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EMPLOYMENT TRIBUNALS

Claimant: Ms K Green

Respondent: London Borough of Barking & Dagenham

Heard at: East London Hearing Centre **On:** 21-24, 27& 28 November 2017

Before: Employment Judge Brown (sitting alone)

Representation

Claimant: Ms S Omeri (Counsel)

Respondent: Miss C Maclaren (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:

- 1. The Respondent did not unfairly dismiss the Claimant.**
- 2. The Remedy Hearing is cancelled.**

REASONS

1 The Claimant brings a complaint of unfair dismissal against the Respondent, her former employer.

2 This hearing took place as a consequence of the Claimant's ordinary unfair dismissal claim being remitted to the Tribunal by the EAT, for hearing by a fresh Tribunal.

3 The issues in the claim were as follows:

Reason for dismissal

3.1 What was the reason for the Claimant's dismissal?

Fairness of dismissal

- 3.2 Was there a genuine redundancy situation?
- 3.3 Did the Respondent conduct adequate consultation and collective consultation?
- 3.4 Did the Respondent give adequate consideration to the Claimant's response to consultation?
- 3.5 Was the assimilation process adopted by the Respondent fair?
- 3.6 Specifically, was the assimilation of Peter Remedios into the PO5 post of senior regeneration professional (Barking Riverside Co-ordinator) fair?
- 3.7 Did the Respondent identify an appropriate pool from which to select for redundancy?
- 3.8 Did the choice of subject for the written test part of the selection process give an unfair advantage to one of the Claimant's competitors, Mamta Toohey? It being alleged by the Claimant that Ms Toohey had prior knowledge of the subject by reason of:-
 - 3.8.1 her husband being a solicitor employed by the Respondent who had sight of a related report; and
 - 3.8.2 having herself submitted a separate related report.
- 3.9 Was the Claimant's written test unfairly given lower marks than it warranted?
- 3.10 Were the written tests of either of the Claimant's colleagues unfairly given higher marks than they warranted?
- 3.11 Were the Claimant's answers in interview unfairly given lower marks than they warranted?
- 3.12 Did the Respondent give adequate consideration to redeploying the Claimant into suitable alternative employment?
- 3.13 Did the Respondent's refusal to provide the Claimant with her competitors' written tests and answers to interview render her appeal unfair?
- 3.14 Did the Respondent "improperly edit" the Claimant's statement of appeal?
- 3.15 Did the HR representative present at the appeal inappropriately question the Claimant?
- 3.16 Was the procedure the Respondent followed in relation to redundancy, assimilation, interview and scoring, and appeal fair?

Remedy

- 3.17 If the Claimant is successful, what is the appropriate remedy:-
- 3.17.1 Should the Claimant be re-instated or re-engaged as she suggests?
 - 3.17.2 What is the appropriate basic award?
 - 3.17.3 What level of compensatory award would be just and equitable in all the circumstances
 - 3.17.4 Should any such compensation be reduced to take account of:-
 - 3.17.4.1 Any contributory fault on the part of the Claimant?
 - 3.17.4.2 Any failure by the Claimant to mitigate her loss?
 - 3.17.4.3 The redundancy payment already made to the Claimant?
 - 3.17.4.4 The chance of the Claimant being fairly dismissed in any event (*Polkey* reduction)?

4 I heard evidence from David Harley, Group Manager, Economic Development and Sustainable Communities and member of the assimilation panel; Suzanne Johnson, Regeneration Manager (the Claimant's manager) and member of the assimilation panel; Rachel Blake, Housing Revenue Account Business Manager and member of the assimilation panel; and Peter Watson, Group Manager Human Resources Business Partners and Advisory Services. I also heard evidence from the Claimant and from David Clarke, Branch Secretary of UNISON. I read the witness statement of Julia Jacobs. There was a bundle of documents and page references in these reasons are references to page numbers in that bundle.

5 Both parties made submissions in writing and orally. A provisional remedy hearing was fixed for 5 March 2018.

Findings of Fact

6 The Claimant started work with the Respondent as a Senior Regeneration Professional in its Economic, Development and Sustainable Communities Group, on 4 August 2008. The Claimant holds a Master of Philosophy (M Phil) qualification in Town Planning from UCL, a BA in Landscape Studies, a Diploma in Landscape Architecture and an MSc in Resource Management with a specialism in Arboriculture. The Claimant is therefore highly qualified in, both, Town Planning and in Landscape Architecture. The Claimant has been a member of UNISON since 1994. While employed by the Respondent the Claimant was elected UNISON Equalities Officer and thereafter Assistant Branch Secretary.

7 The group manager of the Respondent's Economic Development and Sustainable Communities Group was David Harley. The Group had two teams; the Town Centres and Economic Development Team. The Claimant was based in the latter team, which was managed by Suzanne Johnson. The Major Housing Projects Team was managed by Jenny Coombs. Mr Harley reported to the Divisional Director of Regeneration and Economic Development, Jeremy Grint. Mr Grint reported to the Director of Growth, Steve Cox, who was, at all times material to this claim, an employee of Thurrock Borough Council. The Respondent's Chief Executive, Graham Farrant was also Chief Executive of Thurrock Borough Council.

8 The Claimant's post as Senior Regeneration Professional was graded PO6. Three other employees were employed as PO6 Senior Regeneration Professionals; Mamta Toohey, Shamim Akhter and Dubravka Polić. Ms Polić's job description was identical to that of the Claimant's, but her post was funded from the Respondent's Housing Revenue Account and she was part of Ms Coombs' team. The other three PO6 posts were funded from the Respondent's general fund.

9 I found, on the Respondent's evidence, that the Housing Revenue Account is required to be used for housing purposes and/or for the benefit of the Respondent's council tenants and that the HRA funding was not reducing.

10 Mr Harley told the Tribunal that Ms Polic was wholly engaged on HRA work, in particular the Respondent's Gascoigne Estate renewal. He said that Ms Polic's job description, which was a generic job description for a Senior Regeneration Professional, was out of date.

11 In 2010 the Government announced a comprehensive spending review. It was not in dispute that, as a result of that review and other spending cuts, the amount of money given by Central Government to Local Governments was reduced.

12 On 14 September 2012, the Respondent's Corporate Management Team told its senior managers that the Respondent council was projected to have a budget deficit of £8m in the financial year 2013/2014 and a further £15m deficit in the financial year 2014/2015 (p.413). The Respondent's Chief Executive proposed to share further services with Thurrock Borough Council to save costs.

13 The Respondent has an Employee Joint Consultative Committee which meets quarterly (EJCC). The EJCC is made up of Councillors, trade union representatives and senior managers from the Respondent Council, including the Chief Executive and the Director of Human Resources. The Respondent also has a Corporate Joint Consultative Committee (CJCC) which meets monthly; senior managers and trade union representatives attend this, but not Councillors.

14 At an EJCC meeting on 20 September 2012 (p.382(xxiv)), the trade union representatives asked questions about proposed budget cuts. Martin Rayson, Divisional Director of Human Resources and Organisational Development, said that a report outlining the budget deficit and the reasons why cuts were considered necessary would be presented to the next meeting of the CJCC.

15 On 10 October 2012, Jonathan Bunt, Divisional Director of Finance, gave a

presentation to trade unions concerning the projected budget deficit and proposals to make spending cuts.

16 At the next CJCC meeting on 19 October 2012, Martin Rayson told the attendees that budget proposals would be published on 23 October 2012 and that he would provide the trade unions with a spreadsheet, detailing the proposals to make redundancies potentially affecting up to 400 posts at the Respondent council. Mr Farrant said that the situation was serious and that the council would have to find another £7m savings for the year 2014/2015 in addition to those already identified. Mr Farrant said that he hoped that the savings target for the next years would be met through the proposals and further sharing of services with other councils (p.382(vi)).

17 On 23 October 2012, Martin Rayson sent trade union convenors and regional officials for the GMB/GMB APEX, UNITE and UNISON unions notice, under *s188 Trade Union and Labour Relations (Consolidation) Act 1992*, of the Respondent's intention to make significant redundancies. He said that, at the CJCC on 19 October 2012, the Respondent had briefed trade unions on the budget situation and the need to make savings for both 2013/14 and 2014/15 financial years, to bring the budget back into balance. He attached a summary of the proposals and said that the proposals would be considered by the council's select committees during November and December 2012. Mr Rayson said that the Respondent estimated that 285 posts would be deleted over the two years. He said that, where savings needed to be made for the 2013/2014 financial year, the relevant redundancy would have to take place before or soon after April 2013. Mr Rayson said that the council would continue to attempt to minimise compulsory redundancy by allowing staff in scope of redundancy to volunteer and that the council would actively reduce the use of agency staff and would redeploy staff. He said, however, that it was proving more difficult to avoid compulsory redundancies as the Respondent made more and more budget reductions. Mr Rayson said that the council would issue consultative reports relating to the individual service reviews which impacted on trade union members shortly. He said that those reports would contain, in respect of each restructure, the reason for the potential redundancy situation, the number and description of employees' posts potentially at risk of redundancy, total number and description of employees currently affected, the proposed method of carrying out the redundancies and strategies to be adopted to mitigate the effects of the situation (p.54(1)).

18 Mr Rayson included, with his *s188* notice, a "Summary of Savings Options 2013/2014 and 2014/2015" document, setting out lists of redundancies proposed in each council area (p.452 to 456). The spreadsheet stated that there were 18 full-time equivalent posts in the Economic Development and Sustainable Communities Team and there were three potential redundancies from the team, giving proposed savings of £375,000 in the year 2014/ 2015.

19 Mr Rayson attached the HR1 advance notification of redundancies pro forma from the Insolvency Service (p.54(3)). The HR1 set out the number of possible redundancies in each occupational group at the Respondent council and said that the method of selection for redundancy would be using collective agreements - the council's redundancy, redeployment and assimilation procedures.

20 A report by Darren Henaghan, Housing and Environment Director, was

published and placed online. The report was for consideration by the Living and Working Select Committee on 19 November 2012. The report detailed the savings which were proposed in each of the employment areas covered by the Living and Working Select Committee. The report said that it was proposed to achieve a 33% cut in the work of the Economic Development Team in the Economic Development and Sustainable Communities Group. Mr Henaghan's report said that the proposal was to remove one of two business relationship managers, to remove a part-time regeneration officer post and one further post. Mr Henaghan said that funding for Enterprise and Business Support Projects would be reduced and that funding for business awards, supply chain activity retail forums and the Chamber of Commerce would stop.

21 On 19 November 2012, the CJCC met again. Mr Henaghan said that the Living and Working Select Committee was being held that night and that there was reported to have been a good turnout at the committee and that comments from the committee would be collated for the budget recommendations which would go to the Respondent Cabinet meeting (p.382(x) to (xiv)). The Living and Working Select Committee did meet on 19 November and considered Mr Henaghan's report. It agreed some amendments to the proposals for budget cuts to the Claimant's Economic Development and Sustainable Communities Group (p.54a to q).

22 The consultation period was due to end on 30 November 2012. On 19 November 2012, Mr Farrant emailed all employees saying that Thurrock council had not approved further sharing of services (p.480).

23 On 29 November 2012, UNISON wrote to Mr Farrant, saying that unions were concerned that cuts were being targeted unfairly on staff, particularly at the middle and bottom of the hierarchy. UNISON said that economies of scale should be applied from top down, to reduce the number of job losses. UNISON said that the consultation process had been rushed and had not fully involved the trade unions and staff because, for example, before and after structure charts had not been provided as part of the scrutiny process. UNISON said that very few senior managers were at risk, the timescale for consultation was inadequate at five weeks, there had been no direct negotiations with unions, staff had not been given the opportunity to make savings suggestions for their own areas, into which they would have the greatest insight, council members had not been briefed on the union perspective and its alternative proposals and that there were a number of unexplored options, leading unions to believe that the method of delivering cuts, that is job losses, had been chosen, rather than needed. UNISON said that there had been no trade union discussions with any of the Divisional Directors before the savings proposals and that that was contrary to the agreed procedure. The letter said:

"The Unions are aware of the national dimension and are encouraging all Branches to offer alternatives to massive job losses. UNISON provided a number of suggestions in its recent report, 'Consultation on Budget proposals' to be heard at the EJCC meeting on 10th December (see attached)".

24 UNISON asked that Mr Farrant respond to all the issues raised in the letter before the Cabinet meeting, to enable the union to consider their formal response to the proposals (pgs.482-483).

25 A further EJCC meeting was held on 10 December 2012. UNISON produced a 5 page report for that meeting, recommending that the committee take account of UNISON's report and take account of all staff and union suggestions in the delivery of budget savings, rather than looking primarily at staff cuts. The report set out several questions, asking about the council's reserves, including the amount set aside by the council for unallocated reserves, earmarked reserves and school balances. UNISON asked whether the council had considered the financial advantages to rescheduling any debt and asked why staff cuts had been the first port of call. The union asked that income generation be explored in a socially responsible manner, options for different levels of council tax increase be considered, **levels of these** maximised, council tax collection rates be improved, that the empty home discounted tax rate should be removed or reduced, progress on reducing agency staff costs be monitored and reported publicly, the amount that the council set aside for bad debt be considered and measures to improve debt recovery be analysed and implemented.

26 The report asked many further detailed questions about reviewing procurement options and capitalising savings and, further, asked that the union be supplied with the information such as the medium term financial strategy and budget before this was considered by the Respondent council.

27 At the 10 December 2012 EJCC meeting (p.382(liv)), there was a discussion of the budget. Mr Farrant said that input from trade unions would be welcome to identify practices or opportunities that could be used to improve or continue the delivery of services, as well as ideas and how to maximise current budget and revenue. Mr Clarke asked that a structural chart should be provided as soon as possible. Mr Clarke asked that revenue streams should be maximised. Councillors were, however, concerned that additional charges levied on residents would reduce their spending and have an adverse effect on the local economy. Mr Henaghan offered to meet unions on issues such as commercial charges and potential exemptions. Mr Clarke asked whether the Respondent was intending to run a voluntary redundancy scheme. Mr Rayson said that this had been considered, but the council had already run two such voluntary redundancy schemes and was now concerned about the loss of more experienced staff who tended to be the ones who volunteered. Mr Rayson said that the council would seek volunteers within any specific part of the council which was affected by redundancies.

28 The unions raised the issue of the cost of paying agencies and consultants. Mr Henaghan said that work might be moving away from external contractors and back to in-house staff. The meeting agreed that the unions would contact Mr Bunt to arrange finance training for them; that the unions would contact the appropriate corporate director with any service specific questions and suggestions; and that Jonathan Bunt would arrange to meet the unions to discuss the unions' concerns with the overall budget (p.382(lvi)).

29 On 13 December 2012, Mr Farrant replied to UNISON's letter of 29 November 2012 (p.511). In his letter, he said that the Respondent had discussed the budget situation with unions at each CJCC meeting since he was appointed and that Jonathan Bunt had given the unions a detailed briefing on 10 October 2012, outlining the budget timescale and the process for consultation within it. Mr Farrant said that unions had been invited to submit any comments and proposals for making savings via the specific

email address budget@lbbd.gov.uk, set up for the purpose. Mr Farrant said that staff had equally been encouraged to contribute their views and ideas through that email account. He said that regular budget briefings had been issued to staff and that staff had been invited to attend staff feedback forums which had been reasonably well attended and that another forum was planned for 17 December 2012. Mr Farrant said that he had also met with trade unions from Barking and Dagenham and Thurrock on two occasions, to brief them on the plans to bring together management teams and some services in the two Boroughs, as a contribution to the overall savings targets.

30 Mr Farrant said that, at the EJCC meeting on 10 December, Jonathan Bunt had offered to meet with the unions to discuss the points that the unions had made in more detail. Mr Farrant said: "This reflects our on-going commitment to consult with the Trade Union around the budget and the changes that are being made". Mr Farrant said any comments received from staff and trade unions would be shared with Cabinet members in advance of their meeting on 19 December. Mr Farrant said that the budget timetable, which the council had shared with the unions, was based on the need for Cabinet to make decisions in December and the Assembly to make decisions in February, to enable a budget to be set for 2013/14. He said that, where a structure chart had not been available to staff, this was because the detailed impact on any savings had not been worked through, but that there would be consultation around before and after staff structures, before staff in the service areas were put at risk.

31 Mr Clarke of UNISON replied to Mr Farrant on 14 December (p.517). The letter said that the process was taking place too quickly to enable the union to have meaningful input and that, while UNISON appreciated the offer of a meeting with Jonathan Bunt, Head of Finance, UNISON has questioned the usefulness of it when Cabinet was meeting on 19 December and the recommendation for budget proposals had already been informally agreed. Mr Clarke said that it was not appropriate to require recognised unions to submit their suggestions to a generic email address along with all staff. Mr Clarke said that, in the case of *Middlesborough BC v T & G Unite and UNISON* EAT/26/00, redundancies were found to have been unlawful because the local authority had not participated in meaningful consultations. He said that employers are obliged to consult about ways of avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. He said that those matters should therefore have formed the agenda for meetings with trade unions.

32 On 19 December 2012, the Respondent's Cabinet met and noted the proposed budgetary cuts (pgs.534-555 and 604 to 605). A Cabinet member advised that feedback from the consultation had been taken into account in the development of final proposals and specific concerns expressed by the local community and via the Select Committee scrutiny process had resulted in several of the savings options being withdrawn or deferred (p.535-536).

33 The Respondent produced a Response to Budget Challenge Consultation Report 2013/2014, Appendix XX of which set out all the comments made in the consultation exercise and the Respondent's response to them (pgs.609 to 648). At p638, the Appendix said that UNISON had submitted wide-ranging concerns over the future of the Youth Service and the Respondent's response was that a Divisional Director had undertaken to discuss the submission with UNISON and other recognised

trade unions in January.

34 Trade unions met with Mr Bunt in January 2013 to discuss the unions' concerns with the budget. This meeting was noted, at a CJCC meeting on 14 January 2013, to have been very helpful (p.382(xviii)).

35 On 25 February 2013, the Respondent's Assembly met and considered a budgetary report from Mr Bunt (pgs.672 to 682). The assembly approved the report and the budget and approved a proposal to pay its employees the living wage. Mr Bunt's report said that, in fact, the 2013/2014 Central Government finance settlement provided the council with a higher than expected funding in 2013/14, resulting in a forecast of £5.2m surplus. However, the funding for 2014/15 was worse than expected and, including the 2013/14 surplus, a budget gap of £1.5m would still exist at the end of 2015 (p.674).

36 A further CJCC meeting was held on 18 March 2013, when a budget update was provided. Mr Farrant, Chief Executive, met with trade unions to discuss the budget on 8 April 2013 (pgs.706 to 707). Following this meeting, Mr Clarke, from UNISON, wrote to Mr Farrant on 29 April (pgs.711 to 712) Mr Clarke pointed out that there appeared to be a surplus on the accounts, rather than a deficit. He said that other London Boroughs with a higher cut in government grants had made fewer redundancies and that London Borough of Barking and Dagenham appeared to have been over zealous in their cuts. Mr Clarke questioned the Respondent's increase in reserves and said that early payment of debt was not a priority at the expense of valued staff and services. He asked whether the Respondent could deliver a balanced budget and have a freeze on that year's envisaged redundancies.

37 Mr Farrant replied on 9 August 2013 (p.729). He said that the Respondent's approach to the budget had been to seek a two year planned approach to reducing financial commitments, utilising reserves where appropriate, but recognising risks going forward. He said that central government cuts had been weighted towards 2014/15, rather than 2013/14, combining to a larger than anticipated surplus for 2013/14. Mr Farrant commented that, as a result, no further savings would be required in 2014/15. He said that there would be a recurring budget deficit of £1.45m in 2014/15 which the Assembly had agreed would be funded from the council's reserves for that one year. Mr Farrant said that the council had, therefore, with a small call on reserves, an affordable and deliverable budget over the two year period 2013/2015. Mr Farrant said that, in December 2012, the Chancellor of the Exchequer had confirmed that total government spending in 2015/16 and 2016/17 would continue to reduce at the same rate as in the previous spending review. He said that the council faced further significant challenges to balance the budget in 2015/16, probably in the order of a further savings requirement of 15 to £20m. Mr Farrant said that it was important that the council had the minimum level of reserves to protect it from heightened financial risk in future years. The minimum general fund level required had been set at £15m and currently stood at £17.45m. Mr Farrant said that within the vast majority of the council's services were provided in-house and a major cost element was staffing, so that it was inevitable that the need to make savings would often result in redundancies.

38 On 30 September 2013, the Claimant's colleague, Mamta Toohey, presented a monitoring report to the Jobs and Enterprise Board. An update on the Sanofi site was

presented by Mark Bass, who said that discussions were underway with potential purchasers. Ms Toohey's monitoring report also referred to the Sanofi site (p.761).

39 On 20 November 2013 Mr Harley held a consultation meeting for the Economic Development and Sustainable Communities Group. He gave a consultation report to all staff in the Group on the same day. The Claimant attended the consultation meeting. Mr Harley's consultation report proposed a number of changes to the staff structure of the Group. Mr Harley proposed to delete a vacant Business Relationship Manager post and a vacant part-time Principle Regeneration post. He also proposed to delete a vacant Apprentice post, but to create a new HRA-funded Housing Regeneration Support Officer post, to support the delivery of estate renewal and new build housing projects. Mr Harley said this proposal had already been implemented.

40 Mr Harley said that the Barking Riverside Coordinator role was increasingly different from the Major Housing Projects Team and was more aligned to the Town Centres and Economic Development Team, given that its key focus was on unlocking growth. He therefore proposed to move that post into the Town Centres and Economic Development Team. Mr Harley said that, as a result, a new post of Principal Regeneration Officer would be added to the major Housing Projects Team, with a new job description to support and project manage "new build". Mr Harley proposed to delete the post of Principal Regeneration Officer from the Town Centres and Economic Development Team and to delete three PO4-PO6 posts in the same team, but create two new PO6 posts, with new job descriptions, to reflect revised team priorities. He said:

"This clearly reduces the Town Centre and Economic Development team's capacity to deliver, although it does align the team more closely with the level of resources of the Major Housing Projects team which has external funding"

41 Mr Harley attached organisational structure charts, showing the Group's structure before and after the restructure. He said that not all job descriptions in the Group were up to date and that, for the purposes of assimilation, a list of duties would be agreed between staff and their manager, where relevant. Mr Harley undertook to circulate the proposed new job descriptions before the end of the week. Mr Harley said that the implementation of the proposals would follow the council's agreed redundancy procedure and assimilation process; he advised where this could be found on the Respondent's HR portal. Mr Harley said that, given the move from 3 PO4-O6 posts to two PO6 posts, there would potentially be at least one redundancy of a Senior Regeneration Professional. He said that the assimilation process would determine whether those employees whose posts were to be deleted should move into posts in the new structure, by identifying where there was a substantial overlap between the duties in the old, and new, posts. Mr Harley stated that matching would be against the duties detailed in the new job description, only. He continued:

"Once the matching process has been completed, details of the proposed assimilations will be presented to employees along with details of the arrangements for applying and/or making representations or appeal."

42 Mr Harley said that, following publication of the outcome of the matching exercise, employees would have the right of appeal against inclusions or non-inclusion

on the assimilation list and that appeals needed be submitted to the Head of Human Resources within 10 working days of the notification of the decision, with reasons for the appeal. He set out the process under paragraph 22 of the Respondent's assimilation procedure. Mr Harley advised, in his report, that where there was a 65% or more match, individuals would normally be assimilated directly into the new post; and where two or more employees were similarly matched, selection would be by competitive interview. Where there were clear similarities between the old and new job descriptions of at least 50%, but less than 65%, the posts would be ring-fenced and selection would be by competitive interview.

43 Mr Harley set out the financial analysis of his plans, showing how £240,000 would be saved from the Economic Development Team budget. The salary reduction envisaged was £124,720. Mr Harley said that there were options for attracting external project income, but this would be problematic if it was one off and would not prevent the need for salary savings. Mr Harley concluded:

“The purpose of this report is to consult with those affected by its proposals and their trade union representatives in a fair and meaningful way. In order to do so, it is incumbent upon the staff affected to respond to management's proposals and give their views and counter proposals. It is possible to do so on an individual basis, or as part of a group, or through your trade union representatives, by email or by requesting meetings to discuss the issues.”

44 Mr Harley set out a timetable for the changes. In the timetable, the period 20 November to 20 December was stated to be for informal and formal consultation meetings, including agreeing job descriptions or a list of duties, explaining the process to be followed and selecting employees and for assimilation and appeals. The timetable said that, on 20 December, the consultation would end, taking on board comments and responding to any alternative proposals put forward. The indicative timetable showed that appeals against inclusion or non-inclusion on the assimilation list would be completed by 10 February and that assimilation interviews would take place between 12 and 17 February (p.96).

45 On 19 December 2013, the Claimant sent a written response to Mr Harley's restructure consultation (p.108-109). The Claimant said that there was a plan to merge her Division with Regeneration at Thurrock Borough Council and that Thurrock had recently advertised three new regeneration posts. She said that it would be hoped that her own team would go into a merger intact and that, therefore, the timing of the proposed redundancies was inappropriate. The Claimant said that she was concerned that, after three successive years of cuts, there would only be 4 posts remaining in the Town Centres and Economic Development team, which she considered would barely be viable. She referred to UNISON analysis of the cuts in the council more generally, showing heavy redundancies compared to other boroughs. She said that she would expect Jeremy Grint to distribute any cuts within the department as fairly as possible, rather than keep cutting her group, specifically her team.

46 On 22 December 2013, Suzanne Johnson, the Claimant's manager, sent the Claimant a list of her current job duties, following discussion of this with the Claimant. Ms Johnson said that, if the Claimant had any amendments, then she should discuss those with Mr Harley while Ms Johnson was away (p.111a). The Claimant did not seek

to amend the list of job duties further.

47 On 6 January 2014 Mr Harley replied to the Claimant and copied his email to Mr Farrant, Mr Grint, UNISON Branch Secretary and Mr Watson from HR. In his letter, Mr Harley said that the new Graduate Trainee role and the new Support Officer role that the Claimant had referred to in her letter were both shown in the before structure and both had people already in place (Alex and Rachel). He said that the first of those posts had become vacant in 2013 when an employee called Del had left, but that there had been no plans to delete that post, and that the salary scale of the post meant that no existing staff who might be made redundant would be interested in it. It had been decided to refill the post as soon as possible. Mr Harley said that there was no current proposal for a merger of the Respondent and the Thurrock Regeneration teams and, therefore, the fact that Thurrock were recruiting additional Regeneration staff was not something he could take into account in addressing the £240,000 savings which had already been agreed by members of the council. Mr Harley said that, while the Town Centres and Economic Development Team had been very effective in securing millions of pounds of external funding over the years, unfortunately it was rare for funding streams to cover the cost of existing staff. Mr Harley said that the Claimant's letter did not set out any alternative ways of achieving the savings required from those set out in the restructure consultation report and that it was likely that there were to be more savings required in the years ahead. He said that, given that the Claimant had not proposed any alternatives, he could not see any way of amending his report to address the Claimant's concerns and still secure the savings he was obliged to meet.

48 In the minutes of a Skills Jobs and Enterprise Board meeting on 30 September 2013, it was noted that £18,000 was unallocated in the budget. Mr Harley explained to the Tribunal that the £18,000 related to the financial year 2013/2014 and could not be carried forward from one financial year to another, so that he could not take it into account in achieving the savings he needed to achieve in the financial year 2014/2015. Mr Harley also explained that Alex Jeremy had been recruited to a PO1 post, which was a junior role which Mr Harley considered was required. He explained that Keeley, a Business Administrative Apprentice, who helped with filing and photocopying, was paid for directly from the general fund, so that funding for her post could not be made available to retain other posts in the team. Mr Harley also explained that, while an extra £150,000 had been obtained from the HRA, which covered the salaries of the major Housing Projects team, the HRA funding was ring-fenced for housing projects and for the use of council tenants. He further explained that, while s106 funding for public realm improvements could be obtained, there were specific agreements about what the money could be spent on. Morrison's supermarkets had provided s106 funding for the council, but Mr Harley said that Morrison's would not sign s106 funding to fund existing council staff salaries.

49 At a Skills Jobs and Enterprise Board meeting on 27 January 2014, Mamta Toohey presented another project monitoring report referring to the Sanofi site (pgs.761 to 786). She also presented a London Enterprise Panel priorities report, which included science and technology priorities for London encompassing aims such as ensuring a competitive environment for science and technology firms and investors and positioning London as a world leading hub for science, technology and innovation. Her report included priorities for small and medium enterprises, such as access to finance and increasing trade and export. The report also dealt with European funding

for the period 2014/2020. It referred to 748.6m Euros being available in London (p.787).

50 On 3 February 2014 Mr Harley sent the result of his assimilation exercise to the Claimant, Shamim Akhter, Mamta Toohey and Peter Remedios. Mr Harley had completed the assimilation exercise on 30 January 2014. Mr Harley scored Peter Remedios as an over 65% match to the Senior Regeneration Professional (Barking Riverside Coordinator) post. None of the Claimant, Ms Toohey or Ms Akhter achieved a 65% match to that post.

51 Barking Riverside is a regeneration site on the River Thames which has proposals for 10,800 homes, for schools, open spaces, shops and other facilities. Barking Riverside Ltd was a joint venture between the Greater London Authority and Bellway Homes (which was later replaced by London and Quadrant) and they are the lead party in the development. The Respondent, nevertheless, is required to support the delivery of the development and wishes to ensure that its own objectives for the site are achieved. The Barking Riverside Coordinator role was intended to manage the interface between the site developer and all council departments, including education, parks and waste management. Mr Harley told the Tribunal that the role was primarily about ensuring that the development progresses in line with the council's vision for the site. He said that the post was in a specialist area of work, requiring good knowledge of planning and development and was, in fact, distinct from other roles in the group. Mr Harley said that Peter Remedios had been carrying out that role for some time and that his high percentage match, compared to other members of the group, was therefore not surprising, in that the new role was very similar to what Mr Remedios had been doing before the assimilation process.

52 The Claimant told the Tribunal that she held a PRINCE 2 project management qualification and that her whole Group had had links to the Barking Riverside project. The Claimant said that the project was benefiting from infrastructure development such as the extension of the Gospel Oak Line to Barking and the extension of the East London Transit Network, managed by the Claimant.

53 Mr Harley had assessed Ms Akhter, the Claimant, Mr Remedios and Ms Toohey against, both, the Senior Regeneration Professional (Barking Riverside Coordinator) post and the Senior Regeneration Professional posts. He assessed Ms Akhter, Ms Toohey and the Claimant as having a less than 50% match to the Senior Regeneration Professional (Barking Riverside) Coordinator post, but an over 65% match to the Senior Regeneration Professional post. He completed assimilation matrices. He assessed the Claimant as having only a 38% match to the Barking Riverside Coordinator post, but a 78% match to the Senior Regeneration Professional post (p.115a to 115f). Peter Remedios was assessed as having an 82% match to the Barking and Riverside post, but as having an under 50% to the Senior Regeneration Professional pos. Ms Akhter was assessed as having a 31% match to the Barking Riverside Coordinator post (p.115p). Ms Toohey was assessed as also having a 31% match to the Coordinator post (p.115v).

54 Mr Harley decided that Peter Remedios should be assimilated directly into the Senior Regeneration Professional (Barking Riverside Coordinator) post, without a competitive interview, as he was the only employee who had a 65%+ match to the

Barking Riverside Coordinator post. The post was a PO5 post.

55 Clauses 9 and 18 of the Respondent's Redundancy Procedure state, "The matching process will normally commence with the most senior post in the new structure first with the remaining posts appointed to in order of seniority." And, "The process of assimilating employees into posts will begin with the most senior post first."

56 The Claimant contended that Mr Harley failed to follow the Respondent's procedure when he assimilated Mr Remedios to the PO5 Coordinator role before concluding the process for appointing to the PO6 Senior Regeneration Professional posts. She said that this was important because, if she had known the outcome of the PO6 appointment process, then she would have been more likely to challenge the assimilation scoring for the PO5 Coordinator role and to seek to be appointed to it. The Claimant argued that the Respondent's policy was deliberately drafted, for a very good reason: senior employees would have the chance to be appointed to lower grades if they were not successfully assimilated to higher grades, but would be unlikely to seek appointment to lower grades before appointment to higher grades was determined.

57 Mr Harley and Mr Watson both told the Tribunal that there was no real difference in the Senior Regeneration Professional PO6 grade and the Coordinator PO5 grade, so that it was permissible to carry out the assimilation processes in relation to them simultaneously.

58 Following his assimilation scoring, Mr Harley concluded that, as 3 people had an over 65% match to the two Senior Regeneration Professional posts, all 3 would be invited to a competitive interview.

59 Mr Harley sent the assimilation scores to the employees on 3 February 2014. When he did so, he said that he was happy to discuss his assimilation exercise and that he would try to organise interviews for around 18 February. He did not restate the employees' right to appeal against the assimilation process (p.114).

60 On 11 February 2014, Mr Harley invited the Claimant, Ms Akhter and Ms Toohey to a selection process to be carried out on 18 February 2014. He said that the process would involve an unseen test between 10am and 12pm that day and interviews in the afternoon. The selection panel was comprised of Mr Harley, Ms Johnson and Rachel Blake, Housing Revenue Accounts Business Manager. Ms Blake was intended to be the independent person on the panel. She did not know the Claimant and did not know that she was a union official.

61 Mr Harley devised the written test along with Ms Johnson. He also devised proposed questions and model answers to them. It appears that Mr Harley had the primary input into those. He sent them to Ms Blake on 17 February 2014 at 17:14 and said he might adjust them overnight (p.117).

62 The written exercise required the candidates to produce a short briefing report for the council's Growth Board (or Living and Working Board), setting out key issues to take into consideration, to enable it to make a recommendation to Cabinet on whether the council should acquire a site which had previously belonged to a multinational pharmaceutical company called Sanofi. The exercise said that the site contained

superb laboratory and science facilities and that there had been examples elsewhere in the country where such facilities had been converted into multi-occupation science parks. The exercise said that the Greater London Authority had decided not to purchase the site, but that there was a narrow window of opportunity for the council to purchase the site, otherwise Sanofi would demolish the buildings and sell the vacant land. The test said that the exercise required no previous knowledge of the Sanofi site and that it was focused on the candidate's ability to identify and assess the key issues affecting successful delivery of a Regeneration or Economic Development Project, presenting the issues in a clear, concise report, aimed at moving the project forward and reaching a decision (p.118).

63 Mr Harley, along with Ms Johnson, devised a model answer. The model answer said that Mr Harley and Ms Johnson would want to see reference to matters including how the proposal fitted in with the council's growth strategy and council priorities, as well as Regional and Government European policies, the reasons that the Greater London Authority had turned the site down, recognition of the importance of the company's history in the Borough and political implications, understanding of the demand and supply for science facilities in the council area and wider London area, assessment of different options scenarios including worse case scenario, including some form of risk assessment table setting out key risks (reputational, financial, legal governance resources etc) and more specific detailing of risks relating to demand and occupational levels of the site, event levels, increase costs, an indication of the further work needed, an assessment of the boost to the local economy, supporting sectors, aspirations for young people and high quality jobs. The model answer said that the report should set out a project management proposal for the way forward, refer to consultation and stakeholder engagement, and should address who would operate the site, identifying procurement issues.

64 The model answer said that there should be discussion of funding sources and staff and budget resources. It also said that the briefing note should be a concise report, and should address the key points clearly, should set out clear recommendations, be well structured and organised logically, have excellent written communication style, should be easy to read and should capture key information quickly (p.119).

65 In addition, Mr Harley devised interview questions and model answers. The interview questions addressed the candidate's experience (questions 1 to 3), relationships (question 4), equalities and diversity (question 5), skills (question 6) and management of people skills and finance (questions 7 and 8).

66 The Claimant, Ms Akhter and Ms Toohey attended the interviews on 18 February and all the panel members took notes of their answers. The panel members discussed the candidates' performance immediately after the interviews. The panel used a matrix which scored the candidates on whether they had fully met the criteria, partially met, or had not met them.

67 The panel considered that Ms Toohey had fully met all the criteria of "experience", "relationships", "equalities and diversity", "skills" and "management" (pgs.205 to 209). The panel considered that the Claimant partially met "experience", "relationships", "skills" and "management". She scored four partially met out of five

categories (pgs.210 to 214). The panel considered that Ms Akhter fully met “experience,” “relationships” and “management,” but partially met “equalities and diversity” and “skills”. Ms Akhter therefore had two partially met criteria (pgs.200 to 203). Each panel member told the Tribunal that, therefore, they considered that Ms Toohey had performed best at interview, Ms Akhter second best, and that the Claimant had not performed as well as her colleagues.

68 The panel members were cross-examined on why Ms Akhter had fully met the “experience” criteria, when the panel’s notes on her answer to question 1 was that her response was acceptable but “poor” in relation to “the challenges to achieving Regeneration and Economic Development priorities in the council area and how to overcome these”. Each panel witness said that the “experience” criteria were judged over three questions, questions 1, 2 and 3 and, overall, in her answers to all 3 questions, Ms Akhter demonstrated that she did fully meet the criteria.

69 Ms Johnson and Mr Harley marked the written tests, against a total of 19 points. They marked Ms Toohey as having scored 10 out 19, Ms Akhter as 7.5 out of 19 and the Claimant as 6.5 out of 19.

70 Both Ms Johnson and Mr Harley were cross-examined about the Claimant’s low scores. It was put to them that the Claimant had, for example, addressed demand and supply in her report, but she had been given no marks for having done so (pgs.124 and 217).

71 Mr Harley explained that the Claimant had not addressed supply of rival science sites, or demand for science sites. She had simply said that the Sanofi site existed. Mr Harley was cross-examined on the fact, in particular, that the Claimant had been given very low marks for the presentation of her report. Mr Harley said that the Claimant had not structured her report so as to provide clear headings and to make it easy to understand. He said that the Claimant had not clearly set out what further work needed to be undertaken.

72 Mr Harley was cross-examined about not giving the Claimant marks for assessing “risk” when she had mentioned barriers to growth (p.125). Mr Harley said that the Claimant had addressed this in very generic terms - about obstacles to growth in the local economy; her report had not specifically addressed the investment risks in relation to the site itself.

73 Mr Harley was further questioned about the fact that Ms Toohey had attended meetings where the Sanofi site had been discussed and had presented reports which related to the Sanofi site. It was suggested to Mr Harley that this gave Ms Toohey an unfair advantage with regard to the written test. Mr Harley said that he wanted the written test to relate to the work that the candidates had to do and that it would be practically impossible to devise a test which would not touch on work that the candidates had, in fact, undertaken. In any event, he said that the point of the report was not to test candidate’s knowledge, but to test their ability to put together a report analysing what were the key issues which needed to be addressed in order for a recommendation to be made.

74 Ms Johnson and Mr Harley were also cross examined about the written test

marks they gave the other candidates. It was put to Mr Harley that he was generous to Ms Toohey, which was shown by the fact that he recorded that she had “just” satisfied the criteria in several places. Mr Johnson explained why he considered that Ms Toohey had addressed the relevant issue. He was also questioned about why he had given Ms Akhter marks for addressing risks when he had said, “Risks aren’t specifically referred to however a number are raised.” Both Mr Harley and Ms Johnson said that Ms Akhter had addressed risk in her report under her paragraph, “Key Issues for Consideration.” In that paragraph, Ms Akhter said that the Council would need to consider, “The cost of acquiring the land at a significantly discounted rate from market value – in the current economic conditions is the Council in a position to buy the land even at a discounted rate... Capital costs that could be exhaustive to meet fit out costs to make the site a welcoming and attractive place for businesses to operate.. the potential loss of the site and uncertainly which could impact on the local area and its future growth.”

75 After the panel had completed their discussion of the candidate’s interview performance, they had agreed that Mr Harley and Ms Johnson would mark the candidates’ written test. They had agreed that they would meet again if the candidate’s written test results were very different from their interview test results. The written test results were not different to the interview test results and the panel did not meet together again.

76 Ms Blake met Ms Johnson to sign off the interview notes. The date of her signature is 21 February 2014, albeit one of the dates appears to have been changed by Ms Johnson. Mr Harley and Ms Johnson told the Claimant, on 21 February 2014, at a face-to-face meeting, that she had been unsuccessful in securing one of the two positions. She emailed Mr Harley on 24 February, asking for all the documentation, including the test papers of the other candidates (p.219).

77 On 25 February 2014 (p.221), Mr Harley responded to the Claimant, saying that the Claimant had been provided with the model answers for the test and the interview questions. He said that the model answers had been produced in advance of the test and interview and that he would set up a meeting to go through detailed feedback and would invite the Claimant’s union representative and Human Resources to attend that meeting. Mr Harley said that he had been advised that he could not let the Claimant have other people’s tests or interview notes, but that he would explain during the feedback session how her answers related to the points in the model answer and give details about how other interviewees had responded.

78 On 26 February 2014, the Claimant replied, saying that her union representatives were not available for a meeting. She made a freedom of information request in relation to the test documents.

79 On 5 March 2014, Mr Harley emailed the Claimant again, to confirm if she could attend a rescheduled feedback meeting (p.225). He said that he could not provide the Claimant with the notes or test of other candidates, but could explain how her answer differed from the model ones and how the other candidates had responded. The Claimant did not attend a feedback meeting with Mr Harley.

80 On 13 March 2014, Mr Harley sent a draft “at risk” letter to the Claimant, giving a further 3 suggested dates for a feedback meeting (p.257). The Claimant never agreed

to meet for a feedback meeting.

81 On 17 March 2014, Mr Harley sent a letter to the Claimant telling her that she was at risk of redundancy and that she would be placed on the council's redeployment register. The Claimant was added to the council's internal electronic systems so that she could have access to redeployment opportunities (pgs.258 to 259).

82 On 28 March 2014, Peter Watson, from Human Resources, wrote to Mr Clarke at UNISON, saying that it was only permissible for the Respondent to release anonymised scoring of the interviews and test. He said that the interview notes might contain personal information and that the information in the notes might mean that the individual was easily identifiable, so that the notes should not be disclosed according to Data Protection rules.

83 On 1 April 2014, Mr Harley sent the Claimant anonymised selection decision notes, showing the scores of each candidate and indicating whether they had met the criteria (p.274). It also set out the scores that had been given to the candidates for the written test.

84 The Respondent's Redundancy Procedure provides that, ".. employees do not have any right of appeal against the outcome of a ring-fenced interview.., " (p. 392, paragraph 12).

85 Mr Watson told the Tribunal that this prohibition on remarking was agreed with the unions because, in a large ring-fencing exercise, there could potentially be successful appeal, followed by a different (successful) appeal, followed by yet another appeal, from different employees, all contesting the most recent outcome of the same ring fencing process.

86 On 2 May 2014, Mr Harley sent the Claimant notice of redundancy, giving her 12 weeks contractual notice and saying that her employment would come to an end on 25 July 2014. He confirmed that, during the Claimant's period of notice, the Respondent would continue to work with the Claimant to attempt to find suitable alternative employment through the Respondent's redeployment process (p.275).

87 The Claimant appealed against the decision to dismiss her on 15 May 2014 (p.277). She submitted a statement of appeal on 25 June 2014 (p.282).

88 Before the appeal, Mr Harley added his comments into the Claimant's statement of appeal, disagreeing with and responding to each of her points. That was the document which went before the appeal panel, not the Claimant's original statement.

89 In her appeal, the Claimant said that she had not been allowed to see how the interviews and tests were scored. She said that she had discovered that her colleague's husband had been working in the legal department and had been responsible for co-writing the report on the Sanofi site. She said that, in all possibility, it was a subject of many conversations between them and the Claimant felt it was a subject deliberately selected because she had no involvement with it during her day-to-day work.

90 In his responses, Mr Harley said that the subject of the test was not known to any of the candidates before it started and that, while one of the candidates' husband did provide the legal comments on the report, he did not co-write the report. Mr Harley said that the test did not require knowledge of the site; it was a test of skills and general regeneration knowledge.

91 The Claimant produced a further written presentation for the appeal, which Mr Harley did not edit (p. 345).

92 At the appeal hearing on 8 July 2014, the Claimant again said that one of the candidates had had an advantage because her husband was in legal services. The panel said that they would not be able to make any professional judgment of one test against the other. The panel was advised by Michelle Coleman, HR manager. Ms Coleman asked the Claimant questions about her contention that the Respondent had deliberately selected the Claimant for redundancy and that she had been painted as a militant activist, so the Respondent wanted to silence her (p.359).

93 Mr Harley told the panel that Ms Toohey's husband had not been involved in writing the report on the Sanofi site.

94 On 9 July 2014, Michelle Coleman wrote to the Claimant, saying that the Personnel Board had fully and carefully considered the Claimant's grounds of appeal as set out in her written appeal statement and all the evidence presented before and during the hearing. She said that the Personnel Board had concluded that the Claimant's dismissal was fair because the redundancy procedure had been followed correctly; that the assimilation process which had been undertaken and the interview process which was followed were both in line with the council's procedures; that David Harley had offered to meet the Claimant on several occasions to provide detailed feedback on her interview, but that the Claimant had declined the offer; that consultation had taken place throughout the restructuring process and members could find no evidence to support the Claimant's assertion that she had been dismissed due to trade union activities (p.387).

95 In evidence to the ET, Mr Harley denied that he had made any of the decisions in the redundancy process because of the Claimant's trade union activities. Indeed, he said that he was sympathetic to UNISON's opposition to government cuts in funding. He told the Tribunal that, when Ms Johnson resigned from her post, he decided not to recruit a replacement for her, to ensure further cost savings.

96 Mr Harley told the Tribunal that, because Dubravka Polic was wholly engaged on HRA and her existing duties were not comparable with those of the other 3 Senior Regeneration Professionals, Ms Polic was not included in the pool for redundancy selection. It was not clear from his evidence whether he specifically considered including Ms Polic in the pool, at the time, rather than not considering her inclusion at all, because he perceived her role not to come within the ambit of the restructure.

97 Mr Harley agreed, in evidence, that he had not personally assisted the Claimant with redeployment, but had relied on placing the Claimant on the Council's redeployment register as satisfying the Respondent's duty to look for alternative work.

98 The Respondent operates a central register of all vacancies. Redeployees at risk of redundancy are given access to new vacancies 7 days before the vacancies are advertised and are also given assistance in looking for work (p270).

Relevant Law

99 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

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

101 Redundancy is defined in *s139 Employment Rights Act 1996*. This provides, so far as relevant, “ ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—...(b) the fact that the requirements of that business— (i) for employees to carry out work of a particular kind... have ceased or diminished or are expected to cease or diminish.”

102 By *s152 Trade Union & Labour Relations (Consolidation) Act 1992*, for the purposes of the Unfair Dismissal parts of the *Employment Rights Act 1996*, the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee “(a) was, or proposed to become, a member of an independent trade union.. b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.”

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

104 *Williams v Compair Maxam Ltd* [1982] IRLR 83 sets out principles which guide Tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and collective and individual consultation, including consultation on these matters (paragraphs [18] & [19]):

“.. there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent trade union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment..
2. The employer will consult with the union as to the best means by which the desired management result can be fairly achieved and with as little hardship to the employees as possible. In particular, the employer will seek to agree with

the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely on the opinion of the person making the selection but can be objectively checked against things such as attendance record, efficiency at the job, experience or length of service.
4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.”

105 Consultation with the employee must be fair and genuine and, so far as possible, conducted in the way suggested by Glidewell LJ in *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price*, by giving those consulted a fair and proper opportunity to understand fully the matters about which they are being consulted and to express their views on those subjects, and thereafter considering those views properly and genuinely, *Rowell v Hubbard* [1995] IRLR 195.

106 In *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price*, Glidewell LJ, “[24] It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views of the person or body whom he is consulting. ... Fair consultation means: (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; (d) conscientious consideration by an authority of the response to consultation.”

107 *S188 TULR(C)A 1992* sets out the standards required of collective consultation. *S188(2)* provides, “(2) The consultation shall include consultation about ways of – (a) avoiding the dismissals, (b) reducing the number of employees to be dismissed, and (c) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.”

108 In *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area)* [2008] ICR163 it was held that, where dismissals were inextricably linked to the closure of a mine, a duty to consult regarding the closure would arise.

109 In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

110 There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding* [1980] IRLR 255. In that case, an unskilled worker in a factory could easily have been fitted into work she had already done at the expense of someone who had

been recently recruited. Equally, however, there is no principle that the employer is never justified in limiting redundancy selection to workers holding similar positions to the claimant, *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55, EAT.

111 A Tribunal has a duty to consider with care the employer's reasoning in its selection of the redundancy pool, to determine whether the employer had genuinely applied his mind to the issue of who should be in the pool; where the employer had done so, it would be difficult, but not impossible, to challenge his decision. The Tribunal's function, however, is only to decide whether the decision was in the range of reasonable conduct a reasonable employer would have adopted, *Capita Hartshead Limited v Byard* [2012] ICR 1256.

112 Regarding consultation on and review of the selection process, an employee must be given a fair and proper opportunity to understand the matters on which he is being consulted and to express his views on those subjects, *Pinewood Repro Ltd v Page* [2011] ICR 508.

113 In *John Brown Engineering Ltd v Brown* [1997] IRLR 90, EAT, Lord Johnston said, "... in each case what is required is a fair process, where an opportunity to contest the selection of each individual is available to the individual employee.. it also has to be reasserted that it is no part of the industrial tribunal's role in the context of redundancy to examine the marking process as a matter of criteria under a microscope; nor to determine whether, intrinsically, it was properly operated. At the end of the day the only issue is whether or not the employers treated their employees in a fair and even-handed manner." Where, however, there is glaring inconsistency in the scoring, or bad faith, a finding of unfairness can be made, *Mercy v Northgate HR Ltd* [2008] ICR 410.

114 In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296; *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70. A redundant employee should be offered an available vacancy even if it is a lower salary or is of lower status to the post from which he is being made redundant, *Avonmouth Construction Co Ltd v Shipway* [1979] IRLR 14.

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

Discussion and Decision

Redundancy Situation and Reason for Dismissal

116 I decided that the Respondent had shown that redundancy was the reason for the Claimant's dismissal. Her dismissal took place when the Respondent council was undertaking a large-scale restructuring and cost-saving exercise as a result of substantial cuts to local government budgets. Mr Harley was required to make £240,000 of savings from his Group and made a number of proposals designed to achieve this, including deleting 3 PO4-PO6 posts and replacing them with 2 PO6 posts. The Claimant and her 2 colleagues, Ms Akhter and Ms Toohey, were not assimilated to any of the posts in the new structure were underwent a competitive selection process.

The Claimant was decided to have scored the lowest of the candidates in the process and was selected for redundancy. The panel who carried out the selection included at least one person, Ms Blake, who was unaware of the Claimant's trade union membership and status. Furthermore, I accepted Mr Harley's evidence that he did not make any decision in the redundancy process because of the Claimant's union activities and that he was, in reality, sympathetic to UNISON's opposition to local government funding cuts. I found him to be credible regarding this.

117 I concluded that there was a genuine redundancy situation. There was, effectively, a reduction in Senior Regeneration Professional posts in the Respondent's Town Centres and Economic Development Team, from 3 posts to 2: there was a reduction in the Respondent's requirements for employees to carry out work of a particular kind.

Consultation

118 I decided that the Respondent did carry out adequate consultation, both collective and individual.

119 The Respondent provided information to the unions, before the consultation period even started, on the rationale for budget cuts. On 10 October 2012 Mr Bunt gave a presentation to unions, setting out the Respondent's justification for proposing substantial budget cuts and the proposed timescale for consultation.

120 On 23 October 2012, the Respondent sent trade union convenors and regional officials notice, under *s188 Trade Union and Labour Relations (Consolidation) Act 1992*, of the Respondent's intention to make significant redundancies. The notice attached a summary of the proposals and said that the proposals would be considered by the council's select committees during November and December 2012. The notice said that 285 posts would be deleted over the two years. Also included, with the *s188* notice, was a "Summary of Savings Options 2013/2014 and 2014/2015" document, setting out lists of redundancies proposed in each council area (p.452 to 456). The spreadsheet stated that there were 18 full-time equivalent posts in the Economic Development and Sustainable Communities Team and there were three potential redundancies from the team, giving proposed savings of £375,000 in the year 2014/2015. In addition, the HR1 advance notification of redundancies pro forma from the Insolvency Service (p.54(3)), was provided to the unions. The HR1 set out the number of possible redundancies in each occupational group at the Respondent council and said that the method of selection for redundancy would be using collective agreements - the council's redundancy, redeployment and assimilation procedures.

121 The period for collective consultation was due to end on 30 November 2012. The Respondent invited unions and staff to submit any comments and proposals for making savings via an email address budget@lbbd.gov.uk, set up for the purpose. When the Respondent's Cabinet met on 19 December 2012, it was advised that feedback from the consultation had been taken into account in the development of final proposals (p.535-536). The Respondent also produced a Response to Budget Challenge Consultation Report 2013/2014, Appendix XX of which set out all the comments made in the consultation exercise and the Respondent's response to them (pgs.609 to 648). At p638, the Appendix said that UNISON had submitted wide-

ranging concerns over the future of the Youth Service and the Respondent's response was that a Divisional Director had undertaken to discuss the submission with UNISON and other recognised trade unions in January.

122 During the consultation period, the Respondent also published a report by Darren Henaghan, Housing and Environment Director, for consideration by the Living and Working Select Committee on 19 November 2012. The report detailed the savings which were proposed in each of the employment areas covered by the Living and Working Select Committee, including likely redundancies.

123 The CJCC met during the official period of collective consultation, on 19 November 2012. Mr Henaghan said that the Living and Working Select Committee was being held that night and that comments from the committee would be collated for the budget recommendations which would go to the Respondent Cabinet meeting (p.382(x) to (xiv)). The Living and Working Select Committee did meet on 19 November and considered Mr Henaghan's report. It agreed some amendments to the proposals for budget cuts to the Claimant's Economic Development and Sustainable Communities Group (p.54a to q).

124 Just before the end of the official consultation period, on 29 November 2012, UNISON wrote to Mr Farrant, setting out its comments and concerns regarding the proposed cuts and the consultation process itself. On 13 December 2012, Mr Farrant replied to UNISON's letter of 29 November 2012 (p.511), answering each point and question in it.

125 A further EJCC meeting was held on 10 December 2012. UNISON produced a report, recommending that the committee take account of UNISON's report and take account of all staff and union suggestions in the delivery of budget savings, rather than looking primarily at staff cuts. Mr Farrant said that input from trade unions would be welcome to identify practices or opportunities that could be used to improve or continue the delivery of services, as well as ideas and how to maximise current budget and revenue. Mr Henaghan offered to meet unions on issues such as commercial charges and potential exemptions. Voluntary redundancy was discussed and Mr Rayson explained why the Respondent had reservations about further voluntary redundancies.

126 The meeting agreed that the unions would contact Mr Bunt to arrange finance training for them; that the unions would contact the appropriate corporate director with any service specific questions and suggestions; and that Jonathan Bunt would arrange to meet the unions to discuss the unions' concerns with the overall budget (p.382(lvi)).

127 The trade unions did meet with Mr Bunt in January 2013 to discuss the unions' concerns with the budget. This meeting was noted, at a CJCC meeting on 14 January 2013, to have been very helpful (p.382(xviii)).

128 All these meetings and discussions with the unions took place before 25 February 2013, when the Respondent's Assembly approved Mr Bunt's budget report (pgs.672 to 682).

129 I decided that, while the official collective consultation period lasted until 30 November 2012, consultation with the unions continued after that date, in the EJCC

meeting on 10 December 2012, in the meetings offered to the unions with Mr Henaghan and Mr Bunt, specifically to discuss commercial charges and exemptions and the unions' detailed questions about the budget, and through written communications between UNISON and Mr Farrant. It is clear that the consultation encompassed the reasons for the savings proposals – the need to make redundancies at all.

130 The fact that the Respondent held meetings between the unions and these senior Council officers, allowing direct discussions on the unions' concerns and suggestions, is evidence of the Respondent negotiating directly with the unions before the Assembly approved the budget cuts.

131 The Respondent facilitated meaningful consultation between itself and the unions by offering the unions finance training.

132 I also concluded that the Respondent did take into account all the comments and suggestions it received during consultation period, demonstrated by its Response to Budget Challenge Consultation Report 2013/2014, and Appendix XX, which set out all the comments made in the consultation exercise and the Respondent's response to them (pgs.609 to 648).

133 It seemed to me that, while the Respondent was consulting with other stake holders during the consultation process, this did not mean that the Respondent was somehow failing to consult with the unions in the same process.

134 On the evidence, at least some changes were made to the proposals as a result of the consultation process, demonstrating that the consultation was meaningful. The fact that the Respondent did not alter its proposals in response to particular suggestions from the unions does not mean that the Respondent failed to consult the unions. It simply means that the Respondent did not ultimately agree to those particular proposals.

135 I also concluded that the Respondent conducted reasonable individual consultation with the Claimant, and her union representative, on the redundancy process which affected the Claimant.

136 On 20 November 2013, the Claimant attended a consultation meeting for the Economic Development and Sustainable Communities Group. Mr Harley gave all staff in the Group a consultation report the same day, setting out his proposals for changes in the Group staff structure. He described the assimilation process and employees' right of appeal against inclusion or non-inclusion in assimilation lists. He invited the staff affected to respond to management's proposals and give their views and counter proposals. He said that they could do this on an individual basis, or as part of a group, or by trade union representatives, by email or by requesting meetings to discuss the issues.

137 On 19 December 2013, the Claimant sent a written response to Mr Harley's restructure consultation (p.108-109); on 6 January 2014 Mr Harley replied to the Claimant, addressing and answering her points and questions.

138 On 22 December 2013, Suzanne Johnson, the Claimant's manager, sent the Claimant a list of her current job duties, following discussion of this with the Claimant. Ms Johnson said that, if the Claimant had any amendments, then she should discuss those with Mr Harley while Ms Johnson was away (p.111a). The Claimant did not seek to amend the list of job duties further.

139 I decided that Mr Harley's consultation meeting and report and his 6 January 2014 letter did include consultation when the proposals were still at a formative stage; adequate information on which to respond; adequate time in which to respond and conscientious consideration by Mr Harley of the Claimant's response to consultation. Mr Harley also made clear, in his report, that he was inviting consultation, which could take place with trade union representatives.

Assimilation Process

140 I concluded that the assimilation process was within the broad band of reasonable redundancy selection processes available to a reasonable employer. It seemed to me to be reasonable for an employer to adopt a process which sought to retain employees in jobs they were already undertaking, rather than putting all employees in a particular team, or Group, at risk of redundancy and requiring all to apply for the jobs which were still available. The latter course would be much more disruptive and time consuming and would risk disaffection and distress amongst a large number of employees.

141 I considered that Mr Harley allocated percentage scores to employees during the assimilation exercise on an objective basis, reviewing the tasks which the relevant employees had actually been undertaking, rather than those which were theoretically within their job descriptions. It is entirely unsurprising that Peter Remedios achieved a high percentage score for assimilation to a job he had already been substantially undertaking for some time; whereas the Claimant, Ms Toohey and Ms Akhter achieved low percentage scores for assimilation to the Barking Riverside Co-ordinator role, when the tasks they had, in fact, been undertaking had been only tangentially relevant to the Barking Riverside Co-ordinator post. The Claimant had been responsible for general infrastructure projects in the area, which would have benefitted the Barking Riverside Development as well as other council areas, but had not been directly involved in the Barking Riverside development in recent years.

142 The Respondent acted fairly by Ms Johnson discussing the Claimant's job duties with her and sending her the completed list, with an invitation to discuss and amend it further. The Claimant was told of her right of appeal in the consultation report.

Assimilation of Peter Remedios

143 I decided that the Respondent acted within the broad band of reasonable responses in assimilating Peter Remedios into the PO5 post of Senior Regeneration Professional. I accepted that the PO5/PO6 roles were broadly of the same banding. I accepted that it was reasonable for the Respondent to consider the assimilation into those posts at the same time, rather than adopting a sequential process, where there was little difference in the job grades.

144 Moreover, as I have said above, it was entirely foreseeable that Mr Remedios would be assimilated into the job he was mostly already doing, when others were not doing that job. The Respondent's published policy was designed to effect assimilation into the role in those circumstances.

Identification of Pool

145 I accepted Mr Harley's evidence that Ms Polić's job was funded from the Respondent's Housing Revenue Account and that she was part of Ms Coombs' team, whereas the Claimant, Ms Toohey and Ms Akhter's posts were funded from the Respondent's general fund. Ms Polić was wholly engaged on HRA work, in particular the Respondent's Gascoigne Estate renewal. I accepted his evidence that Ms Polić's job description, which was a generic job description for a Senior Regeneration Professional, was out of date.

146 I decided that it was reasonable for Mr Harley to include the Claimant, Ms Toohey and Ms Akhter in the pool for assimilation and selection because the Respondent had decided that it required fewer of their roles, not fewer of the housing roles undertaken by Ms Polić and members of Ms Coombs' team.

147 I decided that Mr Harley had reasonably considered the pool and who to include in the pool. He was restructuring the Town Centres and Economic Development Team and included the people who would be occupying the roles in it.

148 I accepted that there was no evidence that Mr Harley actively considered putting Ms Polić in the pool. However, I do not consider that, in order to apply their mind genuinely to the issue of pool, a manager is required actively to consider and then include, or exclude, all potential members of a pool. A manager can still genuinely apply their mind to the issue of pool, when they do not consider a particular employee for inclusion in the pool, because it is obvious that the employee is not doing the work which is to be reduced. I decided that Ms Polić was clearly not undertaking the work which was being reduced, so that it was reasonable for Mr Harley not to consider including her in the pool.

Choice of Written Test Advantageous to One Candidate

149 I concluded that choosing the Sanofi site as the subject matter of the written test was marginally advantageous to Ms Toohey because she had prepared a report which included some material relating to the Sanofi site and had attended meetings where some aspects of its future had been discussed. She may also have had some discussions with her husband about it because he advised the Respondent on legal aspects of a potential purchase of the site.

150 However, I accepted Mr Harley's evidence that it would be extremely difficult to devise a meaningful test which did not relate to any of the work that any of the candidates had previously undertaken. I also decided that the test was genuinely a test of the candidates' ability to analyse the issues which might arise in relation to such a site, and to identify what work needed to be undertaken to advise the Council on its future action in relation to it, and was not a test of what the candidates already knew

about the site.

151 That being so, I considered that Ms Toohey was not unfairly advantaged by the test and that it was within the broad band of reasonable responses to select the Sanofi site as the test subject.

Claimant's Written Test Marks

152 Ms Johnson and Mr Harley were both extensively cross examined about their marking of the Claimant's written test. I considered that they both gave convincing answers and were able to point to features of the Claimant's test which justified their scores.

153 For example, I found credible Mr Harley's explanation that the Claimant had not addressed supply and demand in relation to the Sanofi site, when she simply stated that the site was available, rather than examining whether there was commercial demand for the site, or whether there were other competing sites in the locality.

154 I also accepted Mr Harley's criticism of the Claimant's report that it was not structured, with clear headings, so that it was not accessible and easy to understand.

155 Furthermore, I was satisfied by Mr Harley's explanation that the Claimant had not been awarded points for considering "risk," when she had mentioned barriers to growth, because the Claimant's report had not specifically addressed the investment risks in relation to the site itself.

156 It was not for me to substitute my own view for that of the Respondent. I was nevertheless satisfied that there was no glaring inconsistency in the scoring, or bad faith, in the way that the Respondent marked the Claimant's written test.

Written Tests of Other Candidates

157 Ms Johnson and Mr Harley were both cross examined about the written test marks they gave the other candidates. It was put to Mr Harley that he was generous to Ms Toohey, which was shown by the fact that he recorded that she had "just" satisfied the criteria in several places. Mr Johnson explained why he considered that Ms Toohey had addressed the relevant issues. He was also questioned about why he had given Ms Akhter marks for addressing risks when he had said, "Risks aren't specifically referred to however a number are raised." Both Mr Harley and Ms Johnson said that Ms Akhter had addressed risk in her report under her paragraph, "Key Issues for Consideration." In that paragraph, Ms Akhter said that the Council would need to consider, "The cost of acquiring the land at a significantly discounted rate from market value – in the current economic conditions is the Council in a position to buy the land even at a discounted rate... Capital costs that could be exhaustive to meet fit out costs to make the site a welcoming and attractive place for businesses to operate.. the potential loss of the site and uncertainly which could impact on the local area and its future growth." These did appear to me to be issues relating to risk: financial risks for the Council and economic risks for the local area, if the site was not acquired by the Council.

158 Once more, I considered that Mr Harley and Ms Johnson justified their scoring, by highlighting the parts of the other candidates' tests which satisfied the scoring criteria. I was satisfied that there was no glaring inconsistency in the scoring, or bad faith, in the way that the Respondent marked the other candidates' written tests.

Interview Scoring: Unfairly Low of Claimant and High of Other Candidates?

159 All the panel members were asked questions in cross examination about their interview scores. For example, they were asked why Ms Akhter had fully met the "experience" criteria, when the panel's notes on her answer to question 1 was that her response was acceptable but "poor" in relation to "the challenges to achieving Regeneration and Economic Development priorities in the council area and how to overcome these". Each panel witness said that the "experience" criteria were judged over three questions, questions 1, 2 and 3 and, overall, in her answers to all 3 questions, Ms Akhter demonstrated that she did fully meet the criteria. I found that explanation to be logical and convincing.

160 Each panel member told the Tribunal that Ms Toohey had performed best at interview, Ms Akhter second best, and that the Claimant had not performed as well as her colleagues. They explained that the Claimant had more "partially met" (rather than "fully met") marks against the criteria, compared to either of her colleagues.

161 I accepted the Respondent's evidence that the Claimant had not performed as well at interview as her colleagues. When challenged, the Respondent's witnesses were able to explain why they had awarded the marks that they did.

Adequate Consideration to Redeploying Claimant

162 The Respondent put the Claimant on its redeployment register. Redeployees at risk of redundancy are given access to new vacancies 7 days before the vacancies are advertised and are also given assistance in looking for work (p270).

163 Mr Harley agreed, in evidence, that he had not personally assisted the Claimant with redeployment, but had relied on placing the Claimant on the Council's redeployment register.

164 The Claimant contended that Mr Harley ought to have considered the Claimant for a vacant PO4 role. The Respondent's process, however, was to assimilate employees into roles which were similar to their existing roles, and to place unsuccessful candidates on its redeployment register. If there were other roles which the Claimant considered that she could undertake, it was open to her to apply for those roles, alongside any other displaced employee at risk of redundancy. I considered that it was reasonable for the Respondent, in the context of a large-scale redundancy exercise, where many employees had lost their jobs, to put all those employees on the redeployment register, so that all had an equal opportunity to apply for vacant posts.

165 The Claimant could not be redeployed to Thurrock BC because it was not her employer and there was no sharing of services across the regeneration service areas.

166 While the Claimant suggested that there could be other sources of funding for

roles in the Town Centres and Economic Development Team, I accepted Mr Harley's explanations regarding why particular types of funding (HRA, s106, were not available to fund salaries in that Team. I also found that there were, in fact, no tranches of funding available to fund an additional post for the Claimant at the time of her dismissal.

R's Refusal to Give Claimant Other Candidates' Written Tests and Answers at Interview

167 The Respondent did not give the Claimant the other candidates' written tests, nor records of their answers at interview.

168 It did, however, provide her with anonymised scores, model answers for the test and the interview questions and repeatedly offered the Claimant the opportunity to attend a feedback meeting, at which Mr Harley said he would explain how the Claimant's answers differed from the model ones and how the other candidates had responded

169 I considered that, if the Claimant had accepted the offer of a feedback meeting, she would have had all the information she reasonably required in order to understand why she had been unsuccessful at interview, why others had been more successful and whether there was anything fundamentally unfair about the process.

170 The Respondent's Redundancy Procedure provides that, "... employees do not have any right of appeal against the outcome of a ring-fenced interview.., " (p. 392, paragraph 12).

171 I agreed with the Respondent's submission that this prohibition on appeals from ring fenced interviews was reasonable. If it were open to unsuccessful candidates to require remarking of an interview process, there would be a risk of a never-ending cycle of challenges to the outcome, resulting in a complete impasse.

172 Furthermore, it seemed to me that the interview panel was likely to be in a far better position to judge the performance of candidates in an interview process, than an appeal body reviewing notes of the process, particularly where the appeal body would not necessarily have any familiarity with the precise job role and requirements for it. The outcome of such an appeal would be likely to be less satisfactory and reliable than the outcome of the interview process.

173 I decided that the Respondent did give the Claimant a reasonable opportunity to appeal, even if it did not give her other candidates' tests and interview answers.

Edited Statement of Appeal

174 Mr Harley did edit the Claimant's appeal document and inserted his riposte to each of her points, before the document was given to the appeal panel. I agreed with the Claimant that this was inappropriate and that she ought to have been able to present her written arguments in the way she wanted, without them being simultaneously undermined by the Respondent.

175 However, taking the Respondent's process as a whole, I concluded that the appeal was fair, because the Claimant was able to present her case to the appeal panel in person, in the way that she wished to. The Claimant produced a further written presentation for the appeal, which Mr Harley did not edit (p. 345).

176 Overall, the Claimant was able to address the appeal panel in the way she wanted, through her additional presentation and her oral address. I considered that the appeal process was within the broad band of reasonable appeals.

HR Representative Michelle Coleman Questioning the Claimant

177 I found that the Respondent's HR Representative asked the Claimant a few clarificatory questions in the course of a lengthy appeal hearing. Such questions can provide the appellant with an opportunity to expand on and explain their argument, to further convince the appeal panel. I did not agree with the Claimant that a few questions in the course of a hearing represented any unfairness to the Claimant, even if no questions were asked of Mr Harley.

Redundancy, Assimilation, Interview, Scoring and Appeal Fair

178 Even taking all of the Claimant's criticisms of the Respondent's process together, I nevertheless concluded that the Respondent's procedure was fair. While Mr Harley told the appeal panel that Ms Toohey's husband had not been involved in drafting the Cabinet report on the Sanofi site, he had said, in his written answers to the Claimant's appeal, that Mr Toohey did provide the legal comments on the report, but did not co-write the report. This was correct. I did not accept the Claimant's argument that the appeal hearing was a sham. It appeared to have been a lengthy hearing at which the Claimant was given every opportunity to make her case.

179 In conclusion, I had much sympathy for the Claimant, who had been a good and committed employee and union representative, and who would never have been dismissed but for swingeing cuts from Central Government. Unfortunately, there were such cuts, resulting in a genuine redundancy situation and the Claimant was fairly dismissed because of redundancy.

Employment Judge Brown

15 December 2017