6410/12

Case number: 2601000/2012

EMPLOYMENT TRIBUNALS

Mr R Nolan **and** CD Bramall Dealership Ltd t/a Evans Halshaw Motorhouse Worksop

Claimant **Respondent**

At a Hearing

Held at Nottingham

Before: Employment Judge Evans
Mr O'Dwyer
Ms Johnson

On: 18 October and 27 November 2012

The Tribunal having reserved judgment, now gives judgment as follows.

Representation

For the Claimant: in person
For the Respondent: Mr Z Dhar - counsel

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant's complaint of age discrimination succeeds.

REASONS

Preamble

1. The Claimant was employed by the Respondent from November 2005 until he was dismissed with effect from 16 February 2012. Following his dismissal the Claimant brought claims of unfair dismissal and age discrimination.

2. The Claimant's claims were heard by the Employment Tribunal in Nottingham on 18 October and 27 November 2012. The Tribunal reserved its judgement.

3. The Claimant represented himself at the hearing of his claims and gave evidence on his own behalf. The Respondent was represented by Counsel. David Heeley, Dealer Principal, Dale Mellor, Regional Financial Controller, Leon Young, Service Controller, and Peter Adams gave evidence on behalf of the Respondent.

4. The Tribunal had before it an agreed bundle of 134 pages.

5. In addition to the bundle, the Claimant produced two letters of complaint against Mr Heeley from a Mr Shaw and an e-mail from a Mr Carl Godley concerning Mr Heeley's treatment of the Claimant. They were produced as though witness statements. The Tribunal read these documents but, as neither Mr Shaw nor Mr Godley appeared as witnesses, attached little weight to them.

Issues

6. It was agreed between the parties that the correct Respondent was CD Bramall Dealership Ltd T/A Evans Halshaw Motorhouse Worksop and the Tribunal has already issued an order on 27 November 2012 that this company be substituted for Pendragon plc as the Respondent.

7. At the beginning of the hearing the parties and the Tribunal agreed that the following issues arose for determination:

Unfair dismissal claim

(1) What was the factual reason for dismissal?

(2) Was that factual reason a potentially fair reason under section 98 of the Employment Rights Act 1996 ("the 1996 Act").

(3) Was the dismissal fair under section 98(4) of the 1996 Act? The Claimant said that it was not because:
   a. The Respondent failed to seek or offer alternative employment for him although this was available in Doncaster.
   b. Another employee (Paul Brooks) should have been made redundant in place of the Claimant.
   c. The Respondent selected him for dismissal because of his age.
   d. The Respondent had included retail work in the wrong journal.

e. Paul Brooks should have been put back to being a technician and so there would have been no need for any redundancy.
f. Paul Brooks and the Claimant should have been included in a pool for selection rather than the Claimant being put into a "pool" of one.

(4) If the dismissal was unfair, whether compensation should be reduced applying the Polkey principle.

(5) If the dismissal was unfair, whether compensation should be reduced under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") because the Claimant did not appeal against his dismissal. It was agreed that this issue only arose if the reason for the Claimant's dismissal was not redundancy.

Age discrimination claim

(6) Has the Claimant proved facts from which the Tribunal could conclude that the Respondent has because of the Claimant's age treated the Claimant less favourably than it treats or would treat others by dismissing him? It was agreed that the appropriate comparator was a hypothetical one who was 30 years younger than the Claimant.

(7) If the answer to the previous question is yes, has the Respondent proved that he did not treat the Claimant less favourably because of age?

The Respondent indicated that if less favourable treatment because of age was shown, it would not seek to argue that such treatment was a proportionate means of achieving a legitimate aim.

Findings of Fact

8. The Claimant began work for the Respondent in November 2005 as a senior service adviser. When he was dismissed in February 2012 he held the position of Service Team Leader. He was appointed to that role in January 2007.

The position of Mr Brooks and the Claimant historically

9. In September 2011 Mr Brooks resigned from his role of Workshop Controller. The Respondent wished to retain the services of Mr Brooks and persuaded him to change his mind. As part of the discussions which took place, the Respondent indicated to Mr Brooks that he would take over the Claimant's more senior and more well-paid role of Service Team Leader when the Claimant retired, which was anticipated to be in January 2013, when the Claimant would reach the age of 65.

10. The Claimant gave evidence that around this time Mr Heeley had told him that he had checked his personnel file to see when he would reach his 65th birthday. Mr Heeley denied this. The Tribunal preferred the evidence of the Claimant to that of Mr Heeley in this respect. This was because it found Mr Heeley's denial unconvincing and the evidence of the Claimant fitted with the undisputed facts that the Respondent had asked Mr Brooks to change his mind after he had resigned and, also, that the Respondent twice asked the Claimant whether he would swap roles with Mr Brooks.

11. The Tribunal finds that the fact that Mr Heeley twice asked the Claimant whether he would like to swap roles with Mr Brooks, the second of these occasions being in November 2011 just a few months before the Claimant's redundancy, shows that the Respondent was satisfied that both the Claimant and Mr Brooks could both perform the role of Workshop Supervisor and, also, the role of Service Team Leader. The Claimant declined to swap roles.

The resource review exercise and the decision to dismiss the Claimant

12. In autumn 2011 the Respondent carried out a resource review across all 15 of its dealerships. This resulted in a number of decisions to reduce staffing levels at different dealerships. At the Claimant's place of work, this resulted in a decision to close the body shop and make all of its employees redundant. In addition, a decision was taken to get rid of the roles of Parts Team Leader and Parts Adviser and create a single Parts Supervisor role.

13. The Respondent also decided to get rid of the position of Service Team Leader in the Claimant's department. There were also job losses at other dealerships. For example the bodyshop was closed at Grantham.

14. The reason that the Claimant was dismissed was the decision of the Respondent to get rid of the position of Service Team Leader. The reason for this decision was that the need for that role had reduced over time because the Worksop dealership where the Claimant worked was not a franchised dealership. Accordingly the reason for the dismissal of the Claimant was a reduction in the requirements of the Respondent for employees to carry out work of the kind performed by the Claimant. However these findings obviously do not explain why the Claimant was *selected* for redundancy.

15. The Respondent's evidence was that it did not consider either bumping the Claimant into the role of Paul Brooks, the Workshop Controller, or including the Claimant and Mr Brooks in a pool from which one would be selected for redundancy. The Respondent maintained that this was because it was the Claimant's role that had disappeared and, in effect, that it did not occur to it that any issue of a pool or bumping might arise. The Respondent maintained that if the Claimant and Mr Brooks had swapped roles then there was no question that Mr Brooks would have been dismissed and not the Claimant.

16. The Tribunal did not accept this evidence. The Tribunal finds that the reason that the Respondent did not consider either bumping the Claimant into the role of Paul Brooks or including him in a pool for selection with him was that the Respondent was determined to retain the services of Mr Brooks and to make sure that there was no risk of him being made redundant instead of the Claimant.

17. The Tribunal makes this finding for various reasons. First, given the Respondent's enthusiasm for retaining Mr Brooks, it finds it implausible that the Respondent would have made him redundant a mere 2-3 months after a role swap, purely as a result of that swap, given that it regarded Mr Brooks and the Claimant as being able to carry out each other's roles.

18. Secondly, the Tribunal noted in this respect the way a pool had been used at another site so as to include Team Leaders from two separate departments and, also, the way that in the Parts Department both roles had been abolished and the two employees both invited to apply for one new role. Although the Tribunal accepts that the position in respect of these two departments was not identical to that in the department of the Claimant, the way that the Respondent dealt with the need for redundancies in these two other cases showed that it was capable of and did carefully consider issues such as pools for selection and appreciated that they could be dealt with in a variety of ways.

The issue of retail work

19. Some work conducted by the Service Department where the Claimant worked was incorrectly recorded. This may have resulted in the correct financial performance of the Service Department not being accurately represented in internal documents of the Respondent.

20. However it was not in dispute that the Service Department made a profit. The decision of the Respondent to get rid of the role of Service Team Leader resulted from it having formed the view that that role was no longer necessary. Consequently the way in which retail work was recorded had no bearing on the decision of the Respondent to dismiss the Claimant.

Paul Brooks being put back into the role of technician

21. Mr Brooks had not performed the role of technician for some time. Given that he had recently resigned to obtain a promotion from the role of Workshop Controller, clearly he would not have agreed to accepted the role of technician so that the Claimant could take over the role of Workshop Controller.

Search for alternative employment

22. The Respondent is part of a much larger group of companies. It advertises jobs internally via an intranet system. When employees are at risk of redundancy, they are invited to search for employment on the intranet.

23. When Mr Heeley met with the Claimant on 7 February 2012 he checked that Claimant knew how to access and use the intranet site and the Claimant confirmed that he did. At the second meeting which Mr Healey had with the Claimant on 14 February 2012, there was a further discussion of whether there were any jobs available which were of interest to the Claimant.

24. In addition, Ms Powell of the Respondent's HR Department conducted searches on the intranet site for possible alternative employment for the Claimant.

25. There were no alternative roles for the Claimant within the Respondent itself. There was one possible role at a BMW dealership in Doncaster (which was part of another group company). As a result of an oversight, the Respondent's HR Department did not identify this role. The Claimant only looked at the intranet site a few times. He did not see this role either prior to the termination of his employment. He did see it very shortly after the termination of his employment but did not apply for it.

The relevance of the Claimant's age

26. The Tribunal finds that Mr Heeley has a tendency to express himself in a way which suggests that he does not consider carefully when and how it is appropriate to make references to the protected characteristics of employees and others in the workplace.

27. One example of this was an e-mail in the hearing bundle dated 24 July 2011 from Mr Heeley to the Claimant and other employees in which Mr Heeley was exhorting those to whom the e-mail was addressed not to move a car from one dealership to another unless the prospective customer had paid a deposit. In this e-mail, Mr Heeley stated: "Maybe even employing a rather large coloured gentleman called "Bubba" to come and do naughty things to you would work??? I'm still not sure !!!!!!!!". Mr Heeley had been disciplined for this e-mail.

28. Further, in his evidence to the Tribunal, Mr Heeley commented that he could see no problem with age-related banter if "everyone is getting on". He went on to say that such banter was not the same "as discrimination about the colour of someone's skin". Whilst it is obviously the case that it is not necessary for employees to avoid all light-hearted references to the protected characteristics of other employees, the way in which Mr Heeley expressed himself led the Tribunal to find that he did not regard age-related banter as being something which some employees might find offensive.

29. The Claimant alleged that Mr Heeley had introduced him on one occasion as his "104 year old Service Team leader". Mr Heeley denied having said this. However, the Tribunal preferred the evidence of the Claimant in this respect. This was because the alleged comment struck the Tribunal as being the kind of comment which Mr Heeley would not have regarded as being offensive, and might well have regarded as humorous, given the findings set out above. In addition, the Tribunal formed the view that the Claimant's recollection of the comment was both accurate and truthful.

30. The Tribunal finds that the Respondent also tolerated the playing of age-related pranks and the use of age-related nicknames in its workplace. For example, on one occasion an employee of the Respondent changed the letters of the Claimant's number plate from "OAB" to "OAP", although the Tribunal also finds that the Claimant found this to be humorous rather than offensive. Further, a number of the Respondent's employees referred to the Claimant as "Yoda", a small wizened character in Star Wars who is several hundred years old.

31. The Claimant also alleged as set out above that Mr Heeley had asked him about his retirement age. As set out above, the Tribunal finds that such questions had indeed been asked.

32. Further, as set out above, the Respondent had quite clearly intended to give the Claimant's role to Mr Brooks on the anticipated retirement of the Claimant in January 2013.

What would have happened if the Claimant had been placed in a redundancy selection pool with Mr Brooks

33. The Respondent did not produce any evidence in relation to whether the Claimant or Mr Brooks would have been selected for redundancy if they had been placed together in a selection pool. The Respondent did not put forward any evidence as to what the selection criteria would in the circumstances have been. The Tribunal finds that, whilst some selection criteria might have resulted in Mr Brooks having been successful, equally, other selection criteria might have favoured the Claimant, who had more experience and longer service.

34. In these circumstances the Tribunal finds that if the Claimant had been placed in a redundancy selection pool with Mr Brooks there would have been a 50% chance that he would been selected for redundancy and dismissed.

What would have happened if the Claimant had not been dismissed in February 2012

35. The Tribunal finds that at the meeting on 7 February 2012 the Claimant commented "this would be my last year, don't mean it to come out the wrong

way but one year off from retirement you want to look forward to it", in accordance with the notes of that meeting.

36. The Tribunal also finds that the Claimant made only very limited attempts to use the intranet site to search for alternative employment.

37. The Tribunal finds that if the Claimant had not been dismissed in February 2012, he would have retired on his 65th birthday in January 2013.

The law

38. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

39. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer.

40. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause him to dismiss the employee.

41. Section 139 of the 1996 Act provides that an employee 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.

42. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.

43. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

44. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

45. When the reason for dismissal is redundancy, the Tribunal should have regard to the standards set out by the Employment Appeal Tribunal in **Williams and ors v Compair Maxam Ltd 1982 ICR 156** in deciding whether the dismissal is fair under section 98(4):

    a. Employees should be warned and consulted about the redundancy;
    b. The selection criteria should be objectively chosen;
    c. The selection criteria should be fairly applied;
    d. If there is a union, its view should be sought;
    e. The employer should look to see if there is alternative work for the employees.

46. An employer must look for alternative employment for an employee who is at risk of redundancy but the obligation is to make reasonable efforts, not to make every possible effort.

47. The Tribunal must decide whether the employer's choice of pool was within the range of reasonable responses. It should not substitute its own view as to what the pool should have been.

48. Consequently the question of the pool is primarily a matter for the employer and it will be difficult (but not impossible) for the employee to challenge its choice of pool provided that the employer genuinely applies its mind to the issue.

49. However the Tribunal is entitled to consider with care and scrutinise carefully the reasoning of the employer to determine if he had genuinely applied his mind.

50. The issue of bumping may arise where a senior employee's post becomes unnecessary and the question is whether the employee should be in a pool of one or whether a more junior employee doing similar work should be considered for redundancy instead.

51. Section123(1) of the 1996 Act requires:

    "Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

52. We have therefore considered whether the compensation awarded should be reduced to reflect the chance that the Claimant could have been dismissed fairly at a later date or if a fair procedure had been used.

53. Section 39(2) of the Equality Act 2010 ("the EqA") provides that an employer must not discriminate against an employee as to the terms of their employment; in the way it affords access to (or by not affording access to) opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; by dismissing the employee; or by subjecting the employee to any other detriment.

54. There are different kinds of discrimination. In this case the Claimant argues that the discrimination which took place was direct discrimination. Direct discrimination occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) EqA).

55. The question, therefore, is whether A treated B less favourably than A treated or would treat a hypothetical comparator and whether the less favourable treatment is because of a protected characteristic. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 EqA).

56. Sections 4 and 5 of the EqA include age amongst the protected characteristics.

57. Pursuant to section 136 of the EqA, it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. These are referred to below as "such facts".

58. If the Claimant does not prove such facts he or she will fail.

59. 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 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".

60. 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.

61. It is important to note the word "could" in section 136 of the EqA. 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.

62. 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.

63. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 138 of the EqA from an evasive or equivocal reply to a questionnaire.

64. 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. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

65. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably because of a protected characteristic, then the burden of proof moves to the Respondent.

66. It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

67. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

68. That requires a Tribunal to assess not merely whether the Respondent 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 the treatment in question was not because of a protected characteristic.

69. 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.

Conclusions

What was the factual reason for the dismissal?

70. The Tribunal concludes that the factual reason for the Claimant's dismissal was that the requirements of the Respondent for employees to carry out the work of Service Team Leader had diminished.

Was that factual reason a potentially fair reason under section 98?

71. That reason was a potentially fair reason under section 98: redundancy.

Was the dismissal of fair under section 98 (4) of the 1996 Act? The Claimant said that it was not because:

The Respondent failed to seek or offer alternative employment for him although this was available in a Doncaster.

72. The Tribunal concluded that the Respondent had taken reasonable steps to find alternative employment for the Claimant within the group of companies to which the Respondent belonged and so had acted within the band of reasonable responses in this respect. The Tribunal concluded that the Respondent's obligation to take reasonable steps to seek alternative employment was not breached by the Respondent's failure to identify the vacant role in Doncaster, which was a role with a different group company. In this respect Tribunal noted that the Claimant did not in any event apply for this role when he became aware of it.

73. Consequently, the Claimant's dismissal was not unfair on this basis.

Another employee (Paul Brooks) should have been made redundant in place of the Claimant.

74. The Tribunal concluded that the Respondent did not act unreasonably and so outside the band of reasonable responses by failing to bump the Claimant into the position of Mr Brooks, so making Mr Brooks redundant. The Respondent regarded the roles of the Claimant and Mr Brooks as interchangeable. The Respondent also regarded Mr Brooks as being a valued employee. In all the circumstances it was therefore clearly within the band of reasonable responses decide that Claimant's employment should not be preserved at the expense of that of Mr Brooks without any pool for selection being constructed.

75. Consequently, the Claimant's dismissal was not unfair on this basis.

The selected him for dismissal because of his age.

76. The Tribunal concluded for the reasons set out below in relation to the age discrimination claim that Claimant was selected for dismissal -- that is to say selected for redundancy -- because of his age and the dismissal was unfair for this reason.

The Respondent had included a retail work in the wrong journal.

77. Given the findings of fact set out above, the Tribunal concluded that the fact that retail work had been included in the wrong journal had no bearing on the Claimant's dismissal. Consequently, the Claimant's dismissal was not unfair on this basis.

Paul Brooks should have been put back to being a technician and so there would be no need for any redundancy.

78. Given the findings of fact set out above, the Tribunal concluded that the Respondent had good reasons for not putting Mr Brooks back to being a technician. Consequently, the Claimant's dismissal was not unfair on this basis.

Paul Brooks and the Claimant should have been included in a pool for selection rather than the Claimant being put into a "pool" of one.

79. The Tribunal concluded that the Respondent was satisfied that Mr Brooks and Claimant could both satisfactorily perform each other's roles. This was demonstrated by the fact that on two occasions the Respondent had asked the Claimant whether he would like to swap roles with Mr Brooks.

80. The Tribunal has found above that the Respondent did not consider constructing a pool for selection which would have included both the Claimant and Mr Brooks because it was determined to retain the services of Mr Brooks. Given the fact that they could perform one another's roles, and given that the Respondent adduced no evidence as to why it was important to preserve Mr Brooks' employment in preference to that of the Claimant, the Tribunal concluded that the Respondent had not genuinely applied its mind to the issue, that this meant that it had acted outside the band of reasonable responses and that consequently the dismissal of Claimant was unfair.

81. Further and alternately, in these distinctly unusual circumstances where the Respondent had sought less than three months before the redundancy exercise to arrange for the Claimant and Mr Brooks to exchange roles, the Tribunal concludes it was outside the band of reasonable responses not to include them both in a pool for selection given that the Respondent's reason for acting as it did was an unexplained insistency on retaining the services of Mr Brooks and not exposing him to the risk of redundancy. The Tribunal therefore concludes that for this reason the Claimant's dismissal was unfair.

If the dismissal was unfair, whether compensation should be reduced applying the Polkey principle.

82. The Tribunal concluded that compensation should be reduced on this basis in two ways. First, compensation should be reduced to reflect the fact that in light of the Tribunal's findings of fact set out above, the Claimant would have had a 50% chance of being selected for redundancy even if a fair procedure had been followed.

83. Secondly, again given the findings of fact set out above, the period in respect of which compensation is payable should be limited to the period ending on the Claimant's 65th birthday on 3 January 2013.

If the dismissal was unfair, whether compensation should be reduced under section 207 A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") because the Claimant did not appeal against his dismissal. It was agreed that this issue only arose is the reason for the Claimant's dismissal was not redundancy.

84. This issue no longer arose for determination because the reason for dismissal was redundancy.

Has the Claimant proved facts from which the Tribunal could conclude that the Respondent has because of the Claimant's age treated the Claimant less favourably than it treats or would treat others by dismissing him? It was agreed that the appropriate comparator was a hypothetical one who was 30 years younger than the Claimant

85. The Tribunal has concluded above that the reason that the Claimant was selected for redundancy without any pool being constructed or any thought being given to bumping was that the Respondent was determined to preserve the employment of Mr Brooks over that of the Claimant.

86. The Claimant has proved the following facts, set out above: Mr Heeley's propensity to express himself in a way which suggested that he did not consider carefully when and how it was appropriate to make reference to the protected characteristics of others; the fact that age-related banter was regarded as being acceptable and unobjectionable in the workplace; the fact that age-related banter was directed at the Claimant including by Mr Heeley; the fact that Mr Heeley asked the Claimant about his retirement age; the fact that Mr Heeley had told Mr Brooks that he could have the Claimant's job on the Claimant's retirement.

87. These facts when taken together are facts from which the Tribunal could infer that the Respondent regarded the Claimant's age which was approaching 65 as a reason to make him redundant without following a proper process. That is to say the Tribunal could infer that the Respondent selected the Claimant for redundancy because he was 30 years older than Mr Brooks and that if he had been the same age as Mr Brooks he would not have been treated as he was in relation to the redundancy exercise.

88. The Tribunal therefore concluded that the Claimant had proved facts from which it could conclude that the Respondent had because of his age treated him less favourably than it treats or would treat others by dismissing him (that is so by selecting him for redundancy).

If the answer to the previous question is yes, has the Respondent proved that he did not treat the Claimant less favourably because of age?

89. The Tribunal concluded that the Respondent had failed to prove this. The Respondent's explanation of what had occurred was that it had simply given no thought to the issue of the pool because it was the Claimant's role that had disappeared and not that of Mr Brooks. However the Tribunal found that in fact the reason that the Respondent did not give any proper consideration to the issue of a pool or bumping was that it wished to retain Mr Brooks' services.

90. Given these findings, and the fact that the Respondent produced no evidence explaining why it had retained Mr Brooks rather than the Claimant (except that it was the Claimant's role and not that of Mr Brooks which had disappeared, which evidence was rejected by the Tribunal) the Tribunal concluded that the Respondent had not on the balance of probabilities proved that the treatment was in no sense whatsoever because of age.

91. The Tribunal therefore concluded that the Respondent had discriminated against the Claimant because of his age by dismissing him.

I. P. Evans

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Employment Judge 10.12.12

JUDGMENT SENT TO THE PARTIES ON

.....12th December 2012.....

AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS