Case No. 2301387/2017 and
2301391/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

Mr John Brooks and Mr Mark Jordan **Claimants**

AND

Govia Thameslink Railway Limited **Respondent**

ON: **11, 12 and 13 June 2018**

Appearances:

For the Claimant: **Ms N. Joffe of Counsel**

For the Respondent: **Mr J Milford of Counsel**

JUDGMENT

1. The judgment of the Tribunal is that the Claimants' claims of unfair dismissal are not well founded and are dismissed.

2. The claims made by the Claimants listed in Appendix 1 hereof are dismissed having been withdrawn.

REASONS

PRELIMINARY

1. The claimants, two conductors employed by the respondent ("GTR") claim unfair dismissal on the basis that their contracts of employment were terminated by notice on 6 October 2016. They accepted new contracts to work as On-Board Supervisors ("OBSs") commencing 1 January 2017. It was agreed that the claimants had suffered no financial loss and their claims were restricted to the basic award in each case.

2. The claimants gave evidence on their own behalf as did Mr Cox of the RMT. Mr P Evans, Head of Employee Relations for Govia Thameslink Railway Limited gave evidence for the respondent.

3. There were two volumes of documents to which reference will be made where necessary.

ISSUES

4. What was the reason for dismissal?
   (a) Redundancy;
   (b) SOSR in the form of a business reorganisation?

5. Did the respondent act reasonably in treating that reason as a sufficient reason for the claimants' dismissal? In particular:
   (a) Has the respondent established that it had a sound good business reason and acted on reasonable information reasonably acquired?
   (b) Was there reasonable collective consultation?
   (c) Was there reasonable individual consultation?
   (d) Did the respondent conduct a fair selection process?
      (i) Was the pool chosen within the range of reasonable pools?
      (ii) Was the method of selection one which a reasonable employer would have made?

6. The issues were formulated at a stage in the case when there were a substantial number of claimants to whom the selection process might have applied. Neither of the present claimants in this case applied for selection, so the selection issues are addressed more shortly.

FINDINGS OF FACT

7. The respondent is the largest rail operator in terms of passengers, staff, trains and revenue in the UK. On a typical work day, the respondent carries over 1,000,000 passenger journeys across all its routes and 327 million passenger journeys in total per annum (Southern itself 190 million passengers).

8. The respondent was in dispute with both the National Union of Rail, Maritime and Transport Workers ("RMT") and the Associated Society of Locomotive Engineers and Firemen ("ASLEF"). The dispute arose in response to GTR's roll-out of driver only operations on part of its Southern network – pursuant to which drivers are assuming responsibility for door operations on trains ("DOO(P)"), traditionally the responsibility of conductors, leaving OBS to focus on the passengers on board. The RMT issued a joint statement with ASLEF on 27 November 2015 to made clear its implacable opposition to the principle of DOO(P). Whilst the dispute with ASLEF has concluded, the dispute with the RMT remains ongoing. At the Labour Conference Fringe Session on Labour and Public Ownership of Rail on 25 September 2016, Mick Lynch (Assistant General Secretary of the RMT) stated that the RMT would go to "war" with anyone that wanted to remove guards and staff from stations and there would be sustained action.

9. The evidence of Mr Cox was more nuanced. He insisted that DOO(P) should be discussed then he might be prepared to discuss changes to the conductor role. “PC stated that RMT would only discuss matters regarding TTE once the principle of DOO had been established” [297]. “PC was prepared to talk about changes to the conductor role but DOO was not acceptable” [299]. “PC said that they are being asked to do something that they cannot do and that it doesn’t exist until they have an agreement for DOO with ASLEF” [303]. “PC said they were not discussing alternative roles when they have no choice on DOO” [304]. “PC said that they can’t discuss until we come formally on a proper discussion on DOO” [305].

10. With the onset of new technology, the respondent acquired trains which had in-cab CCTV. Mr Evans agreed in evidence that at the time consultation commenced, the respondent had a fixed view that it was going to move to DOO(P) for services which had appropriately equipped rolling stock. In essence, DOO(P) services are those services operated without conductors, because train dispatch is managed by the driver with or without the assistance of platform staff through the use of in-cab CCTV.

11. The way in which DOO(P) is operated has evolved over time. DOO(P) services were first operated on the UK rail network in the 1980s. Historically, a number of routes were adapted so that the driver could check if it was safe to close the doors and to pull away without the need for a conductor, which entailed either looking back along the train by leaning out of a cab or doing so by the provision of mirrors or CCTV screens on platforms.

12. On some routes where DOO(P) is in operation platform staff will take responsibility for the dispatch of trains dependent on the type of rolling stock and nature of the station by checking when it is safe to close the doors and giving an instruction to the driver to close the doors by waving a bat or pressing a button on the platform, which provides a Close Doors indication to the driver. Once the doors are closed, the person on the platform checks that it is safe for the train to pull away and, if it is safe, they give a further signal to the driver again either by raised bat or by pressing a button on the platform which provides a Right Away indication to the driver who then pulls away if it is safe to do so.

13. New technology has transformed the ability of drivers to monitor the doors and to control the safe departure of trains. The majority of new trains are equipped with in cab CCTV which enables the driver to check the doors in each car, which he/she can then close, and subsequently pull away. Improvements in station and infrastructure conditions generally have also enabled drivers to manage the safe dispatch of trains alone without the need of platform staff in suitably equipped trains and stations. Whilst the driver is in the station he is not driving and so can devote his attention to the doors.

14. GTR has moved to DOO(P) as the preferred method of operation on Southern services for all trains which are fully in cab CCTV equipped. The respondent considers that on trains which have in cab CCTV, there is no need to have a second person on the train at all, as the driver can see every set of doors. However, in relation to its Southern network, GTR continues to have a second person rostered to every train that previously had a conductor as at August 2016, however, that second person, the OBS, focuses on customer service and

revenue duties rather than operational duties. The introduction of the OBS role was something that the respondent was required to do under its franchise arrangements with the Department for Transport.

15. The respondent considers that the use of driver only operations brings about service efficiency; it assists with service delivery, service recovery; and it assists frequency of service, all of which improve the network capacity and resilience. The rationale for driver only operations has nothing to do with cost cuts, there has been no reduction in employees on trains operated as DOO(P); where there was previously a conductor on the train there is now, save in exceptional circumstances, an OBS on the train.

16. Certain services retain conductors where the rolling stock used is not suitable for DOO(P); as of May 2018, 180 conductors are retained as such to service these trains. On conducted services, conductors are involved in the operation of the train, in that they check that it is safe for the train to be dispatched and signal to the driver accordingly. These duties include checking that it is safe for the train to depart and that the doors are secured. As conductors are involved in the operation of the train, they are classed as "safety critical" staff, and as such on a conducted service when there is no conductor present, the train cannot run. Job descriptions of conductors are at pages 205-222.

17. The OBS is not involved in train operations, but is safety trained, i.e. involved in on board safety and train evacuation procedures. Job descriptions for OBS are at pages 732-737. It is only in exceptional circumstances that an OBS equipped train runs without a second member of staff on board.

18. Services which operate with a conductor can be impeded with train cancellations and delays if a conductor is late, sick, or fails to turn up for work, the train cannot operate. Services operating on a DOO(P) basis with an OBS can, if absolutely necessary, be run more flexibly as they can run without an OBS on board in the event of late notice sickness, service disruption etc. Accordingly, the use of OBS should lead to increased customer satisfaction, improvements in reaching performance targets, and reduced delays and cancellations.

19. As part of the agreement with ASLEF, the respondent monitors the trains that should have OBS but run without one. There have been approximately 120 such occasions in the last 5 months (this excludes periods when the service is disrupted). If those trains had not been DOO(P), they simply would not have run at all, and passengers would have been inconvenienced accordingly. These 120-odd occasions are only where the driver has reported the absence of an OBS: there will be occasions where the driver has not reported it and where, if the train had required a conductor, it would not have run.

20. The Tribunal finds that roles of conductor and OBS are in most respects similar. The two significant differences are that (i) conductors are responsible for closing train doors, whereas OBS's are not; but conversely (ii) OBS's issue penalty fares, whereas conductors do not.

21. The tabular comparison of the roles and responsibilities of conductors and OBS's [76] shows that of the 8 combined "key responsibilities" for both roles, 6 are

identical, viz: “create a relaxed, comfortable, secure and safe environment for customers”; “provide information to passengers at stations and on trains”; “provide regular announcements”; “assist passengers with disabilities or who are otherwise mobility impaired”; “promote marketing initiatives”; and “check and sell tickets”. The two key responsibilities which differ are: “ensure trains are dispatched in accordance with the timetable” – which is a “conductor only” responsibility, entailing closing the train doors, and notifying the driver when this is done; and “issuing penalty fares, unpaid fares notices or failure to carry season ticket notices”, which is a responsibility of OBS’s, but not conductors.

22. The RMT argues that the conductor role is a higher status one than that of an OBS, due to it being a “safety critical” job. The respondent considers that whilst a conductor in effect gives the driver permission to move the train, fundamentally that is the only respect in which a conductor has additional responsibilities beyond an OBS and an OBS has other responsibilities in relation to fares which a conductor does not have. Also, the responsibility of closing the doors is simply unnecessary where the train is fitted with in-cab CCTV and can be operated by DOO(P).

23. The Tribunal accepted the evidence from the respondent that 90% of the work is the same i.e. servicing customers on trains. The key was the remaining 10% because OBSs are not classed as “safety critical”; do not open train doors; and do deal with penalty fares. In relation to the train doors, Mr Jordan said at para 14:

> *“we still need to put on a key at every station to observe passengers boarding and alighting, the difference is we don’t shut the doors, this makes a mockery of the claim that as an OBS we will have more time to spend helping the passengers, as we still have to stop what we are doing at each stop”*.

24. According to the respondent, the real difference is that having got out and observed passengers, the conductor then needs to step on board, close doors other than his own, and then step onto the platform again to check the signal.

25. As a “safety critical” role, conductors are required to have “route knowledge” i.e. learn the routes that they travel along. OBS’s are not required to do this. However:

(1) OBS’s receive the same train evacuation training and train and track safety training; and

(2) OBS’s receive the majority of the PTS training that conductors receive, with the only components that OBS’s are not trained upon being those that are no longer used in modern railway operations. The main things that OBS’s are not trained in are (i) putting track circuit operating clips on the line; and (ii) the use of detonators on the track. The first of these refers to placing a bar across a live rail in the event of a train breakdown, to cut the current, the second refers to the use of a detonator a distance down the track from a broken-down train, to alert an oncoming train to the fact that the train has broken down. The respondent considers that given the existence of satellite radio/phone contact, the likelihood of these practises being required is significantly reduced and, in any case, they can be carried out by the driver. Additionally, the current can be cut remotely via contacting the signaller/control – on the Satellite Phone which the OBS is trained to use.

26. The customer service elements of training are broadly the same for an OBS as they are for a conductor, save that an OBS will also be trained in the issue of penalty fares, unpaid fares notices, or notices of failure to carry a season ticket. Those were previously responsibilities that were carried out by Revenue Protection Officers, but not conductors.

27. There is a slight difference in the way in which conductors and OBS's are rostered, which is to the general benefit of OBS's, because it means that the entirety of their pay is pensionable which was not the case for the conductor role. Conductors were previously contracted to a 35-hour working week, with contractual Sunday overtime which amounted to just over one in three Sundays; so, in reality, the conductors average working week was around 37 hours forty minutes. Within these hours, conductors typically worked 19/20 Sundays a year, and the rostering was compulsory. If a conductor was rostered to work, they had to do so unless they could find someone else to do it for them. However, prior to the change in roles, approximately 25% of conductors either never worked Sundays, or else they only worked one or two a year. Other conductors worked a lot of Sundays, as work on Sundays attracted a 12% pay premium. Conductors usually worked between 4.14 and 4.3 days per week (excluding Sundays). Only pay for work within the working week (i.e. basic salary) was pensionable. Pay for work on Sundays which counted as overtime was not pensionable.

28. OBS's have a 4-day working week with Sunday now classed inside the working week. To arrive at this pattern, the respondent took the Sunday hours averaged over a year and wrapped them back in, which effectively meant a move to a 37 hour, 40 minute working week, with Sunday now inside the roster. OBS's therefore work fewer days, but the shift length has become slightly longer. The end result is that the number of days worked are on average fewer but the hours actually worked within the standard working week are slightly greater. Where an OBS works additional days or additional (i.e. non rostered) Sundays, they are paid overtime at the same rate as a conductor.

29. Those who have remained as conductors have remained on the same terms and conditions. 180 conductors are retained on Southern, the numbers steadily declining as conductors retire.

30. In relation to the locations that OBS's were to work, at the time the new roles started, the respondent confirmed that that there would be no requirement to change any workplace location. This decision was taken principally in order to ensure that there was a minimum of disruption from changing over from a conductor to an OBS role.

31. In early 2015, GTR began informal discussions with the RMT about proposals to revise the responsibilities and duties of some conductors and to re-badge and migrate them to become OBS [283-285]. The respondent confirmed at the start of the consultation and repeated throughout that there would be no job losses, for conductors or drivers, as a result of the increased use of DOO(P) on Southern services,

32. On 3 December 2015, 21 December 2015, 8 February 2016 and 15 February 2016, meetings were held with the RMT at which the RMT did not engage in discussions on the proposal [294-300 and 302-308].

33. On 14 March 2016 [309-310] Andy Bindon, HR Director for the respondent, wrote to confirm job security, making it clear that no one at that time undertaking, a conductor or revenue protection role, would be made involuntarily redundant during the franchise as a result of the proposal.

34. On 30 March 2016, the RMT issued a notice of a ballot for industrial action concerning the extension of DOO(P) [316-318]. The outcome of the ballot was announced on 19 April 2016; it was in favour of industrial action and was immediately followed by a notice of industrial action on the same day [406]. The industrial action took place on 26 and 27 April 2016.

35. On 8 April, the respondent commenced consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), not because they considered a "redundancy situation" arose in normal parlance, it was because they were advised it was prudent to do so, in circumstances where they were changing terms and conditions of individuals via dismissal and reengagement that case law states that such a termination and reengagement (being for a reason "not related to the individual concerned") amounts to a redundancy dismissal for the purposes of TULRCA. The respondent set out its reasons for seeking to refocus the conductor role and migrate conductors to an OBS role to improve the provision of customer service with responsible, skilled and customer focused staff [330-396]. Whilst GTR confirmed that it did not regard the proposed changes as being outside the scope of the conductors' contracts of employment, it was aware that this view was not shared by the RMT. The letter confirmed GTR's proposals to introduce the OBS role with effect from 31 July 2016, and the intention of GTR to revise the responsibilities and duties of some of the conductors to migrate them to become OBS. Further, the letter also confirmed that there would be no requirement under the proposals for any member of staff to change location, and no depots would be closed.

36. The RMT were invited to collective consultation meetings on both 15 April and 21 April, which they declined [418]. This would have been RMT's chance to discuss the basis for selection of conductors/OBS's, and how the selection processes would work. However, the RMT did not attend either meeting. The respondent gave the RMT a further opportunity to attend a meeting on 29 April [418]. The RMT attended this meeting, but at the start re-iterated their opposition to DOO(P) and the introduction of the OBS role in respect of conductors; the meeting broke down.

37. The respondent decided to consult individually with the conductors on the impact of the OBS proposals upon them. It was decided that this would include holding group employee meetings, offering individual consultation meetings and a number of letters to those employees to explain the implications of the proposed changes, and to take account of any concerns they had.

38. Mr Evans wrote to the affected conductors on 9 May 2016 [436-465], to make it clear that their existing employment contract may be terminated, and to inform them about the possible migration to the role of OBS. The letter also

confirmed that whilst GTR had entered into a formal collective consultation process with the RMT on 8 April 2016, the RMT had refused to enter into any meaningful discussions regarding the OBS role, or to agree the changes proposed by GTR. The letter also confirmed that if agreement could not be reached with the RMT, GTR would issue notice to affected employees under their conductor contracts, with a proposal to offer immediate re-engagement to every affected employee of an OBS role.

39. The letter clarified that the proposed changes to the conductors' terms and conditions of employment for those persons migrating to the OBS role were as follows: -

- You will be re-badged as an On-Board Supervisor
- There will [be] no requirement to operate the train doors and ensure the trains are dispatched in accordance with the timetable
- You will be expected to issue penalty fares (which you will be fully trained to do)
- There will be no other changes to your role and responsibilities. - -
- There will be no requirement for any member of staff to change location, no depots will be closed and you will retain your continuity of employment.

40. Employees were informed that if they wished to retain a conductor role, they should make their request by email from midday on 11 May 2016 to 20 May 2016. A pplications to remain in the conductor role would be considered on a first come first served basis.

41. On 26 May 2016, GTR wrote again to affected employees to provide further information regarding the proposals and timeframe [558-567]. The letter stated that to date, a number of conductors had already confirmed their preference to transfer to the OBS role, and that if necessary GTR would issue 12 weeks' notice of the termination of the conductor employment contract, with a formal offer of re-engagement in an OBS role. The letter noted that the proposed timeframe was to issue notice on 27 May 2016, with a view to individuals commencing their new OBS contracts from 20 August 2016. The letter sought confirmation of any further individuals who wished to confirm their intentions with regards to moving to the OBS role.

42. The RMT initially, in May 2016, advised individual employees not to apply for the OBS or conductor roles. However, within a couple of days, the RMT changed their mind and told them to engage in agreeing the OBS contracts, but state by way of a pro forma response they were doing so under duress.

43. Between early June 2016 until 3 October 2016, ACAS facilitated discussions between GTR and the RMT regarding the OBS role [570-572 and 620-622].

44. On 8 August 2016, GTR made an improved 8-point offer to the RMT, including a guarantee that every train that at that time operated with a conductor would continue to have either a traditional conductor or an OBS rostered [623-625].

45. On 3 October 2016, GTR restated the offer of 8 August, and also offered a lump sum payment of £2,000 to all continuing conductors, conductors who migrate to OBS and revenue staff who have already migrated to an OBS role [641-643]. Also, on 3 October 2016, the RMT gave GTR formal notification of strike action for a total of thirteen days between October to December 2016 [645-647]. At the same time, Andy Bindon made clear that whilst GTR hoped that the RMT would accept its latest offer but that in circumstances where such agreement was not forthcoming, GTR would proceed without the RMT's involvement by issuing notice (with offers of immediate re-engagement) to conductors migrating to an OBS role later that week. On 5 October 2016, the RMT rejected GTR's latest offer on behalf of its members [647a].

46. The respondent proceeded to serve affected conductors with 12 weeks' notice of the termination of their employment as conductors and offer immediate re- engagement at the end of their notice period in the OBS role. A copy of such correspondence is at pages 653-654.

47. On Friday 7 October 2016, the RMT wrote to conductors to advise them to volunteer for the OBS role which were on the same terms and conditions [668-669].

48. Pursuant to the franchise agreement with the DfT, the respondent had to switch to OBS operation on a rolling basis from 21 August 2016. The DfT subsequently accepted the environment was too fragile to impose DOO(P) in August 2016 and agreed to an extension to 1 January 2017: but that was not the position at the time the selections took place. Given that, this would (in the circumstances) require dismissal and re-engagement, and sufficient notice of dismissal had to be provided the respondent was effectively in a position where dismissals had to take place by late May 2016. So any selection process had to precede that.

49. The selection process of who migrated from a conductor role to an OBS role was dealt with on a depot by depot basis. There were several reasons for that. First of all, it meant minimum disruption for employees themselves because people would not be moving depots. Secondly, moving employees between depots would have caused significant industrial relations issues, as where employees would apply to other depots, and this would potentially mean an employee already based at that depot would get "bumped". In any case, in circumstances where there was very significant resistance from the RMT to what GTR was doing, anything which meant minimising changes was also less likely to lead to industrial relations problems. Thirdly, conductors need to learn and maintain a detailed knowledge of their routes; therefore, there is a limited number of routes they can cover. If individuals had been moved between depots, they would have had to learn a number of new routes, and this would have taken a significant amount of time. That process could have led to operational disruption, because until a conductor has learnt the relevant routes, he cannot be used.

50. For those depots where some people were to remain as conductors, and others were to become OBS's, GTR had originally considered a "Group Bourdon" test as indicated in Mr Evans letter to Paul Cox of the RMT of 8 April 2016 [330-396]. The "Group Bourdon" test is a test which must be passed by conductors. If employees took the test and failed it, they could no longer continue acting as

conductors at all. If this method was adopted as a selection method in the middle of an industrial dispute, GTR considered that it would be possible for conductors to sabotage the operation by taking the test and deliberately failing it.

51. The respondent did not consider it would be right to adopt a length of service-based selection criterion, because apart from anything else it would probably be indirectly discriminatory on grounds of age (or sex). In any case, the respondent could not agree this or any other selection method with the RMT, because they would not engage in consultation.

52. GTR eventually concluded that the fairest and most practicable way to select for conductor/OBS roles at depots where both conductors and OBS's were required, was to operate a "first come, first served" process where they asked employees to write in with their preferred role and filled each of the two roles based on answers received, in the order they were received. Given the shortness of time available before they had to serve notices of dismissal, they required employees to express a preference within the period from 12.00 pm on 11 May, and 12.00 pm on 20 May 2016.

53. The respondent understood that a "first come first served" process was not ideal, especially as some people were on holiday. However, they had to balance that against the very tight deadline they were working to.

54. Voluntary severance ("VS") was offered as an option in the letters that Mr Evans sent to conductors on 9 May 2016, asking them to express preferences [430-435]. The letter explained that GTR did not propose any reduction in the number of on board staff working for the respondent, but that they appreciated staff were often keen to explore the possibility of VS, so that in principle, but without any commitment, GTR would be prepared to consider releasing a limited number of staff on VS. They explained that employees expressing interest in VS would subsequently be given details of their estimated VS entitlements; they would then be asked whether they wished to proceed with their expression of interest; and if VS was then offered, they would be asked to sign a letter accepting VS and a settlement agreement. The letter stated: "Your eligibility to be considered for voluntary severance may be affected if you take part in industrial action".

55. Ultimately well below 10% of conductors asked for VS. Of those, the majority took part in strike action. Those conductors (and some others) were not offered VS. Around 17/18 people took VS.

56. The process for selecting conductors/OBS's at those depots where both roles were required is not relevant to either of the claims in these proceedings.

57. Mr Jordan is employed at Redhill, where all conductors were required to become OBSs. He was told that he could not apply for a conductor's role [548]. His complaint is that he was unable to apply to be a conductor at Barnham. This would have involved "bumping" a conductor from Barnham.

58. Mr Brooks was based at Barnham. That was a depot where in principle a selection process applied i.e. employees wrote to express a preference for either the conductor or OBS role, and were chosen on a "first come, first served" basis. Mr Brooks was unable to apply for a position in time due to having no email access

but he accepted that he could have contacted a manager, instead, he applied for voluntary severance. He was sent a letter on 7 June 2016 [569], setting out his entitlement should VS be offered to him. An identical letter was sent to Mr Brooks on 15 July [586]. Ultimately, however, Mr Brooks was not offered VS because he took industrial action.

SUBMISSIONS

59. The Tribunal heard detailed, well researched and helpful written and oral submissions from both parties, without intending any disrespect, these submissions are not repeated here.

LAW

The reason for dismissal

60. Section 98(1) (*a*) of the Employment Rights Act 1996 ("ERA") provides that the employer must establish:

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

61. The list of potentially fair reasons is set out in section 98(2) of the ERA, redundancy is given as a potential reason.

62. As there was a dispute about the reason for dismissal the Tribunal followed **Maund v. Penwith District Council** [1984] ICR 143 CA where the Court of Appeal held that the burden of proof remained at all times firmly upon the employer and if he fails to discharge that burden the dismissal is inevitably unfair. The only exception to this, as the **Maund** case recognised, but which does not apply in the present case, is where the employee does not have sufficient qualifying period to claim unfair dismissal.

SOSR

63. The basic principles as to the establishment of SOSR are set out in in **Hollister v. NFU** [1979] ICR 542, **Catamaran Cruisers Ltd v. Williams** [1994] IRLR 386, **Garside and Laycock Ltd v. Booth** [2011] IRLR 735, and **Scott v. Richardson** EATS/0074/04. As far as material, they are:

> (1) To qualify as a valid "substantial reason" for dismissal, a reorganisation should be for a reason which management thinks on reasonable grounds is sound: see **Hollister** at 551. The employer's evaluation that the reorganisation has substantial advantages is not challengeable simply because the tribunal itself might reach a different conclusion: **Scott** at [16].
>
> (2) When assessing fairness, the Tribunal should look at matters in the round. It should balance the advantages to the employer of any reorganisation against the disadvantages to the employee. It should look at matters such as (i) the proportion of the workforce that accepted the

changes; (ii) whether the union recommended acceptance of the changes; (iii) the procedure adopted for changing terms and conditions.

Redundancy

64. Section 139(1) of ERA 1996 defines the circumstances in which an employee will be presumed to be dismissed for redundancy as follows.

> '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*) …
> (*b*) the fact that the requirements of that business —
> (i) for employees to carry out work of a particular kind, or
> (ii) …
> have ceased or diminished or are expected to cease or diminish.'

The presumption does not apply to unfair dismissal.

Diminishing requirement for employees

65. A statutory redundancy situation may occur where there has been a reorganisation resulting in a reallocation of duties causing the requirement for the number of employees to diminish even though the volume of work is undiminished. It was held in **Waste Lubricating Oils v. Algar** (unreported, EAT 605/80*)* that an employee can reasonably be made redundant as a result of reorganisation. However, not every reorganisation dismissal is a redundancy dismissal and the facts of each case need to be examined to establish the true reason for dismissal. The wording of section 139(1) should be closely examined. For example, the change may be as to the kind of employee required to do work but there may be no reduction in 'work of a particular kind' within the meaning of the statute.

Work of a particular kind

66. The definition of a redundancy situation concentrates on whether there has been a diminution in the employer's requirements 'for employees to carry out work of a particular kind'. This means that a change in the type of work being undertaken by employees may constitute a redundancy situation even though the amount of work being done remains the same. However, this will only happen if the difference between the old and the new work are such that they do not amount to work of the same 'particular kind'. A mere change in terms and conditions of employment will not, however, constitute a change in the nature of the work for these purposes.

67. In **Safeway Stores plc v Burrell** [1997] ICR 523 EAT, the Employment Appeal Tribunal decided that it was not necessary to analyse the kind of work the employee was employed to do, and whether there was a diminution in the employer's requirements for that kind of work. In **Murray and anor v Foyle Meats Ltd** [1999] IRLR 652 HL, the Lord Chancellor agreed with the reasoning in **Safeway** and said that the language of the section asks two questions of fact. The first is whether one or other of various states of economic affairs exists, in this case whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the applicant's

dismissal was attributable, wholly or mainly, to that state of affairs. It is a question of causation and is for the tribunal to determine.

68. As explained in **Amos v Max-Arc Ltd** [1973] IRLR 285, work of a "particular kind" for the purposes of the predecessor to section139 ERA means work which is distinguished from other work of the same general kind by requiring special aptitudes, skills or knowledge: the difference being a matter of fact and degree.

Consultation

69. Consultation is one of the basic tenets of good industrial relations practice. Where unions are recognised, consultation will generally be with the trade unions, although this does not normally eliminate the obligation to consult in addition with individual employees. Usually the former will be over ways of avoiding redundancy and (if the union is willing to discuss the issue) over redundancy selection criteria. Consultation with individuals will generally arise once they have been at least provisionally selected, and will be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments. It must also be emphasised that although for analytical purposes the application of the assessment criteria and consultation with individual employees are treated separately, there is often a significant link between them in practice.

70. The decision of the EAT in **Rowell v. Hubbard Group Services Ltd** [1995] IRLR 195 whilst accepting that there were no invariable rules as to what consultation involved, stated that, so far as possible, it should comply with the following guidance given by Glidewell LJ in the case of **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price** [1994] IRLR 72, at para 24:

> 24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at *[1988] Crown Office Digest p 19*, when he said:
> 'Fair consultation means:
> (*a*) consultation when the proposals are still at a formative stage;
> (*b*) adequate information on which to respond;
> (*c*) adequate time in which to respond;
> (*d*) conscientious consideration by an authority of the response to consultation.'

71. The EAT in **Mugford v. Midland Bank** [1997] IRLR 208 summarised the state of the law as follows:

> (1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the [employment] tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
> (2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

> (3) It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

Moreover, as the EAT commented in **Mugford**, unions will generally want to consult over selection criteria, but rarely if ever wish to be involved in the invidious process of selecting individuals by the application of those criteria. It is in that context that individual consultation takes on a special importance.

Individual consultation

72. The fact that there has been collective consultation does not obviate the need for individual consultation (see eg **Walls Meat Co Ltd v. Selby** 1989 ICR 601, CA). The nature of the individual consultation required will depend on the nature of the collective consultation.

73. It may be unfair for an employer not to consider bumping, which in this case would have been geographical, see Fulcrum Pharma (Europe) Ltd. v. Bonassera 2010 WL 4137098

DISCUSSION and DECISION

The reason for dismissal

74. The Tribunal does not consider that there is any obligation in employment law on the respondent to consult the trade union about the decision that in principle trains should be operated DOO(P). The obligation might arise if the implementation of the operation of DOO(P) impacts terms and conditions of employees.

75. The Tribunal finds that the respondent established that they considered there was a substantial advantage and hence they had a sound, good business reason to move the conductor role to that of an OBS, in order to improve service efficiency and reduce train cancellations whilst making the best use of technology; and improving customer service on trains. The Tribunal relied on the evidence that within the 5 months after 1 January 2017, there were 120 trains of which the respondent had been notified where no OBS was available at all from the beginning of the service despite being rostered, which would not have travelled if they had been required to travel with a conductor (i.e. these would have been “direct cancellations”). As Mr Evans observed in his evidence, it was also easier to organise cover for absent OBSs than for conductors, because OBSs were not required to have “route knowledge”. So, they could be centrally coordinated and sent (if necessary) to service trains outside their usual “beat”.

76. The alternative basis for dismissal put forward by the claimants of redundancy was not established. The determination of this issue turned on whether the work of a conductor and OBS are of the same “particular kind”. The Tribunal heard evidence from both sides in relation to the safety functions carried out by conductors. Mr Evans said that it was not of importance that a second

member of staff is able to perform the functions identified in paragraph 25 hereof in the modern railway, in circumstances where there is satellite communication between the cab and the signaller and staff have mobile phones; and where drivers are trained in those functions anyway. Mr Cox strongly disagreed with this evidence emphasising the continuing need for such training and that it is called on "more often than you would think". The Tribunal was aware that this issue is at the heart of the industrial dispute between the parties, that the parties might claim some advantage in the dispute by persuading the Tribunal to adjudicate on the issue, yet no evidence was put before the Tribunal of how often resort was had by a conductor to taking charge of the line or evacuating a train in an emergency. The Tribunal was confident that both parties would have this information but it was not included in the evidence put before it. The Tribunal considered that the evidence on this issue on both sides was probably exaggerated because of the industrial dispute. Whilst the Tribunal is not suggesting that Mr Cox and Mr Evans were not telling the truth, they had been and still were protagonists in a long running and bitter industrial dispute which meant that at times their evidence was imbued with the rhetoric of their arguments. The Tribunal does not intend to adjudicate on an industrial dispute on inadequate evidence through the medium of a finding that the work of a conductor was or was not work of a particular kind in the absence of highly relevant evidence.

Reasonableness of dismissal

77. The Tribunal considered that, taken in the round, the dismissals were fair. There were substantial advantages to the respondent and hence the travelling public. There were few, if any, disadvantages to the employees, all but one of whom were re-engaged on OBS terms and conditions. The respondent sought to reach a consensual agreement with the trade union and held the position open for a lengthy period before proceeding with dismissals.

78. The respondent was criticised for its approach to the timing and nature of the collective and individual consultation but this ignored the fact that RMT had expressed implacable opposition to the introduction of OBSs and would not discuss it. The context is crucial. Meetings were arranged on 3 December 2015, 8 February 2016 and 15 February 2016; attempts to engage in collective consultation meetings on 15, 21 and 29 April 2016 none of which the RMT participated in. It also provided on 8 April 2016 a detailed consultation paper, a draft job description, a comparison of the functions of the conductor and OBS roles, proposed rosters, and a proposed selection method. Time periods were extended although the timescales were distorted by the industrial action.

79. The respondent decided to deal with matters depot by depot, and not to engage in a selection exercise which covered all employees at all depots, irrespective whether particular depots continued to need conductors as well as OBSs. That course meant minimum disruption for employees; prevented industrial relations problems from "bumping"; and forestalled problems with route learning. This was a matter for collective rather than individual consultation, and one which the union had the opportunity to address on the basis of information provided in the letter of 8 April 2016 and the attached consultation documentation.

80. The respondent consulted with individual employees who chose to engage with it following the letter of 9 May 2016 [430 – 435]. All employees who were

dismissed as conductors and made an offer of a role as OBS (around 220) accepted re-engagement and were advised to do so by the RMT. The disadvantages to employees of the changes were minimal. Employees received slightly better pay as OBSs; carried out much the same functions; and worked in the same place, and on roughly the same hours.

81. The Tribunal was doubtful about the way in which the respondent dealt with matters at depots where both conductors and OBSs were required by asking employees to write in, and selecting on a "first come, first served" basis.

82. Mr Brooks made no real effort to apply for a conductor role instead he opted to apply for VS. He participated in industrial action and was not offered VS. He was offered and accepted the only role that remained – i.e. the role of OBS. This was not unfair.

83. Mr Jordan is employed at Redhill, where all conductors were required to become OBSs. His complaint is that he was unable to apply to be a conductor at Barnham Mr Jordan's argument would have required the respondent to apply "bumping", giving rise to practical and industrial relations problems. He accepted employment as an OBS. His dismissal was not unfair

84. The claimants suffered no financial loss in respect of which a compensatory award would be payable. Had they been successful, they would have been entitled to basic awards.

85. The claimants' claims of unfair dismissal are dismissed.

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Employment Judge Truscott QC

Date 31 July 2018

Appendix 1

Adrian Walsh	2310396/2017
Chris Barlett	2301386/2017
John Chew	2301388/2017
Samuel Gillespie	2301389/2017
Gary Hills	2301390/2017
Graham Richardson	2301392/2017
Christopher Rodway	2301393/2017
Francis Taylor	2301394/2017
Mark Thake	2301395/2017