



EMPLOYMENT TRIBUNALS

Claimant: Mrs Thompson

Respondent: Miller Graphics Corniche Limited

Heard at: Leeds (by video) **On:** 6 and 7 December 2021

Before: Employment Judge Knowles
Ms E McAvoy
Mr Q Shah

Representation

Claimant: Mr Germaine, Claimant's friend
Respondent: Mr Shepherd, Solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:

1. The Claimant's claim of age discrimination is not well founded and fails.
2. The Claimant's claim of unfair dismissal is well founded and succeeds.
3. There was a 25% chance that had a fair redundancy process been followed by the Respondent the Claimant would, in any event, have been dismissed by reason of redundancy. Any compensatory award shall be reduced by 25%.
4. There shall be no uplift or reduction in compensation for failure to follow the ACAS Code because there is no statutory ACAS Code on redundancies; ACAS publish only Guidance upon redundancy.
5. A remedies hearing shall now be listed to be heard by this Tribunal by video with an estimated length of hearing of 1 day.

RESERVED REASONS

Evidence

1. This hearing was undertaken remotely by Cloud Video Platform.
2. It was a final hearing heard over 2 days in terms of liability.

3. The parties produced a joint bundle of documents, 229 pages. We were also provided with an excel spreadsheet containing the Claimant's time capture records although this was not referred to other than through the documents produced from that which are contained in the bundle. We were also provided with a skills matrix which was added as page 229.

4. The Respondent called the following as witnesses:

- a. Ms Barnes, General Manager (dismissing manager)
- b. Mr Bataillie, Managing Director (appeals manager).

5. The Claimant also gave evidence.

6. Each witness produced a written statement of evidence.

7. Each witness took an oath by affirmation.

8. Both parties produced written submissions.

Issues

9. The Claimant's case concerns her dismissal, purportedly by reason of redundancy, on 23 December 2020. The Claimant claims that her dismissal was unfair and that she was selected because of her age (62 at the time of dismissal).

10. The issues for us to consider are as follows.

Unfair dismissal

11. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.

12. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

13. The respondent adequately warned and consulted the claimant;

14. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

15. The respondent took reasonable steps to find the claimant suitable alternative employment;

16. Dismissal was within the range of reasonable responses.

Direct age discrimination

17. The Claimant says her age group is 60 to 65 and she compares herself with people in the age group 50 or less.

18. Did the respondent do the following things:

- a. Dismiss the Claimant?

19. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and

the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than A, M, P and N.

20. If so, was it because of age?
21. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
 - a. To attain a balanced workforce going forward.
22. The Tribunal will decide in particular:
 - a. was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - b. could something less discriminatory have been done instead;
 - c. how should the needs of the claimant and the respondent be balanced?

Findings of fact

23. We made the following findings of fact on the balance of probabilities. These findings are not intended to cover all of the evidence heard over the two days of the hearing. These are the material points in evidence which are relevant to the issues and to our determination of the issues. Where a document is referred to and a number or numbers appear thereafter in brackets, then unless otherwise stated that is a reference to the page number in the joint bundle of documents.

24. The Respondent provides printing technique and digital brand imaging services. Their services include delivering printing plates and sleeves, including artwork and reprographics. They are part of an international business, the European Miller Group. In the UK they have offices in Bridlington.

25. The Respondent's structure chart from September 2020 (193) shows them to have, at that time, 21 employees in their UK business.

26. The Claimant began her period of continuous employment on 1 July 1984.

27. Her latest contract of employment states that her job title is Pre-Press Operator / Pre-Flight Operator (46). This was issued in 2012.

28. The Claimant was part of team known as the Studio Team. This comprised a number of Artists / Quality Controllers and 3D Artists (193).

29. The Claimant has clearly undertaken several different tasks during her employment and worked for many clients. She is a long-serving employee.

30. In 2019 she spent most of her time undertaking reprographics but also spent significant working hours in artwork and pre-flight (216).

31. Pre-flight has been described to us as the handling of files which come in from clients and are checked and prepared before they go into production.

32. Most of the work that the Claimant undertook in terms of reprographics was for Client A.

33. Client A was a significant client for the Respondent. Client A began to transfer its work to another company in 2020. This had a significant impact on the work undertaken by the Claimant between January and May 2020. During this period the work split between reprographics and artwork was fairly even (216).

34. The proportion of work undertaken by the Claimant for Client A is shown in the graphs where Client A is removed from the data (217). It is clear that the majority of the Claimant's work was for Client A and that in 2019 most of that work was reprographics work and that in 2020 that work began to decline significantly.

35. The Respondent was in fact running that contract out and completing ongoing matters. Client A served notice on their contract to end August 2020. The contract was worth £400,000 to the Respondent in 2019. Even taking into account income from the run off work for Client A in 2020, and the other impacts of the pandemic, the Respondent suffered a trading loss of £260,000 in 2020.

36. The Claimant was not the sole employee engaged on the account for Client A. Some reprographics work was also undertaken by other studio team members, AW and MB, for Client A. But it is clear that they predominantly work on another account, Client B. Other than a brief period of training on the account for Client B, the Claimant was historically not part of the team that covered that account. Client B was another major client for the Respondent.

37. From June 2020 the Claimant was placed onto furlough leave. On 3 July 2020 the Claimant returned to work 2 days per week on flexible furlough, then from 12 October 2020 resumed full-time work. However, the Respondent placed her on full furlough leave again 6 November 2020. The Claimant does not work again after this point.

38. The Respondent determined that due to the impact of the pandemic and the loss of Client A they must make significant costs savings. Two employees left through natural wastage in October and November 2020 but even taking those into account the Respondent decided to make redundancies to further reduce overheads. The Respondent determined that they would need to make 2 redundancies from the Studio Team. Ms Barnes states that she met with the Quality Manager and Client Services Manager on or around 30 November 2020 to obtain their input on the pool or pools for selection and what they needed going forwards. No contemporaneous documentation concerning the development of pooling or selection processes have been produced.

39. On 8 December 2020 the Claimant received a telephone call from Ms Barnes. The Claimant states, and the Respondent does not dispute, that she was advised that she had been provisionally selected for redundancy and was asked if she would be willing to take voluntary redundancy.

40. The above was confirmed in writing on 8 December 2020. The Respondent sent a without prejudice letter with an offer of an enhanced redundancy payment in return for a settlement agreement. Under separate cover (56), they wrote the following to the Claimant concerning her selection:

“Provisional selection for redundancy

It is with regret that I write to inform you that you have been provisionally selected for redundancy.

As a result of the extremely quiet trading conditions, falling profitability and low sales of clients due to Covid-19, the Company has undertaken a full review of its business in order to identify areas in which costs can be reduced as it can no longer sustain the current staff levels. We have taken advantage of the Government Furlough scheme to extend the difficult decision for as long as possible. but unfortunately we cannot sustain it any longer with no defined timeline in sight of

when and how the market will pick up again from the effects of Covid-19.

We have two redundancies to make from our studio using a fair selection and pooling process. As an Artworker, you are in a fair pool of 2. We have prepared criteria based on the needs of the team/business going forward. Your scorecard is as follows:

Artwork Department Experience 5 (Maximum score of 5)

Other studio skills (Retouch (2), Reprographics (2) & QC (1)) 1.5 (Maximum score of 5)

Additional Roles (Within Miller Group) 0 (Maximum score of 5)

Total 6.5

As you have scored lowest in the pool of 2, the purpose of this letter is therefore to inform you that you have been provisionally selected for redundancy. Further details on the pool scoring will be discussed in the meeting next week.

I must stress that no firm decision has been taken regarding your future employment at this stage.

Would you therefore please attend a phone call or teams meeting with me on Wednesday 16th December to discuss your provisional selection for redundancy at 10am? You have the right to be accompanied by a work colleague or a trade union representative at this meeting. Due to the current situation, please confirm via telephone or email.

I look forward to hearing from you.”

41. The Claimant responded 11 December 2020 (78) asking for the consultation period to be extended to mid-January to allow her to reflect on the offer of voluntary redundancy. She also stated *“I do have concerns about the redundancy selection procedure which lack transparency and also about the selection criteria which has a very narrow focus, I will however wait to air these concerns following a final decision on my redundancy”*.

42. There follows some confusion over whether or not the meeting on 16 December 2020 was postponed.

43. On 16 December 2020 Ms Barnes emails the Claimant as follows:

“Good Afternoon Belinda,

Due to the confusion regarding the Consultation meeting originally scheduled today, I will address the concerns you raised in your original email response dated Friday 11'h December at 16:55. (Email attached)

The Redundancy Selection Process & Transparency;

The need for redundancy in Miller Graphics Corniche/Miller Graphics UK Ltd is a direct result of the extremely quiet trading period we have sustained for the majority of 2020. Upon full review of the business, it is clear we have more resource than we need to service the work intake now and going forward for the foreseeable future

The loss of the [Client A] account in particular has made a huge difference in the studio production schedules and how busy they are, as well as the lack of growth in both existing and new artwork business we had budgeted, prepared for and

expected during 2020. With both these points in mind, we have no alternative to reduce costs in order to preserve the business.

All areas have been considered and reviewed. As you are aware, we have naturally seen a reduction in other areas (Management, Technical and CSR) with [WL] moving on and [IW] retiring, so both these areas have no further room to reduce headcount / costs.

Pool of 2

As I stipulated on the letter to inform you of the provisional selection for redundancy, you were in a fair pool of 2.

You were pooled with [NT] who is another artworker with similar skills and experience to yourself. In terms of scoring, [NT's] scorecard for experience and other skills is the same as yours, however as you know [NT] has an extended role working on group tasks and therefore scored higher than you on this criteria.

It could be argued you were in a pool of 1 as your skills are not identical to those of [NT's]. If this were the case, the selection Criteria would not be necessary. It could also be argued that the pool is extended to the entire studio, however again the scorecard would still not work in your favour I am afraid. If you need me to elaborate on this then please let me know

The Selection Criteria;

Upon review of the studio resource we have, a narrow focus was not taken when deciding on the selection process.

Now more than ever we are looking at multi skillset studio operators/artists that can quickly and efficiently adapt to the many different customers we services and value added roles within the UK business, hence the focus of two of the criteria in the scorecard being relevant to other skills and additional roles. I have not chosen to use criteria such as speed and output as this is difficult to compare from one job to the next and can be very subjective and personal.

It goes without saying that your experience within the department would score maximum points, you have been employed by Miller Graphics (formally Cornice Fine Arts) for many years and gained a wealth of experience in the pre-press artwork industry during this time. This is how we arrived at your score of 5.

With regards 'Other Studio Skills', we have split this between Retouching, Reprographics and Quality Control — along with artwork, these are the main studio tasks in the business today.

The Score of 5 was split as follows:

Reprographics out of 2

Retouching out of 2

QC out of 1

Your score of 1.5 was derived as follows;

Reprographics: 1 out of 2 You have been trained in reprographics basics and have worked on the [Client A] account. Unfortunately this work has been transferred in house by [Client A] so we no longer service the account

Retouching: 0 out of 2 To my knowledge you have no experience in this department that is relevant to the customers we service today.

QC: 0.5 out of 1 You carry out limited quality (buddy) checks between yourself and [NT], but this is very limited QC work.

Finally - Additional Roles within Miller Graphics. As you will be aware, some members of our UK team are involved in teams created and managed at Group level such as the MBC team. You are not involved in any such teams/roles and therefore scored 0 out of 5 for this criteria.

Finally, I note you have chosen someone to support you with your consultation meetings, can I please check they are either an existing employee or a trade union representative? The consultation meeting to discuss the points above further and explore any other options is now scheduled for 10:30 on 23rd December via telephone call.”

44. The Claimant has stated that she was surprised that she was pooled as an Artworker with NT. She has acknowledged that NT undertook Artwork. However she states that she was a multi-skilled reprographics technician, like AW, MB and PW.

45. Ms Barnes has stated that the Claimant’s work in reprographics was mainly for Client A and that work no longer existed.

46. Nonetheless the Respondent does not dispute that the Claimant did some reprographics work for other clients (albeit in far lower quantities) and had continued to do so for Client A in 2020.

47. Nor do they dispute that that was part of her duties, irrespective of her job title.

48. As we explained earlier, her job title in it’s historical 2012 form indicated that the Claimant was employed in areas other than artwork alone.

49. So far as there is a dispute in the evidence as to whether the Claimant was an Artworker or and Multi-Skilled member of the Studio Team, we found that the Claimant’s evidence is to be preferred.

50. Ms Barnes suggestion that the Claimant was an Artworker in role simply because they had lost the account for which she did most reprographics appears to us illogical and unsustainable.

51. She considered the matter from a perspective of what work the Respondent would have for the Claimant going forwards, all other things remaining equal, as opposed to what the Claimant had been employed to do and had been doing up to that point.

52. The fact that there had been a diminution in work for one client (however large and important that client) does not change as a matter of fact what the Claimant was employed by the Respondent to do.

53. The Claimant was employed in a multi-skilled role, as an artworker, reprographics technician and to undertake other production duties. She was not employed as an Artworker nor could that be described as the main element of her work prior to her dismissal.

54. Although the selection criteria and scoring are set out in the email dated 16 December 2020 (80), there is no substantive explanation of the weighting applied to elements of the scoring, such as why “other roles” was ascribed such a high potential score of up to 5.

55. An explanation of this would be important to the Claimant because she was being pooled with someone who had another role, as a member of the Marketing, Business and Communications (MBC) team which is mentioned in the email. This single role has provided NT with 5 points, which were determinative of the outcome of the selection process. There is no scoring criteria, e.g. what would score between 0 and 5 points, or how a holder of another role or roles would generate 5 points. NT appears to have been awarded 5 points simply because he holds an additional role.

56. The Claimant meet with the Respondent on 23 December 2020. The meeting last for 70 minutes and the Claimant recorded the meeting and produced a transcript (88-113).

57. The Claimant has conceded that she was afforded the opportunity to make representations at that meeting.

58. Ms Barnes does answer the points that the Claimant raised.

59. However the Claimant was clearly asking how she was pooled as an Artworker when she undertakes reprographics but the answer given is that most of her work in reprographics is for Client A and that work is no longer available. The Claimant specifically asks why she has not been pooled with others in the Studio Team and why her reprographics skills could not be deployed to work on other clients. The Claimant receives the answer that she is not experienced on the other accounts.

60. Whilst the Claimant was raising significant challenges to the pooling and selection criteria during the meeting, which was the first consultation meeting, the meeting concludes with Ms Barnes confirming that the Claimant was to be made redundant. There was no reflection on the points she had raised, the decision was simply confirmed at the meeting. No further consultation meeting takes place.

61. On the same day, 23 December 2020, the Claimant is sent a letter confirming the termination of her employment with immediate effect. She is advised that she will receive a redundancy payment and her notice in lieu (114). The Claimant is told that she has the right to appeal. The letter goes on to state:

"I must stress, the decision on redundancy has been based on the needs of the Business now and going forward into 2021. There is no question on your artwork skills or experience of the past, it is just unfortunate all the roles/duties you have carried out to this date can either be absorbed into the existing studio or are no longer required going forward to support a full time position. Miller Graphics Corniche and UK have suffered substantial losses during 2020 due to extremely low work volumes and the loss of [Client A].

We have had no other choice than to make redundancies and reduce our costs.

Your point regarding the role that [NT] carries out at Group level for the Marketing, Business and Communication function of the business – [NT] has been in this role for 2 years and it is an integral part of The Miller Graphics Group in order to take all Miller Businesses forward."

62. Although it is unclear why Ms Barnes elected to make two separate communications to the Claimant on the same day, Ms Barnes also emails the Claimant 23 December 2020 (115) setting out the following:

"For the sake of full transparency when looking at the redundancy process from the beginning, the following members of the studio team were pooled as follows based on their main roles/sub-departments in the studio;

Quality — Pool of 1

[SR] - (QC Cover provided by Quality, Sleeve and Print Supplies Manager [DS])

Reprographics — Pool of 1

[AW] - (Full time Reprographic Artist all accounts plus additional artwork cover)

Artwork - Pool of 2

[Claimant] — (Artworker Plus reprographic on [Client A] but Account no longer held)

[NT] - (Additional role within Group on MBC team)

Retouching - Pool of 2

[MB] — (Retoucher plus additional Reprographic and Artwork)

[JR] - (Senior Retoucher)

[PW] — Pool of 1 — [PW] has arrangements under a separate agreement made in 2018 and is now only contracted to 2 days a week to cover the Sleeve work under [another client]. [PW] also has experience to provide cover in Reprographics retouching and artwork

3D Team — Pool of 3

[CY] - (Plus reprographic, artwork and IT/systems support)

[EC] — (plus limited artwork on non-reprographics accounts)

[DM] — Senior BD & Animation Artist

As already mentioned, we naturally lost members of our Customer Services and Management team with [IW] retiring and [WL] moving on to other employments, so these departments have not been included in the redundancy process.

The decision was taken to make the redundancies form the Artwork and Retouch pool as these are the only parts of the studio where the pool is more of than 1, and therefore the second 'role' can be made redundant. When making the decisions, the criteria was based on where we are now as a business and moving forward."

63. We note that this is the first recorded explanation of pooling. As noted earlier, no contemporaneous note of the development of pools or the selection criteria has been produced.

64. The Respondent has not produced any redundancy policy.

65. There appeared to us to be some contradiction when we looked at the letter of redundancy where it explains that "there is no question on your artwork skills or experience of the past, it is just unfortunate all the roles/duties you have carried out to this date can either be absorbed into the existing studio or are no longer required going forward to support a full time position". This appears to suggest that there had not been a pool or a selection between members of a pool, as it focusses on the Claimant's duties rather than those of a pool.

66. There also appeared to be some inconsistency in the email explanation sent the same day. We noted for example that the Respondent has pooled MB as in the

“retouching pool of 2”. However, MB spent most of her time in 2019 and 2020 (215, 216) undertaking reprographics. She also undertook artwork. If Client A was taken out of the equation (as was said to have been how the Claimant had been treated) then her work was to remain predominantly reprographics, not retouching (217). There is a material inconsistency in the pooling here; MB is not placed in the pool for her majority area of work including or excluding her work for Client A. We also note that in being involved in retouching work, MB did do work that the Claimant did not.

67. According to the email 23 December 2020, only AW is placed in the reprographics pool, described as a “pool of one”. Any pool of one is not in fact a pool for selection. There are no redundancies within that pool because there was only one reprographics artist. We note that the Claimant’s job title in use upon her emails in 2020 was the same, reprographics artist. AW is described in this email as a full-time reprographics artist all accounts with some artwork cover. AW did broadly the same level of artwork as the Claimant yet the Claimant is pooled as an artworker whereas AW is placed in a pool of one in relation to reprographics. The quantity of reprographics undertaken by AW is higher than the Claimant, but is not much greater than MB. These three individuals are pooled apart. As a matter of fact we found this factually inconsistent with the explanation for pooling that the Respondent provided. Specifically, we found that the concept of specialisms being the rationale for the pooling to be contrary to the application of the pooling decisions.

68. The Respondent has not produced to us a list of job titles for the Studio Team or any job descriptions. The description of the analysis undertaken by Ms Barnes appears to focus upon her determination of specialisms within the team, but there has been no independent evidence that particular individuals within the Studio Team (save for the 3D team and QC role, which the Claimant accepts are distinct specialised roles) were actually appointed into different roles as opposed to simply being members of a multi-disciplinary team who were allocated different clients and worked according to what those clients needs dictated.

69. We found Ms Barnes to be quite adamant in fulfilling business need going forwards. We found her evidence in cross examination quite telling. When it was put to her that the Claimant could have worked on the Client B account, Ms Barnes replied *“why would I take the work off experienced people, trained on that account. [The Claimant] did not have experience on the account”*.

70. Both of the Respondent’s witnesses have accepted that that the Claimant had the skill and capability to undertake the work on the Client B account.

71. The Claimant has had excellent performance appraisals. In each of the years 2018, 2019 and 2020 her performance appraisals refer to her being trained to work on the Client B account. In 2018 it is recorded (136) that there has been *“not enough training for [Client B]. We just need to give you some jobs and get you signed off”* and *“our plans to the end of the year are to get you over the line with [Client B]”*. In 2019 (139) it was recorded *“train on [Client B] and [another major client] so underpin and support on key accounts work, then we have a team who are able to cover each other, whilst we are training”*. In 2020, (142) *“we talked about generally most failed checkpoints for the [Client B] account, plans for reviewing...”*.

72. Ms Barnes stated in evidence that she did not have months to train the Claimant to work on Client B. Mr Bataillie suggested that it would have taken weeks. The Claimant suggested that it would have taken a few days to a week.

73. The Respondent has described the Claimant as having the skill and capability to do the work but has not explained why it would have taken any great period of time to train her to migrate to other clients and undertake reprographics for them. In the light of the 2018 written evidence of needing just to be given *“some jobs then get you signed off”*, we found that the Claimant’s evidence is to be preferred as to the length of time it would have

taken to migrate her to work on Client B's work.

74. Having considered all of the witness evidence and considered the documentation, we found that on the balance of probabilities the Respondent had predetermined that the Claimant's work was most impacted by the loss of Client A and that this was the true reason for her selection for redundancy. They did not wish to entertain any prospect of the Claimant applying her skills to other accounts. They wished to retain only those people presently serving the other accounts. The purported pooling and selection criteria applied to the narrow pool that the Claimant was put into appeared to us on balance to be a means to justify that end.

75. The Claimant did exercise her right to appeal and an appeal hearing took place with Mr Bataillie on 15 January 2021. We have considered the letter rejecting the appeal, sent on 21 January 2021 (177-181). In this outcome letter we felt that Mr Bataillie had simply accepted all of Ms Barnes' explanations and reiterated them to the Claimant. There does not appear to have been any independent review of the Claimant's representations. For example, he concludes "put simply, we had two employees doing artwork and we needed only one". With all due respect to Mr Bataillie, on any reading of page 115 (Ms Barnes' email 23 December 2020 concerning the pools) there are seven members of the Studio Team referred to as undertaking artwork.

76. We have heard evidence about a post-termination vacancy advertised by the Respondent in March and April 2021 and there appeared to have been an assertion by the Claimant that she should have been offered this role as part of the duty to consider alternative employment. However, we found this not to be relevant to the fairness of the Claimant's dismissal because the vacancy was not envisaged and did not exist prior to the Claimant's termination of employment on 23 December 2020.

Submissions

77. The Claimant made the following submissions:

- a. Mrs Thompson was an extremely long serving member of the studio team at Miller Graphics Corniche, she had service and experience going back to 1984.
- b. For many years she had been entrusted to work on business-critical key accounts using her multiple skills.
- c. She had the ability to work on any account presented to her - any account she was assigned to, she could process.
- d. In December 2020 Mrs Thompson was contacted out of the blue whilst on furlough and informed she was being made Redundant.
- e. At the time she was informed her redundancy was only provisional, yet the other colleague in the pool informed he was safe from redundancy on the same day, 16 days before the consultation began.
- f. Throughout the redundancy process and in her evidence to the Tribunal, Ms Barnes disparaged and belittled Mrs Thompson's skills, Mrs Thompson found this to be dishonest and insulting.
- g. Pooling was deliberately incorrect to protect others in the multi skilled team and to allow the unfair inclusion of MBC ensure that Mrs Thompson failed against a lower skilled team member.
- h. The MBC role was not a role that should have been applicable in a

redundancy criteria as it is not part of the job requirement for an artworker or any other studio team member.

- i. The ACAS procedure was not followed in any way shape or form, Ms Barnes preferring to ambush her victim completely unawares rather than informing and consulting with her staff.
- j. Mrs Thompson and her colleague JR, both aged approximately 63 had highly targeted offers of Voluntary Redundancy
- k. Mrs Thompson believes that
 - i. She was deliberately targeted for redundancy,
 - ii. She was denied skills training for many years
 - iii. She was deliberately not being assigned to work on key accounts such as [Client B] and International Greetings.
 - iv. She had her skills denied, belittled and disparaged by her site manager, Ms Barnes.
 - v. That the decision not to respond to her application for a position at Miller just, three months after her redundancy was deliberate and unkind
 - vi. Mrs Thompson reasonably believed that her dismissal by redundancy was unfair, Ill Judged and that it was very likely to be an age-related event.

78. We asked the Claimant's representative whether or not the dispute that a redundancy situation existed in December 2020 and they confirmed that they did not.

79. We asked the Claimant's representative whether or not they accept that the reason for the Claimant's dismissal was redundancy or were arguing that it was for some other reason. The Claimant's representative stated that the dismissal was through redundancy but there were other factors which played a part to target the Claimant for redundancy.

80. The Respondent's submissions extend to 16 pages and include a comprehensive summary of the law and key authorities. We thank the Respondent's representative for producing such thorough submissions and an excellent account of the legal principles developed through case law.

81. It is not practical to set out the submissions in full in our judgment. Where cases are quoted that contribute to our summary of the law below, we have added them to our summary. Where they repeat principles which we have covered, we have not.

82. We summarise below the key submissions where the Respondent has applied the facts to the law as they would view the matter.

- a. The Claimant was dismissed. A state of affairs existed that resulted in the Respondent's need to have the kind of work carried out by the Claimant to substantially diminish.
- b. Due to a reduction in work levels, in particular with the loss of the [Client A] contract and Covid, there was a substantial reduction of work required. The Respondent was also under severe financial pressure and cost savings had to be made.

- c. There had been resignations and these employees had not been replaced. There was less work for the studio team and this resulted in the overall studio team needing to be reduced by 2 employees.
- d. It was this reduction in workload and the financial pressure that resulted in the need for fewer employees to carry out the work and this state of affairs that was wholly attributable to the Claimant's dismissal.
- e. The Claimant has not suggested that there was not a redundancy situation. Mr Germaine did not put to either Elizabeth Barnes (EB) or Philippe Bataillie (PB) that there was not a redundancy situation.
- f. The Claimant's argument is that she should not have been one of those who was selected for redundancy.
- g. As such, the Respondent contends that the Claimant was dismissed for a fair reason.
- h. The Tribunal simply needs to determine whether the pool used by the Respondent was determined with genuine motives and was one a reasonable employer, considering the wide discretion, could have determined. The Respondent submits that it passes both of these tests.
- i. The breakdown of the pools within the studio team is explained in EB statement paras 41-48.
- j. The Claimant disputes that she should have been in an artworker pool of 2. This was carefully considered at the time by EB and is explained in detail in paras 49-69 of EB's statement, which is all supported by the Millnet data also referred to in EB's statement.
- k. In summary, the Respondent had 2 main reprographic clients, [Client A] and [Client B].
- l. The majority of the Claimant's repro work was for [Client A]. The Claimant did very little on [Client B], and the work she did do in 2019 was pre-flight and output of proofs – EB statement para 52.
- m. The email at page 55 shows that the Claimant did not have the necessary experience of the PackEdge software and refers to wanting to be trained on it – EB statement para 33. The extent and use of PackEdge for [Client A] and [Client B] is different.
- n. The Respondent lost the [Client A] contract and the [Client A] work reduced throughout 2020. The contract ended in August 2020 and there was just ongoing work to complete – EB statement para 53. It was the repro work that the Claimant was doing that had more or less ceased.
- o. This left the Claimant doing mainly artwork for Smith and Nephew and Bostik, also with technical consultancy, which was linked to the artwork for Bostik.
- p. Consideration was given when determining the pools to the Claimant's repro experience, but this experience had not been with [Client B]. Without training, the Claimant was not able to do the repro work for [Client B].
- q. EB gave oral evidence that she placed the Claimant in the artworker pool as, with the loss of [Client A], this was the type of work she was doing.

- r. Mr Germaine cross-examined EB about this at length. He suggested that that the Claimant could do [Client B] repro. He referred to page 213. It is submitted that this undermines the Claimant's case. The Claimant was provided with the Millnet data for 2019 and 2020. The only dates that the Claimant refers to are 8, 16 and 17 September 2020. EB's evidence was that this was part of the Claimant's training.
- s. Mr Germaine also referred to the possibility of being given training on [Client B] in 2018. This shows that additional training would have been needed on [Client B].
- t. This training never happened and it was Mr Germaine who put it to EB that this was because the Claimant was busy on other accounts. This was exactly the point.
- u. The Claimant had been busy on [Client A]. She did not have experience of working on [Client B].
- v. Mr Germaine also asked EB how she could justify placing AW in a pool of one as repro. EB said that AW could do repro and sleeve work on all 3 major client accounts, [Client A], [Client B] and IG, whereas the Claimant could only do repro for [Client A], a client that had been lost. AW could do repro sleeve work and artwork.
- w. AW's primary function was clearly repro.
- x. The Claimant refers to others also doing artwork. This is correct, but only NT did artwork as a primary role. MB also did artwork and repro, but was primarily a retoucher.
- y. It is submitted that EB acted with genuine motives, supported by the Millnet data at the time, for placing the Claimant in a pool as an artworker.
- z. The Respondent submits that the decision to include the Claimant in a pool of 2 as an artworker, given all of the circumstances, was within the band that a reasonable employer could make in these circumstances and is therefore fair.
- aa. If the Tribunal conclude otherwise (which the Respondent respectfully submits would be substituting its view for that of the employer), the Respondent refers to Polkey below.
- bb. Selection Criteria
- cc. Whilst the Claimant criticises the criteria used, the Claimant is trying to impose the criteria she wanted the Respondent to use. The Claimant is asking the Tribunal to substitute the Respondent's criteria with her own, which the Tribunal cannot do.
- dd. Provided an employer's selection criteria are objective, a Tribunal is not to subject them or their application to over minute scrutiny – *British Aerospace v Green* 1995 ICR 1006 CA. The task is for the Tribunal to satisfy itself that the method of selection was not heavily unfair and that it was applied in the particular case in a reasonable fashion.
- ee. Once again, the Tribunal must not substitute its view as to the scores the Claimant ought to have received.
- ff. In *LTI Limited v Radford* EAT 164/00 the EAT held that an Employment

Tribunal had fallen into error when it concerned itself with its own view of what selection criteria should have been applied rather than maintain focus on the employer's criteria.

- gg. The criteria and scoring process is set out in EB statement paras 70-74.
- hh. The Claimant refers to her appraisals, experience and Dave Stead's comments. The Claimant scored 5 out of 5 for artwork. There was no criticism of her ability. EB did not dispute the Claimant's ability.
- ii. The Claimant criticises the weighting given to repro and QC in the scoring process and the scores given to her for these. The Claimant refers to both of these being core skills. This is correct, but they were core skills already covered by others. EB's statement para 70 – these were included to enable cover to be given.
- jj. The Claimant was given 1 out of 2 for reprographics. This reflected her experience of reprographics but also her lack of experience on the [Client B] account.
- kk. The QC work the Claimant did was checking the PDF proofs for Bostik (technical consultancy). It was not the full QC role that was covered by Steve Riley.
- ll. The Claimant did not do retouching.
- mm. The Claimant's secondary argument is the inclusion of the MBC role and the weighting given. The Claimant has sought to belittle this role but her understanding of this role is incorrect and has no substance. Again, the Claimant is wanting the Tribunal to impose criteria she wanted to have been used. The MBC role is a wider Group role. It is a role that the Respondent needed to be carried out and there is no dispute that NT was carrying out this role. The Claimant simply disputes the importance of the role, a role she clearly knows very little about. The text messages at page 63 show that the Claimant was not aware of this role so how can she say that it only took up 45 minutes of NT's time each week?
- nn. Mr Germaine cross-examined EB about this role and how it was not a studio skill. This completely misses the point. The criteria do not have to be based on just artwork skills (for which the Claimant scored 5/5) or studio skills generally, which were included, but a reasonable employer can include additional skills it needs. Indeed, whilst cross-examining EB, Mr Germaine did not dispute the importance of this role but argued that it was not a studio skill.
- oo. PB also explained how important this role was and that NT could spend 20-50% of his time on this. The Respondent can explain why this MBC role was needed and can therefore show that it acted reasonably in not only including wider skills as part of the criteria but in the weighting given. Unlike repro, retouching and QC, the MBC role was not already covered by someone else.
- pp. The Claimant was not deliberately targeted and nor was the scoring criteria manipulated to ensure the Claimant's redundancy. The Respondent was, at all times, focused on the skills needed for the business going forward and the criteria was prepared with this in mind.
- qq. The Respondent again submits that the Tribunal should not substitute its opinion for that of the Respondent with regard to the selection criteria.

- rr. Consultation process
- ss. The Respondent contends that it followed a fair procedure that enabled the Claimant to fully understand the reasons for her provisional selection for redundancy and to challenge the criteria and scoring both during the initial redundancy process and at the appeal stage.
- tt. Mr Germaine challenged EB about not informing the Claimant and others about a possible redundancy situation before telephoning the Claimant on 8 December 2020. EB's evidence was that the possibilities of redundancies had been under consideration since the summer, that this was something she wished to avoid, was using the furlough scheme to do this and she did not to affect morale or worry staff.
- uu. It was towards the end of November that it was clear that redundancies needed to be made. There is no legal obligation to inform and consult prior to the pooling and selection process.
- vv. The Claimant refers to the 'voluntary redundancy' letter dated 8 December 2020 [page 57], the same date as the letter inviting the Claimant to a redundancy consultation meeting [page 56]. This letter was sent on a without prejudice basis. It is clear that this is not a letter requesting volunteers for redundancy in the wider sense but a proposal of an enhanced payment to avoid going through the redundancy process having been provisionally selected. As the Claimant was entitled to do, she rejected the offer and a fair and transparent consultation process was undertaken. The Claimant has referred to request for volunteers during previous redundancy processes. The Respondent was under no obligation to request volunteers and acted reasonably in pooling and scoring to ensure that it retained those with the best skills in the various areas to meet client demand and take the business forward.
- ww. It is also important to note that the business was a lot smaller than in previous redundancy exercises. EB's evidence was that the whole point was to ensure that the core skills were retained.
- xx. The Claimant was unable to attend the consultation meeting on 16 December and it was postponed to 23 December 2020. In her email on 11 December [page 78], the Claimant raised concerns about the procedure and the selection criteria. In her email on 16 December [page 81], once it had become clear that the Claimant would not be attending the meeting, she asked for the information to be sent by email.
- yy. EB responded by email later the same day [pages 80-81]. This provided more detail regarding the reason for the redundancy situation, including the loss of the [Client A] account, the reason for the pool of 2 and an explanation for the criteria and scoring. This all formed part of the consultation process.
- zz. There was then a long 70-minute consultation meeting by telephone on 23 December, with the Claimant's verbatim transcript at pages 88-113. EB statement paras 96-117 refers to this meeting in detail. The Claimant alleges that this meeting was pointless but this was only because she did not understand or accept what she was being told by EB in response to all of her questions and challenges. EB was clear and consistent throughout this meeting.
- aaa. During the meeting, the Claimant accepted that she had not worked on the [Client B] account – page 105 and EB statement para 111. The

Claimant simply referred to her skills being transferrable. It was put the Claimant by Mrs McAvoy if her comments about the whole studio team were discussed at the meeting on 23 December. The Claimant said no, but the transcript and the evidence of EB clearly show that this is not true. In cross-examination, the Claimant accepted that she was able to make the points she wanted and that all of the questions she asked was answered. The Claimant simply did not like, or accept, the answers. As all of the points raised by the Claimant had been considered in detail at the initial decision-making stage, covered in the email on 16 December and during the meeting, and as there was no suitable alternative employment, EB acted reasonably in making the decision to terminate the Claimant's employment on the grounds of redundancy at the conclusion of the meeting.

bbb. The email dated 23 December 2020 [page 115] was not EB making up the pooling after the event. It was merely EB clarifying what had already been explained and discussed at length during the redundancy meeting/call.

ccc. Consideration of alternative employment

ddd. The Respondent was in a difficult financial position and, due to reduced work, needed to save costs. Wayne Larard and Ian Wardlaw left and were not replaced. There was a need to reduce costs further and the combination of Covid and the loss of [Client A] meant that members of the studio team needed to be made redundant. Given this, there was no suitable alternative employment available. The Respondent therefore submits that it followed a fair procedure throughout.

eee. If, which is denied, the Tribunal find that the Respondent/EB had failed to follow a fair procedure, the Claimant appealed. The Respondent contends that Philippe Bataillie (PB) conducted a fair appeal, which was by rehearing, and that any alleged defects were rectified rendering the Claimant's dismissal fair. All of the points raised by the Claimant were fully considered by PB. PB was asked by Mrs McAvoy about what consideration was given by PB to the pooling. PB said that, after the appeal hearing, he discussed this in detail with EB and 'looked at the pools case by case.' Having done so, PB concluded that the pools were correct.

fff. The Claimant has also referred to the new role advertised in April 2021. The Claimant has asserted that this was just a week after her notice period expired. This is not true. The Claimant was dismissed on 23 December and was paid in lieu of notice.

ggg. The Tribunal needs to consider what was in the mind of the Respondent at the time the decision to dismiss was taken. There is no suggestion that the redundancy was sham.

hhh. It is dealt with in EB statement paras 128-129 and the Claimant acknowledges that Emma Braithwaite had resigned. EB's evidence was also that new work came in, which was mainly retouching with some artwork.

iii. As the Respondent had a fair reason for dismissal and followed a fair procedure, the Respondent contends that the Claimant's dismissal was within the band of reasonable responses and fair within S.98(4). As set out above, the Tribunal should not substitute its decision for that of the employer.

Polkey

jjj. Should the Tribunal find that there were procedural defects, the Respondent contends that following any other process would have made no difference to the outcome. If the Claimant had not been in a pool as an artworker, she would have been in a repro pool with AW. AW had the knowledge and experience of the [Client B] account and also IG. The Claimant did not. EB's evidence is that this pool would still have resulted in the Claimant being selected for redundancy. Mr Germaine refers to the Claimant not being given the [Client B] work before but having still worked on [Client B]. As set out above, this was for small number of jobs over 3 days in September 2020. It is simply not comparable with the vast amount of repro work AW did for [Client B]. Whilst the Claimant stated that reprographics is reprographics irrespective of the client, she accepted that there were different customer specifications. [Client A] and [Client B] had different customer requirements – EB statement para 7-9. Regarding transferrable skills and training, this would have taken time. Both EB and PB accepted that the Claimant was capable of learning and doing repro on [Client B] but it would have taken time and training. EB was clear that the Respondent did not have the luxury of time. The Claimant's evidence that the training and getting up to speed would take days or a week is simply not credible. The Tribunal is requested to prefer the evidence of EB and PB on this point. The Claimant had referred to needing training before. She also accepted that she did not provide holiday or sickness cover on the [Client B]. If it was so easy, why not? Would a reasonable employer really select someone for redundancy who had the skills and experience of working on a major client account, and performing very well on it, instead of someone else who had very little experience of working for that client and who would need training and time to get up to speed? No. If placed in the same pool, a reasonable employer would have weighted the criteria based on client needs (both [Client B] and IG) and would have reached the conclusion that the Claimant, not AW, would still have been selected for redundancy. If MB had also been included in this pool, MB had the experience of retouching. The Claimant did not. The Respondent also needed to retain NT's knowledge and experience of the MBC role. Given the different skills that needed to be retained for the clients it had, and the need to market and grow, a pool of 6 of the studio team (excluding 3D and Steve Riley) would have resulted in the same outcome. The Claimant was experienced and multi-skilled but, where the Respondent's needs were – MBC, retouching, repro on [Client B] and IG and sleeve work on IG – others were more skilled and more experienced in those areas such that the outcome would have been the same. This was explained to the Claimant in the email on 16 December and during the meeting/call on 23 December 2020. Even carrying out this exercise would be the Tribunal substituting its view for that of the Respondent.

kkk. Should the Tribunal also find that EB should have adjourned the meeting on 23 December 2020, this would still have made no difference other than delaying the inevitable by a week or so.

lll. All of the points made by the Claimant had been duly considered. The Claimant had raised nothing new. EB would still have made the decision to dismiss the Claimant on the grounds of redundancy.

Age discrimination

mmm. The entire basis of the Claimant's claim is simply that she was in her 60s and that she was dismissed due to her age. There is no "something more". The 'something more' seems to be no more than John Reveley also being selected. The reason for JR's selection is in EB statement para 84. JR only did retouching, which the Claimant acknowledges. He did not also cover

reprographics and artwork as MB did. JR was not multi-skilled.

- nnn. As the Claimant states in her statement, JR had also had his application for voluntary redundancy rejected in 2017/18 due to the need to retain his skills at that time.
- ooo. The Respondent accepts that the Claimant was dismissed. However, for the reasons set out above with regard to the unfair dismissal claim, the reason for the Claimant's dismissal was genuinely on the grounds of redundancy. The Claimant's age played no part whatsoever in the decision to terminate her employment.
- ppp. In the absence of "something more," the Respondent submits that the Claimant has failed to discharge her burden of proof. As the burden of proof has not been reversed, the Claimant's claim for age discrimination should be dismissed at this stage.
- qqq. Should the Tribunal not accept this and find that the Claimant has made a prima facie case, then the Respondent can easily demonstrate a non-discriminatory reason for her dismissal, this being redundancy. The Claimant referred to four comparators at the Preliminary Hearing on 9 June 2021. These were AW, MB, PW, and NT. None of these are in the same circumstances as the Claimant. NT was in the artwork pool with the Claimant. Given his MBC role, he scored higher than the Claimant and, as such, the Claimant scored lowest and was selected for redundancy. His MBC role makes his position materially different to the Claimant. AW would have been in the reprographics pool. She was therefore in a different pool to the Claimant. As set out in the witness statement of EB, and in oral evidence, had the Claimant been in a pool for selection with AW, AW would still have scored higher given her knowledge and experience of reprographics on the [Client B] and IG accounts. The Claimant's circumstances are materially different therefore to AW. MB did re-touching. In her own assessment of her skills, the Claimant accepts that she was not a re-toucher. As such, the circumstances between MB and the Claimant are again materially different. With regard to PW, he worked 2 days a week on sleeve work for IG and provided cover. This was different to the work carried out by the Claimant and PW's circumstances are also materially different. The Respondent therefore contends that all the alleged comparators by the Claimant have material differences in the circumstances to the Claimant.
- rrr. Should the Tribunal not accept this, or construct a hypothetical comparator, despite the Claimant referring to actual comparators, the less favourable treatment (dismissal) was not because of the Claimant's age. The Claimant was not targeted as alleged in her statement. It is also important to note that Mr Germaine did not put to either EB or PB that the real reason for the Claimant's redundancy was her age. The witness statements of both EB and PB are clear that age was never a factor. This evidence was not challenged.
- sss. Even if the Tribunal find that the Claimant was unfairly dismissed, and the Respondent submits that she was not, it does not follow that the Claimant's dismissal was on the grounds of her age.

The Law

Unfair redundancy

83. Section 98 of the Employment Rights Act 1996 ("the Act") provides:

- a. 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-
 - i. the reason (or if more than one reason the principal reason) for dismissal
 - ii. 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.
- b. A reason falls within this subsection if it is... that the employee is redundant.”

84. Redundancy is defined in s 139 of the Act which says that dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for the purpose of which the employee was employed by him either generally or in a particular place or the fact that the requirements of that business for employees to carry out work of a particular kind, again either generally or in the particular place, have ceased or diminished or are expected to cease or diminish permanently or temporarily and for whatever reason. The case of **Safeway Stores v Burrell [1997] IRLR 200** fully explains these matters.

85. In **Abernethy v Mott Hay and Anderson [1974] IRLR 213** Lord Justice Cairns said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. In **ASLEF v Brady [2006] IRLR 576** it was said “Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so.”

86. Section 98(1)(b) requires the tribunal to consider the reason established by the employer and to decide whether it falls within the category of reasons which could justify the dismissal of an employee – not that employee but an employee – holding the position which that employee held (**Dobie v. Burns International Security Service (UK) Ltd [1984] IRLR 329 CA**).

87. Whilst it is a matter for the tribunal to determine whether the reason for dismissal was redundancy or another reason, that is a question of whether or not the decision was genuine as opposed to whether or not the decision was a sound and sensible one. There is ample authority from higher courts who have underlined that the obligation upon the employer is not too high, they must show a good commercial reason but a tribunal is not at liberty to investigate the commercial and economic reasons behind the decision (for example see **Hollister v National Farmers’ Union 1979 ICR 542, CA**, and **James W Cook and Co (Wivenhoe) Ltd v Tipper and ors 1990 ICR 716, CA**). This guidance is important in ensuring that a tribunal does put itself into the position of the employer. An employer is at liberty to close a business or part of a business if it chooses to do so and provided that is genuinely the reason for redundancy, then that is a potentially fair reason for dismissal and the tribunal must go on to consider fairness under Section 98(4) of the Act.

88. Redundancy is a potentially fair reason for redundancy, and if an employer has satisfied the tribunal that on the balance of probabilities the reason, or if more than one the principal reason, for the dismissal was redundancy, the tribunal will then go on to consider whether the dismissal was fair or unfair for the purposes of section 98(4) which:

- 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 sufficient reason for dismissing the employee, and

- b. shall be determined in accordance with equity and the substantial merits of the case.

Case law has given further guidance on how the question of fairness may be addressed by a tribunal in redundancy cases.

89. In **Langston v Cranfield University [1998] IRLR 172** the EAT said we must look at all ways in which a dismissal by reason of redundancy may be unfair. They are (a) inadequate warning, (b) inadequate consultation, (c) unfair selection and (d) insufficient effort to find alternatives.

90. In **R v British Coal Corporation ex parte Price [1994] IRLR 72** fair consultation was defined as (a) discussion while the proposals are still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond and (d) conscientious consideration of the response.

91. On choosing a pool of employees from which to select again the tribunal should only ask whether the choice made is reasonable after the respondent has given adequate thought to the question (see **Taymech v Ryan EAT 633/94**). There is a band of potential responses to a particular a particular problem (**Kvaerner Oil and Gas Limited v Parker and Others EAT0444/02**).

92. IDS's employment law handbook on redundancy puts it like this:

93. However, in all cases, the tribunal must be satisfied that the employer acted reasonably and, in considering whether this was so, the following factors may be relevant:

- a. whether other groups of employees are doing similar work to the group from which selections were made
- b. whether employees' jobs are interchangeable
- c. whether the employee's inclusion in the unit is consistent with his or her previous position, and
- d. whether the selection unit was agreed with any union.

94. In **British Aerospace v Green [1995] IRLR 433** it was said that provided the employer sets up a selection method which could reasonably be described as fair and applies it without any overt sign of bias the tribunal should find the dismissal fair. Again, there is a band of potential responses (**Lomond Motors Ltd v Clark UKEAT/10019/09**).

95. In all aspects substantive and procedural we must follow the clear rule in **Iceland Frozen Foods v Jones [1982] IRLR 439** (approved in **HSBC v Madden [2000] IRLR 827**) and **Sainsburys v Hitt [2003] IRLR 23** that we must not substitute our own view for that of the employer. In **UCATT v Brain [1981] IRLR 224**, Sir John Donaldson put the matter as follows:

"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, "well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing", because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."

96. Under section 123(1), the tribunal may also make a reduction to the compensatory award where it considers it just and equitable having regard to the loss sustained by the employee. Under this section, employers often argue that an employee might have been dismissed had a fair procedure been followed, either at the time of or after the dismissal occurred and therefore this should be reflected by reducing or limiting the duration covered by a compensatory award. This is known as the **Polkey** principle (**Polkey v AE Dayton Services Ltd [1988] ICR 142 House of Lords**).

Direct Age Discrimination

97. Section 13(1) of the Equality Act 2010 provides that “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”.

98. Age is a protected characteristic.

99. The burden of proof has specific provision in the Equality Act 2010, Section 136. This provides that “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” unless “A shows that A did not contravene the provision”.

100. These provisions were enacted because direct discrimination is often covert or concealed.

101. The standard of proof is on the balance of probability, i.e. more likely than not to have occurred.

102. In **Igen v. Wong [2005] IRLR 258 CA** the guidance issued by the EAT in **Barton v. Investec Henderson Crosthwaite Securities Ltd** was approved in amended form:

“(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word “could” in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and

equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

103. That case was heard at the time that the Equality Act 2010's predecessor applied, the Sex Discrimination Act 1975.

104. In ***Madarassy v. Nomura International Plc [2007] IRLR 246 CA*** it was held that the statutory burden of proof provisions "required the complainant to prove the facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination, and not that the respondent could have committed such an act ... the burden of proof did not shift [through the Claimant] establishing the facts of a difference in status and a difference in the treatment of her. Those facts only indicated a possibility of discrimination and would not, without more, enable a tribunal to conclude on the balance of probabilities that the respondent had committed an unlawful act of discrimination."

105. The guidance given in these cases was supported by the Supreme Court in ***Hewage v Grampian Health Board [2012] IRLR 870***.

106. In ***Laing v Manchester City Council and another [2006] IRLR 748*** it was held that the two stage approach need not be followed in all cases and that a tribunal may proceed on the basis of stage two alone, such as "where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator-whether there is a prima facie case-is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337...***".

107. Further it was noted that "The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice question as to whether or not

the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race”.

108. Similarly it has been emphasised that the tribunal may consider all of the evidence at the first stage, and that a tribunal should not ignore evidence adduced by the Respondent.

Conclusions

Was there a redundancy situation?

109. In our conclusion, the combined impact of the loss of a major revenue producing client and the general impact of the pandemic have been shown by the Respondent to establish a redundancy situation.

110. We found the case to be a clear set of circumstances where in the face of a significant downturn in income the employer determined that the downturn should be met by a reduction in overheads including personnel costs.

111. We noted that the Claimant accepts that a redundancy situation existed at the relevant time.

112. We found that on the balance of probabilities the Respondent's requirements for people to carry out the kind of work undertaken in the studio, including artwork, had diminished for the reasons given by the Respondent in evidence.

113. The circumstances in our conclusion met the definition of a redundancy situation contained in Section 139 of the Employment Rights Act 1996.

What was the reason for dismissal; was it age or redundancy?

114. There is no dispute that the Claimant was dismissed. The main area of contention between the parties is why the Claimant was dismissed.

115. The Claimant compares herself with four comparators who are all aged under 50 years old. These are all studio team members. The Respondent had decided to reduce the number of studio team members by two. All studio team members had been placed into pools for selection. There appear broad similarities in the skills that they applied (182), although they are not all the same. Differences which appear to be material apply to MB and PW, who were employed in part to do re-touching whereas the Claimant was not. Also, NT was employed as an artworker and did little else in terms of studio work. It seems clear that MB, PW and NT were employed in employment which was materially different to that of the Claimant, but there appear no material differences in relation to AW. AW's work appeared to us to have no material differences to the Claimant's. From the four comparators identified by the Claimant, we focus upon AW who was placed into the "reprographics pool of one".

Was the Claimant treated less favourably than AW?

116. The Claimant was clearly treated less favourably than AW. The Claimant was pooled with another whereas AW was protected from selection through not being placed in a pool for selection between her and any of her colleagues. The Claimant was dismissed, AW was retained.

Was that because of age?

117. We concluded that the decision to place AW outside of any pools for selection, and to place the Claimant into a pool for selection which did not reflect either her range of skills

or the work that she had been employed to do or was doing, was not because of her age.

118. We took into account the Claimant's submission that only people over the age of 60 were selected for redundancy.

119. However, we found Ms Barnes truthful in her evidence that she did not want to place the Claimant into a pool with employees engaged predominantly in serving Client B. We concluded that the decisions concerning pooling involved significant pre-selection motives. However we could find no evidence that this was motivated in any way by age.

120. On the balance of probabilities we found that the formulation of pools and the Claimant's selection for redundancy was because she worked for Client A and the Respondent had lost that client and did not want to remove as redundant any employee that serviced a retained client such as Client B.

121. These were commercial motives which we found were unrelated to age. We concluded that the Claimant was not selected for redundancy or subject to dismissal because of her age.

Was the reason or principal reason for dismissal redundancy?

122. We concluded that the Respondent's decision to select the Claimant for dismissal was a response to the redundancy situation and that the Respondent had a commercial and economic reason for making decisions as to which employees were to be dismissed in response to the redundancy situation.

123. It is not for us to comment here upon whether or not that was a sound and sensible decision.

124. At this stage in our conclusions we are only concerned with whether or not a potentially fair reason in the principal reason for the dismissal, not whether or not the dismissal was fair in this particular case.

125. We acknowledge that these are decisions for the employer and note that the obligation on the employer to establish redundancy as the reason is not too high.

126. We were satisfied by Ms Barnes evidence that redundancy was the reason for the Claimant's dismissal.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

(i) Did the respondent adequately warn and consult the claimant?

127. We found that the Respondent undertook a most basic and cursory consultation exercise. There was no warning or consultation concerning the selection pools or selection method. There was only one meeting.

128. Although the Claimant expressed substantive concerns over the selection pools, selection criteria and scoring these were handled dismissively during the meeting and comments explaining the matters in more details sent by email only after notice of dismissal had been issued.

129. The appeal process only reaffirmed the original decision.

130. There does not appear, on the evidence, to have been any substantive consideration of the points that the Claimant raised in her single consultation meeting even when they were repeated upon appeal.

131. In our conclusion the approach to warning and consulting over redundancy fell outside of the band of reasonable approaches that may have been adopted by a reasonable employer.

(ii) Did the respondent adopt a reasonable selection decision, including its approach to a selection pool?

132. We found that the Respondent's approach to pooling was not transparent and was a means to achieve an objective that was not shared with the Claimant.

133. The stated objective of pooling according to specialism was unsustainable when considered against the evidence and facts concerning the broad range of skills which people were employed in the Studio team to do and in fact did.

134. See our findings in paragraphs 66 and 67 above. The rationale for pooling people in the manner adopted was illogical and ran contrary to the true situation within the team.

135. It appeared to us more likely than not that the Respondent placing AW outside of any pool was to ensure her retention to service Client B in reprographics.

136. The placing of the Claimant in a pool with NT, who did from a client and revenue generating perspective artwork only, indicates that the Respondent had not given adequate thought to the question of pooling.

137. Weighting 'additional roles' so highly, in circumstances where the Claimant did not undertake an additional role and was in a pool of two, appeared to us a prejudicial selection approach that had not been adequately thought through.

138. In our conclusion, the Respondent's approach to selection and pooling was outside of the range of reasonable approaches that a reasonable employer may have adopted.

Did the Respondent take reasonable steps to find the claimant suitable alternative employment?

139. We found that there were no vacancies at the time of the Claimant's dismissal. The vacancy which the Claimant refers to was not her original role and came around some three months after her dismissal. It is not relevant to the question of suitable alternative employment. We found that the Respondent did not offer suitable alternative employment because there were no opportunities. We found that approach within the band of reasonable approaches to finding the Claimant suitable alternative vacancies.

Was dismissal within the range of reasonable responses?

140. For the reasons set out above concerning warning, consultation and selection in our conclusion dismissal of the Claimant was not within the range of reasonable responses to the redundancy situation that the Respondent faced.

141. The Claimant was unfairly dismissed.

What is the chance that the Claimant would have been dismissed had a fair procedure been followed?

142. We take into account that the Claimant was one of 4 members of the Studio team that undertook very broadly similar duties. Her duties appeared to us not dissimilar in any material way to AW's, yet the Claimant had greater service and excellent performance appraisals.

143. None of AW's performance appraisals were before us.

144. In our conclusion had the pooling not been a means to achieve the end of retaining existing staff to service retained clients, then it is most likely that these four individuals would have been pooled together and selection criteria developed according to needs going forwards from a skills perspective.

145. However, the team would have been scored according to their previous work not according to what work the Respondent had for them in future if people were not transferred between clients.

146. The Claimant was a highly experienced professional within the Studio team and had received excellent appraisals.

147. We were not shown the appraisals of any other members of the team.

148. Although she had no significant experience of the Client B account, there is no suggestion she did not have the skills or capability to undertake the work.

149. It appeared to us, based on the information before us, that had a fair procedure been followed there was a high probability of the Claimant being retained.

150. We placed that probability at 75% and it follows that there should be a 25% reduction in any compensatory award for unfair dismissal.

Employment Judge Knowles
10 January 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
13 January 2022