EMPLOYMENT TRIBUNALS

Claimant: **Ms Ardela Hoda**

Respondent: **UK Greetings Ltd**

HELD AT: **Leeds** **ON:** **21 to 24 October 2019**

BEFORE: **Employment Judge O'Neill**
Mr D Dorman - Smith
Mr M Brewer

REPRESENTATION:

Claimant: **In Person assisted by her husband**
Respondent: **Mr J Boyd of Counsel**

JUDGMENT:

1. The claim for victimisation contrary to section 27 Equality Act 2010 is dismissed on withdrawal.

2. The claim of direct race discrimination fails.

3. The claim of unfair dismissal succeeds.

4. In calculating the Compensatory Award for unfair dismissal no account shall be taken for losses after 22 March 2019.

5. The Respondent shall pay to the Claimant compensation in the sum of £1166.96.

REASONS

Background

1. The claimant is a British citizen of Albanian origin. She was dismissed, the respondents contend by reason of redundancy. She does not dispute that this was a redundancy situation but claims to have been unfairly selected.

2. The respondent contends that the selection was fair in that a fair procedure was followed which had been collectively agreed with the worker representatives and comprised an objective scoring system which identified the claimant as the appropriate person to be made redundant following individual consultation.

3. The claimant alleges that those doing the scoring did so in bad faith underscoring her and over scoring another member of the team because she was perceived as a foreigner and not a British citizen and further because English was her second language it was assumed that her communication skills were poor and her selection amounts to direct race discrimination and unfair dismissal.

4. The Tribunal application was lodged on 30 January 2019.

Issues

5. The issues were originally identified at a preliminary hearing before Judge Shulman and agreed today as follows:

Unfair dismissal claim

5.1. What was the reason for the dismissal? The Respondent asserts that it was a reason related to redundancy.

5.2. Did that reason entail a diminished need for employees to do work of a particular kind?

5.3. Did the Respondent carry out reasonable consultation with the Claimant?

5.4. Was the selection process reasonable (in terms of the pool and the criteria applied to the pool)?

5.5. Did the Respondent act reasonably in offering alternative employment for the Claimant?

5.6. Was that employment a suitable offer of alternative employment?

5.7. Was the dismissal within the range of reasonable responses open to the Respondent?

5.8. The Claimant would answer all these questions in the negative and avers that the reason for dismissal related to her race.

Section 13: Equality Act 2010 ("EA") Direct discrimination because of race.

5.9. Has the Respondent subjected the Claimant to the following treatment falling within section 39 EA, namely:

5.10. Dismissal?

5.11. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators: **Employee B** and **Employee A**.

5.12. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.13. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Evidence

6. There was an agreed bundle of documents paginated and indexed.

7. The tribunal heard from the claimant. Her witness Lynne Kasatkin provided a signed statement but did not appear to be cross-examined. A signed and dated statement was submitted from a former colleague Terry Maguire but he was not present for cross examination and we gave little weight to his statement because of that and because he had left the business in June 2015.

8. We also heard the following witnesses for the respondent namely:
   - Maria Dunstan the claimant's line manager and principle scorer
   - Anna Wallis, revenue and accounting manager, the line manager of Maria Dunstan who had input into the claimant's scores
   - Claire Rusby, Head of HR who had responsibility for coordinating the redundancy process across the business
   - Sarah Walshaw, HR adviser, who was involved in the individual consultation with the claimant

9. All witnesses gave their evidence under oath having produced a written statement.

10. Notes of meeting Pages 56 – 60 were provided on the application of the Claimant and on the direction of the Tribunal redacted to exclude entries for employees other than those in the Claimant's team.

11. The absence records of **Employee A** were also provided at the request of the Tribunal, redacted to exclude the reason therefor.

Law

12. The Race discrimination claim is governed by the Equality Act 2010. The relevant Sections being Section 13 and 39 direct discrimination and 136 burden of proof. The relevant sections applicable to this unfair dismissal claim are S98(4) and S123 Employment Rights Act 1996.

13. The Tribunal has had regard to the following case law referred to it by the parties namely:

Williams v Compare Maxam Ltd 1982 IRLR 83

'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.

Findings

14. Having considered all the evidence both written and oral we made the following findings of fact on the balance of probability. Some of our findings of fact may be contained in the conclusion section to avoid repetition. Some of our conclusions maybe incorporated in the findings section.

15. The claimant joined the respondent company in 2011, originally as a picker but subsequently transferred to an accounts section. In February 2017 she began a new role as sourcing coordinator in a team which included Jade Bell, Alex Marley and Laura Peckham. There was a breakdown in the relationship between the claimant and those employees which prompted the claimant to raise a formal grievance of bullying on 20 December 2017. The claimant accepts that in that grievance she made no complaint of race discrimination. Her grievance was heard on 9 January 2018 but not upheld as bullying. The grievance was dealt with by the line manager Gemma Blackwell and the HR adviser Toya Anderson. The claimant did not appeal.

16. The claimant also claims that following the outcome of the grievance hearing the situation deteriorated and the colleagues she named began making remarks of a more overtly racist flavour. The claimant says that she mentioned this in the corridor to Toya Anderson (of HR) and Gemma Blackwell (her line manager) who did nothing. The claimant did not raise it as a new grievance or as new evidence to support her original grievance on appeal. When this was put to Sarah Walshaw of HR during an individual redundancy consultation meeting she said that she would look into the matter and did so. Her enquiries concluded, in terms, that no formal complaint had been made, Toya had no recollection of any such report, at the time of the disclosure to Sarah Walshaw in November 2018 about 8 months had passed, none of the people mentioned were in the Claimant's current department or had any connection to the redundancy selection. In the circumstances Ms Walshaw considered that it was inappropriate to discuss the historical grievance and alleged conversation with Toyah afterwards because it had no bearing on the selection and scoring discussions related to the redundancy. The Tribunal accept Ms Walshaw's evidence about that enquiry and draw no adverse inference from her conduct in curtailing continued discussions on the subject of the historical race claim during the individual consultation.

17. The claimant accepts that none of those alleged to have bullied her had any part in or influence over the decision to select her for redundancy. The claimant also accepts that Toya Anderson and Gemma Blackwell had no part in or influence over the decision to select her for redundancy.

18. Following the rejection of her grievance the claimant resolved look for another position. She made an application to the accounts receivable department for a full-time position in credit control but was unsuccessful. She made a further application to that department for a part-time position and was successful and began a new role in or about April 2018 on 22.5 hours a week mainly responsible for the Asda account. She was interviewed for and appointed to this role by Maria Dunstan and Ann Wallis (who together undertook the scoring in the redundancy selection process later in the year).

19. The claimant was happy with her move to the new section. By all accounts including her own, she got on very well in the new team which comprised **Employee B** and **Employee A** and the manager Maria Dunstan. **Employee A** is a British citizen of Pakistani heritage, **Employee B** a white British citizen of no stated minority heritage.

20. There was a measure of dispute between the claimant and Maria Dunstan as to whether or not there was a formal three-month review in July 2018 and a further formal review in October 2018. The claimant insists that there was. The respondent witnesses told the tribunal that they no longer operated such a formal review system and the Tribunal accepts that. Ms Dunstan accepts that there was a meeting in October which she characterised as an end of month meeting. The tribunal notes the claimant's emails, which tends to support her contention that there was a meeting in July, and given that the claimant was a new employee to the section, the tribunal finds it likely that Ms Dunstan did have discussions with her in the early months of her employment in the accounts receivable section. Ms Wallis confirmed that such would be her normal practice.

We accept the respondent's evidence that these were not formal review meetings as such. We find that meetings probably took place in July and October in which the claimant's performance was reviewed by Ms Dunstan who was generally very positive and encouraging and gave the claimant lots of praise and may well have made such comments about her team work and progress as to lead the Claimant to understand that she was doing brilliantly. The tribunal finds that there is really no material difference between the claimant and Ms Dunstan in this respect and each has given an honest account as they understand it. We note Ms Wallis's comments about Ms Dunstan and her generally upbeat and enthusiastic approach to her staff and Ms Dunstan's own account of her approach to management which was to accentuate the positives rather than dwell on the negatives.

21. We have read the notes Ms Dunstan claims that she made on 4 October 2018 of the meetings with staff which took place at the beginning of October. The claimant contends that these notes are a fabrication. The reason the Claimant believes this to be the case is because in an email exchange with the Respondents Solicitors in which she requested appraisal records she was told that there were none. Then the document was produced shortly before the Tribunal Hearing, in a form so redacted that it was of little use for comparative purposes as between the team members. Ms Dunstan was not responsible for the redaction. The Tribunal found Ms Dunstan to be frank in her explanation of what happened and her openness in this area where she could be criticised and in other areas of potential criticism has contributed to our finding that she was a credible witness in this matter and generally. Ms Dunstan explained that she had not provided the document initially and had not properly searched for it because, taking a somewhat cavalier approach, knowing that the Company no longer had a policy of periodic review and formal appraisal, made the presumption that she held no document which fell within the description of that being sought. Much later during the preparation of the Tribunal case she was asked to produce a different document and having conducted a word search for that she came across the above notes and sent them to HR. The burden of proof is on the Claimant to show that this is a forgery but apart from the initial failures to produce the document and the late timing of its production there is nothing to suggest that Ms Dunstan has fabricated the document and we accept her explanation.

22. There was a factual dispute between the claimant and Mrs Dunstan as to whether they had had an exchange of messages in relation to a photograph of a Halloween dress. The photograph was put before the tribunal to demonstrate that the two women had a good relationship. The tribunal finds that they did irrespective of the photograph. Mrs Dunstan says the claimant sent it to her by What's App, the claimant denies doing so and Counsel for the respondent invites us to consider this as a matter of credibility.

As we understand it the team were planning a Halloween event as a charity fundraiser and a bit of fun for the team. The respondent has produced no covering message for the photograph showing to whom and by whom it was sent. Ms Dunstan says the photograph was automatically saved to her gallery on the mobile phone. The event involved not just the claimant and Ms Dunstan

but the other members of the team. The tribunal makes no finding that this photograph was sent by the claimant.

The tribunal makes no finding that Ms Dunstan was deliberately misleading the tribunal about the photograph, it was on her phone, it could have been sent by the claimant or by another member of staff and Ms Dunstan may have misremembered.

In the circumstances we make no adverse finding as to credibility in respect of either person arising out of this photograph.

23. The Respondent suspects that the Claimant recorded the meeting of 19 December 2018 despite being told that she should not do so. The Claimant denies having done so and says that she typed up the note as soon as she got home from memory aided by the notes she made and those made by Mrs Kasatkin. It is a very full note but we make no finding that it is a transcript of a recording and the Claimant is not telling the truth.

24. Later on in October 2018 the respondent announced its intention to restructure and to make redundant approximately 15% of the workforce of over 2000. The numbers involved required the respondent to adopt the statutory collective consultation procedures which they did. As a consequence, an agreed procedure was adopted wherein volunteers would first be sought and if there were insufficient suitable volunteers there would follow an agreed selection process for compulsory redundancy. That selection criteria was set out in the collective consultation minutes. At paragraph 61 of the minutes of the second consultation meeting the selection criteria is recorded as follows

‘skills based and/or performance measures e.g. sales
disciplinary for the previous 12 months
sickness used as a tiebreaker only - 24 months from 1 November 2016 to 31 October 2018’

The HR witnesses Ms Rusby and Ms Walshaw confirmed that sickness/attendance was used only as a tiebreaker and that this rule applied across the board in in all departments. There is no evidence to suggest that such a rule (which was applied across the whole redundancy exercise) was adopted in order to advantage **Employee A** who had a poor sickness record.

The criteria were developed further at the third collective consultation meeting which it is recorded that ‘2. Selection will be carried out using skills base criteria which will be relevant to each role and the agreed scoring criteria. 3 scoring will be carried out by an appropriate line manager who has knowledge of the employee… 4…. The lowest scoring employees will be advised of the scores and invited to an individual consultation meeting to discuss the scores’.

The minutes then set out the agreed scoring method which provided the number of points to be awarded in respect of each skills based criteria as follows ‘1 point - poor (development required); 2 points fair (room for improvement); 3 points meets expectations; 4 points exceeds expectations’.

The scoring method also sets out the application of points for attendance as follows 'zero points - no absences; -1 points - 1 to 2 occasions of absence; -2 points- 3 to 4 occasions of absence; -3 points 5 to 6 occasions of absence; -4 points 7+ occasions.'

The scoring system also took into account in every case the disciplinary record. In the claimant's pool we are told that no member had any disciplinary record and the appropriate score for each was zero.

25. The tribunal has seen the sickness record of **Employee A** for the requisite period and have been told by the respondent's that this constitutes seven periods of absence. Had her absence record been taken into account it would have attracted -4 points.

26. In the national accounts receivable section it was determined that the team would be reduced by one. Ann Wallis had the final say about this but based her decision on the proposals of Ms Dunstan. No one from the team had volunteered which triggered the selection and scoring process for compulsory selection which was undertaken by Maria Dunstan in consultation with Ann Wallis.

27. In determining the selection Maria Dunstan as the appropriate manager was first required to set the detail of the skills criteria against which the staff would be scored. Ms Dunstan was very newly appointed to this level of management and had never undertaken a redundancy exercise before. She was mindful of the consequences to the individuals and to the respondent company if she were to get it wrong. She therefore approached HR to establish whether it was appropriate to use the same skills criteria as had been adopted in 2016 when the company had lost a major supermarket client. HR confirmed that it was appropriate and supplied her with a pro forma that had been used at that time. She was also supplied with a document which expanded the competency definitions as follows

1. communication and organisation	able to demonstrate that both written and verbal communication with customers and colleagues which is clear and expressed in a professional manner. Able to organise and prioritise workload in an appropriate manner to complete tasks to achieve deadlines
2. Initiative and decision-making	ability to work under own initiative with little supervision.
3. Relationships	ability to build and maintain effective relationships with customers and colleagues
4. Business systems and procedures	ability to use business systems and follow standard operating procedures

28. The tribunal find these criteria to be somewhat underdeveloped and the managers may well have found it a more useful tool had each heading been broken down into the essential job elements by reference to the job description and scores attached to each by reference to measurable elements in the role. Such an approach would better address the factors in Williams v Compare Maxam.

29. When Ms Dunstan first scored the three members of the team she did it incorrectly. At the tribunal she frankly admitted her mistake. She applied a score for attendance which she should not have done.

29.1. In scoring the claimant and **Employee B** who were never late and had no sickness absences she gave them each a score of three. Under the agreed procedures if sickness absence had been relevant they should each have been given a deduction of zero.

29.2. In scoring **Employee A** Ms Dunstan awarded two points. Under the agreed procedure if sickness absence had been relevant she should have had her score reduced by four points.

Before the final selection was made these mistakes were corrected.

30. Ms Dunstan had been given no training or guidance notes on how to set or score the criteria and she was a new and inexperienced manager. She was asked to explain why she had awarded **Employee A** 2 points for her sickness absence and she admitted that she had found it difficult applying the scoring method in the minutes referred to above (which provided the number of points to be awarded in respect of each skills based criteria as follows ' 1 point - poor (development required); 2 points fair (room for improvement); 3 points meets expectations; 4 points exceeds expectations') and decided that it felt fair to apply 2 point room for improvement and it was clear from her answer that she was adopting as best she could a subjective felt fair approach. In so doing not only did she not follow or appear to have been aware of the system agreed in the Collective Consultation but the Tribunal find that she adopted a personal and impressionistic approach to absence scoring in the area where objective assessment was simple and could be based clearly on counting the absences which she did not do.

31. The Tribunal do not find that she did so in bad faith but because she was untrained and inadequately supported by more senior staff and HR.
The Tribunal are also concerned that her whole approach to scoring was founded on personal impressions and were not evidence based.

32. The final scores given to the candidates after the intervention of Ms Wallis were as follows

	Claimant	**Employee A**	**Employee B**
Attendance			
Discipline	0	0	0
Relationships	2	2	3

Communication etc	2	3	3
Systems etc	2	4	4
Decision Making etc	2	4	3
	8	13	13

33. The claimant told the tribunal that she had no quarrel with the scoring of **Employee B**.

34. **Business Systems and Procedures**. The Claimant was ultimately awarded 2 points and the other members of the Team 4 points each. At the time of the analysis **Employee A** had seven years' service, **Employee B** had two years' service and the claimant had six months service. In the short time that she had been in the section the claimant had been successful in playing her part in reducing a backlog of outstanding invoices. It is acknowledged that she was very good on Excel and had mastered the systems specific to her area of responsibility. However there were other systems used within the Department in respect of which the other two members of staff were said to have had significantly better knowledge and longer experience. The claimant accepted that she was less familiar with the Coda systems because she was not required to use all aspects in her specific range of responsibilities. The Claimant accepts that she had had no training or experience of Ds or cash matching. The tribunal accepts that as the Manager Ms Dunstan probably had sufficient knowledge of the skills and training of the Team to assess their competencies under this heading although a reference to training records would have created a firmer foundation. It is likely on the balance of probability a person with seven years' experience or two years' experience and a clear disciplinary record will have a deeper and wider knowledge of the systems in use in the section and therefore we find the marks given to the Claimant in respect of business systems and procedures was not unreasonable or indicative of bad faith.

35. **Communication and Organisation.** The Claimant was ultimately awarded 2 points and the others each had three. This section was judged on two bases', the first of which was
'able to demonstrate that both written and verbal communication with customers and colleagues which is clear and expressed in a professional manner.'
Ms Dunstan awarded the claimant two points under this section and awarded **Employee A** three points. Ms Dunstan says she awarded the claimant two points because 'Ardela's external communications often contained insufficient or inaccurate information so the client would not always know what she was asking for. Elaine at Asda would sometimes contact me asking for clarification all because Ardella had made errors'. Ms Dunstan says that she did not criticise or down score the claimant on account of her English language skills which met the standards required of any person in this role. Ms Dunstan says that problems arose not because of the quality of the Claimant's English but because of the content of the claimant's email and gave an example from memory of an email which included an attachment without explanation or

instruction. During the individual consultation meetings the claimant asked Ms Dunstan to produce some examples of such emails but none have been provided to the claimant and none are in the tribunal bundle. Ms Dunstan accepted that when she was scoring based upon emails she was doing from memory and had not assembled the offending emails to count or otherwise weigh up.

In addition Ms Dunstan presents, as an example of the claimant having sent an email containing an error, an email dated 12 September 2018 from Elaine. That email only says 'this is different to the one sent by Ardella! Probably need to start again if you can send copies please'. The allegedly erroneous email from the claimant has not been produced. The Tribunal do not find this email to be evidential of any error on the part of the claimant or that Elaine is frustrated with the claimant. This is the only example produced to evidence an error on the part of the claimant or frustration on the part of the client.

The second basis was 'able to organise and prioritise workload in an appropriate manner to complete tasks to achieve deadlines. Again Ms Dunstan relied on her memory and had no records of having counselled the claimant for failing to prioritise her workload or proactively chase debt.

The Tribunal have not been shown any objective basis for the score for this section and find that Ms Dunstan made a subjective and impressionistic assessment which renders her scoring open to challenge. However the Tribunal finds that she is likely to have adopted such an approach in respect of each of the candidates for selection.

36. A robust and objective scoring system is important to ensure among other things that there is no unconscious bias.

The Claimant accepts that Ms Dunstan appointed her and they had a good relationship up to the meeting on 19 December 2018 and that Ms Dunstan had praised her and been positive towards her. The Claimant agrees that Ms Dunstan has never said or done anything to suggest that she has any antipathy to foreigners and in particular to those from eastern Europe. The Claimant was concerned that Ms Dunstan had down scored her on communication because English is the Claimants second language and she fears it can never be as good as a native speaker or a person brought up and educated in the UK. The Tribunal accepts the evidence of Ms Dunstan that she had no complaints at all about the quality of the Claimant's English.

37. **Initiative and Decision Making**. The Claimant was ultimately awarded 2 points and **Employee A** 4 points and **Employee B** 3. This section encompasses ability to work under own initiative with little supervision. It appears to the Tribunal likely on the balance of probability, that the other members of the team would score more highly under taking initiative and decision making. Having had only about six months in the role at the date of scoring, it is self-evident that the Claimant would be more likely to have to ask for more help, advice and confirmation of the steps she intended to take and would be less self-reliant at this stage than the others. In the circumstances the lower marks given to her under the heading initiative and decision making do not appear unreasonable

or illogical or indicative of bad faith. This is an area where the Line Manager's would be reasonably placed to make an assessment from their own knowledge and supervision of the Claimant. However there were no performance monitoring records of any kind (apart from the note of 4 October 2018) before the Tribunal or Ms Dunstan to demonstrate objectivity in the measures applied.

38. **Relationships:** The ability to build and maintain effective relationships with customers and colleagues. Ultimately the Claimant and **Employee A** were each awarded 2 points and **Employee B** was given 3. It was accepted that the claimant had developed excellent relationships with her colleagues in the team.

She was criticised in respect of her relationships with external clients and in particular Elaine and her relationships with other colleagues in the business of whom Chris Barr was named and was said to have emailed Ms Dunstan with complaints connected to the claimant.

In respect of Chris Barr none of the emails have been produced. Ms Dunstan did not assemble the emails from him when evaluating the claimant's relationship with him. According to Miss Wallis, in justifying her scoring of the claimant in this respect, Ms Dunstan made no reference at all to Mr Barr.

In connection with the allegation that the relationship with Elaine was poor the tribunal has been referred to the email of 12 September 2018 referred to above and to an email instruction from Dunstan to the claimant dated 19 June 2018 instructing her to chase the accounts listed and a similar instruction on 23 July 2018 and on 28 August 2018.Having read these emails the tribunal do not find these are indicative of a seriously poor relationship with Elaine. There are no emails to the claimant telling her that her relationship with Elaine needs to change nor guiding her as to what Ms Dunstan expected of her to effect a change.

The Tribunal reminds itself that this is not a performance related dismissal when the absence of such would weigh heavily in the balance on the side of unfairness. The question here is whether we believe Ms Dunstan that the relationship with Elaine needed improving, whether its assessment by her was such as to warrant a score of 2.

The Tribunal believes Ms Dunstan that in her view the relationship was not satisfactory and required improving and that there was a reluctance on the part of the Claimant to engage with Elaine however this appears to be based entirely on her own opinion and not on any record or measure which might be objectively supported.

39. We are satisfied that there was not double counting in respect of Elaine under the headings of communication and relationships and accept that Ms Dunstan and Ms Wallis were following the separate definitions in the Criteria but that given the Asda contract was the principal account for which the Claimant was responsible it was inevitable that a reference to Elaine would be made in respect of each heading and provide the context for the assessment although different aspects were under consideration.

40. Ann Wallis is the Line Manager of Ms Dunstan. Ms Dunstan, mindful that she was a new manager and completely inexperienced in redundancy selection was anxious to ensure that she was adopting the correct procedures and applying them appropriately. With this in mind she approached her line manager Ms Wallis who in conjunction with Ms Dunstan reviewed the scores that she had set. Ms Wallis, although a more senior and more experienced manager, had not previously carried out a redundancy selection exercise based on scoring and the framework developed in 2016 was not actually applied because there was a willing volunteer. It was put to Ms Wallis that by participating in the scoring exercise she was breaking the rules. The tribunal do not find this to be the case and Ms Rusby confirmed that the claimant had misunderstood the point she had made at paragraph 13 of her statement and there was no rule preventing the involvement of Ms Wallis. Ms Rusby said that she approved of the approach that Ms Dunstan and Ms Wallace had taken and the Tribunal can see it was their intention to ensure fairness.

41. The tribunal find that Ms Wallis did not have had any direct meaningful knowledge of the candidates but relied on information given to her by Ms Dunstan. The tribunal find that Ms Wallis's so-called observations were not systematic nor applied equally to all candidates and to have little merit. The tribunal found Ms Wallis to be a somewhat difficult and on occasions evasive and contradictory witness.

    We accept that she provided a sounding board for Ms Dunstan and aimed to be an informal moderator to ensure as best they could that the scores Ms Dunstan had applied were appropriate.

    It was on the advice of HR that the scores were redone excluding sickness/ attendance.

    In order to monitor the scores Ms Wallis asked Ms Dunstan to justify the scoring of each candidate under each heading and Ms Dunstan described the views she held of each candidate and a narrative of why she held them. Ms Wallis accepted those views at face value and did not call for any corroborative evidence or records to validate Ms Dunstan's views.

    As a consequence of their exchange small adjustments were made to the points as follows under the heading initiative and decision making the claimant's score was decreased from 3 to 2 and **Employee A's** score was increased from 3 to 4 in recognition of the award that had been given to her in September 2018.

42. Following the identification of the Claimant as the person with the lowest score there were individual consultation meetings with the Claimant in which she challenged the selection and called for an explanation and evidence in support of the explanations given. The Tribunal find that she was given an explanation of why she was the lowest scorer along the lines set out above in paragraphs 30-33 but was not given any evidential material, records or statistics to explain the scores applied.

43. Sarah Walshaw a member of the Respondent's HR Team dealt with the individual consultation meetings with the claimant in November and December 2018 in conjunction with Ms Dunstan.

    Ms Walshaw accepts that during the consultation the claimant raised the allegation that she had suffered racial abuse after the grievance which was relayed to Toya Anderson (another member of the HR Department) and about which Toya Anderson did nothing.

    As set out above Ms Walshaw looked into the matter.

    The Tribunal is not satisfied that the claimant raised, during the course of the individual consultation meetings, any complaint or allegation that Ms Dunstan or anyone else involved in the scoring had discriminated against her consciously or unconsciously on the grounds of race by down scoring her. Had that been plainly said then Ms Walshaw would have had a duty to investigate further to ensure that the scores were not tainted by race. But this was not the case and we find that the claimant referred Ms Walshaw only to historical allegations arising from her former Department.

44. The Claimant confirmed to the Tribunal that she does not bring her complaint on the basis of an argument that having been forced out of her previous department by the racial harassment of Packham and others, which the Respondent failed to address adequately, she moved to the Accounts receivable section as late as April 2018 and therefore had no opportunity to develop her skills to compete with **Employee B** and **Employee A** in the redundancy selection process. The Claimant was very firm that notwithstanding her late arrival in the Department she had attained a skill level which put her on a par with the others and ahead of **Employee A** in respect of attendance. Her case is based on an allegation that the scorers underscored her and over scored **Employee A.**

Conclusions

Unfair Dismissal

45. The Claimant accepts that there was a Redundancy situation and the Tribunal find that this was a companywide redundancy exercise entailing a diminution of employees of a particular kind, in which the Claimant was selected for redundancy dismissal. Unless the selection is tainted by discrimination, this was a redundancy dismissal and a potentially fair reason.

46. The process was announced at the end of October and the Claimant was not dismissed until 28 February 2019. We find that the initial notice of intended redundancy was timely and the steps in respect of the consultation collective and individual were taken at the appropriate time and employees had adequate warning.

47. The Tribunal find that the Respondent entered into appropriate Collective Consultation with elected representatives and adopted a redundancy procedure. We have had no evidence that there was an appropriate trade union which should have been consulted instead.

48. The Claimant has made no criticism of the pool for selection which comprised the national Accounts receivable team of three people. We find the pool to reflect a discrete team and to be a reasonable approach.

49. The Respondent has a duty as articulated in ***Williams v Compair Maxam*** to '*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'.*

50. The Criteria adopted by the Respondent comprised the following

1. communication and organisation	able to demonstrate that both written and verbal communication with customers and colleagues which is clear and expressed in a professional manner. Able to organise and prioritise workload in an appropriate manner to complete tasks to achieve deadlines
2. Initiative and decision-making	ability to work under own initiative with little supervision.
3. Relationships	ability to build and maintain effective relationships with customers and colleagues
4. Business systems and procedures	ability to use business systems and follow standard operating procedures

51. In respect of each criterion, with the exception of business systems the scoring was based only on the opinion of the person making the assessment ie Ms Dunstan. No attempt was made to check the scores against objective and measurable criteria by Ms Dunstan or Ms Wallis.

52. The absence of material by which the selection can be objectively checked also undermines the efficacy and reasonableness of the individual consultation and makes it almost impossible for the Claimant to make informed representations on how she should have been scored or how she has been improperly scored.

53. The absence of such material also makes it extremely difficult for the Tribunal to assess whether the Claimant's selection has been made fairly in accordance with the criteria.

54. No offer of alternative employment was made to the Claimant. It was an outcome of the collective consultation that all vacancies would be advertised internally to everyone and positions given under a competitive process of application. The Claimant had the same opportunity to be considered as any other employee and has made no complaint that she was unfairly excluded from consideration. On 12 December 2018, during the consultation period the

Claimant was shortlisted for interview but she withdrew. The Tribunal find the Respondents approach to alternative positions to be fair.

55. The tribunal is satisfied that the Respondent has shown the reason for the dismissal to be redundancy which is a potentially fair reason under S98. For the reasons set out below the Tribunal also finds that the Claimant's selection was not tainted by race.

56. Where, as in this case the employer has fulfilled the requirements of S98 (1), under S98 (4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

    (b) shall be determined in accordance with equity and the substantial merits of the case.

    In these circumstances the Tribunal find that the claimant did not have a proper opportunity to make informed representations on her scores during the consultation and the employer did not act reasonably in relying on the scores awarded to the Claimant by Ms Dunstan and Ms Wallis to dismiss the Claimant and her dismissal falls outside the band of reasonable responses.

S123 Justice and Equitability

57. The Tribunal is surprised that Ms Walshaw did not recognise the deficiencies of the system adopted by Ms Dunstan and set about addressing with rigour the concerns of the Claimant in respect of the evidence base for the scores. It should have been apparent that the Claimant was in terms asking that the scores be checked so far as possible against objective data.

58. Had Ms Walshaw undertaken a thorough review by requiring Ms Dunstan to assemble and evaluate the emails, records and data on which she based her opinions for each candidate, the likelihood is that the Claimant would still have secured the lowest score. The Tribunal reach this conclusion because of the comparative inexperience and incomplete training and development opportunities of the Claimant as compared with the longer experience of **Employee A** who we have already found had a wider and deeper knowledge of the business systems and no disciplinary record.

59. In the circumstances had the Respondent revisited the scoring of the Claimant and her colleagues in order to rescore based on an evidential matrix relating to the criteria, it would have taken Ms Dunstan some time to assemble the data and analyse it and rescore, for Ms Dunstan's approach to be checked again by Ms Wallis or someone in HR against the data and for individual consultation to take place on the new data and scores. That being the case probably the Claimant would have been dismissed in any event, we would put the percentage chance of that at 100%. However the process is likely to have

extended her employment with the Respondent by a month but it would not be fair and equitable to award compensation beyond 22 March 2019.

60. The Tribunal does not accept that the Claimant would have been fairly dismissed in any event because she had allegedly taped the meeting of 19 December 2018. Ms Walshaw said that it was merely a suspicion and she could not say if it was the case. The Tribunal have heard no evidence from which to draw a conclusion that the notes are a transcript of a recording. Ms Wilshaw said that the Respondent would take such a matter very seriously but did not go so far as to say that if found it would amount to gross misconduct or conduct justifying dismissal.

Race Discrimination

61. The Claimant complains that her redundancy selection was tainted by race in that had she been scored appropriately she would not have had the lowest score and would not have been selected. She was selected for redundancy but **Employee B** and **Employee A** were not. At this Hearing the Claimant confirmed that she had no quarrel with the scoring of **Employee B**.

62. The Claimant has alleged that the bullying and harassment she claims to have suffered in her former department which constituted racism has culminated in her dismissal. The Tribunal finds that the Claimant has shown no causal connection in that respect. She accepts that none of the people she named in her bullying grievance and who she alleges made racist remarks towards her afterwards had any part in the way in which she was scored for the redundancy.

The claimant accepts that her line manager Gemma Blackwell and the HR advisor Toya Anderson had nothing to do with her redundancy selection.

The claimant accepts that there is no connection between the complaints she made in the old department and Maria Dunstan and Ann Wallis who undertook the scoring.

The claimant is credited with having a brilliant relationship with her current team and accepts that until December 2018 she got on well with Maria Dunstan.

The claimant accepts that she has not seen or heard Maria Dunstan do or say anything which might suggest that she had an antipathy towards foreigners and Eastern Europeans in particular.

Maria Dunstan and Ann Willis appointed her to her new post.

63. The Claimant raised a specific concern that Maria Dunstan discriminated against her by applying a standard of English which the Claimant could not attain because English was not her first language. The Claimant had not pleaded Indirect discrimination and confirmed that the issues remained as identified at the Preliminary Hearing. But in any event the Tribunal find that Ms Dunstan did not mark the Claimant down because of the quality of her English language.

64. Although the tribunal is critical of the respondents method of scoring the criteria and in particular the absence of objective data against which the scoring can be checked and finds that the scoring of the criteria depended solely on the opinion of Ms Dunstan, we find that this was explained by her inexperience and lack of competence for want of training and support and it was not indicative of any bad faith or race discrimination on the part of Ms Dunstan. The tribunal find that she was doing her best but was getting little guidance. The tribunal accepts that the scores reflected Ms Dunstan's genuine opinion on the comparative merits of **Employee A** and the claimant under the criteria. It is likely that a member of staff with 7 years' service and a clear performance record (as in **Employee A's** case) would score more highly than a newly arrived member of staff of six months or so who was still learning the ropes.

65. In the circumstances the Claimant has not proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of race and the race discrimination claim fails.

Remedy

66. Judgement having been given in the substantive matters, the Hearing was adjourned to enable the parties to discuss settlement and on return compensation was agreed in the sum of £1166.

67. There were no applications for costs. The Respondents requested full written reasons.

Employment Judge O'Neill

Date: 24 October 2019