EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr R Ramus	**v**	Fleur C Douetil

Heard at: Reading **On:** 5 & 6 August 2019,
21 August 2019 (in chambers)

Before: Employment Judge Anstis
Mrs C M Carr
Mrs F Betts

Appearances:
For the Claimant: Miss R Owusu-Agyei (counsel)
For the Respondent: Mr G Anderson (counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The respondent must pay £2,793.88 to the claimant as compensation for unfair dismissal. The recoupment regulations do not apply.

3. The claimant's complaint of age discrimination is dismissed.

REASONS

A. INTRODUCTION AND PRELIMINARY MATTERS

1. The claimant was an employee of the respondent from 15 February 1995 to 31 October 2017, when his dismissal took effect.

2. The respondent says that this dismissal was due to redundancy (or alternatively 'some other substantial reason'). The claimant does not accept this. He gives several possible causes for his dismissal, one of which is direct age discrimination. In respect of his age discrimination claim, the claimant places himself in a category of workers who are aged over 50 and relies on a hypothetical comparator who is under 50.

3. At the time of his dismissal, the claimant's job title was "bird keeper and general estate management".

4. The respondent is the owner of Busbridge Lakes. This is an estate which comprises her home (Busbridge Lakes House) along with a pair of semi-detached houses, one of which, "Busbridge Lakes Lodge", was the claimant's home for the duration of his employment. There are large grounds, which contain the Busbridge Lakes Collection, a collection of exotic wildfowl of national, perhaps international, significance. The collection and breeding of these birds was described to us as being the respondent's lifelong passion.

5. The respondent is now in her 80s, and since the death of her husband in 2014 her financial affairs have been largely run by her eldest son, Dane Douetil, who we will call Mr Douetil in these reasons. He is one of three brothers, the youngest of whom, Bill Douetil, now lives at Busbridge Lakes in Busbridge Lakes Cottage, which adjoins Busbridge Lakes Lodge.

6. We heard evidence and submissions on 5 and 6 August 2019, following which the tribunal met for discussion in chambers on 21 August 2019. These are the reasons resulting from that discussion.

7. Mr Douetil gave evidence for the respondent and the claimant gave evidence for himself. While the respondent was the claimant's employer, it is not disputed that the decisions which are in question in these proceedings are ones that she made prompted by and on the advice of Mr Douetil.

8. The claimant was represented by Miss Owusu-Agyei and the respondent was represented by Mr Anderson. It was agreed that this hearing would deal with both liability and remedy matters.

9. At the start of the hearing, the employment judge informed the parties that he had previously worked with Mr Anderson's instructing solicitor in the same firm and department from 2000 - 2012 until the solicitor left to set up his own firm. Since then they had met once to discuss social and business matters (around three years ago), and the employment judge had recently received an email from him (and a colleague) congratulating the employment judge on his appointment to the judiciary. Having heard that, and being given the opportunity to respond, neither party suggested that it was necessary or appropriate for the employment judge to recuse himself, and the tribunal panel did not consider it necessary or appropriate for there to be a recusal.

B. THE LEGAL FRAMEWORK

10. Section 98 of the Employment Rights Act 1996 reads as follows:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:

…

(c) is that the employee was redundant,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

11. Section 139 provides:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

(a) the fact that his employer has ceased or intends to cease:

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business:

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

12. As Miss Owusu-Agyei reminded us in her submissions, in Polkey v AE Dayton Services Limited [1988] ICR 142, Lord Bridge said:

> *"In the case of redundancy … the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."*

13. Under section 13 of the Equality Act 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."*

14. The less favourable treatment alleged is the claimant's dismissal. It is not suggested by the respondent that if the claimant was dismissed because of his age it was justified under s13(2).

15. Section 136 of the Equality Act 2010 provides that:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

C. THE FACTS

The Busbridge Lakes Collection, its financial basis and the claimant's role

16. The claimant was employed from 15 February 1995 as "Curator/Manager" at Busbridge Lakes.

17. In the time period we are concerned with it appeared that there was always one other full time employee at Busbridge Lakes – a gardener – along with a number of part-time assistants (typically two at a time) who were employed either on a part-time or casual basis to assist with feeding of the birds (a task that needed to be done year round and so needed cover on the claimant's days off and during the busy breeding season) and general estate maintenance.

18. The Busbridge Lakes Collection was, as Mr Douetil explained to us, a personal passion of his mother's. He described it as being run as a hobby, in contrast to a commercial or business operation. That distinction is not material to our consideration of unfair dismissal or age

discrimination, but we accept his evidence that the Collection was not operated as a commercial business and despite the fact that birds were bred and sold on to other collectors it could never of itself make a profit. Its continued existence therefore depended on the respondent's other income in order to fund it.

19. The events that are relevant to our consideration start with the death of the respondent's husband in July 2014. In addition to the personal toll that must have taken, a consequence of this was that the pension that the respondent and her husband had been receiving was reduced to half on his death.

20. In the course of administering his father's estate and assisting generally with his mother's financial affairs following his father's death it appears that Mr Douetil appreciated for the first time quite how much the Collection was costing to run. He describes his mother as not being particularly financially well aware, and it seems she was devoted to the Collection to the extent of not appreciating some of the financial realities that went with that. Much of what follows is the story of Mr Douetil's efforts to stabilise the finances of Busbridge Lakes so that the Collection could continue in some form for at least the rest of his mother's life, and so that his mother could continue to live in Busbridge Lakes House. Mr Douetil told us that according to his calculations if matters had continued as they were Busbridge Lakes would have run out of money within five years.

21. Mr Douetil's plans for placing Busbridge Lakes on a sustainable footing were first to reduce the extent of the Collection (and hence its costs) (it is not in dispute that since his father's death the Collection has reduced in size so as to now be around half what it was) and second to increase income generation, typically through renting the estate out for weddings or other events. The second point also brought with it an occupation for Mr Douetil's younger brother, which was considered likely to benefit his recovery from periods of ill-health. The events were run by Bill Douetil as his own business, but with an arrangement set up by Mr Douetil for the revenue to be shared with the respondent.

22. The first time that these plans affected the claimant was in the summer of 2015 when the respondent and Mr Douetil first discussed with him changes to his job description. In a letter dated 27 June 2015 the respondent (although it seems most likely that Mr Douetil wrote this letter on her behalf) described the position in the following way:

> *"… the family has been reviewing its requirements for Busbridge Lakes Waterfowl and have concluded that it no longer needs the resource in the same capacity as previously arranged. Financial resources are constrained and we are reducing the number of birds, pens and breeding along the lines we have already discussed".*

23. The consequence of this outlined in the letter was a change in the claimant's job title for "Curator/Manager" to "Bird Keeper and General

Estate Management", and the addition of, amongst other things, "*to assist with events including weddings, clubs, corporate, camping and film/photo shoot if and as necessary*" and "*take full responsibility for open days including schools and clubs*" to his job description. It appears there was also some discussion about the claimant's occupation of the Lodge and the number of dogs he kept there.

24. There followed a process of discussion with the claimant, during which he had the benefit of legal advice, with "*but you are not personally responsible for any liabilities that may occur …*" added to the "*take full responsibility …*" section. The claimant then agreed to a new contract of employment.

25. During his re-examination the claimant for the first time said that he regarded this change to his job title as the first of a number of attempts by the respondent to get him to leave his job (in particular by imposing restrictions in the number of dogs he and his wife could keep on the property). However, it was not part of his case that this change was not binding on him, and we take as our starting point that at the time of his dismissal he was employed in the role of "Bird Keeper and General Estate Management" on the terms of that contract.

General observations on the witnesses

26. We were impressed by Mr Douetil's evidence. Although with some obvious reluctance he was willing to speak candidly about some difficult family matters. It struck us that he was doing his best to enable the continuation of the Collection in the face of various difficulties, including his mother's reluctance to become properly involved in financial planning. At the same time, he was having to address other family difficulties including some health problems suffered by his younger brother. In response to Miss Owusu-Agyei's careful and comprehensive questioning he was willing to accept the difficulties that arose for the respondent in this case. We considered him to be generally an honest witness – but that of itself is not the answer to the unfair dismissal and age discrimination claims the claimant brings.

27. The failure of Mrs Douetil to give evidence was not criticised by Miss Owusu-Agyei. While she was the employer it was clear that her actions in this case were primarily undertaken on the advice and strong persuasion of Mr Douetil. The claimant at various times in his evidence appeared to take a stronger line in saying that Mrs Douetil was in fact the person behind the decision. We will discuss this latter in these reasons, along with some parts of the claimant's evidence which went unanswered as a result of the decision by the respondent not to give evidence herself.

28. The claimant in this case faced the inevitable difficulty that a claimant faces in any case such as this. He was not privy to the discussions that took place between the respondent and Mr Douetil about his dismissal. He cannot in that sense know or prove by his own testimony what the reason was or was not. He is left to point us to various facts and

material which (on his case) suggest that the reason for his dismissal was something other than what Mr Douetil says it was. It is apparent that in his witness evidence the claimant has taken the opportunity presented by this hearing to criticise the Douetil family including in relation to matters that were not properly relevant to the case (such as Bill Douetil's health and Mrs Douetil's treatment of a trainee). He was correctly subject to criticism from Mr Anderson for this.

29. It is plain that the claimant was highly aggrieved by his dismissal after such long service, and also that the dismissal caused him and his family considerable hardship given that they had to move out of their house in what we heard were difficult circumstances. We also bear in mind that the dismissal took away from the claimant what had been the whole focus of his work for more than 20 years – the care of the Busbridge Lakes estate and the development and care of the Collection. While we have described the respondent's commitment to the Collection, the claimant himself also described seeking out this work as one of the few opportunities in the country to raise birds outside the confines of shooting estates. It appears that he and Mrs Douetil disagreed about aspects of the work, but also that both were committed to the care and raising of the birds and everything that went with that.

30. As we have set out above it is also clear that he was not privy to the discussions and therefore the reason for his dismissal hence, perhaps, him attributing it during the course of his evidence to a number of different factors, including disagreements over culling of wild birds out of the permitted season and his age.

31. During his evidence it also came out that the claimant had been keeping his own diary notes of conversations and discussions with the respondent and Mr Douetil. If so, those could have been very significant across large parts of his claim. He says that those notes were lost when he was forced to move house on losing his employment.

32. We are somewhat surprised that this had not been mentioned earlier by the claimant. It is also clear that he was receiving legal advice throughout the period he served out his notice. Given this we do not understand how these notes could have been lost and not preserved or identified earlier.

33. None of this means that he was or was not dismissed unfairly, or that his dismissal was or was not a matter of age discrimination, but it is the context in which we assess his evidence.

Developments up to the claimant's dismissal – the points relied upon in support of his claim of age discrimination

The first alleged age-related comment

34. In support of his age discrimination claim the claimant raises a number of comments said to be made by Mr Douetil or the respondent in relation to his age. The first of these is described by him as being in mid-2015

where Mr Douetil had asked him to take and email him a photograph of a defective central hearing timer at the Lodge. When the claimant told Mr Douetil that he could not do this, the claimant says that Mr Douetil replied "*For God's sake, even people your age can use a computer! Can't you use a computer at all.*"

35. Mr Douetil agrees that he had an exchange with the claimant about the central heating timer, and getting a photograph of it to him. However, he says that he did not make any comment in relation to the claimant's age, and that their discussion was not in relation to sending a photograph from a computer, but to texting or sending a photo from his mobile phone.

36. We accept what Mr Douetil says concerning this. Where there is discussion about sending a photograph of something like this we consider it much more likely that this was in relation to taking and sending a photograph from a phone, rather than from a computer, because the phone would be mobile and could be used to take a picture of items around the house much more easily than a computer. We also accept that this would be a much more suitable and immediate way of communicating, rather than sending a photograph from a computer. Accordingly, we do not accept that any such comment in relation to sending a photograph from a computer or in relation to the claimant's age was made as alleged.

Early 2016

37. Another incident relied upon by the claimant is that in early 2016 he says he was required by Mrs Douetil to move a large load of gravel by wheelbarrow. He said that he could not do it alone so Mrs Douetil got someone else in to help him do it. He says that Mrs Douetil made "*unpleasant, sarcastic comments along the lines of 'I had to pay extra for someone to help you do that. There was once upon a time when you could have done that yourself.'*" He took this to be a reference to his age.

38. The difficulty for the respondent in replying to this is that it is only Mrs Douetil who could properly respond to it and explain what she meant by it. She did not give evidence. Mr Anderson in his closing submissions objected to the claimant giving evidence on this comment saying that it had not previously been identified or particularised in his ET1, and had first arisen on exchange of witness statements. The respondent could not therefore properly respond to it.

39. Although there is general reference to "sarcastic comments" in the ET1 we accept that the first the respondent knew of this specific alleged comment was in the claimant's witness statement, and that therefore she has not had a proper opportunity to respond. We are also of the view that the comment in question, if made, could equally apply to the respondent's age or to his health. In those circumstances, where the comment is ambiguous and the respondent has not had a proper opportunity to respond, we do not consider that this alleged comment

assists us in our consideration of whether the claimant's treatment amounted to age discrimination.

November 2016

40. Both parties agree there was a meeting in November 2016. This was set up by Mr Douetil with a text message in the following terms:

> *"… I am planning mum's finances for 2017 and beyond. To that end please can we meet … so I can better understand your future plans …"*

41. As envisaged in that text, during that meeting Mr Douetil asked the claimant questions about his future plans. According to the claimant, Mr Douetil framed this in terms of it being "*wise … due to your health*" and "*a lovely option*" to retire. The claimant said that he intended to work on to his "official retirement age". Although identified by him in his witness statement as being a reference to the age of 67 (which he understood to be his state retirement age) he accepted in his oral evidence that no precise age had been mentioned other than his "official retirement age". Mr Douetil says that the claimant and his wife "*confirmed that* [he] *wanted to work until he was 65*".

42. Clearly there was a discussion at that meeting about the claimant's future and around the concept of his retirement. We accept that the claimant said that he wanted to work on until his official retirement, but it seems most likely to us that no specific age was mentioned during this meeting.

43. In his submission Mr Anderson says there is nothing wrong with an employer discussing their employee's future plans (including retirement) with them. We accept this, particularly in the case of such a small employer. There may be circumstances in which mention of retirement is such as to give rise to a potential inference of age discrimination, but this is not one.

January 2017

44. The claimant had been ill with pneumonia in the winter of 2016/2017 (and also previously in the winter of 2015/2016). He was signed off work for two weeks. He says that the respondent was unhappy with this, and that later on he was told by the gardener that "*Mrs Douetil had said that I was 'of no use to her anymore … she couldn't put up with me being off work anymore … and would have to get rid of me*". He attributes this comment as being a reference to his age.

45. Mr Anderson calls this evidence "double-hearsay" and points to it being unlikely that Mrs Douetil would confess her plan to dismiss someone to another employee. He also points to other aspects of the evidence suggesting that Mrs Douetil was in fact very reluctant to dismiss the claimant.

46. We accept Mr Anderson's submission. It seems unlikely to us that Mrs Douetil would confess such a plan to a fellow employee, and we accept that there is other evidence suggesting she was very reluctant to dismiss the claimant. In addition to this, it seems to us that if this remark was made it was (on the claimant's own case) prompted by his illness and seems much more likely to relate to his illness than to his age. This does not assist the claimant in his age discrimination claim.

The dismissal

47. Mr Douetil originally invited the claimant by text message to a meeting which was to take place on 20 May 2017. He said in that message, "*Following our last meeting I would like to follow up and bring you up to date on more general matters regarding Busbridge Estate*". The meeting was eventually fixed for 10 June 2017.

48. There is no substantial dispute about what occurred at the meeting on 10 June 2017, during which the claimant was notified that he was to be dismissed.

49. As the claimant puts it, "*Dane said that the family had decided to terminate my employment*". That much is clear from the preparatory notes that Mr Douetil had made ahead of the meeting. The meeting was to inform the claimant that he was to be dismissed, and the points to be discussed at the meeting were exactly how that was to be done - whether by reason of redundancy (which the respondent said was the true reason) or, at the claimant's option, to describe it as an ill-health retirement. Both sides agree that the reason given at the meeting for this being a redundancy was a requirement for the person carrying out estate and bird management work also to undertake marketing duties for the events business – which would include computer work such as running the website.

50. We note that the claimant had been given no notice that the meeting was to discuss his potential dismissal and that the decision to dismiss had been taken prior to that meeting and as such the discussion at the meeting was limited to how that dismissal was to be carried out, rather than being consultation about the redundancy or means of avoiding the dismissal.

Subsequent events

51. Following this there was correspondence from Mr Douetil to the claimant outlining the decision that had been made and encouraging him to investigate the possibility of framing the dismissal as an ill-health retirement. It appeared that no progress was made in respect of this option and on 30 June 2017 the respondent gave the claimant notice of his dismissal, to take effect on 31 October 2017 (one month longer than the required three months' notice).

52. Further discussions took place between the claimant (and later his legal representative) and the respondent on severance terms, but those need not concern us.

53. In September 2017 an advertisement was placed by Bill Douetil in various countryside and estate management publications. This was for a position described as "Estate Manager". At the same time an advertisement was produced for "Full or part time help needed for estate work and feeding large collection of waterfowl".

54. The claimant describes the first advertisement as being "*exactly the same job that I had carried out for 23 years. The only difference was a small reference to 'computer skills'*". The second advertisement had no reference to computer skills. Mr Douetil points to the first advertisement also as including "*running open days and events with guest interface*". He essentially describes these advertisements as being mistakes made by his brother, which were not placed in appropriate publications and did not contain the appropriate emphasis – from which we take it he is referring to over-emphasising traditional estate management skills as opposed to the marketing skills they were now seeking. It is understandable that the claimant understood the first advertisement to be very similar to his old role. Shortly after his attention was drawn to this advertisement the claimant went off sick and did not return to work prior to his employment ending on 31 October 2017.

55. There are in the tribunal bundle copies of the applications attracted by the advert. We accept, and it does not appear to be in dispute that (i) these applications are typically from people with traditional estate management or gamekeeping skills, (ii) a number are from people substantially younger than the claimant, and (iii) none of these were actually appointed to the role.

56. Following Mr Douetil's intervention the job was re-advertised in October 2017 across several different websites, not including traditional countryside publications. This revised advert described the position as dealing with "*events … aviculture … estate management* [and] *admin and revenue generation*".

57. This attracted a diverse range of applications. It is not disputed that the individual eventually appointed to the role had previous experience in garden maintenance and events management (including brand development) but had no previous experience in working with birds. He was considerably younger than the claimant. His salary was similar to that of the claimant, but with an element applied towards a bonus, and he also took up occupation of the Lodge (following refurbishment). We were told by Mr Douetil (and there is no reason to doubt) that since his appointment the wedding and events business has increased, and he is running the estate's website along with engaging in other promotional work.

The position in relation to remedy

58. We will deal with the facts in relation to remedy later so far as they are necessary to this decision.

CONCLUSIONS

The reason for dismissal

59. As we have outlined above, Busbridge Lakes, under the direction of Mr Douetil, was moving away from bird-keeping and breeding to revenue generating activities such as weddings. This was done in order to place the estate on a sustainable financial footing.

60. It is equally clear that this change would affect the claimant's role. He was essentially the estate manager, and as the emphasis of the estate's work changed his role would have to change.

61. The scope of that change is shown by the person eventually employed in the new estate management role. He had no bird-keeping experience, although that had been for many years the focus of the claimant's work.

62. Miss Owusu-Agyei makes several submissions in support of the claimant's claim that the purported reason for dismissal is a sham.

63. The first is essentially that the respondent has not demonstrated (through proper financial accounts or otherwise) that there was a need to make savings through a redundancy.

64. We do not accept that this is a necessary point for the respondent to prove in any particular manner. Certainly, the respondent has to show the reason for dismissal, but it is not necessary in a redundancy case to show that finances compelled a dismissal. We have set out above our overall assessment of the financial position of the estate.

65. The second is that there was no diminution in the work carried out by the claimant. Miss Owusu-Agyei points out that the respondent was apparently attempting to recruit further part-time or full-time workers at the time.

66. We find that while breeding may now have ceased, the duties that the claimant had done have not gone way. There is still a requirement for general estate management work and for care of the remaining birds. What has happened is that with the reduction in the number of birds and the ending of breeding at the Collection the extent of the work in relation to the birds has substantially reduced. At the same time, the work needed for marketing has increased. There was a reduction in the requirement for employees to carry out work of a particular kind: that work was the care and management of the birds, which was a substantial part of the claimant's work.

67. Since feeding and care of the birds is work that requires cover every day of the year, the respondent will always need part-time or other workers able to cover for feeding at times when their primary carer is not available.

68. Finally, she says that it is not enough simply for there to be a redundancy situation. We must find that the dismissal was "*wholly or mainly attributable to that situation*".

69. We heard from Mr Douetil about the discussion he had with his mother and his brothers during 2017 in the time leading up to the decision to dismiss the claimant. This was in the context of wedding and event bookings at the time decreasing rather than increasing, and financial difficulties ongoing despite considerable cuts already having been made to the Collection.

70. We have expressed earlier our general view of Mr Douetil's evidence, and we were impressed with the way he described these conversations, and the difficulties he had in persuading his mother that further changes needed to be made. We accept that she would have preferred things to remain as they were, with the claimant continuing in his role and the Collection continuing as before. We note the evidence of the claimant that the respondent was in tears at the end of the dismissal meeting and that she said she "*didn't want any of this to happen and wished that things could be different*". While the claimant later attributed this to the respondent's background as an actress, we consider it more likely that that was a genuine expression of emotion by the respondent, and that she did not with to reduce the Collection or dismiss the claimant, but that she had been persuaded by Mr Douetil that such steps were necessary.

71. We find that the claimant's dismissal was genuinely by reason of redundancy. His dismissal was wholly or mainly attributable to the reduction in the requirement for employees to carry out work in the care and maintenance of the birds. This is a potentially fair reason within the terms of s98(1) of the Employment Rights Act 1996.

Fairness

72. It is striking that in this situation the claimant's dismissal was simply announced to him with no warning or discussion. He was not even told ahead of the meeting that it was to discuss the continuation of his employment.

73. We bear in mind that the respondent is a very small employer with few if any administrative resources, but a requirement of consultation with an employee prior to a redundancy dismissal is well established as being relevant to the fairness of such a dismissal, and we do not think that the simple fact of an employer being a small employer removes that duty.

74. Mr Anderson clearly recognises this as a potential difficulty for the respondent, but in his submissions says that (i) this does not automatically lead to a finding of unfairness, (ii) that the consultation had been ongoing since the death of the respondent's husband in 2014 and (iii) that consultation may validly take place during the notice period.

75. We accept that a finding that there has been no consultation does not lead automatically to a finding that there has been unfairness, but "*the employer will not normally act reasonably unless he warns and consults any employees affected*". There is nothing in this case which takes it outside that ordinary expectation of fairness. We do not accept that there was continuing consultation from 2014 onwards. Changes were made but this is far from redundancy consultation and omits the key element that the employee's job is at risk. The case relied upon by Mr Anderson in respect of consultation after notice is given (Dudson v Deepdene School EAT 674/97) says that where there is an opportunity for consultation after a decision on redundancy is made but before it is implemented, "*the weight to be attached to the absence of prior consultation may obviously be reduced*". We are not sure that is a correct way of looking at matters in the modern world, but in any event there was no consultation about avoiding the redundancy after notice was given in this case. It is not a question of consultation having been carried out later than would normally be expected. There was no consultation.

76. In the circumstances of this case that failure to consult means that we find the dismissal to be unfair.

77. Miss Owusu-Agyei goes further than this in her submissions. She says that the dismissal is also unfair because the respondent did not give any attention to the question of the redundancy "pool" or selection from that pool. She cites Taymech v Ryan EAT 663/94 in support of a proposition that "*if an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair*".

78. Taymech was a case in which the EAT found no error of law in a finding of unfair dismissal, "*where the Tribunal concluded that the employers had not even applied their mind to the question of a pool*". That is some distance from finding that a failure to consider a pool is likely to make a dismissal unfair, particularly when the EAT went on to add that the pool in question in that case was one*, "consisting of people doing similar administrative jobs.*" The question of whether a failure to identify a pool makes a redundancy dismissal unfair is essentially a fact-sensitive one. We do not see in this case that the respondent can be criticised for identifying the claimant as the person to be made redundant.

79. Miss Owusu-Agyei suggests that the pool should have included the gardener and perhaps the part-time assistant. We do not think that such a pool would have been suitable or necessary. There is no suggestion that the gardener's role was to cease or diminish. The focus was on the estate work, including the work on the Collection. While we heard that the gardener may on occasion be required to cover for feeding the birds, that is a long way from suggesting that the roles of the gardener and the claimant were interchangeable or involved the same skills. It seems to us likely that they did not. Gardening and estate management are distinct activities. As for the question of the part-time worker, there would be no purpose served by including him in the pool and making him redundant. His role was to help with cover on feeding and similar

duties. There would always been a need for such cover given that the estate manager could not feed the birds 365 days a year. We do not consider a failure to consider a pool (or the related concept of not applying particular selection criteria within that pool) make this dismissal unfair.

80. She goes on to say that the respondent did not take such steps as were reasonable to avoid or minimise the redundancy, pointing to four things she says could have been done but which were not done. We will look at those below when considering what the effect of proper consultation would have been.

81. Miss Owusu-Agyei also suggested that this could not properly be considered a redundancy as the new marketing element of the job related to the events business carried on by Bill Douetil rather than the respondent. We do not accept that this affects the question of whether this is redundancy, or of fairness. The way in which Busbridge Lakes is run is a matter for the Douetil family, and they are entitled to divide up the various duties that go with that between them and their staff as they see fit.

Age discrimination

82. The matters relied upon by the claimant as being matters from which we "could decide" that there had been age discrimination were set out by the claimant at paragraphs 21 - 23 of his statement.

83. We have dealt with these under the hearing "the points relied upon in support of his claim of age discrimination" above, and explained why we consider that as a matter of fact they do not assist the claimant and do not suggest that there has been age discrimination.

84. While the claimant has given several different reasons for his dismissal, we accept that age does not have to be the sole or even the main reason for his claim to succeed. It is enough if it is an effective cause of the dismissal.

85. Miss Owusu-Agyei also refers to the notes at page B14b of the tribunal bundle, which refer to the claimant's health. The problem with that is that it refers to health, rather than age, so does not lead us to consider that this may be a matter of age discrimination.

86. Miss Owusu-Agyei also points the new recruits having been under 50. We note this, but also that the respondent had the opportunity to replace the appellant with someone with essentially the same set of skills, but younger, and did not take that opportunity.

87. Although no other circumstances have been identified we have considered more generally across the circumstances of this case whether there is anything further from which we could properly draw an inference of age discrimination, including taking into account the matters relied upon when taken together. We find that there is not, and for

essentially the reasons set out above when discussing the reasons for dismissal we prefer the case advanced by the respondent that this was about redundancy, and that his dismissal was not because of his age. His age was not an effective cause of his dismissal.

Conclusions on liability

88. The claimant was unfairly dismissed as there was no consultation with him concerning his potential dismissal. The claimant was not discriminated against because of his age.

Remedy

89. The claimant seeks an award of compensation for unfair dismissal, rather than reinstatement or re-engagement.

90. As we have found that his dismissal was by reason of redundancy, and he has already received a redundancy payment, he is not entitled to a basic award of compensation for unfair dismissal (s122(4) Employment Rights Act 1996).

91. There remains the question of a compensatory award for unfair dismissal. Mr Anderson reminds us that in accordance with Polkey we must consider what would have happened but for any unfairness. This requires a consideration of whether this employer would have (fairly) dismissed the claimant in any event, even if the unfairness had not occurred. In effect there are two considerations:

    91.1. If a fair process had occurred, would it have affected when the claimant would have been dismissed, and

    91.2. What is the percentage chance that a fair process would still have resulted in the claimant's dismissal?

92. A fair process in this situation would have involved the claimant being warned on 10 June 2017 of the risk of redundancy, with the respondent giving her explanation as to the reasons for the proposed redundancy – essentially that the work with the birds was decreasing, and that someone was needed to carry out the (primarily computer-based) marketing for events at Busbridge Lakes.

93. It is likely that the claimant would have wanted to take legal advice during any period of consultation, and for that reason we consider that the consultation process would have lasted for four weeks.

94. We have considered what the outcome of any consultation would have been.

95. In her submissions Miss Owusu-Agyei puts forward four possible ways in which the claimant could have retained his job, if there had been proper consultation. These were for the respondent to:

95.1. Offer training to him to undertake the necessary additional computer-based marketing.

95.2. Have other employees undertake these computer-based marketing duties.

95.3. Ask the claimant to continue his existing work on a part-time basis.

95.4. Have the computer-based marketing duties carried out by Bill Douetil.

96. Of these, the first involves the claimant carrying out the computer-based marketing tasks himself, and the other three are variations on the claimant continuing to carry out his former (and now much reduced) duties. That must be on the basis that the claimant carried out that work on a part-time basis as it is beyond dispute that the work in caring for the birds was now much reduced. We find that it could not have sustained a full-time job.

97. There are several difficulties for the claimant in adopting that position.

98. As regards offering him training, we note that:

98.1. This was not suggested by him at the time, despite having had legal advice from an early stage.

98.2. He had shown no interest in such matters when working for the respondent.

98.3. Despite now depending on his dog stripping work and associated activities for his livelihood he has no website to promote this. While he was now answering email and messages on a tablet, he had relied on a friend to establish a Facebook page for this activity. He does not appear to have taken any formal steps to undertake training to now promote his own business through computer-based marketing.

98.4. He had expressed himself as being “computer illiterate” and that he did not want to deal with an electricity bill via email (see email 21 September 2017).

99. As regards retaining his present duties on a part-time basis, with others carrying out the computer-based marketing role, this was not suggested by him at the time, despite having had legal advice from an early stage, and more fundamentally the respondent was entitled to require that the new role was full time and had a substantial computer-based marketing element that he was not equipped to meet.

100. We have been critical of the respondent’s failure properly to consult with the claimant concerning his redundancy, but ultimately we consider that in the circumstances of this case even if there had been proper consultation the inevitable outcome was that the claimant would have

been dismissed. The respondent was entitled to insist on her proposed new role and the claimant was not able to carry out that role. This was not a case in which the claimant would have been willing to or suitable to undergo training for the new role. In the circumstances that existed it is inevitable that the claimant would have been dismissed.

101. As such we find that the claimant's compensation for unfair dismissal is limited to the four weeks that proper consultation would have taken, with a fair dismissal inevitably following after that.

102. While Mr Anderson has criticised a number of the claimant's points on mitigation, we do not understand the arithmetic in the schedule of loss to be criticised. The claimant's compensatory award is four times the value of his weekly pay and benefits, which are given in the schedule of loss as being £388.30 net pay, accommodation to the value of £271.15 and a contribution to household bills of £39.02. This results in a compensatory award of:

4 x (£388.30 + £271.15 + £39.02) = £2,793.88

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Employment Judge Anstis
27 August 2019

Sent to the parties on: .....

.....30.08.19.....
For the Tribunals Office

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