



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE C HYDE (sitting alone)

**BETWEEN:**

Claimants

MR P DALY (1)  
MR M WEYMOUTH (2)

AND

Respondent

OSBORNE CONSTRUCTION LIMITED

**ON:** 15 and 16 July 2019

**APPEARANCES:**

For the first Claimant: In Person

For the second Claimant: In Person

For the Respondent: Mr D Soanes, Solicitor

## RESERVED JUDGMENT

The Judgment of the Tribunal is that: -

1. The complaints of unfair dismissal under section 98(4) of the Employment Rights Act 1996 were not well founded and were dismissed

# REASONS

## Preliminaries

1. Reasons are provided in writing for the Judgment above as the Judgment was reserved. They are set out only to the extent that the Tribunal considered it necessary to do so in order for the parties to understand why they won or lost. Further, they are set out only to the extent that it is proportionate to do so.
2. All findings of fact were reached on the balance of probabilities.

## Evidence Adduced/Documents Considered

3. The Respondent prepared a bundle of agreed documents of approximately 500 pages, and which the Tribunal marked [R1]. In addition, marked [R2] was a 2-page index to the page references for the Claimants' witness statements.
4. The Respondent also prepared witness statements on behalf of Mr P Fletcher, Mr J Craig, Mr A Baybut and Mr S Taylor. Their witness statements were marked [R3] - [R6] respectively.
5. Finally, on behalf of the Respondent, Mr Soanes presented a written skeleton argument which the Tribunal marked [R7].
6. The Claimants had not prepared specific witness statements but their statements were, in effect, set out in documents which were in the bundle from pages 417 - 455. It was a joint statement with some parts of the statement applying to one claimant rather than the other, as identified by them. The Claimants signed the joint witness statement to confirm that they wished to rely on it and that they believed the contents to be true when they gave their evidence. Each of the witnesses on behalf of the Respondent did the same in respect of their witness statements.

## Interlocutory Application

7. At the commencement of the hearing the Claimants applied for the Tribunal to issue witness orders. Their applications had originally referred to five people including Mr Fletcher but in the event the Claimants pursued the applications only in relation to Richard Watts, the Construction Director and the Line-Manager of Paul Fletcher and David Giles, the Claimants' Line-Manager; and Mr T Fishlock who was Pre-Construction Commercial Manager in the estimating department and who reported to Colin Eke, Pre-Construction Director who in turn reported to John Craig, the Managing Director.

8. The reason for the request to have Mr Fishlock as a witness was because the Claimants argued that Mr Fishlock should have been in the pool also. The other reason that the Claimants wanted to call Mr Fishlock was to adduce evidence about Mr Baybut and a history of blaming others. This was to be relevant to the question of the selection for redundancy or the decision as to how to create the pool for redundancy. In relation to Mr Watts, this was to do with wanting to adduce evidence about the nature of the structure and the work done.
9. The Tribunal heard representations from both parties about the applications but was not satisfied that it was necessary to call either of these witnesses in order to be able to deal with the redundancy issue in the case justly. The Respondent was proposing to call witnesses to deal with the structure and the decision to make the Claimant redundant and also the appeal. The Claimants also had no witness statements from either of these potential witnesses.
10. The Tribunal took into account the principle of proportionality in deciding these applications. In all the circumstances, it was not appropriate to make the witness orders.

### **Findings of Fact and Conclusions**

11. Mr Daly commenced employment with the Respondent on 17 December 2012 and his employment ended on 20 April 2018. He was a Divisional Commercial Manager. He reported to Paul Fletcher, Divisional Director (London).
12. Mr Michael Weymouth was employed from 7 July 2014 to 13 April 2018, also as Divisional Commercial Manager. His line-manager was David Giles, Divisional Director (South East). Both Mr Fletcher and Mr Giles reported to Richard Watts, Construction Director who in turn reported to John Craig.
13. The organisational structure at the time of the proposed restructure meant that Mr Weymouth and Mr Daly each had two Managing Surveyors who reported to them.
14. The Respondent's business was the managing of construction projects. Much of the day to day commercial work on those projects was done by managing surveyors.
15. Mr Daly's complaint was presented on 26 June 2018 and that of Mr Weymouth on 27 June 2018. The detail of their claims varied in some respects and any relevant differences will be referred to where appropriate. However, they occupied virtually identical posts in an identical position in

the Respondent's structure just prior to the termination of their employments.

16. The complaint was that the termination of their employment, ostensibly by reason of redundancy, was unfair under section 98(4) of the Employment Rights Act 1996. The Claimants' argument, among others, was that they were blamed for deficiencies in Mr Baybut's projections.
17. The Respondent, Osborne Construction Limited ('OCL') is one in a group of companies owned by Geoffrey Osborne Limited (p106). Mr John Craig who gave evidence to the Tribunal was both Managing Director of OCL and Construction Managing Director on the Geoffrey Osborne Limited board. The other companies at the relevant time were Osborne Property Services Limited, Osborne Homes Limited, Osborne Infrastructure Limited, Osborne Developments Limited and Innovare' Systems Limited. Osborne Property Services Limited and Osborne Homes were jointly referred to as 'communities'.
18. In 2015 a five-year business plan was drawn up for OCL which included a proposed management structure which included three regions sometimes called divisions namely South West, South East and London.
19. The Respondent included in the bundle for the Tribunal a series of structure charts which demonstrated the evolution of the part of the business that the Tribunal was concerned with. During the first two years of the 2015 business plan it became evident to the Respondent that the profile of the projects was different from that envisaged in the business plan in that the Respondent was completing a significantly smaller number of larger value projects. This made retaining three regions unsustainable and the regions/divisions were subsequently reduced to two; South and London, through natural wastage and redeployment. Each of those divisions had separate management teams made up of a Divisional Director (David Giles and later Paul Fletcher), Divisional Commercial Managers who reported to the Divisional Director (of whom the Claimants were two), and a number of Managing Surveyors who reported to the Divisional Commercial Managers.
20. The Divisional Directors of both regions/divisions (Paul Fletcher and David Giles) reported to Richard Watts, the Construction Director, but also had a functional reporting line to Alan Baybut, the Commercial Director who in turn reported to Mr Craig. In the structure chart Mr Baybut and Mr Watts were on the same level. (p106a). The Claimants as Divisional Commercial Managers also had a functional reporting line to Alan Baybut on general commercial matters (para 7 of witness statement of Mr Craig).
21. The July 2016 structure chart of the constructions sector (p106a) also showed Mr Terry Fishlock as Divisional Commercial Manager in a different

reporting line to the two Claimants, i.e., he reported to a different Divisional Director.

22. However, by October 2017 (p106b) the situation had altered again somewhat in that Mr Weymouth reported to Mr Giles and Mr Daly reported to Paul Fletcher as Divisional Directors. These were respectively in the South East and London regions. In a separate part of the structure was Terry Fishlock whose role was described as Pre-Construction Commercial Manager. He was one of a team of seven, the remaining members of staff were engaged in estimating. They reported along with others to Colin Eke, the Pre-Construction Director. This was also the position as set out in the structure chart which related to the timeframe January 2018 (p106c). The relevant period for considering the restructure was early 2018. The essential decision taken by the Respondent was to delete the two posts occupied by the Claimants of Divisional Commercial Manager and to have the project and post-completion teams reporting directly to the Divisional Directors.
23. The teams (project and post-completion) managed construction projects. The Managing Surveyors would carry out commercial reporting, planning and valuations, and present them to the Divisional Commercial Managers, who would in turn present them to the Divisional Directors. The Divisional Commercial Managers (the Claimants) would also ensure that the Respondent was following correct commercial procedures on the projects such as checking that money was coming in on time, checking the accuracy of the valuations carried out by the Managing Surveyors and, where necessary, helping to deal with disputes with clients and subcontractors.
24. In addition, it was not in dispute that the Divisional Commercial Managers would be expected to manage a number of projects themselves. Their job description was in the bundle (pp107-110).
25. The Tribunal accepted the evidence set out Mr Craig's witness statement in particular at paragraphs 5 and 13 that the Respondent struggled to achieve the turn-over and gross sales margin figures included in the 2015 business plan. This continued through to December 2017. The Tribunal further accepted the contention that the Respondent ended up carrying out significantly fewer projects than initially envisaged (pp87 & 176). As evidenced in the 2016/17 business plan at paragraph 4 and in the dismissal letter to Peter Daly dated 20 April 2018 (p175).
26. When the Board of Osborne Group discussed the revised forecast figures for the 2017/18 financial year in December 2017 and January 2018, the management structure which had been devised in line with the original business plan was challenged. Mr Craig was therefore tasked with reviewing the structure including the management structure in January 2018. He completed the action in February 2018. A particular feature of

the review that he carried out at this stage was that income had come down therefore costs came into play.

27. In late 2017/early 2018 Mr Craig decided that the role of Construction Divisional Commercial Manager was no longer viable in view of future forecasting. Therefore, the two Divisional Commercial Manager roles could be removed from the Construction Management structure and the Divisional Commercial Manager duties could be absorbed by the Managing Surveyors and Commercial Director. The Board of the Respondent discussed this and agreed with him. As a consequence, the Managing Surveyors would report directly to the Commercial Director.
28. The Tribunal also accepted that Mr Craig took a little time to consider the position and to consider if there were alternatives even before raising the issue with the Claimants and entering into any formal redundancy consultation process. Thus, he discussed the idea with Mr Steele, Chief Executive of Geoffrey Osborne Limited, who informed Mr Craig that there were roles which were likely to become available elsewhere in the business later in the year and suggested that the Respondent should delay the proposed redundancies until those roles became available so that they could avoid losing the Claimants altogether. The redundancies were therefore delayed by a few weeks.
29. The Tribunal was also satisfied that the Respondent had already started making costs savings elsewhere in the business for example there were two employees in the purchasing team who were not replaced when they left the business (para 20 of R4) in 2017.
30. The rationale for removing the two Divisional Commercial Manager roles was not just financial, it reflected the changed volume and nature of the work being carried out which meant that the Respondent could manage with fewer people as there were fewer projects to be managed.
31. This finding is relevant in relation to the Claimants' argument that Mr Baybut had inflated the monthly forecast figures in order to protect his own position. Mr Craig satisfactorily addressed this issue in his evidence: R4, paragraph 22.
32. Mr Baybut also was involved in the decision making to remove the two Divisional Commercial Manager roles. The Tribunal was satisfied that the suggestion from Mr Craig was not based on previous forecasts but was based on the future forecasts and current turn-over, gross sales margin and work levels (including the number of projects). Mr Craig took responsibility for having made this decision and the Tribunal was satisfied that it was his decision. This was consistent with his position within the organisation. It was not disputed by the Respondent, however, that Mr Baybut advised on the implications of removing these roles.

33. Thus, it was that in March 2018 a redundancy consultation process began with the Claimants. Mr Baybut managed most of the process.
34. The move of Terry Fishlock to Pre-Construction Commercial Manager had taken place about a year before the beginning of 2018 (paragraph 27 of R4). The Tribunal accepted that Mr Fishlock's role was very different from the Claimants' Divisional Commercial Manager roles. Mr Fishlock's role involved checking contract documents on tenders and ensuring that the Respondent had covered off the commercial aspects of bids. It did not involve many, if any, commercial operational activities. On the other hand, the vast majority of the Claimants' roles involved commercial operational activities.
35. The Claimants also raised the issue of the position of a colleague, Richard Bell. Mr Bell's name did not appear on any of the five pages of structure charts. The Respondent's case was initially that he was employed in Osborne Developments Limited of which the Managing Director was David Sarson. His role at the time largely involved the Operational Management of a development project in Cambridge. His job title was Development Commercial Manager. Operationally for this project alone, he reported in to Paul Fletcher (to whom the Claimants also reported) but he was not part of Mr Craig's team and his line management was to a different part of the business.
36. However, the Respondent's closing submission at para 19 was that he worked for Geoffrey Osborne Limited. This was confirmed in the dismissal letter dated 29 March 2018 sent to Mr Daly (p144) in which Mr Baybut confirmed that Mr Bell's job title was 'Development Commercial Manager' and that although he reported in to Paul Fletcher, he was actually employed by the Development Sector of Osborne – a reference to the Osborne Group.
37. Aside from where he sat within the group structure, Mr Bell's role involved producing and reviewing construction programmes. This was different from the role undertaken by the Claimants and did not involve their skill set. It appeared to the Tribunal that Mr Craig's belief that the roles carried out by the Claimants were different from any other roles within OCL was a sustainable and reasonable view to reach. For example, in this context, further evidence was put forward about the role of Mr Bell but this was not a matter which was pursued with any vigour by the Claimants and indeed had not featured very highly in the internal appeal or representations process.
38. The closest that the Tribunal had to a job description in relation to Mr Bell was a list of accountabilities/responsibilities in respect of the project referred to above that he was mainly involved in. This was also described as 'development/project management'. The first of the accountabilities was

‘development management’. This was followed by ‘client project management’.

### **Relevant Law, Issues and Conclusions**

39. There was no dispute about the applicable law and cases which were set out in Mr Soanes’ very helpful skeleton argument. There were no unusual points of law involved and the Tribunal did not disagree with the cases referred to and the principles that they supported. As those were set out in full in the skeleton argument, reference will only be made to the statutory provisions and case law in these reasons where the Tribunal considers it helpful to do so.
40. The first question was whether the employee was dismissed? There was no dispute in this case that the Claimants had been dismissed. The central issues were about the reason relied upon by the Respondent and whether dismissal for that reason was fair.
41. The Respondent contended that the potentially fair reason for the dismissal was that the Claimants were redundant. The Tribunal then had to assess whether there was a genuine ‘redundancy situation’ under section 139 of the Employment Rights Act 1996; and whether the Claimants’ dismissals were wholly or mainly attributable to that.
42. The limb of the definition of redundancy relied on by the Respondent was that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished (or did one of the other economic states of affairs in section 139(1) exist)?
43. The Tribunal’s findings about Mr Craig’s view of the Respondent’s performance as against the envisaged 2015 business plan are set out above. This was also consistent with the evidence given by the Claimants in their witness statements (page 11 of Mr Weymouth’s and page 14 of Mr Daly’s statements) in relation to the position about forecast turnover by Quarter 3 of 2017/2018.
44. For the following financial year (2018/2019) the business plan had a forecast turnover of £197m and gross margins of £17.1m. By March 2018, the budget had reduced to £147m turnover and £13.05m gross sales margin. The Claimants questioned this, based on the 2018 business plan which contained higher figures. However, the Tribunal accepted the Respondent’s contention that this was not a ‘budget’ and that the budget figures appeared separately (p110L). In any event, even under the 2018 business plan, there was, in the words of the Claimants, still a reduction in turnover of £17m (witness statement of Mr Weymouth at page 12 and witness statement of Mr Daly at page 14).



45. The Tribunal also took into account its findings about the nature of the roles carried out by the Divisional Commercial Managers and the decision to remove a layer of management. There was no evidence that the Claimants had been replaced subsequently and there was no evidence to suggest that the Managing Surveyors had not continued subsequently to report directly to the Divisional Directors consistent with that plan.
46. In reaching the decision about whether there was a genuine redundancy situation, the Tribunal accepted the submission because it is well established law that it is not for the Tribunal to scrutinise the commercial and economic reasons underpinning the business requirements to reduce costs or to investigate the rights and wrongs of the employer's decision to initiate a redundancy process. The Tribunal simply needs to be satisfied whether this is genuine and a reasonable decision.
47. Further, it is the requirement of the business for employees to carry out work of a particular kind that is significant. The question of whether work is constant is irrelevant. If fewer employees are needed to carry out work of a particular kind, this is a redundancy situation.
48. The Tribunal was therefore satisfied on the balance of probabilities that there was a genuine redundancy situation within the statutory definition: section 139(1)(b) of the Employment Rights Act 1996.
49. The next question to be decided in relation to a redundancy dismissal under sections 139 and 98(4) of the 1996 Act is whether the dismissal of the employees was caused wholly or mainly by the redundancy situation.
50. The Claimants' argument that the decision to make their roles redundant was motivated by a desire on the part of Alan Baybut to preserve his own position did not, it appeared to the Tribunal, undermine the Respondent's position directly. Further, the Tribunal took into account that it had to reach its conclusions on the balance of probabilities and could not as set out above become involved in substituting itself for the employer and scrutinising the economic or commercial merits of the decision to make redundancies.
51. It appeared to the Tribunal that on the balance of probabilities redundancy was clearly the reason for the dismissal of the Claimants. Their roles had been removed from the structure and not replaced.
52. The next issue raised was about the pool for selection. Given the roles carried out by the Divisional Commercial Managers and that they were of a kind, it appeared to the Tribunal that the decision not to include any other roles in the pool was perfectly reasonable and cogent. Their job roles were not shared with anyone else. It was not a situation in which the number of

DCMs was being reduced. Both roles were being made redundant. There was, therefore, no need for any selection as between the two.

53. A similar argument in this context was the suggestion by the Claimants that Mr Fishlock should have been included in the pool for selection. As set out above, the Tribunal found that Mr Fishlock's role was different from that of the Claimants.
54. In relation to Richard Bell, he was employed in March 2017, a year before the Claimants were put at risk of redundancy (p92). Further, at that time, Paul Fletcher who recommended that the business should employ Richard Bell, had no idea that the Claimants might be put at risk of redundancy in the future. There was no evidence whatsoever to support that contention [R3, paras 7-10].
55. Further, the Claimants contended that Mr Bell was 'officially employed as an Operations Manager'. Having considered the contract that Mr Bell worked under, the Tribunal accepted that he was officially employed as a Development Commercial Manager. The Claimants contended that Mr Bell was an Operations Manager and that the Respondents attempted to disguise his employer as being Osborne Developments Limited (p454).
56. The Tribunal has already made its findings about the tasks on which Mr Bell was employed. Further having regard to the chronology in terms of the date on which Mr Bell was employed, it would be improbable that the Respondent would have set this up through Mr Fletcher, in anticipation, the Claimants would appear to allege, of the Claimants themselves subsequently being put at risk of redundancy approximately a year later. Further, the Tribunal did not accept this because as set out below during the redundancy process the Respondent attempted to move the Claimants into other roles which would have preserved their employment.
57. However, in terms of the choice of the pool, the Tribunal accepted that it was a reasonable choice to restrict the pool to the two DCMs who were employed in the layer of management that was going to be deleted.
58. In all the circumstances therefore, it followed that no selection criteria were needed.
59. The next question was whether the Respondent consulted fairly with the Claimants. Mr Daly and Mr Weymouth were informed at an informal meeting on 12 March 2018 with Alan Baybut that the Respondent was entering a consultation period with them as their jobs were at risk of redundancy (pp116g - i and 283 - 285). Those are references to the letters that Mr Baybut wrote to each Claimant after the meetings summarising the position and what had been discussed. The content of those letters was almost identical but importantly was consistent with the findings that the

Tribunal has made above as to the redundancy situation and the restructure that was proposed which would delete the Claimants' positions.

60. With the letters, Mr Baybut enclosed draft details of an alternative role which he invited the Claimants to look at (pp116(h) and 284) working with the Commercial Director for Communities (John O'Shea); and a copy of the Respondent's redundancy policy.
61. Mr Baybut also invited the Claimants to attend an individual consultation meeting as part of the formal consultation on 15 March 2018.
62. In relation to the alternative post, both Claimants were told that as of that date there were two Head of Commercial positions within the communities' business, one in Osborne Homes and one in Osborne Property Services Limited. They were invited to discuss the matter with the Commercial Director for Communities if they were interested in the roles.
63. The Claimants subsequently attended interviews for the roles identified.
64. Mr Baybut had the benefit of a script for each of the meetings on 12 and 15 March 2018. These were available to the Tribunal. They appeared to be evidence of good preparation for the meetings in order to ensure that Mr Baybut covered all the relevant and important points in the discussion with the Claimants. The content was very similar to that of the letters that were sent to the Claimants subsequently.
65. The Tribunal also noted, for example, that the script for the meeting on 15 March (pp289 - 290) prompted Mr Baybut to tell the employee that he would be reading from a script just to ensure that he covered all the points, i.e., he gave an explanation for it. It was also fair to say that there were references to a number of figures, for example, explaining the turnover, gross sales margin and business plans. It appeared to the Tribunal sensible that steps were taken by the Respondent in advance to ensure that these figures should be reported accurately to the employees in the meetings.
66. The Tribunal was satisfied that the first formal meeting was conducted in accordance with the requirements of a fair consultation meeting. The reasons for the Respondent reaching the decision to put the Claimants' positions at risk, the explanation of the redundancy situation and the invitation to the employees to put forward any suggestions as to how redundancies could be avoided were all done. Further, the Claimants were informed of the list of current vacancies and were pointed to a member of staff of the People Team (Human Resources) to whom they could go to discuss any of these vacancies. At this meeting they were given a job description for the positions in the Communities Business (p290). There were also informed of the timeframes to which the Respondent was working in relation to dealing with the redundancy process. This involved inviting

the Claimants to make counter proposals and pursue any job applications by 20 March; to have a second consultation meeting on 27 March; and a final consultation meeting with John Craig on 11 April 2018.

67. The Respondent also informed the Claimants that although individual redundancy figures had not been calculated yet and as the Claimants had not yet actually been selected for redundancy although they were at risk of it, and as it was a potential outcome of the process, the Respondent could provide the Claimants with calculations at the next consultation meeting.
68. Finally, the Claimants were reminded that they were entitled to bring a trade union representative or work colleague as a companion to the second consultation meeting.
69. The Respondent kept a thorough paper trail in relation to the discussions during the consultation process.
70. Each Claimant was then subsequently written to once again by Mr Baybut after the meetings on 15 March 2018 (pp294-297) in respect of Mr Weymouth and (pp122-125) in respect of Mr Daly. In terms of the requirements of fair consultation, the letters covered the same ground and they fulfilled the conventional requirements of a fair process.
71. The next meeting, the second consultation meeting, took place with each of the Claimants on 27 March 2018. Mr Baybut was accompanied by Emma-Jean Smith from the People Team. As before the Claimants were each unaccompanied. After the meeting Mr Baybut sent letters confirming the discussions and outcome dated 29 March 2018 to Mr Daly (pp143146) and to Mr Weymouth dated 4 April 2018 (pp318-320).
72. Mr Daley had sent an email dated 22 March 2018 setting out proposals to avoid redundancy. These covered the points that have already been included in these reasons about an alternative pool and involvement of other members of staff. Mr Baybut discussed but rejected the first three proposals.
73. A further proposal was whether the Commercial Managers could take on one of the larger projects in a Managing Surveyor capacity whilst carrying out the Commercial Manager role or that the Respondent should reduce the number of Managing Surveyors and have the Commercial Managers take on the Managing Surveyor duties on two smaller projects whilst continuing with a reduced Commercial Manager's role. These options were considered but rejected in the circumstances. In respect of the first option, there was only one suitable larger project and the Managing Surveyor allocated to it up to that point had been involved in the project since the tender stage and had therefore built up a very detailed knowledge of the project. As a result, and it appeared to the Tribunal that this was a

reasonable view for the Respondent to take, Mr Baybut concluded that it would be extremely detrimental to the project to replace this person with one of the Commercial Managers.

74. The second option in relation to the Commercial Managers taking on the Managing Surveyor duties was also considered. This was rejected because it did not appear to be an efficient solution in terms of the workload either for the Commercial Manager or the remaining Managing Surveyors (p144).
75. The email from Mr Daly had also asked for the selection criteria and the Respondent explained that this was not applicable for the reasons the Tribunal has found above.
76. There was then a discussion about the non-inclusion of Mr Bell and Mr Fishlock in the pool of those who were at risk of redundancy. Once again this was explained to Mr Daly in the terms that the Tribunal has found above.
77. There was a record that there was consideration of three freelance Senior Surveyor positions who were currently working in construction. This was a query put by Mr Daly (p145). The Respondent indicated that they were content to offer that role to Mr Daly if he were interested in it but that it would come with the terms and conditions of the role. Mr Daly confirmed that he was not interested in that opportunity.
78. The issue of redeployment within the wider group was then discussed and the representative from the People Group, Emma-Jean Smith, provided Mr Daly with a copy of all the other current vacancies within the company and extended the timescale within which he could express an interest in any other opportunities to 28 March (p145). Mr Baybut recorded that by the time of writing the letter on 29 March, Mr Daly had not expressed an interest in any other opportunities. Also at the time of the meeting he recorded that they were waiting for feedback from the Communities' Head of Commercial interview. Mr Daly questioned how come there was this opportunity within the Communities Sector of the business when their turnover was less than the construction sector and Mr Baybut explained that the business plan forecast growth in the Communities Sector.
79. It was also clear from the letter that by the time of or at the meeting, Mr Daly had been given the figures for statutory redundancy. These were discussed with the Claimant. The Claimant was reminded that he remained at risk of redundancy in all the circumstances and that whilst the outcome of the Head of Commercial position interview was awaited, the Claimant was invited to meet with John Craig for a final consultation meeting on 11 April 2018. Mr Daly was also reminded that he could take reasonable time off from work to register with agencies and attend interviews, and that a list of recruitment agencies had been handed to him in the meeting. He had also been told

that should he wish to do so, Mr Daly did not need to attend the office in between his consultation meetings.

80. He was informed that if the Respondent was unsuccessful at redeploying him, the anticipated date of termination would be 13 April 2018 and that a payment in lieu of notice would be given. Finally, he was informed of the support services offered by the Respondent's Employee Assistance Programme and a contact number and details of their services were given with the letter. There had been prior written reference to this Assistance Programme.
81. In the letter to Mr Weymouth similar issues were recorded. The position with him also was that he had had an interview for the Head of Commercial ('Communities') position but the outcome had not yet been made known. However, by the time the letter was written by Mr Baybut on 4 April 2018, it was known that Mr Weymouth had not been successful in progressing to the second interview stage (p319).
82. For similar reasons to those set out in Mr Daly's letter, Mr Weymouth was informed that he was being invited to a meeting with John Craig for a final consultation meeting also on 11 April 2018 (p319). Mr Weymouth was also told about the possibility of taking time off from work and he was also told about the likely termination date if redeployment did not succeed, i.e, 13 April 2018. Finally, he was also informed of the availability of the support services and given the information on how to contact the Employee Assistance Programme (p320).
83. The particular points that Mr Weymouth had raised in his email (p299) were in relation to cost savings that had been made elsewhere in the business; the question of selection and why Terry Fishlock and Richard Bell had not been considered for redundancy, and the question of why Managing Surveyors had not been considered for redundancy.
84. Mr Daly raised in particular the possibility of the Claimants moving into Managing Surveyor role or other some form of Commercial Manager role (in effect bumping); the question of selection and why Terry Fishlock and Richard Bell had not been considered for redundancy – same point that Mr Weymouth raised; freelance Senior Surveyor roles; and redeployment.
85. As the Tribunal has already set out in its findings, these points were all dealt with and answered by Mr Baybut in his letters to the respective Claimants.
86. The Claimants then instructed solicitors who wrote letters on their behalf raising further points on behalf of Mr Daly (p147); and on behalf of Mr Weymouth (p231).

87. The letter on behalf of Mr Daly was dated 4 April 2018. In this letter Ms Kidd of Downs Solicitors accepted that there had been a reduction in turnover but made representations as to why she believed that the redundancy process had not been conducted fairly. She listed five points as to why the process had not been fair and covered the points already referred to above but in addition expressly referred to there having been 'no consideration of bumping'; and referred to the fact that the company was still recruiting, that two new starters joined on the day that Mr Daly was put at risk, and that further new starters were joining on 16 April 2018. In addition, the points about the absence of a pool for selection or selection criteria were made as was the point that there had been no explanation as to why Mr Daly's role had been selected; and that there had been no consideration of putting other management roles at risk. As set out in the Tribunal's findings above, the Tribunal does not accept that this latter point accurately reflected the position.
88. Finally, the point was made by Ms Kidd that Mr Bell was taken on, having worked with the Divisional Director, Paul Fletcher, six months previously and that to Mr Bell's astonishment he was given the job title 'Operations Manager' but he was in practice working directly for Paul Fletcher.
89. This point has already been dealt with above in terms of the allegation that the Respondent tried to disguise the role that Mr Bell was taken on to do.
90. Ms Kidd then stated that Mr Daly believed that the 'real reason for his dismissal was that he refused to artificially inflate forecast figures and was put under considerable pressure to do so'.
91. There was also reference to the company having the practice when they wanted a person to leave, of instructing a recruitment agency to seek work for the employee elsewhere. The Respondent agreed that they used the services of this agency from time to time. However, they disputed that they had asked the agency to contact the Claimants at this point. There was no adequate evidence on which the Tribunal could resolve this conflict in the Claimants' favour, the burden being on the Claimants to establish that there was a link between a desire on the Respondent's part to dispense with the Claimants' services and the contact that was received by the agency. The Tribunal considered that that burden had not been discharged on the balance of probabilities. Even if the Tribunal were wrong about this, the Tribunal did not consider that there was anything inherently unfair or ill-intentioned if an employee was approached by an outside agency. This could after all lead to another employment opportunity and the employee would be at liberty to decide whether to take up the opportunity or not.
92. The point about the Claimant believing that his card was marked after he refused to artificially inflate forecast figures was made in relation to both Mr Daly (p147) and Mr Weymouth (p321). However, the additional element,

which only applied to Mr Daly, was that it was contended on his behalf that Mr Daly had continually raised concerns with Paul Fletcher that he was being set up and that he felt the need to record his own forecast figures as these were significantly changed before they were reported up the line.

93. In the letter on behalf of Mr Weymouth from the solicitors the same points were made about the agency approaching the Claimant (pp321-2).
94. The contents of these letters were discussed at the respective third consultation meetings with John Craig. Both Claimants had the third consultation meeting on 11 April 2018 and Mr Daly had a further meeting with Mr Craig on 18 April 2018. Once again, the Respondent produced notes of the meetings and letters sent to each Claimant subsequently (in respect of Mr Daly pp175-182); (and in respect of Mr Weymouth pp339345). Mr Craig addressed the points raised. These covered grounds which have already been included in the Tribunal's finding above. Specifically, also he made the following points:
  - i. In respect of other savings which the business could make elsewhere, Mr Craig suggested that this did not alter the basis for the decision to make the Claimant's roles redundant. The Tribunal considered that this was a reasonable approach to have taken.
  - ii. The possibility of bumping the Claimants into Managing Surveyor roles. This was rejected by Mr Craig. The reasoning has been set out already above. It was related to efficiency.
  - iii. In relation to alternative employment, the position was that Mr Daly had, at that point, rejected that role.
95. In the case of Mr Weymouth, various points were covered by Mr Craig including:
  - i. The reason why his role had been identified as at risk of redundancy;
  - ii. The decision not to place Managing Surveyors at risk of redundancy;
  - iii. The reason why other 'Commercial Managers' had not been included in the pool – based on the Respondent's conclusion that no one else did similar work to the Claimants;
  - iv. Other cost savings the business could make; and alternative employment.



96. In short, Mr Craig addressed these points again and dealt with any new points and reached conclusions in relation to them that were reasoned and reasonable.
97. Mr Craig confirmed that the conclusion was that each of the Claimants had been selected for redundancy and there being no alternative employment that was suitable, their employment with the company would end on 13 March 2018 and the Respondent would make payments in lieu of their notice period. There was no suggestion that the figures and the calculations in terms of the termination payments were inaccurate.
98. Both Claimants were given the right to appeal and both lodged appeals (p350 in respect of Mr Weymouth and p186 in respect of Mr Daly).
99. The appeal meetings were held separately with Ms Sarah Taylor, Group People Director.
100. The Tribunal noted that although various points were made by Mr Weymouth in relation to his appeal at pages 350-353 in which he covered some of the points already referred to above such as the position of Mr Bell and the telephone call from the recruitment agency, he also referred to the feed-back he had been given following the interview for the 'Communities' job, which identified that he had not shown sufficient enthusiasm and motivation for the job. It was in essence a wide-ranging letter covering various of the matters which had arisen during the redundancy consultation. Towards the end of the letter he made the point (p352) that he believed that the whole process "could and should have been handled differently and the redundancy process could have been avoided, particularly as there were allegedly alternative roles within the business." He continued: "as a result I would request that Osborne reconsider the 'Redundancy Payment' currently being offered."
101. The Tribunal noted that although Mr Weymouth referred to being made redundant when there were alternative roles within the business, he did not identify any alternative roles which he believed were suitable for him as an alternative.
102. In his letter of appeal (pp186-188), Mr Daly argued that he had been made a scapegoat for the reduction in turnover although he acknowledged that there had indeed been a reduction in turnover. He challenged whether there had been a genuine redundancy or whether the redundancy process had been conducted fairly.
103. He went into some detail about his contention that Mr Baybut had put him under increasing pressure bordering on bullying to inflate the figures and make sure that they hit turnover or that there would be 'consequences'. The Claimants failed to establish that there had been any misconduct or bullying

by Mr Baybut. The Tribunal concluded that what the Claimants described were understandable attempts by Mr Baybut to improve and ensure productivity. In reaching this conclusion the Tribunal also took into account the level of seniority of the Claimants within the Respondent organisation and considered that it was to be expected that they would be put under appropriate pressure to increase turnover. The Claimants however did not establish on the evidence that Mr Baybut had artificially increased the projected turnover as was alleged. Within the bundle the Respondent included a considerable number of documents about the business and the turnover figures.

104. No specific point was made by the Claimants in support of any suggestion that the meeting in front of Mr Craig was not conducted appropriately. In any event the Tribunal considered that, as at the earlier meetings, human resources had prepared a script with appropriate prompts for the manager. Mr Craig indicated that he had not felt bound to follow it word for word but in any event the Tribunal found that the letter sent to the Claimants subsequently by Mr Craig dated 20 April 2018 to Mr Daly (pp175-182) and 13 April 2018 to Mr Weymouth (pp339-345) confirmed that the meeting was conducted appropriately and that all the various issues raised by the Claimants had been discussed and addressed. The explanations provided by Mr Craig as to why any alternative proposals put forward by the Claimants could not be accepted were reasonable and findings in relation to these have already been set out above. Although Mr Craig reached the same conclusions as Mr Baybut earlier, he set out even more detail in relation to the individual points which the Claimants and their solicitor had made. Importantly, during the meeting in front of Mr Craig in the context of the conversation with Mr Baybut in which he said that there would be 'consequences' at staff briefings, Mr Craig recorded that Mr Daly acknowledged that it was not bullying by him although he said that it had felt 'inappropriate'.
105. He set out in relation to alternative employment as well that Mr Daly had succeeded in reaching the second stage of the selection process which was to have taken place in early April but that he did not respond until the day of the second potential date when he informed the Respondent that he would not be progressing with the interviewing process. Despite this, this was discussed with Mr Craig at the meeting on 11 April 2018 and Mr Craig tried to reassure Mr Daly that this was a genuine role that the business wanted to fill. He encouraged Mr Daly to meet with Mr O'Shea again. He was urged to reconsider his position and to pursue this vacancy. He effectively therefore extended the consultation period also to allow Mr Daly to review his position. Further, Mr Daly was provided with an updated current vacancy list at the meeting on 11 April.
106. Mr Daly emailed Mr Craig on 12 April to say that he did not consider the potential job roles within Communities to be suitable alternatives to his

current role. On hearing this Mr Craig reconvened the final consultation meeting on 18 April 2018. At the reconvened meeting there was further discussion of the possibility of positions in the Homes business. Mr Daly was recorded in the letter as saying that in reality with the Commercial Director in place, the role of Commercial Manager in the Homes business, which was considerably smaller than Construction, was 'little more than a senior surveying role.' This, the Tribunal considered, was an indication also that Mr Daly would not, on the balance of probabilities, have wanted to take a role which was essentially a senior surveyor role in the construction department either.

107. At the meeting Mr Craig had expressed his disappointment about this and recorded in the letter that he had told Mr Daly that he genuinely felt that this was an opportunity to be part of the leadership team to deliver the growth in the Homes business. This was consistent with the Respondent's evidence at the hearing and it appeared to the Tribunal that this was a suitable alternative which Mr Daly could have taken up.
108. The letter also dealt with all the formalities to do with the termination of the employment. These are not disputed.
109. Following the appeal meeting Ms Taylor wrote to Mr Daly by letter dated 8 May 2018 (pp210-211) to inform him that she was in the process of reviewing the notes of the meeting. She indicated that if Mr Daly wanted her to address some of the points that he raised in his appeal with a view to getting decisions changed and getting him reinstated, she would need more time in order to conduct further meetings and finalise her thoughts on this. However, she referred to the fact that at the meeting Mr Daly's suggestion was that the only outcome that he wanted from the appeal process was a more generous redundancy package. She clarified to him that the purpose of the appeal process was to determine whether or not the decision to make an employee redundant was correct and/or whether it should be changed, not to determine any redundancy package.
110. She then touched on points that he had raised about 'bumping' and asked for clarification about whether he wanted the Respondent to consider the Claimant for any suitable, more junior roles in the business. She clarified for him also that this would mean making another employee redundant rather than himself and that if he were to be given the role of the bumped employee, it would be at the salary and package level of a Managing Surveyor which was at a lower level than the role that he had been dismissed from. She asked for clarification of these points by 11 May 2018.
111. Ms Taylor also referred to the point being made about Mr Bell. Without making any comment at that stage about whether the Claimant should have been offered the job that Mr Bell was offered, she asked for confirmation from Mr Daly whether he would like to be considered for that job or indeed

any other job that had appeared on the Respondent's vacancy lists over the preceding few months. She also gave the Claimant a list of recent new hires and promotions, and stated that she understood that they had all appeared on the vacancy lists and that copies had been given to Mr Daly. However, she indicated that if there were any roles there which he felt he should have been considered for, she wished him to let her know. She posited the possibility that she could arrange for Mr Daly to be considered for these roles as part of the appeals process. However, quite reasonably, it appeared to the Tribunal, she asked for confirmation from Mr Daly that he would be prepared to accept the different, lower salary and benefits package reflective of the role.

112. The list included both starters and internal promotions since 1 January 2018 and a list of agency workers since 1 January 2018 (p211).
113. Mr Daly responded by email sent on 10 May 2018 (pp212-213). The first point he addressed was the apology in advance given by Ms Taylor for her inability to deal with the appeal by 11 May because of the outstanding issues that she had asked to be clarified. There were also, as she noted, a number of potential issues.
114. He disputed that the only outcome that he wanted was a more generous redundancy package and reiterated that he believed that the process was unfair in that he had been made a scapegoat to protect others. It was in that context that he had responded at the appeal that a successful outcome for him would be to be compensated accordingly for this. In short also in relation to the remaining points about alternative roles, he indicated that too much water had flowed under the bridge and that he did not have sufficient confidence in the Respondent now to see how they could work together with them going forward. He asked Ms Taylor to inform him of the outcome by 16 May as he considered that the resolution was unduly delayed. He also informed Ms Taylor that he had already commenced the ACAS process and instructed a solicitor, and that if he did not receive a response by 16 May, he saw no alternative other than to commence legal proceedings.
115. Ms Taylor held appeal meetings with both Claimants and carried out a thorough appeal process including checking that the CEO of Osborne Group agreed with the redundancy rationale. Then she prepared detailed responses to the Claimants' appeal letters answering the points that they had raised (p226 in respect of Mr Daly and p391 in respect of Mr Weymouth).
116. In relation to the issue of bumping, the Tribunal accepted Mr Soanes' submission that there is no general obligation on an employer to consider bumping. He relied on the Judgment of the Court of Appeal in the case of **Samels v University of Creative Arts** [2012] EWCA Civ 1152 in which it was held that it was not compulsory for an employer to consider whether it

should bump an employee but that if an employer took the route of bumping another employee, it could be very detrimental to employee relations. The Court of Appeal stated: "It is in essence a voluntary procedure": paragraph 31 of the Judgment. In this respect therefore, the Tribunal considered that not only did the Respondent consider bumping and take quite considerable steps along that line as evidenced in the email from Ms Taylor to Mr Daly referred to above, but they also decided not to bump the Managing Surveyors for good reason. The Tribunal considered that given the Claimants very limited attempts to take up alternative roles within the Respondent, it was unlikely that even if the Respondent had considered at an earlier stage bumping one of the Managing Surveyors that they would have taken up that role at a lower rate of pay. It was also lower status within the Respondent.

117. In summary therefore, the Tribunal was satisfied that there was a genuine redundancy situation based on the down-turn in business and indeed this was accepted both by the Claimants in their representations during the employment and also by the solicitor on their behalf. Next the Tribunal was satisfied that a reasonable decision was made about the selection pool and that there was no need for selection criteria because of the nature of the pool.
118. The Tribunal was further satisfied that the Claimants were consulted appropriately and fairly in a way which was consistent with the principles which are long established and set out in the case of **Williams v Compair Maxam** [1982] ICR 156. Further, the Claimants were consulted about alternative vacancies and given the opportunity to explore those both within the Respondent and within other companies in the group. The Tribunal was satisfied that other than the Head of Communities positions which the Claimants were given the opportunity to apply for, there were no other alternative vacancies which were suitable.
119. In all the circumstances, the Respondent gave the Claimants opportunities to appeal and conducted the appeals in a thorough and appropriate manner. The dismissals were upheld at the appeal and the Tribunal considers that the decision to dismiss the Claimants for redundancy was reasonable.
120. In the circumstances, the Tribunal did not find that there were any procedural errors and therefore it was unnecessary to consider the principles in the case of **Polkey v A E Dayton Services Limited** [1987] ICR 142.
121. The claims of each of the Claimants was not well founded and was therefore dismissed forthwith.

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Employment Judge Hyde  
Reserved Judgment and reasons  
Dated: 5 February 2020

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