Case Numbers: 2401921/17
2402022/17

EMPLOYMENT TRIBUNALS

Claimants: Mr P Heberlet and Mr P Hurst

Respondent: Groundwork Cheshire, Lancashire and Merseyside

HELD AT: Manchester **ON:** 31 August 2017
1 September 2017
5 and 6 October 2017

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimants: In person

Respondent: Mr J Jenkins of counsel

JUDGMENT having been sent to the parties on 13 October 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Preliminary issue

1. At the outset the tribunal questioned whether the tribunal had the jurisdiction to consider the complaint of the claimant Mr Heberlet because it appeared from the information on the claim form that the claim of unfair dismissal had been presented out of time.

2. Evidence was heard from Mr Heberlet on this preliminary point.

3. Having considered the evidence the tribunal made the following findings of fact:

3.1 The claimant was told on 19 December 2016 that his employment would terminate on that date and that he would be paid in lieu of notice;

3.2 For that reason the claimant put 19 December 2016 as the end date of his employment on his claim form;

3.3 However, the claimant told the respondent that he had a lot of outstanding work to do and that he would prefer to work at least part of his notice period to complete that work;

3.4 There was an agreement between the claimant and his line manager that he would continue working after 19 December 2016.

3.5 The claimant continued working for the respondent until 13 January 2017.

3.6 The date of receipt by ACAS of the Early Conciliation Certificate was 9 February 2017 (Day "A")

3.7 The date of issue by ACAS of the EC Certificate was 9 March 2017 (Day B")

3.8 The claimant presented the claim form on 18 April 2017

The Law

4. Section 111 Employment Rights Act 1996 ("ERA 1996") provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal –

   (a) before the end of the period of three months beginning with the effective date of termination, or

   (iii) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

5. Section 207B ERA 1996 provides:

   "(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act ('a relevant provision').

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A (mediation in certain cross-border disputes).

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Bay B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

Determination of the preliminary issue

6. The employment relationship continued after 19 December 2016. The effective date of termination was 13 January 2017.

7. The date for presenting a claim of unfair dismissal was three months after the effective date of termination - 12 April 2017.

8. The effect of Early Conciliation was to stop the clock between Day A and Day B. This was a total of 28 days.

9. The limitation period is thereby extended to 3 May 2017.

10. The claim was presented in time.

Issues to be determined

11. After the determination of the out of time issue and before hearing the evidence it was confirmed that the issues were as follows.

Mr Hurst

12. Whether he was unfairly dismissed and in particular:

    12.1 what was the reason for dismissal. The claimant did not accept that there was a redundancy situation;

    12.2 whether the respondent was fair in deciding that the claimant was in a unique position and that he was not in any pool for selection;

    12.3 whether there was fair and effective consultation;

    12.4 whether the respondent had considered alternatives to redundancy;

    12.5 whether the respondent had considered alternative employment for the claimant;

    12.6 whether a fair procedure had been followed

13. If the claimant was unfairly dismissed whether following a fair procedure and/or consultation would have made any difference to the outcome.

14. Whether the respondent had paid the correct statutory redundancy payment and in particular;

    14.1 what was the length of the claimant's continuous employment;

    14.2 had there been a TUPE transfer of the claimant's employment from Groundwork Merseyside to Groundwork Cheshire in or around March 2012

15. Whether the respondent had paid to the claimant the correct payment in lieu of notice and in particular, was he entitled to 12 weeks notice of termination.

Mr Heberlet

16. Whether he was unfairly dismissed and in particular:

    16.1 what was the reason for dismissal. The claimant did not accept that there was a redundancy situation;

16.2 whether the respondent had used fair selection criteria to the pool for selection;

16.3 whether the respondent had fairly applied the selection criteria;

16.4 whether the respondent had incorrectly scored the claimant and thereby chosen him for selection as opposed to the candidate with the actual lowest score;

16.5 whether there was fair and effective consultation;

16.6 whether the respondent had considered alternatives to redundancy;

16.7 whether the respondent had considered alternative employment for the claimant;

16.8 whether a fair procedure had been followed;

17. If the claimant was unfairly dismissed whether following a fair procedure and/or consultation would have made any difference to the outcome.

Submissions

Mr Hurst

18. Mr Hurst made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

18.1 there is insufficient evidence to support Mr Darron's evidence that there was a need for redundancies;

18.2 there was no prudent financial investigation by Mr Darron before he declared the claimant's position as redundant;

18.3 the decision to make the claimant redundant was pre-determined. Mr Darron put to the board his proposals, which identified the claimant as being made redundant – not just the role. The savings to the company and the cost of the redundancy were put to the board based solely on the claimant's own salary and potential redundancy payment;

18.4 Mr Darron and the appeal officer failed to consider the claimant's argument that making his role redundant was not cost

effective, that there were other roles that could have saved more money if made redundant;

18.5 Mr Darron never returned to the Board to discuss the claimants' suggested alternatives to redundancy;

18.6 The respondent was wrong to say that the claimant held a unique role, was in a pool of one, that there was no need to apply a selection criteria;

18.7 The late disclosure of documents by the respondent had shown that the respondent had in fact applied a selection criteria;

18.8 The application of that criteria showed that Mr Darron did not understand the nature of the claimant's role, the extent of the duties he performed, and therefore the scoring was unfair;

18.9 The claimant was not given the opportunity to challenge the scoring against the criteria;

18.10 The respondent did not mark the claimant correctly for length of service;

18.11 The respondent failed to consider "bumping" when a volunteer for redundancy came forward – the claimant could have done the job of another employee fitted in to the redundant role. This would have avoided the claimant's compulsory redundancy;

18.12 No jobs were genuinely put forward as alternatives to dismissal. No job descriptions were provided for the suggested roles;

18.13 No consideration was given by the appeal officer, Mr Upton, to the grounds of appeal. No investigation was carried out. The appeal was cursory and a sham;

18.14 The respondent had failed to pay notice pay and a redundancy payment based on the claimant's correct length of continuous service;

18.15 The claimant transferred from Groundwork Merseyside to Groundwork Cheshire in March 2012;

18.16 Both Jane Staley and Peter Heberlet had agreed that the claimant should enjoy continuous service after his transfer to Groundwork Cheshire;

18.17 Groundwork Cheshire did take over the contracts previously run by Groundwork Merseyside and the claimant was specifically appointed to continue with that work.

Mr Heberlet

19. The claimant Mr Heberlet, made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

19.1 there was a predetermination that he would be made redundant. A clear decision was made to board level that the Director of Land, the position held by the claimant, would be made redundant. No range of figures were given for the cost of any redundancy -- simply the costs of the claimant's redundancy. This indicated that the decision had already been that it was Mr Herbert who would be made redundant, not any of the others in the so-called pool for selection. Mr Darron told Mr Hurst in November that one member of the pool, Mike Crowther, was unaware of the redundancy;

19.2 there was no fair consultation. Mr Darron gave no consideration whatsoever to the claimant's alternatives to making the post of Director of Landscape Design and Build redundant;

19.3 Mr Darron ignored advice from the Board that any selection should take place by way of an interview rather than scoring of selection criteria

19.4 the selection criteria were subjective and unfair;

19.5 There was unfair, subjective scoring against the criteria. No clear guidance was given as to the methodology to follow in performing the scoring exercise;

19.6 One of the scorers, Ms Cottam, conceded that she could not score independently – she required the assistance of Mr Darron;

19.7 Mr Darron admitted scoring subjectively. He had not carried out an appraisal of the claimant. He had much more knowledge of the other members in the pool. His marking was biased;

19.8 there was no attempt to carry out the scoring exercise using documentary or other objective evidence. Mr Darron had failed to even look at the claimant's qualifications when scoring against that

criteria. That by itself shows that the scoring exercise lacked depth vigour and/or honesty;

19.9 When Mike Crowther was on long-term sick the claimant managed some of his work and staff. That was not reflected in the scoring;

19.10 Mr Darron takes decisions in splendid isolation and the Board will accept what he says without question. At the appeal stage Mrs Fishwick failed to question anything that Mr Darron had said. She did not carry out any reasonable investigation of the claimant's grounds of appeal;

19.11 In the appeal outcome letter Mrs Fishwick conceded that the claimant's scores had been totalled incorrectly. However she made a false statement when stating that the claimant was still the lowest candidate when his scores were corrected. The evidence in the tribunal shows that this was blatantly untrue. The only way that the appeal officer could ensure that the claimant had the lowest score was to change the scoring criteria. This shows the bias towards the claimant and the predetermination that it would be him who was selected for redundancy;

19.12 Mr Darron has been inconsistent in his evidence. It is clear that he has been trying to remove the claimant from his office since the merger of the two Groundworks. The claimant has not been given proper management support or business leads, he was moved to the poorest performing team. He was not given a job description, no appraisals were carried out, his pay was reduced by 10%. The claimant was belittled in meetings;

19.13 The scoring exercise was manipulated to ensure that the claimant was dismissed. He was not the weakest candidate of the four in the pool. He was a strong candidate: he was the second strongest candidate on nearly every pooling of scores

20. Counsel for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

Both claimants

20.1 There was a genuine redundancy situation. The documentary evidence shows that financially the respondent was performing worse than expected. The claimant Mr Heberlet, a member of the senior management team, was aware of the financial problems;

20.2 each of the claimant's assertions that there was a conspiracy to remove him from office are unsubstantiated. The claimants were not individually targeted. The respondent engaged fully in the redundancy procedure, there were many consultations with the claimant's. Invitation was made for voluntary redundancy. One application was received and rejected. That fact in itself shows that the respondent was committed to finding alternatives to redundancy and that these claimants were not targeted;

20.3 there was no predetermination as to who should be made redundant. The claimants have placed too much emphasis on the wording of minutes of Board meetings;

20.4 The fact that no other proposals were put to the board for approval does not show that there was no genuine consultation, that a decision had been made. Mr Darron had delegated authority to deal with this. During the consultation meetings each of the claimant's made various points and Mr Darron answered the points. Mr Hurst requested more and more evidence simply to get Mr Darron to change his mind. The claimants were unhappy that Mr Darron did not ultimately agree with their assertions but he did consider them;

Mr Hurst

20.5 Mr Hurst was in a pool of one. His role was unique. His evidence on this is unsatisfactory. Suzanne Murray may have had the same job title but her role was substantially different;

20.6 no scoring exercise was undertaken. Even if the claimant had been placed in a pool with Suzanne Murray he would still have been selected for redundancy because on the provisional scoring undertaken at an earlier stage, he had received the lowest score;

20.7 there were no suitable alternative roles for the claimant. All vacancies were at a far lower salary grade. There was no suggestion at this time that the claimant would have accepted any of the roles offered. His contemporaneous e-mail states that he would not apply because the salary was too low;

20.8 there is no merit in the argument about bumping. This formed no part of the respondent's redundancy procedure. It is not contained in the ACAS policy. There was no obligation on the respondent consider it;

20.9 If there was any failure to consult, any unfairness of procedure, then applying the **Polkey** principle there should be a 100%

reduction in any compensation. Further consultation would have made no difference to the outcome. A business decision was made to select the claimant's role for redundancy. He has raised no satisfactory evidence to challenge that business decision.

20.10 Following the administration of Groundwork Merseyside, there was no transfer of a service provision to Groundwork Cheshire;

20.11 in any event, the claimant was not part of any organised group of employees which transferred. His role was to develop contacts and to secure contracts for the entire business. His role was overarching, not tied to an individual service provision which may, or may not, have transferred;

20.12 there was no suggestion at the time that the claimant joined Groundwork Cheshire that there was a TUPE transfer. It was not likely to have been missed. The claimant applied for the job and attended interview. A start date was agreed, post - dating the end of the claimant's employment with Groundwork Merseyside. The contract clearly states that previous periods of service did not count towards the claimant's continuity of employment;

20.13 Evidence has been led that there was an intention that the period of continuous employment would be extended, would be written into the contract, after the claimant had completed six months service with Groundwork Cheshire. However, that never happened. There was never an agreement to provide the claimant with continuous service from the date of his employment with Groundwork Merseyside;

20.14 Groundwork Cheshire agreed to provide the claimant with certain benefits on an individual basis, for example to allow paid paternity leave, to allow the claimant to extend his pension entitlements. However this was the respondent exercising its discretion. It is not by itself evidence of any contractual entitlement to the continuous period of service claimed;

Mr Heberlet

20.15 Mr Heberlet was in a pool of four. There is no challenge to the pool;

20.16 the selection criteria were fair overall. Some subjective criteria were included but this was fair;

20.17 there was a fair scoring exercise. Mr Darron was qualified to do the scoring. Ms Cottam did have some difficulty on the scoring of the

technical aspects. Collaboration on that part of the scoring was appropriate;

20.18 the claimant was given the opportunity to challenge his scoring and his scores were increased accordingly. That shows that there was no closed mind. There was an error in adding up the scores and this was not spotted initially. Mr Heberlet and Mr Crowther did in fact have the same score. However Mrs Fishwick decided to disregard the objective criteria and conclude that Mr Heberlet still had the lowest score and had been fairly selected for redundancy;

20.19 if there was unfairness then applying the **Polkey** principle it was more likely than not that the claimant would have been fairly selected. A reduction in compensation of around 75% would be appropriate. In any event, there was a tie between the claimant and Mr Crowther. Therefore a reduction could not be less than 50%

Evidence

21. Each of the claimants gave evidence.

22. In addition they relied upon the written evidence of Louise Ashley and Dr Jane Staley. The intention had been to call them to give evidence but counsel for the respondent indicated that the respondent did not challenge their written evidence.

23. The respondent relied upon the evidence of:-

23.1 Mr Andrew Darron, Executive Director;

23.2 Mrs Tracy Fishwick, Chair of the Board of Trustees;

23.3 Mr Andrew Upton, Vice Chair of the Board of Trustees.

24. The witnesses, other than Louise Ashley and Dr Jane Staley, provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

25. An agreed bundle of documents was presented. In addition the claimant Mr Hurst provided a copy of a supplemental bundle References to page numbers in these Reasons are references to the page numbers in the Bundles.

Facts

26. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

27. The respondent is part of Groundwork UK, a federation of charitable trusts across the country. Each charitable trust pays a membership fee to Groundwork UK. The role of Groundwork UK is to preside as a national authority and management body over and above the charitable trusts, who pay a membership fee to be part of that federation. Groundwork UK is responsible for securing major national programmes of funding from the private and public sector, with the localised support of the various Groundworks, charitable trusts, across the country. These monies are then divided out, subject to objective procedure, and work is delivered locally to improve and support disadvantaged communities. The local trusts are autonomous. Individual Groundwork trusts are responsible for their own income generation including contracts brought through at the national level.

28. The respondent is one of approximately 15 separate, independent Groundwork trusts, all members of the Federation. The Trusts are all individual legal entities, governed by their own board , and registered both with their own charity number and as a company limited by guarantee.

29. Groundwork Lancashire West and Wigan was formed in 1983. Groundwork Cheshire was also formed at a similar time. On 1 April 2015 a takeover took place -- with Groundwork Cheshire transferring all of its assets and undertakings to Groundwork Lancashire West and Wigan -- which became known as Groundwork Cheshire, Lancashire and Merseyside (the respondent). Employees were transferred to the respondent by way of TUPE transfer at this point.

30. The claimant, Mr Hurst, commenced employment with Groundwork Merseyside on 1 November 2004.

31. In January 2012 Groundwork Merseyside entered into administration. Administrators were appointed to manage the process. Mr Hurst held the position of Development Manager with Groundwork Merseyside at that time. He remained employed by Groundwork Merseyside and was asked to manage part of the administration process for the administrators.

32. As Development Manager Mr Hurst held an overarching role. He had in the previous three years worked in a fundraising and business development capacity. It was part of Mr Hurst's duties to negotiate and

secure contracts, to build local relationships, to develop and manage the many lucrative projects that he had secured. Mr Hurst did not perform any of the works under the contracts.

33. At the time Groundwork Merseyside went into administration, there were a number of outstanding contracts that needed completion. Complaints had been made locally that Groundwork Merseyside had misappropriated some of the funds allocated to particular contracts, which had not been completed. Both Groundwork UK and the local Groundwork charitable trusts were concerned that this would damage the reputation of Groundwork nationally. It was therefore decided that some of the local Groundwork charitable trusts would take over performance of some of the outstanding contracts. They receive funds from Groundwork UK for doing so.

34. Thereafter, Groundwork Cheshire and Groundwork Lancashire West and Wigan took over the running of some of the contracts between Groundwork Merseyside and a number of their clients. The administrators of Merseyside were not involved in this. There was no formal agreement for the transfer of liabilities under Groundwork's Merseyside's contracts to either Groundwork Cheshire or Groundwork Lancashire West and Wigan. No satisfactory evidence has been provided as to the terms upon which Groundwork Cheshire and Groundwork Lancashire West and Wigan continued running these projects for the clients. In at least one case it was a "damage limitation" exercise with a local Groundwork charitable Trust completing the work under a project, for which Groundwork Merseyside had been paid, but had not provided the services linked to that payment. There is no satisfactory evidence as to the total number of contracts which either Groundwork Cheshire or Groundwork Lancashire West and Wigan commenced working on, the value of those contracts, to what extent either Groundwork Cheshire or Groundwork Lancashire West and Wigan adopted and/or performed the terms of the existing contracts, to what extent Groundwork Cheshire and Groundwork Lancashire West and Wigan negotiated and secured completely new projects with the existing clients of Groundwork Merseyside.

35. Mr Hurst had negotiated a lot of those contracts on behalf of Groundwork Merseyside. He had developed good working relationships with the clients and, when Groundwork Merseyside went into administration he had a number of potential contracts in the pipeline. He therefore had the skills, contacts and experience which would be of considerable benefit to Groundwork Cheshire.

36. Mr Andrew Darron was the Executive director of Groundwork Lancashire West and Wigan at that time.

37. At that time Dr Jane Staley was the Executive director of Groundwork Cheshire; Mr Peter Heberlet, the claimant in this case, was the director of Sustainable Communities of Groundwork Cheshire.

38. Groundwork Cheshire wanted to expand their territory into Merseyside following the administration of Groundwork Merseyside. By expanding their territory Groundwork Cheshire hoped to receive a larger project development fund from Groundwork UK.

39. Dr Jane Staley and Mr Heberlet had a discussion and agreed that they would offer Mr Hurst a contract of employment. Dr Staley asked the claimant to write a job description and person specification for the role of Development Manager at Groundwork Cheshire. These documents were then used to advertise that role internally. The claimant applied for the role. He was the only applicant. He was awarded an interview and was successful. Following that interview it was the intention of Dr Staley and Mr Heberlet to give Mr Hurst continuous service, that is, to count his previous employment with Groundwork Merseyside as part of his continuous service with Groundwork Cheshire. However, Dr Staley told Mr Heberlet that she had to talk to the Board about that.

40. Mr Hurst's employment with Groundwork Merseyside ended on 29 February 2012. It was agreed that he would commence employment with Groundwork Cheshire on 5 March 2012.

41. Mr Hurst applied to the Secretary of State for, and received, a redundancy payment arising from the termination of his employment with Groundwork Merseyside.

42. Mr Hurst was issued with a contract of employment by Groundwork Cheshire extracts from which read as follows:

    3. The date of commencement of employment: Monday 5th March 2012

    4. Period of continuous employment

    Your employment with any other previous employer does not count as part of your continuous employment.
    Your period of continuous employment will date from commencement on a permanent contract.

    5. Probationary period.

    Your employment is subject to successful completion of a probationary period of six months.

43. Dr Staley signed Mr Hurst's contract of employment on behalf of Groundwork Cheshire. It was her understanding and intention that the

contract of employment would be reviewed at the end of the probationary period, after a period of six months, and that, on review, Mr Hurst's contract would have been amended, and Dr Staley would have authorised continuous employment dating back to 1 November 2004, that is, the date of Mr Hurst's commencement of employment with Groundwork Merseyside. The review did not take place. Dr Staley did not at the end of the claimant's probationary period authorise that the continuous employment of Mr Hurst should be amended to provide a start date of 1 November 2004.

44. On 5 March 2012 Mr Hurst started work with Groundwork Cheshire and signed the Contract, accepting the terms and conditions stated therein. He did not seek an amendment to the term at clause 4, the effect of which was that his previous employment with Groundwork Merseyside did not count as part of his continuous employment.

45. Mr Hurst worked for Groundwork Cheshire as Development Manager. Part of his role was to manage some of the contracts previously operated by Groundwork Merseyside and to negotiate new contracts with previous clients of Groundwork Merseyside.

46. Mr Hurst completed his probationary period. Mr Heberlet was his line manager at the time. Mr Heberlet did not review the agreement as to the length of Mr Hurst's continuous employment at that time.

47. During the course of Mr Hurst's probationary period he took paternity leave. Mr Heberlet agreed to pay to the claimant full pay during paternity leave. Employees do not normally receive full pay during paternity leave if this is taken during the probationary period. The respondent agreed that Mr Hurst's pension rights should be based on a length of service to include his employment with Groundwork Merseyside.

48. Mr Heberlet began working for Groundwork Cheshire on 1 July 1993 and transferred to the respondent following the merger on 1 April 2015. His continuous service began on 1 July 1993.

49. The respondent's organisation has four divisions namely:

- Sustainable Communities;
- Employment and Skills;
- Sustainable Business;
- Landscape Design and Build (sometimes referred to as Land Division and/or the Land Team).

50. Each division was managed by a Programme Director. The four programme directors, the executive director, Mr Darron, and a finance manager, formed the senior management team ("SMT").

51. At the relevant time Mr Heberlet was the Programme Director of the Landscape Design and Build division.

52. Following the takeover in April 2015 the respondent's ongoing financial performance was much worse than had been anticipated during the pre-takeover planning. In August 2016 Mr Darron conducted a review of the financial position of the respondent. He noted that:

    52.1 The August 2016 management accounts showed that the respondent had lost £400,000 in the period since April 2015 -- £287,000 of which had been lost in the previous 12 months -- and was losing an average of £23,000 per month;

    52.2 The August 2016 management accounts also showed that the forecast outturn for the year was expected to be a loss of £139,000. This included a year-to-date loss of £31,000 and a forecast end of year loss of £25,000 for the Land team.

    [On this the tribunal accepts the evidence of Mr Darron, in part supported by the documentary evidence. The claimants challenge the veracity of the documents, asserting that the documents do not accurately assess the financial position of the respondent. The claimants make serious assertions of financial mismanagement by Mr Darron. However, there is no satisfactory evidence to support any assertion that the management accounts were deliberately falsified or that Mr Darron was aware that the management accounts did not accurately represent the true financial position of the respondent. It is reasonable for an executive director to rely on management accounts as accurate records.]

53. Mr Darron decided that savings needed to be made (circa £23,000 per month), which required focus on the largest costs within the organisation. There had been previous restructure activity focusing on a reduction in central overheads. The decision was made by Mr Darron that savings could be made by reducing the number of senior posts within the respondent's organisation. He decided that the way forward was to identify those posts that had the biggest cost to the respondent, but whose removal would have the minimum impact on the operation of the business. Mr Darron therefore reviewed the salary costs within the Operational teams and noted in particular the salaries of posts which were considered as Departmental overheads. That is to say, roles that are not direct delivery or that are not funded directly by project income, but are costs to an individual department. These roles are all funded out of the margin that

the projects make and reducing these costs to a minimum would maximise the value of the project profit margins to the respondent.

54. Mr Darron therefore reviewed the roles in the company which had the highest salaries. These were the members of the Senior Management Team and the Role of Development Manager -- Sustainable Communities which, outside the SMT, was the most significant departmental overhead salary the respondent had.

55. Mr Darron then evaluated the impact to the respondent's business of losing each of the roles, that is, each of the four Programme Directors and the role of Development Manager -- Sustainable communities.

56. Mr Darron reviewed the Land team order book, which showed a significant decline in gross income and a decreasing profit margin. Mr Darron came to the genuine view that the management costs within the Land department were too high and the solution was to reduce the management costs by removing the programme Director post and placing the smaller Land team under the leadership of one of the other departments. This change would reduce staffing costs of the Land team by 25%, based on the salary of £56,000 then paid to Mr Heberlet. In reaching this decision Mr Darron held the genuine view that the Land Team was making losses, was failing as a business unit, and that the other Divisions were much stronger.

57. The September 2016 management accounts showed that the situation had deteriorated further with the respondent losing a further £47,000 in the month and the end of year forecast outturn now falling to a loss of £157,000. The Land Team was showing a year-to-date loss of £13,000 and the Sustainable Communities team a year-to-date loss of £20,000.

58. On 30 September 2016 Mr Darron put forward to the Finance sub committee an outline proposal, a restructure plan (page 288) to reduce the respondent's operating and overhead costs through the implementation of a redundancy programme, that would focus on making efficiency levels in the respondent's highest/senior salary bands -- as well as freezing current vacancies at all levels.

59. The restructure plan indicated a need to reduce senior management costs, noted that the performance of the Land Department was severely depressed and unlikely to recover in the short to medium term, and indicated that at its current activity levels the Land Department could no longer afford the cost of a dedicated Programme director. The report continues “as such the post is now considered redundant, with the responsibility of managing the department to be integrated into the other operational departments.” The restructure plan also set out the financial

impact of the proposed redundancy plan naming Mr Heberlet as the Programme director and setting out his specific salary saving, redundancy payment and notice payment. It did not set out a range of savings to cover the possibility that a different Programme Director would be selected for redundancy after completion of any redundancy selection exercise.

60. The restructure plan also indicated that a review of the Communities department had identified some areas where efficiencies could be made. It noted that development capacity forms part of several managers' existing roles -- and it was felt that the team could function effectively without an overarching strategic development role -- rendering the post of Development manager -- Communities redundant. That was the role held by the claimant Mr Hurst. In the financial impact of the proposed redundancy plan Mr Hurst, was named as the development manager and the plan set out the salary saving, redundancy payment and notice payment arising from his redundancy.

61. The Finance sub committee approved the proposal in principle, asking that the detail be developed and implemented.

62. The restructure plan was considered at the Board meeting in October 2016 when it was noted in the Minutes that redundancies would include the loss of Programme Director of Land, and a Development role within the Communities. The minutes were not subsequently amended to clarify that it was the role that was being made redundant, rather than the employee who held that role at that time.

    [The tribunal rejects Mr Upton's oral evidence on that latter point. It is not supported by the documentary or any other evidence.]

63. The restructure plan was approved by the Board. There was discussion as to the selection process for redundancy. The minute (page 300) notes:

    Discussion took place regarding the redundancy process. SJ (Sian Jay) and AU (Andrew Upton) both felt that interviewing should be used as part of the selection process to show fairness to those affected. It was agreed that this was an executive team decision, however, A.D. (Andrew Darron) stated that the trust would seek professional HR advice on this matter.

64. Mr Heberlet has little regard for the business acumen of Mr Darron. Before the review of financial circumstances, and the restructure plan being prepared and placed before the Board, Mr Darron did not give any indication that Mr Heberlet was under threat of dismissal. Mr Heberlet raised no complaint about any unfavourable treatment by Mr Darron prior to commencement of the redundancy exercise. Mr Heberlet agreed to a reduction in his pay, prior to the commencement of the redundancy exercise. He raised no complaint about that at the time. Mr Heberlet has

raised no satisfactory evidence to support his assertion that Mr Darron, prior to the redundancy exercise, belittled Mr Heberlet in meetings and/or was actively taking steps to remove Mr Heberlet from office.

65. Mr Hurst has little regard for the business acumen of Mr Darron. Before the review of financial circumstances, and the restructure plan being prepared and placed before the Board, Mr Darron did not give any indication that Mr Hurst was under threat of dismissal. Mr Hurst raised no complaint about any unfavourable treatment by Mr Darron prior to commencement of the redundancy exercise.

66. Having received authority from the Board, Mr Darron considered the redundancy procedure. He took HR advice on the point. He considered the appropriate pool for selection of redundancy. In the removal of the position of Director of Landscape Design and Build division, he decided that there should be a pool of four, namely, the Programme Directors for each of the four divisions.

67. The evidence of the respondent as to how the claimant, Mr Heberlet, was chosen out of the pool of 4 for redundancy is inconsistent and unsatisfactory. The tribunal has considered all the evidence including the following:

    67.1 Mr Darron's evidence included the following:

        67.1.1 there was a decision to make the role of Landscape Design and Build Director redundant and he decided to place the claimant in a pool of four;

        67.1.2 The selection criteria were in part objective, some subjective. A first draft of selection criteria matrix was developed. Each of the four Programme directors in the pool was given a draft score;

        67.1.3 The selection criteria was changed a further two times. Mr Darron did not obtain the result he wanted and he changed the selection criteria again, giving a three times weighting to the particular technical skill held for each of the three remaining Programme Director roles;

        67.1.4 Mr Darron accepts that if the respondent scored the employees against all of the named criteria then the respondent would not get the result it wanted in that there were three Divisions,

Employment and Skills, Sustainable Communities and Sustainable Business, that were being retained and the respondent needed to ensure that the person left in charge of each Division had the appropriate skills in those areas. It was for this reason that having carried out an initial scoring exercise Mr Darron adapted the scoring and actually only counted in the technical specialism score for the actual business to be retained. In other words, they worked out who had the best score for each of the three remaining roles by adding to each candidate's general scores the score for that specialism only.

67.1.5 On that scoring Mr Darron noted Mr Heberlet as having the lowest score. Mr Darron accepts that he made an arithmetical error in the adding of the scores, and that, if correctly totalled the claimant did in fact have an equal score with Mike Crowther.

67.2 Mr Darron has not provided a satisfactory explanation for failing to note or consider the consequences of this mathematical error.

67.3 Mr Darron held a number of consultation meetings with Mr Heberlet. During the consultation exercise the claimant challenged his scores. He was never provided with the scores of the other candidates even redacted. As part of the consultation Mr Darron did not notify the claimant that there had been an arithmetical error;

67.4 The evidence of Mrs Fishwick, the appeal officer in the case of Mr Heberlet, is particularly troubling.

67.5 Mr Heberlet pointed out at the appeal stage that the arithmetic was wrong and that even on the respondent's own "skewed" scoring he was not the lowest scorer but he had scored equally with Mike Crowther, Programme director for Sustainable Communities. The Appeal officer's evidence on how this was addressed is wholly unsatisfactory and inconsistent. In her witness statement Mrs Fishwick merely states that the selection criteria markings had been miscalculated and adds "I therefore amended the total scores for Peter from 51 to 53. Unfortunately this did not

change the fact that he had scored the lowest of all programme directors."

67.6 In fact in evidence in cross-examination and in questions from the tribunal Mrs Fishwick stated that:

67.6.1 she realised that the scores had been miscalculated and that a correct calculation of the scores did produce an equal scoring for the claimant and Mike Crowther;

67.6.2 she therefore decided to change the scoring system, exclude the objective criteria, and only count the marks for the management skills;

67.6.3 this amendment to the scoring system gave Mr Crowther more marks because he had been on long term sick;

67.6.4 she discussed this with Mr Darron before she did this change to the criteria and rescoring exercise.

67.7 None of this evidence is contained in Mrs Fishwick's witness statement.

67.8 Neither is this explanation contained in letter which advised Mr Heberlet of the outcome of his appeal (page 964), which simply states:

"The scoring total was incorrectly calculated. We can confirm that we did see that your score had not been correctly added up, nevertheless once corrected the score was still the lowest of the four scores."

67.9 Mr Darron made no reference to any involvement in the appeal decision in his witness statement. He made no reference in his oral evidence to having any discussion with the appeal officer, Mrs Fishwick, about the tie break between the claimant and Mr Crowther. His evidence is that if he had noticed there was a tie-break he would have had to look at other ways of scoring.

67.10 There is in the bundle at page 957 a note of a conference call on 25 January 2017 between Tracy Fishwick, Andy Darron and others, which includes a conversation about incorrect scores for Mr Heberlet and refers to an incorrect

score. There is no reference whatsoever to there being a tie break and how they were going to resolve it.

67.11 In his appeal Mr Heberlet said that his redundancy had been pre-determined and referred to a meeting on 17 November 2016 (pages 957 and 958) when, he asserted, he had been told that Mr Darron announced that Mike Crowther would be back to lead the Communities team in the New Year. Mrs Fishwick in her witness statement states that no evidence was provided to support the claimant's assertion that redundancy was pre-determined and that no additional evidence was supplied at the appeal hearing. However, she omitted to address Mr Heberlet's assertion relating to the statement of Mr Darron at the November meeting which, if true, could support the view that Mr Darron had, by that stage, prior to the completion of the consultation exercise, decided that Mr Crowther was not at risk of redundancy. Mrs Fishwick, in evidence before the tribunal, refers to the conference call with Mr Darron and others on 25 January 2017 but makes no reference to seeking questions about what was said by Mr Darron at the November meeting. The minute of the conference call suggests that:

67.11.1 Mr Darron was not questioned directly as to what he had said at the meeting in November 2016 about Mr Crowther coming back in the New Year and taking up leadership of the team;

67.11.2 Mrs Fishwick asked for Minutes of that November meeting.

There is no indication of these minutes being provided or of any follow up by Mrs Fishwick. Mr Darron does not refer in his witness statement to this issue being raised in appeal. This issue was not addressed in the appeal outcome letter (964).

67.12 The tribunal has concern that many of these matters were not addressed in cross-examination of either the claimants or the respondent's witnesses. Mr Darron was not cross-examined on what was said at meeting in November.

67.13 Each of the Programme Directors was scored three times for the remaining three roles. Adding the weighted technical score to the other scoring criteria gave the current incumbent of the post a higher score for that post. As a consequence,

Colin Greenhalgh, existing Programme Director for Employment and Skills, had the highest score for his remaining post; Greville Kelly, existing Programme Director for Sustainable Skills had the highest score for his remaining post; and Mike Crowther, Programme Director for Sustainable Communities had, on the scoring sheet prepared by Mr Darron, the highest score for his remaining post. Mr Darron did not use any documentary evidence to support his scoring system. He did not look at Mr Heberlet's CV to determine his specialist skills and qualifications, relevant to the scoring criteria. In fact there was an error in adding up the total scores for the role of Programme Director for Sustainable Communities. A correct calculation results in an equal score for Mr Heberlet and Mr Crowther.

68. On balance the tribunal finds that the respondent's evidence in relation to the selection of Mr Heberlet from the pool of 4 is unsatisfactory and it is not accepted. There was no genuine selection exercise in relation to the selection of Mr Heberlet for redundancy. The selection criteria were changed, weightings were given, the scoring system was wholly subjective without any reference to any available documentary evidence, to give the desired result as approved at Board level in October 2016 – that Mr Heberlet, as Programme Director of Landscape Design and Build division, would be selected for redundancy.

69. Mr. Darron engaged in a consultation exercise with Mr Heberlet. The consultation with Mr Heberlet was a sham process. His selection for redundancy had already been determined.

70. Mr Heberlet was dismissed. He was advised of the right to appeal. He exercised that right. Mrs Tracy Fishwick, Chairman of the Board, heard the appeal. She gave no reasonable consideration to the grounds of appeal. She confirmed the decision made in October 2016 that Mr Heberlet should be dismissed by reason of redundancy.

[As indicated above, the evidence of Mrs Fishwick was inconsistent and unsatisfactory. It is not accepted by the tribunal that she gave proper consideration to the appeal.]

71. In the removal of the position of Development Manager – Sustainable Communities, Mr Darron considered whether there were any other roles which should fall into a pool for selection. He considered, in particular, the role of Development manager - Employment and Skills, a position held by Suzanne Murray. Mr Darron noted that:

71.1 the roles were within different departments, based at different locations;

71.2 Suzanne Murray's role involved a large element of direct delivery and was project funded. Her role operated with a very specialist marketplace and required specialist knowledge;

71.3 The two Development managers did not work together, neither did they support each other in times of absence.

After considering the two roles Mr Darron reached the genuine business decision that the role of Development Manager - Sustainable Communities was a unique role. It was sufficiently different from the role held by Suzanne Murray. Mr Darron therefore decided that there were no other comparable roles, that Mr Hurst was in a pool of one and that no selection criteria should be applied.

[On this the tribunal accepts the evidence of Mr Darron. Mr Hurst has failed to provide satisfactory evidence to support his assertion that he was not in a unique position, that there were other employees who held a similar role. The fact that Mr Hurst, at the commencement of Ms Murray's employment, assisted her, the fact that he had negotiated contracts to provide Ms Murray's department with work, does not by itself provide satisfactory evidence that his role was sufficiently similar to that of Ms Murray to challenge the veracity of Mr Darron's business decision.]

72. In considering whether Mr Hurst held a unique role, whether there were any other comparable roles, Mr Darron conducted a draft pooling exercise, placing Mr Hurst and Suzanne Murray in a pool of two, and scoring each of them against provisional selection criteria (page 292). Such provisional exercise gave Ms Murray a higher score. Had she and the claimant been placed in a pool of two then the claimant, subject to any amendments to the scoring following consultation, would still have been selected for redundancy. That provisional selection exercise did not form part of the decision to make the claimant Mr Hurst redundant. Mr Darron acted on the later decision that the claimant Mr Hurst should be in a pool of one. Mr Darron did not discuss this provisional pooling and selection exercise during consultation with Mr Hurst, who only became aware of the exercise because the score sheet was provided to Mr Hurst following a Subject Access Request (SAR).

[On this the tribunal accepts the evidence of Mr Darron]

73. As part of the consultation exercise the respondent asked for volunteers for redundancy. There was one volunteer and the request was rejected.

74. By letter dated 31 October 2016 Mr Hurst was advised that he was at risk of redundancy and was invited to a consultation meeting on 3 November 2016. Mr Hurst was advised of the right of representation at that meeting.

75. At the consultation meeting on 3 November 2016 Mr Darron advised the claimant that:

    75.1 A decision had been made to cut posts at senior level because the respondent was losing money and faced an urgent need to reduce costs;

    75.2 The decision to make the role of Development Manager - Sustainable Communities redundant – the role held by Mr Hurst, had been made.

    75.3 The respondent was looking for alternatives to redundancy for Mr Hurst – that is, looking for any other alternative roles to which Mr Hurst could be transferred

76. At the consultation meeting on 18 November 2016:

    76.1 Mr Darron confirmed that he had looked at a number of roles within the organisation and had selected the claimant's role for redundancy using a scale of costs savings and ability to mitigate impact of the loss of the role as the criteria for selection of that role for redundancy;

    76.2 Mr Darron confirmed that the claimant's role was unique and that, once the role had been identified for redundancy, there had been no pooling, and no selection criteria applied;

    76.3 Mr Hurst said he had prepared a cost benefit analysis to challenge Mr Darron's view on the cost of the claimant's role, asserting that the costs of the role was massively outweighed by the money he brought in;

    76.4 Without considering that cost benefit analysis Mr Darron confirmed that the role of Development Manager – Sustainable Communities, the role held by the claimant, would be made redundant;

77. At a further consultation meeting on 1 December 2016:

    77.1 Mr Darron informed the claimant that:

77.1.1 a number of new roles had been created and asked the claimant to consider applying for those roles. The roles were all more junior and attracted a lower salary than that enjoyed by Mr Hurst;

77.1.2 bumping was not a viable option;

77.1.3 the offer of voluntary redundancy had failed to yield any viable options

77.2 Mr Hurst provided Mr Darron with the Cost Benefit analysis and sought copies of the documentary evidence relied upon by Mr Darron in identifying the role of Development Manager – Sustainable Communities as redundant, compared to any other similar role.

78. By email dated 15 December 2016 Mr Hurst informed the respondent that he would not be applying for any vacancies on the grounds that they were not suitable and/or the salary drop was too much.

79. At a further consultation meeting on 1 December 2016 Mr Darron :

79.1 did not discuss the Cost Benefit Analysis produced by Mr Hurst;

79.2 confirmed that the claimant was made redundant with immediate effect;

79.3 advised Mr Hurst of his right of appeal.

80. Mr Darron did not consider the Cost Benefit Analysis prepared by Mr Hurst.

81. Mr Hurst exercised the right of appeal. The appeal was heard by Mr Upton, Vice Chair of the Board of Trustees. Mr Upton considered only whether there had been a breach of procedure, unfairness in the procedure undertaken during the consultation redundancy exercise. He did not carry out any investigation of the identification of Mr Hurst's role as redundant, did not consider the documents produced by Mr Hurst. He did not consider the Cost Benefit Analysis prepared by Mr Hurst. He did not investigate whether:

81.1 removal of the role of Development Manager – Sustainable Communities was a genuine business decision;

81.2 other roles should have been placed in a pool for selection with the claimant's post;

81.3 there had been an agreement with Dr Jane Staley that the claimant should enjoy continuous service, taking into account his employment with Groundwork Merseyside;

81.4 there had been a TUPE transfer between Groundwork Merseyside and Groundwork Cheshire.

[Mr Upton's evidence was contradictory and unsatisfactory.]

82. Mr Upton rejected Mr Hurst's appeal and confirmed dismissal. The outcome letter (page 601) was prepared by Mr Upton but signed by Tracy Fishwick as the respondent understood that the disciplinary procedure necessitated this.

83. Both of the claimant's were advised of available vacancies and encouraged to apply. None of the vacancies attracted the level of salry previously enjoyed by the claimants.

84. The respondent's redundancy procedure:

84.1 does not include an obligation by the respondent to consider "bumping";

84.2 provides that where the dismissing manager was the Executive director, any appeal should be addressed to the Chair of the Board.

Additional Facts relevant to the application of the Polkey principle

85. During the consultation exercise Mr Heberlet made a proposal that the required cost cutting exercise be achieved by each of the 4 Programme Directors reducing to a four day week. This proposal would have required a reorganisation of each of the Director's work and may have adversely affected the running of the business. Mr Darron made a genuine business decision for the respondent to reject that proposal.

[On this the tribunal accepts the evidence of Mr Darron.]

The Law

86. An employer must show the reason for dismissal and that the reason fell within one of the categories of a potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996").

87. Redundancy is a potentially fair reason for dismissal under Section 98(2) Employment Rights Act 1996 ("ERA 1996"). Redundancy is defined under Section 139 Employment Rights Act 1996. **Safeway Stores Plc v Burrell 1997 ICR 523** [endorsed by the House of Lords in **Murray & anr v Foyle Meats Ltd 1999 ICR 827**] states that the correct approach for determining what is a dismissal by reason of redundancy in terms of Section 139(1)(b) involves a three stage process:-

    a. was the employee dismissed? if so

    b. had the requirements of the employers business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? if so

    c. was the dismissal of the employee caused wholly or mainly by that state of affairs?

88. In determining at stage 2 whether there was a true redundancy situation the only question to be asked if was there a diminution/cessation in the employer's requirements for employees (not the claimant) to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. At stage 3 in determining whether the dismissal was attributable wholly or mainly to the redundancy, the Tribunal is concerned with causation. Thus, even if a redundancy situation arises, if that does not cause the dismissal, the employee has not been dismissed by reason of redundancy.

89. Tribunals are only concerned with whether the reason for dismissal was redundancy and not with the economic or commercial reason for the redundancy itself. **James W Cook & Co (Wivenhoe) Limited v Tipper & ors 1990 ICR 716 CA.** On the other hand, tribunals are entitled to examine the evidence available to determine what was the real reason for the decision to dismiss and to ensure the genuineness of a decision to dismiss for redundancy.

90. The employer having established the potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. The burden of proof is neutral: it is for the Tribunal to decide. . We have considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair we remind ourselves that it is not for us to substitute our view for that of the employer. The question is did the respondent act fairly within the band of reasonable responses of a reasonable employer in dismissing the

claimant.

91. The Tribunal must be satisfied that an employer has acted reasonably in deciding the appropriate pool from which to select the redundant workers. **Thomas and Betts Manufacturing Limited -v- Harding [1980] IRLR 255** states that the employers have greater flexibility in defining the unit of selection or pool where there is no agreed procedure. The respondents should show that they have applied their minds to the problem and acted from genuine motives. The Tribunals must be satisfied that an employer acted reasonably taking into account all the factors including, whether other groups of employees are doing similar work to the group from which selections were made, whether employees jobs are interchangeable, whether the employee's inclusion in the unit is consistent with his or her previous position, whether the selection unit was agreed with the union.

92. The Tribunal must be satisfied that selection criteria were reasonable. These must be capable of objective assessment by reference to data such as attendance records, efficiency and length of service. Criteria which are themselves less than objective can nevertheless be applied in such a way as to make a dismissal reasonable. It is reasonable for an employer to try to retain a workforce balanced in terms of ability. An individual's skills and knowledge are reasonable considerations, providing they are assessed objectively. Criteria should be clearly defined. Employee flexibility can be objective criteria for redundancy selection.

93. The Tribunal must be further satisfied that the selection criteria were fairly applied. **Williams and Others -v- Compair Maxam Limited [1982] ICR 156.** It is not the function of the Tribunal to decide whether each mark allocated against the selection criteria is correct but the Tribunal should be satisfied that the method of selection was fair in general terms and was applied reasonably in the claimant's case.

94. The Tribunal should consider whether an employee was warned and consulted about an impending redundancy. Whether consultation is adequate in all the circumstances is a question of fact for the Tribunal. An employer will normally not act reasonably unless he warns and consults any employees affected**. Polkey -v- A E Dayton Services Limited [1988] ICR 142.**

95. An employer should do what he can do, as far as is reasonable, to seek alternative work for the employee before dismissing by reason of redundancy. **Thomas and Betts Manufacturing Limited -v- Harding (Supra).**

96. A service provision change arises where activities cease to be carried out by a contractor on a client's behalf and are carried out instead by another

person on the clients behalf. Reg 3(1) (b) Transfer of Undertakings (Protection of Employment) Regulations 2006.

97. In deciding whether there was any service provision change (SPC) the tribunal has considered the Guidance given by His Honour Judge Peter Clarke in **Enterprise Management Services Ltd v Connect up Limited 2012 IRLR 190**:

    a. an employment tribunal's first task is to identify the activities performed by the in-house employees (in an outsourcing situation) or the original contractor (in a re-tendering or insourcing situation);

    b. next the tribunal should consider the question of whether these activities are fundamentally the same as those carried out by the new contractor (outsourcing or re-tendering) or in-house employees (in sourcing). Cases may arise where the activities have become so fragmented that they fall outside the SPC regime;

    c. if the activities have remained fundamentally the same, the tribunal should ask itself whether, before the transfer, there was an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf the client;

    d. following this, the tribunal should consider whether the exceptions in regulation 3 (3) (b) and (c) apply namely whether the client intends that the transferee, post-SPC, will carry out the activities in connection with a single specific event or task of short-term duration; and whether the contract is wholly or mainly for the supply of goods the client's use;

    e. finally, if the tribunal is satisfied that a transfer by way of an SPC has taken place, it should consider whether each individual claimant is assigned to the organised grouping of employees.

98. In **Metropolitan Resources Ltd v Churchill College Limited and others 2009 ICR 1380** it was stated that a commonsense and pragmatic approach is required in determining this question. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. This is a question of fact and degree.

99. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

100. The first question is what was the reason for dismissal. On balance the tribunal accepts the evidence of the respondent's witnesses that the respondent organisation was suffering from financial difficulties, and that a business decision was taken to address those financial difficulties by reducing the number of employees.

101. The next question is whether the dismissal of each of the claimants was caused wholly or mainly by that redundancy situation.

102. Mr Darron prepared a restructure plan (288) which was presented to the finance subcommittee meeting on 30 September 2016.

103. The restructure plan indicated a need to reduce senior management costs, noted that the performance of the Land Department was severely depressed and unlikely to recover in the short to medium term, and indicated that at its current activity levels the Land Department could no longer afford the cost of a dedicated Programme director. The report continues "as such the post is now considered redundant, with the responsibility of managing the department to be integrated into the other operational departments." The restructure plan also set out the financial impact of the proposed redundancy plan naming Mr Heberlet as the Programme Director and setting out his specific salary saving, redundancy payment and notice payment. It did not set out a range of savings to cover the possibility that a different Programme Director would be selected for redundancy after completion of any redundancy selection exercise.

104. The restructure plan also indicated that a review of the Communities department had identified some areas where efficiencies must be made. It noted that development capacity forms part of several managers existing roles, and it was felt that the team could function effectively without an overarching strategic development role, thereby rendering the post of Development manager - Communities redundant. That was the role held by the claimant Mr Hurst. In the financial impact of the proposed redundancy plan the claimant Mr Paul Hurst, was named as the development manager and the plan set out the salary saving, redundancy payment and notice payment arising from his redundancy.

105. The restructure plan was considered at the board meeting in October 2016 when it was noted that redundancies would include the loss of Programme Director of Land, and a development role within the communities. Mr Upton, member of the board, asserts before the tribunal

that these minutes were later amended to indicate that it was the role of Programme director of Land that was made redundant, not specifically Mr Heberlet. The tribunal does not accept Mr Upton's evidence on this point (see paragraph 62 above).

106. In light of these documents it is perhaps not surprising that each of the claimants assert that they were chosen for redundancy at an early stage because their names were identified in the proposal to the board in October 2016.

107. Mr Darron asserts that he identified that the role which each of them filled was identified as redundant in October 2016 not the person.

108. The question for the tribunal is whether the identification of the roles for redundancy was a genuine business decision arising from the redundancy situation or whether, as asserted by the claimants, there was no genuine redundancy and they were simply targeted.

109. The tribunal has therefore considered with care the evidence of the respondent's witnesses.

110. The tribunal notes in particular that the respondent's evidence on how these claimants were assessed through to redundancy has been inconsistent and the documentary evidence provided has confused the picture.

Mr Heberlet

111. The tribunal notes that Mr Heberlet raises no satisfactory evidence to support his assertion that the real reason for dismissal was unrelated to any redundancy situation. It is clear that Mr Heberlet has little regard for the business acumen of Mr Darron and disagrees with the decision to declare his post as Director of Landscape Design and Build division as redundant. However, there is no satisfactory evidence that Mr Darron, prior to the review of financial circumstances, treated the claimant unfavourably or gave any indication that Mr Heberlet was under threat of dismissal.

112. In all the circumstances the tribunal accepts the evidence of Mr Darron that he made a genuine business decision to make the role of Landscape Design and Build director redundant. The requirements of the respondent's business for an employee to carry out work of a particular kind, namely the work of the Landscape Design and Build director, had ceased or diminished, or were expected to cease or diminish. It was that genuine business decision which led to the dismissal of Mr Heberlet.

113. Mr Heberlet was dismissed and the reason for dismissal was redundancy.

114. Redundancy is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.

115. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent acted fairly within the band of reasonable responses of a reasonable employer in dismissing him.

116. The tribunal accepts that the pool of four was a reasonable pool.

117. The respondent's evidence as to how the claimant was selected for redundancy within that pool is inconsistent and unsatisfactory.

118. As indicated in its findings at paragraphs 67 and 68 above, the tribunal has considered with care the evidence of the respondent's witnesses and, on balance, the tribunal rejects the evidence of the respondent that there was a genuine selection exercise from the pool of 4. The scoring criteria, scoring and the weighting were engineered to secure the removal of the claimant as current holder of the role of Landscape Design and Build Director. The evidence is consistent with the claimant's assertion that it was not only the role that was identified as redundant back in October 2016: it was also the person. The tribunal agrees with that assertion and finds that the decision to declare the claimant as redundant was made in October 2016. The tribunal rejects counsel for the respondent's assertion that the fact that the respondent asked for volunteers for redundancy shows that the decision to select the claimant for redundancy was not predetermined. There was one volunteer and the request was rejected. The respondent was clearly prepared to go through the motions before confirming Mr Heberlet as redundant. There was no fair selection exercise.

119. There was no fair consultation exercise. The decision to declare the claimant as redundant was made in October 2016. Mr Heberlet was not given a fair opportunity to challenge that decision.

120. The claimant was given a right of appeal but the appeal officer did not give due consideration to the grounds of appeal. The appeal hearing was a complete sham exercise. The appeal officer's evidence is inconsistent and unsatisfactory. It is not accepted. The claimant's

challenge to the reason for choosing his role for redundancy was not addressed. His assertion that he had been predetermined for redundancy was not addressed, his correct assertion that he had been incorrectly scored was not properly addressed.

121. The claimant Mr Heberlet was unfairly dismissed.

122. Applying the Polkey principles the tribunal finds that if a fair consultation had taken place the role of Director of Landscape Design and Build Division would still have been declared as redundant. Consultation would not have made any difference to that outcome. It was a reasonable business decision for the respondent to reject Mr Heberlet's proposal that the required cost cutting exercise be achieved by each of the 4 Programme Directors reducing to a four day week. This would have required a reorganisation of each of the Director's work and may have adversely affected the running of the business.

123. If a fair selection procedure been adopted, there was a one in four chance that Mr Heberlet would have been fairly selected for redundancy. His compensation should be reduced by 25% to reflect the chance that he would have been fairly dismissed.

Mr Hurst

124. The tribunal has considered the evidence of the respondent's witnesses.

125. In relation to Mr Hurst, the respondent examined each of the more senior management roles and decided that the claimant's role was the one that should be redundant on criteria of:

125.1 the cost of the role; and

125.2 the effect of losing that role on the business -- i.e. the impact of loss of the role

126. Mr Darron made the genuine business decision that Mr Hurst held a unique position, he was therefore in a pool of one, no selection criteria applied. On this the tribunal has accepted the evidence of Mr. Darron. The tribunal refers to its findings at paragraphs 71 and 72 above in relation to the documents sent to Mr Hurst in response to his SAR request

127. The tribunal accepts the evidence of Mr Darron and finds Mr Darron conducted a provisional scoring exercise, involving Mr Hurst and Suzanne Moore, before deciding whether or not there should be a pool for selection

and, after completing the exercise, decided that there should not be a pool and that Mr Hurst's position was a unique one.

128. The tribunal notes that Mr Hurst raises no satisfactory evidence to support his assertion that the real reason for dismissal was unrelated to any redundancy situation. It is clear that Mr Hurst also has little regard for the business acumen of Mr Darron and disagrees with the decision to declare his post as redundant. However there is no satisfactory evidence that Mr Darron, prior to the review of financial circumstances, treated the claimant unfavourably or gave any indication that Mr Hurst was under threat of dismissal. The decision to declare Mr Hurst's role as redundant, may well, as asserted by Mr Hurst, have been a poor business decision, there may have been other roles that would have produced a better business outcome. However that is not the question. The question is whether Mr Darron made a genuine business decision. On balance the tribunal finds that he did. The requirements of the respondent's business for an employees to carry out work of a particular kind, namely the role of Development Manager - Sustainable Communities, had ceased or diminished, or were expected to cease or diminish.

129. Mr Hurst was dismissed and the reason for dismissal was redundancy.

130. Redundancy is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.

131. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent acted fairly within the band of reasonable responses of a reasonable employer in dismissing the claimant.

132. The tribunal accepts the evidence of Mr Darron and finds that Mr Hurst's role was unique. The decision that the claimant was in a pool of one was reasonable. The claimant has not identified anyone else who was in a similar role. The fact that other people hold the same job title is not sufficient.

133. On balance the tribunal accepts the evidence of Mr Darron and finds that the completion of the scoring criteria, disclosed to Mr Hurst in response to the SAR request, was simply a step taken in deciding how the redundancy exercise should progress. It was never actually used in selecting Mr Hurst for redundancy.

134. The failure of the respondent to consider a “bumping” exercise does not render this decision to dismiss unfair. The respondent’s redundancy procedure does not include an obligation by the respondent to consider “bumping.”

135. The claimant was advised of all available vacancies within the respondent’s business. None of the vacancies attracted the same salary level as the claimant. He chose not to make any application for any vacancy on the grounds that they were not suitable and/or the salary drop was too much. The failure of the respondent to provide detailed job descriptions, to offer the claimant alternative employment without the need to make application and take part in a competitive selection exercise does not render the decision to dismiss unfair.

136. The respondent failed to carry out a reasonable consultation exercise. Mr Darron held a number of consultation meetings with Mr Hurst, who put forward reasoned arguments for consideration by Mr Darron, challenging the decision to make the role of Development Manager - Sustainable Communities redundant. The claimant’s arguments were not given reasonable consideration. The consultation meetings were held to consider solely alternatives to redundancy for Mr Hurst, that is, whether there were any other suitable vacancies. Mr Darron was not prepared to consider alternatives to the decision to make the role of Development Manager - Sustainable Communities redundant, making it clear throughout that the decision to make that role redundant had already been made. As the claimant was in a pool of one, and all available vacancies were at a more junior level and lower salary, it was reasonable to give Mr Hurst the opportunity to challenge the decision to render his post redundant as opposed to another post of similar cost to the respondent. A reasonable employer would have considered the claimant’s proposals.

137. This defect was not remedied on appeal. The appeal officer Mr Upton gave no consideration whatsoever to Mr Hurst's challenge to the decision to make him and/or his role redundant. That appeal process was a complete sham exercise. Mr Upton's evidence to the tribunal was wholly unsatisfactory.

138. Mr Hurst was unfairly dismissed by reason of the respondent’s failure to follow a fair procedure, failure to follow a fair consultation exercise.

139. Applying the Polkey principles the question is whether following a fair procedure would have made any difference to the outcome. Following a fair consultation would not have made any difference to the outcome in that the tribunal is satisfied that Mr Darron made a genuine business

decision and that any representations made by Mr Hurst, properly considered, would have made no difference. However, a difference would have been made in the length of time it would have taken the respondent to carry out a reasonable investigation of the points raised by Mr Hurst. The tribunal will consider submissions on that point.

140. Mr Hurst is claiming that his employment with Groundwork Merseyside should be counted in his continuity of employment. He argued this on two grounds.

141. The first is that there was a transfer of undertaking from Groundwork Merseyside to Groundwork Cheshire.

142. The tribunal would agree with counsel for the respondent that the question is whether there was a service provision change within the meaning of the TUPE regulations

143. The transferor and transferee must carry out the same activities. In **Metropolitan Resources Ltd v Churchill College Limited and others 2009 ICR 1380** it was stated that a commonsense and pragmatic approach is required in determining this question. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. This is a question of fact and degree. Mr Darren accepts that Groundwork Cheshire did take over some of the contracts or projects which Groundwork Merseyside had, and that Groundwork Cheshire carried out those contracts following Groundwork Merseyside going in to administration.

144. The tribunal agrees that there is insufficient evidence as to the number and identity of the contracts taken over by Groundwork Merseyside, the intention of the clients, the duration of the contracts and the terms upon which they were adopted by Groundwork Cheshire, to determine whether there was a service provision change. The tribunal notes that the respondent has failed to provide this detail, asserting simply that there was no novation of contracts, no transfer.

145. However, the tribunal agrees that whether or not there was a service provision change in relation to one or more contracts held by Groundwork Merseyside there is no satisfactory evidence that the claimant was assigned to any organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client. In his application for the position of Development Manager with Groundwork Cheshire, (page 132) the claimant set out a description of his employment history indicating that he had worked in a fund-raising and business development capacity across Greater Merseyside for the

previous three years. His description of his duties as development manager referred to staff, Department and financial management, strategy development and implementation, commercial income generation. It is clear that the claimant did hold an overarching role with Groundwork Merseyside that was not tied to individual service provisions. He was not assigned to any organised grouping of employees who worked on any of the projects/ contracts taken over by Groundwork Cheshire. In the circumstances the tribunal finds that there was no transfer of the claimant's employment to Groundwork Cheshire within the meaning of the TUPE regulations in March 2012.

146. The second argument by Mr Hurst is that there was an agreement that his employment with Groundwork Merseyside should form part of his continuous employment with Groundwork Cheshire. The evidence of Dr Jane Staley is that she intended to review the contract on the termination of the 6 month probationary period and that on review his contract would have been amended and she would have authorised continuous employment dating back to 1 November 2004. That review did not take place. The amendment to the contract was not effected. The fact the respondent authorised continuous employer-based pension contributions from 5 March 2012 and authorise his paid paternity leave in August 2012 does not assist the claimant. The evidence of Dr Staley is clear. The question of continuity of employment was postponed until a formal review after six months temporary employment. For whatever reason that review never took place. The question of continuity of employment is different from an agreement to pay pension contributions and paternity.

147. The tribunal rejects the claimant's assertion that he was continuously employed by the respondent from 1 November 2004. Mr Hurst was continuously employed from 5 March 2012.

Employment Judge Porter
Date: 15 November 2017

REASONS SENT TO THE PARTIES ON

15 November 2017

FOR THE TRIBUNAL OFFICE