EMPLOYMENT TRIBUNALS

Claimant: **Mr N Kirk**

Respondents:
(1) Citibank N.A.
(2) Mr Tom Isaac
(3) Mr Manolo Falco
(4) Mr Ashu Khullar
(5) Mr James Bardrick

Heard at: **East London Hearing Centre**

On: **2 June 2020 (in chambers)**

Before: **Employment Judge Goodrich**

Members:
Mrs P Alford
Mr G Tomey

Representation (written representations)

Claimant: Ms S Jolly QC (Counsel)
Respondent: Mr B Carr QC (counsel

JUDGMENT ON REMEDY

(AS TO WHETHER THE CLAIMANT WOULD HAVE BEEN DISMISSED IN ANY EVENT ABSENT THE UNFAIRNESS OR DISCRIMINATION AS FOUND BY THE TRIBUNAL AND SET OUT IN ITS DECISION ON LIABILITY)

The judgment of the Tribunal is that

The Tribunal reduces the Claimant's compensation by fifteen percent, to reflect the possibility that he would have been dismissed in any event absent the unfairness or discrimination as found by the Tribunal and set out in its decision on liability.

REASONS

Background and the Issues

1 In summary, the background to this (partial) remedy hearing is as follows.

2 Last year this Tribunal conducted a hearing to consider the Claimant's complaints of unfair dismissal and age discrimination.

3 We describe that hearing and the judgment from it as respectively "The Liability Hearing" or "The Liability Judgment".

4 The judgment of the Tribunal at The Liability Hearing was that:

4.1 The Claimant was unfairly dismissed.

4.2 The Claimant's age discrimination claims succeed, to the extent set out below (in the full reasons judgment).

5 When we refer in this judgment to "the Respondent", we are referring to the first Respondent. We refer to the second to fifth Respondents by name.

6 A Preliminary Hearing was conducted on 13 September 2019 to consider the issues and make Case Management Orders to prepare for a remedy hearing.

7 One of the topics that was discussed at that Preliminary Hearing was whether the parties could call further evidence on the issue of whether the Claimant would have been dismissed had a fair procedure been followed and/or had the dismissal not been an act of age discrimination. This was an issue on which evidence was heard and closing submissions given at The Liability Hearing. The Tribunal had, however, not determined that issue and reserved it to the remedy hearing. As set out in greater detail in the reasoning given from that Preliminary Hearing, the Tribunal would probably have determined the so called "*Polkey*" and "*Chagger*" issues if the Respondent had not wished to raise a "*Devis v Atkins*" issue which the parties had agreed should be reserved to the remedy hearing. By the time of the remedy hearing in March 2020, however, the Respondent had decided not to pursue this argument.

8 The remedy hearing for the case was set to take place from 16-20 March 2020. The hearing was, however, adjourned before any evidence had been heard due to issues concerning restrictions coming into place to seek to combat the COVID-19 crisis.

9 The remedy hearing was re-arranged from 1 – 5 June 2020. Mindful, however, of the uncertainties surrounding measures that might be taken to combat the spread of COVID-19, a telephone Preliminary Hearing was arranged for 11 May 2020.

10 At the Preliminary Hearing on 11 May 2020 the remedy hearing scheduled for June was postponed; and a hearing arranged for 28 September 2020 – 2 October 2020.

11 Agreement was reached with the parties' representatives at that Preliminary Hearing that the Tribunal would determine the *Polkey/Chagger* points prior to the remaining issues in the remedy hearing; and that the representatives would send written submissions limited to this point, to assist the Tribunal in doing so. The Judge made Case Management Orders for the exchange of written submissions for this purpose. The parties were to provide their written submissions by 26 May 2020; and any responses they wished to make to each other's submissions by 29 May 2020.

12 The issue for the Tribunal to determine at this aspect of the remedy hearing was whether the Claimant would have been dismissed in any event absent the unfairness or discrimination as found by the Tribunal and set out in The Liability Judgment.

The Relevant Law

Unfair Dismissal compensation- "Polkey" issue

13 Section 123 Employment Rights Act 1996 "ERA" provides that:

> "… the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

14 In the case of *Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL* it was stated:

> "In considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Employment Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

15 In the case of *Software 2000 Ltd v Andrews [2007] IRLR 568 EAT* the following principles were set out for assessing compensation for unfair dismissal in assessing the possibility of whether the Claimant who had been unfairly dismissed would have been fairly dismissed:

15.1 In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

15.2 If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.

15.3 However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise in seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

15.4 Whether that is the position is a matter of impression and judgment for the Tribunal. That in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

16 In the case of *Hill v Governing Body of Great Tey Primary School [2013] IRLR 284*, in giving guidance as to the correct approach and the determination of future loss, it was held as follows:

> "A *Polkey* deduction has the following particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question of what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand. Polkey, properly approached, requires an assessment of chance, which depends upon all the facts – the weight of those facts is best assessed by the primary fact finder."

17 Amongst other cases referred to in the parties' submissions (on behalf of the Respondents and replied to on behalf of the Claimant) was the case of *Virgin Media v Seddington UKEAT/0539/08/DM*.

18 In paragraph 15 of that case it was stated as follows:

> "… the Tribunal regarded the burden of proof as being on the company. That approach would be reasonable in a case, such as *King v Eaton*, of unfair selection for redundancy …: in such a case the question is what the employer himself would have done if a fair procedure had been followed, and it is appropriate that the burden of proof was showing that he would, or might, have dismissed anyway should be on him. But as we have already observed …, this case is not of that kind: the issue which determines loss is whether the Claimant would have found, and accepted, alternative employment. As to that, we do not think that the burden can be regarded as being at all points on the employer. The burden may indeed

> be on him to raise the issue (if the employee has not) – that is, to assert that there was no suitable employment that the employee could or would have taken – and he will also have to provide appropriate evidential support for that assertion: the basic facts about alternative employment will be within his knowledge and not – at least not always or not completely – within the employee's. But if he raises a prima facie case to that effect, it must, it seems to us, be for the employee to say what job, or kind of job, he believes was available and to give evidence to the effect that he would take such a job: that, after all, is something which is primarily within his knowledge. To the extent that any uncertainty about the position is the result of the absence of evidence which the burden is on the employee to supply, then it would be unfair for that uncertainty to be deployed against the employer.

Age Discrimination compensation- "Chagger" issue

19 The Equality Act 2010 ("EQA") provides that a Tribunal may order the Respondent to pay compensation to the complainant.

20 Section 124(6) EQA provides that the amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the County Court.

21 The general principle in assessing compensation for unlawful discrimination is that, as far as possible, the complainant should be placed in the same position as they would have been but for the unlawful act.

22 In the case of *Chagger v Abbey National Plc [2010] IRLR 47 CA* the following guidance was given:

> "The Employment Appeal Tribunal considered that the Employment Tribunal had been wrong to fail to apply *Polkey* or at least an equivalent principle in the tort field. The EAT cites the classic formulation by Lord Blackburn in *Livingstone*, to which we have made reference: what would the employee have earned if he had not suffered the wrong? They concluded that the 'wrong' here was not the dismissal itself but rather the act of race discrimination. Accordingly, the question was not what would have occurred had there been no dismissal, but what would have occurred had there been no *discriminatory* dismissal. That required consideration of the question whether dismissal might have occurred even if there had been no discrimination."

23 This formulation of the Employment Appeal Tribunal was approved by the Court of Appeal. It was stated:

> "It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

24 It was subsequently stated that this exercise requires the court to determine what, in fact, were the chances that dismissal would have occurred had there been no unlawful

discrimination. It focuses on what the employer would have done, not what he could lawfully have done. It was also stated that the gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination.

Submissions of the parties

25 As indicated in our summary of the background to this remedy hearing above, both parties' representatives provided written submissions and both provided replies to the other representatives written submissions.

26 There was broad agreement between the representatives as to the legislation and relevant caselaw. There was some disagreement as to the application of those legal principles, such as that Mr Carr submitted that Ms Jolly had conflated the steps to be carried out in making "*Polkey*" considerations and "*Chagger*" considerations. The main disputes lay in the application of the law to the facts and conclusions of The Liability Judgment.

27 The four sets of submissions are lengthy and we do not set out every point contained in them although we have considered them carefully.

28 On behalf of the Claimant Ms Jolly's submissions included the following points:

28.1 The nature of the evidence upon which the Respondent seek to rely is so inherently unreliable (in accordance with the Tribunal's own factual findings) that no sensible prediction, based on that evidence, can properly be made in their favour; and the findings of fact already made by the Tribunal, supported by the evidence heard, support a finding that a fair, transparent and non-discriminatory process would have placed him in the new role of head of natural resources.

28.2 The Claimant's primary argument is that this is not an appropriate case for any *Polkey*/*Chagger* discount to be made, or alternatively prospects of the Claimant being dismissed in fair and non-discriminatory circumstances was extremely low. The discriminatory acts infected the entirety of the decision making substance and process; and, although the Tribunal found that the reorganisation itself was an opportunistic response to a staff departure, everything that followed was a sham.

28.3 A fake consultation process was constructed to hide the fact that a decision had been made to get rid of the Claimant because of his age and the perception that he was "old and set in his ways", giving details as to why this was submitted to be the case.

28.4 Submissions as to applying the law to the facts, with numerous references to findings made in The Liability Judgment, covering the different stages of the dismissal process and credibility of the Respondent's witnesses, including the following points.

28.5 The Respondent's failure to produce any documentation on the 2017

reorganisation presents serious difficulties for the Respondent's argument that the Claimant would have been dismissed in any event, impacting on such questions as to whether there ever was a pool, whether there should have been "bumping", what size that pool should properly have been and as to whether Mr Husband should have been in the pool.

28.6 The Claimant would have been the successful candidate if there had been a fair and non-discriminatory selection process between him and Ms Olive, giving reasons for this.

28.7 References to The Tribunal's Judgment which set out failures on the Respondent's part to seek to find alternative employment for the Claimant; and submissions that, had the Respondent acted in a fair and non-discriminatory manner, the Claimant would have been found alternative employment.

28.8 It was doubtful whether *Polkey/Chagger* discounts can properly be attempted in circumstances where the discrimination lies at the very heart of the dismissal, infecting every process which the Tribunal must scrutinise and, to some degree, speculate upon. Alternatively, the Claimant reserved the right to argue that such discount should not apply in such circumstances.

28.9 The Claimant asked the Tribunal to find, in accordance with its own findings of fact already made, that the Claimant would have been retained in an open, non-discriminatory process and there is enough evidence to support a 100 percent finding in the Claimant's favour. If the Tribunal has any doubt about that, it is invited to make only the smallest of deductions, of no more than 5 – 10 percent, to reflect any element of uncertainty.

29 On behalf of the Respondent Mr Carr's submissions include the following points:

29.1 Any claim of the Claimant to have superiority over Ms Olive is unsustainable.

29.2 Inviting the Tribunal to consider the case of *Virgin Media v Seddington UKEAT/0539/08/DM* when considering alternative employment. The Claimant, although complaining that the first Respondent had not supported him in searching for an alternative role, had not identified any post to which he claimed he could have been appointed.

29.3 Submissions summarising the Tribunal's findings as to age discrimination; and, separately, in relation to unfair dismissal.

29.4 Setting out what were submitted to be key findings of the Tribunal in The Liability Judgment. These included, amongst other points, the following.

29.5 The centrepiece of the Claimant's case on age discrimination, that there was a "culture or practice, in which those in the Claimant's position and

age group were "expected to make way for a new, and younger generation of senior managers", had been rejected by the Tribunal.

29.6 The Claimant's claims that his performance markings of 2015 and 2016 were the consequences of a discriminatory policy or that he was otherwise discriminated against were also rejected.

29.7 Making particular reference to the development of relationships between institutional clients and partner teams having a greater emphasis and submissions that, if the Claimant and Ms Olive were compared, Ms Olive was substantially superior to the Claimant and she was identified by Mr Isaac and Mr Khullar as the right person for the role.

29.8 Mr Falco had discussed the proposed selection of Ms Olive with other senior managers, including Mr Roberts.

29.9 In the two years leading up to the Claimant's dismissal Ms Olive's overall performance had been rated significantly higher than the Claimant's.

29.10 Ms Olive had a significant advantage of the Claimant in relation to her position as Global Head of Commodities.

29.11 Urging the Tribunal to make a 100 percent deduction in accordance with "Chagger"; and at or close to that figure in relation to unfair dismissal.

30 In reply to the Respondent's submissions, the Claimant's submissions included the following points:

30.1 Submissions as to the *Virgin Media v Seddington* case on alternative employment including that, on the facts of this case, the Respondents had failed entirely to raise any primary case that there was no suitable employment available.

30.2 The Respondent's had incorrectly analysed and minimised the Tribunal's findings as to discrimination. Referring to paragraph 228 of The Liability Judgment, the Tribunal had found that the information leading to, the skillset document, decision to dismiss the Claimant and the Claimant's dismissal were, at least to the extent of having an important effect on the outcome, on the prohibited ground of the Claimant's age; and the Tribunal made positive findings that no effort was made by the Respondents to find the Claimant alternative work or seek to do this with him.

30.3 Likewise, the Respondents sought to re-categorise wholesale failures as to the Claimant's unfair dismissal as being mere questions of degree.

30.4 The Respondents assertion that the Claimant and Ms Olive were of a "comparable age" sought to wholly undermine the Tribunal's findings that the dismissal was because of age.

30.5 The Claimant central allegation has been that he was dismissed because of his age or a perception surrounding his age.

30.6 There was no evidence brought to support the Respondent's submission on broad and substantive management support for the decision, no notes of any conversations, no details from Mr Falco of those conversations, or dates.

30.7 The Tribunal had made no findings that Mr Falco played no role in the earlier decision made by Messrs Khullar and Isaac.

30.8 Submissions as to witness credibility.

30.9 The Respondents were now subsequently suggesting that only performance criteria counted and that partnership was everything in the decision was implausible, retrospectively convenient and demonstrated why it was unsafe for the Tribunal to make findings that are fair and open and non-discriminatory process would have relied almost entirely on one criterion.

30.10 Ms Senecaut had admitted that usually the redundancy policy and selection criteria would have been applicable; and there had never been an answer as to why this was not used in this case. Nor could the Respondent show that their views on partnership, at the time of dismissal, were not themselves discriminatory, for example Mr Falco's view that the Claimant was incapable of change was itself prima facie discriminatory.

30.11 That the Tribunal narrowly concluded that the performance grading assessment was not discriminatory has no impact on that conclusion.

30.12 The July 2017 media assessment showed that the Claimant's partnership skills were improving and that otherwise everything was good, which was not challenged by any of the Respondent's witnesses.

31 The Respondent's reply submissions included the following points:

31.1 It was contradictory to appear to be saying that there should be no deduction because no sensible prediction could properly be made but also to be saying that in fact prediction can and should be made and would lead to the inevitable conclusion that the Claimant would have been retained had a proper process been conducted.

31.2 The Claimant's submissions had risked conflating findings of unfair dismissal with age discrimination and the two should be separated.

31.3 The Claimant's submissions were misleading on how they classified the Tribunal's reference to the restructure that led to the Claimant's dismissal being opportunistic, explaining how this was contended to be the case.

31.4 The Claimant did not suggest in his witness statement for the liability hearing that he should have been put in Mr Husband's role. Nor would he have agreed to do so. Nor did he give evidence that Mr Husband should have been "bumped" rather than the Claimant being selected for redundancy.

31.5 No adverse findings were made about Mr Khullar.

31.6 The Claimant's points in relation to the restructuring and decision to dismiss the Claimant were false and unclear and submissions as to liability of various of the Respondent's witnesses strayed into hyperbole.

31.7 As regards the selection criteria, the Respondent was fully entitled to make its non-discriminatory decision as to what the requirements were for the new role.

31.8 Submissions confirming Ms Olive being the better candidate for the role in question.

31.9 Further submissions as to the importance of partnership:

31.10 The Tribunal was invited to engage in speculation as to the existence of alternative employment, contrary to the guidance given in the Seddington case.

31.11 Even without discrimination the Claimant would still have lost out to Ms Olive.

Findings of fact

32 The findings of fact below, and this judgment as a whole, need to be read in conjunction with The Liability Judgment. Although we have particularly in mind our findings of fact and conclusions at The Liability Judgment, we do not set out below each element of The Liability Judgment that we have considered for each finding below, although we have them very much in mind.

33 In The Liability Judgment some, but not all, of the Claimant's allegations of age discrimination were successful.

34 Of note is that his complaints of age discrimination concerning the awarding to the Claimant of a grade of 3 in his 2015 and 2016 performance reviews were unsuccessful.

35 The complaints of age discrimination made by the Claimant that were upheld were:

35.1 Issue 19(a), the comments allegedly made to C by R3 in the meeting of 25 September 2017 (Mr Falco's remark to the Claimant "you're old and set in your ways".

35.2 Issue 8(e) the provision of information or opinions which led to C being dismissed.

35.3 Issue 8(f), the preparation and/or provision of the “skillset” document referred to in paragraph 51 of the grounds of claim and/or other documents or assertions or assessments relied upon in deciding to dismiss C.

35.4 Issue 8(g), the decision to dismiss C.

35.5 Issue 8(h) C’s dismissal.

35.6 Issue 8(j), the comments allegedly made to C by R5 in the appeal meeting on 21 December 2017.

36 As regards the Claimant’s unfair dismissal complaint, the conclusions were set out in paragraphs 257 – 268 of The Liability Judgment.

37 The Tribunal considered the reason or principal reason for the Claimant’s dismissal. The Respondent did not satisfy the Tribunal as to its primary pleaded case, that redundancy was the reason or principal reason for the dismissal. It did satisfy the Tribunal, however, of its alternative case that it was for some other substantial reason, namely a re-organisation of responsibilities.

38 In paragraph 267 of The Liability Judgment the Tribunal set out its conclusions under Section 98(4) ERA as to whether the dismissal was fair or unfair. Its conclusions at paragraphs 267.1 – 267.6 were that:

38.1 The dismissal of the Claimant was an act of unlawful age discrimination.

38.2 The Claimant was not given any warning as to the proposed reorganisation until after the decision to re-organise had been made and, as set out in the Tribunal’s findings of fact, the decision to select the Claimant for dismissal on the (stated) grounds of redundancy had been made. The so called consultation with the Claimant was not genuine consultation, for the reasons set out in the findings of fact above.

38.3 If any efforts to seek alternative employment were made for the Claimant which, as set out in our findings of fact, we doubt, they were inadequate. The Claimant was an employee for over 26 years. He was trying to keep his job, or be placed in the position for which Ms Olive was to be appointed. No effort was made by the Respondent to have a meeting to discuss with him what might be possible areas of interest for him to work in and for which he might be suited.

38.4 The Claimant’s complaints of age discrimination were, in effect, ignored until the Claimant’s appeal although, in view of the Respondent’s policy they should have been considered as they were made before the Respondent’s so called consultation had started.

38.5 The conducting of the Claimant's appeal by Mr Bardrick was also an act of age discrimination, as described above.

38.6 After meeting the Claimant to discuss his grounds of appeal, Mr Bardrick carried out further investigations. He did not reconvene the meeting or give the Claimant any opportunity to comment on the outcome of his further investigations before reaching his decision on the outcome, to dismiss the Claimant.

39 In accordance with the guidance given in the *Chagger* judgment (above) it is necessary for the Tribunal to ask what would have occurred had there been no unlawful discrimination. Was there a chance that dismissal would have occurred in any event, even if there had been no discrimination, bearing in mind that the gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination?

40 As regards the Claimant's unfair dismissal, from all the evidence, would or might the Claimant's employment have ceased in any event had fair procedures been followed? Is this a circumstance where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made (as was one of the submissions made on behalf of the Claimant)?

41 The Tribunal bears in mind the guidance given in *Hill v Governing Body of Great Tey Primary School* (above) that the assessment of chances that the employer would have fairly dismissed the Claimant are predictive. We bear in mind, as was stated in the *Polkey* case that there is no need for an all or nothing decision.

42 In this case, making predictions of what would have occurred is a difficult exercise. It requires the Tribunal to consider what would have occurred instead of many discriminatory and/or unfair actions that did occur, and actions that should have occurred that did not. It requires, in a sense, the people involved to be different people to the people they were.

43 We do not accept, however, as was one of the submissions on the Claimant's behalf, that the nature of the evidence upon which the Respondent seek to rely is so inherently unreliable that no sensible prediction based on that evidence can properly be made in the Respondent's favour. Although we did have a number of criticisms of the evidence of the Respondents' witnesses we find that the evidence is not so inherently unreliable that no sensible prediction can be made. We do our best to undertake the exercise required by the guidance given in the relevant caselaw as best we can.

44 We set out below what we find would, or might, have occurred absent age discrimination or unfairness as set out in The Liability Judgment.

45 Firstly, there would have been adequate warning and consultation with both the Claimant and Ms Olive whilst the Respondent's proposals were at a formative stage; and the consultation would have taken place with an open mind, rather than both individuals

being given a "fait accompli". A proposed structure chart would have been provided setting out how the proposed new structure would operate and who would be in it. The candidates proposed for selection would have been given genuine assurances, from the outset of the consultation, that the unsuccessful candidate would be supported in seeking to find alternative employment with the Respondent, and the Respondent would have made good these assurances.

46 There would have been a number of possible consequences of such warning and consultation.

47 As has been remarked in appellate decisions, giving fair warning and consultation, gives those at risk the opportunity for looking for another job, both within and outside the organisation.

48 Of particular significance is that Ms Olive would have been in a very different position if she had been consulted when proposals were at a formative stage. The Respondent did not do this, instead telling her that she had been successful in the restructure, information that she was hardly likely to disagree with.

49 If both the Claimant and Ms Olive had been told, at the formative stage of proposals, that she was to have been put in a pool of two, where one of the two positions would be made redundant, she would have been likely to have had her own proposals to make and proper consideration would have been given to both their responses.

50 If both the Claimant and Ms Olive had been firmly opposed to the proposals and/or provided different options for saving costs, reviewing and streamlining the current operating model for the franchises, as was the reasoning for the restructuring set out at paragraph 121 of The Liability Judgment, the Respondent would have considered the proposals properly; and might have decided not to put either of their jobs at risk in the restructure. In 2016 Mr Khullar and Mr Isaac made proposals to consolidate the franchises of energy, power and metals and minerals ("EMEA"). Although a written report was produced by them for their proposed restructure, it did not take place, for reasons set out in paragraph 117 of The Liability Judgment. They might, therefore have once more decided not to go ahead with their proposals. The departure of Mr Hanen achieved, at least in part, an objective of the 2016 proposals if, as we understand to be the case, his position was not to be filled by a new recruit.

51 The Claimant and/or Ms Olive might have made credible proposals, had there been genuine consultation while the proposals were at a formative stage, that would have achieved the aims stated at paragraph 121 of The Liability Judgment, of saving costs, reviewing and streamlining the current operating model; that would not have put their roles at risk. If so, it is possible that their proposals would have been accepted and also possible that they would not have been.

52 It is possible, therefore, that the redundancy selection exercise would not have occurred, or would not have occurred in such a manner as to make one of the Claimant's and Ms Olive's posts made redundant. If so, the age discrimination and unfairness involved in the dismissal of the Claimant would never have taken place. One of the main points of genuine consultation is that it can lead to new ideas, sometimes to better ideas, and the ideas are given serious consideration. If the redundancy selection exercise had

not occurred, or occurred in such a manner as to make one of the Claimant's and Ms Olive's posts made redundant, the age discrimination and unfairness involved in the dismissal of the Claimant would never have taken place.

53 As, however, Mr Isaac, Mr Khullar and Mr Falco wanted one overall head of the franchises, rather than having three heads they had prior to Mr Hanen's departure, it is probable that they would have wanted a restructure that achieved this objective.

54 If the Respondent, at the time of conducting a genuine consultation exercise, had produced a proposed restructure chart, as they would have done if acting reasonably and absent age discrimination, that would have been likely to have shown the new head of franchise role to which Mr Husband soon after the rejection of the Claimant's appeal against dismissal (paragraphs 65 and 180 of The Liability Judgment; and page 1664 of bundle of document at The Liability Hearing).

55 If such a proposed restructure chart had been produced, Ms Olive and probably the Claimant would have argued that Mr Husband's position should be made redundant rather than theirs (if the role he held was deleted on his promotion, rather than subsequently being replaced) or at least that he should have been placed in the pool for selection for redundancy. Ms Olive might well have taken the view that if she were to be unsuccessful in gaining the post of being head of all the franchises, she would rather retain what appears to have been a similar position as head of CB Metals and Mining and be managed by Mr Claimant instead of Mr Isaac than be made redundant. Nor did the Claimant know, at the time of the non-genuine consultation process that took place, of the plan to promote Mr Husband, as he was not given a proposed structure chart of the franchises after the re-organisation. The comments he made between the meeting he had with Mr Falco and Mr Isaac on 25 September 2017 until the dismissal of his appeal were made without full knowledge of the facts. The Claimant might well, therefore, also have asked that Mr Husband be the one made redundant or at least form part of any pool for selection for redundancy. If they had made such a request, it is hard to see how Mr Isaac and Mr Falco (and Mr Khullar, if this had happened before he moved post) would not at least have placed him into a pool for selection, if they were acting fairly and without age discriminatory perceptions of the Claimant.

56 We have considered the submissions as to whether Mr Husband's position would have been "bumped", i.e. he be the person placed for redundancy. It is difficult to be definitive on the submissions for and against the proposition that Mr Husband might have been "bumped", rather than the Claimant or Ms Olive being placed for redundancy. The Tribunal does not know whether the post held by Mr Husband before he was promoted was deleted after his promotion, or whether it was filled. If his post was filled, there would have been no need for Mr Husband to have been "bumped". If, on the other hand, the post he currently held was to be deleted, and he formed part of a pool of three, there must have been a good possibility of the Claimant (or Ms Olive) being successful as against him, as the Claimant was already working at the same level or slightly senior level as the promoted position, whereas for Mr Husband it would have been a promotion. Mr Husband, if likely to be made redundant as part of the reorganisation because of his position being deleted, would also have been consulted, and would have been likely to argue that he should form part of the pool for selection.

57 If the outcome of such a redundancy selection process had been that Ms Olive had been successful in gaining the position of head of the reshaped franchises, and the Claimant been unsuccessful as against Ms Olive, and successful as against Mr Husband, he would almost certainly have been upset and unhappy about Ms Olive being promoted to a position for which he felt that he was the stronger candidate. It is possible that he would have refused the role, as submitted by Mr Carr on behalf of the Respondents. It is, of course, another hypothetical issue, as he was never given such an option. He would have had a loss of status in no longer being managed not by Mr Isaac but by Ms Olive (and, we understand, Mr Parker). The Tribunal does not know whether the promoted position taken by Mr Husband after the Claimant's appeal was rejected was at the same, or similar level of renumeration as the Claimant- the fact that he was being promoted to being head of a franchise suggests that the level of renumeration was been similar to that held by the Claimant, who was the head of the Energy franchise. In the Tribunal's experience an employee given a choice between being dismissed on grounds of redundancy or being retained, with some loss of status and (possibly) some reduction in pay, albeit remaining on substantial pay, might well prefer to remain employed, at least until such time as being able to leave at a time of their choosing (a point that was made in the *Chagger* case was that the fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing.) It is likely, therefore, that he would have preferred to take such a position than be dismissed, even if he might have envisaged or wished to do so on a short-term basis whilst looking for other opportunities.

58 The Tribunal has considered, whether, as submitted on behalf of the Respondents, that there should be a separation of the aspects of the dismissal that were held to be unfair from those held to be discriminatory. The Tribunal rejects these submissions.

59 First, the Tribunal finds the issues of the discriminatory dismissal and the unfair dismissal to be intertwined. Dismissal is a process that starts with the first steps taken in the stages of dismissal and ends with the outcome of the employee's appeal. At all stages of this process the Respondent's actions were influenced by age discrimination, such as the perception that the Claimant was old and set in his ways and that he was not agile enough, in comparison to how Ms Olive was perceived.

60 Second, the steps outlined in the *Williams v Compair Maxam* case giving guidance as to the actions a reasonable employer, acting within the band of reasonable responses, would have adopted influence causation. If, for example, the outcome of consultation had been either for the restructure not to have taken place, or to have taken place in a very different way so as not to have put the Claimant's position at risk, the discriminatory element of the Claimant's dismissal would not have occurred at all because the Claimant would not have been dismissed.

61 Following the consultation process, conducted fairly and without an age discrimination perception of the Claimant as being old and set in his ways and lacking agility, it is also possible that, nonetheless, the Respondents would have decided to conduct the re-organisation as per their proposals, or at least as per their proposals and with the addition of Mr Husband to the pool. It is the prerogative of employers to organise their workforce as they think best and to give consideration to such matters as saving costs, reviewing and streamlining how they operate. The managers concerned wanted to

have the EMEA franchises have one leader in charge of them all, rather than, as prior to Mr Hanen's departure three heads of the franchises, namely the Claimant, Mr Hanen and Ms Olive.

62 As regards the criteria used by the Respondent to make their selection of the Claimant for redundancy the Tribunal sets no great score by the skillset document that was produced, nor were we satisfied that the criteria in it were applied fairly and without age discrimination. It was provided in order to seek to provide retrospective legitimacy to a decision that had already been made (see, for example, paragraphs 130, 131 and 132 of The Liability Judgment). The emphasis given to the importance of the role of Global Head of Commodities in the restructure was unconvincing (see paragraphs 127-129 of The Liability Judgment). The job description and stress testing exercise were conducted after the decision had been made to select the Claimant, rather than Ms Olive, for redundancy. The Tribunal was informed that the Respondent had a redundancy policy, although this was not produced at The Liability Hearing, nor was it explained what the policy was or why it was not followed.

63 The Tribunal does not know, therefore, exactly what criteria would have been used absent unfairness and age discrimination in the process. We find, however, that some criteria would have been given that would have met the guidance given in the *Williams v Compair Maxam* case, to which we referred in The Liability Judgment and that they would have been made fairly and without discrimination. We have in mind the guidance that the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service. The employer will then seek to ensure that the selection is made fairly in accordance with those criteria.

64 If a fair, non-discriminatory process had been chosen, what is the chance that the Claimant, rather than Ms Olive, would have been the successful or unsuccessful candidate?

65 The Tribunal finds that the Claimant would have had at least as good a chance of being successful as Ms Olive. We so find from all the evidence and reading material we heard and read at The Liability Hearing. In particular:

65.1 Both the Claimant and Ms Olive were strong candidates for the role.

65.2 Between 2006 – 2013 the Claimant received a rating of 2 in his performance assessment, the second best out of five gradings.

65.3 In 2014 the Claimant received a performance assessment of 1, the best grade.

65.4 In 2015 and 2016 the Claimant received a grade of 3, the middle of the 5 grades for which the managers were assessed (see, for example, paragraph 76 of The Liability Judgment).

65.5 The Tribunal does not know what grade the Claimant would have received

had he remained long enough in post to receive his 2017 performance assessment. We know, however, as set out in paragraph 120 of The Liability Judgment that the Claimant was informed at his mid review meeting with Mr Isaac and Mr Khullar, under partnership, that they were getting the feedback "all signals good" and reference to having improved. This suggests that the partnerships skills that the Respondent relied on heavily both in justifying its grading of the Claimant for 2015 and 2016 and its selection criteria for the redundancy exercise were improving.

65.6 Ms Olive had performance assessments of 1 for 2015 and 2 for 2016, both excellent grades.

65.7 There was a great deal of cross-examination at The Liability Hearing as to the respective documentation on the performance assessments of the Claimant and Ms Olive, which the Tribunal considered at The Liability Hearing, and on which we gave our findings of fact. We held that the performance assessments for the Claimant were not age discriminatory. We also made a finding, at paragraph 129 of The Liability Judgment, that the data showing feedback given on Ms Olive's partnership skills was not unequivocally positive, but also had some mixed feedback.

65.8 The suggestion in the closing submissions on behalf of the Respondents, that the Claimant was "on the way down" slightly troubles the Tribunal. Although there are many reasons why an employee may be on the way down that have nothing to do with age discrimination and this is no doubt how the submission was intended, the expression gives a slight echo of Mr Falco's remark that the Claimant was "old and set in his ways". In any event, the fact that Mr Isaac and Mr Khullar, as noted above, had told the Claimant in 2017 that they were getting the feedback "all signals good" and reference to having improved his partnership skills (paragraph 120 of The Liability Judgment) suggests that, if he had been on the way down in the two previous years, he was on the way back up again.

65.9 The largest revenue generator of the EMEA franchise was the energy franchise headed by the Claimant (paragraph 132.7 of The Liability Judgment). The Tribunal was sceptical as to the importance given by Mr Isaac of the importance given to the role of Global Head of Commodities (paragraphs 127 and 128 of The Liability Judgment).

66 The Tribunal has also considered what would have happened if the Respondent had taken reasonable steps, and without age discriminatory perceptions of the Claimant, to find alternative employment for the Claimant, bearing in mind the size and administrative resources of the Respondent and the Claimant's twenty six years' service as an employee of the Respondent. The Tribunal made findings as to failings on the Respondent's part to make reasonable efforts to do so, for example in paragraphs 132.6 and 157 of The Liability Judgment. Such steps as were taken left the onus entirely on the Claimant as described, for example, in paragraph 160.2 of The Liability Judgment.

67 The issue of alternative employment for the Claimant was not dealt by the parties in any great detail at The Liability Hearing. The Claimant did not refer to the issue in his

witness statement and the point was only briefly referred to in the closing submissions made on his behalf. Only brief references to the issue were made in witness statements of the Respondents and the point briefly covered in closing submissions on their behalf. Both parties concentrated on their primary cases as, in the Tribunal's experience, is not unusual even where *Polkey* and *Chagger* issues potentially need to be determined.

68 The Tribunal has considered the guidance given in the *Virgin Media Limited v Seddington* case (referred to earlier above). The circumstances in this case have some differences. In the Seddington case, Virgin Media had decided to get out of the specialised market in which the Claimants were working, so that there was no dispute that there was a redundancy situation; in this case there was a dispute as to whether the Claimant was made redundant and the Tribunal decided that the principal reason for dismissal was some other substantial reason, namely reorganisation, rather than the Respondent's primary case that it was redundancy. The closing submissions for this remedy decision, however, reflect an issue in the *Seddington* case, namely as to where the burden of proof lies in steps to be taken to find alternative employment for the Claimant.

69 It is questionable whether the Respondent has raised a prima facie case, with evidential support, that there was no suitable employment that the Claimant could or would have taken, in view of our findings of fact on this issue in The Liability Judgment. What was lacking on their part was the provision to the Tribunal of documentation to show what vacancies had become available at a similar level to that held by the Claimant between his meeting on 25 September 2017 and the dismissal of his appeal; or of steps taken to discuss with the Claimant whether he wanted alternative employment and what sorts of roles, possibly with the help of some training, he considered that he would be willing and capable of fulfilling.

70 Wherever the burden of proof lies on this issue, the Tribunal has considered the core issue required in "*Polkey*" and "*Chagger*" cases of predicting what would, or might, have happened with procedures that were not unfair and had there been no unlawful discrimination.

71 We find that, at the stage that the proposals to restructure the EMEA franchises were at a formative stage, where it was proposed that one of the roles held by the Claimant and by Ms Olive might be deleted, they would have been told that they would give active support to the unsuccessful candidate in finding another job; this would have been a genuine desire and the relevant individuals would have made good such a commitment.

72 Instead, as described, for example, in paragraphs 132.6, 157 of The Liability Judgment, the Claimant was not given any such assistance and given to feel that his managers did not want to retain him in the Respondent's employment. The impression given to the Tribunal was that, once Mr Isaac, Khullar (although he had moved to another position by the time of the meeting of 25 September 2017) and Mr Falco made the decision to select Ms Olive, rather than him, for the position of having one overall head of the EMEA franchise they did not want him to be retained within the Respondent's workforce. Consistent with that impression was, as set out in The Liability Judgment, the manner in which the consultation was conducted, how the Claimant's complaints of age discrimination were dealt with, as was the decision to terminate the Claimant's

employment by terminating his employment within a few days of the letter written to dismiss him and paying him in lieu of notice. In our experience many employers do not wish employees to be in an awkward position of working their notice and we recognise that. In this case the Respondent, if genuinely wanting to help the Claimant find alternative employment within what is a very large organisation, might have put the Claimant on garden leave for his 12 weeks period of notice and kept in touch with him about possible vacancies during the course of his notice period.

73 The onus in seeking out, and finding alternative employment lies with the employee concerned, as well as the employer. The Claimant, so far as the Tribunal is aware, did not apply for any alternative employment with the Respondent. We recognise that the context of whether to apply for alternative work was that the Claimant felt, with justification, that he had been the victim of age discrimination and was being unfairly dismissed. Nevertheless, the fact that he did not apply for any other jobs raises the question of whether there were suitable alternative jobs during the time concerned; and whether he would have applied for them if there had been.

74 If the Claimant had been the individual selected for redundancy, it is likely that, had the process been handled in ways that were fair and with no unlawful discrimination, there would have been some discussions with him as to whether he wanted to find alternative employment, what roles he considered himself suitable for, and what was available or what might be becoming available in the near future.

75 The Tribunal is aware that, in a multinational corporation, vacancies can occur around the world. We know, for example that Mr Hanen left his post within the EMEA franchises to a new role with the Respondent in Dubai (paragraph 119 of The Liability Judgment); and that Mr Khullar left his role as joint manager of the EMEA franchises to go a role in the far east, from where he gave evidence by video link. We do not know whether the Claimant would have been willing to move to another country, whether there were any suitable vacancies for him abroad, or whether there were any vacancies based in continuing to work in London for which he might have been suitable and wishing to apply.

76 The timespan for looking for alternative work would have been likely to span from proposals for restructure when they were at a formative stage around August or September 2017, to at least the determination of the Claimant's appeal, which was by letter dated 2 February 2018. Alternatively, the timespan might have ended 12 weeks from the letter 20 November 2017 dismissing the Claimant.

77 The Tribunal finds, therefore, that there is a chance that the Claimant would have found alternative employment. Absent, however, the provision of positive evidence on the Claimant's part of suitable alternative employment that he would have applied for we find this possibility as being relatively minimal.

78 The Tribunal has set out above multiple different possible scenarios for what would or might have occurred absent age discrimination or unfairness as found by the Tribunal, reflecting the multiple ways in which we have held the discrimination to have been unfair and age discriminatory. We have also given consideration to the question of what we find would have most likely to have occurred, amidst these multiple possibilities.

79 We find that what is most likely to have taken place is that either the position held by Mr Husband would have been deleted as well as those of the Claimant and Ms Olive, and that his position would have been made redundant (if it was not filled after his promotion); or that he would have been placed in a pool of three for two positions. We find that it is likely that the Claimant would have obtained either the role that was offered and accepted by Ms Olive; or the role that was offered and accepted by Mr Husband.

80 If the Claimant had been successful in obtaining the role offered to Ms Olive, he would undoubtedly have accepted it, as it was the position he fought for, having been told that he was unsuccessful. If he had not been successful and offered instead the role to which Mr Husband was promoted, he would have been highly likely to have accepted it, for the reasons set out earlier above.

81 Having all these considerations in mind, the Tribunal finds that, absent the unfairness and discrimination as found by the Tribunal and set out in The Liability Judgment, it is unlikely although possible that he would have been dismissed. We reduce the Claimant's compensation by fifteen per cent, to reflect the *"Polkey"* and *"Chagger"* issues namely, as described in submissions on behalf of the Respondents, whether the Claimant would have been dismissed absent the unfairness or discrimination as found by the Tribunal and set out in its decision on liability.

Conclusions and next steps

82 For the reasons set out in our findings of fact above, the Tribunal concludes that absent the unfairness or discrimination found by the Tribunal in The Liability Judgment there is a fifteen percent chance that the Claimant would have been dismissed.

83 We hope that the parties will seek to resolve remedy themselves; and, if they do, to notify the Tribunal as soon as they have done so. If not, the parties are aware that the case has been listed for a remedy hearing from 28 September- 2 October 2020; and for a Preliminary Hearing by telephone on 30 July 2020.

Employment Judge Goodrich
Date: 24 June 2020