Neutral Citation Number: [2022] EAT 103

Case No: EA-2020-000627-BA

EA-2021-000258-BA

EA-2019-000861-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Tuesday 12 July 2022

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY
MS G MILLS CBE
MRS G P TODD

- -

Between :

(1) **CITIBANK N.A.**
(2) TOM ISAAC
(3) MANOLO FALCO
(4) ASHU KHULLAR
(5) JAMES BARDRICK

Appellants

- and -

NIELS KIRK **Respondent**

- -
- -

Bruce Carr QC (instructed by DAC Beachcroft LLP) for the **Appellants**
Schona Jolly QC (instructed by Leigh Day Solicitors) for the **Respondent**

FULL HEARING
Hearing dates: Tuesday 10 May, Wednesday 11 May and Thursday 12 May 2022

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FINAL JUDGMENT

SUMMARY

AGE DISCRIMINATION, UNFAIR DISMISSAL, REMEDIES

The Claimant succeeded before the Tribunal in his claims of unfair dismissal and age discrimination (in part) following his dismissal from the Respondent at the age of 55. The comparator in respect of the dismissal was Ms Olive, aged 51. The principal challenge to the Liability Judgment is that the Tribunal erred in not properly considering the Respondents' explanation for the treatment of the Claimant in light of the marginal age difference between the Claimant and Ms Olive, and the unchallenged evidence that all of the individual Respondents regarded the Claimant and Ms Olive as being in the same age bracket. This aspect of the appeal is upheld as the Tribunal appears not to have given due consideration to the Respondents' evidence in this regard, and their explanation that age could not be reason for the alleged discriminatory treatment.

The Respondent also appealed against two Remedy Judgments. The appeal against the First Remedy Judgment was primarily a perversity challenge based on the Tribunal's approach to the selection pool that would have been adopted had the Respondents followed a fair and non-discriminatory process. Whilst the inclusion of a subordinate in the selection pool for a position superior to that held by the Claimant and Ms Olive is surprising, it is not such as to establish an overwhelming case that the Tribunal had adopted a course that no reasonable tribunal on these facts would have adopted. Accordingly, the high threshold for a perversity challenge was not crossed.

The appeal against the Second Remedy Judgment challenged the Tribunal's failure to take account of the value of the Claimant's shareholding in a company established by way of mitigating his loss. In principle, such value could be taken into account. However, the burden is on the Respondent to establish the value of the shareholding and the extent to which that should be offset against loss. In the particular circumstances of the present case, including the unsatisfactory evidence adduced by the Respondents on this issue, the Tribunal was entitled to conclude that that burden had not been

discharged. Accordingly, there was no error of law in not ascribing a value to that shareholding for the purposes of assessing loss.

MR JUSTICE CHOUDHURY**:**

Introduction

1. We shall refer to the parties as the Claimant, First Respondent (or Respondent), Mr Isaac, Mr Falco, Mr Khullar and Mr Bardrick, as they were below. The Claimant, Mr Niels Kirk, was employed by the Respondent from 1 June 1991 until 27 November 2017. He was aged 55 at the date of his dismissal. He complained that his dismissal was both unfair and discriminatory on the grounds of age in that following a restructuring exercise, he was selected for termination whereas one of his peers, Ms Olive, who was aged 51 at the time, was appointed to the new Head of Department role.

2. By a corrected judgment promulgated on 2 January 2020 (the original having been promulgated on 19 July 2019) after a nine-day liability hearing held in March and April 2019 before the East London Employment Tribunal ("the Tribunal"), Employment Judge Goodrich presiding, the Claimant succeeded in his claim of unfair dismissal and in some of his age discrimination claims. (We refer to that judgment as "the Liability Judgment" or "LJ"). In particular, it was held that the Claimant's dismissal was on the grounds of age discrimination. At the First Remedy Hearing held in June 2020, the Tribunal concluded ("the First Remedy Judgment" or "RJ1") that any compensation should be reduced by 15% to reflect the possibility that the Claimant would have been dismissed in any event absent the unfairness or discrimination found by the Tribunal. At the Second Remedy Hearing on 30 November 2020, after considering the extent to which the Claimant had mitigated his loss, the Tribunal awarded compensation in the sum of just under £2.7m including interest ("the Second Remedy Judgment" or "RJ2").

3. The Respondents appeal against all three judgments. The principal challenge to the Liability Judgment is that the Tribunal erred in not properly considering the Respondents' explanation for the treatment of the Claimant in light of the marginal age difference between the Claimant

and his comparator, Ms Olive, and the unchallenged evidence that all of the individual Respondents regarded the Claimant and Ms Olive to be in the same age bracket.

4. The Respondents are represented, as they were below, by Mr Bruce Carr QC, and the Claimant (as he was below) by Ms Schona Jolly QC. We are grateful to both Counsel and their respective legal teams for their helpful written and oral submissions.

Background

5. The Respondent is a financial institution with approximately 5,000 employees in Great Britain. From 2011 until his dismissal, the Claimant worked as a corporate banker within the Respondent's Energy and Natural Resources Department. He had the job title of 'EMEA Head of CB Energy, Managing Director', and managed a team of around 16 individuals. The Tribunal found that he was a high-performing senior employee earning substantial remuneration. His total remuneration in each of the four years prior to 2017 was £901,669 in 2013, £937,313 in 2014, £597,636 in 2015, and £534,613 in 2016.

6. Mr Isaac and Mr Khullar were the Claimant's immediate line managers from April 2016 to September 2017, after which Mr Isaac was the Claimant's sole line manager. Mr Falco, who was the head of the Respondent's Corporate Investment Bank, EMEA, was the manager of Mr Isaac and (until September 2017) Mr Khullar. The Tribunal found Mr Isaac, Mr Falco and Mr Khullar to be the relevant decision makers in respect of the Claimant's dismissal. Mr Bardrick heard the Claimant's appeal against dismissal.

7. The Claimant's position formed part of the Respondent's Energy, Power and Metals & Mining franchises. The Claimant was Head of Energy, Ms Olive was Head of Metals & Mining, and a Mr Hanen was Head of Power. Each had the title, Managing Director ("MD"). There was a further MD, Mr Husband, whose title was also Head of Metals & Mining, although he reported to Ms Olive.

8. The Respondent operated a performance rating system whereby managers would be rated between 1 and 5, with 1 denoting "exceptional" performance, 2 as "highly effective", 3 as "consistently strong", 4 as "partly effective" and 5 as "not effective". The Claimant was consistently rated a '2' every year from 2006 to 2013. In 2014, he received a rating of '1', but his ratings from 2015 and 2016 fell to '3'. Part of the explanation for these ratings appears to be that the Respondent started, from about the middle of 2014, to place greater emphasis on the development of relationships between institutional clients and partner teams within the Respondent. This has been referred to as "partner" or "partnership" skills. There had been a drop in the Claimant's partner skills feedback in 2015. There had also been some negative comments made by some managers about the Claimant, including that he was "sometimes abrasive internally" and that he needed to "cure his narcissistic behaviour as its (sic) counter productive and a nightmare for others".

9. The Respondent did not collect data on the ages of its workforce. However, some data in respect of ages was disclosed in response to applications made by the Claimant below. The Tribunal found that in 2015, there were 48 MDs in the Respondent of whom only one was older than 57, and that in 2016, there were 51 MDs of whom two were older than 57.

Proposed restructure in 2016

10. In 2016, Mr Isaac and Mr Khullar as Co-Heads of Corporate Banking for EMEA, considered ways of improving operational efficiency. They proposed a consolidation of the Energy, Power and Metals & Mining franchise and a reduction in the number of MDs in that franchise from 4 to 2 (although it has sometimes referred to as a reduction from 3 MDs to 1). Although a written report in support of this proposed restructure was produced, the restructure did not proceed at the time because adequate costs savings were achieved elsewhere. None of the four MDs had

been consulted about the proposed restructure in 2016.

Restructuring opportunity in 2017

11. At some point in 2017 (the Tribunal not being able to find precisely when), Mr Hanen, Head of Power, decided to take up a new position with the Respondent in Dubai. In early August 2017, Mr Isaac and Mr Khullar decided, in light of Mr Hanen's departure, not to replace him but to use this as an opportunity to save costs, and to review and streamline the current operating model. They proposed to create a consolidated natural resources team led by single senior MD. Unlike the proposed 2016 restructure, no written documentation or structure chart was produced to explain the restructure or the reasons for it. The Tribunal also found that there were no notes of any discussions between senior managers or with Human Resources (HR) about the restructure.

12. Mr Isaac and Mr Khullar decided that Ms Olive was more suitable for the proposed senior MD role. Two explanations were given for this: the first was that Ms Olive's role included the role of Global Head of Commodities and they did not want that to be affected by the restructure; the second was that both Mr Isaac and Mr Khullar had concerns about the Claimant's partnership skills. The Tribunal expressed "scepticism" about these explanations as the Global Head of Commodities role occupied slightly more than 5 to 10% of Ms Olive's working time; it was accepted that both the Claimant and Ms Olive had the ability to be head; Ms Olive's partnership feedback was "not unequivocally positive"; and neither Mr Isaac nor Mr Khullar had consulted Ms Olive's manager, Mr Parker, about her performance or suitability.

13. The proposals were discussed with Mr Falco, who gave Mr Isaac and Mr Khullar, the "go ahead" to proceed. A job description was prepared and "stress testing" of the provisional decision to appoint Ms Olive was carried out.

Meeting on 25 September 2017

14. Mr Falco and Mr Isaac wanted to notify the Claimant of the proposed restructure before undertaking any formal consultation. They decided to have what they described as a "heads up" meeting with the Claimant. That meeting was held on 25 September 2017 between Mr Falco, Mr Isaac and the Claimant. Mr Khullar did not attend as he had by this stage commenced a relocation to Hong Kong.

15. The Claimant was given no advance notice that the meeting was to discuss proposals that put his job at risk. The Claimant made a contemporaneous handwritten note of the meeting. He was informed by Mr Falco that there would be a reduction from 3 MDs to 1 and that Ms Olive would be the one. Of particular significance in this case is that the Claimant noted that Mr Falco said, "Your many years in the bank and hands on style counted against me. You are old and set in your ways". Mr Falco denied making that remark about being "old and set in your ways". The Tribunal found, however, that the remark was made.

16. Later that day, the Claimant sent an email to Mr Falco and Mr Isaac complaining that he was the best qualified candidate and that the decision to pass him over had nothing to do with skills or sector experience but rather his age. He did not, however, at that stage refer expressly to the remark made by Mr Falco. In further emails, the Claimant alleged age discrimination.

17. The Claimant made longer handwritten notes after the meeting on 25 September 2017. Although this did include a reference to the remark made by Mr Falco, it appeared from the way the note was written that the remark had been inserted after the first draft of the note had been completed. This was due to the fact that the remark was contained in a space between paragraphs, whereas there was no such insertion in the space between any of the other paragraphs in the note.

Consultation, Dismissal and Appeal

18. The first formal consultation meeting took place on 17 October 2017. The Claimant alleged at that meeting, which Mr Isaac attended by telephone, that Mr Falco had made the remark about being old and set in your ways. He was not challenged about this at the time. A further consultation meeting took place on 26 October. During that meeting, Mr Isaac referred at least four times to the need for a more "agile" approach and for greater "agility".

19. The Tribunal further noted that no efforts were made to find alternative employment for the Claimant. A final consultation meeting took place on 9 November 2017. At that meeting, Mr Isaac referred again to the need for "agility" and stated that Ms Olive had prevailed in a benchmarking comparison between her and the Claimant.

20. The Claimant was dismissed by letter dated 20 November 2017. The reason for dismissal was said to be redundancy. He was notified of his right of appeal, which the Claimant exercised. The Claimant complained, amongst other things, about Mr Falco's remark and that the decision to dismiss him was based on a perception that he was "old and set in his ways" rather than being "agile" and "flexible".

21. The Claimant's appeal was heard by Mr Bardrick on 21 December 2017. Mr Bardrick showed some incredulity that age discrimination could be part of the culture of the bank and was found to be dismissive of the Claimant's allegation. This was notwithstanding Mr Bardrick's knowledge of another complaint of age discrimination made against Mr Falco by another employee, Mr Graham, and that Mr Graham had intended to take the matter to the Tribunal.

22. By a letter dated 2 February 2018, the Claimant's appeal was dismissed. Mr Bardrick concluded that Mr Falco had not said that the Claimant was "old". The Tribunal noted that a draft of the appeal decision letter had also included the Claimant's allegation that Mr Falco had told him he was "set in his ways". However, those words were omitted from the final letter. Mr Bardrick could not explain the reason for the change.

23. The Claimant's claim was lodged on 20 February 2018. He complained, amongst other matters,

of unfair dismissal, direct and indirect age discrimination and age-related harassment.

The Tribunal's conclusions.

Liability Judgment ("LJ")

24. The Tribunal found that, by the time Mr Isaac and Mr Falco met with the Claimant on 25 September 2017, they had already decided that Ms Olive would be appointed to the post and that the Claimant would be made redundant. Their reasons for so concluding were set out as follows:

> "132.1 The evidence of Mr Isaac and Mr Falco in particular appeared unconvincing and at times evasive when questioned on this topic. The Tribunal had the impression that we were not being given the full story as to whether their consultation with the Claimant was genuine.
> 132.2 No paper trail, such as the structure chart produced in 2016 (to which we referred further above in our findings of fact), or written explanation for the restructure was provided by any witness of the Respondent.
> 132.3 Written records of any meetings or discussions conducted between July and September 2017 are scant, to the point of being almost non-existent, as to discussions about the proposed restructure. It is less surprising that there are no such records of discussions between Messrs Khullar, Isaac and Falco, as they had adjacent offices. It is more surprising that no such records were kept of discussions with human resources as the Tribunal was informed that frequent discussions and meetings were taking place during this time between Mr Isaac, Mr Khullar and human resources. As, the Tribunal was informed, human resources would usually keep records of such meetings or discussions; it is surprising that none had been produced (even allowing for the possibility that parts of such meetings might have been excluded on the basis of legal advice privilege).
> 132.4 Mr Isaac and Mr Khullar had decided that Ms Olive was more suitable for the post before they asked Ms Senecaut to draw up a job description for the post and before the so-called "stress testing" of their decision.
> 132.5 Before Mr Isaac and Mr Falco met with the Claimant on 25 September 2017 to notify him of the proposed restructure, they had already met Ms Olive to inform her that she was their preferred candidate for the position and check that she wanted the role.
> 132.6 There was a lack of effort on the Respondent's part to seek to find alternative employment for the Claimant, to which we refer further below. This suggests that, once the Claimant had been selected for redundancy, the Claimant's managers were not interested in retaining him within the organisation by engaging with him as to the possibility of finding him suitable alternative employment.

> 132.7 The Claimant's franchise, energy, was the largest revenue generator of the franchises being consolidated. As referred to above, the Tribunal had some scepticism about the explanations given for the restructure and their responses when cross-examined on the issue.
> 132.8 Mr Falco was asked in cross-examination whether he had a perception that Mr Kirk could not change and replied: "I tried my best – he had a lot of opportunities to change".
> 132.9 Mr Falco's initial response to questions as to whether there was any point in the stress testing being carried out appeared to the Tribunal to be evasive. The Tribunal formed the impression from his evidence, and that of other witnesses for the Respondent that the stress testing was undertaken to seek to give credence to a decision that had already been made, rather than being an open minded inquiry as to which of the two individuals was better suited to the role.
> 132.10 In an interview conducted by Mr Bardrick for the Claimant's appeal against dismissal, Mr Falco stated, in response to being asked about the Claimant's opinion that the decision was a fait accompli, Mr Falco replied that he personally would have preferred a more direct conversation but HR did not allow it.
> 132.11 When cross-examined about this interview and the meeting on 25 September, Mr Falco's reply included that they had really thought about their decision and once they were in the room (i.e. on 25 September, a meeting to which we will refer shortly) "we were very certain that's what we were going to do". This suggests that by 25 September the decision to make the Claimant redundant was, as the Claimant believed, a fait accompli.
> 132.12 The Tribunal agrees with the Claimant's case that once meetings were conducted with the Claimant from late September until November, the Claimant's responses to the consultation were not addressed in an open-minded way.
> 132.13 The manner in which the Claimant's complaints of age discrimination were dealt with by the Respondent were surprising for an organisation professing to take equal opportunities seriously."

25. As to the key factual dispute as to whether Mr Falco made the "old and set in your ways" remark attributed to him, the Tribunal found as follows:

> "138 On the balance of probabilities, the Tribunal finds that Mr Falco did say: "you're old and set in your ways" at the meeting on 25 September. We so find from our consideration of the written and oral evidence of the three witnesses concerned and consideration of all the evidence provided to the Tribunal in the case. Our reasons for so finding include:-
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> 138.1 The Claimant, on the whole, was (as referred to above) the most convincing of the three witnesses. His evidence was succinct, straightforward, calm, appeared plausible and not to be evasive. As referred to above, the

evidence of Mr Isaac and Mr Falco appeared to the Tribunal to be less convincing.

138.2 That the Claimant was set in his ways appeared to be what Mr Falco thought about the Claimant. We refer for example to his comment (referred to above) "I tried my best – he had a lot of opportunities to change".

138.3 The Claimant did make a written record of the meeting at the time it was being held. Mr Isaac accepted, when cross-examined on the point, that the Claimant was taking notes of the meeting. It was not put in cross examination of the Claimant that the notes the Claimant produced, that he said he had written during the meeting on 25 September, were not the notes he had written during the meeting, or were false.

138.4 Mr Isaac's evidence was that he threw his contemporaneous note of the meeting into the confidential waste bin. This was surprising to the Tribunal for someone being extensively advised by human resources. Mr Isaac's evidence also changed as to how many days after the meeting he took his recollection of what was said at the meeting.

138.5 The Tribunal has some concern about the length of time the Claimant took to make the allegation as to these remarks. Initially, he made only generalised references to assuming that age discrimination was a factor in the decision, rather than referring to the specific remarks. His explanation for not making the specific allegation sooner was reasonably plausible, i.e. that he was fighting to keep his job, rather than jeopardise it. In the Tribunal's experience sometimes such an explanation (the delay in making the allegation) is genuinely through giving priority to try to save their job, sometimes it is, as suggested by Mr Arnaldi when he was cross-examined, a tactical decision to make such an allegation to bolster their case.

138.6 Mr Isaac's explanation for not challenging the Claimant's allegation when he first heard the Claimant make it in a telephone conference call was slightly less convincing. We accept that he was in his hotel room which was not the best of circumstances for responding to such an allegation. It is nevertheless surprising that, if he was indignant about the allegation as he said he was during his evidence, that he did not challenge the Claimant about his allegation when he first heard it. Another possibility is that he did not challenge the remark when it was first brought to his attention because he knew that Mr Falco had said it.

138.7 The Tribunal also has some concern about the authenticity of the remark because of Mr Falco's evidence, for whom English is not his first language, that: "set in your ways" is not an expression he would * use. Had we felt more confident in Mr Falco's evidence as a whole, we would have given more weight to this evidence of Mr Falco, although we have borne this part of his evidence in mind when weighing up all the evidence with which we were provided on this dispute of fact.

138.8 We also have some concern about a point referred to in cross-examination of the Claimant as to the Claimant may be adding the comment in

> a subsequent written note he made of the meeting, in that remark appears to have been inserted between two lines.
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> 138.9 We accept that, as asserted in closing submissions and in Mr Arnaldi's evidence, that it would have been a stupid remark for Mr Falco to have made, particularly as a Mr Graham had previously made similar allegations against Mr Falco as those of the Claimant. Nonetheless, in the Tribunal's experience, individuals do from time to time say foolish things; and this was a meeting where no-one from human resources was present.
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> 138.10 The remark appeared to the Tribunal to be the kind of throwaway remark Mr Falco could make.
>
> 138.11 The Tribunal does not give great weight to the fact that Mr Graham brought an age discrimination against the Respondent and attributed the age discrimination as being by Mr Falco. The case was settled so no findings of fact were made one way or another at a Tribunal hearing for his case. Nonetheless Mr Graham was another individual who considered that Mr Falco had discriminated against him because of his age, including as to his dismissal; and he felt strongly enough to bring Employment Tribunal proceedings against the Respondent."

26. At LJ [217], the Tribunal identified the key issue in the case as being "whether the Claimant was treated less favourably than his comparator, or a hypothetical comparator, because of his protected characteristic, namely his age".

27. The Tribunal then went on to consider whether the Claimant had proved, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act or acts of age discrimination of which the Claimant complaints. It also reminded itself that it should consider the reason why the Claimant received less favourable treatment. No issue is taken by the Respondents as to that self-direction.

28. The Tribunal concluded as follows:

> "220 The Tribunal has concluded that the Claimant has proved such facts, at least for the allegations concerning the Claimant's performance reviews and his dismissal, including because:
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> 220.1 Mr Falco's remark "you're old and set in your ways," was an act of age discrimination in itself.

220.2 As recorded in the Tribunal's findings of fact the remark by Mr Falco represented his view of the Claimant, for example, by his response in cross-examination "I tried my best – he had a lot of opportunities to change".

220.3 The Claimant received a rating of 2 every year from 2006 to 2013, then a rating on 1 in 2014. His drop by two grades calls for an explanation. Additionally, the differences in the feedback received for the Claimant as an important part of the explanation for dropping two grades from 2014 to 2015 and 2016 appeared relatively similar during the three years in question (although as highlighted in the findings of fact there were some differences).

220.4 Taking together, some of the statements made by Mr Turek, Mr Falco, Mr Isaac and Mr Bardrick could show, possibly unconsciously, the presence of age discrimination. We refer to our findings of fact earlier above, such as Mr Turek's comments in the Claimant's performance review document, to Mr Falco's comments quoted in the Financial Times concerning the recruitment of Mr Davison, to Mr Bardrick's comments published in the Evening Standard and to Mr Isaac's frequent references to the word "agile" as part of his explanation for selecting the Claimant for redundancy.

220.5 The statistical information provided to the Tribunal shows that during 2015, out of 48 managing directors, only one was 57 or more; and out of 51 managing directors in 2016 only two were 57 or over.

220.6 The Claimant's complaints of age discrimination were treated less seriously than a complaint of sex or race discrimination would have been treated, as described in our findings of fact above. The explanation given for not investigating the Claimant's allegations of age discrimination independently of the consultation process leading to his dismissal did not stand up. According to the Respondent's case, the consultation process with the Claimant did not start until the meeting on 17 October, by which time the Claimant had already complained of age discrimination. It was dismissed out of hand, at least until the Claimant's appeal against dismissal. The Respondent's witnesses responses as to why they did not consider it relevant that Mr Graham had made complaints against Mr Falco or age discrimination were evasive.

220.7 More generally the Respondents' witnesses treated with some incredulity that there could be the existence of any age discrimination within the Respondent. Although a large organisation, they do not monitor age to investigate the possibility of age discrimination.

220.8 Although Mr Bardrick expressed surprise during the Claimant's appeal hearing as to the Claimant's allegations of age discrimination, he appeared to have agreed that Mr Falco made statements about the Claimant being old and set in his ways; and the words "set in your ways" that were in his draft appeal outcome letter were removed from the letter that was sent to the Claimant.

220.9 As set out below the Claimant was unfairly dismissed. Unfair or unreasonable treatment is not necessarily discriminatory treatment. Neither, however, would we assume that the Respondent habitually dismisses its

> employees unfairly regardless of their ages. Dismissing an employee unfairly calls for an explanation as to the employer's motives for doing so."

29. Having so concluded, the Tribunal went on to consider whether the Respondents' treatment of the Claimant was on the prohibited ground or whether the Respondents had proved, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of age. As to the allegation that the awarding of lower grades in 2015 and 2016 was an act of age discrimination, the Tribunal concluded "narrowly" that the treatment was not on the prohibited ground. Their reasons for so concluding included the fact that: until the September meeting, the Claimant had never considered that he had been subject to any form of age discrimination; that the sophisticated appraisal system was based on largely objectively measurable data; the fact that the Claimant received a rating of '1' in 2014 did not suggest that age discrimination was a factor in subsequent lower ratings; there were some negative remarks about the Claimant; and there was a greater emphasis on partnership working after 2014 which provided a reasonably plausible explanation for the drop in ratings thereafter.

30. The Tribunal upheld the complaint that Mr Falco's remark amounted to unlawful harassment related to age.

31. At LJ [227] and [228], the Tribunal set out its conclusions on whether the decision to dismiss and the Claimant's dismissal amounted to age discrimination:

> "228 The Tribunal considers and finds that the information leading to, the skillset document, decision to dismiss the Claimant and the Claimant's dismissal were, at least to the extent of having an important effect on the outcome, on the prohibited ground of the Claimant's age including because:
>
> 228.1 Mr Falco's perception of the Claimant was that he was old and set in his ways and that Ms Olive was not.
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> 228.2 Mr Isaac shared Mr Falco's perception of the Claimant, although probably not to such a conscious extent. He supported Mr Falco's denial of the remark and did not challenge him. He perceived the Claimant as being less "agile" than Ms Olive and thus less suited for the position in question.
>
> 228.3 The Claimant's age was not, however, the only factor in the decision to dismiss him. The Tribunal accepts that Mr Isaac and Mr Khullar did want to reorganise the department as, in the Tribunal's experience, many

> incoming managers do. The opportunity for a reorganisation was presented by Mr Hanen leaving his position and moving to another part of the Respondent's organisation.
>
> 228.4 The Tribunal considers and finds, therefore, that the decision to make the Claimant redundant, and the process undertaken to seek to give credence to the decision was an opportunistic response to the circumstances presented in 2016; rather than a long standing desire and plan to prepare the ground work in earlier years, through the performance reviews in 2015 and 2016, in order to dismiss him in 2017.
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> 228.5 There are compelling reasons, set out above, for why the burden of proof shifted to the Respondent to disprove age discrimination in respect of the processes leading to the Claimant's dismissal and the dismissal itself. The Respondent has fallen a long way short of satisfying the Tribunal, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.
>
> 228.6 The Tribunal also concludes that Mr Bardrick's upholding of the decision to dismiss the Claimant was tainted with age discrimination, although possibly unconscious. Whether consciously or unconsciously, he agreed with, or at least wished to support, Mr Falco and Mr Isaacs views of the Claimant and to close his mind as to the Claimant's ground of appeal that he was being dismissed because of his age. As set out in the Tribunal's findings of fact above there is a strong possibility that Mr Bardrick did believe that Mr Falco had made the remark in question although, if that was his opinion, there is a contradiction between how he questioned the Claimant and what he truly believed had happened. His questioning of the Claimant at the appeal meeting suggested incredulity at the possibility of age discrimination on the Respondent's part, rather than an open mind. When conducting further investigation of the Claimant's allegations he accepted Mr Falco and Mr Isaac's denials without any great scrutiny and chose to support Mr Falco with whom he had had a close working relationship for the years when they had a joint managerial responsibility. It suggested a possible desire on his part to support Mr Falco's version of events, despite believing that Mr Falco had telling the Claimant that he was old and set in his ways as part of his explanation for preferring Ms Olive for the role in question.
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> 229 These complaints of the Claimant, therefore, succeed against the First Respondent, Mr Isaac, Mr Falco and Mr Khullar."

32. The Claimant's further complaints of victimisation were rejected.

33. As to the claim of unfair dismissal, the Tribunal found that although it was unclear whether the statutory definition of redundancy had been met, it was satisfied that the reason for dismissal was re-organisation, that being potentially fair as "some other substantial reason" within the meaning of s.98(1) of the *Employment Rights Act 1996* ("ERA"). Finally, the Tribunal

considered whether the dismissal was fair or unfair within the meaning of s.98(4), ERA and held as follows:

> "267 In the circumstances of the case (including the size and administrative resources of the Respondent) did the Respondent act reasonably or unreasonably in treating the re-organisation concerned as a sufficient reason for dismissing the Claimant, in accordance with equity and the substantial merits of the case? The Tribunal has concluded that neither the procedures adopted by the Respondent nor the substantive decision to dismiss the Claimant fell within the band of reasonable responses a reasonable employer might have adopted, including for reasons set out in our findings of fact and for each of the following reasons:-
>
> 267.1 The dismissal of the Claimant was an act of unlawful age discrimination.
>
> 267.2 The Claimant was not given any warning as to the proposed re-organisation until after the decision to re-organise had been made and, as set out in the Tribunal's findings of fact, the decision to select the Claimant for dismissal on the (stated) grounds of redundancy had been made. The so called consultation with the Claimant was not genuine consultation, for the reasons set out in the findings of fact above.
>
> 267.3 If any efforts to seek alternative employment were made for the Claimant which, as set out in our findings of fact, we doubt, they were inadequate. The Claimant was an employee for over twenty six years. He was trying to keep his job, or be placed in the position for which Ms Olive was to be appointed. No effort was made by the Respondent to have a meeting to discuss with him what might be possible areas of interest for him to work in and for which he might be suited.
>
> 267.4 The Claimant's complaints of age discrimination were, in effect, ignored until the Claimant's appeal although, in view of the Respondent's policy they should have been considered as they were made before the Respondent's so called consultation had started.
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> 267.5 The conducting of the Claimant's appeal by Mr Bardrick was also an act of age discrimination, as described above.
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> 267.6 After meeting the Claimant to discuss his grounds of appeal, Mr Bardrick carried out further investigations. He did not reconvene the meeting or give the Claimant any opportunity to comment on the outcome of his further investigations before reaching his decision on the outcome, to dismiss the Claimant.
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> 268 The Claimant's dismissal was, therefore, unfair."

The First Remedy Judgment ("RJ1")

34. The purpose of the First Remedy Hearing was to consider whether the Claimant would have been dismissed in any event, absent the unfairness or discrimination found. It was therefore to

consider whether there should be any reduction on "*Polkey*" (*Polkey v AE Dayton Services Ltd* [1987] IRLR 503 HL) or "*Chagger*" (*Chagger v Abbey National Plc* [2010] IRLR 47 CA) grounds. Although these were issues on which submissions and evidence had been heard at the Liability Hearing, it was decided to reserve adjudication on them to the First Remedy Hearing, partly because the Respondent had raised a "*Devis v Atkins*" issue which the parties had agreed should be reserved to the remedy hearing. The Respondent decided, in the event, not to pursue that issue. The Tribunal proceeded to determine the *Polkey* and *Chagger* issues on the basis of written submissions alone and without any further evidence.

35. The Tribunal directed itself as follows at [39] to [41] of RJ1:

> "39 In accordance with the guidance given in the *Chagger* judgment (above) it is necessary for the Tribunal to ask what would have occurred had there been no unlawful discrimination. Was there a chance that dismissal would have occurred in any event, even if there had been no discrimination, bearing in mind that the gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination?
>
> 40 As regards the Claimant's unfair dismissal, from all the evidence, would or might the Claimant's employment have ceased in any event had fair procedures been followed? Is this a circumstance where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made (as was one of the submissions made on behalf of the Claimant)?
>
> 41 The Tribunal bears in mind the guidance given in *Hill v Governing Body of Great Tey Primary School* (above) that the assessment of chances that the employer would have fairly dismissed the Claimant are predictive. We bear in mind, as was stated in the Polkey case that there is no need for an all or nothing decision.
>
> 42 In this case, making predictions of what would have occurred is a difficult exercise. It requires the Tribunal to consider what would have occurred instead of many discriminatory and/or unfair actions that did occur, and actions that should have occurred that did not. It requires, in a sense, the people involved to be different people to the people they were.
>
> 43 We do not accept, however, as was one of the submissions on the Claimant's behalf, that the nature of the evidence upon which the Respondent seek to rely is so inherently unreliable that no sensible prediction based on that evidence can properly be made in the Respondent's favour. Although we did

> have a number of criticisms of the evidence of the Respondents' witnesses we find that the evidence is not so inherently unreliable that no sensible prediction can be made. We do our best to undertake the exercise required by the guidance given in the relevant caselaw as best we can."

36. The Tribunal went on to conclude that if there had been a genuine consultation exercise, the proposed restructure chart would have been likely to have shown the new head of franchise role to which Mr Husband was appointed soon after the rejection of the Claimant's appeal against dismissal. Had this occurred, the Claimant and Ms Olive would probably have argued that Mr Husband's proposed position be made redundant rather than theirs or at least that he should be placed in the pool for redundancy. The Tribunal considered that if such a request had been made:

> "55… it is hard to see how Mr Isaac and Mr Falco (and Mr Khullar, if this had happened before he moved post) would not at least have placed him into a pool for selection, if they were acting fairly and without age discriminatory perceptions of the Claimant."

37. The Tribunal also considered the Respondents' submission that the discriminatory and unfair aspects of the dismissal ought to be considered separately for the purposes of the *Polkey/Chagger* assessments. The Tribunal rejected that submission, stating as follows:

> "59 First, the Tribunal finds the issues of the discriminatory dismissal and the unfair dismissal to be intertwined. Dismissal is a process that starts with the first steps taken in the stages of dismissal and ends with the outcome of the employee's appeal. At all stages of this process the Respondent's actions were influenced by age discrimination, such as the perception that the Claimant was old and set in his ways and that he was not agile enough, in comparison to how Ms Olive was perceived.
>
> 60 Second, the steps outlined in the *Williams v Compair Maxam* case giving guidance as to the actions a reasonable employer, acting within the band of reasonable responses, would have adopted influence causation. If, for example, the outcome of consultation had been either for the restructure not to have taken place, or to have taken place in a very different way so as not to have put the Claimant's position at risk, the discriminatory element of the Claimant's dismissal would not have occurred at all because the Claimant would not have been dismissed."

38. The Tribunal noted that, although the Respondent stated that it had a redundancy policy, this had not been produced at the Liability Hearing. The Tribunal did not therefore know what

criteria would have been followed had a fair and non-discriminatory procedure been applied, but found:

> "63… that some criteria would have been given that would have met the guidance given in the *Williams v Compair Maxam* case, to which we referred in The Liability Judgment and that they would have been made fairly and without discrimination. We have in mind the guidance that the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service. The employer will then seek to ensure that the selection is made fairly in accordance with those criteria."

39. The Tribunal then considered the chance that the Claimant rather than Ms Olive would have been the successful candidate and concluded that he "would have had at least as good a chance of being successful as Ms Olive". The Tribunal's reasons were as follows:

> "79 We find that what is most likely to have taken place is that either the position held by Mr Husband would have been deleted as well as those of the Claimant and Ms Olive, and that his position would have been made redundant (if it was not filled after his promotion); or that he would have been placed in a pool of three for two positions. We find that it is likely that the Claimant would have obtained either the role that was offered and accepted by Ms Olive; or the role that was offered and accepted by Mr Husband.
>
> 80 If the Claimant had been successful in obtaining the role offered to Ms Olive, he would undoubtedly have accepted it, as it was the position he fought for, having been told that he was unsuccessful. If he had not been successful and offered instead the role to which Mr Husband was promoted, he would have been highly likely to have accepted it, for the reasons set out earlier above.
>
> 81 Having all these considerations in mind, the Tribunal finds that, absent the unfairness and discrimination as found by the Tribunal and set out in The Liability Judgment, it is unlikely although possible that he would have been dismissed. We reduce the Claimant's compensation by fifteen per cent, to reflect the "*Polkey*" and "*Chagger*" issues namely, as described in submissions on behalf of the Respondents, whether the Claimant would have been dismissed absent the unfairness or discrimination as found by the Tribunal and set out in its decision on liability."

40. Accordingly, a reduction of 15% was applied to the final remedy assessment.

The Second Remedy Judgment ("RJ2")

41. The Second Remedy Hearing was listed to assess quantum. By the time of that hearing, the Claimant had set up a consultancy business with a Mr Lovegrove, by the name of Kirk, Lovegrove & Co Ltd ("KLC"), in which he had 35% equity stake. The Tribunal found that although KLC had not got off to as strong a start as expected by its founders, and had required emergency funding of £200,000 in March 2020, it was expected to be making substantial profits by 2021. Furthermore, those profits were likely to increase such that by 2025, the Claimant would be earning at least as much from KLC as his annual loss from losing his employment with the Respondent, namely £765,000.

42. The Respondent invited the Tribunal to take account of the increase in the value in that period to 2025 of the Claimant's equity share in KLC as a further offset against his loss. The Respondent had sought to rely on valuations given in evidence by Mr Craig Wallace, Global Co Chief Administrative Officer for banking, capital markets and advisory.

43. The Tribunal found Mr Wallace's evidence to be "less convincing" than that of the Claimant, that he had at times appeared "evasive, and that his evidence as to the value and profits of KLC was "grossly" and "wildly" over optimistic. Notwithstanding the limitations of the evidence and the speculative nature of the exercise, the Tribunal was able to conclude as follows:

> "155.9 Doing the best we can, with the provisos we have set out above, we find that the gap between what the Claimant will receive with KLC and his other appointments with Subsea 7 and Advanced Power, and what we have found that he would have received whilst working for the first Respondent will diminish by approximately 20% for 2021; 40% for 2022, 60% for 2023 (by which time the Claimant will no longer hold positions with Subsea 7 and Advanced Power); and 80% for 2024. In other words, the Claimant's overall remuneration with KLC for 2021, whether by way of salary, repayment of previous salary sacrifice, dividends or bonus, rather than being £250,000, as stated by the Claimant, as against £765,000, that the Tribunal finds that he would earn in total with KLC the sum of £353,000 in 2021; in 2022 the sum of £456,000; in 2024 the sum of £559,000; and 2025 the sum of £662,000."

44. Having so concluded, the Tribunal went on to consider whether any account should be taken of

the value of Claimant's equity shareholding in KLC. The Respondent's case was that some value should be attached to the shareholding even if this involves speculation. The Tribunal found, however, that it was "unable to make any sensible valuation" of the shareholding as at the cut off point for loss of earnings. The Tribunal was critical of Mr Wallace's evidence and noted that he was not an expert and had never conducted such a valuation. The Tribunal accepted that the burden was on the Respondent in this regard given that the valuation of the shareholding would be an offset against mitigation. That burden was not discharged, and the Tribunal would be making a wild guess as to value. It concluded as follows:

> "Whether to include a valuation of the shares held by the Claimant in KLC as part of the Claimant's mitigation of loss
>
> 177 A difficult, and so far as we were made aware, untested, question is whether the Tribunal should include the value of the Claimant's shares in KLC at whatever point is taken for such a calculation.
>
> 178 The issue is an interesting one, although unnecessary for the Tribunal to resolve in view of our findings about the evidence produced on behalf of the Respondents to substantiate their case on this point. We offer the following observations.
>
> 179 The Tribunal can appreciate an argument that the Claimant's mitigation for remuneration from KLC included the dividends it was estimated he would receive. Dividends are something the Claimant received from being a shareholder and would not have been payable had he been purely an employee of the company. We can recognise, therefore, an argument that, likewise, the value of the shares he has in forming a company that forms part of his mitigation of loss should also be taken into account.
>
> 180 The Tribunal would have concluded, however, that the Claimant's shareholding in KLC is conceptually different from the remuneration he earned whilst working there, other than the following qualification we make.
>
> 181 If the Claimant was deliberately depressing his earnings in the company in order to inflate the compensation he would receive, we would accept that this would be a failure of mitigation on his part. In this case, however, although we have found the Claimant's figures on future earnings to be over cautious, we have not found that he was deliberately seeking to depreciate the amount of the dividends or value of the company to increase his loss of earnings award. Additionally, in our findings of fact above as to what the Claimant's future remuneration with KLC will be, the Tribunal has sought to strike an appropriate balance between the need to invest in KLC, to ensure that it pays

> its employees sufficiently well to attract and retain employees that will enable KLC to obtain high quality work and to have some resilience against future downturns in business, with keeping to the stated objectives when the company was formed of paying dividends to its shareholders.
>
> 182 Firstly, an employee who has savings may choose to invest their money in a multitude of different ways. He/she might, for example, invest in the stock market, or purchases of property. The Claimant chose to invest in a company for which he was to be the chief executive. If he had wished and succeeded to do so, or lacked ready funds to invest himself, he could have become chief executive for the company with no or minimal personal investment in the company.
>
> 183 Secondly, and perhaps more importantly, decisions on when an individual may wish to retire from paid work and when they may wish to cash in and spend their investments are different. Although it is possible that the Claimant might wish to sell KLC,
>
> or at least his shareholding in it at the date of his retirement from working with the company, or at an earlier date, the two will not necessarily be aligned. If the company would be unlikely to be sold for at least 8 – 10 years from its inception, and the hope was that its value would increase over the years, as stated by Mr Lovegrove when the company was being set up, it is unlikely that the Claimant would seek to sell his shareholding before that date. Similarly, if an individual were to invest in property, and have no reason to make an immediate sale, it would be unlikely that he/she would do so in the middle of a property slump. The Claimant remuneration for working for KLC; and the value of his shareholding in the company are conceptually different."

45. Accordingly, no further offset was applied based on the value of the Claimant's shareholding in KLC.

Liability Appeal

Grounds of Appeal

46. There are three grounds of appeal:

    a. Ground 1 – Failure to make proper findings of fact on points central to the issues in the case. This ground of appeal is based, essentially, on the contention that the Tribunal ought to have reached an express finding on whether the Claimant had subsequently inserted the words "old and set in your ways" into his second manuscript note of the

September meeting, and that its failure to do so amounted to an error of law.

b. Ground 2 – Failure properly to apply the burden of proof provisions and to consider the Respondents' non-discriminatory explanation for the Claimant's dismissal. Although, this is numbered Ground 2, it was the primary ground of appeal in respect of the Liability Judgment. It is based on the inherent implausibility of there being age discrimination in circumstances where the difference in age between the Claimant and his comparator is a mere four years.

c. Ground 3 – Failure to consider, properly or at all, the comparator for the purposes of the complaint of age discrimination against Mr Bardrick.

47. We deal with each of these grounds in turn.

LJ - Ground 1- Submissions.

48. Mr Carr submits that it is tolerably clear that the words, "you're old and set in your ways", were inserted into the Claimant's second manuscript note after it had first been drafted. If that is so then it raises a suspicion as to the authenticity of the inserted words. Given the central importance of those words to the Claimant's case, it was incumbent on the Tribunal, submits Mr Carr, to make a finding of fact as to the provenance of the document. However, the Tribunal merely identified the possible insertion of words as a "concern" (at LJ [138.8] and [144]), without making any clear finding about it. Had an adverse finding been made, particularly in light of the Claimant's denial that he had inserted the words, the Tribunal might have reached a different conclusion as to the Claimant's credibility and the reliability of his evidence, the Tribunal's positive view of which was clearly influential in its overall judgment.

49. Ms Jolly submits that this is a "non-point" given the unchallenged contemporaneous note

of the September meeting, which also contains the same words without any hint of insertion or ex-post facto addition.

LJ - Ground 1 - Discussion

50. The key issue of fact here was whether or not Mr Falco made the remark. In respect of that issue, the Tribunal made a clear finding that he did and set out ample reasons for so doing. These included the fact that the Claimant had made a contemporaneous note of the meeting, those notes contained an unambiguous reference to Mr Falco having made the remark, and it had not been suggested in cross-examination either that those notes were not contemporaneous or that any of the contents were false. In these circumstances, the significance of the longer manuscript note, written up some time after the meeting, is somewhat diminished. That longer note is another item of evidence. The Tribunal is not obliged to set out every item of evidence that it considered in reaching its main conclusion or to set out every subsidiary conclusion of fact that was reached in respect of such evidence in deciding the key issue of whether Mr Falco made the remark. As this is fact-finding territory, this appellate tribunal would be very slow to interfere.

51. Of course, it would be surprising if an important detail had been omitted altogether from the subsequent write-up. That was not the case either: the words attributed to Mr Falco were in the later note. The only issue arises from the possibility, raised by the disputed words appearing between paragraphs, that they were subsequently inserted. The Tribunal did not "duck" this issue, as Mr Carr submits. It clearly had the point well in mind as it expressly identified it as a "concern". It can reasonably be inferred from a fair reading of the judgment, and bearing in mind the Tribunal's ultimate conclusion that Mr Falco did make the remark, that the Tribunal concluded that the possibility of insertion did not affect

or undermine its conclusion that the remark was made. That may be because the Tribunal accepted the Claimant's evidence on this issue, or because, even if there was some doubt about that evidence, it did not change the Tribunal's overall view that the Claimant was "on the whole… the most convincing of the three witnesses". The use of the phrase, "on the whole" is telling: the Tribunal was not suggesting that the Claimant was convincing in every single aspect of the evidence he gave, and in fact there may have been aspects which appeared less convincing, of which his denial that the words were inserted after the first draft, might have been one. These are quintessentially matters for the assessment and judgment of the Tribunal, and the fact that it did not expressly set out each and every such instance where the Claimant was believed and those where there was some doubt, does not begin to undermine the Tribunal's conclusions or give rise to any error of law.

52. Mr Carr relied upon the following passage in *Levy v Marrable* [1984] ICR 583 in support of his contention that the Tribunal had failed to discharge its fact-finding duty:

> "With respect to Mr. Digby's argument, we have found it very difficult to find in the language of the decision any clear indication of the view taken by this industrial tribunal about the conflicting evidence led on each side in regard to the alleged previous episodes of welding in the store.
>
> What is our duty in those circumstances? We think the principle involved is the following: where there has been a conflict of evidence at the hearing before an industrial tribunal on a significant issue of fact, then the industrial tribunal's finding (i.e. their acceptance or rejection of such evidence) must be made plain one way or the other. Express words are not necessary. That is clear from *Union of Construction, Allied Trades and Technicians v. Brain* [1981] I.C.R. 542, and in particular the judgment of Donaldson L.J. at p. 551. But the language must be sufficiently full and clear to make it possible for anyone to tell from a reading of the decision as a whole whether the members have believed the relevant witnesses or not. Failure by the industrial tribunal to provide that indication, expressly or by reasonably clear implication from the overall language of their decision, amounts to an error of law: see *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] I.C.R. 120,122. This principle has not, we think, been affected by—indeed it derives implicit support from—the recent decision of the Court of Appeal in *Varndell v. Kearney & Trecker Marwin Ltd*. [1983] I.C.R. 683. Application of that principle to the circumstances of the present case has driven us to the conclusion, on the grounds already indicated, that the industrial tribunal failed to make it sufficiently clear, on a plain reading of their decision as a whole, whether they

> accepted (and if so to what extent) or whether they rejected the evidence on the one side or the other. Thereby they fell into an error of law which it is our duty to redress."

53. In our judgment, the decision of the Tribunal does satisfy those requirements. As already stated, there was a clear decision that Mr Falco made the remark. That was the significant issue of fact in question; not whether a secondary note of the meeting contained an insertion after the event. The decision of the EAT in *Levy v Marrable* is not authority for the proposition that the Tribunal must expressly set out its conclusion on every single evidentiary question that might arise in the course of determining a significant issue of fact. The obligation is to ensure that the judgment is '*Meek*-compliant' in that it sets out sufficient detail to tell the parties, in broad terms why they lost or why they won: see *DPP LLP v Greenberg* [2021] EWCA Civ 672 at [57]. In our judgment, the Liability Judgment is plainly *Meek*-compliant in respect of the Falco remark issue. Even if the insertion question was considered to be more than an evidentiary question and was a significant issue of fact (something which is doubtful given the existence of the unchallenged contemporaneous note containing the same words), there is sufficient detail in the judgment to infer that the Tribunal concluded that issue in the Claimant's favour notwithstanding the concerns expressed.

54. This ground of appeal is not upheld.

LJ - Ground 2 - Submissions

55. Mr Carr submits that in light of the unchallenged evidence that all of the individual Respondents considered both the Claimant and Ms Olive to be in the same age bracket, there was no factual basis for concluding that his non-selection for the Senior MD role

was because of age. Mr Carr had submitted below that the marginal age difference between the Claimant and Ms Olive rendered age discrimination "implausible" or "fanciful", and relied on the analysis of Underhill J (as he then was) in *ABN Amro v Hogben* [2009] UKEAT/0266/09/DM, in which it was held that a tribunal had erred in not striking out a claim of age discrimination as being *prima facie* implausible where the difference in age between Mr Hogben (who was aged 42 at the time) and his comparators ranged from a few months to 7 years. However, this authority was not considered by the Tribunal and there was no attempt on its part to grapple with the unchallenged evidence as to the Respondents' belief that Ms Olive was in the same age bracket as themselves and the Claimant. (Mr Isaac was 55, Mr Falco was 53, Mr Khullar was 52, Mr Bardrick was 55 and Ms Olive was 51). The Tribunal's only reasons for concluding that there had been discrimination appear at [228.1] and [228.2], but these failed to explain why the marginal difference in age in this case did not render the claim implausible. The fact that Mr Falco had made an age-related remark in the September meeting did not absolve the Tribunal from considering his explanation for deciding to dismiss the Claimant instead of Ms Olive whom he considered to be a similar age or from determining whether age could really be the reason why he did so.

56. Mr Carr submits that the position is worse with regard to Mr Isaac as there appeared to be no evidential basis for concluding that age played any part in his decision other than the fact that he has supported Mr Falco's account of the September meeting. Mr Isaac's references to "agility" were clearly in relation to the team and not to individuals, and could not have been the basis for an age-related distinction drawn between the Claimant and Ms Olive given that he also considered them to be roughly the same age. The position in relation to Mr Khullar is the most egregious as there was no material identified by the Tribunal that could lead to a conclusion that age was a factor in his decision. In fact the

Tribunal appears expressly to have concluded that the decision to restructure and move from 3 MDs to 1 was a genuine one in which age did not play a part: see LJ [228.3].

57. This was not a case, submits Mr Carr, where there was any "cliff edge" age-related practice or policy such that even a small difference in age might be relevant. This was a case where it was alleged that there was a perception that the Claimant was old and set in his ways but the Tribunal does not explain why age can be the differentiating factor when Ms Olive was perceived to be the same or almost the same age. Mr Carr further points out that a perception that someone is old and set in their ways can only properly support a case of age discrimination where that view is based on age as opposed to being based on actual experience of a person being resistant to change. Reliance is placed in this regard on the decision in *Live Nation Venues v Hussain* UKEAT/0234/08.

58. Ms Jolly submitted that this was one of those rare cases where an expressly ageist remark was made by a senior manager in explaining why the Claimant was being dismissed. Where such an inherently discriminatory reason for the treatment is evident, the significance of the comparator, and in particular whether she was considered to be of a similar age to the Claimant, is diminished. Ms Jolly submits that Mr Carr's criticisms of the Liability Judgment fall foul of the requirement not to read passages from Tribunal Judgments in isolation and not to be hypercritical of certain words or phrases used. In this regard, she contends that Mr Carr is wrong to focus on the passages in LJ [228.1] and [228.2], and that a fair reading of the whole judgment, including those sections explaining why the burden of proof had shifted to the Respondents to prove that the reason for treatment was in no way related to age, provides a sufficiently clear and *Meek*-compliant explanation for its conclusions. Ms Jolly points out that the Tribunal clearly had in mind Ms Olive's age: LJ [61.9]. Given that awareness and the fact that no issue is taken with

the Tribunal's self-direction in law, the EAT should, in accordance with the guidance in *DPP v Greenberg*, be slow to conclude that there had been any error in the application of those directions.

59. As to the difference in age itself, this was not marginal. Given that s.5 of the *Equality Act 2010* merely refers to a person being a "particular age" or "age group", there is no reason why a difference of 4 years cannot give rise to unlawful age discrimination. In this respect, *ABN Amro* is a very different case where there was no material other than a relatively small difference in age to support the claim. That case is plainly distinguishable, submits Ms Jolly, given the presence, amongst other matters, of Mr Falco's ageist remark. Thus, whilst it might appear superficially attractive to say that a difference in age of only 4 years renders the claim implausible, in fact on closer analysis, it can be seen that, as the Tribunal found, there is discrimination on the grounds of age.

LJ - Ground 2 – Discussion.

60. Section 5, EqA provides:

> "5 Age
>
> (1) In relation to the protected characteristic of age—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
>
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

61. Section 13, EqA, which deals with direct discrimination, so far as relevant provides:

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

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

62. Thus, the prohibited act occurs if, because of age, a person treats another less favourably than he treats or would treat others. It is clear from s.5(2), EqA that "age" can refer to a person of a particular age or falling within a range of ages. Age discrimination can, therefore, arise where there is only a small difference in age between the person treated less favourably and his comparator. This is most likely to arise where the employer applies a particular age as a cut-off for some benefit or the imposition of some detriment. The person reaching the cut-off age may be subject to less favourable treatment whereas a person who is only a few weeks or months short of the cut-off age may not. However, in the absence of a cut-off age (or, as Mr Carr, puts it a "cliff edge") a relatively small difference in age may render it less likely that the discriminatory treatment is because of age. Even then, the particular ages of those concerned might be relevant: a difference in age of two years between an 18- and 20-year-old might, for example, be considered much more significant than the same difference in age in those over the age of 40. A small difference in age between protagonists in their 50s might, without more, render it implausible that age is the reason for any difference in treatment. That is not to say that age could not be the reason in such cases, but a claim that it is would be subject to careful scrutiny.

63. Section 136, EqA deals with the burden of proof. So far as relevant it provides:

> "136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision…"

64. In the present case, in considering whether there was age discrimination, and in recognition of the fact that it is unusual for there to be clear, overt evidence of age discrimination, the Tribunal applied the well-established two-stage approach set out in *Igen v Wong* [2005] IRLR 258 in dealing with the burden of proof requirements under s.136, EqA:

> "17 … The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the Respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the Respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

65. The Court of Appeal in *Igen v Wong* set out some guidance in an Annex to its judgment. In respect of stage 2, so far as relevant the Court said as follows:

> "…
>
> (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."

66. The requirement on Tribunals to assess the employer's explanations and to examine them carefully is apparent from (12) and (13) above.

67. There is no dispute that the Tribunal in this case properly directed itself in accordance with that guidance. Express reference was made to *Igen v Wong* and to the Annex thereof: LJ [24]. As to the first stage, the Tribunal clearly found that the Claimant had proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had discriminated against the Claimant on the grounds of age. The Tribunal reaches that conclusion at LJ [218] to [220]. There is no appeal against that conclusion, which has the effect of shifting the burden of proof on to the Respondents. It is in respect of the second stage, and the consideration of whether the Respondents have proved that the conduct was not because of age, that Mr Carr contends that the Tribunal has erred. Once the burden of proof has shifted to the Respondent, a failure to adduce any or any credible evidence explaining the impugned treatment will almost inevitably lead to the conclusion that the burden has not been discharged, in which case the Tribunal is mandated by s.136(2), EqA to hold that there has been unlawful discrimination. Where, however, the Respondent adduces prima facie credible and/or unchallenged evidence relevant to whether or not s.13, EqA has been contravened, it is incumbent on the Tribunal to consider that evidence to determine whether the burden of proof has been discharged. A failure to undertake that task would amount to a failure to undertake the analysis mandated by s.136, and would deprive the respondent of the opportunity of discharging the burden.

68. The Respondents discharged that burden (albeit "narrowly") in respect of the allegation that the awarding of lower grades in the 2015 and 2016 performance reviews was on the prohibited grounds: see LJ [222]. In coming to that conclusion, the Tribunal had regard to the Respondents' evidence about these reviews, including the fact that they were based on

objectively measurable data. However, in respect of the decision to dismiss and the Claimant's dismissal, the Tribunal concluded that "the Respondent has fallen a long way short of satisfying the Tribunal, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground": LJ [228.5]. Mr Carr's principal contention is that this conclusion was reached without giving proper consideration to the unchallenged evidence that all of the individual Respondents considered the Claimant and Ms Olive to be roughly the same age or in the same age bracket. Ms Jolly's principal retort to that contention is that, this being one of those rare cases where there is direct evidence of an ageist remark being made to explain the Claimant's selection, it did not matter what the comparator's actual age was if she was not perceived by the Respondents in the same age-specific way. Ms Jolly relies upon decisions such as *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 and, in particular, the observations on that case made by Elias J (as he then was) in *Law Society v Bahl* [2003] IRLR 640 at [111]:

> "111. We would make three observations about [Shamoon]. First, by requiring all the relevant circumstances to be taken into consideration when defining the hypothetical comparator in the context of answering the "less favourable treatment" issue, and not merely when asking the "reason why" issue, a tribunal which finds that the prohibited grounds have played no part in the decision will also thereby necessarily be concluding that there is no less favourable treatment. This is not, however, of any practical importance since the determination of the "reason why" issue against the applicant is itself enough to defeat the claim. Conversely, if the tribunal find that the reason was a prohibited reason then there will usually be no difficulty in inferring less favourable treatment, as Lord Nicholls indicated. Once it is shown that a discriminatory reason has had a causative effect upon the decision, it will almost inevitably be an adverse one resulting in the victim receiving less favourable treatment than that which would have been meted out to the hypothetical comparator. In other words, the finding that the treatment was on the grounds of race or sex will almost always involve a finding of less favourable treatment".

69. Ms Jolly highlights the final sentence of that passage and submits that, although Elias J was there considering the hypothetical comparator, the existence of an actual comparator

does nothing to diminish the significance of the finding that the treatment was on the impugned ground. We cannot accept that submission. The analysis in *Bahl* (and in *Shamoon*) was concerned with the situation where there was no actual comparator, the question being whether the treatment was less favourable than that which would have been meted out to a hypothetical comparator. In those circumstances, an adverse finding against the employer as to the reason for treatment could obviate the need for any extensive consideration of the position of the hypothetical comparator. However, where there is an appropriate comparator (and there is no suggestion here that Ms Olive's relevant circumstances were materially different from those of the Claimant) the fact that she was perceived by the Respondents to be of a similar age to the Claimant cannot be said to be a matter of no significance or one that can be disregarded. If the Tribunal were to accept the evidence that the Respondents perceived both the Claimant and Ms Olive to be roughly the same age, then that could affect its conclusions as to the reason why question.

70. We accept that there may be circumstances where overt evidence of blatantly discriminatory conduct could lead to the conclusion that the treatment was on discriminatory grounds even though another person with the same protected characteristic is treated more favourably. Take the example of an employer giving an overtly racist explanation for refusing to promote a black person (A). The fact that another black person (B), who was considered by the discriminatory manager to be "not like the rest of them", was given the promotion would not necessarily avoid a finding that the refusal to promote A amounted to direct discrimination because of A's race. However, even in that case, there would have to be a careful consideration of the mental processes of the employer to determine whether, notwithstanding the racist remark (which could of course found a claim of harassment), race was in fact the reason for the failure to promote A.

71. Ms Jolly relies in the present case on the presence of the overtly ageist remark which the

Tribunal accepted that Mr Falco had made. However, one does not see anywhere in the judgment any express consideration of the evidence that Mr Falco, Mr Isaac and Mr Khullar considered the Claimant and Ms Olive to be roughly the same age. The Tribunal does refer to the ages of each of the protagonists at [61.9]. It can and ought to be inferred therefore that the Tribunal had well in mind that the difference in age between them all was small. However, it seems to us that it was incumbent on the Tribunal to consider also the evidence given by each of the Respondents as to their perception of the age difference (or lack thereof) between Ms Olive and the Claimant, as this was part of the Respondents' case that the Claimant's treatment was not age-related, and therefore part of the material to be considered by the Tribunal at stage two of the *Igen v Wong* analysis. This does not appear to have been done. We bear in mind of course that the Tribunal is not required to refer to each item of evidence before it and that "what is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind": *DPP v Greenberg* at [57(3)]. However, in the present case, if that evidence as to perceived similarity in age was taken into account, then one might have expected to see something in the Tribunal's reasons explaining why that perception did not go towards discharging the burden on the Respondents to show that age was not the reason for dismissal. In fact, the explanation for rejecting the Respondents' case is said to include those matters set out at LJ [228].

72. At LJ [228.1], the Tribunal refers to Mr Falco's perception that the Claimant was old and set in his ways but that Ms Olive was not. However, one does not see any factual finding in the Judgment to the effect that Mr Falco perceived Ms Olive as not "old" or not in the same age bracket as the Claimant. Mr Falco's statement for the hearing provided that he "did not perceive a material difference in age between Mr Kirk and Ms Olive; in fact I considered Mr Kirk, Ms Olive, Mr Isaac and I were in the same broad age bracket". Of course, it might be said that the Tribunal's generally negative view of the Respondents'

evidence, leads to the reasonable inference that this evidence was rejected. However, it is difficult to see why, when the difference in age was marginal, such evidence should be rejected, at least without some explanation for such rejection. Ms Jolly submits that one cannot hive off the reference to being "old" from the rest of Mr Falco's remark and that it should all be considered in the round. We accept that there is a danger of being overanalytical in respect of a remark that was clearly found to have been made. However, given that the "set in your ways" part of the remark is not inherently ageist – a younger person could also be perceived as being resistant to change – the critical part of the remark for the purposes of a claim of age discrimination is the reference to being old. As such, we see no difficulty in considering whether there was evidence before the Tribunal, or any finding, to support the conclusion that Mr Falco's perception was that Ms Olive was, as compared to the Claimant, not old. It does not appear that there was any such evidence or that there is any such finding of fact.

73. This was not a case where the Respondents' evidence that Ms Olive and the Claimant were considered to be in the same age bracket was implausible. The difference in age – 4 years – was, in the context of a group of employees all in their 50s, marginal. That being so, a question is raised as to whether age can realistically be the reason for the difference in treatment. It is contrary to common sense (in a non "cliff edge" type of case) to treat any difference in age, however small, as providing a proper basis for concluding that the difference on treatment was based on that difference. Mr Carr relied on *ABN Amro v Hogben* below in support of the contention that a case involving a 4-year age difference rendered the case "implausible" or "fanciful", and complains that the Tribunal appears not to have considered the *ABN Amro* case. In our view, the failure to refer to that case does not of itself give rise to any error. *ABN Amro* does not, in our judgment, establish any principle of law that wherever there is a marginal age difference Tribunals should

approach the claim from the standpoint of it being implausible or fanciful. Underhill J (as he then was) stated in that case:

> "15. In my judgment the prospect that the Claimant could prove a prima facie case of age discrimination in relation to his non-appointment to either role is indeed fanciful, for the reasons advanced by Mr Linden which I have already set out – and which indeed the Judge largely accepted. So far as the UK job is concerned, where the age difference was only nine months, nothing more need be said. But even as regards the global job there would in my judgment have to be some very particular reason to believe that Mr Pettit was liable to be influenced by the age difference [of seven years] in question. The passage from the note of the investigation meeting relied on by Mr Reade does not in my view afford any such reason. It shows simply that Mr Pettit thought, from his appearance, that the Claimant was somewhere in between 38 and 48. Even if Mr Reade were able to get Mr Pettit to admit that he thought the Claimant was near the bottom of that range, i.e. a year or two younger than he in fact was, that does not make his case more plausible to any appreciable extent. I can see nothing else to indicate even a possibility of age discrimination. …"

74. It is quite clear from that passage that where there is material ("some very particular reason") to believe that the impugned decision was influenced by the difference in age, then the fact that the difference is marginal or relatively small would not of itself be fatal to the claim. As Ms Jolly rightly points out, here there was 'some very particular reason', namely Mr Falco's ageist remark, which could lead one to conclude that even the marginal age difference influenced the decision to dismiss. However, the existence of that remark does not absolve the Tribunal from giving proper consideration to the evidence adduced by the Respondents in support of their case that age was not the reason for the decision. The Tribunal ought to have assessed and carefully examined the evidence as to the perception of the difference in age (or lack thereof). If that evidence is accepted then it would render it less likely that the reason why the Claimant was dismissed was the fact that he was 55 and Ms Olive was a few years younger. In respect of Mr Falco, we consider that that exercise was not carried out. We consider that to be a material error of law.

75. As for Mr Isaac, the conclusion that he too was influenced by age stems (it would appear

from LJ [228.2]) from three matters: the first is that he shared Mr Falco's perception of the Claimant although probably not to such a conscious extent; the second is that he supported Mr Falco's denial of the remark; and third that he perceived the Claimant to be less "agile" than Ms Olive. As to the first of these points, there is the same difficulty as with Mr Falco in that nowhere is it apparent that the Tribunal engaged with Mr Isaac's evidence that he considered the Claimant and Ms Olive (as well as himself and the other decision makers) as being "all roughly in the same age bracket". That evidence, which was neither challenged in cross-examination nor explicitly rejected by the Tribunal, does not sit with the finding that Mr Isaac shared Mr Falco's perception that the Claimant was old and set in his ways and that Ms Olive was not. As to the second point, the fact that Mr Isaac supported Mr Falco's denials could lend some support to the Claimant's case, but still does not address the fundamental difficulty that there was not perceived to be any material difference in age between the Claimant and his comparator. The final matter relied upon is Mr Isaac's repeated references to the need for agility. The Tribunal said this about "agility" at [156]:

> "156 The transcript produced to the Tribunal of the meeting on 26 October shows. Mr lsaac as following Ms Senecaut's script for the meeting. Of note during the meeting (and referred to in Ms Jolly's closing submissions) were at least four occasions when Mr Isaac referred to the need for a more "agile' approach and for greater 'agility'- the point being asserted that agility is a characteristic [of] or associated with youth."

76. An emphasis on "agility" could be a conscious or unconscious device by which to favour a younger candidate over an older one. However, it would be odd, in our judgment, to consider that the term (which was clearly not being used to denote physical agility, that being wholly irrelevant to the role in question, as Mr Isaac made clear during his evidence) was being used here to favour a 51-year old over a 55-year old because of the difference in age. Given the inherent unlikelihood of the term being used in that sense, it was all the

more important to give proper consideration to the evidence adduced by Mr Isaac as to his perception that there was no material difference in age between the Claimant and Ms Olive. However, as with Mr Falco, it is difficult to glean from the judgment, even on the most benevolent reading of it, that that was done.

77. As for Mr Khullar, he too gave evidence that the majority of senior bankers were of a similar age to him (52), although he did not refer specifically to Ms Olive's age, and nor was he asked about it. Mr Khullar was also adamant that age played no part in any of the decisions in which he was involved, claiming to be "baffled" by the allegation. There is no reference to any of this evidence in the Judgment. The only reference to Mr Khullar in LJ [228] is at LJ [228.3] and (by implication) LJ [228.4].

> "228.3- The Claimant's age was not, however, the only factor in the decision to dismiss him. The Tribunal accepts that Mr lsaac and Mr Khullar did want to reorganise the department as, in the Tribunal's experience, many incoming managers do. The opportunity for a reorganisation was presented by Mr Hanen leaving his position and moving to another part of the Respondent s organisation.
>
> 228.4 The Tribunal considers and finds, therefore, that the decision to make the Claimant redundant, and the process undertaken to seek to give credence to the decision was an opportunistic response to the circumstances presented in 2016, rather than a long standing desire and plan to prepare the ground work in earlier years, through the performance reviews in 2015 and 2016, in order to dismiss him in 2017."

78. Mr Carr submits that those passages are exculpatory in that, far from explaining why Mr Khullar had not discharged the burden on him, they in fact appear to accept that none of his actions was influenced by age. We do not read them quite so benevolently for the Respondents. It is tolerably clear that the Tribunal is here seeking to explain why it considers that there were reasons *other than* age that contributed to the dismissal, including the opportunity to restructure presented by Mr Hanen's departure. However, even though not quite exculpatory, we agree with Mr Carr that there is nothing in these two paragraphs that begins to address Mr Khullar's evidence as to the similar ages of those concerned or as to why age might have been a factor in his mind in respect of the stages

at which he was still involved. We are conscious of the need, as with the case of Mr Falco and Mr Isaac, not to focus unduly on these passages and to consider the Judgment as a whole bearing in mind that the failure to refer to evidence does not mean that it was not considered. Even taking that approach, there does not appear to be anything to indicate that Mr Khullar was influenced by the Claimant's age. We recognise that at this stage of the analysis, the burden is on him to prove that age was not a factor. However, he did adduce evidence of that; furthermore, such evidence was *prima facie* credible, given the marginal age difference and his perception that the majority of senior bankers are of a similar age. He was entitled to have that evidence taken into account and, insofar as it was rejected, for there to be some explanation for that. A finding that the evidence of the Claimant was on the whole more convincing does not negate all of the evidence given by the Respondents. Indeed, the Tribunal found in RJ1 that "Although we did have a number of criticisms of the evidence of the Respondents' witnesses we find that the evidence is not so inherently unreliable that no sensible prediction can be made": RJ1 [43]. The Tribunal's view of the evidence did not therefore provide a broom with which to sweep away all of the Respondent's evidence.

79. Ms Jolly submits that the Tribunal was entitled to reach the conclusion that it did in respect of Mr Khullar. That is because Mr Khullar was jointly involved in the decision to appoint Ms Olive instead of the Claimant, which decision had, as the Tribunal found, been taken before the September meeting. Furthermore, Mr Khullar had been instrumental in requesting the steps taken to give credence to that decision. However, these are matters that gave rise to the shifting of the burden of proof; they do not address Mr Khullar's explanation that none of it could be age-related because all concerned were thought to be around the same age.

80. The only other passage in LJ [228] relevant to Messrs Falco, Isaac and Khullar is [228.5] where the Tribunal states as follows:

> "228.5 There are Compelling reasons, set out above, for why the burden of proof shifted to the Respondent to disprove age discrimination in respect of the processes leading to the Claimant's dismissal and the dismissal itself. The Respondent has fallen a long way short of satisfying the Tribunal, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground."

81. Here, the Tribunal refers back to the matters which led to the burden shifting in the first place. It then concludes that the Respondent has "fallen a long way short" of discharging that burden. However, the Tribunal does not add anything further to the reasoning already mentioned in the preceding sub-paragraphs as to why that is the case. In particular, there is no material from which one could reasonably infer that the Tribunal grappled with the Respondents' case, clearly put in its evidence and in submissions, that there could not be age discrimination because of the marginal age difference and the perception that both the Claimant and Ms Olive were in the same age bracket.

82. Although we are reluctant, as any appellate tribunal ought to be, to disturb the conclusions of an experienced Tribunal which has directed itself correctly in law, we are persuaded, not without some misgivings, that the Tribunal did err at stage 2 of the *Igen v Wong* analysis.

83. Ground 2 of the Appeal is therefore upheld.

LJ - Ground 3 - Submissions

84. Mr Carr submits that in relation to Mr Bardrick, the Tribunal failed to determine the case against him by reference to an appropriate hypothetical comparator. It is said that the

Tribunal failed to consider whether, in respect of a comparator who was materially younger, Mr Bardrick would have had an open mind, been more credulous as to the possibility of age discrimination or would not have supported Mr Falco. As a result, the Tribunal's analysis is said to be defective, and its conclusions not adequately explained.

85. Ms Jolly submits that there was ample evidence (including the negative findings on credibility) on which the Tribunal could conclude that Mr Bardrick had not discharged the burden placed on him to prove that age did not influence his decision to uphold the appeal. In particular, the Tribunal had concluded that Mr Bardrick had held or shared, consciously or subconsciously, the ageist views expressed by Mr Falco.

LJ - Ground 3 – Discussion.

86. There was no actual comparator in respect of the complaint that Mr Bardrick had discriminated against the Claimant because of age. A hypothetical comparator had to be considered.

87. As in any case involving a hypothetical comparator, the circumstances of that comparator must be materially the same as those of the Claimant. We agree with Mr Carr that one of the relevant circumstances in this case is that the complaint of age discrimination is made where treatment is considered less favourable than that meted out to someone only a few years younger than the complainant: a complaint of age discrimination where the difference in age is 10 or 15 years or where the difference is 4 years but in respect of a 25 year old complainant, would be very different in character from the Claimant's claim. A further relevant circumstance is that a similarly ageist remark was made by a manager in the course of proceedings.

88. There were two complaints in respect of Mr Bardrick: the first was that he dismissed the Claimant's appeal; and the second was that his questioning of the Claimant during the

appeal was in itself discriminatory. The Tribunal did not expressly identify a comparator for the first complaint, but did do so in respect of the second, identifying the question to be considered as follows:

> "237 In respect of Mr Bardrick's questioning, did he treat the Claimant less favourably than he would have treated a younger employee making a complaint of direct age discrimination".

89. The Tribunal's identification of the hypothetical comparator did no more than state that he would be a younger complainant; it is certainly not apparent that any account was taken of the nature of the age discrimination complaint being brought.

90. Although no comparator is expressly identified in respect of the dismissal of the appeal, we think it appropriate, bearing in mind the principles set out in *DPP v Greenberg*, to assume that the Tribunal had the same comparator in mind for both complaints. Having identified an appropriate comparator, it was incumbent on the Tribunal to consider whether the impugned treatment of the Claimant – i.e. the way he was questioned during the appeal hearing and the dismissal of his appeal against the decision to dismiss – was less favourable than that which would have been meted out to the hypothetical comparator. The Tribunal's analysis of this is set out at LJ [228.6] (in respect of the decision to dismiss the appeal), and at LJ [238] (in respect of Mr Bardrick's questioning during the appeal).

91. As to the dismissal of the appeal, the Tribunal found that the decision was "tainted with age discrimination" because: Mr Bardrick chose to support Mr Falco's and Mr Isaac's views of the Claimant; closed his mind or was incredulous as to the possibility that the Claimant was dismissed because of his age, notwithstanding the strong possibility that he believed that Mr Falco had made the ageist remark; and accepted Mr Falco's and Mr Isaac's denials without any great scrutiny. However, there is no express reference to how the hypothetical comparator would have been treated. It must be assumed that the Tribunal concluded that in the case of a younger complainant (also relying on a minimal age

difference) Mr Bardrick would not have chosen to support Mr Falco's or Mr Isaac's views of the Claimant. However, there appears to be no identifiable reason why Mr Bardrick would have acted any differently in this regard. The Tribunal appeared to find that it was the "close working relationship over many years" between Mr Bardrick and Mr Falco, which lay behind Mr Bardrick's loyalty to Mr Falco. It is difficult to see why such loyalty would not also have manifested itself in a case involving a younger employee making a similar complaint. Similarly, the incredulity expressed by Mr Bardrick at the possibility of age discrimination might have been just as likely (or possibly even more likely) had the complainant been younger. There is, unfortunately no analysis of these issues by reference to comparator; instead there is a conclusion that Mr Bardrick's support for Mr Falco and Mr Isaac must mean that Mr Bardrick's decision-making is also tainted by age-discrimination. However, support born out of loyalty does not necessarily translate to age-related less favourable treatment of a hypothetical comparator in similar circumstances.

92. As for the second part of the complaint, namely the questioning of the Claimant during the appeal hearing, the Tribunal's reasons for concluding that a younger employee would have been treated differently are set out at LJ [238.1] to [238.3]. However, these hark back to the reasons set out previously at LJ [228.6]. They suffer from the same flaw which is that there appears to be no attempt to compare the Claimant's treatment with that which would have been meted out to the hypothetical comparator. We acknowledge that the burden of proof at this stage was very much on Mr Bardrick and that the Tribunal had been critical of his evidence. However, such criticism does not obviate the need to ensure that the appropriate comparative exercise is conducted. Even on a benevolent reading of the Judgment, it is not apparent that this was done.

93. Ground 3 of the appeal is upheld.

First Remedy Appeal

94. There are four grounds of appeal against the First Remedy Judgment:

    a. Ground 1 – Failure to address the Respondents' case on certain key aspects;

    b. Ground 2 – Perversity in proceeding on the basis that Mr Husband, who was subordinate to Ms Olive, would have been included in the selection pool with Ms Olive and the Claimant, for a role that was senior even to them;

    c. Ground 3 – Failure to distinguish between the *Polkey* and *Chagger* exercises;

    d. Ground 4 – The Tribunal's speculation as to what would have occurred went too far.

RJ 1 - Grounds 1 and 2 – Submissions.

95. Mr Carr's submissions focussed on the first two grounds, with particular emphasis on the second and the Tribunal's assessment that a fair and non-discriminatory process would have resulted in Mr Husband being included in the pool for selection. This was "preposterous", submits Mr Carr, given that Mr Husband was junior to Ms Olive, and his inclusion in the pool would have meant that he was competing with his bosses to be their superior, a proposition which Mr Carr submits was clearly perverse.

96. Mr Carr further submits that the Tribunal was not loyal to its findings in the LJ in assessing what would have happened in the absence of discrimination and unfairness. As a result, the Tribunal wrongly approached the *Polkey/Chagger* analysis on the basis that all aspects of the process, including the decision to reorganise and to move from 3 MDs to 1, were tainted by discrimination. In the circumstances, the minimal 15% reduction of compensation on *Polkey/Chagger* grounds, which was based largely on the assumption as to Mr Husband's inclusion in the pool, was wrong and should be remitted for reconsideration.

97. It was further submitted that the Tribunal was wrong to reject the Respondents' contention

that the *Polkey* and *Chagger* exercises should be conducted separately and was wrong / perverse to consider that the Respondent, a global financial institution, would have applied selection criteria such as those set out in *Williams v Compair Maxam*.

98. Ms Jolly submits that the Tribunal was entitled to assess compensation on the basis that it did. The evidence of what had happened to Mr Husband had only emerged at the hearing when Mr Isaac had referred during his cross-examination to there being a reduction from 4 MDs to 2 rather than from 3 to 1. In those circumstances, there was clearly some evidence on which to presume that a fair and non-discriminatory process could have resulted in Mr Husband being considered alongside Ms Olive and the Claimant, notwithstanding the fact that he reported to Ms Olive. It was certainly a long way short of perverse to have so concluded.

99. The Tribunal had concluded that the unfair dismissal and discriminatory acts were intertwined such that a separate analysis of the *Polkey* and *Chagger* reductions was not justified. In any event, the Respondents' submission that the Tribunal was disloyal to its own findings as to when discrimination commenced was based on a misunderstanding of the Tribunal's decision. Finally, in relation to *Williams v Compair Maxam*, Ms Jolly submits that on a proper reading of the Judgment, the Tribunal was not suggesting that inappropriate selection criteria would have been used.

RJ 1 - Grounds 1 and 2 – Discussion

100. It appeared to us that, save in respect of one matter, Mr Carr's submissions in respect of RJ 1 largely comprised a series of disparate and "nitpicking points" which did not undermine the Tribunal's judgment. We can deal with these briefly as follows:

a. Disloyal to findings – We did not discern any such disloyalty to the conclusions in the LJ. Mr Carr submitted that the Tribunal's finding in RJ1 at [59] that, "At all stages of this process the Respondent's actions were influenced by age discrimination…", was necessarily inconsistent with the finding in the LJ at [228.3], where the Tribunal held that "The Claimant's age was not, however, the only factor in the decision to dismiss him", as the latter means that the processes prior to the decision to appoint Ms Olive were not considered discriminatory. However, the passage from RJ1 [59] quoted above needs to be read with the preceding sentence, which provides:

"Dismissal is a process that starts with the first steps taken in the stages of dismissal and ends with the outcome of the employees appeal".

In stating that "At all stages of this process the Respondent's actions were influenced by age discrimination…" the Tribunal was referring back to the process of dismissal. The Tribunal was not thereby suggesting that the decision to reorganise was itself an act of discrimination. Even if we are wrong about that, the Tribunal's various conclusions as to what would have happened had there been a fair and non-discriminatory process, appear to be focused on the outcome of a proper consultation exercise having been undertaken. Such consultation would have taken place when the restructuring proposals were "at a formative stage" (RJ1 at [45]) and certainly prior to any decision being made as to which of Ms Olive or the Claimant to retain. The Tribunal was entitled to conclude that a fair and non-discriminatory procedure would have involved the Respondent undertaking consultation at that stage. In doing so, it was not being disloyal to its findings in the LJ or substituting its view as to what should have occurred, but reaching a reasonable conclusion based on the evidence available as to what the Respondent was likely to have done. Given that the Respondent accepts that there was consultation after the Claimant had been given a "heads up" that Ms Olive was the one to lead the division, it is hardly a leap to conclude that, acting fairly

and without discrimination, this employer would have commenced the consultation at an earlier stage.

b. Reliance upon *Williams v Compair Maxam* – At RJ1 [63], the Tribunal said as follows:

> "63 The Tribunal does not know, therefore, exactly what criteria would have been used absent unfairness and age discrimination in the process. We find, however, that some criteria would have been given that would have met the guidance given in the *Williams v Compair Maxam* case, to which we referred in The Liability Judgment and that they would have been made fairly and without discrimination. We have in mind the guidance that the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service. The employer will then seek to ensure that the selection is made fairly in accordance with those criteria."

Mr Carr submits that it is an egregious error to suppose that a financial institution in selecting for termination between two highly paid individuals would do so by reference to such matters as attendance records. However, on a proper reading of the passage it is clear that the Tribunal is merely indicating that a fair employer would conduct its selection by reference to objective criteria which would include "<u>such things as</u> attendance records, efficiency at the job, experience or length of service." (Emphasis added). In other words, these criteria were only identified as examples and were not cited as ones that this employer would have to apply in order for the dismissal to be fair. This reading is supported by the fact that nowhere in RJ1 does the Tribunal suggest that the Respondent ought to have considered attendance records or would have done so. In fact, the Tribunal's assessment of what would have occurred is by reference primarily to past performance assessments: RJ1 [65].

c. "Influence causation" – At RJ1 [60], the Tribunal said as follows:

> "60 Second, the steps outlined in the *Williams v Compair Maxam* case giving guidance as to the actions a reasonable employer, acting within the band of reasonable responses, would have adopted[,] influence causation. If, for example, the outcome of consultation had been either for the restructure not to

> have taken place, or to have taken place in a very different way so as not to have put the Claimant's position at risk, the discriminatory element of the Claimant's dismissal would not have occurred at all because the Claimant would not have been dismissed."

Mr Carr criticises this passage as containing a clear misdirection of law in that the Tribunal was saying that if the Claimant had not been unfairly dismissed, he might not have been subjected to discrimination. However, it does not appear to us that the Tribunal was giving itself a direction of law to that effect; rather, it was merely indicating that if there had been fair consultation then one possible outcome would have been that the Claimant would not have been dismissed, whether discriminatorily or otherwise. This was stated in support of the Tribunal's view that the dismissal and discrimination issues were intertwined.

d. Mr Husband – Mr Carr also criticised the Tribunal's approach to the evidence and the Claimant's late inclusion of Mr Husband as a comparator. Mr Carr contends that Mr Husband had not been identified as a comparator and if he had been the position would have been properly addressed in disclosure and statements. Whilst the Tribunal will be astute not to permit late amendments without careful scrutiny, we note in this case that the significance of Mr Husband's position only emerged during the cross-examination of Mr Isaac when he posited that the restructuring was "4 MDs going to 2 MDs not 3 going to 1", the fourth MD in that scenario being Mr Husband. In circumstances such as this, where significant evidence emerges at a late stage, the Tribunal was entitled to consider submissions on it. The fact that, in the circumstances of this particular case, the Tribunal decided to take that evidence into account cannot be said to amount to an error of law.

101. The one area where Mr Carr's submissions had more merit was in relation to the Tribunal's view that in a fair and non-discriminatory process, Mr Husband might have been included in the pool for selection along with the Claimant and Ms Olive. Mr Carr

submits that this was clearly perverse as it would involve Mr Husband, who was subordinate to the others, competing with his boss (Ms Olive) to be her boss. This would, says Mr Carr, have been guaranteed to set Mr Husband up to fail and would have been unfair to him, or, if by some chance he had been successfully appointed, undoubtedly unfair to the others.

102. The conclusion that Mr Husband ought to have been included in the pool is certainly surprising, but is it perverse? We remind ourselves that there is a high threshold to be crossed for a perversity challenge to succeed:

> "Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached." (per Mummery LJ in *Yeboah v Crofton* [2002] IRLR 634).

103. We have come to the conclusion that, whilst the conclusion as to Mr Husband is surprising, it does not quite cross the high threshold for a perversity challenge to succeed. The starting point is Mr Isaac's evidence, from which the Mr Husband issue emerged. His evidence was that there was to be a reduction from "4 MDs to 2", the fourth MD being Mr Husband. Whilst Mr Isaac was at pains to point out that Mr Husband was not at the same level as the other MDs – a fact which was not lost on the Tribunal (LJ [116]) – that evidence does provide some foundation for the Tribunal's subsequent conclusions in RJ1 about Mr Husband's suitability for inclusion in a hypothetical selection pool. The Tribunal was also aware that success for Mr Husband in the selection process, if included in the pool, would mean a promotion (RJ1 [56]). Although it is unusual for employees of different ranks to be included in a selection pool, it can occur and is not necessarily unfair when it does, if there is a realistic prospect of the lower ranked person succeeding. Mr Husband had the same title of MD as the Claimant and Ms Olive, albeit he reported to Ms Olive, and following the restructuring, he was appointed to the level at which the Claimant had worked. There was therefore a realistic prospect of Mr Husband being selected for a role

at that level. It was certainly far less likely that Mr Husband would be appointed to a more senior role, but we do not consider that that reduced likelihood, in the circumstances of this case, renders the Tribunal's conclusion perverse.

104. The Tribunal considered that if there had been a consultation exercise, and the employees had been told that Mr Husband's role was earmarked for deletion, then Mr Husband would have argued for inclusion in the pool or that "Ms Olive and probably the Claimant would have argued … at least that he should have been placed in the pool for selection for redundancy" (RJ1 [55]). Whilst it is right to say that it is unlikely that any employee would argue for inclusion in a selection pool from which he had poor prospects of emerging successfully, it is not perverse for the Tribunal to conclude that he might.

105. In our view, Mr Carr makes a strong case that no reasonable tribunal would have reached the same conclusions as the Tribunal did, but it is not an "overwhelming" case. There are, as we point out above, some factors providing some support for the Tribunal's approach, in particular Mr Isaac's evidence. In coming to this conclusion, which we reach with some misgivings, the EAT has found the views of the Lay Members, who have decades of Human Resources and Industrial Relations experience between them, particularly helpful.

106. Grounds 1 and 2 of the First Remedy Appeal do not succeed and are dismissed.

RJ1 - Ground 3 – Failure to distinguish between Polkey and Chagger exercises.

107. This ground was not developed in oral submissions. In short, the contention is that the Tribunal was bound to distinguish between the bases on which the Claimant had succeeded respectively in his claims of age discrimination and unfair dismissal when assessing the compensation due for the discrimination claim. The basis for Mr Carr's contention that there was an error here is that the Tribunal was not loyal to its findings in the LJ and had departed from those findings by expanding the range of acts considered to

be discriminatory. For reasons already discussed under Grounds 1 and 2, we reject that submission.

108. The difficulty with this ground is that the Tribunal expressly rejected the Respondents' suggested separation because it considered the discrimination and unfair dismissal claims to be "intertwined". That was a conclusion that the Tribunal was entitled to reach. We were not taken to any authority requiring a strict separation between the *Polkey* and *Chagger* analyses in every case where there is discrimination and an unfair dismissal. There may be cases where such separation is warranted on the facts: for example where a discrete act of discrimination is found to have occurred that is distinct from procedural steps leading to a dismissal that was considered unfair. However, there will be other cases, such as the present one, where such a separation may not be as easy because the acts of discrimination and those giving rise to unfairness are interrelated.

109. Ground 3 fails and is dismissed.

RJ1 - Ground 4 – Speculation taken too far

110. This ground was also not developed in oral submissions. In our judgment it adds nothing to the matters already considered under Grounds 1 to 3 of the First Remedy Appeal above. The exercise in which the Tribunal was engaged at this stage was necessary speculative. Mr Carr argues that in certain respects, that speculation went too far. However, short of the speculation being perverse or wholly ungrounded in the evidence, it is difficult to say that the degree of speculation gives rise to any error of law. The examples of "over speculation" set out in the Notice of Appeal (at [21]) amount to little more than an attempt to reargue the case below as to what the Tribunal ought to have found. We can discern no error of law in the Tribunal's approach to the speculative exercise in which it was necessarily engaged or as to the conclusions it reached.

111. Accordingly, this ground is also dismissed.

Conclusion on First Remedy Appeal

112. For the reasons set out above at [100] to [111], Grounds 1 to 4 of the First Remedy Appeal fail and are dismissed. There is a Cross-Appeal by the Claimant in respect of the RJ1. However, this Cross-Appeal is said to be brought on a "contingent basis", that contingency, as we understand it, being that the Respondents' appeal against RJ1 is upheld. As that appeal has not been upheld, the Cross-Appeal does not arise.

Second Remedy Appeal

113. Although there are two grounds of appeal in the Notice of Appeal, both Counsel dealt with the principal issue in the round. That issue is whether the Tribunal erred in failing to ascribe a value to the Claimant's shareholding in KLC for the purposes of assessing loss. The Tribunal decided not to ascribe any such value because it was "unable to make any sensible valuation of the Claimant's shareholding at the cut-off point". It considered that the burden of proof in this regard was on the Respondent and that Mr Wallace's evidence was unsatisfactory in a number of respects such that any valuation would amount to "wild guesswork".

RJ2 - Submissions

114. Mr Carr submitted that it was incumbent on the Tribunal to make an assessment of value no matter how difficult and speculative it may be to do so. In circumstances where the Tribunal has concluded that KLC will be sufficiently successful by 2025 to generate income by way of salary, bonus and dividends in the sum of £662,000 per annum, it was not open simply to disregard the increase in the value of the company. Mr Carr submits

that there was evidential material on which the Tribunal could have come to a valuation, rough and ready though it might be, such that by taking that value into account the Claimant would have entirely mitigated his loss.

115. Ms Jolly submits that as the valuation of the shareholding is an aspect of mitigation, the burden lies with the Respondent. That burden was not discharged because of the wholly unsatisfactory evidence of Mr Wallace. Whilst the increased value of a shareholding may be taken into account, whether or not the Tribunal can do so in a particular case will depend on the evidence. Here, that evidence was lacking with the result that the Tribunal was being asked to conduct the difficult task of valuation with no sensible evidential basis for doing so. Ms Jolly further submits that it is important to note the Tribunal's findings as to the purpose of setting up KLC, which was to build a company that the shareholders could be proud of and which generates good returns rather than primarily to achieve a quick capital sale, and that a capital sale was "unlikely to happen for a good 8-10 years even if the opportunity presented itself earlier" (RJ2 [124]). Ms Jolly submits that in light of such findings, it was open to the Tribunal to take the course that it did.

RJ2 - Discussion

116. In principle, the increase in value of a shareholding acquired after termination is something that may be taken into account in assessing loss. In *Lavarack & Woods v Colchester* [1967] 1 QB 278, CA - better known for the principle that a contract breaker may be assumed, in assessing what would have occurred had there not been a breach, to have performed the contract in the manner least onerous to himself - the Court of Appeal also considered whether the increased value of two shareholdings acquired by the plaintiff after termination should be taken into account in assessing loss. In that case, the plaintiff had obtained new employment on a low salary with a company called Martindale, in which

he had acquired a 50% shareholding. He had also invested money in another company, Ventilation, with which there was no employment connection. Lord Denning MR held as follows:

> "But a serious question arises as to the plaintiff's investments in Martindale and Ventilation. Ought he to give credit for his profits from them?
>
> (I) Martindale: This company has done well under the plaintiff's management. In the first 17 months from August, 1964, to December, 1965, it made £4,000, largely by reason of one special contract. In the following two years to December, 1966, and December, 1967, it is expected to make £2,500 a year. Thus the £9,000 loss will be made good and it will start to make profits in 1968.
>
> (ii) Ventilation: This company was under the management of M. Devaud. It made losses in its first and second years, 1965 and 1966, but it is expected to break even in the year 1967, and then to make profits in 1968.
>
> The master held that the plaintiff ought to give credit for his investments in both these companies. He estimated the present value of the future profits at £1,500 in the case of Martindale and £7,500 in the case of Ventilation, and deducted those sums.
>
> In my opinion the master was wrong in requiring the plaintiff to give credit for his investment in Ventilation. He might have invested his money in any other company and made similar profits. It is sheer speculation whether he would do better in Ventilation than in others. I realise that the plaintiff was only at liberty to invest in Ventilation because his employment was terminated. But nevertheless the benefit from that investment was not a direct result of his dismissal. It was an entirely collateral benefit, for which he need not account to his employers.
>
> Martindale stands on a little different footing. His salary of £1,500 was very low for a man of his ability: and it looks as if he was getting, in addition, a concealed remuneration by a profit on his shares in the company. In the course of the argument Russell L.J. worked out the estimated improvement in his equity over the period from August, 1964, to March, 1967, in so far as it was due to his work. It comes to £2,066. I think that the plaintiff should give credit for that figure in addition to the actual earnings of £3,717 9d. 2d."

On the same issue, Russell LJ held as follows:

> "Finally, there is the question whether any and what deduction should be made from the damage suffered on account not only of his salary earned and expected in the period from Martindale, but also on account of the undoubted fact that the expenditure of the time released to him by the wrongful dismissal has enabled him by his work and management during that time to enhance the value *301 of the half interest in Martindale that he bought for £1,500 shortly after his dismissal. I agree that account should be taken of this, though of

> necessity a fairly high degree of estimation is involved. The master held that in all the circumstances it was reasonable that the plaintiff should go into Martindale on the terms on which he did, rather than hawk his services around. One of the reasons for saying that it was reasonable is that avowedly the plaintiff was hoping to gain in part by improving by his own efforts the value of his holding as well as, in other part, by a relatively low salary. To the extent that this hope has been fulfilled in the relevant 2 2/3 years, it seems right to set it against his loss of salary from the defendants. …"

117. A number of points emerge from that aspect of the decision in *Lavarack*:

a. The equity value in a shareholding acquired after termination may be taken into account as an aspect of mitigation;

b. However, it is only where the benefit from the investment is the direct result of the dismissal that it may be taken into account;

c. An increase in value of a shareholding where such increase had nothing to do with dismissal or which can be said to be a collateral benefit will not be taken into account;

d. The exercise of assessing the amount to take into account will involve "a high degree of estimation".

118. Their Lordships in *Lavarack* did not expressly consider the burden of proof in establishing the equity value to be set off against the plaintiff's loss. The general position is that the burden of establishing a failure to mitigate lies with the employer. The relevant principles when dealing with mitigation of loss were helpfully summarised by Langstaff P in *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15/JOJ:

> "16. …
>
> (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
>
> (2) It is not some broad assessment on which the burden of proof is neutral. … If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

> (3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see *Waterlow , Wilding and Mutton*).
>
> (4) There is a difference between acting reasonably and not acting unreasonably (see *Wilding*).
>
> (5) What is reasonable or unreasonable is a matter of fact.
>
> (6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.
>
> (7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see *Waterlow* , Fyfe and Potter LJ's observations in *Wilding*).
>
> (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
>
> (9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

119. Whilst the burden of establishing a failure to mitigate does lie with the employer, it is less clear whether that burden also extends to showing that a reasonable mitigating step (in this case the setting up of KLC) has had the result of reducing or extinguishing all loss. In our judgment, there is no reason in principle why the burden should not so extend. The burden of establishing the fact of loss and the amount thereof clearly lies with the Claimant. However, it seems to us that the burden of proving facts asserted by the guilty party with a view to avoiding or abating such loss (of which an alleged failure to mitigate is an example) must also lie with that party. In the present case, the burden therefore lay with the Respondents to establish any failure to mitigate and any facts relied upon as abating the level of loss claimed.

120. The Respondents do not dispute that the setting up of KLC was a reasonable mitigating step to take. Their complaint is that the Tribunal did not have regard to the full extent to

which setting up KLC mitigated the Claimant's losses. In particular, it is said that the increase in the value of the Claimant's shareholding ought to have been taken into account.

121. The Tribunal appreciated the force of the contention that, in principle, the value of the Claimant's shareholding ought to be taken into account:

> "179 The Tribunal can appreciate an argument that the Claimant's mitigation for remuneration from KLC included the dividends it was estimated he would receive. Dividends are something the Claimant received from being a shareholder and would not have been payable had he been purely an employee of the company. We can recognise, therefore, an argument that, likewise, the value of the shares he has in forming a company that forms part of his mitigation of loss should also be taken into account."

122. However, it went to conclude (at RJ2 [180] and [181]) that there was a "conceptual difference" between the value of the Claimant's shareholding in KLC and the remuneration earned whilst working there, such that the shareholding should not be taken into account unless the Claimant was deliberately depressing his earnings in order to inflate the compensation received. The Tribunal's reasoning for this "conceptual difference" appears to be that decisions as to when to recoup the benefits of an investment will be governed by separate considerations that will not always align with decisions about employment (such as the decision when to retire). If, by that, the Tribunal meant that the value of a shareholding should never be taken into account (except in cases of deliberately depressing the amount earned) then it was probably inconsistent with the decision in *Lavarack* (to which, incidentally, its attention had not been drawn). However, the Tribunal had already concluded (at RJ2 [158]) that the evidence was such that it was unable to make "any sensible valuation" of the shareholding.

123. On the basis of the principles set out above, it is for the Respondent to prove the value of the shareholding by adducing evidence about it. The Respondents did purport to do that by adducing the evidence of Mr Wallace. However, the Tribunal was highly critical of that evidence and made the following findings:

> "158 The Tribunal finds that we are unable to make any sensible valuation of the Claimant's shareholding at the cut-off point we have selected for his loss of earnings (or if we were to have been taking the position as being on the Claimant's 65th birthday) including because:
>
> 158.1 Mr Wallace is not an expert witness. Although he is a qualified accountant, he has never conducted such a valuation in the period of over 20 years that he has been working for the first Respondent.
>
> 158.2 Mr Wallace's current role requires no expertise in energy and his only experience in energy was during 2002 – 2006. His role with the Respondent includes balancing risk and returns for work in the pipeline and interpreting financial statements for strategy purposes, but he does not have a client facing role.
>
> 158.3 Mr Wallace has no experience of running or starting up a new business.
>
> 158.4 The comparators on which Mr Wallace based his valuation of the Claimant shareholding as being 10 times its profit ratio did not appear to be comparable to KLC. As was pointed out by the Claimant in his second witness statement, Evercore is a global advisory firm founded in 1995, with 1,900 employees and a market capitalisation of $3billion; Lazard is a global advisory firm/investment bank and founded in 1848, with some 800 employees in asset management and perhaps a similar number in financial advisory globally, with a market capitalisation of $3.7million and Greenhill a company listed in 2004 with 400 employees worldwide and the market capitalisation of $240million.
>
> 158.5 Any estimate of the Claimant shareholder value by the Tribunal, whether 2 times, 10 times, 23 times or some other figure would be wild guesswork rather than being based on reliable evidence.
>
> 158.6 If there were to be a shareholder dispute at KLC and an application for sale and valuation made to the High Court, it is hard to conceive that the High Court would be satisfied with the level of evidence provided at this hearing for the size of the valuation proposed by the Respondent. In the cases provided by Ms Jolly, there was a variety of evidence provided by individuals with specialist expertise in the fields in question and expert evidence in the form of forensic accountancy evidence. None of this was provided.
>
> 158.7 We accept Ms Jolly's submission that the valuation of the Claimant's shareholding is an offset of mitigation, with the burden of proof on the Respondent to satisfy the Tribunal as to its valuation. It has not done this.
>
> 158.8 If the Tribunal were to make a wild guess as to the value of the Claimant's shareholding at the appropriate time, it would be a judicial decision with potential consequences should a future valuation of the company be required."

124. The Tribunal's approach to mitigation and the burden of proof (as mentioned in RJ2 [158.7] was correct. The Tribunal was entitled to conclude that the evidence was

inadequate to discharge the burden on the Respondents such that no sensible evaluation could be reached.

125. Mr Carr submits, however, that notwithstanding any views as to inadequacy of the evidence, the Tribunal ought to have conducted an evaluation nevertheless. He relied upon the judgment in *Scope v Thornett* [2007] IRLR 155, where Pill LJ said as follows at [34] and [36]

> "34 Having regard to those authorities, I am unable to accept Mr Blake's first three submissions. The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account.
>
> …
>
> 36 The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation. Giving judgment in the leading case on loss of earning capacity, *Moeliker v A Reyrolle & Co Ltd* [1976] IRLR 120, an important head of damage in personal injury cases, Stephenson LJ when seeking words to define the correct approach to be followed stated, at p.144:
>
> 'I avoid "speculation" because this head of damage can really be nothing else.'

126. *Scope v Thornett* is an unfair dismissal case where the Tribunal is required by s.123 of the 1996 Act to award such compensation as is "just and equitable" in all the circumstances having regard to the loss sustained in consequence of dismissal. The decision confirms that that assessment cannot be avoided merely because it might involve speculation based on very little evidence. Mr Carr also ought to rely on the following passage from the

judgment of Elias LJ in *Wardle v Credit Agricole* [2011] IRLR 604 at [50] and [53]:

> "50 I agree with Mr Jeans that it will be a rare case where it is appropriate for a court to assess compensation over a career lifetime, but that is not because the exercise is in principle too speculative. If an employee suffers career loss, it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step.
> …
>
> 53 Exceptionally, a tribunal will be entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job. In such a case, the tribunal necessarily has to assess the loss on the basis that it will continue for the course of the claimant's working life. *Chagger* is an example of such a case. By the time the tribunal came to assess compensation in his case he had already been out of a job for some years. The evidence was that he had made every effort to obtain employment in his chosen field, having made countless applications for new employment. There was a suggestion that he had been stigmatised in the eyes of other employers as a result of the manner of his dismissal. He had taken reasonable steps to mitigate his loss by going into teaching. In these circumstances the tribunal was entitled to conclude that he had suffered, permanent career damage and should be compensated accordingly. Where such a loss is established, a tribunal has to undertake that task, however difficult and speculative it may be." (Emphasis added)

127. These decisions confirm the common sense principle that the difficulties inherent in assessing future loss do not provide a reason for avoiding that assessment altogether. However, in our judgment, they are not authority for the proposition that irrespective of whether the burden of proof is discharged in respect of a failure to mitigate or other factor relied upon to abate the award of compensation, the Tribunal is bound to come to some assessment in respect of such failure or factor. If that were not so then the burden of proof would be reduced to nil, and it would be open to the wrongdoing employer merely to assert some abating factor without adducing evidence in support, in the expectation that the

Tribunal will nevertheless make some assessment of the value of that factor. We do not consider that to be a proper application of the burden of proof.

128. In our judgment, the Tribunal was entitled to say, in respect of the evidence as to valuation, that it was too unreliable, and that any estimation would be the result of "wild guesswork". The mere fact that there could, on the evidence that was available, have been one valuation at 23 times annual profits and another at twice the annual profit, appears to confirm that remark. We do not see any inconsistency between the Tribunal's approach to that evidence and its ability to engage in the speculative exercise of assessing earnings from KLC over the next few years. There were several items of evidence that enabled the Tribunal to make the latter assessment. These included the following:

a. The evidence of the Claimant himself, which the Tribunal considered to be "measured, thoughtful, concise and plausible": RJ2 [153];

b. The track record of KLC to the date of the hearing, including evidence as to salaries paid, salary sacrifices, emergency funding, retainers and success fees;

c. The strategy documents produced by KLC;

d. The Claimant's forecasts and estimates of future performance and the increased confidence in KLC by the time of the Second Remedy Hearing: RJ2 [135] and [150];

e. Mr Lovegrove's "scenarios" document and potential outcomes: RJ2 [142] to [143]; and

f. The management report produced in September 2020: RJ2 [145].

129. In our judgment, that provided ample material on which the Tribunal could reach sensible conclusions (albeit involving a degree of speculation) as to future earnings from KLC. All of this contrasts sharply with the Tribunal's view of Mr Wallace's evidence, which, apart from a single internal email from Mr Lovegrove, comprised the bulk of the evidence on

shareholding value.

130. Ms Jolly submits that such cases would invariably require expert evidence of the sort adduced in two clinical negligence cases she cites, *XYZ v Portsmouth NHS Trust* [2011] EWHC 243 and *Johnson v Roux Fourie* [2011] EWHC 1062. We do not go as far as to suggest that in tribunal cases involving an evaluation of shareholding (which are likely to be uncommon) parties would invariably have to go to the expense of obtaining and adducing (with permission) expert reports. However, respondents can expect that, in a case where a complex shareholding evaluation is required, they will need to adduce cogent evidence before they could discharge the burden upon them.

131. Mr Carr criticises the Tribunal's comment at RJ2 [158.8] where it stated that it ought not to make a determination of value lest it be treated in future cases as a judicial determination of value. We agree with Mr Carr that that is not a proper reason for not engaging in the evaluation, which would be conducted for the specific purpose of assessing compensation in an employment dispute and would not necessarily bind any party for other purposes. However, we do not consider that this comment undermines the Tribunal's conclusion at RJ2 [158.7] that the Respondents had not discharged the burden of proof. The reasons given by the Tribunal for rejecting Mr Wallace's evidence on this issue were detailed and extensive. These were findings that could only be set aside if the high threshold of perversity were crossed. Mr Carr did not seek to argue that the Tribunal's assessment of Mr Wallace's evidence was perverse. In our judgment that contention would have been unarguable in any event.

132. For all of these reasons, it is our view that the Tribunal's decision not to attempt to value the Claimant's shareholding was one that it was entitled to reach in the particular circumstances of the case, and no error of law is disclosed.

133. Grounds 1 and 2 of the Second Remedy Appeal fail and are dismissed.

Conclusion and Disposal

134. For the reasons set out above:

a. The Liability Appeal is allowed in respect of Grounds 2 and 3 only;

b. The First Remedy Appeal is dismissed; and

c. The Second Remedy Appeal is dismissed.

135. It is clear to us that the matter shall have to be remitted, as further findings of fact may be necessary to reach final conclusions on the issues covered by Grounds 2 and 3 of the Liability Appeal. Ms Jolly submits that the matter should be remitted to the same Tribunal as any other course would be deeply unfair to the Claimant given that the majority of the LJ remains undisturbed. Mr Carr submits that the only fair option would be to remit to a freshly constituted tribunal. He points out the passage of time since the judgment and the difficulties of recollection, the practical difficulties of remitting to the same Tribunal given the Judge's retired status, the risk of partiality and bias and the flawed nature of the LJ which diminishes any confidence that the Tribunal would, even with the EAT's guidance, get it right the second time round.

136. The principles to be applied in determining whether remittal should be to the same or freshly constituted tribunal are well-established and were summarised by Burton J in *Sinclair Roche Temperley v Heard* [2004] IRLR 763:

> "46…
>
> 46.1 Proportionality must always be a relevant consideration. Here the award was for £900,000, and although we are conscious that ordering a fresh hearing in front of a different Tribunal would add considerably to the cost to parties on both sides who have already invested in solicitors and Counsel, both at the Tribunal and on appeal (in the case of the Applicants, two Counsel for the appeal), sufficient money is at stake that the question of costs would from the

one point of view not offend on the grounds of proportionality and from the other not be a decisive, or even an important, factor. Similarly the distress and inconvenience of the parties in reliving a hearing must be weighed up, but (a) are rendered necessary in any event by the decision to set aside the original decision and (b) will not be greatly less by virtue of the extra time taken by a fully, rather than partially remitted, hearing, the main distress and inconvenience being caused by the matter being reopened at all.

46.2 Passage of Time. The appellate tribunal must be careful not to send a matter back to the same tribunal if there is a real risk that it will have forgotten about the case. Of course, tribunals deal with so many different cases per month that it is impossible for them to carry the facts in their minds, nor would they be expected to do so. But they can normally refresh those minds from the notes of evidence and submissions if the case occurred relatively recently. This case was a relatively long one, and will not on that basis alone have completely evanesced from the minds of the tribunal. It was only just over a year ago. That in itself is quite a long time, though the lengthy reserved decision sent to the parties on 30 July 2003 would have kept the case in the minds of the Tribunal at least until then: but in addition they have held a remedies hearing which began in October 2003, the hearing lasting until 18 December, and then required consideration in chambers' meetings in January and March, and did not result in a promulgated decision until as recently as 19 March 2004. We are satisfied therefore that the question of delay and loss of recollection is not a material factor in this case one way or the other.

46.3 Bias or Partiality. It would not be appropriate to send the matter back to the same Tribunal where there was a question of bias or the risk of pre-judgment or partiality. This would obviously be so where the basis of the appeal had depended upon bias or misconduct, but is not limited to such a case.

46.4 Totally flawed Decision. It would not ordinarily be appropriate to send the matter back to a tribunal where, in the conclusion of the appellate tribunal, the first hearing was wholly flawed or there has been a complete mishandling of it. This of course may come about without any personal blame on the part of the tribunal. There could be complexities which had not been appreciated, authorities which had been overlooked or the adoption erroneously of an incorrect approach. The appellate tribunal must have confidence that, with guidance, the tribunal can get it right second time.

46.5 Second Bite. There must be a very careful consideration of what Lord Phillips in English (at paragraph 24) called “A second bite at the cherry”. If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say “I told you so”. Once again the appellate tribunal would only send the matter back if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be

> prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised.
>
> 46.6 Tribunal Professionalism. In the balance with all the above factors, the appellate tribunal will, in our view, ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission. By professionalism, we mean not only the general competence and integrity of the members as they go about their business, but also their experience and ability in doing that business in accordance with the statutory framework and the guidance of the higher courts. Employment law changes; indeed it has been a rapidly developing area of the law. Employment tribunals are therefore all too familiar with the need to apply a different legal approach to a case today from that which they applied last year, or even last week, where the law has changed, although the cases may be on all fours as regards their facts. Some areas of employment law have not been easy, and the approach to be adopted in considering whether there has been race or sex discrimination in a case such as this is just such a matter which has understandably caused problems for tribunals. It follows that where a tribunal is corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a "totally flawed" decision described at 46.4), then, unless it appears that the tribunal has so thoroughly committed itself that a rethink appears impracticable, there can be the presumption that it will go about the tasks set them on remission in a professional way, paying careful attention to the guidance given to it by the appellate tribunal."

137. Dealing with each of these, the position as it appears to us is as follows:

a. Proportionality – The size of the claim and the award in this case means that it would not necessarily be disproportionate to remit to a freshly constituted tribunal, if it were otherwise appropriate to do so.

b. Passage of Time – We do not accept Mr Carr's submission that the passage of time since the LJ renders it unrealistic for the Tribunal to be able to assess the necessary issues on remittal. Whilst it will be nearly 4 years since the original Liability Hearing, the Tribunal made extensive and detailed findings of fact which it can use to refresh its memory. Moreover, the Tribunal has already had to refresh its memory on two separate occasions since the LJ: first when considering RJ1; and second, in November 2020, when considering RJ2. Thus, this is not a case where the Tribunal has not turned its mind to the matter for years. Even though the RJs raised distinct issues, we note

that in both judgments, the Tribunal did, as one would expect, refer back to aspects of its findings in the LJ and based its judgments on remedy on those findings. We note that the Judge did state, in July 2021, that his recollections were "a great deal less fresh than they would have been nearer the time" and that he could not remember a particular item of evidence about which he was asked. However, those difficulties, which are to be expected, are not such as to render the task of reconsidering the narrow issues on remittal unreasonably challenging for this experienced Tribunal.

c. Bias or Partiality – We agree with Ms Jolly that there is no real risk of bias or partiality here. The Claimant did not succeed on all of his claims, and it is evident that the Tribunal approached its task in a fair and balanced way. Mr Carr relies on the apparent decision by one of the Lay Members to recuse themselves from another subsequent case involving the First Respondent because of a "conflict of interest" arising out of their involvement in another Citi case. The Respondents "understand" that other case to be this one. However, there is no firm indication of that, and there appears to be a degree of speculation as to the precise basis on which the Lay Member decided upon recusal. Even if it is the involvement in this matter that caused the Lay Member concern, it would not follow that the fair minded independent observer would consider that there was any real risk of bias in the Lay Member revisiting a case in which they had already been involved. In any case, if there is an issue in this regard, the Lay Member would have the opportunity to raise it if they so wish; that would be preferable to the EAT seeking, on the basis of incomplete information, to pre-empt what course the Lay Member might wish to take;

d. Totally Flawed Decision – The LJ was not, on any view, "totally flawed". Whilst we have found that the Tribunal did not properly address the second stage of the *Igen v Wong* test, perhaps because of an over-reliance on the finding as to Mr Falco's remark,

we remain confident that the Tribunal would be able to complete that aspect of the analysis with the guidance of this judgment.

e. Second Bite – We do not consider that the Tribunal is irrevocably wedded to its conclusions such that it would not be willing or able, having properly considered those matters omitted from its analysis on the first occasion, to come to a different conclusion, if so advised.

f. Professionalism – There is no doubt about the Tribunal's professionalism. The only point raised by Mr Carr in this regard is as to the Lay Member's position. However, for reasons already discussed under (c) above, we do not regard that as a difficulty in this case.

138. Taking all of the above into account, it is our view that the matter should be remitted to the same Tribunal. We recognise that there may be practical difficulties, not least arising out of the Judge's retirement, in remitting to the same Tribunal. However, those are matters that can considered by the Regional Employment Judge, should it prove necessary, and our Order directing remittal to the same Tribunal will allow for the REJ to direct otherwise if considered appropriate.

139. For these reasons, the matter shall be remitted to the same Tribunal (subject to any direction that may be made by the Regional Judge by reason of the Employment's Judge's availability or otherwise) to reconsider the Respondents' alleged reason for the impugned treatment, having regard to the EAT's decision in respect of the Liability Appeal. Whether or not further evidence may be adduced to consider that aspect will be a case management matter for the Tribunal.