



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4112571/2018 and 4112644/2018

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Held in Glasgow on the 8, 9, 10, 11 and 12 July 2019

Employment Judge Lucy Wiseman  
Members Fiona Paton  
Neelam Bakshi

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**Ms J Smith**

**First Claimant  
Represented by:  
Mr M O'Carroll  
Advocate**

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**Ms A Paton**

**Second Claimant  
Represented by:  
Mr M O'Carroll  
Advocate**

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**Securitas Security Services (UK) Ltd**

**Respondent  
Represented by:  
Mrs J Young  
Counsel**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claims

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#### REASONS

1. The claimants presented claims to the Employment Tribunal on the 13 and 20 July 2018 respectively asserting they had been unfairly dismissed and discriminated against because of the protected characteristic of sex.
2. The respondent entered a response in which it admitted the claimants had been dismissed for reasons of redundancy but denied the dismissal was unfair, and denied the allegations of discrimination.

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**E.T. Z4 (WR)**

3. A preliminary hearing to consider case management issues took place on the 24 October 2018. The claimants confirmed the fairness of the dismissal was challenged on the grounds of the composition of the pool, the selection criteria used and the role of the line manager, Mr Cuthbertson, in the process. The claimants further clarified, after the preliminary hearing, that the sex discrimination complaint was one of direct discrimination in which it was said the less favourable treatment was being included in the pool for selection for redundancy and ultimately being made redundant. The comparators were named as Greig Wilson and Craig White, whom it was said, had been removed from the pool for selection to protect them because they were men.
4. We heard evidence from Mr Danny Williams, Chief Operating Officer; Ms Sarah Hayes, Head of HR; Mr Richard Cuthbertson, Director of Key Accounts, and the claimants' line manager; Mr Mark Allen, National Operations Manager, who heard the claimants' appeals and we also heard from the claimants.
5. We were referred to a jointly produced folder of documents.
6. We, on the basis of the evidence before us, made the following material findings of fact.

#### 20 **Findings of fact**

7. The respondent is in the business of providing security officers to provide security/surveillance services to a variety of clients' premises on a nationwide and global basis.
8. Ms Smith commenced employment with the respondent on the 21 May 2007. She was employed as a Branch Manager. Ms Smith's contract of employment was produced at page 332. Ms Smith earned a salary of £34,144.50, together with a car allowance of £7200 and private medical insurance.
9. Ms Paton commenced employment with the respondent on the 29 August 2006. She was also employed as a Branch Manager. Ms Paton's contract of

employment was produced at page 482. Ms Paton earned the same salary and allowances as Ms Smith.

10. The global Securitas business decided in 2015 to focus on protective security solutions rather than traditional manned guarding. This meant the respondent would endeavour to introduce and sell technology to every client rather than providing security guards. A key part of this process was the introduction of the Protective Services Branch Manager (PSBM) role. This role was introduced in Europe and, in 2017, the UK business decided to adopt it.
11. The Executive management team in the UK, which includes Mr Danny Williams, Chief Operating Officer, held discussions during 2017 regarding the failures of the existing Branch Manager role and the need to restructure the business.
12. The structure of the business within the UK was made up of branches, with each branch having a Branch Manager and operational support. There were six Branch Managers in Scotland (which was part of the North region). The Executive management team proposed to delete the Branch Manager role and introduce the new PSBM role which would concentrate on the management and conversion of customers along with profit and loss responsibility for the branch, and a new Service Delivery Manager (SDM) role which would concentrate on the management and welfare of the security officers, without profit and loss responsibility. The revised structure in Scotland was to have 2 PSBM roles and 6 DSM roles.
13. Ms Sarah Hayes, Head of HR, became involved in the restructuring proposals in May 2017. She engaged an external company to help identify the key competencies to be looked for in a candidate for the PSBM and SDM roles. The respondent was in the position of creating more jobs than they currently had employees, and accordingly it was decided to include external candidates in the process of assessment. No external candidate would be offered a job in preference to a suitable internal candidate.
14. The respondent kept the trade unions updated regarding the proposals and consulted in August 2017 regarding the creation of the new roles, the pools

for selection and the selection criteria. The trade union is recognised, but not in respect of all parts of the business (for example it is not recognised in Scotland).

- 5 15. The respondent decided in or about September 2017 to proceed with their proposals.
16. The respondent decided, based on Ms Hayes' recommendation, that the selection for the PSBM and SDM roles would include a competency interview, a presentation, a psychometric test (the wave test) and an aptitude test (the swift test).
- 10 17. Ms Hayes was responsible for putting the assessment panels in place for the interviews and the presentations. She ensured there were 3 people on each panel, being an Area Director, an HR professional and another Area Director with the option of a member of the executive management team joining the panel. Ms Hayes organised assessors based on their availability and  
15 geographic location, and then slotted candidates into time slots. Ms Hayes did not know many candidates involved in the process, and did not know the claimants. Ms Hayes also ensured that a person being assessed would have different panels for their interview and their presentation.
- 20 18. The presentation scoring sheet for Mr Neil Mosson (produced as an additional document during the hearing) showed only two panel members present. Ms Hayes acknowledged this but insisted there would have been three members on the panel.
- 25 19. All candidates undertook the Swift test, but the respondent was informed that the scores did not accord with the norm in the country and instead of following the usual graph for scores, the scores were instead clustered at the bottom. The respondent decided the scores were not meaningful and omitted them from consideration.
- 30 20. Mr Richard Cuthbertson, Director of Key Accounts, and the claimants' line manager, was responsible for heading up the process in the North region for Mr Danny Williams. Mr Cuthbertson held a staff meeting on the 3 October

2017 to give notification that there was to be a reorganisation and that those in a Branch Manager position were at risk of redundancy.

21. Mr Cuthbertson took staff through a series of slides (produced at pages 185 – 221) which informed them about the reason for the restructure, the creation of the new roles, the assessment and selection process, the consultation process and the timeline.
22. The claimants also received an emailed letter dated 3 October 2017 (Ms Smith at page 340 and Ms Paton at page 493). The letter confirmed the claimant's position was at risk of redundancy and confirmed the first consultation meeting would take place on the 9 October. The letter also directed employees to look at the Sharepoint folder where the information produced at pages 196 – 258 was available.
23. An Operations Organisation chart for the North was produced at page 118. It was dated 30 May 2017, and showed there were six Branch Managers in Scotland: Ms Smith, Ms Paton, Mr Wilson, Mr White, Mr Adam and Mr Atsegoh. That position changed prior to the pool for selection for redundancy being announced in October 2017.
24. Mr Greig Wilson was a Branch Manager (mobile). He developed and expanded his role by mining data and introducing initiatives to, amongst other things, reduce costs on travel and sickness and other matters. Mr Wilson compared and analysed the performance of his area with another area and found that his area performed better. Mr Williams was of the opinion the whole region could benefit from the work Mr Wilson had carried out and he was keen for other branches to adopt the good practice. Mr Williams put Mr Wilson into others areas and found they improved and got better results not only in the area but also in the region.
25. Mr Williams sought authorisation on the 25 July 2017, from Brian Rils Nielsen, Country President, (page 137) for a change to Mr Wilson's role (Regional Mobile Lead – North) and a salary increase of £2500 per annum backdated to 1 July 2017.

26. Mr Wilson's role continued to develop and on the 1 November 2017 (page 264) authorisation was given for Mr Wilson's post to become Regional Mobile Compliance Manager on a salary of £45,000.
27. This role was not advertised because it developed out of the work done by Mr Wilson.
28. Mr Craig White applied for the role of National Accounts Director, which had been advertised on the internal vacancy list sent to all employees in June 2017. The closing date for applications was the 17 July 2017. Mr White was one of a number of candidates who applied and was interviewed. He was offered the job by letter of the 13 September 2017 (page 179). The salary for the post was £50,000.
29. Mr Greig Wilson and Mr Craig White were not in the pool for selection for redundancy because they were no longer Branch Managers at the time the redundancy was announced.
30. The pool for selection for redundancy comprised Ms Smith, Ms Paton, Mr Greg Adam and Mr Victor Atsegoh; and, Mr Brian Doherty, who had been employed as a Solutions Development Manager.
31. Mr Greg Adam scored higher than the claimants and was offered and accepted the post of PSBM. None of the other candidates in the pool for selection attained the cut-off score of 90 for the post of PSBM. The second PSBM post, which was based in Aberdeen, was in the circumstances offered to an external candidate.
32. Mr Doherty and Mr Atsegoh did not achieve the cut off score for the posts for which they had applied. They were accordingly in the position where they were to be made redundant. The respondent's Redundancy policy (page 112) provides that "*Securitas will make every effort to redeploy to a suitable alternative work any employee who is selected for redundancy.*"
33. Mr Doherty and Mr Atsegoh were offered the post of SDM as suitable alternative employment to avoid redundancy, subject to them undertaking training in the areas which had been identified as weak in the assessment.

34. Ms Smith and Ms Paton each attended a first consultation meeting with Mr Cuthbertson and Ms Lynn Sneddon, HR on the 9 October 2017. Mr Cuthbertson had been provided with a checklist of discussion points to go through at each meeting (page 344) to ensure all relevant information, including the selection criteria, was provided and to seek the initial views and comments from each employee.
35. Ms Smith completed an Expression of Interest form (page 347) in which she indicated she was interested in her first choice position of PSBM, the second choice position of SDM (static) and third choice position of SDM (mobile).
36. Ms Smith was invited to attend for assessment on the 2 November. The scoring of Ms Smith's presentation was produced at pages 367 – 375; and the scoring of her interview was produced at pages 378 – 384. Ms Smith scored a total of 75 points. The cut-off score for the PSBM post was 90, although internal candidates who scored between 80 and 90 would, in the absence of other suitable alternative candidates, be offered a second interview for the post.
37. Ms Smith's presentation panel comprised Mark Corris, who scored her 12; Ron Lea, who scored her 8 and Lynn Sneddon who scored her 11. The interview panel comprised Dany Williams, who scored her 23; Susan Calvert (HR), who scored her 18; Richard Cuthbertson, who scored her 20 and David Lee who scored her 21.
38. Ms Smith attended a second consultation meeting with Richard Cuthbertson on the 29 November 2017 (page 413). Ms Smith was advised by Mr Cuthbertson that her score did not meet the cut-off point of 90 for the PSBM role. Ms Smith had met the cut-off point for the SDM role, and so was offered that role in Glasgow on a salary of £32,000 and a car allowance of £5400. Ms Smith agreed to undertake the role for a 4 week trial period, but did inform Mr Cuthbertson that she was not happy and considered the role to be a demotion.
39. Ms Smith raised with Mr Cuthbertson the fact she considered her interview had been "derailed" by Mr Cuthbertson rolling his eyes at some of her answers.

40. Ms Smith also questioned Mr Cuthbertson regarding the Mobile Compliance Manager role. Mr Cuthbertson was not able to answer her questions at that time, and so agreed to investigate and feed back to her. Mr Cuthbertson did this at the last consultation meeting on the 15 December, when he informed Ms Smith that the role had been given to Greig Wilson because he had already been doing it prior to the redundancy process starting.
41. The third and final consultation meeting took place on the 15 December (page 416). Ms Smith confirmed that in relation to the SDM role she would “go with the flow” at the present time.
42. Ms Smith received a letter dated 22 December (page 420) confirming her position as an SDM (static). The letter confirmed the post would commence on the 1 January 2018 and enclosed a copy of the contract of employment. The letter further confirmed the claimant had a 4 week trial period in the role and that she retained her right to a redundancy payment should it become apparent during the trial period that the role was deemed not suitable by either party.
43. Ms Smith emailed Ms Sneddon and Mr Cuthbertson on the 26 January (page 430) to advise that she could not accept the SDM role because her salary had been reduced, her car allowance had been reduced, her healthcare had been withdrawn, and her annual leave and sick leave entitlement had been reduced, effectively demoting and deskilling her.
44. Mr Cuthbertson responded (page 431) to confirm the claimant’s employment would terminate by reason of redundancy on the 20 April 2018 (the claimant was required to work 12 weeks’ notice). A statutory redundancy payment of £7,335 was paid to the claimant.
45. Ms Smith exercised her right to appeal against the termination of her employment (page 437). Her appeal focussed on the pool for selection being incorrect; the assessment process being flawed and the selection process favouring male candidates over female candidates.



46. The claimant's appeal was heard by Mr Mark Allen on 27 March 2018. The claimant was accompanied by her trade union representative, Mr Martin Doran. The claimant read out a statement (page 453) which expanded on her points of appeal, which included (i) the fact Grieg Wilson and Craig White had not been included in the pool for selection; (ii) the interview being derailed by Mr Cuthbertson rolling his eyes; (iii) Mr Brian Doherty and Mr Victor Atsego were not successful in getting any roles, but were subsequently offered the SDM role and (iv) the process favoured men over women and an example of this was Janet Brown who had been demoted to SDM.
47. Mr Allen, following the appeal hearing, emailed Ms Sneddon, HR, (page 323) seeking information regarding the points raised by Ms Smith and copies of documents. Ms Sneddon responded on the 6 April (page 322).
48. Mr Allen, having investigated the appeal pointed raised, wrote to Ms Smith by letter of 30 April (page 468A) to confirm his decision to dismiss the appeal. Mr Allen set out each of the points raised by the claimant and his response. Mr Allen confirmed the role to which Craig White was appointed had been advertised internally (prior to the redundancy process) and a clear selection process followed. He further confirmed that Greig Wilson's promotion had been a natural progression of his role, and was a formalisation and expansion of the duties he had already been performing prior to the branch manager team being placed at risk of redundancy.
49. Mr Allen further confirmed the structure of the assessment was "*designed so that an individual could not bias the scoring: the presentation and interview were each conducted with a panel, and where possible independent assessors of whom you would not have had a direct working relationship with.*"
50. Mr Allen understood from Ms Smith that she alleged Mr Cuthbertson had rolled his eyes at some of her answers during the interview, and that Mr Williams would have seen this. Mr Allen spoke with Mr Williams to investigate this allegation. He confirmed in the letter to Ms Smith that Mr Williams did not

recall Mr Cuthbertson doing this, and that he would have dealt with the matter if he had noticed it.

51. Mr Allen confirmed, in relation to Mr Doherty and Mr Atsegoh, that they had not achieved the cut-off point for the roles for which they had applied and were accordingly in a redundancy position. The respondent's policy is to avoid redundancy where possible and redeploy into suitable vacancies. Mr Doherty and Mr Atsegoh were offered the SDM role as suitable alternative employment on condition they undertook training in the areas identified as being weak by the assessment.
52. Mr Allen spoke with Janet Brown to establish what had happened to her during the restructuring. Mr Allen could not disclose details of Ms Brown's circumstances but confirmed the change of role was not a consequence of her gender.
53. Ms Brown had been promoted to the post of Area Director but had subsequently requested to be moved to the role of Area Manager for personal reasons. Ms Brown's post was part of the restructuring and she was placed in a pool for selection for redundancy. Ms Brown was not successful in gaining a PSBM post and accepted an SDM post.
54. Ms Smith commenced alternative employment as a Project Co-Ordinator on the 10 September 2018. The claimant is earning a net weekly pay of £431.17.
55. Ms Paton completed an expression of interest form (page 497) in which she designated the PSBM role as her first choice; the SDM (static) role as her second choice and the SDM (mobile) role as her third choice.
56. Ms Paton was invited to attend for interview on 2 November and the scores for her interview were produced at pages 519 – 527, and the scores for her presentation were produced at pages 547 – 560. Ms Paton scored a total of 67 points.
57. Ms Paton's interview panel comprised Ron Lea, who scored her 18; Lynn Sneddon, who scored her 19; Mark Corris who scored her 19 and Susan Calvert who scored her 20. The presentation panel comprised Danny

Williams, who scored her 15; David Lee, who scored her 15 and Richard Cuthbertson who scored her 9.

58. Ms Paton attended a second consultation meeting with Mr Cuthbertson on 29 November (page 561) where she was advised her score had not met the cut – off point of 90 for the PSBM role. Ms Paton was offered the SDM (mobile) role because she had previous experience managing mobile. Ms Paton objected to this because she did not want to do the mobile role.
59. Mr Cuthbertson spoke with Mr Victor Atsegoh after the second consultation meeting with Ms Paton, and he agreed to switch roles.
- 10 60. The third consultation meeting took place on 11 December (page 564) and Mr Cuthbertson offered Ms Paton the SDM (static) role. Ms Paton confirmed she would undertake a trial period of this role and decide during that time whether to continue in the role.
- 15 61. Ms Paton received a letter from Mr Williams dated 22 December (page 568) confirming the role of SDM (static). The letter confirmed Ms Paton was entitled to a 4 week trial period and retained the right to a redundancy payment should it become apparent during the trial period that the role was not suitable. The letter included Ms Paton's contract of employment for the new role, which confirmed a salary of £32,500.
- 20 62. Ms Paton sent an email to Mr Cuthbertson and Ms Sneddon on the 25 January (page 578) to confirm she had completed the trial period for the SDM role, but wished to accept redundancy and leave the company.
63. Mr Cuthbertson responded to that email (page 579) and confirmed a redundancy payment of £6112.50 would be paid upon the termination of employment on 13 April 2018.
- 25 64. Ms Paton exercised her right to appeal against the termination of her employment (page 581). The grounds of appeal were (i) the pool for selection for redundancy and the fact Greig Wilson and Craig White had been removed from the pool; (ii) the constitution of the pool for selection for the post of SDM was flawed and (iii) discrimination on the grounds of sex.
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65. Ms Paton could not attend the appeal hearing because it was the day after she started a new job. Ms Paton prepared a statement (page 595) setting out an explanation of the grounds of appeal. This was handed to Mr Allen by Ms Smith. The expanded grounds of appeal included an allegation that Mr Williams had “derailed” her presentation when he had said to her “I’m over here”. Ms Paton further alleged the scores had been manipulated to suit the “predetermined” candidates.
66. Mr Allen investigated the points raised by Ms Paton and responded as set out above. He confirmed he had spoken to Mr Williams who had confirmed that during the presentation Ms Paton had had her back to the managers because she was reading off the screen. This gave the impression she had not prepared for the presentation. Mr Williams had requested the claimant make her presentation to him so that he could assess her skills.
67. Ms Paton commenced alternative employment on the 26 March 2018 as a Practice Manager for a GP surgery. She is earning £439.29 net per week. Ms Paton has applied for a Practice Manager post for a group of surgeries, and if successful, this would bring a salary of £37,000.

### **Credibility and notes on the evidence**

68. Ms Smith invited the tribunal to find the post of PSBM was simply another name for the post of Branch Manager. She believed Grieg Wilson and Craig White had been removed from the pool for selection for redundancy to protect them because they were men. Ms Smith argued that if the Regional Compliance role had been advertised she would have applied. She also argued that Craig White had been encouraged to apply for the role of National Accounts Director and mentored by Richard Cuthbertson and Lynn Sneddon. Ms Smith told the tribunal she had been working with Mr White when he accidentally opened his application for the role. He said “*you weren’t meant to see that*”. Ms Smith considered this supported her position that he had been given a heads up to apply and told to keep it secret. Ms Smith told the tribunal that if she had known of the redundancies, she would have applied for the National Accounts Director role.

69. Ms Smith considered Mr Cuthbertson should not have been on the assessment panel: he had rolled his eyes at some of her answers, and influenced the other panel members. This had “derailed” her and affected her performance. She also felt it had been unfair to have four people present at her interview. Ms Smith alleged Mr Cuthbertson had previously made sexist comments (for example, why have a dishwasher when I have a wife) and thought women should be administrators and not hold promoted posts. She also alleged Mr Cuthbertson had made racist comments regarding the recruitment of employees from ethnic minorities.
- 10 70. Ms Smith also alleged Mr Greg Adam had tried to apply for a role with Oracle in order to avoid the redundancy, but had been told he was too late as the redundancy process had already started. Ms Smith did not believe this was correct and asserted Mr Adam had not been allowed to apply for the Oracle post because he was to be given a PSBM post rather than a woman.
- 15 71. Ms Smith also asserted the reason why she had not been scored highly was because she had been the subject of a race discrimination complaint. This matter was not pursued beyond being in the claimant’s witness statement.
- 20 72. Ms Paton argued the same points. She considered she would have been well placed for the Regional Compliance role because she had experience of the Branch Manager mobile role. She told the tribunal that Mr Wilson had told her that he had been taken into a room and told his existing job was finished but that he had a new one. Ms Paton considered Mr Williams’ comment at her presentation had “derailed” her, and that Mr Lee had asked the same question of her repeatedly and in a belligerent manner.
- 25 73. We found the claimants to be, on the whole, credible and reliable witnesses. Ms Paton in particular gave her evidence in an honest and straightforward manner. Ms Paton was willing to accept or concede points where it was appropriate to do so, whereas Ms Smith held to her position. For example, the claimants maintained Craig White should have been in the pool for selection even though by the time of the redundancies, he held the position of National Accounts Director which was not at risk of redundancy and even though they
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acknowledged that post had been advertised internally and was a post for which they could have applied had they wanted to.

74. The claimants challenged the evidence of Ms Hayes that Mr Doherty and Mr Atsegoh had been offered the post of SDM subject to training. They argued training had not been given to the men. We could not accept this aspect of the claimants' evidence because it was not supported by any evidence to explain to the tribunal how the claimants could know this.
75. The claimants also argued the role of PSBM was simply another name for the Branch Manager role. We could not accept that position because we preferred the respondent's evidence, supported by the Job Descriptions, that the PSBM role was a promoted post which carried an increase in salary. We considered we were supported in that conclusion by the fact the claimants told the tribunal that they believed Mr Cuthbertson did not "*want women in promoted posts*" and this could only have referred to the PSBM post.
76. We deal with all of the points raised by the claimants below.
77. There was a theme running through the evidence of the claimants and the cross examination of the respondent's witnesses that Mr Victor Atsegoh, who is of African origin, was also deliberately scored poorly because of his race. The claimants did not bring forward any evidence to support what they told the tribunal and did not invite the tribunal to draw an adverse inference from the circumstances of Mr Atsegoh. We have not referred to this in our findings of fact or our discussion below because it was not material to the issues before this tribunal.
78. We also found the respondent's witnesses to be credible and reliable. Mr Williams sat on approximately 16 panel selections. He stressed the importance of the PSBM role, because that role was seen as key to the success of the company.
79. Mr Williams readily acknowledged that he had said to Ms Paton, during her presentation, "*I'm sat over here, can you present to me*". Ms Paton had been standing with her back to the panel reading her presentation from the screen

when Mr Williams made the comment. Mr Williams acknowledged he has a loud/strong voice, but he had not thought the comment off-putting and had not noticed Ms Paton appearing derailed. He made the comment because he wanted Ms Paton to make her presentation to him. The set up of the room had been the same for everyone but Ms Paton was the only who had faced the screen.

80. Mr Williams told the tribunal he had not been aware of any eye-rolling by Mr Cuthbertson, and as the members of the panel had been sitting in a line, he could not understand why Ms Smith thought he would have seen it.

81. Mr Williams accepted Mr Lee had asked a similar question 2 or 3 times because the answer given had not been in line with the question. Mr Williams had not considered there to have been anything untoward in Mr Lee's manner.

82. Mr Williams was asked about the claimants' suggestion they could have applied for the Regional Compliance role if it had been advertised. Mr Williams responded by stating that if the claimants had shown the same initiative as Mr Wilson, they would have been offered the same opportunities. The information used by Mr Wilson had been available to all Branch Managers, but only he had had the initiative to use it and develop this into a new role. This was a situation where Mr Wilson had created the role he now occupied rather than a situation where there was a role to be filled.

83. We found Mr Williams to be a credible and reliable witness, who gave his evidence in an honest and straightforward manner without seeking to embellish or overstate what had happened.

84. Ms Hayes was the HR person responsible for project managing the restructuring. Ms Hayes made all the arrangements for the composition of the panels, based on availability and geographic location, and slotted employees into time slots. The aim of the exercise was to have candidates interviewed by different panels of 3 or 4 people, where the candidates did not have the same panel for their interview and presentation and where the candidates did not have a direct working relationship with all members of the panel.

85. Ms Hayes was asked about the document produced for Neil Mosson's interview which recorded only two names for the panel. Ms Hayes responded "*there were no 2 person panels*". It was first time Ms Hayes had seen the document and so she could not respond further.
- 5 86. Mr Cuthbertson denied the allegation that he had rolled his eyes or done anything else, like shake his head, to make it difficult for Ms Smith. He also denied he was given to making sexist comments, and denied he was part of a company which favoured men. Mr Cuthbertson noted in response to these allegations that his scores had not been the lowest. It was suggested to him  
10 that Ms Calvert, HR, had taken a lead from the men to ensure that Ms Smith was scored down. Mr Cuthbertson absolutely rejected that suggestion and noted Ms Calvert is a very experienced HR professional with 25/30 years' experience.
- 15 87. The specific allegations made by the claimants, in terms of the sexist and racist comments alleged to have been made by Mr Cuthbertson, were not put to him in cross examination. Mr Cuthbertson was asked generally if he was given to make sexist comments, and whether he had made sexist comments.
- 20 88. Mr Cuthbertson acknowledged Mr Lee had asked a question 2/3 times but had done so in a normal manner. The members of the interview panel had "*touchpoints*" to look for and which candidates had to refer to: if they did not they were scored accordingly.
89. Mr Allen noted that females had scored highly in the process and been appointed to PSBM roles; he also noted that the person with the highest score in the business was a woman.
- 25 90. The tribunal heard evidence regarding the post of PSBM in Aberdeen, which was offered to an external candidate. The claimants suggested they had simply applied for a PSBM post, of which there were two in Scotland, and there had been no question of it being the PSBM post in Glasgow or the PSBM post in Aberdeen. The claimants argued that if they had been offered the  
30 PSBM post in Aberdeen they would have accepted it. We have not included this evidence in our findings of fact, or above, because it appeared an



academic argument in circumstances where neither claimant scored 90 or more to be offered the post, or 80 – 90 in order to be offered a second interview.

### Respondent's submissions

- 5 91. Mrs Young submitted the reason for dismissal in this case was redundancy. She referred to the terms of section 98(2)(c) and section 139 of the Employment Rights Act. Mrs Young also referred the tribunal to **Shawkat v Nottingham City Hospital NHS Trust No 2 2001 IRLR 562** where the Court of Appeal followed the House of Lords decision in **Murray v Foyle Meats**  
10 **1999 IRLR 562**. Mrs Young submitted the creation of the PSBM was not just a change in job title, but a promotion which was reflected in the higher salary. The skills and attributes of the PSBM were different to those of the Branch Manager.
- 15 92. It was submitted that should the tribunal consider there had not been a diminished requirement for work of a particular kind, and therefore no redundancy, there was no dispute regarding the fact there was a reorganisation and the role of Branch Manager was deleted and the duties split between the PSBM role and SDM role.
- 20 93. Mrs Young referred the tribunal to the cases of **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439** and **Williams v Compare Maxam Ltd 1982 IRLR 83** with regards to the reasonableness of the decision to dismiss.
- 25 94. The claimants believed their dismissal was unfair because (a) two male managers were excluded from the pool for selection; (b) the composition of the panel was unfair and (c) the claimants were discriminated against because of their sex when they were included in the pool for selection for redundancy, made redundant and not considered for the alternative roles obtained by Mr Wilson and Mr White.
- 30 95. Mrs Young referred to the cases of **Taymech v Ryan 1994 EAT/663/94** and **Capita Hartshead Ltd v Byard 2010** where some guidance had been given regarding the extent to which an Employment Tribunal could challenge the

pool of potential redundees chosen by the employer. It was submitted that the pool for selection included all Branch Managers in Scotland: at the time the pool was formed, neither Greig Wilson nor Craig White were Branch Managers, nor were they going to be placed into one of the new positions because they had both secured alternative employment.

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96. The **Byard** case confirmed that the test to be applied when looking at the pool is that of the reasonable responses test. In **Morgan** it was recognised that in a situation where the employer is going to appoint to new roles, the employer's decision must of necessity be forward-looking. This, it was submitted, supported the respondent's position that the pool was irrelevant to circumstances where there was a reorganisation and new and different jobs were created.

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97. Mrs Young referred the tribunal to the case of **Ralph Martindale & Co Ltd v Harris 2007** where the EAT said "*the question for the tribunal was whether the selection process, including the interview, met at least some criteria of fairness.*" It was submitted the PSBM role was a new senior role and the use of interviews and presentations to identify the best candidates for the jobs was reasonable and met the criteria of fairness.

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98. The claimants did not seek to challenge the criteria in themselves: they challenged the composition of the panel. Mrs Young submitted the members of the panels were more senior than the claimants and all had experience of recruitment. There was also an HR business partner on the panel to provide experience. Both claimants challenged the presence of Mr Cuthbertson on their panel. Mrs Young invited the tribunal to prefer the evidence of Mr Cuthbertson when he denied having rolled his eyes or shaken his head. She further invited the tribunal to have regard to Mr Cuthbertson's scores, which did not support what Ms Smith was saying. Mr Cuthbertson did score Ms Paton low for her presentation, but explained this was because she was jumping around in her presentation and did not provide a mobilisation matrix, which had been vital.

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99. Mrs Young submitted that a review of the scores would disclose there was no correlation between a male assessor giving lower marks than a female assessor.
100. Ms Paton complained that Mr Lee acted belligerently towards her by asking a question over and over again. This however was not mentioned in the consultation notes. Mrs Young again invited the tribunal to prefer the evidence of Mr Cuthbertson and Mr Williams.
101. The claimants also argued that it had been unfair to offer Mr Doherty and Mr Atsegoh the SDM roles after they had failed to make the cut off point for these roles. Both claimants thought it would have been fairer to have Mr Doherty and Mr Atsegoh re-apply for the SDM role even though there were vacancies. It was submitted this was completely unreasonable. They were offered the roles because they were at risk of redundancy and the SDM role was a suitable alternative. This was a reasonable approach by a reasonable employer.
102. The claimants also challenged the fact the respondent had allowed external candidates to apply for new roles in the business. It was submitted there were good business reasons to do this: the respondent wanted to appoint the best candidates to the new PSBM roles which were central to the success of the business. Ms Young invited the tribunal to accept Mr Williams' evidence when he told the tribunal the current crop of Branch Managers were unable to demonstrate that they could covert solutions. The respondent, in any event, put safeguards in place to ensure external candidates were not given a role over a suitable internal candidate.
103. An external candidate was appointed to the PSBM role in Aberdeen. Ms Smith accepted in evidence that she never considered the Aberdeen role, and at no point expressed any interest in doing it. Ms Paton suggested she would have done this role, but then gave evidence regarding a work/life balance. Mrs Young submitted the Aberdeen role would have required extensive travelling that would have affected her work/life balance significantly and to her

detriment. She never suggested she could do this role or was prepared to move to Aberdeen.

104. The claimants complained that the respondent had not dealt with their appeals appropriately. Mrs Young invited the tribunal to have regard to the evidence of Mr Allen and the emails sent (page 321) asking pertinent questions of those involved in the process.
105. The claimants claimed they could have undertaken the Regional Mobile Compliance role that Greig Wilson was aligned to. Mrs Young invited the tribunal to prefer the evidence of Mr Williams, that this role was created because of the special skill set that Mr Wilson had in dealing with data analysis and efficiencies that he had demonstrated, and that it was this skill set that led to the creation of the role. Neither of the claimants demonstrated that skill set and so would not have been suitable for the role. Mr Wilson was in the role before the claimants and other branch managers were put at risk of redundancy in October 2017.
106. The claimants also argued that the National Accounts Director role should have been held back and should have been part of the reorganisation. It was submitted that it was clear the National Accounts Director role was significantly senior to the Branch Manager role and paid substantially more. The claimants both had an opportunity to apply for the role which was widely advertised, but neither did so. The respondent's position was that neither claimant would have obtained the role in any event given it was at a higher grade than the PSBM role and the claimants did not achieve the cut-off for the PSBM role.
107. The claimants argued the SDM role was a demotion: this was not accepted by the respondent. The respondent accepted the claimants pay reduced slightly, but the claimants earned more than most Branch Managers for historic reasons. Many of the Branch Managers who accepted an SDM role did so with no loss of salary. The claimants could have mitigated their losses by remaining in the SDM role and looking for alternative employment.

108. Mrs Young referred the tribunal to sections 13 and 136 of the Equality Act, and to the cases of **Igen Ltd v Wong 2005 IRLR 258** and **Madarassy v Nomura International plc 2007 IRLR 246**. Mrs Young also referred to the case of **Zafar v Glasgow City Council 1998 IRLR 36** as authority for the position that an unreasonable employer is not to be assumed as a sexually discriminatory employer.
109. The respondent's position was (i) that they treated other employees in exactly the same way as the claimants regardless of their sex and (ii) that the allegations of sex discrimination against Mr Cuthbertson were unfounded and did not happen.
110. The claimants claim that the fact they were included in the pool for selection for redundancy was discriminatory on the grounds of sex because Mr Wilson and Mr White were not included. There was no evidence to support the claimants' claim that Mr Cuthbertson had anything to do with Mr Wilson or Mr White being appointed to their roles. Mr Williams' evidence was that he made the decision to appoint Mr Wilson, and this was supported by emails between Mr Williams and the Country President. The claimants did not argue Mr Williams discriminated against them, and so there were no facts upon which the tribunal could infer from the appointment of Mr Wilson that the claimants were discriminated on grounds of their sex.
111. The process for appointing Mr White was transparent. The job was openly advertised and sent to all employees. The claimants could have applied for the role if they wished to do so. Mr White was interviewed and scored sufficiently highly to be offered the role. Mr Cuthbertson was not involved on the panels for recruitment to the National Accounts Director role. It was submitted there were no facts upon which the tribunal could infer from the recruitment of Mr White that the claimants were discriminated against on the grounds of their sex.
112. The claimants alleged Mr Cuthbertson had made sexist comments. This was denied by Mr Cuthbertson, and the claimants made no complaint about any such issue at the time.

113. The claimants claimed the redundancy matrix creation and its application favoured male candidates over females. However, it was clear that the highest scoring employee was a female, and this undermined the claimant's position. Furthermore, there were other female candidates who scored higher than the claimants. The claimants had not provided any cogent evidence to support their allegation.
114. Ms Smith also suggested Janet Brown had been demoted to SDM. Mr Allen investigated the situation with Ms Brown and confirmed he could find no evidence to support Ms Smith's allegation. The tribunal was invited to prefer the evidence of Mr Allen and find Ms Brown's demotion had nothing to do with her sex. It was submitted the respondent was able to demonstrate the promotion of women in the business, an example of which was given by the claimants when they agreed Ms Kelly, their former line manager, had been promoted to Head of the SOC and then HR Director and a member of the Executive management team.
115. Mrs Young submitted Mr Wilson and Mr White were not valid comparators because they were not in the same or similar circumstances to the claimants. Further, the claimants were at no more of a disadvantage by being in the pool as the other male candidates (Mr Adam, Mr Atsegoh and Mr Doherty). It could not be said that the reason why Mr Wilson and Mr White were removed from the pool was because they were men, when 3 men were not removed from the pool.
116. The reason why the claimants were made redundant was because they did not accept the SDM roles that they had expressed an interest in as their second option. The redundancy had nothing to do with two male former branch managers being left out of the pool.
117. The claimants suggested the fact Mr Doherty and Mr Atsegoh were offered the SDM roles was indicative of the respondent treating male candidates more favourably. It was submitted this argument was spurious, and it was evident from the documentation that throughout the redundancy process the respondent confirmed it would prioritise candidates at risk of redundancy by

offering vacant alternative posts. The respondent was not treating them more favourably: they were complying with their duty to avoid redundancy by offering suitable alternative employment.

- 5 118. Mrs Young submitted there were no facts upon which it could be inferred that the claimants were discriminated against because of their sex.
119. Mrs Young, in conclusion, invited the tribunal to dismiss the claims in their entirety.
- 10 120. Mrs Young, in response to the submissions of Mr O'Carroll, noted the claimants placed great weight on the organisation chart (page 118), but that was dated May 2017, which was six months prior to the reorganisation. Mr White was offered the role of National Accounts Director in September 2017 and so by the time of the reorganisation, he was no longer a Branch Manager. Further Mr Wilson had been doing another job since July 2017.
- 15 121. Mrs Young invited the tribunal to have regard to the further particulars provided by the claimants' representative, the purpose of which was to provide details of the complaint of sex discrimination and the comparators relied upon. The comparators were named as Mr Wilson and Mr White. It was submitted that it was not now open to the claimants to introduce new comparators and other allegations of discrimination.
- 20 122. Mrs Young noted Mr O'Carroll had referred to the claimants being aware "*something was in the air*". Mrs Young did not recall this being said in evidence but if that was the claimants' position then why had they not applied for the National Accounts Director role?

### **Claimants' submissions**

- 25 123. Mr O'Carroll referred the tribunal to sections 13 and 39 of the Equality Act and submitted the discriminatory acts were:-
- (i) the exclusion of two male branch managers (Greig Wilson and Craig White) from the pool for selection for redundancy, providing them with

preferential treatment in comparison to the claimants who are both female;

(ii) the exclusion of two male branch managers (Greig Wilson and Craig White) from the pool for selection for redundancy, providing them with preferential treatment in comparison to the claimants who are both female;

(iii) requiring the claimants to attend an assessment day in front of panels comprised of four people, including three senior managers, contrary to its own stated guidance;

(iv) applying more favourable treatment to male candidates who had failed the redundancy assessment criteria;

(v) derailing and disrupting the interview of Ms Smith;

(vi) derailing and disrupting the presentation of Ms Paton;

(vii) demoting both claimants to the position of SDM from their previously held posts of Branch Manager and

(viii) dismissing both claimants for the stated reason of redundancy.

124. Mr O'Carroll submitted the discriminatory acts stood individually and collectively as evidence of discriminatory behaviour towards the claimants by the respondent because of their sex.

125. Mr O'Carroll submitted the appropriate comparators in point (i) were Greig Wilson and Craig White. They were both formerly Branch Managers and were men. They were removed from the pool of candidates for possible selection for redundancy and therefore did not require to be assessed for a new role in the restructuring. Unlike the claimants, their roles were never at risk. It was submitted that the treatment of the claimants was detrimental in comparison to the treatment afforded to the comparators.

126. Mr O'Carroll invited the tribunal to have regard to the timing of events in relation to point (i). The announcement of redundancy was made on the 3



October 2017, but Mr Williams' evidence was that it had probably been conceived of at least six months prior to that. Ms Hayes became involved in May 2017, and consultations with the trade union took place in August 2017. Mr White applied for the National Accounts Director post in July 2017, two months prior to the announcement of the restructure. Why was Mr White secretive about his application if it was all above board? Mr Wilson had four changes of post to safeguard him from the risk of redundancy: Regional Mobile Lead (North) in July 2017; Regional Compliance Manager from 1 November 2017; Branch Manager prior to that and Regional Service Delivery Manager Mobile from October 2018.

127. Mr O'Carroll submitted Mr White had an advantage over the claimants because he was being mentored and guided by Mr Cuthbertson and HR, and the claimants did not realise their roles were under threat. Both claimants would have applied for the post if they had known of the threat of redundancy.

128. Mr Wilson's role was never advertised and this was an exception to the general company rule regarding recruitment. Mr Williams did all that he could to ensure that Mr Wilson was safeguarded from the threat of redundancy and/or demotion by removing him from the pool at exactly the time when the reorganisation was being put into effect. Both claimants would have applied for this role if it had been available to them.

129. Mr O'Carroll invited the tribunal to have regard to the evidence concerning Janet Brown who had been an Area Director and had asked to step down. The organisation chart at page 118 showed her to be an Area Manager. The matrix at page 312 confirmed her first choice was the PSBM role: she was not successful and was offered and accepted an SDM role. One of the employees who formerly reported to her, James Livingston, was promoted to the new role of PSBM.

130. In relation to point (ii) the appropriate comparator was Neil Mosson. He was a man who faced a presentation panel consisting of two assessors. The respondent's policy was that candidates would be assessed by 2 or 3 assessors. The claimants were assessed by panels comprising 4 assessors.

The policy stated the assessors would where possible be independent: the claimants' assessors included their direct line manager Richard Cuthbertson, and his direct line manager Danny Williams, another Area Director, David Lee and a member of HR, Susan Calvert, all of whom knew the claimants. The process applied to the claimants was daunting and intimidating in comparison to that faced by the comparator.

- 5
131. In relation to point (iii) the appropriate comparator was Brian Doherty. He was not a Branch Manager but he was a male candidate placed in the pool for possible redundancy. Mr Victor Atsegoh was not an appropriate comparator because he had the protected characteristic of race. Mr Doherty, having failed the assessment entirely, was nonetheless offered the same role as the claimants. He therefore received treatment that was more favourable than the comparator female candidates, who had passed the bench mark for the SDM role.
- 10
132. Mr O'Carroll invited the tribunal to have regard to the claimants' evidence that no training was provided to Mr Doherty and Mr Atsegoh, and that they were only offered the post of SDM after an intervention by Ms Kelly, Director of HR. This, it was submitted, brought the credibility of the selection procedure into doubt.
- 15
- 20 133. In relation to points (iv) and (v) the appropriate comparator was a male candidate included in the pool for possible redundancy within the same assessment process as the claimants. The male candidates would not have had their interview or presentation derailed and disrupted by members of management on the panel.
- 25
- 30 134. Mr O'Carroll submitted the claimants had been confronted by a senior and daunting panel of four contrary to the respondent's briefing, and in light of this different treatment, were subjected to harsher scrutiny. The claimants were set up to fail. This was supported by the experience of Ms Smith where Mr Cuthbertson rolled his eyes during her interview; and Mr Williams shouted at Ms Paton during her presentation and was treated belligerently by Mr Lee.

The claimants scored poorly as a result of this: it was a deliberate strategy to undermine and derail their performances on the day.

135. Acts (vi) and (vii) follow on from acts (iv) and (v). It was as a result of their assessments being derailed that caused the claimants to achieve low scores.  
5 As a result of the low scores, they were denied the opportunity for promotion which was obtained by Greg Adam and James Livingston, the male comparators under these headings. Instead, unlike Mr Adam and Mr Livingston, the claimants were demoted and only offered the role of SDM.
136. The claimants concluded, within the statutory four week trial period, that they  
10 could not accept the cut in pay and status and de-skilling involved in the SDM role, and they rejected the role. As a result of that choice, they were both dismissed for the stated reason of redundancy. Had they not been female they would not have been dismissed.
137. Mr O'Carroll referred to section 136 of the Equality Act which sets out the  
15 burden of proof. He also referred to the **Igen** case (above). He submitted the facts provided to the tribunal provided a prima facie case that the respondents unlawfully discriminated against women in the operation of its redundancy process.
138. The claimants were also unfairly dismissed contrary to section 94 of the  
20 Employment Rights Act. The claimants were, in light of the evidence heard, unfairly selected for redundancy. Mr O'Carroll invited the tribunal to make an award of compensation as detailed in the schedules of loss.

### Discussion and Decision

139. We considered it appropriate to firstly have regard to the issues for  
25 determination by this tribunal. The Employment Judge, at the commencement of the hearing, confirmed with the claimants' representative that the alleged less favourable treatment was as set out in the further and better particulars (page 90), and that was "*being included in the pool for selection for redundancy and ultimately being made redundant. Further, it is not being*  
30 *considered alongside other male branch managers for alternative*

*employment in order to avoid the necessity for redundancy*". The comparators were identified as being Greig Wilson and Craig White.

140. It became apparent during the course of the hearing that the claimants were making much wider allegations of less favourable treatment. The Employment Judge intervened to clarify this with the claimants' representative, and Mr O'Carroll confirmed the issues of Mr Doherty and Mr Atsegoh being given the SDM post, the claimants being derailed, the composition of the panel and being demoted were factors the claimants would rely upon when inviting the tribunal to draw an inference, and not new alleged acts of discrimination.
141. Mr O'Carroll, in his submissions, however, in fact invited the tribunal to find the wider allegations were individually acts of discrimination, and collectively were evidence of discriminatory behaviour towards the claimants. Mr O'Carroll confirmed, in response to a question from the Employment Judge, that he was inviting the tribunal to consider each of these matters as individual acts of discrimination.
142. Mrs Young, in her response to the claimants' submissions, reminded the tribunal the claimants had, in their further and better particulars, set out the details of the claim and the comparators. She submitted it was not open to the claimants now to raise other allegations of discrimination and new comparators.
143. We, in considering this matter, noted there had not, at any stage, been an application by the claimants to amend the claim to introduce new allegations of discrimination. Accordingly, the claim, as detailed in the further particulars was that the claimants had been treated less favourably than Mr Wilson and Mr White when (a) they were included in the pool for selection for redundancy and ultimately made redundant and (b) they were not considered alongside the other male branch managers (Mr Wilson and Mr White) for alternative employment in order to avoid the necessity for redundancies.
144. The issues to be determined by this tribunal are:

- were the claimants treated less favourably than Mr Wilson and Mr White when they were included in the pool for selection for redundancy and ultimately made redundant; and when they were not considered for alternative employment in order to avoid the necessity for redundancies;
- if so, were the claimants treated less favourably because of their sex and
- were the claimants unfairly dismissed.

145. The wider allegations (numbered (ii) – (vii) in Mr O’Carroll’s submission) cannot be considered by this tribunal as individual acts of less favourable treatment because they are not part of the claim as detailed by the claimants. The respondent had no notice of these matters being argued as individual acts of discrimination. The wider allegations will be considered by this tribunal factually and in terms of whether any adverse inference may be drawn from those primary facts.

### ***Sex Discrimination***

146. We decided it would be appropriate to determine the complaint of sex discrimination first. We had regard to the terms of sections 13 and 39 of the Equality Act which provide as follows:

147. Section 13: *“A person (A) discriminates another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

148. Section 39: *“An employer (A) must not discriminate against an employee of A’s ... by dismissing him/her”.*

149. The less favourable treatment relied upon by the claimants was (a) being included in the pool for selection for redundancy and ultimately being made redundant and (b) not being considered for alternative employment in order to avoid the necessity for redundancies. We understood point (b) related to the claimants’ assertion that Mr Wilson and Mr White were appointed to other

roles to protect them and avoid the need for them to be part of the pool for selection for redundancy.

150. The claimants named two actual comparators: Greig Wilson and Craig White.

151. Section 23 of the Equality Act provides that there must be “*no material difference between the circumstances relating to each case*” when  
5 determining whether the claimant has been treated less favourably than a comparator. In other words, in order for a comparison to be valid, like must be compared with like. The House of Lords in the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** explained that  
10 this means that the “*comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.*”

152. We also had regard to the EHRC Employment Code which makes clear that  
15 the circumstances of the claimant and the comparator need not be identical in every way. Rather “*what matters is that the circumstances which are relevant to the claimant’s treatment are the same or nearly the same for the claimant and the comparator*”.

153. We noted the following facts were not in dispute:-

- 20
- there were, as at May 2017, 6 Branch Managers in Scotland: Greig Wilson, Craig White, Jacqui Smith, Anne Paton, Greg Adam and Victor Atsegoh;
  - Craig White was appointed to the post of National Accounts Director on the 13 September 2017;
  - 25 • Greig Wilson was described as Regional Mobile Lead in July 2017 and paid an increased salary for those duties;
  - a redundancy was announced on the 3 October 2017 and all Branch Managers informed of the proposal to delete the Branch Manager role and introduce two new roles of PSBM and SDM and

- the pool for selection for redundancy comprised four Branch Managers and one Solutions Development Manager.

154. We concluded the circumstances relevant to the claimants' treatment were not the same or nearly the same for the claimants and Greig Wilson and Craig White. We say that because as at October 2017 when the redundancy/restructuring was announced Mr Wilson and Mr White no longer held the position of Branch Manager. The post of Branch Manager was to be deleted as part of the respondent's restructuring: those who held that post were part of the pool from which selections would be made for new posts/redundancy. Mr Wilson and Mr Craig were not in the pool for selection because they did not hold the position of Branch Manager.

155. The people who, in October 2017, held the post of Branch Manager were Jacquie Smith, Anne Paton, Greg Adam and Victor Atsegoh. They were all in the pool for selection. The claimants (female Branch Managers) were treated in the same way as Greg Adam and Victor Atsegoh (the male Branch Managers).

156. We next considered whether the claimants were treated less favourably than Mr Wilson and Mr White when they (the men) obtained other roles and were not therefore in the role of Branch Manager at the time of the redundancy.

157. The evidence regarding Mr Wilson's move to the position of Regional Compliance Manager came principally from Mr Williams, who accepted it had been his decision to offer Mr Wilson the role of Regional Mobile Lead (North) with a salary increase, prior to the move to Regional Compliance Manager, with an increased salary.

158. Mr Wilson originally held a Branch Manager position. The evidence of Mr Williams, which we accepted, was, essentially, that Mr Wilson showed initiative and demonstrated ways in which his Branch, and others across the Region, could become more efficient. Mr Wilson used data available to all Branch Managers, analysed it and from that introduced efficiencies in his Branch relating to factors such as travel and sickness absence. Mr Williams

invited Mr Wilson to demonstrate his efficiencies worked in other Branches, and thereafter across the Region.

159. We accepted Mr Williams' evidence that there was not a Regional Compliance Manager post to fill, but rather that Mr Wilson, and the work he was carrying out, developed that role. Mr Williams accepted the post had not been advertised and that this was an exception to the respondent's recruitment policy. We accepted it had been an exception because of the way in which it evolved.
160. The claimants sought to argue that they could equally have performed this role. We considered the claimants' position regarding this was undermined by the fact that the data available to, and analysed by, Mr Wilson was readily available to the claimants. They did not seek to use the data in the same way as Mr Wilson: they did not show the initiative demonstrated by Mr Wilson.
161. The evidence regarding Mr White's promotion to the position of National Accounts Manager was very clear. There was no dispute the post was advertised internally in June 2017, and that there were 3 positions available. The closing date for applications was the 17 July 2017. The claimants could have applied for the post if they had been interested.
162. A number of internal candidates (12) applied for the posts. Mr White attended an assessment following which he was offered the post in September 2017.
163. The claimants sought to suggest that the post of National Accounts Director ought to have been held back and offered as suitable alternative employment in the redundancy. We could not accept that argument in circumstances where the advert for the posts was circulated in June 2017 at a time prior to any firm decisions having been made regarding the restructuring. Mr Williams acknowledged there had been discussions at executive management team level regarding the restructuring proposals, but the proposals were not taken to the trade union for consultation until August 2017 and, until that consultation process had been completed, there could be no certainty regarding the process. We also accepted the principle that the respondent's business could not be put on hold pending the restructuring.



164. The claimants also argued they could have performed this role. We considered this argument immaterial because the claimants were not considered for the role because they did not apply for it in circumstances where others in the respondent company saw the advert and decided to apply.
- 5 165. The claimants suggested Mr White had been given a “heads up” regarding the redundancies. They suggested this was demonstrated by (i) Mr White said to Ms Smith “*you were not supposed to see that*” when she accidentally saw his application for the post; (ii) he said he had been told not to tell anyone and (iii) he told the claimants he was being mentored and tutored by Mr  
10 Cuthbertson and Ms Sneddon.
166. We considered a number of points undermined the claimants’ position. Firstly, there are many reasons why Mr White may have said to Ms Smith that she was not supposed to see his application for the post, not least of which being it is a private matter. Secondly, if Mr White said he had been told not to tell  
15 anyone, it begs the question why he was telling the claimants. Thirdly, it is within the industrial knowledge of this tribunal that it is not unusual for a member of staff to be supported by their line manager and HR in their application for a promoted post. Fourthly, why did all of this not suggest to the claimants that they should apply for the post. Mr O’Carroll in his submissions  
20 made reference to Ms Paton feeling/knowing “*something was in the air*”. This was not said in evidence by Ms Paton but was a statement made in her expanded grounds of appeal. If this was so, then it undermined Ms Paton’s position that if she had known about the redundancies she would have applied for the post. Fifthly, there was no suggestion that the other male Branch  
25 Managers had also been given a heads up about the redundancies but chose not to apply for the post. The claimants were, accordingly, in the same position as the other male Branch Managers.
167. The claimants’ argued the respondent treated men more favourably than women and the fact Mr Wilson and Mr White had been “given” other jobs to  
30 protect them from redundancy was illustrative of this. We, in considering this argument, had regard to the wider factors relied on by the claimants to show

this, and we asked whether an adverse inference could be drawn from any/some/all of these wider factors.

168. The claimants argued they had been required to attend assessments by a panel comprising three or four people, and they contrasted this with Mr Neil Mosson whose paperwork suggested he had had a panel of two people. The claimants also took issue with the seniority of the people on their panels and the fact Mr Cuthbertson was on the panel.
169. Ms Smith had a panel of three people assessing her presentation, and four people for her interview. Ms Paton had a panel of three people assessing her interview and a panel of four for her presentation.
170. Ms Hayes' in her witness statement stated: *"In respect of the interview and presentation process, there were 3 members of the panel. 1 member of the panel would be an Area Director, the other would be an HR professional and the last member would be either another Area Director or a member of the executive management team."* Ms Hayes was cross examined about the composition of the assessment panels, and in response to the question that the panel would comprise three people, she responded *"panels would be 3 or 4 people, but different panels assessed the interview and the presentation."*
171. Ms Hayes was asked about the panel for Neil Mosson and responded: *"No, there were no 2 person panels. This is the first time I've seen this [document] and so I can't respond"*.
172. We accepted the evidence of Ms Hayes and found as a matter of fact that there were no 2 person panels. We acknowledged Ms Hayes could not explain why Mr Mosson's paperwork only had two names on it, but this was because she had not seen this paperwork before. Ms Hayes was a credible witness: she was responsible for deciding the format of the panels and getting people on to the panels. We considered her insistence that there were no two person panels was both credible and reliable and not undermined by the paperwork for Mr Mosson.

173. We, in addition to the above evidence, also had regard to the fact there were many, many assessments (the figure of 100 was mentioned by Mr Cuthbertson, and there were 172 names on the scoring matrix for assessment for the PSBM and SDM roles) conducted throughout the UK business. We heard no evidence (with the exception of Mr Mosson's case) regarding the composition of panels for other employees. There was no evidence regarding, for example, the composition of the panels for the male employees in the pool for selection, and in particular for Greg Adam who was successful in obtaining a PSBM post.
174. We also had regard to the fact the composition of panels was organised by Ms Hayes who had to take into account availability and geographic location. She then slotted employee names into available times. Ms Hayes did not know the claimants. We considered this element of randomness undermined the claimants' position.
175. The claimants also complained about the seniority of those on their panels. The paperwork regarding Mr Mosson was produced by the respondent for this purpose, to demonstrate that Mr Mosson's line manager had been present on his panel. The claimants were treated no differently by having their line manager present on their assessment panel for either the interview or the presentation.
176. Mr Williams told the tribunal he had attended 16 assessments and his counterpart in the South had also attended assessments. We considered this undermined the claimants' complaint regarding the seniority of those on their panel.
177. We considered the primary facts to be taken from this evidence were that (i) the claimants had a panel of 3 or 4 for their assessment; (ii) the paperwork showed Mr Mosson had a panel of 2 for his assessment; (iii) other panels included Mr Williams or someone of his level within the company; (iv) other panels included the line manager and (v) there was no evidence regarding the composition of the panel for others in the same pool for selection as the claimants.

178. We asked whether an adverse inference could be drawn from these primary facts that the claimants faced a more senior and daunting panel and the reason for this was because they were female. We concluded the primary facts did not support the drawing of this adverse inference. We say that because the primary facts supported the respondent's position that the composition of the claimants' panels was no different to others. We did not consider one example, in a situation where many candidates were assessed, undermined that position, particularly having regard to Ms Hayes' evidence.
179. We next considered the argument that the respondent applied more favourable treatment to male candidates who failed the redundancy assessment criteria. This focussed on the treatment of Brian Doherty and Victor Atsegoh. Mr Doherty and Mr Atsegoh were in the pool for selection. They did not achieve the cut-off mark to be considered for either the PSBM role or the SDM role. They were in a position where they were to be made redundant. The respondent offered Mr Doherty and Mr Atsegoh the SDM role as suitable alternative employment to avoid redundancy. They accepted. Mr Doherty and Mr Atsegoh achieved the same role as the claimants notwithstanding they failed to meet the cut off point for the role.
180. We could not accept there was a comparison to be made between the treatment of the claimants and Mr Doherty and Mr Atsegoh. We say that because the claimants had identified and expressed an interest in the SDM role as their second choice. They met the benchmark for the role and were offered and accepted it albeit on a trial basis. They were not in a redundancy situation: the letter offering them the SDM role specifically confirmed they were no longer in a redundancy situation. The claimants' position was materially different to that of Mr Doherty and Mr Atsegoh who were going to be made redundant unless suitable alternative employment could be found.
181. The respondent has a duty, both in terms of the fairness of any subsequent dismissal and in terms of their Redundancy Policy, to seek alternative employment in order to avoid redundancy. The respondent acted within the band of reasonable responses by identifying there were posts which were not

only suitable alternative employment, but were also vacant and could be offered to Mr Doherty and Mr Atsegoh who were to be made redundant.

182. The claimants challenged this on the basis they did not believe Mr Doherty and Mr Atsegoh had been given training. We did not accept this aspect of the claimant's evidence because it was an assertion with nothing to support it. The claimants had no way of knowing whether the training had been, or was going to be, provided. We preferred Ms Hayes' evidence when she told the tribunal that the posts were offered to Mr Doherty and Mr Atsegoh on the basis they agreed to accept training in the areas of weakness identified in the assessment.

183. The claimants also attached weight to their belief that the posts had only been offered to the men after an intervention by Ms Kelly, Director of HR. This was denied by Ms Hayes. We, in any event, could not understand the relevance or significance of any alleged intervention by Ms Kelly. She was the Director of HR and it would have been correct for her to intervene if the respondent was about to dismiss employees without considering suitable alternative employment.

184. We concluded the primary facts to be taken from this evidence were (i) the claimants were offered and accepted the posts which they had indicated were their second choice because they met the cut-off point for those posts and (ii) two men were offered an SDM role as a suitable alternative to redundancy notwithstanding they had not met the cut-off point for those roles.

185. We asked whether those primary facts supported the drawing of an adverse inference that Mr Doherty and Mr Atsegoh had been offered the SDM posts only because they were men. We concluded the primary facts did not support drawing an adverse inference. We say that because the facts clearly demonstrated the reason why Mr Doherty and Mr Atsegoh were offered the roles, and that was because they were in a redundancy position and not because they were men.

186. We next considered the claimants' argument that they were derailed in their interview (Ms Smith) and their presentation (Ms Paton).

187. Ms Smith alleged Mr Cuthbertson had rolled his eyes in response to some of her answers. She asserted this had been seen by Mr Williams. Mr Cuthbertson vehemently denied this. Mr Williams told the tribunal he had not seen Mr Cuthbertson roll his eyes, and if he had done, this would have been addressed. Mr Williams also questioned Ms Smith's belief that he had seen this because members of the panel had been sitting in a line and therefore it would not have been visible to him.
188. Ms Paton alleged Mr Lee had asked her the same question 2 or 3 times in a belligerent manner. Mr Cuthbertson and Mr Williams each confirmed Mr Lee had asked a question several times because the answer given had not addressed the question, but he had asked those questions in a normal manner. Mr Cuthbertson told the tribunal that as assessors they had "*touchpoints*" to look for in the answers given by candidates. A failure by a candidate to mention a touchpoint would mean they were marked accordingly. Mr Cuthbertson mentioned this in the context of Mr Lee asking a question 2 or 3 times.
189. Ms Paton also alleged Mr Williams had shouted at her during the presentation. Mr Williams denied shouting at the claimant, but accepted he had said to her "*I'm sat over here*" and asked her to address her presentation to him. Mr Williams explained Ms Paton was facing the screen where the slides were being shown and had her back to the panel. Mr Williams wanted the claimant face the panel and address her presentation to them.
190. Mr Williams is a tall man with a loud commanding voice. He rejected the suggestion his intervention had derailed Ms Paton's presentation. He did not notice any change in Ms Paton's demeanour or presentation and noted she had subsequently joked with him about being his "*right hand Anne*".
191. We noted the room layout for the presentation was exactly the same for all candidates. It appeared Ms Paton was the only candidate who had had her back to the panel.
192. We, on balance, preferred the evidence of Mr Cuthbertson, and the evidence of Mr Cuthbertson and Mr Williams regarding Mr Lee. We accordingly

concluded the primary facts to be taken from this evidence was that Mr Williams said to Ms Paton that he was “*sat over here*” and asked her to address her presentation to the panel.

193. We should state that even if we accepted Mr Cuthbertson rolled his eyes and Mr Lee asked the same question 2 or 3 times in a belligerent manner, and Mr Williams made the comment to Ms Paton, would those findings have supported an adverse inference that Mr Cuthbertson, Mr Lee and Mr Williams had acted in that way to deliberately derail the assessment and/or because the claimants were female. We concluded those facts would not, on their own, have supported the drawing of such an inference. We say that because there was a reason for Mr Williams making the statement to Ms Paton, which would have applied equally to any employee with their back to the panel during their presentation; there was a reason why Mr Lee was asking the question to ascertain touchpoint information and, in the second consultation meeting, Ms Smith noted Mr Cuthbertson may not have been aware he rolled his eyes. If that was so, it undermined the suggestion he had done so deliberately and because the claimant was a woman.

194. The claimants made general assertions regarding Mr Cuthbertson which amounted to him being sexist and racist. The specific comments alleged to have been made by Mr Cuthbertson were not put to him. Instead a general question was put to him about whether he was given to making sexist or racist remarks. Mr Cuthbertson denied it. We were not persuaded, on the basis of this evidence, to draw any adverse inference regarding Mr Cuthbertson.

195. The claimants also maintained Mr Cuthbertson should not have been on their assessment panel because (a) he was their line manager and (b) he adversely influenced the other members of the panel to mark the claimants down. The only evidence placed before the tribunal regarding the composition of the panel was in relation to Neil Mosson. The paperwork demonstrated that his line manager had been present.

196. We, in considering the assertion that Mr Cuthbertson adversely influenced the other members of the panel, had regard to the fact that for this tribunal to

accept that, would mean accepting Mr Cuthbertson had influence over Mr Williams, who is his senior and to whom he reports, and influence over Ms Calvert who is an experienced HR professional. There was a complete absence of evidence to support what the claimants invited the tribunal to accept. In addition to this, Mr Cuthbertson was not the lowest scorer on the assessment panel. We accordingly concluded on the basis of this evidence that there was no adverse inference to be drawn from Mr Cuthbertson's presence on the panel.

197. We next considered the claimants' argument that they had been demoted. We noted this was a situation where the claimants had, in effect, applied for the role of SDM. They both indicated on the preference form that their first choice of role was the PSBM role, and their second choice was the SDM static role. The claimants applied to be considered for the SDM role. The claimants met the cut off point for the same role: they were considered for that role and were offered, and accepted the role subject to a trial period. There was no suggestion that other Branch Managers in the same position as the claimants had been treated any differently.

198. The claimants described the SDM role as a demotion because of the drop in salary and car allowance, the removal of private health insurance and the loss of some duties (for example, they would no longer be responsible for the profit and loss of the branch). The respondent's evidence that the claimants earned more than other Branch Managers for historic reasons was not challenged. We accepted that for the vast majority of Branch Managers who moved into the SDM role, there was either no change to their salary or an increase to their salary.

199. We accepted the claimants lost approximately £2000 in salary and £1800 in car allowance, and that there were certain duties they would no longer have been required to carry out. We concluded that whilst other Branch Managers moving to role may not have lost salary, they equally would have had a reduced car allowance, no private health insurance and would no longer be required to carry out certain duties.



200. We made no finding of fact that the SDM role was a demotion. We accepted the claimants, for the reasons stated, considered the role a demotion.
201. We next had regard to the fact the claimants were dismissed for the stated reason of redundancy. We noted there was no suggestion men in the same position as the claimants – that is, men who had been offered an SDM role and who had accepted it on the basis of a trial period and subsequently decided not to accept it, were treated, or would have been treated any differently. We also noted the claimants did not suggest that at the stage of them rejecting the SDM role, the respondent should have taken other action to prevent their redundancy.
202. We concluded, for the reasons set out above, that the primary facts of the individual instances did not support the drawing of an adverse inference.
203. We next considered it would be appropriate to stand back and, looking at the allegations of discrimination and the wider allegations, ask whether, collectively, those facts supported the drawing of an adverse inference that the respondent favoured men, moved Mr Wilson and Mr White out of Branch Manager posts to protect them from the redundancy and deliberately derailed the assessments of the claimants.
204. We included in our considerations the fact that some women did obtain a PSBM role; the highest scorer in the assessment exercise was a woman and the respondent's process was designed to be fair with checks and balances put in place to guard against bias – for example, the fact the assessment comprised a psychometric test, an interview and a presentation; the fact the assessment panel comprised 3 or 4 people, each of whom scored the candidate and the fact that the panel comprised some people with whom the candidate did not have a direct working relationship.
205. We concluded the primary facts did not support the drawing of any adverse inference. We say that because the respondent has provided an explanation which was credible and not connected in any way to sex. For example, we accepted Ms Hayes' evidence that notwithstanding the paperwork produced, there was no panel with only two members. This evidence was credible and

reliable because Ms Hayes arranged the panels. Further, even if Mr Mosson's panel only had two members, there was nothing to suggest that 3 or 4 people had been put on the claimants' panels because they were women. The claimants could have produced evidence of the composition of the other assessment panels, and in particular the assessment panels of the men in the pool for selection: they did not do so, and in a redundancy involving many people throughout the respondent's business in the UK an example of one person treated differently was not sufficient to draw an inference.

206. We decided, having had regard to all of the above points, that the claimants had not discharged the onus on them to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful. If the claimants do not prove such facts, the claim will fail. We decided to dismiss this aspect of the claim.

### ***Unfair Dismissal***

207. We had regard to the terms of section 98 Employment Rights Act which provides as follows:

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

*(a) the reason (or, if more than one, the principal reason) for the dismissal and*

*(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*A reason falls within this subsection if it ... (c) is that the employee was redundant.*

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

(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

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

208. We also had regard to the terms of section 139 Employment Rights Act which sets out the definition of redundancy as follows:

10 “For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to ... (b) the fact the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.”

15 209. The first question for this tribunal to determine is whether the respondent has shown the reason for the dismissal of the claimants. The claimants argued they had been dismissed for discriminatory reasons and not for the stated reason of redundancy. We have decided (above) that the claim of sex discrimination was not made out.

20 210. The respondent accepted the claimants had been dismissed and asserted the reason for the dismissal was redundancy. We, in considering this matter, had regard not only to the statutory definition of redundancy, but to the cases of **Safeway Stores Ltd v Burrell 1997 ICR 523** and **Murray v Foyle Meats Ltd 1999 ICR 827**. In the first of these cases the EAT stated that the questions a tribunal must decide are: (i) was the employee dismissed; (ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to do so and (iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

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211. This approach was subsequently endorsed by the House of Lords in the **Foyle Meats Ltd** case, where it was said that section 139 asks two questions of fact.

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The first is whether there exists one of the situations set out in section 139. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

5 212. There was no dispute in this case regarding the fact the claimants had been dismissed. We next asked whether the terms of section 139 had been met. There was no dispute in this case regarding the fact the restructure deleted the post of Branch Manager. Accordingly, in terms of section 139, the requirements of the respondent's business for employees to carry out branch manager work had ceased. The respondent had no requirement for Branch  
10 Managers in the business. We acknowledge the work carried out by the Branch Managers was ongoing insofar as the PSBM and SDM roles comprised component parts of the branch manager function, but there was no requirement within the respondent's business for a Branch Manager.

15 213. We next asked whether the dismissal of the claimants was caused wholly or mainly by that cessation or diminution. The answer to that question was "yes". The claimants' dismissal was caused wholly by the fact the Branch Manager role was deleted in the respondent's structure, and, after trying the SDM role for a trial period of four weeks, the claimants each confirmed they did not want to continue in that role. The claimants' employment terminated for reasons of  
20 redundancy.

214. We were satisfied the respondent has shown the reason for the dismissal of the claimants was redundancy in terms of section 98(2)(c) Employment Rights Act. The tribunal must now continue to determine the fairness of the dismissals for that reason.

25 215. We were referred to the case of **Williams v Compare Maxam 1982 ICR 156** where the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The key question for the tribunal, however, was to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors  
30 suggested by the EAT were:

- whether the selection criteria were objectively chosen and fairly applied;
  - whether employees were warned and consulted about the redundancy;
  - whether, if there was a union, the union's view was sought and
- 5           • whether any alternative work was available.

216. We were also referred to the case of **Morgan v Welsh Rugby Union 2011 IRLR 376** where the EAT recognised the factors identified in the above case are applicable to the selection of employees who are to be made redundant from an existing group. It was said:

10           *“There are some redundancy cases where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. The factors set out in **Williams** do not seek to address the process by which such roles are to be filled. Where the employer has to decide which employees from a pool of existing employees are to be made redundant, the*

15           *criteria will reflect a known job, performed by known employees over a period. Where however an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Whereas **Williams** type selection will involve consultation and*

20           *meeting, appointment to a new role is likely to involve something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion. A tribunal considering the fairness of such a process must apply section 98(4) of the 1996 Act. No further proposition of law is required. A tribunal is entitled*

25           *to consider, as part of its deliberations, how far an interview process was objective, but it should keep carefully in its mind that an employer's assessment of which candidate will best perform in the new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures*

30           *when making an appointment and whether they were fair. A tribunal is entitled to consider whether an appointment was made capriciously, or out of*

*favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4).”*

217. We considered the comments of the EAT in the **Morgan** case to be helpful, but we focussed on the **Williams** factors because they were akin to the points raised by the claimants when challenging the process used by the respondent.

218. The claimants sought to challenge the fairness of the redundancy in terms of the pool for selection; the application of the selection criteria; the consultation process; the way in which Mr Doherty and Mr Atsegoh obtained SDM roles and the fact the SDM post was a demotion. We addressed each of those points in turn.

219. We had regard to the case of **Thomas and Betts Manufacturing Ltd v Harding 1980 IRLR 255** where the Court of Appeal held that where there is no customary arrangement or agreed procedure to be considered, employers will have a good deal of flexibility in defining the pool from which they will select employees for dismissal.

220. We also had regard to the case of **Taymech Ltd v Ryan EAT/663/94** where the EAT stated: *“there is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem.”*

221. There was no dispute in this case regarding the fact the pool for selection comprised Branch Managers and a Solutions Development Manager. The issue raised by the claimants related to the fact Mr Wilson and Mr White, who had been Branch Managers, were not included in the pool. We have already dealt with this matter above, and we do not repeat the points discussed. We were satisfied that the employer had genuinely applied its mind to the question of the composition of the pool, and Mr Wilson and Mr White were not included

in the pool because they were no longer Branch Managers by the time of the redundancy.

222. The claimants attached significant weight to the fact the organisation chart (page 118) identified Mr Wilson and Mr White as Branch Managers, and on that basis they argued they should have been included in the pool. There was no dispute regarding the fact the organisation chart was dated May 2017, some five months prior to the redundancy announcement. The organisation chart correctly reflected the position in May 2017, but it did not correctly reflect the position in October 2017. Mr White was offered the post of National Accounts Director on the 13 September 2017, and accepted that post. Mr Wilson took on other duties in July 2017 and whilst his job title changed in July and again in November, we were entirely satisfied, he was not included in the pool because he was no longer in a Branch Manager position.

223. The claimants' argument that Mr Wilson and Mr White were moved to other posts to protect them because they are men is dealt with above and not repeated here.

224. We were satisfied the pool correctly comprised Branch Managers because the Branch Manager post was going to be deleted. The claimants were Branch Managers in October 2017, and accordingly were correctly included in the pool. The claimants raised no issue with regard to Mr Doherty, the Solutions Development Manager being in the pool.

225. The respondent did include external candidates in the assessment process. We were satisfied however that they had in place safeguards to ensure external candidates were not offered posts over a suitable internal candidate. The PSBM post in Aberdeen was offered to, and accepted by, an external candidate. We considered the decision of the respondent to appoint an external candidate to this role fell within the band of reasonable responses in circumstances where no internal candidates met the cut-off point of 90, and no internal candidates had scored 80 or over to be considered for a second interview.

226. We next considered the issue of the selection criteria, and noted the claimants did not take issue with the selection criteria chosen by the employer, which comprised a Wave (psychometric test), an interview and a presentation. Ms Hayes' evidence that the respondent decided not to include the results of the Swift test, used to assess aptitude, because they were unreliable was not challenged.
227. The claimants did challenge the fairness of the application of the criteria in two ways: (a) by challenging the composition of their assessment panels and (b) by challenging the behaviour of Mr Cuthbertson, Mr Lee and Mr Williams when on the panels. The claimants asserted the behaviour "derailed" their assessment and caused them to perform poorly and achieve lower marks than expected. We noted that although the claimants asserted generally that their scores had been affected, they did not seek to challenge the scores awarded or suggest which scores should have been higher.
228. We were referred to the case of **Eaton Ltd v King 1995 IRLR 75** where the EAT held that on a proper application of the principles established in the **Buchanan v Tilcon Ltd 1983 IRLR 417** case, all that the employer had to show was that it had set up a good system of selection which had been reasonably applied.
229. The issue of the composition of the claimants' assessment panels has been dealt with above, and is not repeated here. We accepted Ms Hayes' evidence that no assessment panel had only two members. Ms Hayes was not able to explain why the document produced in respect of Neil Mosson, showed only two names on the assessment panel, but insisted this was not correct. We, in any event, considered that even if Neil Mosson's assessment panel only had two members, it did not of itself mean that it was unfair for the claimants' assessment panel to have 3 or 4 members. We say that because we accepted Ms Hayes' evidence that there were 3 or 4 members on each assessment panel. Further, one example of a two person panel in a redundancy exercise involving many people, was not sufficient to demonstrate some unfairness.



230. The claimants also challenged the fact Mr Cuthbertson was on their assessment panel. We were entirely satisfied, based on the fact Mr Mosson's line manager was present on his assessment panel, that there was nothing unreasonable in the fact Mr Cuthbertson was on the claimants' assessment panel. There was no suggestion, for example, that he had not been present on the assessment panel for others in the same pool for selection as the claimants.
231. The issue of the behaviour of Mr Cuthbertson, Mr Lee and Mr Williams has been dealt with above and is not repeated here. We accepted the evidence of Mr Cuthbertson and Mr Williams who acknowledged Mr Lee had asked a question of Ms Paton 2 or 3 times, but had done so in a normal way and not belligerently. We considered that in the context of the assessors looking for "touchpoints" on which to score candidates, it would not have been unreasonable for him to have acted in this way.
232. Mr Williams accepted he had said to Ms Paton that he was "sat over here" and to make her presentation to him. We considered that in the context of Ms Paton being either side on to the panel, or with her back to the panel, this was a reasonable comment to make. Mr Williams does have a loud voice, but this was not the first time Ms Paton had met Mr Williams and she would have known the timbre of his voice.
233. We concluded that in relation to Ms Paton, there had been nothing unreasonable in the way in which the Mr Lee and Mr Williams conducted themselves.
234. We accepted Mr Cuthbertson's evidence that he had not rolled his eyes during Ms Smith's interview. Ms Smith asserted Mr Cuthbertson had rolled his eyes at Mr Williams, but he rejected that suggestion. Our impression of Mr Williams was that if he had seen Mr Cuthbertson roll his eyes, he would have said so.
235. We acknowledge that Ms Smith raised this issue during the second individual consultation meeting, and was advised by Ms Sneddon that her "*presentation was too short and [you] had a blank slide.*"

236. We further noted, from the notes of the second consultation meeting, that Ms Smith suggested Mr Cuthbertson may not have been aware he had rolled his eyes. We considered this suggestion undermined Ms Smith's position that Mr Cuthbertson had rolled his eyes at Mr Williams, and that it had been a deliberate act to derail her. If, as suggested by Ms Smith, Mr Cuthbertson was not aware of rolling his eyes, he cannot have been acting deliberately to derail her.
237. We concluded, in relation to Ms Smith's assessment, that Mr Cuthbertson had not acted as alleged. Further, even if Mr Cuthbertson had rolled his eyes, but been unaware of doing so, that appeared to be a much lesser allegation than suggested by Ms Smith.
238. We concluded for all of these reasons that the selection criteria had been fairly applied to the claimants.
239. We next considered whether the views of the trade union were sought. We accepted Ms Hayes' evidence when she told the tribunal that the recognised trade union (which was not recognised in respect of all regions of the respondent business, and was not recognised in Scotland) had been informed of the respondent's proposals and consulted about them. This had been done orally by one of Ms Hayes' HR colleagues.
240. We next considered the issue of whether the employees were warned and consulted about the redundancies. There was no dispute regarding the fact Mr Cuthbertson made an announcement to employees on the 3 October 2017 to inform them of the respondent's proposals for restructuring the business. This was confirmed to the claimants (and others) by letter of the 3 October, which also referred employees to information held on the Sharepoint. There was no dispute regarding the fact that a great deal of information was provided to employees including the reasons why the restructure was being put in place, the proposals in terms of posts to be deleted and the new structure, information regarding the new posts, frequently asked questions and the selection criteria. The claimants raised no issue regarding a lack of information about the process.

241. The claimants each attended three individual consultation meetings with Mr Cuthbertson and Ms Sneddon, HR. The format of those meetings was that Mr Cuthbertson had a checklist of points he was required to cover with the claimants in terms of providing information to them. The claimants were  
5 critical of the consultation process because they felt it was a tick-box exercise with little opportunity for them to comment.
242. We noted Mr Cuthbertson was not asked about this in cross examination. We acknowledged the list of points to be covered at each consultation meeting were produced, and had been ticked off to indicate each point had been  
10 covered. However, that in itself did not suggest the claimants had had no opportunity to comment. One of the items ticked off was a point where the employee was asked for their comments. It appeared that at the first consultation meeting the claimants took the information with which they were provided and made little comment.
- 15 243. There was no suggestion the claimants were denied an opportunity to comment. The claimants did not, for example, give any evidence about what they would have said if they had had the opportunity.
244. We concluded, having had regard to these points, that the respondent carried out a reasonable consultation process in terms of the information provided to  
20 employees and the opportunity to provide comments which the claimants did at the second and third consultation meetings.
245. We next had regard to the issue of alternative employment. There was no dispute regarding the fact the claimants each identified the PSBM post as their first choice and the SDM (static) post as their second choice. The  
25 claimants did not achieve the cut-off point of 90 for the post of PSBM. They did not achieve a score of 80 or more which would have entitled them to a second interview for the PSBM post if there was a vacancy. They did achieve the cut-off point for the post of SDM, and were each offered this role. The claimants were entitled to try the role for four weeks: they did so and decided  
30 they did not want to accept the role.

246. The claimants took issue with the fact Mr Doherty and Mr Atsegoh did not achieve the cut-off point for the SDM role but were offered it nonetheless. We, as set out above, were satisfied Mr Doherty and Mr Atsegoh were in the position where they were going to be made redundant, and they were offered the SDM role because it was suitable alternative employment (and there were vacancies) to avoid redundancy. The respondent has an obligation to consider the issue of suitable alternative employment both in terms of the fairness of the redundancy process and in terms of their Redundancy Policy.
247. The claimants did not seek to argue that at the point when they rejected the SDM role, the respondent had suitable alternative employment available which should have been offered to them. Accordingly, we were satisfied the respondent had reasonably considered suitable alternative employment.
248. We next considered the claimants had an opportunity to appeal against the termination of their employment. The appeal was heard by Mr Allen. The claimants were critical of Mr Allen: Ms Smith asserted Mr Allen had failed to address her concerns regarding the conduct of Mr Cuthbertson and had failed to address the fundamental flaws identified regarding the whole redundancy process. Ms Paton made similar assertions regarding Mr Allen's failure to investigate Mr Cuthbertson's conduct.
249. We, in considering this matter, had regard to the evidence of Mr Allen. We noted that following the appeal hearings Mr Allen sought information and documentation from Ms Sneddon, HR. Mr Allen told the tribunal that he had also "*asked questions of senior managers*" in order to try to carry out a fair appeal. The managers spoken to by Mr Allen included Mr Weeks, whom he spoke to regarding the appointment of Mr White to the National Accounts Director role; Mr Cuthbertson, who he spoke to regarding the allegations made by the claimants regarding his conduct and Ms Janet Brown, whom he spoke to regarding her move from Area Director to Area Manager.
250. Mr Allen, in his letter to each claimant confirming the outcome of the appeal, summarised the key points that he considered were particularly relevant when

considering each appeal. Mr Allen then set out his response to each of those points, including information which he had obtained from his investigations.

5 251. Mr Allen specifically noted that he had spoken with Mr Williams regarding the allegation that Mr Cuthbertson had rolled his eyes during Ms Smith's interview. He also noted what he had been told by Mr Williams. Mr Allen also noted that in relation to the allegations of "candidate racial profiling" made by Ms Smith against Mr Cuthbertson, he had no evidence to substantiate her claim.

10 252. Mr Allen noted, in the letter to Ms Paton, that he had spoken with Mr Williams regarding the allegation that he had derailed her presentation. Mr Allen confirmed that Mr Williams told him that during the presentation Ms Paton had her back to the managers and was presenting by reading off the presentation which gave the impression she had not prepared for the presentation. The role calls for persons who are confident in such skills, and Mr Williams noted  
15 that he merely requested her to present to him as she would a customer in order for him to assess her skills as per the job description which had been available prior to the interview.

20 253. Mr Allen did not, in the letter to Ms Paton address her concerns regarding Mr Cuthbertson. Mr Allen was not asked about this matter in cross examination. We concluded however that notwithstanding there was no mention of this in the letter to Ms Paton, it was evident – as set out above – that Mr Allen had spoken with Mr Cuthbertson regarding the matters raised. We acknowledged that as a matter of good practice Mr Allen ought to have included this in the letter to Ms Paton, however we were satisfied no issue of unreasonableness  
25 arose from this in circumstances where Mr Allen had in fact investigated the matter.

254. We were referred to the case of **Iceland Frozen Food Ltd v Jones 1982 IRLR 439** where the EAT set out the correct approach for tribunals to adopt when determining whether a dismissal is fair or unfair. It was said:

30 *"(1) the starting point should always be the words of section [98(4)] themselves;*

*(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;*

5 *(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

*(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

10 *(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair."*

15 255. We asked ourselves, having had regard to all of the points set out above, whether the decision of the employer to dismiss the claimants fell within the band of reasonable responses which a reasonable employer might have adopted. We decided the decision did fall within the band of reasonable responses because the claimants were correctly placed in the pool for  
20 selection, the criteria were fairly applied to them, they did not achieve the cut-off point for the PSBM post, or the cut-off point for a second interview for that post, and in circumstances where they had achieved the cut-off point for the SDM role, they were offered that role, which was their second choice role. The claimants decided, following a four week trial period, to reject the role.  
25 They did not suggest there was alternative employment available at that stage which they were denied. The respondent had followed a fair procedure. In those circumstances we concluded the decision to dismiss fell within the band of reasonable responses. The decision to dismiss was fair.

256. We decided to dismiss the claims of Ms Smith and Ms Paton.

Employment Judge:

Lucy Wiseman

Date of Judgement:

01 August 2019

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Entered in Register,

Copied to Parties:

02 August 2019

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