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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr D Smith

AND

United Overseas Bank Limited

Heard at: London Central

On: 5-7, 11-13 February 2019

Before: Employment Judge Wade

Members: Mr M Simon
Mr S Soskin

Representation

For the Claimant: Ms C Jennings, of Counsel

For the Respondent: Mr M Magee, of Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that the respondent:

1. Unfairly dismissed the claimant;
2. Did not discriminate against him because of his race, indirectly discriminate against or victimise him.

REASONS

1. The Claimant was dismissed from the Respondent's employment after 23 years and he claims that the dismissal, purportedly by reason of redundancy, was unfair and that the failure to offer him a new role during the process, which could have been a suitable alternative role, was race discrimination. He also claims indirect discrimination and victimisation.

The applicable law

2. This case was complex because of the murky factual situation. The law is relatively straightforward.

3. A redundancy may be a fair dismissal under s.98 of the Employment Rights Act but the dismissal must be fair in all the circumstances. The Claimant does not argue that the initial decision to remove the main function of his role, thus creating a redundancy situation, was suspect or that he should have been consulted when that decision was made. However, he cites twenty examples of incidents in support of the claim that the process thereafter was fundamentally flawed, especially the failure to redeploy him.
4. The discrimination issue is whether the decision not to offer the Claimant the position of finance/admin officer was less favourable treatment because of the Claimant's race, this being that he was not of Asian origin. A subsidiary question was whether that resulted in the Claimant being selected for redundancy.
5. When deciding whether there was discrimination the first question is whether the Claimant can establish facts from which the Tribunal could conclude that the Claimant's race was a factor in reaching the decision. Second, if so, can the Respondent show that the decision was in no sense whatsoever related to the Claimant's race? It has been established that it is not incumbent upon the Tribunal to deal with these two questions sequentially and that the Tribunal may instead ask "what was the reason why the Claimant was treated as he was?"
6. The Claimant relied upon an actual comparator, Ms M Z, who was given the disputed role and also upon a hypothetical comparator.

The evidence

7. The Tribunal heard evidence for the Respondent from:
 - (1) Mr Andy Cheah, Branch Manager of the London Branch at the material time,
 - (2) Mr Quek Chee Peng, Operations Manager of the London Branch.
 - (3) Mr Ash Kumar Vyas, Deputy Operations Manager at the material time.
 - (4) Mr Peter Lelliott, Relationship Manger who dealt with the second grievance.
 - (5) Mr Steven West, Relationship Manager who dealt with the formal redundancy process.
8. For the Claimant we heard evidence from Mr Daniel Smith himself and Ms Lena Chong, his former Line Manager.
9. We read the pages in the bundle to which we were referred.

The facts

10. Having taken into account all the evidence we find the following facts on a balance of probabilities. These findings focus upon the facts needed to reach conclusions on the issues.

11. The Respondent is an international bank operating in nineteen countries. Its Head Office is in Singapore and its London branch has twenty nine employees. It has an equal opportunities policy.
12. The Claimant began his employment with the Respondent aged nineteen on 15 September 1993. At least in later years, he was employed in Treasury Remittance as a Senior Officer. The majority (80-90%) of his work was in the administration of the Bank's function clearing sterling which the London branch did for all the branches worldwide.
13. The grades for middle-ranking staff, started with Senior Officer, moved up to Manager, Assistant Vice President ("AVP"), Vice President One ("VP1") and then Senior Vice President ("SVP").
14. The Claimant's Operations Manager was Mr Quek and he reported to the Branch Manager who was Mr Cheah from 2014. In about 2007 Ms Lena Chong became the Claimant's Line Manager. She was a VP1 and Head of Treasury Remittance. Her's was the supervisory role and she carried out the Claimant's annual appraisals. He was her only report and as far as we are aware there were no issues arising out of the appraisals. This point is important later as there is no evidence that the Claimant was not considered to fit successfully into the bank and its culture.
15. About 50% of Ms Chung's time was spent on clearing work, this rose to 70% at peak times especially when she covered for the Claimant. Otherwise she did other projects. As someone who was three grades above him, it is not surprising that he was the "doer" and she the checker of the work, so he alone was doing clearing work at that functional level.

The respondent's plan to stop doing clearing work

16. In late 2015, for various business reasons, Mr Cheah suggested to Head Office in Singapore that the London branch should cease acting as the clearing agent for sterling for the bank worldwide. The Claimant does not suggest that the reasons for this proposal were not genuine or that they were personal to him. He agrees that he would not have expected to have meaningful input into this high-level discussion. However, if the clearing work ceased this would mean that 80%-90% of his work also ceased.
17. On 21 December 2015, Head Office advised that it had no objection; it was an "in principle" decision at this stage and the practical implications needed to be understood and then the changes planned and implemented. The Respondent could have told the Claimant at this point that there were plans which could affect his job, but given his junior grade it was not unreasonable to withhold the information and await more detail.
18. Mr Cheah had a meeting with Lena Chong (we use her first name because another Ms Chong appears in this narrative later on) in January 2016 and he told her that there was strategic agreement from Head Office for London to cease its clearing work. Mr Cheah recalls that Ms Chong seemed surprised and concerned

and he reassured her that the team, this was her and the Claimant, would be taken care of. His general intent was to take care of a team which had been working for the Respondent for so long.

19. However, Mr Cheah told Ms Chong not to tell anybody, including the Claimant, about the proposal until there was more certainty. This was reasonable given her seniority and the preliminary nature of the plan.

20. The Claimant says that when he was not included in the discussions with Ms Chong this indicated that it was a forgone conclusion that he was going to lose his job. We do not agree and note that the Claimant did not understand that there was quite a significant distinction in rank and responsibility between his position and Ms Chong's.

Ms Chong tells the claimant confidentially

21. Despite assuring both Mr Cheah and Mr Quek that she would keep the information confidential, Ms Chong told the Claimant what she had been told because she thought it was unfair to keep it from him; they were quite close friends apparently. She then kept him regularly updated. Senior managers did not know that the Claimant had been told and Ms Chong did not think to try to persuade them to tell him themselves. This situation caused confusion further down the line.

22. Knowing what he knew, and senior managers not knowing that he knew it, the Claimant was upset that he was not being included and he was worried for his job, but nothing could be done because he was not in a position to negotiate (Ms Chong could have done so on his behalf but did not).

23. In early 2016 Ms Chong was selected for some leadership training which the Claimant says demonstrates that management were already taking steps to find new opportunities for her. However that they did not know that he knew about the changes explains why they were not thinking about putting measures in place for him.

24. Mr Cheah then offered an Operations Assurance role to Ms Chong which, with the remaining 50% of her Treasury work would make a full time job. She turned this offer down because she thought that there would be a possible conflict of interest.

25. Plans continued to be made and during April and May the amount of clearing work declined so that the Claimant was less busy than usual. There is no indication in the documents that the Respondent was thinking of making Ms Chong or the Claimant redundant rather than moving them into other functions.

26. On 11 May the Claimant was told by somebody in Compliance that clearing was ending, and since he had derived this information from a different source, he was able to raise his concerns without betraying Ms Chong. He told Mr Quek in an email that he was worried about this news because the work constituted 80-90% of his daily work.

27. Mr Smith received a strange response from HR. It was very general, talked about restructuring which had not been his query, and told him to wait for formal announcements. He was understandably not reassured, nor were the specifics of his job discussed at all. Mr Cheah was copied in and he did not take action to reassure the Claimant either.

28. Mr Cheah's reason for not reassuring the Claimant was that the arrangements had not yet been fully finalized, but given that he both knew what the plan was and had experienced a decline in workload, the Respondent should have told him more about what the plans were and offered reassurance. This silence was the source of much resentment on the part of the Claimant.

Ms Chong is found a customized role

29. In May 2016 two staff at VP1 grade left the Bank, Julian Chong, Head of Capital Loan Operations and James Thompson, Deputy Operations Manager. These were possible new roles for Lena Chong and so discussions with her commenced. It was not relevant to commence similar discussions with the Claimant at this time because roles had not come up which would potentially be appropriate for him.

30. A complex set of discussions ensued regarding the possibility of Ms Chong becoming Head of Loan Operations. There is disagreement about whether she offered and accepted the role at any point. The only certainty that emerges from this muddle is that she retained her 50% of Treasury work and was found other activities assisting Mr Quek which meant that she was occupied at VP1 grade and not redundant. Although she had turned down the first job offer, she was prepared to accept a new customised role which meant that there was no need to look at redundancy.

31. We find that the Respondent should have told the Claimant in May, at least in outline, that there were plans to cease the clearing work thus deleting 80-90% of his work. If that is not right, they should certainly have told him in June when the reduced level of work spoke for itself; the management committee meeting of 23 June noted that the clearing work had reduced by 50%. It was artificial at that point for the Claimant not to be told what he could see for himself and wrong that he was not offered reassurance.

Mr Cheah tells the claimant of the plan to end his clearing work

32. Eventually at the end of July, Mr Cheah decided that there was no going back so that he was ready to tell the Claimant what the plans were. He met Mr Smith on 1 August 2016 and, whilst he should have been told of the plans sooner, this was a reasonable time to start a discussion. It was not a formal redundancy consultation as the Respondent was not thinking of possible redundancy at this stage.

33. Mr Cheah offered the Claimant a role of "Back office/middle office officer". The job description showed that it was a customised role comprising the remaining

10% of the Claimant's current job plus some extra work. The meeting did not go well for a number of reasons, with Mr Cheah trying to look to the future and the Claimant wanting some answers to why he had been told so late. This set the tone for the discussions going forward, which were largely unsatisfactory, and damage had already been done to the employment relationship.

34. Mr Smith showed the job description for his new job to Ms Chong and her comment was that it did not look like a full job and she did not encourage him to accept it. Sadly, she sat on the sidelines and did not communicate her views to Senior Management or try to mediate to secure a successful outcome whereby something more satisfactory was found for the Claimant to do.

35. Mr Smith says that Mr Cheah knew all along that this was not a "proper" job and that it was not permanent. There was no sign at this stage that Mr Cheah wanted the Claimant to end his twenty-three-year-long career with the Respondent and we have already seen him offer Ms Chong a customised role to keep her there. We do not think that the Claimant was being set up to fail and if he had accepted this job, he would probably have still been in employment now. The way that the Respondent operated was to put together roles for its long-standing employees which kept them fully employed; not perhaps a particularly systematic way of working but one which kept them in employment. We can understand that the Claimant might have found this approach confusing and unsatisfactory, but it was not a sham. It was also not in the Respondent's mind to think about making the Claimant redundant at this time.

Cross-training/ restructuring

36. Almost simultaneously, on 2 August, Mr Cheah met with the whole Operations Department to promote an idea he was keen on. This was what he called a "cross-training exercise", but the staff took to be a restructuring, whereby anyone who wanted to could volunteer to swap jobs and work in another part of the department with management's agreement. This was a way of ensuring that staff were cross-trained and thus more inter-changeable. The confusion arose because the plan was not to conduct short-term training but to swap individuals into different jobs, perhaps for a matter of years.

37. The exercise was viewed with some scepticism by the Claimant and Ms Chong and it never really got off the ground as a process because only two staff members offered to swap out of their existing roles.

Lip Ching Chong's finance/admin role

38. One person who did express interest was an AVP called Ms Lip Ching Chong. She was doing what is known as the "Finance/admin" job and she wanted to move. Although there was no one to swap directly with, various new roles were explored for her, very much in the same way that a role had been put together for Ms Lena Chong. She could not do a direct swap with the claimant, not least because his role was ending.

39. On 4 August the Claimant sent a short note to Mr Cheah saying “I have considered your offer for the new role and decided that it is not a suitable position for me and so I am declining the offer”. Mr Cheah commented to Mr Quek “my feeling is that he is gunning for redundancy and frankly his attitude has been disappointing. I am open to giving him redundancy, lets discuss the costs and implications...”. The Respondent considered the Claimant’s rejection of the role to be hostile and unconstructive and from then onwards, his having declined their offer to look after him, the Respondent was not minded to find the Claimant a new role. He was indeed angry and suspicious; he had reasons for this, but these feelings did stand in the way of his playing his part in negotiating a satisfactory conclusion.
40. Another reason for the Claimant rejecting what is known as the “Middle office” role was that he thought that better opportunities might arise as part of the “restructuring”. He met with Mr Quek on 19 August to discuss his future and Mr Quek asked what he wanted if he did not want the Middle office role. The Claimant said that the only job he would consider was Ms Lip Ching Chong’s Finance/admin role. This was an AVP role, two levels above him and the Respondent says that Mr Smith said he was only interested if it was at that corporate rank.
41. This point became an important refrain for the Respondent during the hearing. Mr Cheah and Mr Quek were adamant that there was no point in offering the Claimant the Finance/admin job at his SO level because he would not accept it. They even went as far as to say that if he *had* accepted the role at SO grade they would have given it to him. This last point was not in their witness statements or documented in the bundle, but they said it during the hearing. The evidence is ambiguous; there is evidence that the Claimant did indeed require an AVP-grade job, but there is also evidence that he was more flexible.
42. What is clear is that whilst Mr Quek already knew that Lip Ching Chong had said that she would like to move jobs so that the Finance/admin job was going to be available, he did not tell the Claimant. He also did not treat this as an expression of interest under the restructuring exercise, the explanation being that the Claimant was offering to put himself forward but “it had strings attached”, i.e. his wish to be ranked the same as Lip Ching Chong.
43. The Claimant did not see Mr Quek’s notes of the meeting of 19 August for some months but when he saw them after he had applied for the role, he strongly challenged them. He pointed out that he had in fact applied for the Finance/admin role when it was graded SO and had not said anything at the interview about expecting it to be regraded to AVP. He also said that he had not made the point as emphatically as Mr Quek says he did and all he had said was that he would “expect” the role to be given to him at AVP grade. Of course, the word “expect” is open to interpretation, being anything from a negotiating stand to an absolute requirement.
44. Later in August 2016 the Respondent employed somebody else to do the Middle office role. It was not quite the same job because the Claimant’s remaining 10% from his existing job did not transfer over and for various reasons

she took the job on as a fixed term three to six month contract. The job remained as a fixed term role.

External recruitment for the Finance/admin role

45. By 7 September the Respondent was already talking to recruitment agencies because it had decided to recruit to the Finance/admin role externally. The Claimant was not told. The role was advertised as SO grade and Mr Quek says that the Claimant was not involved because he had made it clear that he would only accept it as an AVP grade. During the hearing Mr Quek acknowledged that the Claimant should have been offered a chance to apply at this time.

46. Also at this time, settlement discussions were taking place to see if a voluntary severance agreement could be reached.

47. With negotiations going nowhere, the Claimant was advised by Mr Quek on 21 September that he was at risk of redundancy. Management's position was that the Claimant had been offered a new role, the Middle office role, and he had turned it down and because the Claimant wanted the Finance/admin role at AVP not SO grade it was not a suitable redeployment option. The obvious thing to have done would have been to offer the Claimant the Finance/admin job and seen what he had said because that would have decided the position once and for all, but they did not do that. In their oral evidence both Mr Cheah and Mr Quek reiterated that had the Claimant been prepared to accept the job at SO grade they would have given it to him without an external competition so it was most unfortunate that they did not clarify his position. Through the end of September and into November, settlement discussions continued together with a debate about whether the Middle office job had been suitable or not.

The claimant's first grievance

48. On 26 October the Claimant submitted his first grievance. He was complaining that he had not been treated with respect when his work started to diminish and that he had been discriminated against because of his race as Lena, his Manager, had been looked after and he had not. The Claimant did not recognize, as he should have, first that as his manager she was in a different position from him, and second, that he had been made a similar offer of a customised role, but he had turned it down.

The claimant is told of the finance/admin vacancy and applies

49. On 9 November Mr Quek told the Claimant about the Finance/admin vacancy for the first time. This was on advice from the Respondent's legal advisers and, as we know, was at least two months after the external recruitment process had begun. We find that this is evidence of the fact that the Respondent had no plans to allow the Claimant to apply for this job and no plans to appoint him.

50. There may have been some worry as a result of the grievance leading to this legal advice because, on the face of it, it is not surprising that the claimant had not been offered the chance to apply. This was because this role included a duty

to carry out statutory reporting, an important function of which the Claimant had no experience. It is strange to us, therefore, that the Respondent's witnesses said that they would have offered him this job had he agreed to take it at SO grade, but nonetheless that is what they said.

51. On 10 November the Claimant confirmed that he wished to apply for the Finance/admin officer vacancy. He knew it was advertised at SO grade but said that he expected salary and rank to be AVP. Mr Quek did not check out what he meant by that and told us he assumed that the Claimant would not take the job unless it was AVP.

52. The Claimant's focus became the Finance/admin role and although he was re-offered the Middle office role on 25 October, he had made it clear that he was not interested.

53. On 28 November the Bank confirmed that the restructuring/cross training exercise was not going ahead because there was insufficient interest but that the Claimant would be included in the external competition for the Finance/admin role.

54. The process did not go smoothly, and it seems that there was no plan to interview the Claimant although the external candidates were going to be interviewed. However, at the eleventh hour, on 1 December, Mr Cheah instructed Mr Quek to organise an interview "so we can show that he has been given a fair chance". This is further evidence that there was no serious intention to give the Claimant the job.

55. Mr Quek agreed to do the interview and asked his senior colleague, David Ng, to sit in, and rather surprisingly the interview happened that very day. The Claimant must have had some notice that it was going to be happening because he emailed Mr Quek setting out in brief his qualifications and experience. However, he was not given an application form to fill in nor was he asked for a CV; at the very least the external candidates will have provided a full CV.

56. The Claimant did not have notice of the time or date of the interview and he was unexpectedly called into a room by Mr Quek and the interview began there and then. The Claimant says that at the interview he was not given the opportunity to explain all his relevant qualifications and it is agreed that he was also not asked some of the questions which the other candidates were asked because the Respondent believed they already knew the answers.

57. Mr Ng filled out a marking matrix for the Claimant and two external candidates and Mr Quek reported back to Mr Cheah, who had not been present at the interview, that he had emphasised the extreme importance of submitting timely and accurate statutory reports "which could have a bearing on our being authorised to continue to operate in UK". He knew when he wrote this that the Claimant had not done statutory reporting. Mr Quek also recorded that the Claimant had said that he should be paid the same as Lip Ching Chong (ie at AVP and not SO grade). He then went on holiday.

58. Mr Cheah met the two external candidates for a final interview. His mission was to identify whether or not they were a “UOB fit”. He did not meet the Claimant because, he explained, he had seen him in action every day, he had feedback and it was a given that after twenty three years he was a UOB fit, “if he didn’t meet the criteria he shouldn’t be working for the Bank”.

MZ is appointed to the Finance/admin role

59. It was decided that one of the external candidates, MZ, should be offered the role. Whilst Mr Cheah was the most senior decision maker, it was a unanimous decision by three senior executives, Mr Cheah and his two colleagues Mr Quek and Mr Ng. As the Claimant agrees, MZ had statutory reporting experience which he did not.

60. Mr Cheah rehearsed his script for giving the Claimant the bad news with Mr Quek and in an email said “I will inform him that his application for the Finance/admin role is unsuccessful. I will tell him what our criteria were, and that there were stronger candidates applying for the role”; there was no reference to “UOB fit” being the deciding factor. The Claimant says that this was a tick box exercise and he was never going to be seriously considered. We agree that MZ’s suitability or otherwise was never the deciding factor.

61. Very fairly, the Claimant does not say that he was better than the successful candidate, but he does say that he should have been given the job and trained up either as part of the restructuring exercise or as a suitable alternative to redundancy. We find that although the Claimant had a way to go before he would be able to do statutory reporting, Lip Ching Chong was available to train and assist him and as she was the previous incumbent of many years who did not have a pressing need to go to another role, this could have worked.

62. On the marking matrix the “UOB fit” comments for the three candidates were

- (a) The Claimant: “familiar with UOB culture in view of years of experience”
- (b) MZ: “familiar with Asian culture”
- (c) The other external candidate was “not familiar with Asian culture and has not worked in an Asian environment before. Will take time to fit in”.

63. The Claimant says that “UOB fit” means “Asian” but Mr Quek explained that what it meant to them was that the candidate would fit in with the Bank’s culture and the “South East Asian way of doing things” which was common to many Banks in Singapore where they valued hard work and the customer coming first, for example. It was self-evident, Mr Quek said, that the Claimant fitted in to this culture because he had been with the Bank for so many years but MZ would at least understand it because she was from South East Asia and had worked for an Asian bank in the past.

The claimant is told he has not got the job

64. On 9 December Mr Cheah duly met with the Claimant. He advised that his application for finance/admin officer had not been successful based on three

criteria which were qualifications, experience and the candidates' ability to "fit into UOB". There are three versions of what Mr Cheah actually said and we have taken the Claimant's version because it represents his case at its highest although it was not recorded contemporaneously, unlike the other two. The Claimant records "and he said that unfortunately my application had been unsuccessful because they had a strong candidate for the role who was an Asian woman and in particular from South East Asia so she would "fit" into UOB well". We do not doubt that something like this was said and we are not surprised that Mr Smith reacted to it, but what he did not explore, and Mr Cheah did not therefore explain, was that Mr Cheah was not saying that the successful candidate would fit in to UOB *better than* the Claimant.

65. Mr Vyas, who took the notes of the meeting at the meeting said that he had come to the Tribunal to give evidence, even though he was now working in a different bank, because he felt very strongly that Mr Cheah was not a racist. For what it is worth, he did not pick up from what was said that Mr Cheah was telling the Claimant that he was unsuccessful because he was not Asian.

66. Mr Cheah's evidence was that he used race as a descriptive term only and that of course the Claimant was an even better fit. He repeated this explanation during the second grievance investigation. The Claimant saw the minutes of the grievance investigation but did not accept the explanation or even comment on it. On advice, which we think was unfortunate, Mr Cheah changed the minutes of the meeting that Mr Vyas had taken to make them seem more anodyne, but they did not change the essence of what was being said. By making this change it looked as if Mr Cheah had something to hide, as if mentioning that the successful candidate was Asian was inevitably a racist thing to say, when of course mentioning someone's race is not inherently racist, it all depends on the context.

Grievance appeal and second grievance

67. The outcome of the first grievance was that it was unsuccessful, and the Claimant appealed. On the same day, 16 December he submitted his second grievance which said that he had been discriminated against because of his race when the Respondent withheld the finance/admin role and gave it to an Asian candidate. This second grievance is a protected act for the purposes of a victimisation claim.

The formal redundancy process

68. In December 2016, Steven West a Senior Vice President and a Relationship Manager was appointed by Mr Cheah to conduct the formal redundancy process. He was appointed because of the complaints against Mr Cheah which meant that somebody independent needed to conduct the process. He was given a small amount of background information by Mr Cheah, including that the Claimant had not been successful in his application for the Finance/admin role as there were better candidates.

69. Mr West formally put the Claimant at risk of redundancy (again, because Mr Quek had already done this on 4 January). Mr Smith's response was that he had been the victim of discrimination and that there had been a duty to offer him the Finance/admin role; he did not say to Mr West that he would not have taken the role unless it was at AVP grade. If he had ever intended to dig his heels in on this point, he may have softened once he realised that he was facing redundancy although there is also some evidence that his main objective was to obtain a good redundancy payment.

70. Mr West went through a series of redundancy consultation meetings. He was supported by the Respondent's external HR Legal Advisor which was particularly necessary because he had not led a redundancy exercise or a grievance process before and had received no training. Although he had good intentions, we find that he simply followed the process and did not get involved in any of the difficult issues which we have identified. He experienced the Claimant as angry and obstructive and felt that he was not engaging, which did not help. However, a thorough redundancy process would have examined the feasibility of re-offering the Middle office role and the rights and wrongs of not offering the Finance/admin role with training. These points were discussed but there was no in-depth exploration.

71. The discussion with Mr West was on the basis that there were only two roles available in the bank, one a Middle office role, which did not include the Claimant's remaining 10% of work, which was now available on a three to six month fix term contract. The other role was a more senior role which the Claimant was clearly not suited to.

72. In relation to the Middle office role, Mr Cheah said that they had discovered that the role was best done fixed-term and that the backlog of work which they had been troubled about in August had been to some large extent cleared. Therefore, in that form it was not really a suitable option for the Claimant although Mr West thought that, if he had taken it, it might have led on to other things, which is true. Mr Cheah explained to us in evidence that the fixed-term role was only part of what the Claimant could have done because there was still the remainder of the Treasury work and therefore, although the job description did not show this, there was also a customised role available for the Claimant which therefore had a better chance of being a permanent role. However, this was not discussed or offered to the Claimant at this time, Mr Cheah's reason being that the Claimant had been so dismissive in August that it would be strange to offer it again. Of course, what had changed was that the Claimant was now facing redundancy and there was no possibility that he would be "saved" through the restructuring process so it should have been re-offered as part of a fair procedure.

73. The process was slightly distracted by the Claimant's insistence to Mr West that Ms Lena Chong should have been included in the redundancy exercise and also Lip Ching Chong; neither was in a comparable situation and this was indeed a distraction. The Claimant also used strong language directly to Mr West and more explicitly to Ms Lena Chong; he was very angry and this did not help achieve positive progress.

The second grievance investigation, the redundancy process is on hold

74. After some delay the second grievance was investigated. Because it raised issues about the redundancy Mr West quite rightly put the redundancy process on hold at that point. The second grievance was investigated by Mr Lelliott. He was also a Senior Vice President and was chosen because of his independence. Unfortunately, because he also had little training in how to investigate complicated grievances like this he relied heavily on external legal HR and was not able to assist us much at the hearing when he gave evidence. The second grievance was rejected, and an appeal of both grievances was also rejected.

75. As has already been said, Mr Lelliott did explore the “UOB fit” issue and Mr Cheah explained the context to him following which his conclusion was that “DS more than fulfilled this criterion given his length of service with the Bank. However, DS scored low on technical competence and practical experience against the other two candidates”. He concluded that Mr Smith was not rejected based on his ability to fit in or on the grounds of his race but because he did not possess the level of technical competence and practical experience of the other two candidates. He did, however, go on to recommend that the Bank consider removing “UOB fit” as a standard criterion in candidate selection, a recommendation with which we heartily agree.

76. At that stage there had been no discussion about the Claimant being given the Finance/admin job with some training and Mr Quek had emphasised that it was necessary for the new candidate to hit the ground running.

The ET1

77. The Claimant filed his ET1 on 23 March 2017. This was a second protected act.

78. On 5 May 2017 MZ resigned from her Finance/admin role and as Lip Ching Chong was available she covered it. The Finance/admin role was re advertised, it was open to the Claimant to apply but even though he was at risk he was not offered any encouragement, training or concessions. This time the role was advertised as an AVP role, two grades above his, because this was the level at which MZ had been carrying out the role.

79. The Claimant did not apply for the job and said he did not do so because he had suffered discrimination last time and believed that the Respondent preferred a South East Asian appointee. He did, however, also say to Mr West that he did not think he could work with Andy Cheah any more and it appeared to Mr West that the relationship with the Bank had broken down irretrievably. Mr West did not take it upon himself to see if he could broker any kind of arrangement between Mr Smith and Mr Cheah whereby the relationship was restored and/or the Finance/admin role was made available to the Claimant with training.

80. Once the grievance appeals had been rejected, the redundancy process continued on 18 May and a further consultation meeting took place on 30 May. By this stage the closing date for the Finance/admin job had passed and Mr West

understood from Mr Cheah that it was in fact not feasible to train the Claimant up to the role within a reasonable period of time although he did not tell the Claimant that. The Claimant's belief was that the Respondent had no intention of giving him that role.

81. On 1 June 2017 Mr Smith was dismissed by reason of redundancy. He was paid twelve weeks' pay in lieu of notice and his other redundancy money.

Conclusions

Unfair dismissal

82. In the list of issues, the Claimant gives twenty examples of the unfairness of the dismissal. We prefer to give our overall conclusions and will then go through each of those allegations.

83. It is not disputed that there was a genuine redundancy situation. The work which the Claimant's did was effectively ceasing, or at the very least diminishing as only about 10% of his duties remained.

84. However, as part of the obligation to be fair the Respondent had a duty to look for suitable alternatives in the work place in order to avoid redundancy. Having picked our way through the murky factual situation we conclude that there was a chance that the Claimant would have remained in employment had the procedure been fair.

85. Various roles fall to be examined as set out below:

The Middle office role

86. The original "middle office" role offered to the Claimant was a feasible option for him but he turned it down and that was why he was not appointed to it. The Respondent was not at that stage setting him up to fail and it would have been a permanent job.

The Finance/admin officer role

87.1 The epicentre of this case is the "Finance/admin officer" role. Was it suitable for the Claimant? We do not think it was suitable in that he could not have hit the ground running, but it was suitable with some training had the Claimant been prepared to accept it at an SO grade. The Respondent's witnesses told us at the hearing that they would have given the job to him had he agreed to take it at an SO grade and so we take them at their word.

87.2 Much of the evidence indicated that they did not plan to give him the job on any basis, and the reality seems to be that they did not think about training him up at the time and were intent upon recruiting somebody who already had the necessary statutory reporting experience. However, as they agreed as an afterthought at the hearing, he could have been put in the role at SO grade with training from Lip Ching Chong who was available

to support him. Had there been a proper exploration of suitable alternatives during the redundancy process this would have been identified.

87.3 This was particularly feasible because the offer at the cross training/restructuring meeting on 2 August was that staff should move around the various roles, including the Finance/admin role to get more experience and train themselves up.

87.4 The possible fly in the ointment is that the Claimant might have refused this proposal, and certainly Mr Quek was adamant that he would have refused to take on the role at SO grade.

87.5 We find that there was a 75% chance that the Claimant would have accepted the role at SO grade had it been offered to him. The chance is high because, whilst he did say he “expected” the job to be at a higher grade: (i) this was never tested because he was never offered it, (ii) he did apply for the role in November knowing that it was SO grade and (iii) once the reality of the redundancy got closer it is likely that he would have taken steps to avoid it by accepting the role.

87.6 We were not ultimately convinced that the Claimant’s only objective was to take the money and run as there was plenty of correspondence suggesting that he was genuinely worried about his future and his job security.

A customised role

88.1 In January 2017 there was the possibility of a customised job being created for the Claimant had the Respondent taken the appropriate steps to explore this. Perhaps because Mr Chea and Mr Quek were offended by the fact that he had not accepted the middle office role the first time round, and Mr West did not know the situation well or have any experience of conducting a redundancy exercise, this was not explored. The fact that the fixed term role was not quite the same as the customised role which the Claimant had been offered on 1 August was never identified or discussed.

88.2 In his evidence, Mr Cheah said that he could have put together a role for the Claimant even at this late stage because the middle office fixed term contract would become available and could be supplemented by the remaining 10% of the Treasury role.

88.3 The Claimant could have been “saved” from redundancy had a reasonable procedure been followed and had Mr West had the experience to delve more deeply into the options. It must have been obvious to him that both Ms Lena Chong and Ms Lip Ching Chong had been moved into customised roles and in Ms Lena Chong’s case that when she had turned down the first role offered, she had been provided with another.

88.4 We find that if this had been discussed during the formal redundancy process between November 2016 and June 2017, there was a 50% chance that the Claimant would have taken that job.

88.5 There is only a 50% chance because the Claimant did demonstrate from August 2016 that he was not happy with this job offer and he may not have been in the frame of mind to engage particularly because his friend Ms Chong had advised against it. We think that the job would not have come to an end in the short term once he was in the role as a permanent employee

89. There were no other feasible opportunities for the Claimant during the redundancy exercise.

90. We have identified a number of points of procedural unfairness in the redundancy process and we now list these in respect of the twenty specific allegations:

1. *Failed to warn the Claimant of the risk of redundancy when it knew of the same as compared to Ms Lena Chong. We have recorded that we agree that the Claimant should have been told of the risk by May 2016 but not in January when she was told.*
2. *Failed to choose a reasonable pool for selection (it should have included Ms Lena Chong, whose workload also consisted of a significant amount of clearing). Although Mr West was wrong to say that Ms Chong's clearing was only 10%, it was only 50% and the nature of her work was supervisory and managerial and so different from the Claimant's. As a manager three grades higher than the Claimant, she had different opportunities available to her and, although she turned down the first option, she was content to be assimilated into a customised role before any redundancy discussion arose. Therefore the question of when to tell her about the downturn in work and what to do with her next was very different and she should not have been included in a pool with the Claimant. He alone did the functional clearing work which was the vast majority of his job.*
3. *Provided conflicting information about whether Ms Lena Chong was at risk of redundancy and avoided it because of accepting a new role, or in fact was not at risk of redundancy at all. In reality the situation was fluid as we have described above. Given the way the Respondent dealt with the situation it cannot be analysed in this way and because Ms Chong was not a comparator for the Claimant in relation to the redundancy this issue is not relevant.*
4. *Failed to consider the Claimant for alternative roles as early as Ms Chong. We have already explained that his situation was different from hers.*
5. *Created a confusing situation where it was unclear if there was a restructure taking place in which all employees within the operations department would be able to apply for alternative jobs. We agree that the situation was very unclear. The Claimant was told about his clearing work ending on 1 August and the restructuring/cross-training exercise was announced on 2 August. It can hardly be called a cross-training exercise because it did entail staff moving jobs for a period of months and or years so it was more than just training and the Claimant was led to believe that he was*

being offered some opportunities. The exercise opened up the options for the Claimant, or should have had the Respondent handled the exercise more logically. We acknowledge that the Claimant was angry with the Respondent for keeping him in the dark about the downturn in his work and that he played a part in inhibiting the process, as did Ms Chong by telling him about the plans but not telling Senior Management what she had done.

6. *Informed the Claimant that there was a suitable alternative role, however this was not in fact a substantive role.* We do not agree, we have found that the offer of a middle office role on 1 August was not a sham and that had the Claimant accepted it this would have been a permanent role.
7. *Treated the Claimant differently from Ms Lena Chong, by not putting her at risk of redundancy and by not requiring her to interview for her new role.* We have already explained that whilst she was treated differently from the Claimant, her circumstances were different.
8. *Treated the Claimant differently from Ms Lip Ching Chong, by not putting her at risk of redundancy despite her role being filled by an external candidate and her not being placed in another role.* This is not the case. The role was never redundant, Ms Chong chose to move out of it because she wanted to change role and it was understood that she would be “taken care of”, which she was.
9. *Misled the Claimant as to what roles were available from 1 August 2016.* The Claimant was not misled on 1 August but he was misled on 19 August when Mr Quek did not tell him that Lip Ching Chong had expressed an interest in leaving the Finance/admin role so that this was going to be available. The Respondent failed to think through the possibility of the Claimant being offered the Finance/admin role at SO grade with some training which Mr Cheah and Mr Quek admitted during the hearing was possible. The also failed to think through the possibility of offering the customised Middle office role to the Claimant during the formal or redundancy exercise.
10. *Required the Claimant to compete against external applicants for a role that amounted to suitable alternative employment.* We have discussed this above. There was a 75% chance that the Claimant would have been given this role and not have been made to compete against external applicants if the redundancy exercise had been conducted fairly.
11. *Did not provide the Claimant with the appropriate information to allow him to succeed at interview for this role.* We are not quite clear about the wording of this allegation but we agree that the Claimant was offered an interview as an afterthought and on extremely short notice of less than a day. He was not told that he could produce a CV which might have assisted him, although ultimately he would not have succeeded against the external candidate MZ if the requirement was that the candidate hit the ground running.
12. *Failed to consider whether the Claimant could have undertaken training or a trial period in respect of this role.* We agree that had a fair redundancy

process been undertaken this would have been considered. This was not just a theoretical possibility because Lip Chip Chong was available to assist and train the Claimant and so it was feasible that he could have been trained.

13. *Changed the responsibilities of this role after interviewing the Claimant and without informing him of the same.* It is true that once the Respondent appointed MZ they upgraded the role to VP. Although we do not think that this had a direct detrimental effect upon the Claimant, it indicates the probability that the Respondent never intended to give the Claimant the role.
14. *Predetermined the question not to offer this role to the Claimant.* We agree that the decision was predetermined in the sense that the Claimant was not in management's mind and this was why the Respondent put the job out to external candidates, failed to offer the Claimant an interview until advised to do so and then offered the interview at very short notice. At the last minute they wanted to be seen to be going through the motions, but they had no plans to offer the Claimant the job.
15. *Appointed an external candidate to the role.* See 14 above.
16. *Allowed race to play a part in the Claimant's selection for redundancy.* See our findings on the discrimination claims.
17. *Delay to the formal redundancy process.* We find that this was both good and bad for the Claimant and so are neutral on this point. If the process had started on 1 August 2016 the Claimant would have lost his job well before June 2017, indeed he might have lost his job before having the chance to apply for the Finance/admin role. It is not uncommon for employers to explore options informally before starting a formal process. On the other hand, if the formal process had started sooner the Claimant would have known where he stood.
18. *Applied pressure on the Claimant to take redundancy before the formal process was engaged.* Again, we are neutral on this point, see above.
19. *Failed to genuinely consider the Claimant's concerns raised regarding the alleged redundancy situation and differences in treatment.* A great deal of time was spent by Mr Cheah, Mr Quek and Mr West but much of it was wasted in that opportunities were missed to find and indeed develop options for the Claimant to remain in employment. This office was not an environment where there were clinically clear lists of job descriptions which staff should slot into; roles were much more fluid as is common with small work places and the possibility of negotiating a customised role was very real.
20. *Failed to engage in meaningful consultation.* See above. Mr West was well intentioned but without knowing the operations side of the work, and no training, he could not contribute much at all.

Direct Discrimination

91. We can understand why the Claimant believed that he had been discriminated against when he was not offered the Finance/admin role in that from what Mr Cheah said to him he could have inferred that MV was a better fit than he because she was Asian. However, he was mistaken. The reason she was given the job was that, as the Claimant himself alleges, the Respondent had never planned to give it to him. Also, as the Claimant agrees, she was better experienced.

92. From as early as August 2016 when Mr Quek failed to tell the Claimant that the Finance/admin job could be available, it was clear that the Respondent did not plan to appoint the Claimant to that role, probably because he did not have the necessary experience of statutory reporting and they had not thought about offering training. He had refused the Middle office role, which they had offered and expected him to take, and they did not see anything else on the horizon for him, possibly because they experienced him as angry and obstructive. Therefore the die was cast long before MZ appeared on the scene.

93. Discrimination is a comparative exercise, the question is not was the Claimant unfavourably treated but whether he was *less* favourably treated. His actual comparator was MZ and s.23 requires that "there must be no material difference between the circumstances relating to each case" on a comparison. As demonstrated in *Shamoon* the definition of the material circumstances is up for discussion. One possibility is that her material circumstances were different in that she had better experience than the Claimant as he agrees. This would mean that the burden of proof would not pass because she was not a comparator. Another possibility is that the Claimant and MZ were in the same material circumstances in that they were both a UOB fit as recorded in the marking matrix and the second grievance and the reason the claimant was not appointed was because he was less experienced, a reason not connected to race. If the words of Mr Cheah in the meeting of 9 December were sufficient to mean that the burden of proof passed because those words needed explanation, the cogent explanation unrelated to race was that Mimi had better experience. These same points relate to a hypothetical comparator.

94. Whilst something may look suspicious, the question is what was in the mind of the decision maker, conscious or unconscious. In this case there were three decision makers all of whom preferred MZ. For there to have been discrimination all three would have to have had a discriminatory intent against the Claimant or gone along with the discriminatory intent of their colleagues and this is unlikely. In this case Mr Cheah was the most senior decision maker but he had involved Mr Quek, to whom he regularly deferred and who was also a senior employee, and he would have had to have ignored the marking matrix prepared by Mr Ng which recorded that the Claimant's fit was complete. As far as Mr Ng's input is concerned there is no indication that he considered that MZ was better than the Claimant in terms of fit because she was Asian.

95. It is a classic of unconscious racism that an employer thinks that a new recruit should not join the business because of a general sense that "they would not fit it". However, this is not one of those general cases. First, an unconscious racist is

not going to say explicitly and directly to the person who they are discriminating against that they do not think he is fit for the job because he is not Asian. Instead, he is going to have a genuinely held view that the person will not fit in and be unconscious that this is informed by discriminatory views. Second, this Claimant was not someone coming new into the company and he already fitted in so it is illogical to suggest that this feeling existed. He had been in the company for twenty-three years and was by no means the only Caucasian employee in the bank.

96. This case was different because of specific facts but we want to make it very clear that we agree with Mr Lelliott that using the criterion "UOB fit" is very ill advised. Whilst the Claimant was not discriminated against because he was a UOB fit and MZ's fit was not better than his, the result of the criterion for a new Caucasian candidate who did not have Asian experience or experience in the bank would be that they would not get the job. We say again that we are not surprised that the Claimant was concerned about what was said, but the context in his case was explained to him by Mr Lelliott which should have put his mind at rest.

97. If the burden of proof passed in this case the reason why the Claimant was not appointed was because the Respondent did not want to give him the job in the first place and MZ was better experienced. The Respondent's decision was not contaminated by race, conscious or unconscious. The Respondent was ill advised to change the minutes of the meeting once the Claimant had expressed concerns about what was said. This exacerbated his suspicions and did not address the fundamental point, which nobody seemed to understand, which was that it needed to be explained to the Claimant that whilst MZ fitted because she was Asian, he fitted better because he was a long term UOB employee.

Indirect Discrimination

98. The Claimant asserts indirect discrimination the alternative but the arguments were not expanded in evidence or in submissions. This is because the issues are a reiteration of the direct discrimination argument and there is nothing more to say.

Victimisation

99. The Claimant also claimed victimisation although again these arguments were not expanded. This was because the detriments occurred before the protected acts in that the Respondent had decided not to give the Claimant the Finance/admin role from August 2016 as a result which he lost his job. The Middle office role which was still available in May 2017 was not offered because the Claimant had turned in down in August 2016 and so all the damage had been done by the time of the first protected act on 16 December 2016.

Outcome

We will award a remedy based on our unfair dismissal findings. If the parties require a remedy hearing, they are to make a joint application with a time estimate, agreed suggested directions and dates to avoid.

Employment Judge Wade

Dated: 19 March 2019

Judgment and Reasons sent to the parties on:

21 March 2019

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For the Tribunal Office