EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs S Cohen		Pastor Real Estate Limited

Heard at: London Central **On**: 21, 22 and 23 September 2021

Before: Employment Judge Holly Stout
Tribunal Member Bridget Makins
Tribunal Member Jessica Marshall

Representations
For the claimant: In person
For the respondent: Hollie Higgins (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not contravene ss 13 and 39(1)(c) of the Equality Act 2010 by directly discriminating against the Claimant because of her age. The claim is dismissed.

(2) The Claimant's claim for unfair dismissal under Part X of the Employment Rights Act 1996 is not well-founded. The claim is dismissed.

(3) The Respondent did not breach the Claimant's contract by failing to pay her commission for her notice period. The claim is dismissed.

REASONS

Introduction

1. Mrs Cohen (the Claimant) was employed by Pastor Real Estate Limited (the Respondent) from 11 January 1999 until 31 July 2020, latterly as Head of Lettings and Property Management. The Respondent is a London based luxury estate and lettings agency which undertakes real estate development activities, along with real estate investment. The Respondent is owned by Patrice Pastor, but day-to-day management of the Respondent is undertaken by Christopher Mitchell (Head of Investment).

2. Mrs Cohen was one of eight employees dismissed by the Respondent in the summer of 2020. The Respondent says that the reason for dismissal was redundancy / business reorganisation. The Claimant in these proceedings claims that the dismissal was unfair and/or directly discriminatory on grounds of age. The Claimant was 73 at the time of her dismissal. She also claims that the Respondent breached her contract by failing to pay her commission during her notice period.

The type of hearing

3. This has been a remote electronic hearing by video under Rule 46 which has been consented to by the parties.

4. The public was invited to observe via a notice on Courtserve.net. A member of the public joined. The Claimant had some difficulty connecting to the hearing at the start of the proceedings, but this was remedied by her using the]pexip[infinity connect app to connect through her mobile phone. The Claimant confirmed that she was content to go ahead on that basis and that she had hard copy documents available to her which she could view separately to her phone. On Day 3, when all that happened was that the Tribunal gave oral judgment, there were a number of difficulties with connecting to the room. The Claimant was in the end only able to connect by telephone and did not have visual access to the room. She confirmed that she was content to go ahead on that basis.

5. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

6. The issues to be determined had been agreed by the parties to be as follows:

Unfair dismissal

(1) Did the decision to dismiss the Claimant and the procedure adopted by the Respondent fall within the reasonable band open to the Respondent? In particular:

(a) Was there warning and consultation? The Claimant complains that there was insufficient consultation as to the scoring and results of the scoring exercise. The Respondent denies this and contends that there was fair consultation.

(b) Was the Claimant pooled and selected reasonably?

i. The Claimant contends that her selection was unfair because: (1) her age was involved in the decision; and (2) her assessment scoring was orchestrated to ensure she did not score sufficient to avoid redundancy; and (3) the employees in the 'Family Office' department were not placed at risk of redundancy;

ii. The Respondent contends that the Claimant was assessed fairly and reasonably.

(c) Were reasonable efforts made to find suitable alternative employment for the Claimant? The Claimant says that none were made at all.

(2) In addition, the Claimant contends that her dismissal was unfair because of the conduct of the appeals process. As to this, the Claimant contends that unfairness arose because the appeal process was predetermined and she was removed as a statutory director before the appeal process was concluded[1]. The Respondent contends that the appeal process was fair and that the removal of the Claimant was actioned unbeknownst to the appeal decision makers.

Direct age Discrimination

(3) Did the Claimant's selection for redundancy constitute less favourable treatment of the Claimant because of her age (73) as compared to Spencer Taffurelli?

Breach of contract

(4) Is the Claimant owed notice pay? The Claimant says she is owed commission in respect of her notice period. The Respondent says the Claimant was paid all sums due under the contract of employment and is owed no further sums in respect of her notice pay. The Claimant says it

[1] The List of Issues included at this point a reference that the Claimant wished to include as to Without Prejudice material, but we explained at the hearing that was a matter that was confidential to the parties and could not in a case like this be taken into account in determining liability. Neither party raised any objection to this.

was agreed that she would be paid commission in respect of her notice period but that this is now denied.

Remedies

(5) What loss has the Claimant suffered?

(6) Should any award made to the Claimant be reduced to take account of payment of her statutory redundancy payment in the sum of £16,140.00?

(7) Absent any unfairness or discrimination, would the Claimant have been dismissed in any event and should any award made to the Claimant be reduced accordingly?

The Evidence and Hearing

7. We had before us an agreed electronic bundle of documents running to 148 pages, witness statements for Mr Mitchell and the Claimant and, at our request at the start of the hearing, we were also provided with a page detailing the names and ages of the other employees at the Respondent and the scores they were given in the redundancy process. We gave the Claimant time to read this new document and confirmed she was ready to proceed before continuing with the hearing.

8. We read the documents and heard oral evidence from the Claimant and Mr Mitchell. The Claimant questioned Mr Mitchell and Ms Higgins questioned the Claimant. We questioned both witnesses.

9. We explained our reasons for various case management decisions as we went along.

10. We gave judgment orally at the hearing. These written reasons are expressed slightly more fully and represent the final judgment of the Tribunal.

The facts

11. We have considered all the oral evidence and the documentary evidence in before us. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

12. The Claimant was employed by the Respondent from 11 January 1999 until 31 July 2020, latterly as Head of Lettings and Property Management. The Respondent is a London based luxury estate and lettings agency which undertakes real estate development activities, along with real estate investment. The Respondent is owned by Patrice Pastor, but day-to-day management of the Respondent is undertaken by Christopher Mitchell (Head of Investment). Prior to joining the Respondent the Claimant had worked for Blenheim Bishop Limited in a similar role and had 25 years' experience in the industry. Mrs Cohen was one of eight employees dismissed by the Respondent in the summer of 2020. The Claimant was aged 73 at the time of her dismissal.

The Claimant's contract of employment and Company directorship

13. The Claimant was employed under a contract of employment dated July 2012.

14. Clause 1 provided that her period of continuous employment commenced on 11 January 1999.

15. Clause 4.1 provides for payment of salary and at clause 4.4 there is separate provision for commission as follows: *"You shall be entitled to a commission, calculated and payable in accordanc with the terms notified to you by the Company in writing from time to time"*.

16. Clause 8 provides for termination and notice period, which for the Claimant was 12 weeks.

17. Clause 9 provides (so far as relevant): *"[The Respondent] will not be obliged to provide you with work at any time after notice of termination has been given by either party and … may, in its absolute discretion terminate your employment with immediate effect and pay your salary entitlement only in lieu of all or any part of the unexpired period of notice subject to deduction of tax and national insurance."*

18. Clause 14 provides: *"We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change."*

19. The Claimant was also a statutory company director of the Respondent, but solely for the purpose of enabling the Respondent to be a member of ARLA (the Association of Residential Letting Agents). She did not exercise any of the other functions of being a company director.

Relevant matters prior to the 2020 Coronavirus pandemic

20. When the Claimant first joined the company she was effectively its UK manager. She brought a team with her from Blenheim Bishop and they were

based in an office in the Mayfair area. Her role encompassed lettings and property management and, since the Respondent did not have a separate sales team, the Claimant undertook some sales and was for a period the 'public face' of the Respondent so far as sales was concerned.

21. Christopher Mitchell joined the Respondent in January 2013. We take Mr Mitchell's evidence as to the date on this as he is more likely to know than the Claimant. He was then aged 29 and by the time of the Claimant's dismissal was 37. His role was initially as Head of Investment, but it has evolved over the years, and since early 2017 he has been Head of the UK business. He is a company director and fulfils full responsibilities as such. He reports directly to Patrice Pastor who owns the business and spends most of his time working in Monaco. The Claimant reported directly to Mr Mitchell who became her line manager.

22. At the start of his employment, the Claimant sought to offer advice to Mr Mitchell about what properties to purchase in the Mayfair area. She suggested apartments which are easier to let, but he bought large houses which she considered were difficult to let and require a lot of maintenance. The Claimant felt that Mr Mitchell was reluctant to take her advice because he *"felt threatened by my age and experience making him dismissive of my presence"*. She considered that *"he used his position to undermine my place within the firm at every opportunity and to challenge my judgment in relation to residential investments"*. However, Mr Mitchell told us that the reason why he did not follow her advice on this is because from an investment perspective a business needs to purchase freehold properties which usually means buying larger properties and blocks of flats. He denied that he was dismissive of the Claimant or otherwise felt differently toward her than other colleagues because of her age. He said that he did look to her for guidance on the matters where she had expertise and experience. We accept that both the Claimant and Mr Mitchell gave honest evidence as to their feelings on these issues and that Mr Mitchell was not consciously influenced by the Claimant's age in his approach to her. Whether he was subconsciously influenced we address in our conclusions.

23. In 2015 a new recruit was employed as Head of Sales without consultation with the Claimant and Mr Mitchell announced that the Claimant and everyone else would now report to him. This person was brought into the business by Mr Mitchell although the decision to employ him was Mr Pastor's. The Claimant did not consider that this person was the right person for the job or that his qualifications or experience justified his six figure salary. She made her views clear. A second dedicated Sales office was opened in December 2015 to house the Head of Sales and two further new team members. The team was not successful and the office was closed in September 2019, with the Head of Sales leaving in early 2020.

24. In November 2017 Mr Mitchell opened a new office in Chelsea. Again, the Claimant sought to advise him against this as she considered the market was not buoyant enough to support a start-up and that the team had to spread itself too thinly in order to cover the Chelsea office as well as the main office

in Mayfair. Mr Mitchell explained to us that he disagreed with the Claimant, that the Chelsea market was a good match with the Mayfair market and the business already had a 'foothold' in Chelsea so they were not starting from scratch clients-wise. He felt that the Claimant did not show enough interest in this office, and told her so. The Claimant for her part says that despite her doubts she did her best to make the office work because revenue from the Chelsea office counted towards the whole team's target revenue figures, but the market was such that it was not successful. It closed in February 2020. Mr Mitchell's perspective was that there were a number of factors that had contributed to the Chelsea office not being successful, including the prevailing market, but that one factor in its lack of success was the Claimant's reluctance to embrace the project and put as much energy into it as she did into her existing Mayfair client base. He said he felt the Claimant was very loyal to her existing Mayfair business but not loyal to the Respondent's business as a whole. We accept Mr Mitchell's evidence as to the Claimant's attitude to the Chelsea office because it was apparent during the hearing that the Claimant still feels very strongly that this office opening was a bad idea. Her views on the subject are entrenched and we therefore find it plausible that her attitude would have affected the way she dealt with it day-to-day in the way described by Mr Mitchell.

25. In September 2018 Mr Mitchell decided to buy a new management/block management company, 1st Asset, which he asked the Claimant and the Respondent's Property Manager to run. The Claimant's evidence was that she was only shown a page of A4 relating to the purchase when it was about to happen. Mr Mitchell disagreed. He said he had sought to involve her earlier, but she had not appeared interested so he did most of the due diligence and work on the deal himself. Again, we accept Mr Mitchell's evidence on this point. While we found both the Claimant and Mr Mitchell to be honest witnesses, we consider that the Claimant was (and, indeed, still is) very negative about this project and that it is therefore likely that Mr Mitchell's recollection is the more reliable one and that the reason the Claimant was not greatly involved in this was because she made clear she considered it a bad idea and was not interested. The purchase was not a success and the Claimant again regards herself as 'proved right' about this. The Claimant sought a meeting with Mr Pastor about it, who acknowledged that the purchase had been *"a very expensive mistake"*. Again, the Claimant says she did her best to turn it around, but it was not successful. However, we conclude that her negative attitude towards the project would have continued as happened with the Chelsea office.

26. The Respondent has an annual performance appraisal process. Mr Mitchell carried out appraisals for the Claimant. We have not been shown any documentary evidence of these appraisals, but the parties are agreed they did not result in any formal grading and did not use the criteria that were used to score individuals in the redundancy process (to which we turn below).

The pandemic

27. During the week commencing 15 March 2020 the Claimant no longer felt it safe to attend work because of the Coronavirus pandemic. She and her husband were in the 'vulnerable' age group and her husband was particularly at risk. The whole office closed the following week under national lockdown.

28. The pandemic and lockdown had a significant negative impact on the property market. It was not even clear for a period whether people could lawfully move house. At the beginning of April the Respondent decided to place a number of staff on furlough, including the Claimant, three other more junior members of the Lettings team and the more junior member of the Property Management team. The Respondent retained only one Lettings Manager (Spencer Taffurelli) and one Property Manager (Barry Daly) in the office. Mr Taffurelli was aged 38 at this time and Mr Daly was aged 33.

29. Mr Mitchell gave evidence that he did not know the specific ages of any of his colleagues, though he could see their ages in general terms and we find that it would have been obvious that the Claimant was significantly older than him and Mr Taffurelli and Mr Daly and that Mr Mitchell was therefore well aware of that age difference.

30. Mr Mitchell nonetheless gave evidence, which we accept accurately reflected his conscious reasoning, that he selected Mr Taffurelli and Mr Daly to remain in the office because he considered that they were each best placed to single-handedly run their respective parts of the business. In particular, with Mr Taffurelli he said that he was the best negotiator the Respondent had, he did more viewings and was best placed to do the 'cradle to grave' management of the lettings business, whereas the Claimant had been more reliant on her team to do some parts of the work. With Mr Daly, he said that he was most familiar with the day-to-day property management. He said that the fact that the Claimant had removed herself from the office prior to the start of national lockdown because she was in the 'vulnerable' age category did not figure in his thinking because they were all working remotely anyway by the time he was considering furlough and were intending to do so for the remainder of lockdown. Although the Claimant was unhappy about being selected for furlough, on 6 April 2020 the Claimant formally agreed to be placed on furlough. Furlough was subsequently extended a number of times to 31 July 2020.

The redundancy process

31. In June 2020 the Respondent decided that the effects of the pandemic on the market were such that it needed to make eight redundancies from its then team of 17 as the full furlough scheme was ending in July 2020. Decisions about 'pools' for redundancy selection were made by Mr Pastor, Mr Mitchell and Ms Maury (Mr Pastor's executive assistant and London office manager). They decided there should be six 'pools':

a. What came to be called the 'Family Office' (4 employees);
b. Sales (2 employees);
c. Lettings (5 employees, including the Claimant);
d. Property Management (3 employees, including the Claimant);
e. Block Management (2 employees);
f. Administration (2 employees).

32. The four employees in the newly designated 'Family Office' it was decided were still required in the business. These included Mr Mitchell and three core administrative staff, including the Respondent's accountant and Ms Maury (executive assistant to Mr Pastor) and another assistant to Ms Maury. Ms Maury and her assistant were employed principally on Mr Pastor's wider business interests and not on the Respondent's property management business. For each of the other pools the Respondent intended to reduce each team to one person. As the Claimant's role spanned Lettings and Property Management she was placed in two pools.

33. Criteria were devised against which to assess employees. There were 10, being Quantity of work and efficiency, Quality of work, Initiative, Skills/qualifications/technical expertise and ability, Future potential, Flexibility and Adaptability, Timekeeping, Absence Record in previous 12 months, Length of Service and Disciplinary Record. A four-point scoring system was devised with 'descriptors' for each point. Mr Mitchell then scored most of the employees (including the Claimant) and Ms Maury 'ratified' or checked them. Ms Maury scored the other employees (the administrators) and Mr Mitchell 'ratified' them. The Claimant has questioned whether Mr Mitchell and Ms Maury were the appropriate people to assess her work, but given that everyone apart from the Family Office was in scope for redundancy we cannot see who else could possibly have carried out the scoring. In any event, this is a small company and Mr Mitchell and Ms Maury had worked with the Claimant for some time. We find it was appropriate for the Claimant to be assessed by them.

34. The Claimant scored a total of 30. This was less than Mr Taffurelli who scored 34 and also less than Mr Daly who scored 34. She was therefore identified as being at risk of redundancy. In all pools the oldest employee was selected for dismissal. However, the Claimant does not attach any particular significance to this (or invite us to draw an inference for the purposes of her age discrimination claim) save in relation to the selection of Mr Taffurelli over her. She says that in the other pools (Property Management, Block Management and Administration) the selection is readily explained by the relative experience of the two individuals in scope.

35. The selection scoring process was carried out before the first consultation meeting. There were four consultation meetings on 17 June, 24 June, 26 June and 1 July. These were attended by the Claimant, Mr Mitchell and Ms Maury. The Claimant was not offered the right to be accompanied to these meetings, but nor did she ask to be accompanied. The meetings were conducted on Zoom. Each meeting was followed by a letter and minutes were taken and provided later.

36. The 17 June letter set out the Claimant's scores against the criteria and provided her with a full copy of her score sheet. It informed her that she was at risk of redundancy and that there would be another meeting to discuss matters further, including alternatives to redundancy.

37. At the 24 June meeting the Claimant challenged her scores on three criteria (Quality of Work, Future Potential and Flexibility) and Mr Mitchell agreed to look at this again. No alternatives to redundancy were identified by the Respondent or suggested by the Claimant. There was some light-hearted discussion of whether a role could be created for her in the US, or whether she could take on an administration role, but neither party considered these were suitable options.

38. By email of 25 June 2020 Mr Mitchell informed the Claimant that he had reviewed the scores but did not consider they could be revised. He informed the Claimant that the score she required in order not to be provisionally selected for redundancy was 34. It was in this email that Mr Mitchell first used the term 'Family Office' to the Claimant, which had not been used at the Respondent before.

39. At the 26 June meeting the Claimant asked about the Family Office and Mr Mitchell explained what he meant by that. She also queried why it was only the furloughed people who were being made redundant and Mr Mitchell said that the redundancy and furlough decisions were separate. Mr Mitchell checked with the Claimant whether they had answered all her questions and she said yes.

40. At the 1 July consultation meeting the Claimant was informed that she was being made redundant and was subsequently provided with a letter confirming this and stating that the Claimant's employment would terminate on 31 July 2020 and she would be paid in lieu of notice, together with her statutory entitlement to redundancy pay. At the meeting the Claimant asked about her redundancy pay and commission and says that Ms Maury confirmed at this meeting that she would be paid commission for the three months of her notice period. Mr Mitchell denies this was said. We have the notes of the July meeting which do not include any words to the effect that the Claimant recalls, although they do include some phrases that could have been interpreted to that effect. In emails of 2 July following the meeting the Claimant queried the payment calculations in the letter she had been given, and set out her understanding of what had been said at the meeting and sought confirmation of that. Mr Mitchell replied apologising for any confusion and stating that during the notice period the Respondent would pay in lieu of notice salary only. On this, it seems to us that there was a lack of clarity about what was said by both Ms Maury and Mr Mitchell in this meeting. The Claimant genuinely understood Ms Maury to have said she would be paid commission during her notice period, but we do not find that that was said in so many words. What was said was unclear and required clarification, and it was made explained quickly after the meeting that the Respondent did not intend to pay commission for the notice period.

41. No alternative positions had been identified. All the planned redundancies were made and the Respondent has not created any new roles since.

42. The dismissal letter did not offer the Claimant a right of appeal, but the Claimant instructed solicitors (for that purpose only) and on 14 July 2020 they wrote an appeal letter on her behalf.

43. Mr Mitchell acknowledged the appeal on 15 July 2020 and explained that because of the size and structure of the company and the redundancy situation there was no other suitable manager available to hear her appeal, which would therefore be considered by him and Ms Maury.

44. The Claimant was by this time suffering from anxiety and depression and provided a doctor's note to that effect. She requested the appeal be dealt with in writing. By letter of 21 July 2021 Mr Mitchell asked her various questions about her grounds of appeal, to which the Claimant responded on 24 July 2020. By letter of 30 July 2020 Mr Mitchell informed her, in a detailed letter which dealt with the substantive appeal points, that the appeal had been dismissed.

45. In the meantime, on 20 July the Respondent's accountant removed the Claimant as a director with Companies House and the Claimant received automated notification of this. On 23 July Mr Mitchell emailed the Claimant requesting her resignation with Companies House. She responded that she noted that he had already removed her as a director and saying she took this as an indication that her appeal had been predetermined. He emailed the next day apologising, explaining that the accountant had 'jumped the gun'. He then sent an informal warning to the accountant about her actions. We accept Mr Mitchell's evidence as to what happened on this point that the accountant acted of her own volition and that she was not aware that Mrs Cohen had appealed her dismissal and that that was ongoing. There is nothing to contradict Mr Mitchell's account, which is consistent with the emails and we find it entirely plausible that the accountant was aware of the dismissal but not of the Claimant's appeal and acted accordingly.

46. The Claimant's employment accordingly terminated on 31 July and she did not work her notice period. Mr Mitchell accepted in cross-examination that if she had wanted to work her notice period that could have been considered, but that possibility was not raised at the time.

<u>The scoring in more detail</u>

47. In these proceedings, the Claimant has in particular challenged her scores on Quality of Work, Future Potential and Flexibility and Adaptability, but Mr Mitchell accepted that there were three other criteria for which subjective assessments were required, namely Quantity of work and efficiency, Initiative and Skills/qualifications/technical expertise. In his witness statement he had explained why he scored the Claimant as he did. He did not explain why he

scored the Claimant's named comparator Mr Taffurelli as he did. Mr Mitchell did give us some evidence about that orally, and also expanded on his reasons for scoring the Claimant as he did. Our findings in relation to the scoring are as follows:-

a. *Quantity of work and efficiency* – The Claimant was scored 3 for this criterion which corresponds to *"Consistently achieves at least minimum expectations and often exceeds them. Works with efficiency and completes tasks in the time expected"*. Mr Taffurelli was scored 3 as well. Neither of them scored 4 which would have been *"Always exceeds minimum expectations by a significant margin. Works with great efficiency and completes tasks to a good standard in the time expected"*. In his witness statement Mr Cohen said that he did not award a score of four (and indeed considered a score of 2) for the Claimant because he thought her work rate was *"slow and fairly inefficient"*, and that she *"would track lettings deal progress in a ledger book by hand, subsequently transferring the information to an Excel spreadsheet"* and that she would not use formulas in Excel to speed up work. In oral evidence, he acknowledged that this was what he had been told by Mr Taffurelli and others in the office prior to lockdown rather than observing for himself and confirmed that the Claimant had not used a *"ledger"* for some years, so this point was historic. Nonetheless, we accept that these were genuinely Mr Mitchell's conscious reasons at thetime. For Mr Taffurelli, Mr Mitchell said orally that he thought Mr Taffurelli was a 3 because there were no particular problems with his work and he did not seem to be making many errors. The latter point is one that properly goes to the *Quality of work* criterion, but we accept that the essence of Mr Mitchell's (conscious) assessment of Mr Taffurelli was that there were no particular issues with his quantity of work and efficiency and he considered that the descriptor for a score of 3 properly fitted Mr Taffurelli's performance. We note that on this criterion Mr Mitchell was, if anything, generous to the Claimant in scoring her the same as Mr Taffurelli despite having more concerns about her work.

b. *Quality of work* – The Claimant scored 2 for this, which equated to *"Quality is generally acceptable. Error correction necessary on occasion"*. Mr Taffurelli was scored 4 which equated to *"Consistently high standard of work. Errors of any significance rarely made."* In his witness statement and orally Mr Mitchell said that the Claimant's work was generally acceptable with some error correction needed at times. He said that there had been some significant errors with financial reporting by the Claimant, which had required input from the accountant to the extent that the accountant had complained (an event which was not disputed by the Claimant, although she had not been given a full explanation for it) and there was one specific incident which occurred shortly before lockdown and so had not been raised with the Claimant where the Claimant had double-charged for a fee and did not correct that in the deal reporting spreadsheet. With

Mr Taffurelli, Mr Mitchell was happy with his work and could not give examples of any significant errors, even though for two months before the scoring it was he Mr Mitchell who had been responsible for reviewing any formal documents prepared by Mr Taffurelli. Again, we accept that Mr Mitchell's evidence reflects his conscious reasoning at the time.

We pause here to observe that while it may seem strange that an assessment of the quality of someone's work apparently placed little weight on their ability to do their job in general terms (such as relations with clients, revenue generated and so on), we find that to be a product of the way the descriptor for this particular criterion is drafted which invites the assessor to focus on the extent to which the employee makes errors. This is perhaps unfortunate, but that is how the criterion appears to have been understood by Mr Mitchell and it is in that way that he (consciously) applied the criterion to both the Claimant and Mr Taffurelli and distinguished between their quality of work principally on the basis of number of errors rather than making a broader assessment.

c. *Initiative* – Both the Claimant and Mr Taffurelli scored 3 which equated to *"Normally shows initiative across whole job range. Completes routine tasks without reference tosupervisor. Will suggest improvements to work practices, systems etc"*. Neither of them scored 4 which would have been *"High degree of initative exercised, will analyse problems, seek to implement solutions. Supervisory guidance rarely required."* In his witness statement Mr Mitchell said that the Claimant normally showed initiative, but there was no evidence that the Claimant was actively identifying problems and inefficiencies and implementing solutions. He gave the example again of her initially manually recording lettings deal progress in a ledger book until told to do otherwise. We find that was the extent of what he had mind at the time. In oral evidence he added that she could have identified earlier that lettings was over-staffed and that five staff were not needed to do the job, since the Respondent has managed in his view very well with one since the dismissal of the rest of the team. We asked him in oral evidence whether this was a point he had in mind at the time and he said that he had as he had always thought there were too many staff. He had no explanation for why he had not included this point in his witness statement. We find that this is a point on which Mr Mitchell has convinced himself after the event rather than something he had in mind at the time. It is a product of him having found in the year since the rest of team were made redundant that the lettings department can be run adequately with one person. If he had had the point in mind at the time, he would have said so either in a letter at the time or in his witness statement. Mr Mitchell did not give any specific explanation for why Mr Taffurelli was scored as he was, but as he was generally very happy with Mr Taffurelli's standard of work and there had been no 'negative attitude' incidents with him, we take that to be the explanation for the score.

Again we note that on this criterion Mr Mitchell was, if anything, generous to the Claimant in scoring her the same as Mr Taffurelli despite having more concerns about her work.

d. *Skills/qualifications/technical expertise and ability* – The Claimant scored 3 which equated to *"Above average practice and technical skills, or appropriate qualifications and training, to perform their current job or a similar job. Good technical expertise and strong ability to perform role"*. Mr Taffurelli scored 4 which equated to *"Considerable technical and practical skills, or appropriate qualifications and training, applied consistently, accurately and to a high standard. Exceptional technical expertise and great ability to perform role"*. Mr Mitchell identified the difference between them as being that the Claimant did not make full use of the Respondent's Reapit software on a day-to-day basis, instead relying on her staff, whereas Mr Taffurelli was highly skilled in using the software. The Claimant disputed this assessment, but we find that this was genuinely Mr Mitchell's view of the difference between them.

e. *Flexibility and adaptability* – The Claimant scored 2 which equated to *"Responds reasonably well to new demands"* and Mr Taffurelli scored 3 which equated to *"Adjusts quickly to new demands"*. Mr Mitchell considered that the Claimant was not able to adjust 'quickly' or 'readily and easily', giving examples orally of her attitude to the Chelsea office and the 1st Asset purchase. There were no such issues with Mr Taffurelli. Again, we find that these were genuinely Mr Mitchell's conscious reasons at the time.

f. *Future Potential* – the Claimant scored 2 which equated to *"May be capable for limited promotion but is more likely to carry out other jobs at equivalent level following training"* while Mr Taffurelli score 4 which equated to *"Is promotable now to a more senior job"*. On this, the Claimant was marked down not only because as she was already head of two departments there was limited scope for promotion and but also because of her reticence to support the business plan for growth in 2017-2019 with the recruitment of Head of Sales, the Chelsea office purchase and the 1st Asset purchase. Mr Mitchell did not specifically explain why Mr Taffurelli was scored as he was on this criterion, but being more junior there was more scope for promotion and there were not the examples of negative attitude with Mr Taffurelli that there were with the Claimant. It is also obvious from his selection of Mr Taffurelli to be the one employee in the department not furloughed that he considered he was ready to 'run' the department. Again, we find that these were genuinely Mr Mitchell's conscious reasons at the time.

48. Finally, we record that although *Timekeeping* was regarded by Mr Mitchell as being an objective criterion, in fact in his witness statement he indicated that on reflection he might have over-scored the Claimant on this as although she was never late, he could not recall occasions when she had regularly worked

past 6pm or ever on the weekend, i.e. more than the standard hours, which he regarded as part of the criterion for being scored as a '4'. The Claimant disputed that, putting to him that she was always in by 8am. He did not disagree with that but repeated that she was never in on the weekends and worked from home on a Friday, which we find to be his genuine assesesement.

49. The outcome of the scoring exercise was that the employees who were selected to remain in the business were all those who had not been put on furlough, plus Ms Lemasson. It was put to Mr Mitchell that this showed the furlough decision had pre-determined the redundancy decisions. His evidence was that this was not the case, that they had carried out the redundancy scoring against the criteria and 'it just happened' to come out with the same result as the decisions the business had made at the start of furlough. He did not think that was really surprising because to an extent the decisions about who not to furlough were based on similar considerations about who had the best overall skill sets for the job which were reflected in the redundancy criteria.

Conclusions

Age discrimination

The law

50. Under ss 13(1) and 39(2)(c) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in dismissing the Claimant discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristic relied on by the Claimant is her age.

51. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). The Claimant relies on Mr Taffurelli as a comparator. However, if we consider that his circumstances are not materially the same, we must consider how a hypothetical comparator would have been treated. We bear in mind in this regard that evidence about an alleged comparator may still be of important evidential value even if their circumstances are not materially the same so as to bring them within s 23(1) EA 2010.

52. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

53. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863.

54. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope. In all cases, it is important that the Tribunal must stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

Conclusions

55. We have considered very carefully whether the Claimant's age influenced Mr Mitchell's decision to select her for redundancy. In doing so, we have also taken into account the matters that we deal with below that in relation to the unfair dismissal claim.

56. This is not a case where we have found it necessary to resort to the burden of proof. We have simply sought to make findings of fact on the basis of the evidence before us, applying the legal principles set out above.

57. We are satisfied that there was no conscious discrimination here for the reasons we have already given in our findings of fact. There is also nothing inherently discriminatory about the criteria that were applied: while the *Future potential* criterion could (depending on how it was applied) have disadvantaged someone older and higher up the career ladder in this case that criterion was interpreted more broadly so as to encompass general attitude to business development, and it was in any event counterbalanced by the inclusion of a *Length of service* criterion which clearly favours older employees.

58. However, there are a number of aspects of the evidence which have caused us to think very carefully about whether we should draw an inference that the Claimant's age unconsciously influenced the decision to select her for redundancy. In particular:

a. The Claimant felt that from the outset Mr Mitchell was dismissive of her in part because of her age, but we find as a fact this was not the case. We accept his evidence that he sought to draw on her expertise, but on a number of key occasions (appointment of Head of Sales, opening of Chelsea office and purchase of 1st Asset) the Claimant was negative in her attitude towards business growth decisions and continued to be so even after the decisions were taken and all employees should have been working together to make those business steps successful. It is immaterial here that the Claimant may have been 'proved right' on any of these decisions. The point is that there should have been committed team-working, but there was not and if Mr Mitchell appeared somewhat distanced from the Claimant, we find it was because of her attitude rather than her age.

b. The Claimant had taken herself out of the office prior to national lockdown because she was in a 'vulnerable' category because of her age, but we accepted that this did not play any conscious factor in Mr Mitchell's reason for placing her on furlough and we see nothing in this event of itself to infer that age played a subconscious part either. Mr Mitchell was able to give a full explanation for his decision and we are satisfied that as everyone was working remotely the fact that the Claimant was in a 'vulnerable' category because of her age was not a factor in this decision-making.

c. We have already noted in our findings of fact above that the Claimant herself does not attach any particular significance to the fact that the oldest employee in each of the pools was selected for redundancy. We have nonetheless considered whether the Claimant may be wrong about this not being relevant, but we are satisfied on the evidence we have heard that the Claimant is right that no particular inference is to be drawn from what might otherwise appear to be a significant pattern.

d. There were elements of the reasons that Mr Mitchell gave for scoring the Claimant as he did in relation to redundancy selection which could be said to be age-related. These include: her historic use of a ledger, reluctance to use IT to its full potential, and her reluctance to engage with new business ideas. While all of these might be the product of a stereotyped view about older people, we find that in this case these were views that Mr Mitchell held on the basis of facts that he genuinely believed to be true or correct and he was able to give specific examples of what he meant. We do not therefore find in this case that these factors indicate that the Claimant's age unconsciously influenced his assessment of her.

e. Finally, we have considered whether Mr Mitchell was able to give an adequate non-discriminatory explanation for each of the scores he gave the Claimant and Mr Taffurelli and why they differed. We find that he has. For each of the criteria Mr Mitchell was able to explain

why he scored the Claimant as he did, and to give specific examples. He also gave evidence in relation to his view of Mr Taffurelli's performance which in our judgment provided a sufficient basis for his scoring of Mr Taffurelli. It must be remembered in this respect that this is not a dismissal for poor performance – far from it. This was a redundancy selection exercise where the same criteria were applied to all employees in scope in an effort fairly to distinguish between a number of employees, none of whom would have been dismissed if the Respondent had not decided to reduce its workforce drastically in response to the pandemic. As such, points about employees' performance that would not normally have been cause for concern and, indeed, had for a number of years been tolerated by the Respondent without significant comment became points of distinction between otherwise valued and, in the Claimant's case, long-serving employees. We therefore find that Mr Mitchell has provided an explanation for his scoring from which we can conclude that the Claimant's age played no material part.

59. Standing back and looking at all the evidence in the round, there is no evidence here from which we can draw an inference that the decision to dismiss the Claimant was influenced to any extent by her age.

60. The age discrimination claim therefore fails and is dismissed.

Unfair dismissal

The law

61. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA 1996). Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. in this case redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at paragraph 44). (There are exceptions to that approach, as identified in *Jhuti*, but they are not relevant here.)

62. We therefore have to consider, first, whether the Respondent has proved that the definition of 'redundancy' in s 139(1)(b)(i) ERA 1996 is satisfied, i.e. whether the requirements of the Respondent *"for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish"* and whether the dismissal is *"wholly or mainly attributable"* to that state of affairs. The House of Lords in *Murray and ors v Foyle Meats Ltd* [2000] 1 AC 51 made clear that these are questions of fact for us as a Tribunal.

63. In deciding what the requirements of the business are for the purposes of s 139, Tribunals are not to investigate the commercial and economic reasons behind an employer's actions: *James W Cook and Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716 and *Moon v Homeworthy Furniture* [1977] ICR 117.

64. If we are not satisfied that the Claimant was dismissed for redundancy, then we must consider whether she was dismissed for some other substantial reason. This requires that there be a 'sound business reason' for the reorganisation: *Hollister v National Farmers' Union* [1979] IRLR 238 and *Banerjee v City and East London Area Health Authority* [1979] IRLR 147.

65. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

66. As this is a redundancy dismissal, the principles in *Williams v Compair Maxam* [1982] ICR 156 apply. As adjusted to dismissals where there is not union involvement, they are as follows:

    (1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered;

    (2) The employer must consult as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible;

    (3) The employer must 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;

    (4) The employer must seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection;

    (5) The employer must see whether instead of dismissing an employee he could offer him alternative employment."

67. We note that although selection criteria must not depend solely on the opinion of the person making the selection, there is no rule of law that they must be exclusively objective: see *Nicholls v Rockwell Automation Ltd* UKEAT/0540/11/SM at §§31-32: *"…it is not the law that every aspect of a marking scheme has to be objectively verifiable (by which we mean verifiable independently of the judgment of management) as fair and accurate. If overall the redundancy criteria were reasonable… then the fact that some items were not capable of objective verification is not fatal to the scheme… Selection criteria are not to be limited to those which can be the subject of box-ticking exercises"*.

68. The question of which employees should be pooled is primarily a question for the employer, subject to the test of whether the choice is within the range of reasonable responses: *Capita Hartshead Ltd v Byard* [2012] ICR 1256 at [31].

69. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48].

70. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. This is particularly the case in a redundancy dismissal where the *ACAS Code of Practice on Disciplinary and Grievance Procedures* does not apply. The Court of Appeal has recently confirmed that in such cases the absence of an appeal or review procedure does not of itself make a dismissal for redundancy unfair and it would be wrong to find a redundancy dismissal unfair *only* because there was no appeal procedure. However, it is one of many factors to be considered in applying a test of overall fairness: *Gwynedd Council v Barratt* [2021] EWCA Civ 1322 at [38].

71. There is also no right for the employee to be permitted to bring a companion to redundancy consultation/dismissal meetings. Section 10 of the Employment Relations Act 1999 does not apply in redundancy cases: see *Heathmill Multimedia ASP Ltd v Jones and Jones* [2003] IRLR 856 and *London Underground v Ferenc Batchelor* [2003] ICR 656.

Conclusions

72. We have no difficulty concluding that the test for redundancy in s 139(1)(b)(i) ERA 1996 is satisfied here. The Respondent's requirements for employees to carry out work of the kind done by the Claimant had diminished. The Claimant was employed to do lettings and property management work. The Respondent's requirements for employees to do that work reduced from 7 to

2. Further, the Claimant's dismissal was wholly or mainly attributable to that state of affairs. Mr Mitchell would not have dismissed the Claimant had the Respondent not decided to reduce its workforce in that way. The Respondent has thus established that there was here a potentially fair reason for dismissal.

73. We also find that the dismissal was fair in all the circumstances within s 98(4) because:

a. The Respondent's choice of pools for employees was well within the range of reasonable responses. The Claimant did not suggest that she should have been included in any pool other than the lettings and property management pools in which she was included, and we could see no basis for including her in any other pool. There was no need to include the members of what came to be called the so-called Family Office in any pool because they were doing work of a different kind and/or for a quite separate element of the business (ie. personal administration for Mr Pastor, accounts and, in Mr Mitchell's case, business management) and the Respondent had not reduced its requirements for employees to carry out work of that kind.

b. The criteria used to select employees comprised a mixture of subjective and objective elements. The subjective elements dominated (there being at least six out of ten in that category, and even timekeeping including an element of subjectivity), but the detailed descriptive criteria for each score were drawn up in such a way as to enable consistent and quasi-objective assessments to be made in relation to those six criteria and we consider that the criteria as a whole were sufficiently objective, and appropriate that it was fair to use them.

c. The criteria were applied fairly. Because a discrimination claim was brought in this case we have in fact examined the individual scores and the justification for them in a great deal more detail than would normally be appropriate in an unfair dismissal case where we must apply a range of reasonable responses test. Applying that test, Mr Mitchell's reasons for scoring fall within the range of responses open to an employer. That is not to say that there is not scope for improvement: it would have been better practice if Ms Maury and Mr Mitchell had scored each employee independently and then compared scores so as to avoid 'confirmation bias'; it would have been preferable for the Claimant to be scored solely by reference to her current performance, rather than past use of a ledger; it would have been better if only performance issues that had been raised with her had been relied on; and it would have been better if he had not relied on past conversations with Mr Taffurelli for his information or if he had relied on similar conversations with the Claimant about Mr Taffurelli. Making these small changes would have made the process appear more transparent and fair to the Claimant. However, none of these points are in our judgment sufficient to take the

Respondent's approach outside the range of reasonable responses. We are satisfied that Mr Mitchell conscientiously applied himself to the task of assessing each employee against the criteria and that he took the same approach to all employees so there was no unfairness here.

d. Although the outcome of the scoring was that those who had not been furloughed got to stay and everyone else (apart from Ms Lemasson) was made redundant, we do not find that the furlough decisions predetermined the outcome of the redundancy selection. We accept Mr Mitchell's evidence that he and Ms Maury conscientiously sought to apply the redundancy selection criteria, and that it was not surprising that this gave much the same result as the decisions made at the start of furlough because of Mr Mitchell's and Ms Maury's view of the relative qualities of the employees in question. It does not mean the selection was 'predetermined'.

e. There were no alternative roles available and the Claimant has not sought to dispute that. She has sought to criticise the Respondent's business decisions as to the amount of work available and how many employees are required to do that work, but these are matters that the case law makes clear we as a Tribunal cannot re-evaluate. Nor would it have been reasonable for the Respondent to 'create' a job for her: the cases in which fairness might require that are very rare indeed and this case where a small employer is making half its workforce redundant is certainly not such a case.

f. A fair consultation process was followed prior to dismissal. There was sufficient warning of the possibility of dismissal, the Claimant was provided with the information she needed to make representations about scoring, there were four meetings and we find that Mr Mitchell was not simply 'going through the motions'. He listened and responded to the points raised by the Claimant. The fact that they did not change the scores in response to her representations does not mean that the process was not a fair one.

g. An 'appeal' to the same managers as took the original decision is not an appeal at all in our judgment. The essence of an appeal is that it is to someone else who reviews or rehears the case. But in a redundancy case, the legal principles we have to apply mean that we cannot on this basis alone find the dismissal to be unfair. We have to consider whether, taken in the round, the overall process was a fair one conducted within the range of reasonable ways that employers may conduct such processes. We find that it was. While we consider that the Respondent could have located an independent person external to the business to consider an appeal (or, indeed, possibly Mr Pastor), it did the next best thing, and offered what was in effect a 'reconsideration' process. Again, Mr Mitchell and Ms Maury undertook that process conscientiously, going beyond the minimum by asking detailed questions about the grounds of 'appeal'

and responding to each. This was not an appeal but neither was it a complete nullity as a process.

h. Removal of the Claimant as a statutory director on 20 July, we find was a mistake by the accountant who was unaware of the ongoing appeal. It did not signify that the appeal was predetermined.

i. There is no entitlement to be accompanied to redundancy consultation/dismissal meetings and in any event the Claimant never requested to be accompanied and was well able to represent herself. No unfairness arises from that.

74. We therefore find that the Respondent's decision to dismiss the Claimant was for a potentially fair reason (redundancy) and that it was not unfair either procedurally or substantively. The unfair dismissal claim is therefore dismissed.

Breach of contract

75. The Respondent's decision not to pay the Claimant commission as part of the payment in lieu of notice was in accordance with the contract. The Claimant's contract provides separately for salary (clause 4.1) and commission (clause 4.4). Clause 9 confers an absolute right on the Respondent to pay in lieu of notice and *"pay your salary entitlement **only** in lieu of all … of the period of notice"* (emphasis added).

76. Clause 14 provides that variations must be agreed in writing. On its face, therefore, the contract cannot be varied orally. That does not mean that there could not have been some oral collateral agreement to pay commission during the notice period, but even if such an offer was made in the 1 July meeting, that would not be enough to make a collateral contract as it was a gratuitous offer for which there was no consideration by the Claimant.

77. In fact, however, what was said at meeting on 1 July was not in our judgment a clear offer at all. What was said was unclear, and required clarification, which was subsequently given, confirming that the Respondent's offer was to meet the Claimant's contractual and statutory entitlements and no more.

78. While Mr Mitchell accepted orally that he could have offered the Claimant an opportunity to work during her notice period, the Respondent was not required by contract to make such an offer and the Claimant was in any event by that time signed off sick with stress and anxiety, so working during the notice period was not a realistic option.

79. The breach of contract claim is therefore dismissed.

Overall conclusion

80. The unanimous judgment of the Tribunal is:

(1) The Respondent did not contravene ss 13 and 39(1)(c) of the Equality Act 2010 by directly discriminating against the Claimant because of her age. The claim is dismissed.

(2) The Claimant's claim for unfair dismissal under Part X of the Employment Rights Act 1996 is not well-founded. The claim is dismissed.

(3) The Respondent did not breach the Claimant's contract by failing to pay her commission for her notice period. The claim is dismissed.

Employment Judge Stout

23 September 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/09/2021.

FOR THE TRIBUNAL OFFICE