EMPLOYMENT TRIBUNALS

Claimant: **Mr Frances Da Silva**

Respondent: **Advanced Insulation Systems Ltd**

Heard at: **Bristol** **On:** **18 & 19 March 2019**

Before: **Employment Judge Hargrove**
Members: Mr C Williams,
Mrs GA Meehan

Representation
Claimant: **Mr D Osborne of Counsel**
Respondent: **Mr R Steer of Counsel**

JUDGMENT

The unanimous judgement of the tribunal is as follows: –

1. The claimant's claims of unfair dismissal and of direct discrimination on the protected characteristic of race nationality are not well-founded.

REASONS

1. In an ET1 claim presented to the tribunal on the 4th of October 2017 the claimant brought a claim against the respondent, his former employers, of race discrimination and unfair dismissal in respect of his employment as an installation applicator from 11th of May 2015 until the 9th of June 2017, when he was dismissed and paid in lieu of notice. The claims were identified at case management hearings which took place on 28th of January 2018 and 26th of March 2018 as being of direct race discrimination contrary to section 13 of the Equality Act 2010; and of unfair dismissal.The respondent put in a response in form ET3 asserting that the claimant had been fairly dismissed for redundancy, and denying any act of discrimination.

2. The claimant is by race nationality and colour, black African and of Angolan nationality. The claimant originally claimed that the reason for his dismissal was not redundancy, which was a sham in his case; and that various acts of the respondent in advance of and during the supposed redundancy round were acts of discrimination which also affected the reason for his dismissal.

3. At the hearing the claimant was represented by Mr David Osborne of counsel and the respondent by Mr R Steer of counsel.The tribunal starts by setting out a chronology of the main relevant events. The claimant gave evidence first at the hearing; and the respondent called the following witnesses: – Mr Robert Collinson, the claimant's line manager and senior site manager for the respondent, who conducted the consultation process leading up to the claimant's dismissal for alleged redundancy, Mr Stuart McAllister, the respondent's contracts manager and the line manager of Mr Collinson, who conducted the claimant's appeal against his dismissal, and Miss Veronica Baker, director of corporate services, who assisted Mr Macallister at the appeal. There was a bundle of documents consisting of 145 pages, a written chronology and a cast list.

    3.1. The respondent is in the business of designing and supplying insulation systems for the oil and gas industry within the UK and overseas. It has a head office in Gloucester, and another office in Plymouth. In particular it bids for contracts for the provision of insulation for national and international companies in that field. For this purpose, in addition to a project department, the respondent employs installation applicators, chargehands and site managers who may be required to work in the UK and abroad.

    3.2. The claimant was originally interviewed and recruited to work for the respondent by Mr Collinson in 2015. He commenced employment on 11th of May 2015. There is a contract of employment at pages 29 to 33 of the bundle. Materially to the present case, The contract provided at page 30 that the claimant must be contactable at all times via his mobile or home telephone. There was an issue as to whether that applied to contact when the employee was working only in UK, or also abroad, in circumstances where mobile communication might be difficult. The claimant worked, during his employment, in UK, Italy, Spain, Norway,and in Angola.

    3.3. The claimant attended a training course at head office in Gloucester for five days ending on the 28th of August 2015. This was entitled the C 25 training module. It trained attenders on the application of Phenol insulation to oil and gas client's installations using a 2KM mixer machine. Approximately 10 applicators attended the course, where training was provided by external and internal trainers, and it was also attended by Mr Collinson, but not throughout all of the sessions, and there was an introduction from Mr Mcallister. At that time the respondent had a contract for work in Angola and the claimant and at least two other black Angolans attended the course, they being particularly suited to be part of a team because of the ability to speak Portuguese, and there would be no problem with visas for them to enter the country.

3.4. At the end of the training the claimant was issued with a certificate of training on the C 25 module. So were the claimant's three white comparators, Frank Rogers, John Paul and Tom Carlyon, see pages 37 A to D. We assume that the other attenders, including those from an ethnic minority, were also issued with certificates. Materially to the case, the claimant also asserts that, although he was provided with the certificate, and was given access to the theoretical parts of the course, he was not given any or any adequate access to the practical aspects of the course involving the actual use of the 2KM machine. This is said to be an act of discrimination on the part of the respondent . Nonetheless, the claimant was given a certificate. In addition, the claimant filled in a pre-training form for the course and a post-training form. The pre-training course in which he marked the criteria reflecting his level of experience at the low rates of 1 and 2 out of a maximum of 10 are at pages 34 to 35 and he indicated "I am looking forward to expand my knowledge regarding the C 25 and to be able to extend my higher score". In the post training evaluation he marked himself on the criteria at levels 6,7 or 8 out of 10, thus apparently indicating competence in the application of the process. The claimant claims that this was only an indication of his theoretical knowledge of the process and that he was not competent in the practical application of it, having been denied access to that part of the course. He also claims that he complained to Mr Collinson after the course that he had not been adequately trained and asked for further training, and for a video of the training. Mr Collinson denies that he ever asked for further training, and claimed that there was no video of the course, which the claimant did not request in any event.

3.5. The claimant worked on a contract in Barcelona in 2016. He claims that he was subject to racial harassment from a fellow white employee, Baxter, who used the word Nigger to him. The allegation came to the attention of Mr Collinson. The person against whom the complaint was made apparently asserted that he had used the word nincompoop. The matter was reported by Mr Collinson to Mr Macallister, who arranged for it to be dealt with by way of a grievance investigation by HR. The claimant has not pursued this allegation as a separate freestanding head of claim of discrimination or harassment, but refers to it in his witness statement and the tribunal has ruled that it is capable of being relevant to the claimant's separate and freestanding claims of race discrimination. Mr Macallister claims that there was an investigation, witnesses were interviewed but no conclusive finding was made as to what had been said. In those circumstances Mr Mcallister wrote to the claimant on the 23rd of June 2016-40A- with the outcome. The outcome was that whatever had been said had been said in the heat of the moment due to the pressure of work to complete the contract, and stated that the claimant had indicated that he did not believe that the perpetrator was a racist. The letter went on to indicate that "the company did not believe that such offensive comments should be made under any circumstances; that the company took such allegations extremely seriously and would be putting into place measures across all sites to ensure that employee awareness was raised." The letter indicated

that the claimant could appeal the conclusion. The respondent asserts that the claimant did not appeal the outcome.

3.6. The respondent issued a redundancy warning to the 34 then existing applicators, eight supervisors and five site managers at the end of April 2017. Mr Macallister claims that he had been reviewing the requirement for applicators and other staff against the contracts for installation available from 2016 onwards, and that this indicated that there was insufficient work coming in to justify the continued employment of 34 applicators, and the existing number of supervisors and site managers. An announcement of potential redundancies was issued to all affected staff at a discussion.see pages 38 to 40. Volunteers were called for to act as representatives under a collective redundancy process. A telephone conference was arranged on 26 April where a prepared script was read out to the affected staff including the claimant. There was a follow-up letter on the 27th of April. See pages 42 to 43. The letter indicated that the redundancies were mainly as a result of the downturn in work and difficulties the Oil and gas industry was currently facing. It was further notified that the company wanted to explore any options available other than redundancy in order to fulfil the company's business needs. There was a call for volunteers.If there was still a need for the company to make further redundancies the company would consider implementing a compulsory redundancy programme. The company indicated that there were no alternative vacancies currently available but "we do have temporary agency production staff working at present at Manuplas (our division in Plymouth)." The letter indicated that interest in that role should be notified by the 8th of May. There would be individual consultation meetings at which representatives could attend if requested. Because of the geographical spread of the workforce affected, the consultation process would be carried out by telephone during week commencing the 8th of May. The announcement did not provide Information about the level of savings which would need to be made although it did ask for employees to come forward with ideas.

3.7. Subsequently, at the beginning of May, 2 members of the workforce put themselves forward as employee representatives, Mr Frank Rogers, who had been on the C 25 training course with the claimant and Mr Brian McCauley, and they were appointed.

3.8. On the 5th of May 2017 the claimant emailed HR – see page 57 stating "I understand the downturn in work and the difficulty the Oil and gas industry is currently facing, the company is forced to downsize its workforce in order to cut costs and save capital." He indicated in the email that he was willing to have (1) a temporary layoff for two months initially without pay, (2) a pay cut, (3) a pay freeze, and (4) temporary work at the Manuplas division in Plymouth. There is also documentary evidence that the claimant was looking for accommodation in Plymouth during this period.

3.9. A copy of the blank criteria for selection for compulsory redundancy was distributed, including to the claimant, on or about the 12th of May

2017. We will describe this in more detail later. On the same date a standard letter was sent out to the 34 Applicators at risk indicating that the company believed that it would be necessary to make 17 employees redundant. A further 1:1 telephone consultation was notified for 22 May. See pages 61 to 62.

3.10. On the 15th of May a circular was issued to staff by Mr Firth, the respondent's subsea sales director, indicating that the respondent had won a further contract from Chevron for C 25 installation work in the Gulf of Mexico, which indicated that further work would be available for applicators. The claimant asserts that this announcement should have alleviated the need for as many as 17 redundancies. Mr McAllister asserts that the contract had been in the offing since April 2017, and that the possibility of winning the contract had already been factored into the respondent's assessment of the number of redundancies to be made.

3.11. Mr Collinson was managing the redundancy selection process, and asserts that he consulted with the relevant managers and distributed the selection criteria.Some of the notes apparently obtained from the relevant managers, or at least four of them, messers Armstrong, Owen, Clark and Common, are to be found at pages 52, 53 and 54 of the bundle. It is asserted by Mr Mcallister that there were other notes from other managers which were available to him at the appeal, but which are not in the bundle.

3.12. The scoring of the criteria is set out in a matrix listing all of the 34 applicators with their individual scores for each of the 13 criteria at pages 64, 64a, 64b, and 64c. Also at page 64C is a list of the final total scores for each of the applicators ranging from 25 to 48. Those 17 who scored in the range 25 to 37 were subsequently selected for redundancy. Those 17 who scored in the range 38 to 48 were retained. The cut-off point was therefore 37. We note that within the group of 17 subsequently selected for redundancy, there were in addition to the claimant, the two other black Angolan applicators. It is common ground that the 17 retained were all white. Within the group of 8 Charge-hands there was one black Angolan, who was retained. Originally three charge-hands were selected for redundancy. However one of them appealed successfully on his matrix scores and was in consequence retained with the result that only two charge-hands were made redundant. The claimant was marked at 26, the second lowest score. Further details of the scoring will be discussed later in this judgement. In the meantime, the claimant had submitted by email some points about the matrix scoring process on the 15th of May 2017 See page 68. Amongst the issues which he raised within that email were, under the criterion headed "machine capability", the allegation that he was the only one amongst four, the three others being the white comparators, who had been denied the opportunity to operate the 2KM machine hands-on whilst undergoing training. Under the heading of "contactability," he acknowledged the downturn in work in the oil and gas industry but he asserted that he had been looking for six months for the best deals for mobile phones enabling him to receive calls from abroad, and that

the new contract for its use outside Europe would start on the 1st of June 2017.

3.13. On the 19th of May 2017 the claimant emailed Mr Collinson notifying him that he had not been kept up-to-date in email circulars for the previous five months, and that other applicators had been circulated with the emails. Mr Collinson responded on 20 May notifying his apologies and attaching the latest communications. These are set out at pages 72 to 90 of the bundle. It is clear from the circulation list that at least 30 or more staff including the applicators were included on the list, but the claimant's name and email address does not appear on it. Mr Collinson asserts that this was an innocent and unintentional omission on his part. The claimant asserts that it was not unintentional and was an example of less favourable treatment on the grounds of his race. It is a matter of record that the original circulation list included the names and emails of three other black Angolans.

3.14. There is evidence in an email dated the 18th of May 2017 at page 69 that a second individual consultation telephone call took place on Thursday, the 25th of May, but there is no documentary record, or further email, recording that it took place and we have not been notified by any of the witnesses what was discussed.

3.15. On the 23rd of May the claimant again emailed Mr Collinson attaching a holiday request form from the 7th of June until the 4th of July 20 days in total. In addition he requested authorisation for a further two months off without pay from the 5th of July to the 5th of September 2017 "in order to conclude geographical research on the ground for mining and prepare the necessary paperwork… I thought that this will be a good time as the company is lacking contracting work. However if any job comes up suddenly and the company requires personal urgently I will be happy to contact to be contacted via email if not reached on the third, and to urgently travel to the distant place of work." This was a follow up to his earlier letter.

3.16. There is an email at page 97 dated the 26th of May which refers to earlier meetings but which does not expressly refer to a telephone consultation on the 25th of May. At page 98 the email states "we enclose the selection matrix as it relates to you. This sets out the scores which were awarded under each of the criteria. The scoring was carried out by the site managers, contracts manager, HR and myself. These are the scores we discussed and agreed with you in a meeting". A final consultation meeting was notified to take place week commencing the 5th of June over the telephone and the claimant was notified that he could be accompanied during the meeting by either Mr McCauley or Mr Rogers who could dial into the call.

3.17. During the afternoon of the 31st of May the respondent emailed the claimant notifying that a call would be made on Tuesday, the 6th of June for the final consultation. Later that evening, the claimant emailed having received the score update.He challenged the C 50

scoring not worked in the last 12 months claiming that he had been trained and worked with the material earlier in unit 11 in 2016. Under the criterion of Aptitude, where he had scored one, he asserted that although not a charge hand he had always demonstrated the spirit to cooperate with his team. He clearly expected a higher score. He also by inference challenged the score under contactability (one) asserting that he had never missed a phone call in the U K. In relation to the criterion of machine capability (score 0) he said "able to run at least the basic."

3.18. Mr Collinson responded to that email on the 2nd of June stating that the review period covered the last 12 months only, which had been reflected in his scores. "The scores on skill and aptitude is certainly not a criticism of your efforts, as input is recognised. It is however based upon an assessment of skill level and from feedback from a number of people is seen as a fair reflection of yourself and other individuals were looking at all employees who have carried out this role… Regarding your contactability – during your time in Italy Bob and John Strathdee tried to call you repeatedly but could not get hold of you which could havecaused us an issue. Steve, also had trouble getting hold of you in Norway. I do not recall you being formally trained on running and maintaining the machines (2K a.m.). Taking into consideration all the issues we had in Spain, I also don't think you would be confident being left alone to run the machine. Therefore the school given is a reflection of your abilities in that area." (tribunal is underlining).

3.19. During the tribunal hearing Mr Collinson admitted that at that time he had no recollection that the claimant had attended the C 25 course in 2015. Mr Collinson asserts, however, that the marking on the first criterion "trained on key materials" adequately reflected at level two that the claimant had in fact been trained on two materials, namely C55 and C25. If that is true, the marking must have been made on the basis that someone was aware that he had attended the course. It is to be noted that the maximum he could have scored on that criterion was three.

3.20. The final consultation call took place on the 6th of June 2017. It appears that the claimant was not attended either by Rogers or McCauley at the call, about which the claimant made a later complaint at the appeal stage. The claimant states that the reason why he did not want to be represented by Rogers was because Rogers was one of the three comparators with whom he had been trained in 2015 who had had access to practical training on the 2KM. He did not explain or give any reason why he had not used McCauley.That evening the claimant emailed Mr Collinson, Becky Malkowska, the HR manager, and Stuart Macallister at 21:17, and Mr Macallister at 21.34. See pages 103 to 104.

3.21. The claimant received written notification of his dismissal for redundancy on the 8th of June 2017 at pages 106 to 107. The termination was to take effect on the 9th of June and the claimant was to receive pay in lieu of notice. He was advised of his right to appeal

to Mr Macallister by the 16th of June.The claimant's appeal letter setting out a list of reasons is dated the 13th of June and is at pages 111 to 112.

3.22. Mr Macallister wrote to the claimant on the 26th of June notifying him of an appeal meeting by telephone conference on the 4th of July 2017. The claimant responded on the 28th of June asking for a face to face meeting at the head office in Gloucester instead of by teleconference. That application was allowed and the claimant was notified that he could bring a trade union representative. The hearing did take place in person at head office on the 4th of July and the claimant was accompanied by Mr Bailey, his trade union representative. The outcome of the appeal, which was unsuccessful, was notified to him by Mr Macallister in a recent letter dated the 6th of July 2017 Pages 119 to 122.

That concludes a chronology of the main events.

4. The relevant statutory provisions and the tribunal self-direction on the law.

5. The claimant brings claims of **direct discrimination** under section 13 of the Equality Act 2010 in respect of the protected characteristic of race, which is defined in section 9 as including colour; nationality; and ethnic or national origins.

5.1 Section 13 of the Act defines direct discrimination as follows:-
"(I) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than he treats or would treat others."
In that connection, the claimant relies upon three white comparators whom he claims were treated differently in relation to the training opportunity in August 2015.

5.2 Section 23 (1) states:-
"On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case".
That means that the circumstances of the claimant and the actual or hypothetical comparator at the point of comparison must be the same, except of course the difference of race, colour or national origin.

5.3 The respondent takes the point that the claim to the tribunal in respect of the training issue was presented outside the relevant time limit under Section 123 of the Act. That provides that a complaint may not be brought after the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.
For the purposes of that provision, conduct extending over a period is to be treated as done at the end of the period. The tribunal has power to extend time if it would be just and equitable to do so.

5.4 The next relevant provision in the Equality Act is contained in section 39, which defines discrimination in the employment field. Section 39(2)(c)and (d) state that an employer must not discriminate against an employee by

dismissing him or subjecting him to any other detriment.

5.5 There are special provisions concerning the burden of proof in discrimination cases in Section 136 of the Act, which provides:-
(2) " If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.
(3) But that does not apply if the employer shows that it did not contravene the provision."
In practical terms, that prescribes a two stage process whereby at the first stage the claimant has to prove facts, either from his own evidence or from cross-examination of the respondent's witnesses or other documentary evidence, from which the tribunal could reasonably conclude that he had been treated less favourably because of his protected characteristic, in this case, race. Having done so, the burden shifts to the employer at the second stage to show that the treatment in question had nothing whatsoever to do with the claimant's race.

6. As to unfair dismissal:

6.1 The burden rests upon the respondent to prove a reason for dismissal of a kind specified in section 98 of the Employment Rights Act 1996. In this case the reason put forward is redundancy. Redundancy occurs where it is proved on the balance of probabilities that there has been a reduction in the requirements of the business for employees to carry out work of a particular night kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer. See Section 139 of the Act.

6.2. If the respondent proves that redundancy was the reason or principal reason for dismissal, the tribunal then has to decide whether or not the dismissal for that reason was fair or unfair applying section 98 (4) of the Act, which states:

"The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".

There is no burden, either upon the claimant to show that the dismissal was unfair, or upon the dismisser to show that the dismissal was fair. The burden is neutral.

6.3 In a redundancy dismissal the case of Polkey v AE Dayton Services Ltd 1988 ICR page 142 indicates that an employer will not act fairly unless he adopts a fair procedure for selection where a number of dismissals are proposed from a pool of employees; consults fully with the employee or employees concerned; listens to what they have to say and considers all reasonable alternatives to dismissal, including seeking alternative posts with the employer and considering any reasons put forward for not making redundancies or reducing their number.

6.4 That case is also authority for the proposition that, if there is a failure of

consultation which renders the dismissal unfair, in deciding what compensation it would be just and equitable to order the employer to pay for loss of earnings under Section 123 of the Act, the tribunal has to assess what the chances are in percentage terms that, if this employer had carried out a fair procedure , a fair dismissal would nonetheless have occurred, and if so when, and to make a commensurate reduction in the award. That principle also applies in discrimination cases. If the respondent's dismissal of the claimant is found to be an act of direct discrimination, the tribunal has to decide what the chances are that if a non-discriminatory process had taken place, or for any other reason, the claimant's employment would have come to an end, and if so, when. See Abbey National plc v Chagger 2010 ICR 397. Court of Appeal.

7. **The Tribunal's conclusions**.

7.1 <u>The reason or principal reason for dismissal.</u>

The tribunal is satisfied that the reason for principal reason for the dismissal was redundancy on the basis that the respondent had a downturn in work, which resulted in a decision that the work force of applicators should be halved. No other credible reason has been put forward by such a large number of employees should be dismissed at one time. That does not exclude the possibility however that one or more of those dismissed might have been dismissed under the cloak of redundancy, but for another undisclosed reason. The claimant claims in these proceedings that his dismissal was related in some way, or, to put it in legal terms, was materially influenced by his racial or national origins. That is an issue which we will consider next, alongside the other freestanding claims of race discrimination. There is no doubt however that the respondent conducted a genuine redundancy exercise upon the basis that there was a reduction in the requirements of the business for as many as 34 applicators, and the accompanying charge hands and site managers; and it is noteworthy that the claimant in several emails accepted that there was a genuine redundancy situation. We accept that when the decision was made that it should be 17 applicators who should be dismissed, that the obtaining of the Chevron contract was known and taken into account. It follows that without the Chevron contract there may have been more job losses.

7.2. <u>Whether the respondent discriminated against the claimant.</u>

The claimant initially asserted in these proceedings that the redundancy was a sham. It clearly was not in respect of the process as a whole, and in the event we had to decide whether he had proved facts from which we could reasonably conclude, by inference or whether otherwise that the claimant's racial origins materially influenced the decision to select him. If they did, that would certainly give rise to the possibility of a sham decision in his case. We note the racial breakdown of the group selected for redundancy and the group retained. There is a difference which raises at least the possibility that the process was used to dispose of black Angolans, there being 3 out of 17 selected whereas there were none in the retained group. That argument was however not identified as an issue at the trial pre-trial hearings and it has not been canvassed in any way during the course of the hearing itself. Also we note that another black Angolan charge hand was not selected from that group, and 2 white employees were. In addition a substantial majority of the Applicators selected, 14 out of 17, were white.

Before we state our conclusions on this aspect of the case, we state our conclusions on the other allegations of race discrimination preceding the announcement of the decision to select the claimant, because if we accepted any of those it would be potentially highly relevant to the decision to dismiss. Some of them were pleaded issues and some were not. The evidence about those that were not, were all also admissible as potentially indicating a conscious or unconscious reason to dismiss. We first considered in chronological order the allegation that the claimant was denied the opportunity for hands-on training on the 2KM application machine in August 2015. The documentary evidence indicates that the claimant did undertake all aspects of the training and he acknowledged it in his post training self evaluation on the 26th of August 2015. Accepting that the claimant's evaluation of himself may have been optimistic, we note that the claimant marked himself 8 out of 10 for experience of maintaining C 25, and in confidence in operating, 6 out of 10. We do not accept that he raised any issue about the quality of the training at that time or at any time thereafter with Mr Collinson until the threat of redundancy arose in May 2017, Some 20 months later. We note that the claimant was not marked down in any way in the relevant criterion for training under the matrix – 2 out of 3 – despite Mr Collinson's lack of recollection of him attending training at the time. That score reflects the fact that other charge-hands and Managers were consulted and took part in the scoring.

The claimant also asserts that he was denied access to emails for a period of five months in 2017 as an active direct race discrimination, but three other black Angolans were not denied access and we except that it was a clerical error on Mr Collinson's part. It is not explained why Mr Collinson should deliberately have singled out the claimant on the basis of his race or colour when the contents of the missed email, which were innocuous, are taken into account.

There is evidence that the claimant was racially abuse by a fellow employee, Baxter, in 2016, an example of an allegation which is not a freestanding claim of discrimination, but that does not assist assistance in any way in deciding whether another employee, Mr Collinson, himself treated the claimant less favourably because of his race. We note that Mr Collinson properly reported it to Mr Macallister, and it was the subject of an investigation which was clearly not a sham. It may well be that the N word was used to the claimant, but the incident was not swept under the carpet.

As to the allegation that a white applicator was sent to Angola in place of the claimant shortly before the redundancy process commenced, thus allegedly rendering it more likely that he, a white person, would not be selected for redundancy, but the claimant would, we accept that both were put at risk and although Mr Riley was retained and the claimant was not, it has not been suggested that Mr Riley was marked artificially high under the matrix, and he scored considerably higher than the claimant. We reject the contention that the claimant was retained in the UK in order to be dismissed.

In summary, the other allegations of race discrimination, including the allegation that the claimant was denied the opportunity for hands-on training in 2015, having been rejected, we reject the contention that the scores were manipulated to ensure the claimant's dismissal. We conclude that on the balance of probabilities neither Mr Collinson nor anybody else who participated in the marking of the matrix criteria were materially influenced by the claimant's racial origins.

7.3 Whether the dismissal was fair or unfair.

We accept that the designated procedure for selection was fair and that there was adequate consultation with the claimant who notably participated by making realistic alternative proposals which were however rejected at each stage, which at least at the dismissal stage could be described as cursory. There is also a concern that some of the criteria under which the claimant was marked down were subjective and the notes from charge hands in the bundle, only one of which was critical of the claimant, which cursory; and some of the notes have not been produced to the tribunal, but we do accept that Mr Collins did discuss and agree the scores with others. On the other hand, the claimant did score highly on the objective criteria. We accept that there were criticisms expressed about the claimant in respect of some of the criteria, for example that of contactability while abroad, which the claimant did not dispute. He accepted that the mobile contract he had did not allow contact, at least outside the EC. At least two managers or charge hands reported difficulties in that respect. It is not for the Tribunal to substitute more favourable scores even if we were minded to do so. We accept the scores were assessed in good faith.

As to alternative employment, we accept that there no suitable alternative permanent jobs available with the respondent. The set design engineer and sales support manager roles were not roles which the claimant was competent to perform. The only other employment available was agency work not employed by the respondent, which was for a very limited period and would have involved him travelling to Plymouth. As far as the Gloucester agency work was concerned, this was offered after the appeal and the claimant did not follow it up.

7.4. Time points.

This is an academic point because the tribunal has found that the other allegations of race discrimination, which were probably presented out of time unless it could be argued that if there was a failure to provide training it was a continuing failure, were not well-founded. However if we had found them well- founded we would have found it just and equitable to allow them to proceed on the basis that the respondent could not show any prejudice to themselves arising from the delay.

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Employment Judge Hargrove

Date: 20 March 2019