RG-V1/mf

Case Number: 3202676/2011

EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Shiret**	
Respondent:	**Credit Suisse Securities (Europe) Limited**	
Heard at:	**East London Hearing Centre**	**On: 11, 12, 13, 18 June 2013 & 26 June 2013 (in Chambers)**
Before:	**Employment Judge Brown**	
Representation		
Claimant:	Mr M Duggan (Counsel)	
Respondent:	Mr A Nawbatt (Counsel)	

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Respondent directly discriminated against the Claimant because of age when it dismissed him.**
2. **The Respondent did not indirectly discriminate against the Claimant.**
3. **The Respondent unfairly dismissed the Claimant.**
4. **It is 30% likely that the Respondent would have dismissed the Claimant fairly and in a non discriminatory manner. Compensation for loss of earnings due to unfair dismissal and direct age discrimination should be reduced accordingly.**

REASONS

Preliminary

1. The Claimant brings complaints of direct age discrimination, indirect age discrimination and unfair dismissal against the Respondent, his former employer.

2. The issues in the claim were set out in a Case Management Discussion by Employment Judge Allen on 19 December 2012 and are as follows:

Age Discrimination

2.1 Claims of direct and indirect age discrimination under Sections 13 and 19 Equality Act 2010.

Direct Age Discrimination

2.2 The less favourable treatment complained of is the selection of the Claimant for dismissal. The parties did not agree on the identification of the correct comparator. Justification is not relied upon by the Respondent.

Indirect Age Discrimination

2.3 The provision, criterion or practice relied upon by the Claimant is the inclusion of performance and potential within the selection criteria for the redundancy exercise. The Respondent denies that older people were placed at a particular disadvantage when compared with younger people and/or that the Claimant was put at a disadvantage. The Respondent relies upon justification. Its suggested legitimate aim is to seek to retain those individuals who will best meet the Respondent's business needs going forward or, in short, to retain the best people. The proportionate means relied upon is the adoption of the selection criteria used. The Respondent says that all four criteria need to be looked at as a whole and that even if one criterion placed older people and/or the Claimant at a disadvantage that is balanced by other criteria in the exercise. The Claimant says that the application of the potential, performance and skills criteria was done in a discriminatory way and that this renders the achievement of any possible legitimate aim tainted by discrimination.

Unfair dismissal

2.4 The Claimant accepts that the reason for the dismissal was redundancy and the Claimant accepts that there was a genuine redundancy situation. The Claimant contends that the selection criteria were chosen subjectively and unfairly applied. The Claimant contends that there was no meaningful consultation collective or individual. The Claimant contends that there was a failure to provide the Claimant with sufficient information to deal with the consultation and that the information he was provided with was not provided within sufficient time. The Claimant contends that the inclusion of the general retail and food retail areas in the pool was outside the reasonable actions of a reasonable employer and that the Respondent did not have genuine motives for identifying that pool. The Claimant also relies on the absence or inadequacy of an appeal process at the Respondent. The Respondent wishes to rely on the principles raised in Polkey and Section 123(1) of The Employment Rights Act 1996.

3. The parties agreed at the commencement of the substantive hearing that these remained the issues to be determined. The Employment Tribunal heard evidence form the Claimant himself and from Steven East, Co-Head of Equity Research, Christopher Carpmael, Co-Head of European Cash Equities and Ruth Carson, Director and Head of HR for Equities EMEA.

4. The Tribunal had a two volume bundle. New documents were introduced by consent during the hearing. The Claimant submitted an opening note. Both parties made closing submissions, including written submissions; both handed up authorities. The parties supplied chronologies and a list of dramatis personae.

5. The Employment Tribunal timetabled the case at the outset. The parties complied with the timetable. The Employment Tribunal reserved its decision.

Findings of Fact

6. The Claimant commenced work for Barclays de Zoete Wedd in January 1993, as a research analyst. In late 1997 his employment was transferred, pursuant to the *Transfer of Undertaking (Protection of Employment) Regulations*, to the Respondent. He was promoted to the position of Managing Director in December 2000. His job remained that of a research analyst.

7. The Claimant worked in the Respondent's Pan-European Equity Research Department. The Equity Research Department was itself part of the Respondent's European Equities Department within Cash Equities.

8. Steven East and Charlie Mills were Co-Heads of the Pan-European Equity Research Department. They jointly reported to Chris Carpmael, who was Co-Head of European Cash Equities and also to Stefano Natella, Global Head of Equity Research, who was based in the USA.

9. The Equity Research Department was split into 30 different industry sectors with teams allocated to each sector. Those teams comprised between one and nine employees.

10. The Claimant was both a research analyst in, and sector head for, the general retail sector. By 2011 the Claimant had eighteen years' service. The role of research analysts is to advise investors on where they should invest within a particular sector. They forecast the future earnings and cash flows of companies, as well as valuing those companies.

11. The general retail sector had a team of two people in 2010. Mr Assad Malic was the other research analyst in the department. He had been promoted to the position of Director on 1 January 2011, from the position of Vice President. The next stage of promotion for him would have been to Managing Director.

12. Mr Malic had seven to eight years' experience in the general retail sector and had strong technical skills. The Claimant was well-known in the general retail field as an expert. He was rated number 2 in the 2010 Extel Survey and number three in the 2010 Institutional Investor Survey of 100 analysts. He was also listed in the Retail Week "Retail Power 100 list", the only city expert on the list.

13. There was also a food retail team in the Equity Research Department. It comprised two individuals. Andrew Kasoulis was head of the team and was a Managing Director. Mr

Kasoulis had fifteen to twenty years' experience and was considered one of the City's most experienced food retail analysts. The other member of the team was Xavier Le Mene. He was a Director, promoted from Vice President on 1 January 2011. He had ten to twelve years' experience.

14. The Claimant was born on 2 March 1956 and was aged 54 at the end of 2010. Mr Kasoulis was born on 16 April 1966 and was aged 44 at the end of 2010. Mr Malic was born on 22 October 1975 and was aged 35 at the end of 2010. Mr Le Mene was born on 8 May 1970 and was aged 40 at the end of 2010.

15. The Respondent uses a score card, compiled using internal data, to appraise performance and determine pay awards for employees at the end of each year. The weightings for each category on the score card were notified to employees around the beginning of each calendar year. The score card also used data collected externally.

16. The score card contained a number of metrics used in appraising employees. 50% of the score card was made up from "profit and loss". This was calculated using "Attributed Client Value Added" and "commission". 75% of the profit and loss figure was calculated using Attributed Client Value Added and 25% was calculated using commission. From those figures were deducted the team cost, to arrive at the final profit and loss figure.

17. Attributed Client Value Added is calculated using two different factors. First is the dollar value of services provided to clients. Three quarters of the Equity Research Department's target customers give direct feedback to the Respondent, voting for teams which have delivered value to them and ranking those teams relative to the Respondent's competition. On the basis of those votes, the Respondent attributes a dollar value to the services provided to customers, based on the sector votes, relative to how much the client pays the Respondent.

18. The dollar value of the client vote is the most significant factor in the Equity Research Department's revenue and thus is the largest single component in the Attributed Client Value Added score.

19. The second element of that score is "management access" revenues. Clients pay the Respondent to organise meetings with management teams and a dollar value is attributed to all management access meetings organised by a team. "Client vote" revenues and "management access" revenues are added together to calculate the revenues the clients are paying the Respondent's research department to deliver research content.

20. As stated, the gross profit and loss score is calculated by giving 75% weighting to client value added revenue and 25% commission revenue, less all costs of the team pre-bonus. In addition to the 50% profit and loss element on the score card, the following other metrics were taken into account on the score card:-

20.1 Team performance on model portfolio system under which teams buy and sell shares artificially on an electronic system tracked over a calendar year (10% of the score card).

20.2 Feedback from the derivatives business (10% of the score card).

20.3 360 degrees technical skills feedback (10% of the score card). The Respondent has an internal feedback system where the Respondent's sales team, the Respondent's traders and other internal customers of the research department score the analysts. The analyst is then ranked based on the number of votes received and the scores received. If an analyst receives a large number of votes as well as a higher score this leads to a higher ranking than if an analyst receives a small number of votes, even if those votes are of a high score.

20.4 Other qualitative factors where corporate citizenship was taken into account, for example, involvement in graduate recruitment and work on IPOs and IPO investor education. IPOs are Initial Public Offerings. They are valuable to the Respondent's business (20%).

21. In the 2010 performance appraisal process, the general retail team (the Claimant and Mr Malic) was ranked sixteen out of 32 teams for profit and loss, page 399. This was the same ranking the team had achieved in 2009.

22. The Tribunal heard a considerable amount of evidence regarding another metric, Technical skills on the 360 degree feedback. It finds as follows:

22.1 the Claimant was ranked 49 out of all analysts and Mr Malic was ranked 29th. Mr Kasoulis was ranked fourth and Mr Le Mene was ranked 53rd. This represented a change in their positions from 2009. The Claimant had fallen from 43 to 49, page 165. Mr Malic's rank had risen from 50 to 29, page 400.

22.2 The Claimant's actual score on the 360 degree internal feedback was a score of 2.3. 53% of analysts have scores in the bracket 2 to 2.5 and 28% had worse scores, page 62. The average score for the whole department was 2.32. The lower the score; that is, the closer to zero; the better.

22.3 The Claimant's ranking of 50 out of 86 analysts placed him in the bottom quartile for Managing Directors and would have placed him in the bottom quartile of Directors.

22.4 The scores corresponded to the following descriptions:-

1 Exceptional.

2 Highly developed skills.

3 Fully competent.

4 Development needed.

5 Weak in this area.

6 Not observed.

22.5 A score of 2.3 therefore was between "highly developed skills" and "fully competent" and, indeed, it was closer to highly developed skills than fully competent, page 309.

22.6 The sales traders employed at the Respondent were accidentally excluded from the 360 degree feedback in 2010. They had been included in the 360

degree feedback in previous years. In 2009 the sales traders had provided a significant number of high votes for the Claimant. Their exclusion meant that the Claimant's rank was likely to have been negatively affected - and disproportionately negatively affected compared to Mr Malic's, who did not receive so many votes from the sales traders. The exclusion of the sales traders' votes would not have meant the Claimant would have been ranked more highly than Mr Malic but it would have significantly narrowed the gap between them. It could also have affected the Claimant's ranking compared to others in the research department. In 2009 the Claimant had been ranked 2nd out of 80 analysts by the sales trading department.

23. The Respondent considers that a key performance indicator of a sector is how many clients vote for the sector in their "top three". In 2010, the votes received by the Respondent from 144 of its target clients showed that 42% voted the general retail team as a "top three" team. This compared to a department average of 50% of target clients considering a team to be a top three team, page 165 and was a fall from 54.4% in 2009 and from 58.4% in 2008, page 161. This drop in 2010 was worse than all other departments, apart from aerospace and defence. The Respondent stopped covering aerospace and defence after 2010.

24. The Claimant undertook a major research report on Adidas in 2010. This was a very high quality piece of work which was very well-received. Mr East considered it to be an excellent piece of work. It was produced five months later than the date initially planned. This was because Adidas had scheduled a strategy update in November 2010 and the Claimant considered that his report would be best produced after this strategy update.

25. The Employment Tribunal accepts the Claimant's evidence with regard to this. It does not accept Mr East's contention that the note ought to have been produced earlier in any event. The Tribunal notes that Mr East did not prompt or chase the Claimant for the note before November 2010 and concludes that Mr East tacitly accepted that waiting until after 2010 to produce the note was the appropriate course for the Claimant to take.

26. The Claimant also produced a research note on Next in March 2011. This was another high quality piece of work and was acknowledged as such by Mr East. Both Adidas and Next share prices have significantly risen since the Claimant produced his notes.

27. Mr Malic produced a well-received note on Home Retail in 2009 but gave a favourable analysis on Dixons and Halfords during 2010, both of which later issued significant profit warnings in 2011.

28. Mr East met with the Claimant to complete his end of year appraisal in November 2010. He drew the Claimant's attention to the fact that the Claimant's own metrics and that of his team had fallen, page 165.

29. He gave the Claimant some targets for 2011. These included that that team should target getting top three votes back above the department average of 50% and reverse the decline in client vote revenues; that the team should look for opportunities to lift the team's management access revenues; should look for ways to service the derivatives business to generate recognition; and should rebuild the internal franchise of the team, page 165.

30. In the Claimant's formal objectives for performance review of 2011, other matters were included. These included mentoring Assad Malic and Rogerio Fujimori and assisting Lindsay Aland on her return from maternity leave. They included: aim to improve external rankings, maintain support of sales, sales trading and trading desks and show a timely information flow to allow appropriate risk decisions to be taken, maximise profit and loss, mentor nominated colleagues from outside the retail team, ensuring appropriate information flow from direct managers and contribute to required programmes, for example graduate recruitment and promote the growth of the CS athletics network, page 204 to 205.

31. The Claimant's pay fell after 2010, to reflect the Respondent's view that his performance had not been as good as in previous years. However the Claimant's basic salary had increased from £155,000 per annum on 1 January 2010 to £350,000 per annum, reflecting a general shift in the industry to paying a greater proportion of remuneration through salary rather than bonuses. This may have clouded the bonus figures in 2010 to some extent.

32. Mr East did not indicate to the Claimant that his performance was unacceptable, or was likely to render him liable to any form of performance management.

33. In November 2010 the Claimant had a disagreement with his assistant Rachel Clifton, during which he shouted and swore at her. This took place in the office and was overheard by others.

34. Charlie Mills spoke to the Claimant and told him his behaviour was not acceptable. He followed this up with an email which said "Following our conversation earlier this is to confirm that your behaviour last week was both inappropriate and totally unacceptable. There are standards we expect in the workplace and you failed them", page 159A. The Claimant accepted that his behaviour had been incorrect. He had apologised to his assistant in any event.

35. The Respondent contended that the Claimant's behaviour in the workplace, more generally, was challenging and difficult. However, in evidence, Mr Carpmael said that the Claimant's behaviour was not out of line for others in the industry. Mr Carmael said that Mr Malic had later complained about the Claimant's behaviour and that this was a red flag.

36. The Tribunal has not heard any particulars of the way in which the Claimant was alleged to have behaved unacceptably on a day-to-day basis towards Mr Malic. It heard generally that Mr Malic wanted more autonomy, but did not hear of any inappropriate behaviour like the incident in December 2010. On balance, the Tribunal accepts Mr Carpmael's evidence that the Claimant's behaviour was not out of character for others in the industry. It does not find, save for the December 2010, incident that the Claimant behaved in an unacceptable, or difficult, way in the workplace.

37. In the first quarter of 2011 (that is January to March 2011), Ruth Carson, the Respondent's Director and Head of Human Resources for the Equities Department was having regular discussions with the Head of Equities, Steven Dainton, about resources and headcounts in the department. This was due to the state of the market and the impact it was having on the business. None of these discussions, nor the advice given by human resources, was documented. The possibility of redundancies was discussed in general terms at least.

38. In early 2011 Mr Malic was applying for jobs outside the Respondent. He had moved house and had a young family and wanted to increase his earnings. He kept the Claimant abreast of his applications and his intentions.

39. In about early February 2011 Mr Malic received an offer from a smaller company than the Respondent, Berinberger. The job offered paid significantly more than Mr Malic's position in the Respondent.

40. Mr Malic emailed Mr East on 14 February 2011 asking for an "important chat" the same morning. Mr East met with him at about 10 o'clock. After the meeting he emailed Mr Mills, Co-Head of Equity Research saying, "Assad is on the brink of resigning. Came to see me, we had a chat and he went away again (without leaving me his resignation letter)... The key issue is he can't take working with Tony [the Claimant] for another year." Page 190.

41. Mr Mills then saw Mr Assad. At 12.32 he emailed Mr East and Mr Carpmael saying:

> "Seems to me we need to look at the long term on this sector. Plenty of big stocks not covered. They have got stuck in following Legacy UK with little or no future. Tony isn't going to be around forever and Assad will have the chance to lead the sector longer term at a big house unlike Berinberger. We should look at an overhaul of approach? How committed is Tony? Does he want to go to a three day week? Some feel he is already there? What is (sic) Tony's ambitions?" Page 193.

42. Mr East emailed Mr Mills back later that afternoon at 16.14 saying "Chris and I have spent more time with him. He is thinking things over now. I think he'll stay." p196, to which Mr Mills responded at 16.16 saying "We'll need to get stuck into stores to sort it out a bit – how committed is Tony? What are his medium term intentions? Etc. Haven't promised Assad any money have we?" p195.

43. Mr East replied:

> "I think this accelerates what we were already planning for Tony. No way Assad will stay if he has to do another year with Tony. We have said a lead analyst on a sector gets paid at a level that is competitive to the Berinberger with upside in coming years if he does a good job." p 195.

44. Mr Mills replied at 16.28 "Ahh that's going to be tough then isn't it – Assad will feel he's knifing Tony, even if the blade was already drawn. Can we offer early retirement? He is 55 this year, retirement age is 58 at CSS extraordinarily". Page 195.

45. Mr Malic emailed Mr Mills at 16.18 saying "Well still here at the moment, mulling things over, Chris has made an interesting case." Page 200. To which Mr Mills said in the email "I thought he might!". Mr Malic decided to stay.

46. Neither Mr East, nor Mr Mills, nor Mr Carpmael instituted any form of performance management in respect of the Claimant following their meetings with Mr Malic, nor did they intimate to the Claimant that they might. Neither Mr East, nor Mr Mills discussed Mr Malic's threatened resignation with the Claimant. Neither discussed the Claimant's behaviour in the workplace, nor told him that Mr Malic found it unpleasant.

47. Mr East and Mr Carpmael told the Employment Tribunal that the emails at p195 exchanged between Mr East and Mr Mills were talking about a plan to bring forward a performance management for the Claimant and not about dismissing the Claimant. The Employment Tribunal rejects Mr East and Mr Carpmael's evidence with regard to this. The Tribunal notes that the emails at p195 do not mention performance management at all. It notes that, on the evidence, there were never any preparatory steps taken by the Respondent towards performance managing the Claimant.

48. The Tribunal finds that Mr East was not a credible witness when talking about these emails. He did not make eye contact. He gave brief answers and appeared to be uncomfortable. Significantly, the words of the emails themselves suggest plainly that the Claimant will be dismissed. Mr East's email at 16.19 says "No way Assad will stay if he has to do another year with Tony". At this point Mr East clearly wanted Mr Malic to stay. If Mr East was planning to performance manage the Claimant, rather than dismiss him, then Mr Malic would have had to continue to work with the Claimant. Mr East said, in the same email, that he and Mr Carpmael had told Mr Malic that a lead analyst on a sector gets paid a level that is competitive to the Berinberger offer. Again, what is being contemplated by those words is that Mr Malic will be the lead analyst on the sector, rather than the Claimant. That was only likely to happen if the Claimant was dismissed, rather than that if he was performance managed.

49. The words of Mr Mills' answering email show that Mr Mills understood that the plan was to dismiss the Claimant. He says "that it is going to be tough" and that Mr Malic "will feel that he is knifing" the Claimant. The words "knifing" suggest an end; that is, a dismissal, rather than something less. Furthermore Mr Mills is clearly contemplating the Claimant leaving when he says, "Can we offer early retirement?"

50. Soon afterwards, on 30 March 2011 Mr East emailed Stefano Natella, copied to Charles Mills, before a redundancy consultation process had started, saying that potential names that he was looking to exit the business during the current redundancy programme included Tony Shiret, the Claimant.

51. The Employment Tribunal finds that the suggestion that Mr Mills and Mr East were planning to performance manage the Claimant rather than dismiss him is wholly incredible. It finds that Mr Mills and Mr East intended to dismiss the Claimant in February 2011.

52. Mr Carpmael told the Employment Tribunal that there was no discussion about headcount reduction within the Equity Department or redundancies until the first week of March in 2011.

53. On 25 March 2011 Ruth Carson sent an email to all employees in the Equities Division, notifying them of an intended redundancy process and proposing arrangements for the appointment of employee representatives, p212. On 30 March 2011, Mr East emailed Stefano Natella saying, "As requested at the DOR on Monday, potential names that we are looking to exit the business during the current redundancy exercise are .. "Tony Shiret" [and 4 other names]." P213. ("DOR" standards for Directors of Research meeting). Mr Natella replied saying, "Are we sure about the last one? Is Ravi ok?" p213A. The last name on the list was not, in fact, later made redundant, but moved to a different part of the Respondent's business. Mr Natella did not query whether Mr East was sure about intending to dismiss the Claimant during the redundancy exercise.

54. On 1st April 2011 Ruth Carson informed employees of a first collective redundancy consultation meeting, scheduled for 4 April. At that consultation meeting, the management representative proposed four selection criteria to be applied during the redundancy exercise: "performance; skills and competencies, technical/specialist skills; experience; and potential." Management said that these had been used in previous redundancy exercises and had worked well. The notes of the meeting record that, after discussion, it was agreed that these selection criteria would be applied again, p218.

55. Mr East took on board the task of deciding which sectors the Equities Research department would lose. As stated previously, the research department covered 33 sectors. Mr East decided to cut headcount from the General Retail, Healthcare, Biotech, Utilities, Infrastructure sectors. He then decided to include Retail – Food, with the General Retail sector, in the pool from which he would select for redundancy. Mr East told the Employment Tribunal that he took into account the following matters in making this decision on the sectors from which headcount would be lost :

55.1 The overall attributed value to customers (made up of client vote revenues and management access revenues) as shown on the 2010 scorecard;

55.2 Commissions by sector, as set out on the 2010 scorecard;

55.3 The importance of the sector to ECM and IBD (which Mr East then scored from 1 to 4)

55.4 The most recent data for the first 3-4 months of the year.

56. The Claimant's sector General Retail team (the Claimant and Mr Malic) had been ranked sixteenth out of 32 teams for profit and loss – that is, attributed client value and commissions - on the 2010 scorecard. Within that figure, Commissions in the General Retail were low. Nevertheless, on those bases alone, General Retail would not have been a obvious candidate for redundancies. It was not near the bottom 5 performing sectors on this measurement.

57. The Tribunal accepts that the most recent data for the first three to four months of the year showed that the General Retail sector had fallen further in assessment of top three teams by target clients.

58. Mr East told the Tribunal that he discussed the importance of the sectors with Chris Horne and Tome Aherne of IBD and that they attributed little or no value to the Retail General sector. The only notes of Mr East's discussions with Mssrs Horne and Aherne are handwritten annotations on the documents at Bundle pp209-210. At p209, there are comments noted against some of the sectors. "Don't care" is noted in relation to Retail – food; Tobacco and Luxury Goods; Chemicals; Tech-Semiconductors. "Don't care" is not noted beside General Retail. The only comment beside General Retail is "Best in 5 years". At p210 there are fewer annotations. "Don't Care" is noted against "Retail – Food; and Biotech and Chemical". Question marks, which appear to indicate ambivalence about a sector, are recorded against: Retail- Food; Building; Tobacco & Luxury Goods; Biotech; Real Estate; Infrastructure; and Chemicals. There are no annotations against Retail – General.

59. The Tribunal does not accept Mr East's evidence that he included "General – Retail" in the sectors for redundancy selection partly because of the IBD/ECM input. There is no evidence to support his contention. The notes of his meetings with the

relevant individuals do not indicate that General Retail was a sector that they considered ought to be reduced.

60. The Tribunal therefore does not accept Mr East's evidence regarding the reason for including General Retail in the sectors where headcount was to be reduced. Significant other factors such as attributed client value, as shown on the profit and loss on the scorecard, did not indicate that General- Retail was a low performing sector, from which headcount should be reduced.

61. The Tribunal concludes that, seeing that Mr East had already decided that the Claimant would be made redundant, he included General Retail in the sectors for redundancy to achieve that result.

62. Mr East told the Tribunal that there was no guidance used by managers to understand and complete redundancy selection forms. He said that he was told, verbally, by HR, how to fill out the forms. Ms Carson told the Employment Tribunal that there was a written HR Guide to completing the redundancy selection forms. This was never produced to the Tribunal. The Tribunal finds that Mr East did not use any Guidance when completing the redundancy selection forms.

63. Mr East put all the team members from General Retail and Food Retail into one pool for redundancy selection, meaning that the Claimant, Assad Malic, Andrew Kasoulis and Xavier Le Mene were in a pool together. Possible scores in each category ranged from 1 (lowest) to 5 (highest). The potential scores were described on the standard form as follows:

> "5. **Far exceeds requirements**. The individual's overall assessment **FAR EXCEEDS** requirements, as per the descriptions.
>
> 4. **Exceeds requirements.** The individual's overall assessment is a combination of **FAR EXCEEDS** requirements and **MEETS** requirements, as per the descriptions.
>
> 3. **Meets requirements.** The individual's overall assessment **MEETS** requirements, as per the descriptions.
>
> 2. **Partly meets requirements.** The individual's overall assessment is a combination of **MEETS** requirements and **DOES NOT MEET** requirements, as per the descriptions.
>
> 1. **Does not meet requirements.** The individual's overall assessment **DOES NOT MEET** requirements, as per the descriptions."

64. The words "as per the descriptions" were not explained to the Tribunal and no "descriptions" were produced.

65. Mr East gave the men the following scores,

65.1 Claimant. **Performance,1,** "Client votes have been slipping for 3 years and suffered a large drop in 2010. Tony's individual 360s technical skills feedback have also been dropping consistently and fell to 50th out of the 85 analysts in the department which is bottom quartile of the MDs and would be bottom quartile of the Ds. **Skills and Competencies (including technical or specialist skills), 4,**, "Tony has very strong technical skills and stock

broking ability. While the internal and external franchise has been declining there are still flashes of brilliance (e.g. Next or Adidas initiation); **Experience 5,** "Fantastic industry knowledge and contacts. A wealth of experience built up over a long career, including 18 years at Credit Suisse. **Potential 1,** Tony displays little appetite to develop further and sometimes appears very frustrated with his existing job."

65.2 Assad Malic. **Performance 4**. Despite the team's franchise being in decline, Assad's individual performance continues to be excellent. In the internal 360s technical skills feedback Assad moved from 50th in 2009 to 29th out of 85 analysts in the department. This puts Assad in the middle of the Director population, despite only being promoted to Director on 1st Jan 2011. **Skills & Competencies (incl..) 4**, Very good technical skills in both the secondary market and on recent investor education work for an IPO. **Experience, 3,** has 8 years of experience on sell-side and previous professional experience outside banking, but would benefit from building up more retail industry contacts. **Potential, 4**, Continuing to develop strongly with appetite to take on new challenges and help out more broadly within CS.

65.3 Andrew Kasoulis **Performance 4,** The Food Retail team remains a top tier franchise for us and individually Andrew is top quartile in the 360s technical skills feedback (coming 4th out of 85 analysts in the department in 2010). **Skills & competencies (incl.) 4,** Andrew's technical skills are very strong and he consistently delivers strong product to internal and external customers. **Experience 4,** Andrew has great industry experience which is uses (sic) to good effect through both his stock calls and the corporate access he wins. **Potential 3,** Andrew has reach (sic) his full potential in the analyst role, but still finds the time to help out with ad hoc projects such as gathering feedback and helping to improve the new RAVE database we've rolled out.

65.4 Xavier Le Mene **Performance 3,** the Food Retail team remains a top franchise for us and Xavier continue (sic) to perform at a high level. He was 52nd out of 85 analysts in the department, while a VP in 2010, which was in the middle of the population and recently was promoted to D. **Skills & competencies (incl) , 3,** Xavier has good technical skills and abilities as a full coverage analyst and with full client responsibilities. **Experience 3,** Xavier's six years of experience in industry and 12-years on the sell side puts him in a strong position as an analyst. **Potential 4,** Xavier has the potential to take on more leadership in the future." Pp 249 – 255.

66. Mr East told the Tribunal that he discussed the scores with Mr Mills and the Tribunal notes that Mr Mills signed off the score sheets for example at 256B. They were also countersigned by HR.

67. Mr East scored the Claimant "1 ,does not meet," for both performance and potential. He awarded him a 1, rather than a 2, which would have been a combination of "meets" and "does not meet". Effectively, he scored the Claimant as not meeting potential or performance at all. Page 256A.

68. Mr East told the Tribunal that he gave the Claimant a 1 for performance, "does not meet" because the Claimant was a Managing Director of the sector and was ultimately responsible for the performance of the team when the sector's client vote had been

slipping for two to three years. He said that the 360 technical skills feedback was particularly significant because the Claimant was in the bottom quartile of Managing Directors and Directors. He also awarded this score because of concerns about the Claimant's behaviour in the office.

69. The Tribunal acknowledges that the Claimant's recent performance had certainly not been as stellar as it had been in previous years. However, the Tribunal does not accept Mr East's explanation for giving the Claimant a 1. The most significant and lengthy comment justifying it on the form was that the Claimant's individual 360 technical skills feedback had been dropping and was now fiftieth out of 85 analysts. However, as Mr East was well aware, the Claimant had in fact scored 2.3 on the 360 skills analysis, which equated to a score of between "highly developed skills, 2" and "fully competent, 3" – and, indeed, was nearer highly developed skills.

70. Mr East should have been aware, in addition, that the sales traders had not been asked to provide 360 technical feedback in 2010, through error, and that this was likely have affected the Claimant's score detrimentally in comparison with other analysts, given how highly rated he had been by sales traders in previous years. Had sales traders been included as they previously had been, and not omitted in error, the Claimant's score could very well have been higher than 2.3.

71. With regard to potential, Mr East told the Employment Tribunal that he scored the Claimant a 1 because he found that the Claimant had not shown the proactivity or initiative that he would have expected to see from a sector head. Mr East said that the Claimant did initiate Adidas, but that this was delayed, and that the Claimant said that he would initial Hugo Boss but had not done so in 2011 Q1.

72. Mr East agreed in cross-examination that the Claimant had volunteered for a pastoral scheme and that he had done a lot of work in promoting a running network in the community, which had enhanced Credit Suisse's reputation. Mr East also told the Tribunal that, in deciding whether an employee had appetite to develop, he took into account all avenues for development, including leadership and management. He then agreed that he had not included mentoring when scoring the Claimant, although the Claimant was carrying out mentoring responsibilities. It appears that Mr East did not take into account all avenues for development when he marked the Claimant for potential. He did not take into account the pastoral scheme or areas in which the Claimant had enhanced Credit Suisse's reputation outside the strict confines of his job.

73. Mr East told the Employment Tribunal that he had given Mr Le Mene 4 for potential because Mr Le Mene had the potential to take on more leadership. Initially, in his evidence, he said that Mr Le Mene was travelling to other parts of the world for companies he was covering and that this showed potential, but then he agreed that Mr Le Mene was simply doing this as part of his normal job duties. The Tribunal notes that Mr Le Mene travelling to other parts of the world was not recorded on his form as a reason for his high potential score.

74. Mr East said that he had scored Mr Kasoulis 3 for potential because he had helped out on IT projects beyond his role and that he had given Mr Malic a 4 because he had worked on an IPO outside his sector. He agreed that he had asked Mr Malic to do this. It was not in dispute that the Claimant had worked on a number of IPOs over the preceding decade.

75. The Tribunal finds that Mr East treated the Claimant less favourably compared to the other men in the pool when awarding scores in the same categories. Mr East did not give the Claimant any credit for the leadership roles that he was already undertaking, including mentoring and developing a running network and enhancing Credit Suisse's reputation. These were included in his 2011 objectives. Mr East gave Mr Le Mene a very high score because he had the potential to take on more leadership, even though there was no evidence of him actually doing so. Mr East therefore gave the Claimant no credit for the fact that he was capable of taking on leadership roles – he was already doing so in, and outside, his current role – but, on the other hand, gave Mr Le Mene a lot of credit because he had not taken on leadership roles, but might in the future.

76. The Tribunal finds that Mr East gave little or no evidence explaining why Mr Le Mene deserved a 4 for potential. He did not explain why Mr Le Mene merited a 4 for potential while Mr Kasoulis, for example, but who was older than Mr Le Mene, only merited a 3. Mr East could give a concrete example of Mr Kasoulis taking on responsibilities outside his role - helping out on IT projects – but did not give any examples of Mr Le Mene acting outside his role.

77. The Tribunal finds that Mr East's explanation for why he awarded the Claimant a score of 1 for both performance and potential, lacks credibility. The Claimant scored extremely highly on skills and competence and experience and was noted for flashes of brilliance in relation of Next and Adidas in his skills and competencies. No credit at all was given for this in the performance and potential categories. In Mr Malic's scoring, by contrast, it appears that Mr Malic was given credit for his work on an IPO both in the skills and competencies, and in the potential categories. Again, this indicates less favourable treatment of the Claimant than Mr Malic in the same circumstances.

78. The Tribunal observes that, only if the Claimant had been given extremely low scores for performance and potential, could he possibly have been selected for redundancy, given his acknowledged strong skills and competencies and unrivalled experience. It appears that Mr East gave the Claimant the scores he did in order achieve his intention to select the Claimant for redundancy.

79. The Claimant told the Tribunal that Mr Dainton had given instructions that Managing Directors should be removed during the redundancy exercise. He said that Mr Stefano Natella had told him this. The Respondents denied that that was an instruction and denied that Mr East had acted on such an instruction.

80. The Tribunal observes that the Claimant only gave this evidence in cross-examination. It was not part of his original lengthy witness statement. The Claimant was giving hearsay evidence about what Mr Dainton said to Mr Natella. Given, that it was hearsay evidence and only emerged during cross-examination, the Tribunal does not accept that evidence.

81. The Claimant produced statistics reflecting the age profile of EMEA employees at the Respondent in January 2011. These statistics were based on figures provided by the Respondent and were not challenged in any detail by the Respondent, page 518.

82. The age profile was as follows, 21.7% of employees were under 30, 29.2% were aged 30 to 34, 26.9% were aged 36 to 39, 15.1% were aged 40 to 44, 5% were aged 45 to 49 and 2.1% of employees were aged 50 and over.

83. Of those age profiles 5% of employees aged under 30 were made redundant. 11.2% of those aged 30 to 34 were made redundant, 9.7% of those aged 35 to 39 were made redundant, 14.4% of those aged 40 to 44 were made redundant, 26.1% of those aged 45 to 49 were made redundant and 36.8% of those 50 and over were made redundant.

84. The Tribunal finds that the statistics show that the age profile of employees in the EMEA section was weighted in favour of younger employees, particularly those below 40. The Tribunal did not have evidence about the reasons for this, save that the Respondent suggested that it may reflect the industry age profile in general.

85. While it is correct that redundancy rates amongst those aged 45 and over and 50 over were higher than those in the other age groups, this may well reflect the fact that there were fewer employees in those age groups and therefore any redundancies were going to be statistically more significant than in younger age groups.

86. Overall the Employment Tribunal, is not able to draw any particular conclusions about the reasons for the age profile being as described. The number of redundancies was low in any event and this may mean that any meaningful statistical analysis of such redundancies is difficult, as a single redundancy may make a great difference to the percentages.

87. There were only two compulsory redundancies in the Equity Research Department in the Claimant's round of redundancies. The Claimant, who was aged 50, and Mr Whitbread who was aged 33. It is extremely difficult to make any reliable statistical analysis on such a small number of redundancies.

88. On 18 April 2011 Ruth Carson wrote to the Claimant, notifying him that he had been provisionally selected for redundancy because he was the lowest scorer in the pool, page 259.

89. On 20 April the Claimant emailed Ms Carson, asking for papers forming the basis of the evaluation by Mr Mills (as the Claimant understood it), including the score cards for 2008, 2009 and 2010, summaries of top 3, 5 and 10 client votes for general retail from 2008 to 2011, 360 degree technical skills analysis and comments for 2008, 2009 and 2010 and asking for the size and composition of the pool, page 265.

90. Ms Carson gathered information by 3 May 2011 and provided it to the Claimant, page 270. On 5 May 2010, Mr East provided the Claimant with charts used at the end of year appraisals 2008 to 2010 and the percentage of votes in the top 3, 5 and 10 for those years, page 274.

91. The Claimant attended his first consultation meeting on 9 May 2011. Mr East gave the Claimant an explanation about his performance and potential scores. He said that Adidas and other notes were not taken into consideration in the Claimant's performance because it was a normal part of the analyst's role. Under potential, Mr East confirmed he had not taken into account mentoring, or the Claimant's involvement in community events, when awarding the scores. Mr East told the Claimant that the Claimant had, on occasion, been frustrated in the office and he mentioned outbursts. The Claimant queried this and said that it had happened on one occasion. Mr East said that he had to make a judgment on general demeanour and attitude to work but he did not give any further details of behaviour which was relied on, page 286.

92. On 10 May 2011 Mr East provided the Claimant with his 360 degree information and told him that his average 360 degree score was 2.3 as on the score card, page 310.

93. The next day, 11 May, the Claimant asked what Mr Malic's score was and Mr East replied, giving the scores for Mr Kasoulis, Mr Malic and Mr Le Mene, page 309. Also on that day the Claimant asked to see data supporting the decision to downsize general retail headcount, page 312.

94. On 17 May 2011, Stefan Grazza emailed Mr East concerning a meeting with Hugo Boss. He said "Are we allowed to already speak to Rogerio already re Hugo Boss to set up a meeting – we don't need to mention to the company yet that Tony is leaving." Mr East replied saying "I'll get Rogerio's availability". It was common ground that Rogerio took over responsibility for Hugo Boss when the Claimant was put at risk of redundancy.

95. The Tribunal notes Mr Grazza's use of language. Mr Grazza was Managing Director of Equity Capital Markets. He said "Tony is leaving". Mr Grazza seemed to assume that it was certain that the Claimant would leave, despite the fact that the consultation exercise was still taking place.

96. Mr East's reply to Mr Grazza did not say that the company was in a consultation exercise and that no decisions had been made. He simply said that he would get Rogerio's availability. The Tribunal considers that this is further evidence that a decision had already been made that the Claimant would be dismissed during the exercise.

97. On 18 May 2011 Mr East emailed the Claimant explaining how his 360 scores and the ranking of analysts were calculated, page 328. The Claimant asked for a description of the scores in the 360s at page 329 and Mr East replied that, 1 corresponded to exceptional, 2 to highly developed skills, 3 to fully competent, 4 development needed and 5 weak in this area, page 329, 11 May 2011.

98. The Claimant attended a second consultation meeting on 18 May 2011 page 334. Mr East provided the Claimant with a bar chart and illustrations which he said demonstrated how general retail had been selected as an area in which headcount could be lost. The Claimant questioned these. Mr East did not give examples of the Claimant's poor behaviour which had been relied on in selecting him for performance at this meeting, page 344 and 355.

99. On the same day, 18 May, the Claimant emailed Ruth Carson with additional questions page 337. On 18 May Mr East provided some answers to these questions, page 345.

100. Two days later, on 20 May 2011, by email the Claimant queried Mr East's assertion that there was little IBD/ ECM work in General Retail. He said that there had been a reasonable level of IBD/ECM work in the General Retail sector in 2009/2010 and gave examples of New Look and Euroset IPOs and a Carphone Warehouse deal and referred to the extensive amount of IPO work during the previous decade, page 358.

101. The Claimant submitted an appeal against his redundancy on 25 May 2011 page 366. The Respondent did not have a written redundancy process. It does not have the right of appeal after the consultation process. The Respondent agreed to provide the Claimant with a third consultation meeting after receiving the appeal document.

102. The appeal document was lengthy and detailed. It contended, amongst other things, that the alleged assessment of lack of IBD/ECM potential for general retail was not evidenced and was contradicted by nine IPOs during the previous decade, including one in 2010 (New Look) and one in 2011 (Euroset). It contended that the 360 degree scores were calculated omitting the sales trading department, when sales traders had ranked the Claimant second out of 80 analysts in 2009 and that the omission was likely to have materially depressed the Claimant' ranking. The appeal also argued that there was no evidence of any non-sector related activity by Xavier Le Mene, but that he had been given a 4 for potential despite this.

103. The Claimant attended a third consultation meeting on 26 May 2011. The Claimant again questioned the inclusion of the general retail sector in the redundancy exercise. Mr East said that the Claimant was looking at historical data and that the Respondent needed to look to the future. The Claimant asked questions about the scoring and Mr East answered these, page 393 to 395.

104. The Claimant was dismissed with effect from 31st May 2011, page 411.

Relevant Law

Discrimination

105. By *s39(2)(c) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him.

106. Direct discrimination is defined in *s13 EqA 2010.* Indirect discrimination is defined in *s19 EqA 2010.*

107. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

Direct Age Discrimination.

108. Direct discrimination is defined in *s13 EqA 2010:*

"(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."

109. By *s5 EqA 2010*, age is a protected characteristic. A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group. 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.

110. In the case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Elements of Direct Discrimination

111. Accordingly, for a Claimant to succeed in a direct age discrimination complaint , it must be found that:

(a) A Respondent has treated the Claimant **less favourably** than a comparator in the same relevant circumstances;

(b) The less favourable treatment was because of age as defined in s5 EqA - **causation**;

(c) that the treatment in question constitutes an unlawful act such as dismissal.

"Because"- Causation

112. According to the heritage case law, the test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?" Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, Para [77].

113. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

Burden of Proof and Inferences

114. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and the Annex to the judgment. Adapted for age discrimination under the Equality Act that guidance is as follows:

(1) Pursuant to s136 EqA 2010 it is for the claimant who complains of race discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by the Act or which is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

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

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

or she would not have fitted in'.

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

(5) It is important to note the word 'could' in s136. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s138 of the EqA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s138 EqA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.s15(4) of the EqA 2006. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

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

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

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

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

115. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail*

Infrastructure Ltd v Griffiths-Henry [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in protected characteristic and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58.

116. In *Burgess v Bear Stearns International Limited* (2011) UKEAT/0216/10, Underhill P stated, at para [36] that the facts necessary to raise a prima facie case, "..will vary according to the nature of the case alleged. Some instances of discrimination will be inherently implausible (say, against a football referee on the grounds that he is a man) and will take a lot to prove even a prima facie case. Some kinds of discrimination, by contrast, in some kinds of environment, are all too common, and it will not take much to shift the burden of proof. In the case of age, we see nothing wrong in the observation that, generally speaking... small differences of age between middle-aged executives are unlikely to influence decision-takers.... There will of necessity almost always be some difference of age – in one direction or the other – between a Claimant and a potential comparator. .".

117. It is not necessary in every case for a Tribunal to go through the two stage procedure: *Brown v Croydon* LBC [2007] IRLR 259 at paragraphs [28] – [39]. It may be appropriate for the Tribunal simply to focus on the reason given by the employer and, if it satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation would have been capable of amounting to a prima facie case under stage one of the *Igen* test.

118. As explained by the EAT in *London Borough Of Islington v Ladele* [2009] IRLR 154 at [40] –[41], the employee is not prejudiced by that approach because the tribunal is acting on the assumption that the first hurdle has been crossed by the employee: the case fails on the basis that the employer has provided a convincing non-discriminatory explanation for the less favourable treatment at the second stage. Equally, if a Claimant establishes that the reason for the detrimental treatment is a prohibited reason, the Claimant "necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic. Accordingly, although the Directive and the Regulations both identify the need for a Tribunal to determine how a Tribunal was or would have been treated, that conclusion is necessarily encompassed in the finding that the Claimant suffered detriment on the prohibited ground. So a finding of discrimination can be made without the Tribunal needing specifically to identify the precise characteristics of the comparator at all", para [32] and see [33]-[38], per Elias P. See also *Hewage v Grampian Health Board* [2012] ICR 1054 at [32] per Lord Hope.

Unreasonableness and Inferences

119. The EAT has commented *In London Borough of Islington v Ladele* [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. "That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in *Zafar v Glasgow City Council* [1997] IRLR 229:

'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

120. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ indicated, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment."

Stereotypical Assumptions and Inferences

121. In a claim for direct discrimination based on stereotypical assumptions about a person's protected characteristic, there must be evidence: (1) from which an Employment Tribunal could properly infer that incorrect assumptions were made about that person; and (2) that those assumptions were operative in the detrimental treatment of that person, *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278, per Mummery LJ at [49].

Indirect Age Discrimination

122. Indirect discrimination is defined in *s19 Equality Act 2010.*

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,

(*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(*c*) it puts, or would put, B at that disadvantage, and

(*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.

123. In the context of redundancy selection, whether a selection criterion applied puts a Claimant at a particular disadvantage is a question of fact, requiring an analysis of the nature and application of the criteria by which the selection was determined and the extent to which the employee's protected characteristic affected their score against that criterion, *NTL Group Limited v Difolco* (2006) UKEAT/0120/05.

124. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

125. The Court of Appeal held in *Rolls Royce v Unite the Union* [2010] 1 WLR 318 that, the inclusion of the length of service criterion amongst other criteria in a redundancy selection process was a proportionate means of achieving a legitimate aim. The legitimate aim was to reward loyalty, and to achieve a stable workforce in the context of a fair process of redundancy selection. The proportionality of the means adopted was demonstrated by the fact that the length of service criterion was only one of a substantial number of criteria for measuring employee suitability for redundancy, and that it was by no means determinative.

Unfair Dismissal

126. *Section 94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

127. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Redundancy is a potentially fair reason for dismissal.

128. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

129. *Williams v Compair Maxam Ltd [1982] IRLR 83* sets out the standards which guide tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

Pool

130. There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding [1980] IRLR 255.*

Criteria for Selection

131. The fact that criteria involve a subjective judgment being made does not render a dismissal unfair. Underhill P said, in *Samsung Electronics (UK) Ltd v Monte –D'Cruz* UKEAT/0039/11, " not all aspects of performance or value of an employee lend themselves to objective measurement, and there is not obligation on an employer always to use criteria which are capable of such measurement."

132. Tribunals should not undertake a detailed re examination of the way in which selection criteria were applied. It is sufficient for the employer to have set up a good system and to have administered it fairly, *Inchcape Retail Ltd v Symonds* (2009) UKEAT/0316/09.

133. In all these matters, the employer must only act reasonably and there is a broad band of reasonable responses open to a reasonable employer.

Polkey

134. If an employer has dismissed an employee in a way which is unfair, the ET can consider what is the likelihood that the employee would have been dismissed fairly – *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974.

Polkey & Discrimination

135. The *Polkey* principles apply to discriminatory dismissals, *O'Donoghue v Redcar and Cleveland BC* [2001] IRLR 615, CA, *Abbey National plc v Chaggar* [2010] ICR 397. If there was a chance that, apart from the discrimination, the Claimant would have been dismissed in any event, an appropriate deduction should be made.

Discussion and Decision

Direct Age Discrimination

136. The Claimant contends that the Respondent directly discriminated against him because of his age when it dismissed him. Addressing the burden of proof, the Tribunal asks whether the Claimant has shown facts from which the Tribunal could conclude that the Respondent dismissed the Claimant because of his age, or that one of the reasons the Respondent did this, was his age. It reminds itself that, according to *Igen v Wong*, the outcome at this stage of the analysis by the tribunal will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

137. On our findings of fact the Tribunal concludes;

137.1 that the Respondent intended to dismiss the Claimant in February 2012 when Mr Malic threatened to resign,

137.2 that, by 30 March 2011, the Respondent had decided to use the redundancy process to achieve its intention of dismissing the Claimant, as evidenced by the email sent on that date, and

137.3 that Mr East gave the Claimant scores during the redundancy exercise to secure his dismissal, and

137.4 in doing so, Mr East treated him less favourably compared to the other employees that he was scoring.

138. Has the Claimant shown facts from which the Tribunal could conclude that the Respondent intended to, and did, dismiss the Claimant because of his age, or that one of the reasons that the Respondent did this was because of the Claimant's age?

139. The Tribunal notes, at this point, that this is not a case where there were small differences of age between middle-aged executives. Claimant was aged 54 at the end of 2010. Mr Kasoulis was aged 44 at the end of 2010. Mr Malic was aged 35 at the end of 2010. Mr Le Mene was aged 40 at the end of 2010. The Claimant was therefore nearly twenty years older than Mr Malic and 15 years older than Mr Le Mene. That is a generational gap. He was even a decade older than Mr Kasoulis, who was the closest to him in age. The Tribunal finds that the Claimant was significantly older than all the other employees in the pool. He was the only employee in the pool who was aged over 50.

140. It appears from page 195 that Mr East and Mr Mills were already planning to dismiss the Claimant, even before February 2011. Mr Mills said "I think this accelerates what we were already planning for Tony". The Tribunal asks why were they planning to dismiss the Claimant before February 2011? Even the Respondent has not suggested that, before February 2011, it was planning to dismiss the Claimant because of performance. There was no evidence that his performance could have justified a fair dismissal on the grounds of capability.

141. The Tribunal looks at the comments that were made about the Claimant in the email chain. At 12.32 Mr Mills said "Tony isn't going to be around forever and Assad will have the chance to lead the sector longer term at a big house unlike Berinberger.

142. At 16.19 Mr East said "I think this accelerates what we were already planning for Tony. No way Assad will stay if he has to do another year with Tony". Mr Mills replied "That's going to be tough isn't it ... Can we offer early retirement?"

143. In the emails Mr Mills and Mr East are talking about the Claimant not being employed in the future and Mr Assad taking over. They talk about already having plans for the Claimant and then talk about retirement. The Tribunal considers that a proper inference from this email chain is that Mr Mills and Mr East were planning that the Claimant would retire and Mr Assad, the younger man, would take over, but that Mr Assad Malic's threat to resign had brought this forward.

144. The Tribunal has not accepted, on the facts, that there was any plan to performance manage the Claimant. There was certainly no evidence at all that there was any plan to *dismiss* the Claimant *because of his performance* before February 2011. The logical inference is that the plan to dismiss the Claimant was due to succession planning, or retirement, rather than the Claimant's performance. That plan for retirement was necessarily because of the Claimant's older age and proximity to retirement.

145. The Tribunal also considers that the way in which the criteria were applied to the Claimant during the dismissal process indicates that the Claimant's age was a reason for his dismissal. The categories for scoring included both experience and potential. The Tribunal acknowledges that experience, on the one hand, could discriminate indirectly against younger employees, while, on the other hand, potential could indirectly discriminate against older employees. The Claimant was therefore not necessarily at a disadvantage because of his age in the way that the criteria, as a whole, were selected.

146. However, when Mr East applied "potential" to the Claimant, he treated the Claimant less favourably than he did others in the same or not materially different circumstances.

147. Mr East told the Tribunal that he took into account everything that showed leadership, when scoring potential. However he did not give the Claimant credit for things that the Claimant undertook by way of leadership, even outside his role, in terms of

mentoring and setting up a Credit Suisse athletics network, which had increased Credit Suisse's profile externally. He gave the Claimant no credit for the matters that demonstrated his leadership potential, including outside his role.

148. On the other hand, he gave Mr Le Mene credit when he had done nothing at all. Mr East did not apply the same criteria to the Claimant as he did to Mr Le Mene or to Mr Malic. He did not take into account all aspects of leadership, as he said he had done, when he came to marking the Claimant. He gave him a score which equated to nothing for potential. This is despite the Claimant having exceptional industry contacts and having a very high level of skills.

149. The Tribunal considers that it could infer from those facts that Mr East saw the Claimant has having no potential, despite his excellent skills and unrivalled contacts, because of his age.

150. The burden of proof shifts to the Respondent to show that age was no part of the reason it dismissed the Claimant. Has the Respondent discharged the burden of proof? Again, the Tribunal bears in mind the guidance in *Igen v Wong.*

151. The Tribunal has not accepted the Respondent's explanation of the wording used in the emails on 14 February. It does not accept that the Respondent was planning to performance manage the Claimant. There was no evidence of any steps being taken to performance manage the Claimant. Indeed, if the Claimant's performance was not satisfactory, performance management would be an obvious step to take, if the Respondent had any intention of employing him in the future and making use of his considerable skills.

152. The Tribunal did not accept Mr East's evidence that he included general retail in the pool, partly because of the IBD/ECM input. There was no evidence to support that. The notes of his meetings with the relevant individuals did not indicate that general retail was a sector that they considered ought to be reduced.

153. Furthermore, the Tribunal considers that Mr East's explanation for the very low scores he awarded the Claimant for performance and for potential was not credible. The Respondent had an employee who had very high skills and exceptional industry contacts. He may not have been performing as well in the year running up to the redundancy exercise, as he had done in previous years, but the Respondent took no steps to increase the Claimant's performance by way of any performance management exercises. The only plan it appeared to have for the Claimant was dismissal.

154. The Respondent has not discharged the burden of proof on it to show that age was not part of the reason for dismissal. The Tribunal is satisfied, on the evidence, that age was part of the reason that the Respondent dismissed the Claimant.

155. The Respondent has not argued that any direct discrimination against the Claimant was justified under *s13(2) EqA 2010.* The Claimant's claim for direct age discrimination succeeds.

Indirect Age Discrimination

156. The Claimant contended that the selection criteria applied by the Respondent in the redundancy selection process placed older people at a particular disadvantage. The Tribunal acknowledges that applying "potential" as a criterion for selection could put

Managing Directors at a disadvantage, compared to Directors or Vice Presidents. Vice Presidents or Directors had potential to take on more leadership in the future on appointment to Managing Director. Managing Directors had less potential to develop than those at a lower level in the organisation. Employees at a higher level in an organisation are likely to be older than those at a lower level in an organisation. Thus the criterion could be indirectly discriminatory against older employees.

157. Applying *Rolls Royce v Unite the Union*, however, the Tribunal finds that "potential" was one of the criteria applied. "Experience" was also a criterion applied. Experience could, equally, have favoured older employees, who had been in the organisation for longer and had gained more experience. Potential was only one criterion for measuring employee suitability for redundancy, and would not necessarily have been determinative. The inclusion of potential could be a proportionate means of achieving legitimate aim. The legitimate aim is seeking to retain those individuals who would best meet the Respondent's business needs going forward.

158. The problem in this case was that the criteria were, in fact, applied in a directly discriminatory way, so that the Claimant was not even given credit for evidence showing his ability to take on leadership roles, even outside his existing role, when Mr East said that all matters indicating leadership should be taken into account. That is a matter of direct age discrimination, however, rather than indirect age discrimination.

159. The Claimant's indirect age discrimination claim does not succeed – his direct age discrimination claim has.

Unfair Dismissal

160. On the Tribunal's findings of fact, the Respondent had decided to dismiss the Claimant before the redundancy consultation process even started. It included the General Retail sector in the sectors for headcount reduction because it wanted to dismiss the Claimant. Mr East applied the criteria in a discriminatory and unfair way. While the Respondent did provide the Claimant with the documents he sought during the process, and held three consultation meetings with him, the Tribunal accepts that there was therefore no meaningful consultation with the Claimant. It finds that there was never going to be any result, other than the Claimant being made redundant, at the end of this process.

161. All those actions are outside the band of reasonable responses of a reasonable employer and the Claimant's dismissal was therefore unfair.

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162. The Tribunal has found that the Respondent acted unfairly and unreasonably in including general retail in the sectors for headcount reduction. If it had not been included, then the Claimant would not have been made redundant.

163. The Tribunal has not accepted what the Respondent has said about the reasons for scoring the Claimant as it did for potential and for performance. It has concluded that the score for potential was unfair and discriminatory.

164. The Tribunal considers what was the chance that the Respondent would have dismissed the Claimant fairly had it followed a fair procedure.

165. The following facts are particularly relevant:

165.1 There was a chance that the Respondent could have fairly included the general retail sector in the sectors for consideration. While overall value attributed to customers was in the midrange of the sectors, commissions by sector were low and the most recent data for the first three to four months of the year showed that the general retail sector had fallen further in assessment of top three teams by target clients.

165.2 Furthermore, the Claimant was the head of the sector and therefore was responsible for this.

165.3 His 360 degree feedback was not as good as Mr Malic's, even allowing for the likelihood that the Claimant's score was artificially deflated by the exclusion of the sales traders. As a Managing Director, his performance was not at the higher end of Managing Director performance.

165.4 The Tribunal considers that, on a fair scoring of the selection criteria, the Claimant would not have scored less than a 2 for performance, or potential, and he would, at least, have tied with Mr Le Mene in the scoring.

165.5 The Claimant did have excellent skills and had demonstrated brilliance in the previous year. He had acknowledged greater industry presence by far than Mr Malic or Mr Le Mene.

166. Taking all matters into consideration, the Tribunal considers that it is less than 50% likely that the Claimant would have been made redundant had a fair process been followed. General Retail might never have been included in the sectors for reduction. Even if it had been, the Claimant would not have scored less highly than Mr Le Mene and he had undisputed superiority to Mr Malic and Mr Le Mene in particular areas.

167. Allowing proper weight to the factors which weigh against the Claimant being retained after a fair selection procedure, the Tribunal considers that it is 30% likely that the Claimant would have been dismissed had a fair procedure been followed. Compensation for loss of earnings for unfair dismissal and age discrimination should be reduced by 30%.

18.7.13

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Employment Judge J Brown

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

25.7.2013

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS