THE EMPLOYMENT TRIBUNALS

Claimant: **Mr F Adaji**

Respondent: **Newham College of Further Education**

Heard at: **East London Hearing Centre**

On: **23-25 January 2018**
And (In chambers) on 26 January 2018

Before: **Employment Judge Allen**

Members: **Ms M Long**
Mr D Ross

Representation:

Claimant: **P Gorasia (counsel)**

Respondent: **L Harris (counsel)**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claim of direct race discrimination fails and is dismissed.

2. The claim of unfair dismissal fails and is dismissed.

REASONS

Claims and Issues

1. The Claimant, who is of black ethnicity and Nigerian national origin, was employed by the Respondent from 20 January 2014 until dismissed with effect from 31 August 2016. By Claim Form presented on 27 November 2016, he brought claims of direct race discrimination and unfair dismissal against the Respondent. The act(s) of discrimination alleged were confirmed at the outset of the hearing to relate solely to the alleged treatment of the Claimant by Ms Herbert during the interview on 21 July

2016.

2. The disputes in the unfair dismissal claim were identified at the outset of the hearing as follows:

   a. What was the reason for dismissal?

   b. Was the consultation process adequate?

   c. Was a fair process followed overall?

   d. Were sufficient attempts made to find suitable alternative employment for the Claimant?

   e. Was the Claimant offered an appeal?

Procedural History

3. The Tribunal heard evidence from the Claimant and, on behalf of the Respondent, from Mary Herbert, former Vice Principal – Curriculum for the College; Olivia Besley, Director of Human Resources & Legal Services; and Sobhana Pillai, HR Manager.

4. The Tribunal was directed to specific pages in an agreed bundle of documents.

5. The Tribunal received oral and written submissions from both parties after the conclusion of the evidence.

6. Following submissions on the morning of the 3rd day of the hearing on 25 January 2017, the Tribunal's decision was reserved. The Tribunal deliberated on 25 and 26 January 2017 before arriving at its unanimous decision.

Findings of Fact

7. The Claimant started working at the Respondent as an hourly paid lecturer. He commenced employment with the Respondent on 20 January 2014. He was appointed as Curriculum Manager Business and Management on 12 December 2014. He has achieved an impressive array of qualifications. The Claimant's commitment to his job and his students was commended by his line manager who described his commitment as 'magnificent' and he was highly regarded by his colleagues.

8. Under his contractual terms the Claimant had an entitlement to a 4 month notice period if dismissed by reason of redundancy.

9. The Claimant resigned on 15 October 2015 but withdrew his resignation on 2 December 2015 following an intervention by his line manager, Dr David Arnaud, who had expressed dismay at the Claimant's departure;

and by Annette Cast, Deputy Principal Performance Quality and Inclusion.

10. As part of the arrangements following his return to work, the Claimant was absent on pre-agreed annual leave from 24 March 2016 to 2 May 2016 and on pre-agreed unpaid sabbatical leave from 3 May 2016 to 3 June 2016. Damon Lane, Curriculum Manager Combined Studies (who is white) covered the Claimant's role in his absence.

11. The Claimant was the only black manager at the Respondent.

12. Starting in April / May 2016 a review was undertaken - initially of some of the Respondent's provision, but which became a College wide review. The Curriculum Manager roles held by the Claimant and Damon Lane were amongst 17 posts identified as at risk and 11 vacant posts were ring fenced for those at risk as part of the proposed restructure. The Claimant accepted in oral evidence that of those 11 posts the closest fit for him was Head of School Business and Humanities. This was also the case for Mr Lane.

13. On 30 June 2016 there was a meeting with the recognised trade union to discuss the proposals. On 1 July 2017 all affected staff including the Claimant were emailed the consultation documents and documentation about a voluntary severance scheme (referred to as VS) which set out the terms of voluntary and compulsory redundancy – the primary difference being that under the voluntary severance scheme departing employees would be paid in lieu of notice. The consultation documents included a timetable as follows:

Date	**Activity**
23.06.16	Date signed off by Deputy Principal - Performance, Quality & Inclusion
28.06.16	Date signed off by Principal & CEO
29.06.16	Email draft proposal to the Trade Unions
30.06.16 12.00noon	Meet with the Trade Unions
01.07.16	Email consultation proposal to affected staff
04.07.16 1pm-Stratford Campus	Meet with affected staff and the Trade Unions
07.07.16 1.30pm -East Ham	Meet with affected staff and the Trade Unions
12.07.16 10.30- East Ham	Meet with affected staff and the Trade Unions
15.07.16	End of Consultation
W/C 18.07.16	Interviews
01.09.16	New structure implemented

14. After the collective consultation meeting with the union on 30 June 2016, three group consultation meetings were timetabled with affected employees and their trade union representatives. The Claimant gave unchallenged evidence that the meetings on 4 and 7 July 2016 were in the alternative (he attended the 4 July 2016 meeting) and then there was a further meeting on 12 July 2016 which he also attended.

15. At the 4 July 2016 meeting, Annette Cast stated that she would be 'happy to meet individually'. The Claimant in oral evidence told the tribunal that he didn't ask for such a meeting because he was expecting a meeting with her relating to his return from sabbatical leave (which did not ever take place). On 4 July it was explained that Job Descriptions for the new posts would be circulated on the following day.

16. On 5 July 2016 all affected employees and their union representatives were sent the draft Job Descriptions / Person Specifications. They were asked to send their comments as part of the consultation process. The Head of School draft Job Description / Person Specification was generic rather than specific to e.g. Business & Humanities and covered a range of 6 Head of School posts also including Hair & Beauty; and Science & Humanities.

17. On 12 July 2016 a further consultation meeting took place, attended by the Claimant and other affected employees, chaired by Mrs Herbert and attended by Ms Besley (Ms Cast arrived shortly before the end of the meeting). Notes of the consultation meetings were not circulated at the time. The Respondent's evidence was that Ms Pillai took a handwritten note, which was later typed up for the purposes of these proceedings. The Claimant, although critical of the failure of the Respondent to disclose the notes in a timely fashion during the litigation process, has not challenged the accuracy of the typed notes compared with the handwritten notes - but he has contended that one section of the note of Ms Besley's comments does not reflect something which was said at the meeting (see further below at paragraph 23). On balance of probabilities, given the Claimant's agreement in relation to a large part of the note and given the evidence of the Respondent's witnesses that the notes accurately reflected the meeting, the Tribunal considered that whilst not verbatim, the notes did accurately reflect the content of the meeting.

18. Ms Besley stated at the meeting that "Updated JDs for the new structure and how this will look have been emailed to you all. So far there has not been any questions in terms of the new structure or JDs." To which the union representative stated "What, no one has emailed you with any concerns?". The tribunal notes that the recipients had had the documents for 1 week at that time and that although it is clear from Ms Besley's use of the words 'so far' that the Respondent was not closed to any further comment, no further formal consultation meeting was arranged. It was not suggested to the Tribunal that any questions were raised at any point after this in relation to the job descriptions or the new structure.

19. The affected employees who wished to apply for posts in the new

structure were told that they needed to supply a supporting statement by the following Monday, 18 July 2016, clearly identifying which posts they were interested in. Voluntary Severance applications had to be made by Friday 15 July 2016.

20. In answer to the following question from the union "I want to ensure as it was discussed in the previous meeting, there is no written assessment or presentation, just an interview based on the statement you submit." Ms Besley responded that "Yes that is correct, I want to make it very clear, restructure is the last resort, this is not a reflection on staff, posts needed and posts deleted. You also need to tell your members, please go into the interview prepared, do not go in with the assumption that the panel knows you. Securing a post will be solely based on the interview. If you require interview skills update or training please do let me know, so that we can support you. This does not mean HR will be giving you the answers, only helping with interview techniques." By 'restructure is the last resort', the tribunal have presumed that Ms Besley meant 'redundancy is the last resort'.

21. Mrs Herbert stated at the meeting that she would be going on leave from Friday 22 July 2017 and wanted to have interviews dealt with by then and when asked if only one statement was required for an expression of interest in 2 or 3 jobs, she stated "Yes that is correct, you need to focus on your experience to date, please know your data, success rate, retention rate. I will be interested to see you know your curriculum data . . . Have subheading, look at the JD. Experience, achievement to date, curriculum planning and so on for headings . . . have a starting paragraph of your skill set, subtitles evidence based statement, eg management experience, curriculum specialism, resources, success, retention come you do this every day within your role."

22. Ms Besley further stated at the meeting "Interview will take place Tuesday onwards and feedback given before Mary goes on leave. Please showcase in your statement what you have achieved to date, please do not presume you will be selected because the panel knows you. This will be a fair and open process."

23. The part of the note that the Claimant challenges states that Ms Beasley went on to say: "Please also note, if you are unsuccessful in obtaining a post, HR will discuss with you redeployment within the College, VS if you have made a firm application, or redundancy, employees who are displaced and not to be considered for redeployment, their employment will end with the College on 31 August. You will be expected to work your notice period I also want to make it very clear, if you are not successful in securing a post within this process, post to be considered will be outside of this process, you will be expected to complete a skills audit form - there is a two month review if you are redeployed which will be part of your notice period as stated in your contract. I don't want to go into too much detail at the moment, however, if you have any questions I or Shobie will be available." As stated above, on balance the tribunal was satisfied that this or something like this was said by Ms Besley at the

meeting.

24. The union raised concerns that some people may be unavailable and that this was one of the busiest times of the year.

25. On the same day the affected employees were notified by email as follows:

> "Thank you for attending the consultation meeting today. I am writing to confirm the next steps in this process. Consultation closes on Friday 15th July at 5pm. Please submit all your written responses by then. If you are wishing to submit a voluntary severance application, this must be sent to HR by 5pm on Friday 15th July. Late applications will not be accepted. After representations from UCU, decisions on voluntary severance applications will not made until after the interview process.
> If you wish to apply for a vacant post in the new structure, you will need to submit your supporting statement based on the JD and person specification to HR by 5pm on Monday 18th July. Preferences for posts you wish to be considered for need to be stated clearly on your supporting statement.
> You will have one interview which will incorporate all posts that you have applied for.
> Interviews to be scheduled throughout the week commencing 18th July for those who express an interest. A draft interview timetable will be circulated shortly.
> Once the interviews have been concluded, people will be informed of the VS decision and whether they have been successful in a securing a post in the new structure by Friday 22nd July. If you are unsuccessful in securing a post, you will be invited to meet with Mary and a representative from HR to consider your options.
> For those who are being assimilated into posts, you will be written to confirming your post and salary once the whole process has concluded on 22nd July.
> If you have any further questions, please let me know."

26. There was no further information or discussion with the affected employees about the scoring criteria or methodology for the interviews.

27. The Claimant did not at that stage indicate that he was interested in voluntary severance. He submitted his supporting statement on 18 July 2016 specifically stating that he was interested in the post of Head of School Business & Humanities, setting out his qualifications, experience and skills, and concluding by stating "I am also happy to be considered for any other suitable role within the new structure."

28. The only other expression of interest in this Head of School Business & Humanities role came from Mr Lane, who was in a similar position to the Claimant, his former role also having been deleted in the restructure.

29. The Claimant's interview took place on 21 July 2016. The Panel (which dealt with all of the interviews for all new posts) was chaired by Mary Herbert and also comprised: Jo Swindells, Director of Maths and English, Odette Carew, Director of Service Industries, Claire Gavaghan, Quality Manager and Sobhana Pillai (known as Shobie) HR Manager. Mrs Herbert, Ms Swindells and Ms Gavaghan are white, Ms Carew is black and Ms Pillai is Asian. Mr Lane was also interviewed on 21 July 2016. Mr Adaji attended his interview first at 1pm and Mr Lane attended his interview at 2pm.

30. The interview consisted of 9 marked questions. The Tribunal had sight of all 5 score sheets for each of the 2 candidates.

31. The questions that were marked were as follows:

Give an example of when you have improved the performance of staff?
Why should the College employ you and what would your current line manager say are your strengths and weaknesses?
What decision do you regret making in relation to work and why?
What new ideas would you propose for the curriculum offer? Why have you done this before?
What is the biggest threat to Newham College?
How would you deal with the different quality processes for HE and FE?
How would you improve progression into HE from within the College?
How would improve the bad debts in HE?
How would you improve attendance in HE?

32. The tribunal were not particularly impressed with the questions but accepted the Respondent's argument that in large part, these questions tested things that the Respondent was looking for in the Head of School role going forward and that in large part they were either based on matters set out in the Job Description / Person Specification which the Claimant had been sent and / or matters that it was reasonable to expect an interviewee to anticipate or be able to deal with.

33. Each panel member scored each answer separately out of 10. In a table set out at the bottom of each question there was an indication that 1 or 2 was 'poor'; 4 to 7 'The expected standard'; and 9 and 10 'Excellent' – with 3 and 8 being buffer zones between those categories. At the end of the process all of the scores were added up. Mr Lane's overall score was higher than that of the Claimant and each individual panel member scored him higher than the Claimant. Mr Lane received a score which was higher than the Claimant in the total scores for each question albeit that there were some examples of individual panel members giving the Claimant a higher or equal score to Mr Lane on specific questions. There was no discussion between the panel members prior to the interviews as to the scoring methodology (albeit that this was set out in the table beneath each question). There was no greater weighting given to any particular question and no moderation discussion in relation to any apparently rogue or disparate scores. The different panel members did vary in their allocation of marks. Mrs Herbert tended to give lower scores to both candidates on all questions. Ms Carew tended to give higher scores for both candidates on all questions. Mr Lane's interview was the last interview for the roles within the new structure. Following his interview, the panel considered all the applicants for the positions in the new structure to determine who was most suitable for each role. They agreed that Mr Lane was most suitable for the role of Head of School Business & Humanities. They considered whether Mr Adaji was suitable for any of the other roles. However, for each of the other roles in the new structure, they deemed other members of staff more suitable.

34. The Claimant's evidence was that Mrs Herbert was hostile towards him at the interview and that towards the end of the interview, he was asked if he had any questions or anything that had not been clear and when he asked to be considered for any other suitable post in the new structure,

Mrs Herbert retorted sarcastically, *"are you just telling us that now?".* The Claimant considered that this hostility and sarcasm amounted to acts of race discrimination.

35. Mrs Herbert and Ms Pillai denied that there had been any particular hostility towards the Claimant and both denied that she had stated *"are you just telling us that now?"* in a sarcastic manner or at all. The Claimant and Mrs Herbert disagreed as to when he referred to alternative employment and Ms Pillai thought that it may have been referred to at the beginning *and* the end of the process but all agreed that he had stated at the interview that he wanted to be considered for alternative employment if unsuccessful and that he had also done so in his supporting statement. The tribunal did not consider that it was necessary to determine when this had been mentioned. Having experienced Mrs Herbert's manner, the tribunal can understand how she could have been perceived by the Claimant as brusque – and even somewhat negative in a pressurised interview situation (which would also have been stressful for her given the short timescale in which difficult tasks had to be completed). However given Ms Pillai's corroboration of her evidence, on balance the tribunal was not satisfied that she was either hostile or made a sarcastic comment towards the Claimant as alleged.

36. On the following day the Claimant attend a short 10 minute meeting with Mrs Herbert and Ms Pillai. He was informed that he had not been successful in his application for the Head of School Business & Humanities post and given some brief feedback. He asked what his options were and he was told to speak to human resources.

37. Either at that meeting or at a subsequent discussion with Ms Pillai on the same day, the Claimant asked whether he could still be considered for voluntary severance. He was supplied with voluntary severance terms and also compulsory severance terms. Both calculations came in a document with the same statement at the top of the page "You are required to leave Newham College of Further Education under severance. This is your confirmed severance payment breakdown. Working on the assumption of a termination date of 31/08/16". This wording is certainly unfortunate as Ms Pillai accepted during her oral evidence. The impression gained by the Claimant on 22 July 2016 was that he was certainly being dismissed and that his last date of employment would be 31 August 2016. It was not the Respondent's intention to give him that impression on that date.

38. Ms Pillai's evidence to the tribunal was that the Claimant told her at their one to one meeting on 22 July 2016 that he no longer wished to be considered for redeployment. The Claimant denies this. On balance the tribunal find that neither the Claimant nor Ms Pillai referred to redeployment on 22 July 2016. There was no note taken by Ms Pillai, who was a human resources professional and the Respondent's documentation overall including the ET3 form submitted to the tribunal does not mention this important assertion which makes its first appearance in Ms Pillai's witness statement. That said, the tribunal

considered that it was certainly the case that the Claimant on that day gave the impression that he was primarily interested in finding out about voluntary severance. This may have led the Respondent to believe that he was not interested in redeployment.

39. On the evening of 22 July 2016 at 8.13pm, the Claimant emailed his students as follows:

> "Dear students.
> This is to confirm that my last working day at Newham College University centre is Friday 5th August 2016.
> All your results for 2016 have been finalised and approved. I have also scheduled assessment resubmission workshops over the coming week. I would strongly encourage you to attend these if you have to resubmit or resit any assessments.
> I will be available in G104, and fully accessible . . . for any assistance you may require over the next two weeks.
> After this time, you may direct all inquiries to Mr Damon Lane."

40. 10 minutes later the Claimant emailed his colleagues as follows:

> "Subject: Final Leaving date
>
> Hi all,
> This is to notify you that my last date of employment with Newham College University Centre has been confirmed as 31st August 2016.
> I will however be on annual leave from Monday 8th August.
> It has been a very rewarding experience working with you over the last four years and I want to take this opportunity to wish you all the best for the future."

41. On 25 July 2016 at 14:00 he emailed Ms Pillai as follows:

> "Subject: Leaving Arrangements and Settlement Agreement
> Dear Sobhana,
> Further to our discussion on Friday 22nd, I would require some advice on my leaving arrangements.
> I have so far proceeded on the basis of 31st August as termination date.
> I have annual leave booked from 8th - 19th August (10 days outstanding leave Sept 15 - Aug 16)
> I would also request an additional 7 days carried forward from Sept 14- Aug 15. This would extend my annual leave to the 31st August
> Could you please confirm that these dates are accurate?
> Are you able also to present me with a schedule of handover activities required from me.
> Finally, and most crucially, when can I see you in order to receive the settlement agreement?
> I look forward to your response."

42. It is clear to the Tribunal on reading this correspondence that the Claimant although not 100% certain, felt that his employment was effectively being brought to an end on 31 August 2016. Ms Pillai responded on the same day telling him that he could collect the agreement the next day. His communications would not have suggested to her that he was focused on anything other than voluntary severance. She did not comment on his understanding of the termination date and therefore his impression remained that he was being dismissed and his last day of service was 31 August 2016.

43. In a letter dated 25 July 2016 from Ms Besley to the Claimant, she enclosed copies of the settlement agreement for return by 5 August 2016. Her letter included the following wording:

> "Finally should you for any reason decline to accept the terms of severance proposed in this agreement, the College will proceed to follow a full and fair procedure to address the outstanding issues between you and the College in accordance with its legal duties. However should you decline to accept this offer, in the event that your employment is subsequently brought to an end pursuant to a fair and lawful procedure, you should not assume any enhanced term offered in this compromise agreement will be available at that time."

44. The Respondent argues that there is a technical deficiency in its communications which does not technically permit the Claimant to argue that he had already been given notice of dismissal. The Tribunal considers that the relevant determination in relation to this matter is that the Claimant considered that he had been informed that his employment was to come to an end on 31 August 2016 and the Respondent has not corrected him when he queried this. No other option had been suggested to him save for the wording in the 25 July 2016 letter, which could not be said to expressly contradict an assumption that employment was coming to an end on 31 August 2016 in any event – although it did suggest an alternative to acceptance of the severance terms. The Claimant's understanding as at the end did not however mean that an alternative post could not have been offered after that date – and prior to 31st August 2016.

45. On 9 August 2016 at 6.04am, having taken legal advice and come to the conclusion that he was not satisfied with the redundancy process and that race may have played a part in the interview scoring, the Claimant emailed Olivia Besley to tell her that he had decided to decline the proposed settlement agreement.

46. As a result, Ms Pillai telephoned the Claimant. He recorded the call and he has produced a transcript – which she does not challenge. He queried the length of his notice period and the calculation of his holiday pay – and she attempted to explain and clarify these matters. He referred to giving up any possibility of a claim and appears to have been essentially asking whether the terms could be enhanced. She stated that

> "if you think we haven't followed the consultation to the tee, but we're confident, wherever you're taking and get the advice, and if we have to defend ourselves as an organisation, we'll be able to defend ourselves. The only reason that we do the settlement agreement is parting company in amicable way saying we both agree that we can't bring any future claim against the employee and the employee can't bring any claims against the employer. It's safeguarding the employee and the employer going forward. . . . But also in terms of settlement agreement, I said to you that you can draft a reference, which you need to send to us, and which we get it signed and keep in a folder so if you look for a job, that's the reference that will be sent. Yeah, so that's why I thought I'd give you a ring"

47. When he expressly referred to negotiating an increase or difference in terms, she said:

"There won't be. There won't be. I can tell you now that's what's on the table and if you don't accept it, then we'll expect you to work your notice period. We'll go down the statutory redundancy route in terms of you'll be getting letter from us when the consultation finishes and that offer will be taken off the table because there isn't room for negotiation whatsoever."

48. The Claimant said:

"Finally, in my last discussions with HR, it was understood that my last working day is 31st August. I offered that in between that time I'm still happy to continue completing outstanding tasks, for example marking, resubmissions and assessments. Given the state of affairs as at this morning, what do I need to do about that?"

49. She replied

"In what?' In terms of? If you're not actually taking the settlement agreement, then we can come back, we'll put it all in writing in terms of your notice period. As an employer, we can ask you to work that notice period' because we won't be paying that three months lump sum but we can say you need to come in to work for that four months or three months so... because it was agreed for you to actually leave on the 31st but you offered to help out and we said that was really generous of you in terms of being like helping us out an employer ... If you feel that we haven't done anything to the tee, then by all means put that in writing . . . It's up to you. Because you're not actually accepting it, we as an employer can say you need to work your notice period. We can actually say you need to come in and work but if you're in two minds ..."

50. After a break when she consulted Ms Besley, Ms Pillai returned to the Claimant and stated

"And she goes, in terms of the ... you know what was agreed ... in terms of you working from ... there was an agreement. It was agreed for you to work from home because you was going under the voluntary, but now you're saying you're not signing the settlement agreement and I've told her you've got an assessment today and tomorrow, we expect you to work your notice period, so you need to go into NUC to do the assessment. Ok?"

51. Ultimately this attempt to increase the terms offered to the Claimant was rebuffed.

52. The Claimant wrote on 10 August 2016 to Ms Pillai referring to her indication that he would need to work his notice period and seeking clarity.

53. Ms Besley wrote on 10 August 2016 stating:

". . . we are contemplating terminating your employment by reason of redundancy. However we will now embark on a process of consultation with you over the next 5 days to consider whether there may be ways of avoiding the redundancy, whether any alternative positions may exist for you within the College and to consider any suggestions or comments you may wish to put forward."

54. She proposed a meeting with Mrs Herbert on 12 August 2016 and stated: "I should stress that no final decision has been taken in relation to the redundancy and will not be taken until the end of the consultation process on 15 August 2016." She made it clear that the voluntary severance offer was still available but she did not refer to the post of Business and Management Lecturer, which was openly advertised the

following day by the Respondent. By this point, the Claimant would have clearly understood that a further process was envisaged by the Respondent prior to any confirmation of dismissal.

55. On 11 August 2016 the Claimant submitted a grievance highlighting that:

> "It is my position that:
> 1. My employment was effectively terminated by your notice of severance of 22 July 2016
> 2. The redundancy process, which culminated in this termination, was flawed. The redundancy procedure has been conducted in an unfair way, and that my termination of employment in the present circumstances is an unfair dismissal
> 3. Your attempt to resile from your earlier position of dismissal by redundancy is unlawful"

> "I was not offered any suitable alternative employment despite my willingness to accept such, as indicated in email of 18 July. I was also not advised of any appeal rights against my dismissal. . . . As of 25 July 2016, I was not aware of any impediment to an offer of alternative employment within the new school of business and humanities. I am also aware that at least one full-time business and management lecturing in addition to part time teaching roles existed at the time of my dismissal. It is therefore my belief that Newham College of Further Education acted unreasonably by not exploring the possibility other options, including, but not limited to, offering me a teaching role as an alternative to redundancy."

56. The Claimant also made it clear that his view was that he had been given notice of dismissal on 22 July 2016 and that he had had not asked for Voluntary Severance until after receiving this notice. He made it clear that he would not attend the meeting with Mrs Herbert. He stated that

> "I have been, and continue to be, besieged with demands, from students and staff alike, for an explanation about the circumstances surrounding my departure from Newham College. These demands have been particularly strident among the black student community of the Newham University Centre who form over 80% of the student body. They have been asking why I, the only black manager and full time academic staff in the university centre, have to leave. I am sure you can see how this has created a very stressful environment and experience for me."

57. He made a request in the following terms

> "Please would you be kind enough to disclose the entire interview scoring criteria, notes and scoring documentation from my 21 July 2016 interview. Please note, in the event that I exercise my right to a Subject Access Request pursuant to 8.7 Data Protection Act 1988, you will be at liberty to furnish and provide all relevant documentation."

58. On 15 August 2016, Mrs Herbert sent the Claimant a notice of termination by reason of redundancy. Which states

> "As you know, we have been consulting with you during the past 5 days following the College's decision to place you at risk of redundancy. We have considered the points that you have raised about the situation and your potential redundancy."
>
> The consultation process has now ended and I am writing to confirm the College's decision to make your role redundant with effect from 31st August 2016. The basis for our decision was explained in our letter of 10th August 2016. The College is therefore serving you with notice to terminate your employment. Your employment with the College will end on 31st August 2016, and in the period between now and that date, you will be required to undertake any duties assigned to you. We will continue in the period

between now and 31st August to seek to find a suitable alternative post for you but in the event we are not successful, then your employment ends on 31st August.

Your contractual notice period is 4 months and as you will be employed for only half of one month of that period, we shall make a payment to you in lieu of the remaining part of your notice period, this being 3.5 months; In addition to this payment in lieu of notice, you are entitled to a statutory redundancy payment of £1,437.00.

Please note that in accordance with clause 7.4 of your employment contract, you will be required to take any accrued but outstanding holiday entitlement before your employment ends, and you are not entitled to be paid for any untaken leave.

Finally, I need to inform you that you have a right of appeal against this decision to terminate your employment. If you wish to appeal, you should send your written appeal to the Head of Human Resources & Legal Services within 10 working days of the date of this letter, setting out the grounds on which you are appealing. HR will then arrange a meeting to hear your appeal."

59. On 16 August 2016, by letter from Ms Pillai, the Claimant was offered the Business and Management Lecturer role - asking him to respond by 19 August. He responded the following day declining this offer and again stating that he was unhappy with the redundancy process, that the offer was made after he had been given notice of dismissal, that the Lecturer salary was £8,043 pa less than his old job and had a diminished status and that he had permanently left the college.

60. On 18 August, the Claimant chased for a response to his grievance.

61. On 22 August the Respondent offered the post of Business and Management Lecturer again but this time with 12 months salary protection – this offer was left open until 25 August 2016. Perhaps unwisely, given that a separate letter could have been sent, the letter goes on to counter the Claimant's criticisms of the redundancy process (without any investigation of the grievance having actually taken place) and points out that the Respondent would not treat his letter of 11 August 2016 as a grievance because it relates to the termination of employment and the appropriate process would be an appeal against termination. The Respondent did not simply treat the grievance as an appeal – but required the Claimant to formally confirm that he wanted to appeal and to set out his grounds by 25 August 2016.

62. On 24 August 2016 the Claimant responded reiterating his position and stating

"I note your offer of salary protection for the Lecturer in Business and Management role. Whilst I accept that, apart from the diminished status, this could qualify as suitable alternative employment under the right circumstances, the timing of this offer completely undermines its value. There was certainly no reasonable impediment to the offer of a suitable alternative before, and as an alternative to, my dismissal on 22 July 2016. As such, for the college to have waited until I have effectively left employment on 15 August 2016 before making this offer is, quite frankly, self serving and insincere. I maintain that I do not believe that a continued working relationship is practicable.
For the avoidance of doubt, I will state that I am neither interested, nor willing to consider this, or any future 'offers of suitable alternative roles'.
Finally, I note your decision not to deal with my letter of 11 August 2016 as a grievance. Be advised that I have no intention of appealing against my dismissal of 22 July 2016,

as I do not believe that a continued working relationship is tenable. As I had requested interview notes in that letter, however, I will now make a formal subject access request."

63. On 25 August 2016 he made a Subject Access Request in particular for his interview scoring criteria, notes and scoring documentation.

64. After his employment came to an end on 31 August 2016, Ms Pillai wrote back to the Claimant on 2 September 2016 contradicting his account and noting that as his employment had ended the matter was now closed. In this letter she referred to the Lecturer post as suitable alternative employment.

65. The Respondent produced a breakdown showing the ethnicity of staff at various levels in the organisation. As noted above, the Claimant was the only black manager and after his dismissal, there were no black managers.

The Law

Race Discrimination

66. The following sections of the Equality Act are relevant:

> *13 Direct discrimination*
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> *. . .*
>
> *23 Comparison by reference to circumstances*
> *(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*
> *. . .*
>
> *39 Employees and applicants*
> *. . .*
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
> *. . .*
> *(c) by dismissing B;*
> *. . .*
>
> *136 Burden of proof*
> *. . .*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

67. The potential relevance of statistical information in relation to claims of direct discrimination was established in *West Midlands Passenger Transport Executive v Singh* [1988] ICR 614, CA at 619 D-F, a race discrimination case where the complainant sought and obtained disclosure of data showing the numbers of white and non-white applicants for, and appointees to, posts that were broadly comparable to that for which he had unsuccessfully applied. The Court of Appeal (Balcombe LJ) recognised that this data might be something from which

the employment tribunal could infer discrimination if it revealed a pattern of treatment by a Respondent towards persons of the complainant's racial group. The Court recognised the difficulties that complainants face when attempting to prove direct discrimination at 618 G-H and noted that in many cases the only way for them to do so may be by the tribunal drawing appropriate inferences from all the evidence including statistics.

Unfair Dismissal

68. The following sections of the Employment Rights Act 1996 (ERA 1996) are relevant:

> 94 The right
> (1) An employee has the right not to be unfairly dismissed by his employer.
>
> 98 General
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show— (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
> . . .
> (c) is that the employee was redundant,
> . . .
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

69. Both counsel supplied the tribunal with helpful oral and written submissions for which the tribunal is grateful. We were referred to the following authorities (all relating to unfair dismissal) and given copies of those that are starred:

a. By the Claimant:

Williams v Compair Maxam Ltd [1982] IRLR 83

R v British Coal Corpn and Secretary of State for Trade & Industry, ex p Price [1994] IRLR 72

**Mugford v Midland Bank* [1997] IRLR 208

**Pinewood Repro v Page* [2011] ICR 508

Quinton Hazell Ltd v Earl [1976] IRLR 296

**Avonmouth Construction Co Ltd v Shipway* [1979] IRLR 14

**Green v London Borough of Barking and Dagenham* UKEAT/0157/16

**Morgan v Welsh Rugby Union* [2011 IRLR 376

b. By the Respondent:

**Mugford v Midland Bank* [1997] IRLR 208

**Samsung Electronics (UK) Ltd v Monte D'Cruz* UKEAT/0039/11

Martindale & Co v Harris UKEAT/0166/07

**Burton Group v Smith* [1977] IRLR 351

**Alboni v Ind Coope Retail* [1998] IRLR 131

**Stacey v Babcock Power* [1986] IRLR 3

70. Redundancy is one of the potentially fair reasons for dismissal listed in s98(2)(c) ERA 1996. For a dismissal to be by reason of redundancy, a redundancy situation must exist. It is not for the tribunal to investigate the reasons behind such situations. The tribunal has no jurisdiction to consider the reasonableness of the decision to create a redundancy situation. A tribunal is entitled only to ask whether the decision to make redundancies was genuine, not whether it was wise.

71. Our primary guide to the question of fairness is the wording of s98(4) ERA 1996. We also relied on the following relevant guidance from the relevant authorities:

a. "in a case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation"[1];

b. In a classic 'selection for redundancy exercise', the *Williams v Compair Maxam Ltd* [1982] ICR 156, EAT principles which reasonable employers should usually adopt when dismissing for redundancy employees who are represented by an independent recognised trade union are set out at para 19, helpfully quoted in Mr Gorasia's submissions for the Claimant.

"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the

[1] Lord Bridge in *Polkey v A E Dayton Services Ltd* [1988] ICR 142 at 162–163

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 in the undertaking or elsewhere.

2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly 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 upon the opinion of the person making the selection but can be objectively checked against such things 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.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'."

c. The principles set out in *Williams* should not be treated as if they were a statute or check list. Where redundancy arises in consequence of a re-organisation and there are new roles to be filled, the employer's decision is likely to centre upon the assessment of the ability of the individual to perform in the new role. The *Williams* criteria are unlikely to be as useful in such cases, as appointment to the new role is likely to involve something more akin to an interview than a traditional selection process. The tribunal remains entitled to consider how far the process was objective, but should recognise that the decision as to which candidate will perform best in the new role will involve a substantial element of judgment (*Morgan v Welsh Rugby Union* [2011] IRLR 376, EAT) – see paras 30 and 36:

> 30. … 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.
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> 36. To our mind a tribunal considering this question must apply s.98(4) [ERA]. 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).

d. Each case depends on the consideration of s98(4). The information which a reasonable employer would have provided an employee in advance of such an interview may differ from what an employee would need to be told about a traditional redundancy scoring exercise; there is no obligation always to use criteria which are capable of objective measurement; and a finding of unfair dismissal in such a case should not turn upon the minutiae of good interview practice (*Samsung Electronics (UK) Ltd v Monte-D'cruz* (UKEAT/0039/DM) (1 March 2012, unreported).[2]

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. . .

> (a) We start by observing that "selection criteria" is not quite the right language. This was not, as the Tribunal itself had noted, a situation where one or more of several job-holders was being selected for redundancy: rather, the Claimant's job was being abolished but he was being offered the chance to apply for a different job. However, the issue does not turn on terminology. The real question is whether it was unfair that the Claimant was not told in advance of the interview what scoring method would be used in assessing him against any other candidate. We cannot see that it was, and the Tribunal does not explain why it should be. The Claimant himself did not, either at the time or in his evidence to the Tribunal, complain of any unfairness in this regard.

. . .

> 27. We take first the reference to subjectivity. "Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are

[2] we noted that a 'competency bar' (i.e. pass mark) in a competitive slot exercise may be capable of rendering a dismissal unfair depending on the other circumstances - *Cumbria Partnership NHS Foundation Trust v Mr N Steel* UKEAT/0635/11/JOJ – although that was not applied in this case

capable of such measurement, and certainly not in the context of an interview for alternative employment: cf. the observations of HH Judge Smith in *Ball v Balfour Kirkpatrick Ltd* (EAT/823/95) quoted in *Morgan* at para. 32 (p. 381). Given the nature of the Claimant's job, we see nothing objectionable in principle in his being assessed on "subjective" criteria. Although the Tribunal says that it would have been better to use the person specification as the basis of assessment we are unclear how that would have avoided subjectivity.

. . .

31. We have no problem with the proposition that it is good practice for interviewers to discuss with one another before an interview the approach to be followed. It may well be sensible, as part of that process, for them to discuss what they understand by any specified assessment criteria. Likewise we can accept that it may be a good idea for interviewers to discuss in advance what would be "good" answers to the questions asked, as suggested in para. 109, though there will be limits to the extent to which such discussion can provide a complete uniformity of approach (even assuming that to be desirable). In a perfect world it may perhaps also be ideal, to pick up the point made in para. 109, be ideal for all questions and answers to be recorded in full – though we doubt whether the ideal is attainable in practice. But we cannot accept that failure to take these various steps will, of itself, render the interview decision – and still less any eventual dismissal – unfair, any more than the failings of process which were found in Morgan did. The fairness of a decision to dismiss in cases of this kind cannot depend on whether the minutiae of good interview practice are observed. In the present case, an arguable case of unfairness would only have been raised if it had been found, on the basis of proper evidence, that the failures in process identified had led to some serious substantial unfairness to the Claimant. Subject to the particular point considered below about assessment of past performance, the Tribunal made no such finding, and there seems to us no basis on which it could have done so. In fact we observe that the scores given to the Claimant by Mr Porter and Ms Bean, both factor-by-factor and overall, were pretty similar.

e. In *Green v London Borough of Barking & Dagenham* (UKEAT/0157/16/DM), the EAT emphasised that *Morgan* should not be elevated into a principle of law and (as *Morgan* itself had emphasised) the essential consideration was s98(4):

39. The difficulty we find is that the ET thereby appeared to see *Morgan* as providing the solution to the case as it if laid down a rule of law, when *Morgan* in fact made clear it was directing ETs back to section 98(4) ERA unvarnished; it expressly did not lay down any further proposition of law (see paragraph 36 of *Morgan* above).

40. We can see that, where a redundancy arises in the context of a reorganisation or restructuring that sees old jobs disappear and new jobs created, the selection process that the employer will carry out may be hard to characterise in Williams terms; that was the point being made in *Morgan* relevant to the particular facts of that case. In the present case, however, the redundancy arose in the context of a much larger collective redundancy situation, quite unlike *Morgan*. The reduction of three jobs into two was part of the restructuring, but it was not the creation of a different job as such. It is hard to see why this should not simply be characterised in terms of a selection pool of three, from which two employees were to be retained and one would be selected for redundancy.

41. That is not to say, however, that the Respondent was not entitled to carry out its selection process in the way that it did; we do not say it was required to apply the criteria identified at paragraph 3 of the *Williams* guidelines. The question for the ET was whether the Respondent thus acted within the range of reasonable responses. So, even if distinguishable from *Morgan* - in that this was not a case

involving the creation of a new position - that would not have prevented the ET concluding that a process that looked forward - seeking to determine who would be best qualified and who had the most relevant abilities and skillset - fell within the range of reasonable responses. Similarly, it would be open to the ET to consider that the process of selection - here carried out by means of an assessment and interview - was also fair.

42. At all times, the touchstone would need to be section 98(4); the ET would keep in mind the need not to fall into the error of substitution, but it would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable responses. Here, we do not consider we can be satisfied that the ET adopted this approach. We consider it became blinkered by what it felt was the requirement to apply *Morgan* as if it laid down a rule of law. That was an error: first, because this was not a case on all fours with *Morgan*; and second, *Morgan* should have directed the ET back to section 98(4) - it did not provide a means of short-circuiting that assessment.

f. A tribunal will not usually undertake a review of the marks employees received. It will usually be sufficient for the employer to show that he set up a good system of selection and that it was fairly administered. There will ordinarily be no need for the employer to justify all the assessment on which the selection was based. In general, if the employer sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness, it will have satisfied the requirements of ERA 1996, s 98(4).[3]

g. The tribunal should not embark upon a detailed critique of individual items of scoring to determine if an employee's selection was reasonable.

h. Having found the system of selection to be reasonable, a Tribunal should not go on to examine in detail the actual scores awarded, nor should it substitute its view of the score which should have been given to the employee for that awarded by the employer without assessing the reasonableness of the score.

i. The Tribunal should not substitute its views for those of the employer. It is not the function of the tribunal to decide whether they would have thought it fairer to act in another way (*Williams* para 18).

j. A dismissal of an employee may be considered unfair if no consideration is given to finding him another job within that company – even at a lower status or salary (*Avonmouth Construction Co Ltd v Shipway* [1979] IRLR 14).

k. The fairness of a dismissal for redundancy will be judged not simply at the date on which notice is given but also with regard to events up to the date on which it takes effect (*Alboni v Ind Coope Retail Ltd* [1998] IRLR 131, para 12).

[3] *British Aerospace v Green* [1995] ICR 1006 @ 1019 F-H

l. The ACAS Code of Practice does not apply to redundancy dismissals but employees should have the opportunity to challenge or appeal against their redundancy.

Conclusions

Race Discrimination

Was the Claimant less favourably treated than Mr Lane?

72. Mr Lane was successful and the Claimant was not. The Claimant had recently been persuaded by the Respondent to return to his job after an attempted resignation. The Claimant and Mr Lane were put through the same process – and whatever criticisms can be levelled at the nature of the process or the questions or the relationship of the questions to the Job Description / Person Specification, they were equally applied to both candidates. The Claimant's case relied on two aspects of Mrs Herbert's chairing of the selection panel on 21 July 2016. The Tribunal have made findings of fact above that she was not hostile towards the Claimant and did not make the sarcastic comment alleged and therefore this claim is not made out on the facts. The Claimant was not treated less favourably than Mr Lane.

Was the Claimant's treatment 'Because of Race'?

73. Despite its finding of fact about Mrs Herbert's behaviour as referred to in the previous paragraph, the tribunal went on to consider whether any treatment of the Claimant could be said to be 'because of race' in relation to the Respondent's failure to select him for the Head of School post. The tribunal did not feel that the statistical evidence available to it was useful given the small sample size. The Tribunal did take into account that the Claimant was the only black manager and that no black managers remained after the restructure. However (as set out below) this was a genuine redundancy exercise which affected a number of people.

74. The Tribunal did not consider that it had evidence before it from which it could decide, in the absence of any other explanation, that the Respondent's failure to select the Claimant for the Head of School post could have been because of race to any degree.

Unfair Dismissal

Reason for Dismissal

75. The tribunal considered that there was genuine redundancy situation. This was a wide ranging re-organisation of management function across the Respondent which affect 17 posts. The Claimant urged the tribunal to consider whether the amount saved by the restructuring (if any) was sufficient to justify making him redundant but it is not for the tribunal to determine the wisdom of the Respondent's approach. The tribunal noted that this was a reorganisation with aims that went beyond costs saving to encompass a shift in the management / teaching burden of the Head of School post compared with the Curriculum Manager post which was

being deleted and that the reorganisation had been the subject of reasonably detained proposals which were shared with the trade union and explained to the individual employees. The Claimant was then put through an interview process along with other individuals.

76. Therefore the tribunal concluded that redundancy was the reason for dismissal and rejects the Claimant's argument that the restructuring was a sham to enable Mr Lane to be placed in the role of Head of School Business and Humanities or that the real reason for dismissal was an act of discrimination.

Fairness

77. The tribunal considered the various elements of fairness individually before then taking an overview and asking itself whether in all the circumstances the Respondent acted reasonably in dismissing the Claimant.

Fairness – Consultation and Interview

78. The Claimant confirmed that his criticism was levelled at the individual rather than the collective consultation. The tribunal felt that the consultation that did take place was genuine although the time scale was tight and that given the number of individual employees affected there could have been one to one meetings with the relatively small number of affected employees. Although consultation did take place in group meetings on 4 (or 7) and 12 July 2016, which included the circulation of draft job description / person specifications on 5 July 2016, the initial indication to the affected employees in the timetable sent out on 1 July 2016 did not suggest that there would be any individual consultation after 15 July 2016; and the email of 12 July 2016 confirmed that "Consultation closes on 15 July 2016". The employees were told that they could have a one to one meeting with Ms Cast; were repeatedly told that they could come back to Ms Besley and Ms Pillai with any queries; meetings took place with the Claimant on 22 July 2016 after the result of the selection process; and the Claimant was offered a further meeting with Mrs Herbert on 12 August 2016, which he declined. The tribunal considered that the Claimant could not successfully argue that there had been insufficient individual consultation when such offers had been made but not accepted.

79. The Claimant argued that there was no consultation with the Claimant about the interview selection criteria, the nature or weighting of scoring or the panellists' approach to selection. The tribunal accepted this argument to a certain extent – albeit that the Claimant was aware that the interview would be based on the job description / person specification and that to prepare for it he needed to look at his experience to date, his data (success rate, retention rate and his curriculum data), curriculum planning, skill set, management experience, curriculum specialism, resources and successes – as per Mrs Herbert's advice on 12 July 2016.

80. The tribunal did not consider that the questions asked during the interview were particularly well designed and that although largely

referable to the job description / person specification in broad terms, on the whole they appeared to be somewhat generic rather than specific to the job applied for. There was no discussion with the affected employees or between the panel members about the scoring methodology and no moderation of disparate scores after the interviews. The employees were expressly told that securing a new post would be based solely on the interview (itself based on the job referred to in the supporting statement); the fact that 5 panel members marked independently before totalling their scores at the end of the process ameliorated the inevitable subjective element to this judgment process; and some information was given to the employees about the preparation necessary for the interview. The time period available to the affected candidates was relatively short (given Mrs Herbert's leave from 22 July 2016) and came at one of the busiest times of the working year for the affected employees and prior to the August holiday period.

81. On the single sub-issue of whether the interview alone could potentially amount to unfairness (albeit within the context of having to look at all the circumstances before making a final decision), the tribunal were divided 2:1. Ms Long felt that the interview process was potentially outside of the band of reasonable actions of a reasonable employer in particular given that the affected employees were told on 12 July 2016 that the interviews were going to rely on the supporting statement and she felt that the questions went beyond that and that she felt that the consultation process overall was imperfect in that the Claimant had not been consulted about the way in which the interviews were to be marked. Mr Ross and EJ Allen did not agree and whilst their view of the process did not flatter the Respondent, they considered that its actions were within the band of reasonable actions of a reasonable employer and that the Claimant had been sufficiently well informed of the matters that would be investigated at interview and that he knew from Mrs Herbert's comments on 12 July 2016 that it would go beyond merely the contents of his own supporting statement. Mr Ross and EJ Allen considered that in line with the guidance in *Morgan*, *Samsung* and *Green* as set out above and having looked at s98(4), the Respondent's actions were reasonable – although not praiseworthy. Mr Ross and EJ Allen considered that the scoring of such an interview inevitably involves an element of subjective judgment – but that this does not render such a process unreasonable.

Fairness - Alternative Employment

82. The Tribunal considered that the Respondent should have offered the Lecturer post to the Claimant a little earlier. The tribunal considered carefully the Claimant's detailed submission as to the importance of the context of the timing of the offer to the Claimant's decision to reject it. However taking into account that the Claimant remained in paid employment until 31 August 2016; that he had given the impression to the Respondent on 22 July 2016 that he was primarily interested in voluntary severance; and that the Respondent ultimately offered him the Lecturer post - initially on 16 August 2016 and with pay protection worth £8,043 for 1 year on 22 August 2016, which the Claimant turned down,

the tribunal did not consider that the employer acted outside the band of reasonable responses in this regard.

Fairness – Appeal

83. The Claimant was offered a right of appeal in the termination letter of 15 August 2016 and in the letter of 22 August 2016. The tribunal considered that had the Respondent either treated the Claimant's grievance as an appeal or at least offered to have done so, this may have been better practice. However the tribunal did not consider that this failure placed the Respondent outside the band of reasonable responses given that weeks prior to the Claimant's effective date of dismissal, he was offered a right of appeal which he rejected at a time when he was still in paid employment. He would have received further information about his scores and the interview if he had appealed.

Fairness overall

84. All members of the Tribunal considered that an institution with the size and administrative resources of the Respondent (including internal human resources support) could have done better. The Tribunal was not impressed with the manner in which the redundancy consultation was handled (including its haste); with the conduct of the interview process; and the lateness of the offer of the Lecturer post. However, given the consultation that did take place; that the Respondent did offer a right of appeal; and made the offer of alternative employment on 16 August 2017 - which was offered again on enhanced terms on 22 August 2017, taking a step back and looking at all the circumstances of the case, the tribunal (unanimously) was not satisfied that this employer's actions overall were outside the band of reasonable responses. For Ms Long this was a borderline decision given her concerns as expressed above.

85. The Respondent has already indicted to the tribunal that it has identified a number of learning points from this case and the Tribunal hopes that the consequence of the Claimant's decision to bring this case will have positive consequences for the Respondent's employees in the future.

Polkey etc

86. Although in light of their decision, the tribunal was not required to go on to determine questions relating to the size of the compensatory award, but if it had the dismissal to be unfair, the tribunal would have made a very sizeable reduction given that (a) there were two candidates for the Head of School Business & Humanities job – and Mr Lane did score appreciably better than the Claimant; (b) the Claimant rejected the Lecturer job offer made eventually on enhanced terms preserving his salary for 1 year.

Conclusion

87. Therefore the Claimant's claims for race discrimination and unfair dismissal fail and are dismissed.

Employment Judge Allen

5 February 2018