



EMPLOYMENT TRIBUNALS

Claimant: Mr L Adams

Respondent: University of Huddersfield

Heard at: Leeds

On: 22-24 January 2018

Before: Employment Judge Maidment (sitting alone)

Representation

Claimant: Mr J McHugh, Counsel

Respondent: Mr P Smith, Counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent
2. By agreement between the parties, the Respondent is ordered to pay to the Claimant the sum of £8,625.40 as compensation for unfair dismissal.

REASONS

The issues

1. The Claimant's sole claim in these proceedings is of unfair dismissal. The Respondent puts forward that the Claimant was dismissed by reason of redundancy or in the alternative for some other substantial reason arising out of a reorganisation. The Claimant maintains there was no redundancy situation in circumstances where there was no reduction in employee numbers, but in any event that no fair procedure was followed in circumstances where the Claimant ought reasonably, he says, to have been slotted into an alternative position, where the selection process for altered positions was unreasonable and where there was no offer of suitable alternative employment, including the possibility of a trial period.

The evidence

2. The Tribunal had before it an agreed bundle of documents of in excess of 187 pages to which some brief additional documentation was added in particular in respect of the offers of alternative employment to other individuals.

3. Having clarified the issues, the Tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation. When each witness came to give evidence, they could do so by simply confirming the content of their statements and, subject to brief supplementary questions, then be open to be cross examined. The Tribunal heard firstly on behalf of the Respondent from Ms Siobhan Campbell, Human Resources Director, Mrs Lorraine Noel, Head of Customer Services in Computing and Library Services and Professor Timothy Thornton, Deputy Vice Chancellor. The Claimant then gave evidence on his own behalf.
4. Having considered all of the relevant evidence, the Tribunal makes the findings of fact as follows.

The facts

5. The Claimant was employed by the Respondent as an Operations Team Assistant (grade 5) from November 1991 until 31 May 2017, latterly in the Admissions and Records Office. As such his main responsibility was to provide a positive and proactive administrative service in relation to applicants and students and to ensure that each student's record was kept in an accurate and timely manner.
6. In early 2017 the Respondent commenced a restructure process affecting and effectively disbanding the admissions records office. The work involved in student recruitment was to sit in the marketing, communications and student recruitment office whereas the record keeping function was to be moved to financial services. The Respondent proposed therefore that the Claimant's position be removed from the structure and that the Claimant and others in his role be placed at risk of redundancy.
7. As part of the Respondent's redundancy policy post holders might be slotted into positions available within any new structure where posts are substantially unchanged and where the number of post holders is the same as or less than the number of posts available. Indeed, the potential now existed for 'slotting' in circumstances where there were 6 available positions for a new grade 5 Recruitment Team Administrator and a further 6 positions for the newly created Student Records Team Assistant within financial services. Both of these positions were at the same grade 5 as the Claimant's post of Operations Team Assistant. The total number of available positions exceeding the existing number of Operations Team Assistants.
8. The Respondent also operated a redeployment procedure which was agreed by Mrs Campbell, Director of Human Resources, to apply as soon as an employee was placed at risk of redundancy. This procedure

provided that, in the event that an employee did not have all the necessary skills to undertake an alternative job, an assessment would be made as to whether appropriate training would be able to bridge the skills gap within a reasonable period of time. Otherwise, where the employee fulfilled the candidate specification, taking into account any skills gap that could be met from training, the job should be offered to the employee at risk.

9. Mrs Campbell wrote to the Claimant by letter of 15 February 2017 notifying him of his 'at risk' situation. She explained that it had been determined to align responsibility for recruitment and record keeping with separate existing departments noting an increased expectation from prospective students and a stronger requirement to focus on developing a relationship between an inquirer and the Respondent to ensure that the Respondent developed excellence practices to secure student acceptances. Reference was made to the increasingly competitive higher education market. The implication was that there was a proposal that the Claimant's position was redundant with effect from 31 May 2017.
10. She went on to explain the new positions of Recruitment Team Administrators and Student Records Team Assistants enclosing copy job descriptions and inviting the Claimant to submit a supporting statement which would be assessed against the selection criteria for whichever position he chose to apply for. It was open to him to apply for both positions. Further, it was confirmed that he might explore any other new jobs created as a result of the restructure or any other vacancies within the Respondent. The Claimant was given a number of points of contact if he required more information or wished to discuss his options further. The Claimant chose not to pursue any such enquiries.
11. The Respondent's proposals were discussed with the recognised trade union, Unison, of which the Claimant is a member. Unison was informed of the redundancy proposal at the same time as the Claimant together with a written rationale for the changes which were said to be underpinned by a determination to improve data quality and customer service. A number of posts were then listed as available within the new structure with the Student Records Team Assistants and Recruitment Team Administrators identified as "*redeployment*" opportunities if there was a sufficient skills match. It was made clear that selection would be on the basis of an assessment against selection criteria, interview and test and that the positions would be externally advertised if not filled through redeployment.
12. The Respondent had considered 2 individual posts as suitable for 'slot ins', but not the position held by the Claimant. The Claimant made representations through his local union representatives that he should be slotted into the role of Recruitment Team Administrator. The Respondent disagreed with that analysis. Mrs Campbell's view was that there were significant differences between the roles and whilst there were significant similarities (they were "*very similar*" when looking just at the job

descriptions she conceded) the fundamental difference was that the old role was essentially administrative focusing on the processing of applications whereas the main responsibility of the new post shifted the focus to providing an excellent customer service to students through email and telephone conversation from first enquiry to secure application and enrolment. This, she considered, required the post holder to be proactive and take ownership of this important first point of contact with the Respondent.

13. She responded indeed to the local trade union representatives by email of 21 March rejecting the arguments for automatic slot ins. As regards the Recruitment Team Administrator role, she said that the new job description required staff to respond to all enquiries internally and externally and to follow up with all enquiries. There would be in use a new system known as CRM which was an electronic system for logging contacts and an individual's information which could then be linked to letters and emails to be sent to such individual. She went on that the new post required attendance at confirmation clearing, open days and evening and weekend events. The new role required staff to deal with general enquiries received by the student recruitment service.
14. In fact, other than the use of CRM, the primary functions carried out within the new role were functions already performed by Operations Team Assistants when dealing with admissions. The main change from the Respondent's point of view was the change in focus to a more professional customer service experience. Anyone in the Claimant's position changing to one of the two available types of position in the new structure would have to relinquish either the record keeping or the admissions part of his or her work.
15. The Claimant put together a statement in support of him meeting the person specification for a Recruitment Team Administrator and the essential attributes listed. The essential attributes included recent experience of providing a front-line customer service, good customer focus, a highly developed customer awareness and knowledge of or the ability to learn to use social media as an effective means of communication. The Tribunal notes that the person specification for the Student Records Team Assistant also included experience of high quality customer service provision and the ability to use or learn social media as a means of communication. In his personal statement the Claimant described experience of currently providing a front-line service involving face-to-face enquiries including at open days, extensive email and phone communications. He described his current use of the ASIS data gathering and processing system. He went on to refer to his view of the importance of good communication.
16. Mrs Campbell accepted that the Claimant satisfied the person specification for the role and, on that basis, he was invited to attend an

interview on 3 April. An additional part of the selection process involved the Claimant undertaking a practical test which involved an assessment of how he answered a scenario whereby an anonymous member of staff telephoned the Claimant with an enquiry the type which might be made by a prospective student. The Claimant achieved a score of 2 points out of 5 for efficiency and telephone manner, 1 point out of 5 for accuracy and 4 points out of 5 for courteousness giving a total of 9 points out of a possible 20. The feedback was that he had gone off topic on a number of occasions, losing his thread and confusing the inquirer.

17. The Claimant's separate interview panel was chaired by Mrs Lorraine Noel, Head of Customer Services in Computing and Library Services with two other senior managers including Jenny Grainger who headed up the new department in which the role of Recruitment Team Administrator was to fall. The panel interviewed all those who had applied for the position of Recruitment Team Administrator and for other positions falling within Mrs Grainger's directorate on the same day. At the commencement of the day they determined that they would mark each candidate out of a potential 5 points against each question asked. There was no discussion as to what might be needed to attain a particular point score or what a particular value reflected, but it was understood that there was a scale of nought up to the maximum available points assessment of 5. At the end of the day, the panel discussed their individual marks of each candidate before coming to an agreed mark to be given in respect of each question. The Claimant was assessed as meriting a score of only five points out of a possible total of 30 points, scoring one point out of five in respect of five of the questions and no score at all in respect of a particular question.
18. Mrs Noel's view was that the Claimant's answers lacked depth and substance. He fundamentally failed to focus on the customer service aspect of the new role instead concentrating on systems and processes which had been more important in his existing/deleted post. She considered that he did not provide relevant examples demonstrating an understanding of service delivery and that despite prompting he was unable to outline the potential benefits of social media in engaging with students. She did not consider his response as to how he might balance workload priorities to be satisfactory and in terms of professional development she did not consider there to be an acknowledgement of the need to obtain customer service skills and knowledge. During the panel discussions of each candidate, notes were made of key points to be fed back to any candidate requesting feedback. This was subsequently, as will be described, provided to the Claimant.
19. Mrs Noel and her panel did not give consideration to if and how the Claimant might be able to perform in the role with further training or support, nor what other positions might be suitable alternative positions. It had been determined in advance that candidates were required to achieve 30 points from the combined test and interview assessment, i.e. 60%, to

be successful. There was no consideration of the candidates' personal written statements. Mrs Campbell described it, although not part of the redundancy procedure, as being good practice as part of a selection process or after the Claimant had been unsuccessful to have considered whether additional training could have been provided. It is what she would have expected where the Respondent was trying to mitigate against potential redundancy.

20. The Claimant's score of 14 points was below that required and resulted in the Respondent writing to the Claimant by letter of 7 April informing him that he had been unsuccessful and as a result he had been selected as redundant. If the decision stood the Claimant was informed that his dismissal would be effective on 31 May but he was told of his right to appeal to a panel of senior staff. A copy of the interview and test assessment marks were provided to him with the letter.
21. On 10 April the Claimant enquired of human resources whether he could be re-interviewed for the same position on the basis of his understanding, correctly, that not all of the positions had been filled. He received a response that unfortunately he was not able to apply for any positions for which he had already applied and been unsuccessful, only any other vacancies which were left. Of 9 individuals who had applied, the Claimant and one other were unsuccessful but that person had made a successful application for another role. However, only 4 of the successful candidates were ultimately interested in the position as the others also preferred to take up offers of alternative posts within the structure. Therefore, in due course, the Respondent commenced an external recruitment process to fill all of the Recruitment Team Administrator vacancies.
22. The Claimant also on 10 April requested detailed feedback on his interview. This was provided to the Claimant by email of 25 April.
23. By letter of 11 April the Claimant was advised of all the positions still available which included that of Student Records Team Assistant and was informed that the Respondent had agreed to allow any unsuccessful candidates a second opportunity to apply for any remaining suitable vacancies (other than the ones unsuccessfully applied for). The Claimant chose not to do so. In cross-examination he confirmed that he was not interested in any of the other vacancies and, in particular, he did not wish to stay in a role which was concentrated on record keeping. As the Claimant did not express any interest in the still unfilled positions, it was reconfirmed to him by letter of 20 April that he had been selected as redundant.
24. The Claimant did appeal against the redundancy decision setting out written grounds of appeal. These sought to revisit the issue of slotting. The Claimant further maintained that two other employees, Elaine Wise and

Susan Lingard, had been offered positions without having attended an interview for those positions and when they had withdrawn their interest in those posts. In fact, the Tribunal has seen that both individuals had been successful in their own job applications. Mrs Wise had been tested and interviewed in respect of the Student Records Team Assistant and Recruitment Team Administrator position successfully. She had withdrawn from the position of Student Records Team Assistant, but, based on her successful performance at the other interviews, she was notified that she was regarded as suitable for that post and it was an option open to her. Mrs Lingard had applied successfully for a position of Student Systems Support Officer following an interview and was deemed suitable also for three other positions at the same grade 6 or a grade lower and offered still the opportunity for those positions despite her earlier withdrawal of interest.

25. Within his appeal, the Claimant raised that he should have been offered reasonable training to bridge any skills gap asserting that he did not believe that a significant gap existed. He made the point that this had been his first interview in 25 years and queried whether it was fair that a role he had carried out successfully for that period of time could be judged on one interview. He raised some queries about the scoring he had received as well. A pack of documentation was produced for the appeal panel which included a number of effective testimonials the Claimant had gathered from people within the Respondent who had dealt with him. This included a note from Paula Morrison who had been the Claimant's line manager since 2008. She referred to the Claimant having adapted to and embraced the many changes, external and internal, which had taken place in the time that the Claimant had been a member of the various admissions offices. She said that with those changes he had built up a wealth of experience and knowledge. The pack also included a management response to the Claimant's written grounds of appeal prepared by Judith Davidson, Director of Admissions and Records office i.e. the directorate in which the Claimant currently sat.
26. The appeal took place on 2 May chaired by Professor Tim Thornton, Deputy Vice Chancellor, together with the Head of Registry and Director of Computing and Library Services. The appeal meeting at which the Claimant was accompanied by Mrs Leonie Sharp, regional officer for Unison, was adjourned after 45 minutes on the panel determining that they needed to make further enquiries and gather further documentation.
27. The appeal reconvened on 15 May. The Claimant presented his grounds of appeal. Within that he explained that if there was a skills gap between his existing role and the new role, he would be able to bridge this gap in a reasonable amount of time and he should have been offered the post. The panel then raised some questions of the Claimant, albeit not in respect of his particular comment regarding skills gap. Mrs Davidson was then given an opportunity to ask the Claimant questions but she raised only one

query. She was then asked to present the management case in response. Within that she said that had been made clear to the members of staff affected that these were new jobs and there was a requirement for the service to be delivered in a different way. She explained that together with Mrs Campbell she had looked at the job description and person specification and decided that this was not an appropriate case for slot ins. She said that members of staff who had made further enquiries had been told that they should avoid solely focusing on the function of the new posts, such as admissions, and think more widely around the delivery of the duties.

28. Mrs Sharp then had an opportunity to question Mrs Davidson. Towards the end of her questions she put forward that the Claimant should have been given the opportunity to bridge the skills gap and asked Mrs Davidson whether she thought that he could bridge this gap in a reasonable period of time. Mrs Davidson explained that she did not think the Claimant could bridge this gap saying that if he had been successful he would have been provided with full training and guidance. At this point Mrs Davidson said that the Claimant wouldn't have bridged the gap because he was resistant to change. Mrs Sharp and the Claimant described themselves as having been shocked by this statement but agreed that neither of them raised any objection to it or any further query of Mrs Davidson. Very brief closing statements were then presented and the hearing ended giving the panel time to deliberate and reach a conclusion which they did around 25 minutes later.

29. The panel decision was provided to the Claimant by letter of 25 May which involved a detailed summary of Professor Thornton's reasoning. It is noted that he did not deal with the arguments raised by the Claimant in respect of Mrs Lingard and Mrs Wise and he conceded in cross-examination that he did not investigate those issues. As regards the argument for slot ins, he referred to the focus on delivery of the new role being substantially different from the post the Claimant currently undertook. As regards the Claimant's protestation that he could have bridged any skills gap, Professor Thornton responded that the reference to skills gap was in the Respondent's redeployment procedure. The selection process for the Recruitment Team Administrator had been in accordance with the Respondent's redundancy policy with the selection criteria agreed with the trade unions. He went on "*there is no requirement for the University to consider a skills gap at this stage of the process and therefore it is for these reasons that this point of your appeal is not upheld*".

30. In evidence before the Tribunal, however, Professor Thornton said he was nevertheless keen that any skills gap be discussed and he allowed the issue to be aired. He said he was clear that there was a gap which could not be bridged. This was based on the low interview scores and what he had heard at the appeal. He did not enquire how any particular training may have helped the Claimant. He placed great weight on Mrs Davidson

who referred to the Claimant as resistant to change and felt some of the phraseology she used about the Claimant not to be encouraging. If she had been more positive, he said, there might have been an adjournment and management and the Claimant could have looked at other ways of resolving the situation. The appeal against dismissal was rejected.

31. The Claimant had access to and was well aware of other vacancies within the Respondent but did not regard any of them as alternative employment for which he wished to apply. During the redundancy process the Claimant had started to consider whether he might instead undertake a course of full-time study indeed at the Respondent. He said that having failed in his appeal, he decided to apply in the middle of June for a place on a degree course and was informed very shortly after that his application had been successful for a course which commenced that September.

Applicable law

32. In terms of legal issues, redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the Employment Rights Act 1996 ('ERA'). Redundancy itself is defined in Section 139(1) of the ERA as follows:

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

.....

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

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

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

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

33. In **Murray –v- Foyle Meats Ltd 1999 ICR 827** the House of Lords considered the test of redundancy and Lord Irvine suggested that Tribunals should ask themselves two questions. Firstly, does there exist one or other of the various states of economic affairs mentioned in the section? Secondly, was the dismissal wholly or mainly attributable to that state of affairs?

34. Section 98(4) of the ERA provides:

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

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

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

35. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where employees are represented by an independent union. It is not the function of the Tribunal to decide whether it would have thought it fairer to act in some other way. The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

36. These principles were considered in **Morgan –v- Welsh Rugby Union 2011 IRLR 376**. In that case two roles were to disappear and be replaced with a new single post. The Claimant met the requirements of the job description for the new post but the alternative candidate was appointed following an interview and presentation despite him not meeting the job description, with particular reference to the level of coaching qualification said to be required. In that case Judge Richardson commented as follows:

" We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams-type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.

To our mind a Tribunal considering this question must apply s.98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new

role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4).

When making an internal appointment, we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind the employer was entitled to interview internal candidates even if they did not precisely meet the job description; and it was entitled to appoint a candidate who did not precisely meet the person specification. It was, in other words, entitled at the end of the process, including the interview, to appoint a candidate which it considered able to fulfil the role. We do not, therefore, see any error of law in the approach of the Tribunal to this matter; and we do not consider the approach of the majority to be perverse.

37. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

38. Applying the above principles to the facts as found the Tribunal reached the conclusions set out below.

Conclusions

39. The Tribunal accepts that the Claimant was dismissed by reason of redundancy, a potentially fair reason for dismissal. There was no longer any requirement for employees to carry out work of a particular kind, that is to say the work of an Operations Team Assistant which was deleted from the Respondent's structure. If there had been no redundancy situation, however, then clearly the Claimant was dismissed arising out of a business reorganisation and therefore for some other substantial reason such as to potentially justify dismissal.

40. Obviously, within the new structure, there were vacant positions for which the Claimant was allowed and encouraged to apply. The Claimant maintains that the Respondent acted unreasonably in not simply slotting him into the new position of Recruitment Team Administrator which he applied for. The Tribunal considers that the functions to be undertaken in this new role were very similar to functions which the Claimant had

performed in his post. Mrs Campbell in her evidence accepted that proposition, certainly in terms of job description. There was a new CRM system to be used by any Recruitment Team Administrator but that, in itself, did not fundamentally alter any aspect of the post holder's responsibilities – it was simply a tool to enable information to be efficiently and effectively gathered and used. Otherwise, the main difference put forward in the positions was what has been described as a change of focus to a more professional customer service experience. It has not been explained to the Tribunal what that actually means in terms of an employee's duties as opposed to how they are carried out and the performance expected of an employee. The Claimant in his current role was very much customer facing, interacting with prospective students by telephone and email in circumstances where he was seeking to provide information but also to encourage student applications and "sell" the University. The Tribunal accepts that the Respondent was looking for people who could do that most effectively and be able to do so innovatively including through the use now of social media. However, that did not make the duties of the Recruitment Team Administrator so different to those duties which the Claimant was already carrying out.

41. However, the role of Recruitment Team Administrator was not a replication of the Claimant's existing post in the sense that, as an Operations Team Assistant, the Claimant also had responsibility for maintaining the student record. That responsibility did not carry over into the recruitment post but instead was split off from his recruitment responsibilities to rest in another alternative new position available to the Claimant of Student Records Team Assistant sitting in financial services. In this sense the Operations Team Assistant position cannot be said to be a fundamental match for either of the 2 new positions. A group of Operations Team Assistants, the Respondent considered, ought to be given an option of applying for either or both of the available new positions. This was in circumstances where the Claimant for instance could have been adjudged as already doing the functions of the Student Records Team Assistant and then have been allocated to that position in circumstances where it was not, on his evidence, a role he had any interest in performing as he valued the work he did in student recruitment more highly. There is no evidence of any neat split amongst Operations Team Assistants in terms of their abilities and/or preferences such that they could simply be allocated to the new positions such as to satisfy them and the Respondent.
42. In all the circumstances of a change of emphasis in the role and the splitting of the functions of the post of Operations Team Assistant, it was not unreasonable for the Respondent to have decided to carry out a selection exercise and to assess suitability for the new positions.
43. The Tribunal then turns to consider that selection process. It does so mindful that this was not a process to select employees for redundancy but to select them for alternative employment. The test is whether in all

circumstances the Respondent acted reasonably. It is noted firstly that the Claimant had an opportunity to determine which of a number of positions he wished to put himself forward for. He was encouraged to find out more about any of the new positions and what the Respondent was looking for in any successful candidate.

44. It was reasonable for the Respondent to assess individuals through a test which simulated a real-life scenario at work and through an interview where standard questions were asked of each candidate aimed at assessing their understanding of the Respondent's desire for a change in emphasis to a more customer focused environment and their ability to fulfil the Respondent's requirements. Whilst there was no detailed marking scheme each of three panel members understood that against each question they were assessing the candidate on a scale of nought to 5 points. Each panel member scored individually as each interview progressed and the scores were then discussed at the end of the day until the panel arrived at an agreed score for each candidate. It was not unreasonable for the Respondent to have determined a level of attainment necessary to be offered a new position and, whilst there may have been some argument as to how rigidly that benchmark ought reasonably to have been adhered to in all the circumstances, including where these were internal applicants with a track record of employment and where there were, as it transpired, more vacancies than candidates who wanted to fill them, the Claimant's score was significantly lower than the benchmark set and could and was reasonably considered to be a "poor" score. The Tribunal is not permitted to carry out its own assessment of the Claimant's performance at interview or in the test but, in any event, on the face of the questions asked and feedback given by the Respondent explaining the Claimant's scores, there appear to have been genuine assessments carried out of the Claimant's interview performance and a rational justification for the individual scores awarded.
45. The Respondent did not act unreasonably in not allowing a candidate such as the Claimant on his request to be given a second interview – an improved second interview might reasonably indicate an understanding now on the part of a candidate of how to score more highly at interview rather than a true representation of skills and abilities.
46. The key question for the Tribunal in this case is whether a reasonable employer would then have reasonably concluded that the Claimant was not suitable for the new role such as to justify his dismissal.
47. The Tribunal notes that this was not a case where the Claimant was applying for a position at a higher grade than he had previously been employed at. Nor is this a situation where there was a competitive process in the sense that a number of candidates for the position were bound to be disappointed. Indeed, if there had been sufficient successful candidates who wanted the Recruitment Team Administrator role to fill all of the

vacancies for that position, the Tribunal is satisfied that the Respondent, subject to reasonable attempts to look for alternative employment, could have fairly dismissed the Claimant.

48. Mrs Campbell accepted that it would have been good practice to consider at the stage of selection for the role of Recruitment Team Administrator whether or not appropriate training might have been successful in bridging any skills gap within a reasonable period of time. Mrs Noel's panel gave no consideration to that and the scoring of the Claimant led to the generation of a confirmation of his imminent redundancy dismissal without any such consideration.
49. The issue of skills gap was raised on behalf of the Claimant late in his appeal hearing, but on the evidence the Tribunal is not satisfied that this was given any detailed consideration. The appeal outcome letter does not suggest any such consideration and in fact suggests the Claimant's pleas being ruled out on the basis that there was no requirement for the Respondent to consider a skills gap in the selection process for the post of Recruitment Team Administrator with no recognition that this was in itself a redeployment opportunity given that the Claimant's existing post was disappearing. Professor Thornton in his oral evidence said that he allowed the issue of bridging any skills gap to be aired but on the evidence, if there was any consideration of this issue, it was brief and determined effectively by Mrs Davidson's opinion that the Claimant was resistant to change and phraseology Professor Thornton noted she used in describing the Claimant which he did not regard as positive indicators in terms of the Claimant's ability to flourish in the new role with the greater emphasis on customer service.
50. Professor Thornton's panel had before it, it is accepted, the unfavourable assessments made of the Claimant during the test and interview process. On the other hand, the Claimant had met the person specification for the role (otherwise his application would not have been progressed to interview at all) and had engaged with what was required, he thought, in the new role in the personal statement he had submitted, which had not in fact been considered by Mrs Noel's panel or anyone else.
51. The Tribunal is urged by Mr Smith not to be swayed by any feelings of sympathy for the Claimant where he accepts such feelings might be understandable. The Tribunal understands that it must not substitute its own decision or make its own assessment of how the Claimant should have been treated. On the facts, this employer had a need to fill a number of still vacant positions. The Claimant wanted to remain in the Respondent's employment in one of those positions. He had carried out the core functions of that new position already within the Respondent for a significant number of years. The Respondent has been at pains in this hearing to make it clear that there is no criticism at all of the Claimant's previous performance in his role as Operations Team Assistant. The

Claimant had significant knowledge and experience of the Respondent. The testimonial of his immediate line manager refers to that as well as indeed the Claimant over the period of his employment having had to adapt to change. The Respondent and its decision-makers had no evidence or examples of the Claimant being resistant to change or unable to learn and develop personally. Professor Thornton did not seek any elaboration from Mrs Davidson or justification for her view that the Claimant was resistant to change. No basis has been put forward before this Tribunal for the arrival at such conclusion or to explain why the Claimant could not undertake the new position other than his poor scores in the interview process. There is no evidence of the Respondent giving any consideration to what might have been a reasonable period to expect the Claimant to bridge any skills gap. There is no explanation of the type of customer service skills the Claimant could not acquire through training.

52. Again, the Respondent's own procedures allow for consideration of an opportunity for an employee at risk of redundancy to be redeployed where training might bridge any skills gap. It further envisages an offer of redeployment being made subject to the statutory trial period. In this case the Claimant could have commenced a trial period immediately and in circumstances where otherwise there remained vacant positions to fill from external candidates who, however well they might have performed at interview, and would be inevitably unknown quantities to the Respondent.
53. In all the circumstances the Tribunal must conclude that no reasonable employer in the Respondent's position would have reasonably concluded that the Claimant's employment ought to be terminated due to his lack of suitability for the new position, at least not without allowing the Claimant an opportunity to carry out the role under a trial period with training and support provided. On this basis the Respondent did not act reasonably in terminating the Claimant's employment and his dismissal therefore was unfair.
54. The Tribunal would say that it considers otherwise in terms of seeking alternative employment that the Respondent behaved reasonably. The Claimant was aware of all vacancies open to him including vacancies across the Respondent and had the means to put himself forward for any of them in circumstances where it was not unreasonable to assume that he would come to his own conclusions as to what might be suitable and where there was no lack of reasonableness in anyone from the Respondent more proactively identifying particular roles for which the Claimant might be suitable. The most obviously suitable roles for the Claimant were absolutely clear in that they related to the type of work which he had carried out and the Respondent, even when the Claimant failed in his application process, gave him a further opportunity to express an interest in any of the remaining vacancies. In any event, the Claimant is clear in his evidence that the only position he was interested in and would

have regarded as suitable alternative employment was the position of Recruitment Team Administrator.

55. The Tribunal would also reject any argument of unreasonableness based on any inconsistency of treatment. Mrs Wise and Mrs Lingard's circumstances were materially different to those of the Claimant.
56. The Tribunal is invited pursuant to the principles derived from the case of **Polkey**, to consider whether, had the Respondent acted fairly the Claimant would have been dismissed in any event and with what degree of likelihood and/or after what period of time. The lack of evidence in this case renders such an exercise wholly speculative and the Tribunal cannot say that the Claimant could not have shown that he was capable of the level of customer service which the Respondent required and considered to be essential. This is in circumstances where the Claimant had carried out a frontline customer facing role without any suggestion of previous performance failings. The Tribunal cannot from the test and interview the Claimant undertake extrapolate any definable factor or degree of likelihood that the Claimant would fail in the new position, particularly since in the new role the Claimant would have been provided with training and support. There is no evidence of any high level customer service skills being required. There is no evidence that the Claimant could not be developed through such training and support. Therefore, no reduction in compensation is justifiable pursuant to **Polkey**.

Remedy

57. After a brief adjournment, the parties confirmed that they had reached an agreement as to the award of compensation to be paid to the Claimant other than that in respect of pension loss. The parties were not in a position to carry out a complex calculation in respect of pension loss in circumstances where the Claimant had been a member of a defined benefit scheme. The Tribunal was asked, however, as a first stage to hear evidence and make findings which would assist the parties in how that calculation should be undertaken. The Claimant gave further evidence reconfirming his witness statement which already included reference to the steps he had taken in looking for employment following his dismissal by the Respondent. He was then cross-examined by Mr Smith. The Tribunal then gave its further findings relevant to remedy.
58. The Claimant's employment ended on 31 May 2017. Had he been successful in his application for alternative employment with the Respondent he would have remained in its employment. He would not, had he not been made redundant, commenced a course of higher education study. He only decided to commence that degree course after his employment had ended. He did so, however, only after a very cursory assessment of the labour market and without any serious or meaningful attempt to seek alternative employment. He determined that he would be more employable in the future with a degree.

59. However, in the context of the Claimant then delaying a return to the job market until he is 58 or 59 years of age, the Tribunal did not consider that to be likely. The Claimant is likely to have been just as employable now at a slightly younger age and with current up-to-date knowledge in the higher education sector and without a more significant break in his employment history.
60. The Claimant cannot be penalised for not seeking any other jobs within the Respondent prior to his dismissal and there is no evidence that he would have been likely to be successful. However, after his dismissal, in taking his degree studies and not pursuing before doing so any employment opportunities, he had failed in his duty to mitigate his loss.
61. The question was then when he would have attained alternative employment if he had taken reasonable steps. The Claimant's administrative skills do not limit him to the higher education sector, but he is unlikely to have attained a role in local government such that, if he had attained a role outside the higher education sector, it is likely to have been in the private sector. If so, there is next to no chance that he would have enjoyed pension benefits similar to those provided by the Respondent.
62. Given that the Tribunal is, by reason of the parties' agreement as to non-pension loss, only materially concerned with the issue of alternative employment in the context of pension loss, the Tribunal has specifically sought to assess the Claimant's prospects of a role in higher education where he would inevitably on his own evidence have enjoyed a defined benefit pension scheme.
63. This cannot be an exact science. The Claimant has sought no jobs so there is no indicator of any lack of ability to get a job. The Claimant's age is, however, not in his favour. Against that, the Claimant is well located to work at a significant number of higher education institutions located along the M62 corridor. He also has significant sector experience and knowledge. The Tribunal has been shown evidence of available positions of an administrative nature within alternative higher education institutions and some of these are admissions related. The higher education sector has its issues but is healthier than some and universities need to put particular resources into student recruitment. The Respondent's own restructure illustrates that. The Claimant would be an asset given his knowledge of the systems for student admissions and would be significantly ahead of a candidate with non-education based administrative skills. The Claimant is more likely now, given his experience within the Respondent, to be able to present himself effectively at any interview.
64. On balance, the Tribunal considers that, had he taken reasonable steps to do so, the Claimant would have attained an administrative position at a

higher education provider at an equivalent level of pay and pension benefits to that enjoyed with the Respondent by not later than 31 May 2018. If fortunate, he may have been successful sooner, but this date recognises that he would realistically be seeking employment in one sector only if he was to avoid any continuing pension loss.

65. The Tribunal having given its findings, the parties agreed that a more simplified approach could on the basis of those findings be used to calculate pension loss based effectively on the level of employer contributions which would have been made over a 12 month period. After a further brief adjournment, the parties confirmed that agreement had been reached as to pension loss and the sum ordered to be paid by the Respondent to the Claimant in the above Judgment reflects the total sum agreed between the parties in respect of loss of earnings and pension.

Employment Judge Maidment

Date: 26 January 2018