr Morris nor Mr Wilkinson were ever in a position to promise the Claimant the job, and in any event Mr Morris was not in post beyond March 2016. We also bear in mind that at this stage it was not a question of which employee should be selected for redundancy. That took place at the Best Fit stage. The issue to be considered at the suitable alternative stage was which of the various displaced employees should be given an unfilled role. Having considered the whole process in the round, and conscious of the fact that the process had been extensively negotiated with the Trade Union and made plain to all the employees we consider that overall the process by which the Claimant was considered and rejected for the HFM role was not unreasonable or in breach of section 98(4).

Conclusions - age discrimination - the failure to get the HFM role

71. The tribunal has had no evidence which would support the proposition that Mr Mainwaring or Ms Maguire or anyone else at the Respondent considered the fact that the Claimant was 63 and/or would not be entitled to severance to be relevant to the issue of his suitability for the HFM role. We are satisfied that the burden of proof does not shift to the Respondent in this regard and that there is no material from which the Tribunal could draw an inference of direct age discrimination.

Submissions - age discrimination-clawback

72. For the Claimant Ms Bowen submits that the application of the clawback provisions amounted to direct and indirect age discrimination. She submits that the age discrimination cannot be objectively justified. For the Respondent, Ms Davis accents that the impact of the clawback provision amounts to direct discrimination on grounds of age but states that it is objectively justified.

73. Both counsel referred to a significant number of authorities including *Seldon v Clarkson Wright and Jakes 2012 ICR 716, McCulloch v ICI 2008 ICR 1334, Loxley v BAE Systems Land Systems 2008 ICR 1348, Kraft Foods UK v Hastie 2010 ICR 1355, Lockwood v Department of work and Pensions 2014 ICR 1257,Ingeniorforeningen I Danmark v Region Syddanmark 2014 ICR 1, Dansk Jurist –og-Okonomforbund v Indetigs-og Sundhedsminteriet 2014 ICR 1; ; Ingeniorforeningen I Danmark v Tekniq and Odar v Baxter Deutschland GmbH 2013 2 CMLR*

74. Ms Bowen submits that the clawback arrangements for the scheme amounted to both direct and indirect discrimination which could not be objectively justified. Insofar as indirect discrimination was concerned she submitted that the clawback arrangements in the scheme amounted to a PCP capable of being applied to all staff who are entitled to severance payments but which put persons who were over 62 and the Claimant at a particular disadvantage. She also submits that the clawback provisions amount to less favourable treatment because of age. They operated on the basis of retirement entitlement to full pension which was of itself a function of age.

75. She submitted that the Respondent's explanations for the clawback boiled down to the issue of cost. Saving money was of itself not a legitimate aim unless it was combined with other factors (*Cross and others v British Airways plc 2005 IRLR 423*). Although clawback severance schemes had been upheld by case law in the past, each decision was case specific and all preceded the removal of the default retirement age. Case law in the ECJ suggested that such schemes were not justified.

76. <u>For the Respondent</u> Ms Davis submitted that this was a case properly considered as direct discrimination. She accepted that the clawback provision was directly discriminatory because of age but submitted that it was objectively justified. It had been agreed with the Trade Unions who considered the clawback to be justified. It was important that severance payments be focused on those most in need of a cushion. As a matter if intergenerational fairness the Respondent had to strike a balance between the needs of the employees of different ages and circumstances while obtaining best value for the use of public funds.

<u>Conclusions age discrimination-clawback</u>

77. We agree with Ms Davis that this is a case more properly considered to be direct rather than indirect age discrimination. The entitlement to severance payment is linked to the age of entitlement to pension, which is of itself a function of age. It was common ground that Ms Bradley and other younger employees would receive severance. It was not disputed that the clawback was directly discriminatory—the issue was whether the Respondent could justify it.

78. As such, as set out in Seldon, justification for direct age discrimination requires "social policy objectives of a public interest nature" and not simply individual reasons particular to the employer's situation.

79. In this case Mr Anyon gave evidence about the aims both of the severance scheme itself and of the clawback provisions. The aims of the clawback are as set out in paragraph 32 above. "In essence, it ensures that the cushion provided to employees losing their job by the enhanced severance payments, offered by Magnox is focused on those most in need of that cushion….. If we did not apply this principle, we would effectively be providing a windfall to employees who had a lesser need for that cushion.

80. We accept that the enhanced severance terms are an important part of the employee package. We also accept that severance scheme, including the clawback, has been discussed and negotiated with the recognised Trade Unions and amended from time to time in agreement with the Unions. The severance scheme is in recognition of the flexibility that is expected of employees in a business which is constantly decommissioning and closing parts of the business so that most will eventually be made redundant.

81. The history of the clawback provision (see above) is relevant to our considerations. When the clawback provision was first operated the aim behind the clawback was to prevent employees from receiving a windfall. A formula was therefore devised to prevent an employee receiving more through the severance scheme than he or she would have received if she had worked until the age when he or she was required to retire. At this time the scheme was justified in preventing a windfall. It was similar to the original scheme referred to in Loxley before it was amended (above).

82. In 2006 age discrimination legislation was introduced. In line with this change the terms of the clawback provision were amended to make age 65 the relevant trigger point. The cost to the Respondent increased but the logic associated with the avoidance of a windfall was preserved.

83. When the default retirement age was removed the clawback provision was changed reducing the trigger point from 65 to the pre 2006 position,

effectively to age 63. The clawback was referable to the age at which the employee in question was eligible for "a full accrued pension".

84. The rationale for the severance scheme was to encourage loyalty, ensure staff harmony by avoiding concerns around the prospect of redundancy and to encourage volunteers for redundancy. The aims of the clawback were to obtain value for the use of public money. Mr Anyon in his evidence sought to justify the clawback by reference to (a) cushioning and (b) avoidance of windfall. As to the latter he said that if the Respondent did not apply this principle "we would effectively be providing a windfall to employees who had a lesser need for that cushion. If a redundant employee was to receive a full severance payment at the point where they can also receive their full accrued pension benefits, then we would be compensating them for loss of earnings which they would not have experienced in any event." He said that those who to wished to continue to work would have less need of the cushion than those who did not have that option. He was eliding the windfall and the cushioning argument though the two are in reality distinct.

85. The issue for the Tribunal is whether the clawback provision, which disadvantaged those within a year or so of normal retirement age compared with younger employees, was a proportionate means of achieving a legitimate aim. The aim should refer to "social policy objectives of a public interest nature" and not simply individual reasons particular to the employer's situation.

86. As originally devised the purpose of the clawback was to prevent a windfall. However the clawback arrangements, which were designed for the prevention of a real windfall, have now been carried over in circumstances where that rationale for clawback no longer applies. Mr Anyon, in his justification continues to refer to a windfall. (That is also part of the explanation give to the Claimant in his stage 2 grievance.) However since employees are no longer required to retire at 63, the payment of severance to an employee who is 63 and who had intended to continue working cannot be said to be a windfall. This is because that employee can continue to work, to receive full salary and to accrue additional years of pension. He does now suffer a real loss if he is made redundant. Although the Claimant would be able to draw his pension he had hoped to be able to accrue additional years' service and to save his lump sum for a later date.

87. We accept that there is some force in the cushioning argument and that it is legitimate to devise a scheme that aims to ensure that severance money should be distributed to those most in need of it. What was the issue for the Tribunal was whether the means of doing this was proportionate to the discriminatory effect. Did the clawback go beyond what was reasonably necessary to achieve the identified social policy

objectives? Was it proportionate to expect employees aged 63 and over to use their pension provision to cushion the effect of redundancy rather than, for example, to reduce the terms of those longer serving employees who had protected terms. Would that be feasible? Was it legitimate to assume that those who were 63 were less in need of a cushion than those who were younger? Did it take longer for those employees to find another job? What was the cost of deleting the clawback altogether? How many employees, in broad terms were likely to be affected? What percentage of the work force chose to work beyond 63?

88. The burden of establishing justification is on the Respondent. The Respondent not only has to show that it has a legitimate aim, but also that the means chosen to achieve that aim are necessary and proportionate in that the objectives pursued could not be attained by less restrictive or discriminatory measures. We find that the Respondent has failed to establish this. The Respondent has started with a measure, designed for, and justified in, different circumstances. When those circumstances changed it adopted the same measure without considering those changed circumstances. There was no evidence before the Tribunal that the Respondent had considered whether the legitimate aim identified (cushioning) could be achieved by less discriminatory means. It had not measured the impact of the clawback on (a) the employees and/or (b) cost. Was it a genuine burden on the undertaking? We were given large numbers of documents (though not taken to all of them) but ultimately the explanation was no more than what Mr Anyon provided as set out above.

89. Mr Anyon had not been present at the discussions in 2011 and the documents that we were taken to did not demonstrate that the Respondent had genuinely applied its mind to the proportionality issue--whether other measures might achieve the aim. The Respondent says that the severance scheme had been identified as a target and there was a risk of external intervention if appropriate steps were not taken. However that analysis serves only to suggest that the purpose behind the retention of the clawback and the age reduction to 63 was a desire not to rock the boat rather than any genuine analysis of proportionality. He also says that there was a risk that the NDA would not approve the Employee Agreement but the issue for them was likely to be the overall cost rather than the way the benefits were allocated.

90. The evidence before the Tribunal showed that in 2011 the Respondent and the Trade Unions wished to preserve the scheme with as few changes as possible. In the footnote to the Joint Agreement on Protected Severance Terms (460, 597) the unions note that the severance provisions are highly valued and they wish them to be subject to <u>minimum change</u> in seeking to ensure compliance with legal requirements in respect to age discrimination. The same footnote goes

on to state that the Respondent and the Unions viewed the protected severance arrangements as "fully objectively justified as a means of ensuring that their legitimate aims are met and that compliance with legal requirements in relation to age discrimination are met.". The legitimate aims are not spelt out, nor is there any explanation of the basis upon which the Unions have reached that conclusion. The wording appears to be formulaic.

91. In response to questions from the Tribunal it appears that the Respondent had not undertaken any analysis before or since 2011 of how the clawback would or had operated or sought to quantify the amount of savings that they had made through the clawback provision and to consider whether those savings could be achieved by less discriminatory means. After questions from the Tribunal the Respondent provided some additional material on the fourth day of the hearing including an email dated 1st December 2011 in which some analysis had been done of the number of people who would be affected by the change in the clawback provisions from age 65 to Normal Retirement Age (i.e. 63 except the some women for whom NRA was 60). We did not consider that this took us much further.

92. In Loxley the employer operated a similar scheme to the one which we are considering. Loxley concerns a scheme which gave an entitlement to a redundancy payment based mainly on length of service. Only those under 60 were so entitled and those between 57 and 60 had their payments reduced according to tapering provisions. The rationale for excluding those over 60 was that as employees were required, at that time, to retire at 60 the tapering requirements and the exclusion of the over 60s were designed to prevent those close to retirement from receiving a windfall in the event that they were made redundant. In 1996 the retirement age was raised to 65, though employees could still take their pension from the age of 60 without penalty to their accrued benefits. One effect of this change was that thereafter it could not necessarily be said that employees denied enhanced redundancy payments after the age of 60 were justifiably being prevented from obtaining a windfall. Although the Employment Tribunal found that the clawback provisions in that case were objectively justified on appeal to the EAT the case was remitted on the basis that the Tribunal had not grappled with the question of whether it was proportionate to exclude those over 60 from any redundancy payment altogether.

93. In this case however, on the evidence before us, we find that the Respondent has failed to establish that the clawback was a proportionate means of achieving a legitimate aim.

94. The issue of remedy is adjourned to be heard on 4th December 2017 though it is anticipated that the parties should be able to reach an

agreement as to the appropriate amount. If they do reach settlement the tribunal should be informed as soon as possible so that the date can be vacated.

Employment Judge Frances Spencer
27th July 2017