EMPLOYMENT TRIBUNALS

Claimant: **Mr S Ashberry**

Respondent: **EE Limited**

Heard at: **Bradford IAC**
On: **15-19 October and (deliberations only) 19 November 2018**

Before: **Employment Judge Maidment**
Members: **Mr R Webb**
Mr M Brewer

Representation
Claimant: **Miss C Casserley, Counsel**
Respondent: **Miss A Datta, Counsel**

RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal is well founded and succeeds. This matter shall be listed for a hearing in Leeds to determine remedy with a time estimate of 1 day.

The Claimant's complaint alleging a failure by the Respondent to comply with its duty under Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (collective consultation) is dismissed upon his withdrawal of it.

REASONS

The issues

1. The Claimant's sole complaint in these proceedings is of ordinary unfair dismissal. The Claimant maintains that his dismissal was unfair because it was predetermined, that collective consultation was a sham, that no reasonable attempts were made to identify alternative employment for him and that his appeal did not have the effect of rectifying any earlier flaws in the redundancy process. Prior to this hearing, the Claimant had withdrawn a complaint that his

dismissal was automatically unfair because it resulted from a protected disclosure he alleged he had made. During the course of this hearing, the Claimant also withdrew a complaint pursuant to Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of an alleged failure to consult with appropriately elected representatives in a collective redundancy situation.

The evidence

2. The Tribunal spent the first day of the hearing privately reading into the witness statements exchanged between the parties and relevant documentation included within three volumes of lever arch files and numbering in excess of 1000 pages. At the commencement of the second day of hearing it emerged that two documents, each a number of powerpoint presentation slides, had only just been disclosed by the Respondent to the Claimant. One document represented a summary of the redundancy rationale and proposal prepared for the use of management in ensuring a consistent message was given to staff. The other was relevant, amongst other things, to the basis upon which employees had been mapped across to positions within a new business structure. The Respondent accepted that both of the documents were relevant, albeit Ms Datta's position was that the Respondent had not appreciated their relevance at an earlier stage. Indeed, the Claimant wished such documents to be viewed by the Tribunal but in circumstances where Ms Casserly required time to take the Claimant's instructions before she commenced her cross examination of the Respondent's witnesses. Such request was entirely reasonable and the Tribunal adjourned to allow additional copies to be produced of the relevant documents and for those to be properly considered on the Claimant's side. As such it was only possible to start to hear live evidence from 1 p.m. on day 2 of the hearing.

3. The Tribunal having read the relevant witness evidence, each witness was able to simply confirm the accuracy of their statements and then, subject to brief supplementary questions, be open to be cross-examined on their contents. The Tribunal heard firstly on behalf the Respondent from Jackie Ronson, Director of E-Service. She had not completed her evidence by the close of day 2 and on day 3 the Tribunal interposed Alex Diaz, Resource HR Consultant and Hema Mehta, Senior Digital Marketing Manager, both of whose evidence was given by videolink. Ms Ronson's evidence was then completed on the afternoon. At the commencement of day 4 of the hearing the Tribunal heard, on behalf of the Claimant, from Cate Nisbet, former AEM Technical Content Manager. Then from the Respondent the Tribunal heard from Matthew Everson, HR Business Partner for the Marketing and Digital areas of the business, Maureen Perry, Senior Service Manager and elected employee representative and finally from Mr Shannon Daly, Head of Marketing, Planning and Go to Market. On day 5, the Claimant gave evidence on his own behalf. The Tribunal heard closing submissions from, Ms Casserly, on the Claimant's behalf, amplifying upon written submissions provided also to the Tribunal, and then from Ms Datta on behalf of the Respondent.

4. Having considered all of the relevant evidence the Tribunal makes the following findings of fact.

Facts

5. The Respondent is a major internet and mobile telecommunications company. The Claimant first joined a predecessor business, Ananova, in September 2000. The business became Orange, which later merged with T-Mobile to form the Respondent, which was then acquired by BT. Whilst his role could be broadly described whilst with the Respondent as being responsible for digital content it changed during his period of employment. The Claimant is a journalist by background and was originally employed by the Respondent's predecessors to write content/copy the nature of which varied over time. In particular, whilst employed by Orange, he was tasked with producing engaging commentary and reviews of various entertainment, sport and news. This included promotional work relevant to Orange film offers and 'Hollywood star' interviews. The emphasis of his writing changed when employed by the Respondent which did not go in for longer blogs but concentrated on factual information to provide help to and to answer customer questions. The Claimant described his team as finding themselves working on a very different kind of website for the Respondent which concentrated on its products. He said that they had spent years on more engaging content but after the TUPE transfer to the Respondent they were tasked with writing dry content, whereas the team was interested in doing something more engaging. The Claimant was not challenged on this evidence which came across as a genuine and spontaneous history of his copywriting experience in the telecommunications industry.

6. He felt that the Respondent's management significantly misunderstood the copywriting abilities of the team members, considering that they had only ever done short form copy and Q&A's which only in fact reflected their more recent work with the Respondent.

7. The Claimant used a software application known as AEM to publish new material on the Respondent's website, within their applications and also to make amendments to existing content. This was an application which had within it various levels from a basic read-only mode to much more technical capabilities. It was at times a troublesome and unstable piece of software which itself went through periodic updates and modifications. The Claimant's evidence was that in more recent times only 30% of his time and been spent writing copy and the majority of the previous 18 months had been taken up in working with the AEM application.

8. The Claimant went through numerous reorganisations and changes of Department/job title. The Claimant, however, had never previously been put at risk of redundancy. Whilst the Respondent issued individual job descriptions

as part of periodic recruitment exercises, job descriptions were not centrally held or standardised.

9. The Claimant had always been assessed as performing satisfactorily in his job and had been in receipt of regular bonus payments and awards, albeit the majority of the Respondent's employees had received similar performance ratings to the Claimant.

10. By 2017 the Claimant was employed as a Content Manager at grade 13. He was based at the Respondent's Leeds office and had always, whilst with the Respondent and its predecessors, worked from Leeds. The Claimant sat within the digital content team managed by Terri Cheshire, who in turn reported to Victoria Gibson, Head of Content who then reported up to Jackie Ronson who had become, in March 2017, Director of Digital, Customer Relationship Management (CRM) and Insight. Ms Cheshire, Ms Gibson and Ms Ronson were all London based and the content team was split between members based in London and Leeds.

11. In early 2017 external consultants were engaged to review Ms Ronson's area of responsibility and to come up with proposals regarding an optimal structure. This led to a restructure which took place in June/July 2017 and resulted in a number of redundancies. However, a restructure of a separate digital customer experience team led by Mr Van der Lans and the digital content team led by Ms Gibson was delayed given the large size of the two teams and a need for some further analysis of preferred ways of working before a future structure was determined. The Claimant was aware that some form of review was in the offing and, as already noted, restructurings were quite regular within the Respondent. The Claimant did not, from what he had been told by the Respondent, consider that there was a primary aim to reduce costs and in turn to potentially reduce the workforce in his area.

12. Mr Van der Lans and Ms Gibson worked with Ms Ronson in devising a new structure, but Ms Gibson gave notice to terminate her employment and left the Respondent on 15 September 2017. After her departure, Ms Ronson combined the two areas under Mr Van der Lans' management on an interim basis.

13. Ms Ronson's evidence is that Mr Van der Lans spent a great deal of time speaking to senior managers within each team to understand how the teams worked and the exact nature of the roles within them. This included, she said, Mr Van der Lans speaking to Ms Cheshire and visiting the Leeds office. The Claimant's perception was that, whilst he accepted that Mr Van der Lans had met with Ms Cheshire in August 2017 to talk through in detail the type of work the team did, the meeting was less than an hour in duration and he had no awareness of Mr Van der Lans ever visiting Leeds or following up his conversations with Ms Cheshire. The Tribunal notes that the Respondent

regards itself as very fast-moving and fleet of foot. Ms Ronson described an hour as being "*a long time in EE*".

14. Whilst the Tribunal accepts that Mr Van der Lans never spoke to the Claimant himself until 7 December 2017 after the restructure had been determined, it accepts that Mr Van der Lans did speak to Ms Cheshire and Ms Ronson regarding the job functions within the content team, albeit the Tribunal has no evidence as to the amount or exact nature of those discussions. The Tribunal has seen an email from Ms Cheshire to her content team on 14 December where she expressed a feeling that she had been ignored and had not been taken up on her offer to go over any extra questions. She did, however, make clear that she had had a meeting in August with Mr Van der Lans and Ms Ronson to talk through the type of work "*that we do in detail"*. Mr Van der Lans also spoke to Ms Hema Mehta who managed the marketing team at a similar level to Ms Cheshire.

15. Mr Van der Lans in fact gave notice of his resignation in October 2017 after only a few weeks in his new role as interim head of the two areas. He remained in the business prior to a return to his native Australia in the New Year.

16. Ms Ronson announced the proposed restructure on 7 December 2017. This involved an identification of 17 new roles which were to be created but with the redundancy proposed of 13 existing positions. Whilst not straightforward to see, not least given that some of the new positions were quite different to the role undertaken by the Claimant, a slight overall reduction in headcount was to be achieved. Six of the proposed redundancies would to be from the Respondent's Leeds office and the remainder from London. All 6 posts within the Claimant's content team were identified as being at risk of redundancy including his own position of content manager. There was to be the creation of a new copywriting team responsible for all of the content produced by the Respondent through its website and web apps with the exception of content relating to the Respondent's online store (which had always been dealt with separately) and the content produced by the marketing team under Ms Mehta's management. The Respondent's proposal was that the marketing team in the future, as well as devising and managing their campaigns, would also be responsible for the uplifting of the content online through the AEM application and for any amendments to that content using AEM. As such, they would have complete ownership of the entirety of their marketing product without the need, which was seen as inefficient, to pass over the AEM production work to the separate content team.

17. The Respondent determined that Ms Mehta's marketing content management team were all automatically mapped into roles in a new team of Producers, a title subsequently within the consultation process amended to Digital Marketing Managers. The Respondent's rationale was based on a practice within the Respondent, albeit undocumented and certainly not part of any formal policy, that if any replacement role encompassed 70% or more of the existing role then the incumbents in those existing roles were automatically

matched and transferred into the new positions. The Respondent, it is clear from slides it prepared for management use, broke down the marketing team's roles as 30% stakeholder management, 20% journey planning, 20% digital marketing, 10% project coordination, 10% sign off copy and 10% life-cycle management. Journey planning was described by Ms Ronson as the end to end journey the customer took from the first interaction with the Respondent to the desired outcome. Digital marketing was about how one presented a campaign and the best way to translate the Respondent's message online when it had a product to promote. Life-cycle management involved having a bigger view of the brief to understand customer segments, for instance, when a customer last bought a phone, their length of time with the Respondent and their channel preferences. Of those functions, the stakeholder management, journey planning, digital marketing and life-cycle management work was to remain to be performed by one of the Producers/Digital Marketing Managers. The remaining 30% of the new role would be the publishing element through the AEM software. Therefore, whilst this 30% AEM of the new role was indeed new to the current job holders and a function previously carried out by the content team, 70% of the role was considered the same, so as to lead to the conclusion that the roles ought to be mapped.

18. The Claimant's content manager role (in contrast to his own assessment of his recent work) was assessed as encompassing 50% copywriting and 50% AEM work. Since this did not match, to the extent of 70%, with the new Producer/Digital Marketing role that was not considered to be a match with that role. The Respondent was also putting together a new copywriting team. However, the roles in that team were determined to be 100% copywriting in circumstances where the Claimant, in his existing role, only did that type of work, on the Respondent's evaluation, for 50% of his time. Therefore, he also was not deemed to be in a role which mapped into this new copywriting team. Again, the Claimant's evidence was that in more recent times only 30% of his time and been spent writing copy and the majority of the last 18 months taken up in working with the AEM application.

19. It is again clear from the slides produced by the Respondent, that the Respondent did consider a number of options. Option 1 indeed was the chosen one of mapping Ms Mehta's team into the new Producer/Digital Marketing roles and place Ms Cheshire's team at risk of redundancy. The pros of doing so were listed as a clear mapping by percentage of the role for the members of that team, that it would have less impact on people and would provide a clear justification for Ms Cheshire's team's roles being completely split up. The listed cons included that more people would be placed at risk of redundancy initially and that there was a risk of a higher number of vacancies in the new structure if none were successfully redeployed into other areas.

20. Two other options were considered but rejected. The first of those involved mapping Ms Mehta's team into the new producer/marketing team and similarly forming a closed pool of Ms Cheshire's content team into the new copywriting team. In terms of the cons when evaluating such option, it was noted that the

content team might not all see themselves as copywriters, that the justification was awkward as copywriting was only part of their current role and that the option was commercially challenging as not all of the individuals had the skill sets to be a full-time copywriters. The final option involved pooling the marketing and content teams together and selecting from them those appropriate to take on the new Producer/Digital Marketing roles. It was recognised that this gave everyone a chance to secure a role, but as cons it was seen that this made the proposal look to be uninformed, there would be a major impact to the business of this form of restructure and it was envisaged that there might be a lengthy process to potentially end up at option 1 in any event, if members of the content team were unsuccessful in putting themselves forward for the new marketing roles.

21. The new content/copywriting team included the positions of Digital Editor and Digital Copywriter. All employees who were not mapped into roles in the new team were to be given the opportunity to apply for any remaining new roles including those new positions within the new content/copywriting team. There were a number of other new but more junior roles vacant within the structure.

22. The Claimant explained to the Tribunal the different areas within the Respondent's business where there was a need to write copy. His evidence was uncontested. Firstly, there was copy to be written for the online shop i.e. internet retail sales which the Claimant explained had always been carried out by a separate department not involved in this particular restructure. The "Why EE?" work was essentially that carried out by the marketing managers to lure in new customers. The Claimant described this as the "*shiny, sexy campaign pages*" which Ms Mehta's team dealt with. There was then "My EE" which was where existing individual customers logged into their account to look at their contract details and for instance to pay any bills. Finally, the "Help" section was aimed at helping existing customers with queries they might have and with the aim of reducing the need for customers to telephone the Respondent's call centres. The type of copy used for this section was, he said, inevitably quite factual rather than any form of sales pitch with more flowery language. The Claimant considered that the "Help" section would, as it had to, to achieve its objectives, remain largely factual and functional. He described how his team also carried out an element of analytical work to see which pages worked best.

23. The Claimant's understanding, which again has not been contradicted in evidence, is that within the Respondent's new structure the new digital marketing team would provide the copy and then carry out their own online publishing of the "Why EE?" pages. The "Help" and "My EE" pages would have fallen within the new copywriting team as indeed there was no other section of digital publishing left once the online shop was carved out and separately managed as it all ways had been. The Claimant on that basis queried and continues to query how the copywriting involved within the new copywriting team would be so different and innovative when compared to what had gone before.

24. The Claimant referred at the time redundancy consultation commenced and indeed referred the Tribunal to a document which had been provided by the Respondent after the redundancy announcements setting out the responsibilities of the Producers and members of the content team in the new structure. Under "Content" the list of responsibilities commences with reference to content strategy, content style guide and editorial review, going on then to include copywriting (campaign, functional, support, marketing). The key performance indicators were listed as being: accuracy, quality, engagement and ranking. The Claimant, as will be described, based his applications for alternative positions upon those listed responsibilities which he did not understand to involve the need to show a particular or defined ability to write in any particular new style. The Respondent's witnesses have not enlightened the Tribunal any further.

25. On 7 December the Claimant had his first formal meeting with Mr Van der Lans at which he was told that his role was at risk of redundancy and there would be a group meeting to tell everyone of the wider proposals later in the day. He agreed that the proposed restructure was then shared with the members of the content team in both Leeds and London through a joint video link meeting with Ms Ronson present in London and Mr Van der Lans in Leeds. They were shown some PowerPoint slides which had been put together as a presentation to explain the proposed structure to the staff affected. This did not include the aforementioned slides setting out in percentage terms the key component parts of each position and the restructure options which had been considered and rejected.

26. The Claimant's reaction was that the new digital Producer role sounded very much like his own role and he was unclear why members of Ms Mehta's team had not been placed at risk but had all been effectively slotted into the new roles. He felt that there was a fundamental lack of understanding in the very time consuming nature of production work in AEM which he understood that the new Digital Producers would be required to carry out themselves.

27. Shortly after the presentation, the slides were uploaded onto the Respondent's shared intranet. The Claimant and his colleagues considered that the digital Producers would struggle to undertake the AEM work which had formed the major part of the content team's responsibilities yet up to now had not formed any part at all of the responsibilities of the marketing team. The Claimant was concerned that, with their lack of knowledge of AEM, this could lead to potential regulatory and compliance breaches. As well as being inequitable, the Respondent's plan would simply not work and deliver on its objectives. On further consideration, the Claimant considered that the other new roles in the new content/copywriting team of Digital Editor, Senior Digital Copywriting Executive and Digital Copywriter appeared to be roles members of his team were already employed to do. Certainly, he understood that he was already engaged with editing, production and copywriting tasks, as were his colleagues.

28. When Ms Ronson visited the Leeds office the following week, the Claimant and his colleagues met her and expressed the view that those making the decisions did not seem to understand what their day-to-day jobs were and how long the AEM work actually took. Mr Van der Lans arranged as a result a further meeting with the team to go through how they saw their day-to-day work, but, whilst the meeting took place, no changes resulted from it.

29. Prior to Christmas, the Claimant became exasperated at delays in providing what he considered to be sufficient information to put together a counter proposal on behalf of himself and his colleagues. The Claimant had indeed agreed to be the effective spokesman for the content team and to take the lead in drawing up a counter proposal. In particular, detailed job descriptions had not yet been finalised in respect of all of the positions in the new structure. He asked for copies of the job description for the Claimant's existing Content Manager role and others but was told that these were not centrally held by HR.

30. The Respondent originally gave the content team until 21 December to submit a counter proposal. An extension of time into the New Year was requested to finalise this and an extension ultimately allowed by the Respondent until 29 December. The proposal was submitted. This was clearly carefully and seriously thought out, both in terms of an alternative structure thought workable by the content team and one which did not, as they thought unlikely to be regarded as a constructive suggestion, simply place the marketing team at risk rather than themselves.

31. The evidence before the Tribunal is that on 4 January the counter proposal was discussed by the Respondent's management. That discussion included Maureen Perry, an elected staff representative for the purposes of redundancy consultation for the Claimant's area of work. She had also been involved in earlier staff representative meetings to consult on the Respondent's proposals.

32. The Claimant's team were invited to a meeting on 5 January when they received detailed feedback as to why their counterproposal had been rejected.

33. They were told that there were new roles available and the Respondent would like to redeploy people where possible.

34. The Claimant attended a first individual consultation meeting on 9 January 2018 with Terri Cheshire who herself was at risk of redundancy and left the business shortly afterwards. The Claimant made it clear at this meeting that he wanted to stay with the Respondent and would be applying for the new roles. It is noted that enhanced redundancy terms were on offer to those who wished to accept redundancy and a number of the Claimant's colleagues took that option.

35. The Claimant had until 16 January to apply for any vacant roles which interested him. He applied for the new roles of Digital Editor and Digital Copywriter but also for a Digital Marketing Manager position within Ms Mehta's team as one of the team mapped onto those roles, Stephanie Cocks, had decided to leave the Respondent. All of these roles were at the Claimant's existing level of grade 13. The Claimant was told that all these roles could be carried out in either Leeds or London.

36. The Claimant duly applied within the time limit. He completed an online form setting out what he thought he would bring to the job to which was attached his CV. The Claimant put together his applications based on the job descriptions which had been published for each role and key responsibilities document and, he thought, with careful reference to the key responsibilities. There was an issue as to whether or not the Claimant had in fact met the application deadline and whether the Claimant's application should therefore be allowed to proceed at all. However, it was shortly discovered that the Claimant had in fact submitted his application in time. The Claimant was hopeful that he would be successful in obtaining an alternative role as he had survived numerous previous restructures and was aware that a number of his colleagues had decided to leave the business meaning there was less competition for the available posts.

37. On 18 January 2018, the Claimant was interviewed remotely through WebEx for the Digital Marketing Manager position by the team manager Ms Mehta. The Claimant was never told that he could ask for a face-to-face meeting or that his expenses would be met if he travelled for an interview in person. The fact that the Respondent paid for business travel for meetings without any particular restraints was on its own not likely to and did not give the Claimant reason to think that a request for an interview in person would be granted. However, the WebEx was not working correctly with no images available so that the interview proceeded effectively as a telephone interview. The Claimant felt nevertheless that he had performed well, giving the "Help" transformation project as an example where he had managed internal stakeholders in a project which involved a so-called "end-to-end" customer journey – the type of work which he considered was relevant to the Digital Marketing Manager role. The Claimant's only misgiving was that Ms Mehta referred to the need to be in London regularly to interact with the rest of the team.

38. Ms Mehta scored the Claimant and indeed was of the view following the interview that he was appointable to the position. She, however, also interviewed one of the Claimant's colleagues, Gavin Woods, for the position. He scored more highly than the Claimant and was offered the position. Ms Mehta had put together her interview questions as those she thought most appropriate for the position she was recruiting for. Ms Mehta did not follow the Respondent's standard guidelines and format for interviews. As Ms Diaz accepted, managers did sometimes depart from those guidelines. 12 questions were asked and each scored out of 10 points. The Claimant and Mr Woods were asked the same questions, Ms Mehta recorded the key points of

the answers they gave and commented on how some of the scores were arrived at on her summary sheet. The questions asked for examples of work done, for the candidates to explain how they would deal with particular issues and, for instance, what the candidates thought made "*brilliant digital content*". Ultimately, Mr Woods score of 114 was by a little distance greater than the Claimant's score of 90 out of 120. She also considered the candidates' CVs as well as any knowledge she had herself of work they had done. Ms Mehta's evidence as to the genuineness of the process she conducted and her scoring of the candidates was convincing and the Claimant does not himself suggest that Mr Woods was not a credible candidate. The Tribunal accepts Ms Mehta's evidence that her preference of Mr Woods had nothing to do with him living closer to London than the Claimant.

39. On the same day the Claimant was interviewed by Mr Brian Hoadley simultaneously for the two roles of Digital Copywriter and Digital Editor. Mr Hoadley was new to the Respondent's business and indeed engaged by it only on a consultancy basis to drive forward the changes the Respondent had in mind in the new digital teams utilising his significant industry experience. The interview with Mr Hoadley was intended to be also by WebEx but again the system was not working and the Claimant was forced effectively to undergo another telephone interview. The Claimant had never met Mr Hoadley before and felt disadvantaged by this.

40. Again, however, the Claimant felt that the interview had gone well and that he had been able to put across what he thought were concrete and relevant examples of the type of work the Respondent would be looking for in these new positions, based on the job descriptions and list of responsibilities the Claimant had been provided with. However, he did feel that the questions were quite narrowly framed. As regards the Digital Copywriter role, he felt that the questions were focused almost entirely on writing copy to the exclusion of other aspects of the role outlined in the job description.

41. The evidence of Ms Diaz, who was with Mr Hoadley during the interview, was that the Claimant's CV and application form represented his initial expression of interest, effectively to get him through the door for consideration, but that those documents and the Claimant's prior experience were not then considered. Suitability for the alternative positions was based purely on performance at interview. That interview lasted for 45 minutes. The interview was to cover suitability for either or both of the Copywriter and Digital Editor positions. The Claimant had expressed a preference out of the two positions for that of Digital Editor. The Claimant was asked 2 questions about the copywriting position, firstly to discuss his approach to designing and delivering copy, how he kept his skills current and what he felt he would bring to the job and, secondly, where he was asked to talk about a project where the copy adversely impacted customers and how he approached resolving the problem. In respect of the editorial position, he was asked to describe his approach to developing and maintaining an editorial process and guidelines, encompassing also how he managed teams. From the interview sheet

completed it is clear that the Claimant described his experience with Orange. When giving examples he referred on more than one occasion to the "Help" transformation project upon which he had been working most recently and which remained to be completed. Mr Hoadley's recorded view was that he would have liked to have heard more examples about a broader range of work and it was felt that the Claimant hadn't really demonstrated how to use his seniority to drive copy or editorial improvements. At times Mr Hoadley appeared, from his notes, to be unclear whether the Claimant was talking about his own work for that of his overall team. The Claimant was given a score of 14 marks out of a possible 25 for both of the positions.

42. For both positions the Claimant was in competition with Darren Lee. For the Digital Editor position, Mr Lee scored 17 points and another candidate, Andrew Bullimore, scored 11. On the basis of his higher scoring, the position was offered to and accepted by Mr Lee. It is noted that this was Mr Lee's first preference but that he had also applied for the Digital Copywriter position and had achieved a score of 20 marks in the assessment for that position.

43. Ms Diaz's evidence was that there was no threshold score necessary to be appointable to the Digital Copywriter position. Mr Lee and the Claimant were the only two candidates for that position, but as already recorded Mr Lee opted to take the Digital Editor position instead. However, the Claimant was not regarded by Mr Hoadley as suitable for the Digital Copywriter position which remained unfilled for some time before eventually an external appointment after the Claimant's employment had ended.

44. It is noted that a Mr Mark Appleby separately applied for the position of Digital Copywriting Executive which was a grade 11 position and at the same time for the higher grade 12 position of Senior Digital Copywriting Executive. He was given a score of 12 points for each position and initially was not deemed appointable to either. However, after further discussion his score in respect of the grade 11 position was uplifted to a total of 15 points and he was then offered and accepted that alternative employment. The view was taken that with a grade 11 position there could be scope for development and he had been assessed at one interview for positions at two different grades.

45. Ms Ronson, Mr Hoadley and Mr Everson met on 22 January to discuss the Claimant's performance at the interviews. The primary evidence of their discussion came from Ms Ronson in circumstances where Mr Everson did not have a particularly detailed recollection of the meeting. He did, however, comment that in his recollection the discussion was about whether or not the Claimant would be good enough for the Digital Copywriter role. Whilst Ms Ronson told the Tribunal that the Claimant's experience in the organisation had been taken into account and that the Claimant's previous experience had been evident from his CV, it is clear from Ms Diaz that this was not at all the case in the process which Mr Hoadley adopted and his considerations.

46. Ms Ronson did tell the Tribunal that the decision not to offer the Claimant the copywriter role came down to a judgement of whether he was fit for purpose for the new role. The message she got back from Mr Hoadley was that the Claimant had not given enough examples of his copywriting experience. The issue was who was the best fit for the position and Mr Hoadley's expert opinion was that the Claimant was not right for the role. Ms Ronson said that Mr Hoadley's interview process had assessed the suitability of candidates and she did not go through issues which had arisen out of the Claimant's interview in detail with him, simply recalling that she looked at the scoresheet to see the points allocated to the Claimant. However, she considered that it was not felt the Claimant was fit for this role in circumstances where the Respondent wanted people who were passionate about copy and engaged with the Respondent's vision in terms of future developments and the use of more multimedia applications. They wanted the right person and with the right experience for the future direction of the business. In the Claimant's interview he had in fact said that he had not done much copywriting in the last couple of years and editorial work appeared to be of more interest to him. He described his work on the "Help" transformation project but that related to a part of the Respondents website which was quite factual with not a lot of engaging content. She said that the Respondent had an *"aim to bring in seasoned copywriters from other sectors to transform the way we write*". Other candidates had been felt to express better what excited them. The question mark regarding the Claimant was whether he could adapt and whether he was right to be the senior person leading more junior people in copywriting tasks.

47. The Respondent had in place a set of guidelines to help consulting managers to support affected employees during restructures and possible redundancy. In a section setting out some frequently asked questions there was reference to the possibility of trial periods. The response to be given to such an enquiry was that, if an alternative role was identified and the at risk employee required training to be fully competent, it might be appropriate to offer a longer trial period. It was raised with Ms Ronson whether any consideration had been given to the Claimant being allowed to perform the copywriter position pursuant to any form of trial period. Her response was that she did not recall any such discussion and was not told by Human Resources about the possibility of trial periods. Mr Everson told the Tribunal that he had not raised the possibility of trial periods because he thought it was not something that was relevant to a situation where someone applied for an alternative position. It would only be relevant if someone was effectively slotted in to a new role.

48. At 4:30 p.m. on that day, 22 January, Mr Hoadley telephoned the Claimant to tell him that he had been unsuccessful for both the roles he had applied for. The Claimant asked what was to happen next, expecting a conversation about alternative roles/vacancies. Instead, Mr Hoadley informed the Claimant that the next day would be his last day within the business. He said that the Respondent would be holding a final consultation meeting on 23 January.

49. The Tribunal accepts the Claimant's evidence in this regard, which is uncontested, and also that the Claimant was completely shocked at the outcome he was given. The Claimant was further disconcerted to learn that the final meeting with him was envisaged to be through WebEx rather than in person. The Claimant queried this with Mr Hoadley, who then made arrangements to travel to Leeds to meet with the Claimant.

50. The Claimant indeed met Mr Hoadley on 23 January. He was handed a letter confirming the termination of his employment which was in fact dated 16 January. The Tribunal accepts that this was an administrative error reflecting the date when template letters had been prepared rather than that it had been decided at that earlier date, and indeed before the interviews for alternative employment, that the Claimant's employment be terminated.

51. The Claimant was surprised that in the dismissal letter there was a reference to reducing the Respondent's costs as one of the reasons for the redundancy exercise. This had not been put forward previously by the Respondent as the reason for the restructuring. Ms Ronson has explained to the Tribunal that cost indeed was not the driving factor in the proposal for the restructuring which was primarily to create more efficient functions, fit for purpose for the future to deliver an enhanced service to customers. Whilst the restructure had to be completed with a budget in mind and a reduction in overall headcount was envisaged, had proposals altered, then so might that budget and the result produced by the restructure.

52. The Claimant appealed against his dismissal by email of 29 January 2018. However, he was not invited to an appeal meeting. Instead Mr Shannon Daly reviewed the documentation together with the Claimant's letter of appeal and provided the Claimant with a written outcome dated 21 March 2018 rejecting his appeal.

53. The Digital Copywriter position remained unfilled. The Digital Marketing Managers, who had previously only had "*observer status"* with AEM were trained by Ms Nisbet on its basics on one day and then attended a one day session on its more advanced functions. Ms Nisbet also trained those recruited into the new content team, including copywriters, in the use of AEM. Her evidence was that work continued on the "Help" project with which the Claimant had been heavily involved, although she accepted that the remaining work required was for a limited time only.

Applicable law

54. Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides:

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*

the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

55. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the ERA. Redundancy itself is defined in Section 139(1) of the ERA as follows*:*

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

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

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

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

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

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

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

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

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

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

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

58. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where employees were represented by an independent union. In the Williams case it was stated:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

59. The Tribunal also refers to the case of **Capita Hartshead Limited v Byard [2012] IRLR 814** and in particular a passage of Silber J as follows:

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:-

> *'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne – Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]);*

'[9]… The courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn' (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother [2005] All ER(D) 142(May));

'There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It will be difficult for the employer to challenge it where the employer has genuinely applied his mind [to] the problem' per Mummery J in Taymech Limited v Ryan [1994] EAT 663/94, 15 November 1994, unreported):-

The employment Tribunal is entitled if not obliged to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible for an employee to challenge it.".

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

"***30***

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

36

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

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

39

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

40

Nor do we consider that the Tribunal erred in law in its approach to the process which the Respondent followed. The Tribunal accepted that it was regrettable that there was no person with specific coaching experience on the panel; but as the Tribunal said, the committee was an extremely senior committee with experience of making key senior appointments.

41

The Tribunal accepted that it would have been better if the interviewing panel had followed the intended process more strictly, but after a careful review it considered that the interviewing process was objective and fair. We, like the Tribunal, are critical of the panel's failure to mark the candidates in accordance with the original plan; but we think this is a matter for the Tribunal to take into account in its assessment under s.98(4), and we are satisfied that the Tribunal did so."

61. Ms Casserly refers the Tribunal to the Employment Appeal Tribunal's decision in the case of **Newcastle City Council v Ford EAT0358/13** where an Employment Tribunal's decision that the Claimant's dismissal for redundancy was unfair in circumstances where she had performed poorly at an interview for one of the new roles the Council had created was upheld. The Claimant in the case had not been informed that the selection decision would be based entirely upon the interviews and the Council would not be taking into account prior knowledge of candidates or their written application forms. Thus, she had been unfairly denied the chance to sell herself for the role at interview. Ms Datta was right to point out that each case turned on its own facts noting that in the Newcastle case the performance of the candidates at interview had been well below what would be expected and the scores were so poor so as to indicate an unfairness in the method of selection.

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

63. Applying the above principles to the facts as found, the Tribunal reaches the conclusions set out below.

Conclusions

64. The Respondent has shown that the reason for the Claimant's termination of employment was redundancy. There was a reduced need for work of a particular kind. The Claimant's role disappeared from the Respondent's structure and there was an overall reduction in headcount. There was a reorganisation creating a substantive change in the kind of work required by the Respondent to be carried out individually by its employees so that whilst copy and AEM work continued, the role performed by the Claimant and others did not. The restructuring envisaged a reduction in overall employment costs, but the driving factor was the Respondent's genuine belief that different roles and ways of working were required to deliver on its vision for the future. The restructure nor the Claimant's treatment within its implementation was not to target the Claimant as a perceived resistor of change or otherwise. There is no evidence to support that contention.

65. There was certainly significant warning given to employees, including the Claimant, of the possibility of redundancy. Whilst the Claimant might, on the basis of past experience, have expected that in any restructuring he would be found a new position or alternative role, all of the affected employees were aware that the first phase of restructuring had occurred which had resulted in redundancies and that their own teams were then to be looked at as part of the same wide-ranging reorganisation.

66. There was no general failure to fairly and reasonably consult regarding the Claimant's redundancy situation. Firstly, there was significant collective consultation with properly appointed and elected employee representatives who were invited to a succession of meetings. The Tribunal notes, in particular, that Ms Perry was an appropriate representative of the Claimant's team and that she was significantly involved in meetings where counter proposals were discussed and considered with feedback then being agreed upon to be given to the affected staff.

67. Save as highlighted below with reference to alternative employment, the Claimant also enjoyed the benefit of genuine and effective individual

consultation. The Respondent's proposals were explained in detail firstly in group meetings, although the Claimant had his own individual notification of the restructure prior to a wider announcement. The Claimant and his colleagues had an opportunity to submit a counter proposal and indeed took the opportunity to put together a very well thought out and detailed alternative. This indeed was in turn seriously and thoroughly considered on the management side with a full response given to the individuals at risk of redundancy. There were some delays in the Claimant being provided with information and then constraints in the time allowed to make the counter proposal, but the Claimant managed to complete the task on his own and his colleagues' behalf and certainly the Tribunal does not consider these to be flaws so significant as to potentially render dismissal unfair.

68. After this stage, the Claimant had a first individual consultation meeting with Ms Cheshire. Whilst Ms Cheshire was herself at risk of redundancy and not the decision maker in terms of the preferred restructure, she was still at this point in time the Claimant's line manager and not an inappropriate individual to conduct a first consultation meeting with him. There had by the stage of his meeting with Ms Cheshire already been a lot of time and focus spent on alternatives, if any, to the Respondent's restructure proposal.

69. The Claimant obviously progressed after this meeting to 2 separate interviews for alternative vacancies and thereafter was told of his lack of success and had a final meeting with Mr Hoadley to confirm the redundancy decision. The Claimant appealed the decision, an opportunity which was granted to him. The appeal itself would have been a more effective exercise had the Claimant had an opportunity to meet with Mr Daly, but the Claimant had put together significant written grounds of appeal, Mr Daly had an understanding of the Claimant's issues and whilst flawed the appeal process again on its own would not have been an aspect of the Respondent's procedures performed so defectively as to render dismissal unfair.

70. Turning to the actual substance of the restructure, the Tribunal considers firstly the selection pools and the decision taken by the Respondent to map some, but not all, including the Claimant, into alternative roles within the new structure. The Tribunal is satisfied, with particular regard given to the document which shows the 3 options under consideration, that the Respondent certainly did more than simply turn its mind to the question of the appropriate pools and considered the arguments for and against a number of alternative approaches. The decision to map the marketing team into the Producer/Digital Marketing Manager positions in the new structure was not one outside the band of reasonable responses. Indeed, there was a justification and logic to mapping those individuals into what were predominantly similar positions. The requirement of those employees in the future to carry out the online publishing through AEM of their own work did not alter the fundamental nature and purpose of their roles. If the Claimant is right about his own Content Manager role having come to involve AEM work for around 70% of his time, then clearly, on his own evidence, what he had been doing was not a match for the role of

the new Producer/Digital Marketing Managers. The Tribunal accepts that the majority of the Producer/Digital Marketing Manager role did not come to involve AEM.

71. The Respondent's approach to pooling, which again the Tribunal considers an approach reasonably open to it, meant that there was no selection of the Claimant for redundancy as against other colleagues. The Claimant's role disappeared and his survival within the Respondent then depended upon the possibility of alternative employment being found for the Claimant. It was clear and always had been clear to both the Claimant and the Respondent that within the new structure there would be available vacancies. The Tribunal considers that the Claimant acted reasonably in applying for 3 different types of position all at his existing grade 13. It was unrealistic and unreasonable to expect the Claimant to go for all of the vacant positions. The Respondent has raised, in effective criticism of the Claimant, his lack of expression of interest in more junior low-grade positions but this has to be seen in the context of an unknown outcome for the Claimant of applications for 3 other positions where simply from the number of positions available and the numbers applying he might reasonably have thought himself to have had a good chance of success. Also, there was an obvious consideration of a potential perceived loss of credibility if he was putting himself forward at this earlier stage for lower grade positions.

72. It was unreasonable for the Respondent in fact to close the consultation process before the Claimant could consider those more junior positions and potentially ask to be considered for any of the lower grade vacancies. The Claimant was, on the Tribunal's findings, in an obvious state of shock and disbelief at the outcome of his interviews. The Claimant was given no time to digest his situation and it is unsurprising given the way his employment was then swiftly brought to an end that the Claimant might have the impression that the Respondent did not want him to remain within its employment. Indeed, the Claimant's treatment at this late stage of the consultation process is sufficient, the Tribunal considers, to render the Claimant's dismissal unfair. Again, the context was, on Ms Ronson's own evidence, of their being lots of vacancies within the structure (a number of employees opted for voluntary severance) and plenty of them remaining unfilled after the completion of the redundancy exercise. Ms Casserly points out that the Respondent's own guidance was to hold a final outcome of the consultation meetings at least a week prior to the termination date. As she said in submissions, the Claimant had effectively no time to absorb the fact that he had failed to obtain any of the jobs he applied for and was therefore to be made redundant. He had no time to apply for any posts at a lower grade. The Respondent produced no evidence of any other efforts made to advise him of other possibilities within the Respondent which, she rightly notes, is a large employer with certainly vacancies in the Claimant's existing work area. Ms Ronson thought that suggesting lower grade positions might have been considered "*demeaning"* by the Claimant, but this was an employee with significant service who otherwise would have to leave the Respondent.

73. The Tribunal does not consider the Respondent to have acted unreasonably in the way it assessed the Claimant against other candidates for the grade 13 positions which he did apply for. The interview processes for the Digital Marketing Manager position and the Digital Editor and Copywriter positions were objective exercises with common questions being asked of each candidate and an assessment of the answers given. The Claimant was realistic in his lack of complaint regarding missing out against a colleague for the Digital Marketing Manager position and indeed cannot say that Mr Lee was not a suitable candidate for the Digital Editor position which would have been the Claimant's preference out of the 2 roles for which he was interviewed by Mr Hoadley. The Claimant being interviewed by telephone (effectively) was not a flaw sufficient to render dismissal unfair, particularly in the context of the Respondent's business and the quite routine use of electronic communications for a variety of meetings. There is no basis for the Tribunal impugning Mr Hoadley's thought process that Mr Lee was the preferred candidate for the Digital Editor position.

74. In essence, the Claimant was fairly scored against the alternative candidates for all the positions he applied for but in circumstances where the Digital Copywriter position remained vacant. The Claimant had attained a score of 14 points out of 25 for that role but once Mr Lee had been appointed to his first preference of the Digital Editor position, the Claimant was the sole candidate. There was, the Tribunal has found, no cut-off mark below which a candidate could not be considered. The Tribunal notes that Mr Lee was regarded as a suitable candidate for the Digital Editor position with a score of 17 points and that a candidate for another position was successful with just 1 point greater than the Claimant in the scoring exercise he was put through.

75. The Tribunal is acutely aware of not being permitted to substitute its own view and that an employer's obligation in terms of looking for alternative employment is limited. It may be difficult for an employee at risk of redundancy to say that an employer who has published vacancies within a new structure, given employees an opportunity to apply for them and then assessed them fairly for such positions, has acted outside a band of reasonableness. Nevertheless, in all the circumstances of this case the Tribunal does conclude that the Respondent's actions fell outside band.

76. The fundamental unfairness in this case is the Respondent's refusal/failure to allow the Claimant to undertake the still vacant role of Digital Copywriter.

77. The Claimant in the competitive interview process, a process which was imperfect in it being reduced to no more than a telephone interview and in circumstances where the Claimant was an individual who the Respondent knew would be well out of practice in terms of being interviewed for employment, did still obtain a score of 14 points. Again, other employees were considered to be appointable with scores of 17 and 15 points respectively and, in the case of the latter point score, when this had been uplifted from 12 points

to reflect not only the level of the role applied for but also the opportunity for the employee to be developed within the new role.

78. The Claimant had, to the Respondent's knowledge, clearly significant relevant experience to the Digital Copywriter position in circumstances where the Respondent has failed to evidence how the new role was so different to tasks and responsibilities previously undertaken by the Claimant during his period of employment. The Tribunal reminds itself of the evidence as to the type of copy required to be written in the new role and considers the Respondent's vision and desire for something new and innovative to be an assertion without satisfactory explanation or demonstration in evidence before the Tribunal. It is not evident from the new job descriptions and key responsibilities document. It is not consistent with the limitations and purpose of copy for the "My EE" and "Help" functions.

79. Indeed, there was a lack of consideration of the Claimant's past experience and no account of the Claimant's copywriting role when working with Orange which involved far more innovative, quirky and engaging content than the traditional approach taken by the Respondent to how it communicated with customers online.

80. Also to be factored in, is the evidence that whilst the Claimant reasonably was not regarded as carrying out responsibilities sufficient to be automatically mapped into the Digital Copywriter position, on the Respondents own evidence was extremely close to being so mapped. The Tribunal notes that the Claimant's role was already regarded as encompassing copywriting to the extent of 50% and it notes Mr Everson's acceptance that at the very least 10% of the Claimant's previous role involved AEM. It is more likely than not that the Claimant work on AEM was in fact significantly greater. However, even at its lowest on Mr Everson's assessment, the Claimant was doing certainly 60% of the digital copywriter position in circumstances where 70% would have resulted in him being mapped automatically into the position.

81. The Claimant was ultimately adjudged as not being capable of doing the innovative/engaging copy which was required in the new role. However, all the evidence points to Ms Mehta's team doing what has been described as the "*sexy*" copy and Ms Mehta of course, in her assessment of the Claimant following his interview, considered that he was a capable and credible candidate for a position within her team as a Digital Marketing Manager. He would have been appointed to such a position had there not been a higher scoring candidate.

82. The rejection of the Claimant for the Digital Copywriter position was almost purely based on Mr Hoadley's view as to exactly what he would consider to be an ideal candidate for the role. Ms Ronson's stated view in evidence was that they wanted to bring in the best but this was without any consideration of the fact that the Claimant was at risk of redundancy. On the evidence, the context

for the Respondent was purely of this being a recruitment exercise for available positions within a new structure rather than a redundancy exercise where employees would lose their employment if unsuccessful. There was no even cursory consideration of the possibility of a trial period, again in a role which, on the evidence, the Respondent ought reasonably to have considered the Claimant a significant potential fit for. This again then is in the context of the role remaining vacant and unfilled for a significant period.

83. On the basis of all these factors, the Tribunal considers that the Claimant was unfairly dismissed and his claim of unfair dismissal is therefore well-founded and succeeds. There is no evidential basis for the Tribunal concluding that the Claimant would not have been capable of or would or might not with any degree of possibility have survived in the Digital Copywriter position, had he been afforded that opportunity for alternative employment.

Employment Judge Maidment

Date 12 December 2018