

## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr T Childs**

v

**Health & Social Care Information  
Centre (t/a NHS Digital)**

**Heard at: Leeds by CVP**

**On: 9,10,11,12 November 2020**

**Before: Employment Judge C O'Neill**

**Representation:**

**Claimant: Mr P Morgan, of Counsel**

**Respondent: Ms Niaz- Dickenson of Counsel**

## RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds.
2. I make no order for compensation or other remedy.

## REASONS

### **Background**

1. The claimant worked for the respondent as a lead information analysis manager between 29 June 2009 and 1 May 2019.
2. The claimant complains of unfair dismissal. The respondent admits the dismissal of the claimant. The respondent relies upon the statutory permitted reason of redundancy in its defence of the unfair dismissal claim.
3. The issue for the Tribunal as agreed at the preliminary hearing before Judge Brain on 5 May 2020 is whether the respondent acted fairly and reasonably in treating redundancy as a sufficient reason for dismissal of the claimant and acted within the range of reasonable responses / managerial prerogative when deciding whom to make redundant. At that hearing it is recorded that 'The claimant fairly accepts there to have been a genuine redundancy situation'.
4. The Claimant has now secured alternative employment within the public service sector and confirms that he has suffered no pension loss and given his redundancy payment seeks no order for compensation or remedy other than a declaration.

### **Evidence**

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

6. On the eve of the hearing and/or during the course of the hearing, the following additional documents were added: job description with tracked changes; moderated scores table; Wave One organisational toolkit.
7. The Wave One Organisational Toolkit was added at the end of Mr Morgan's cross examination of Mr Nelligan when an HR manager realised that the Toolkit in the bundle on which Mr Morgan had based his cross examination was not in fact the Toolkit in existence when Mr Nelligan developed the Process for Change document. I therefore held Mr Nelligan over to the following day to enable Mr Morgan to re-examine Mr Nelligan if he deemed it necessary to do so on the basis of the correct document.
8. The tribunal heard from the claimant and the following respondent witnesses  
Matt Neligan - Director of Data – assessor - member of Interview panel – and moderator panel  
Chris Roebuck – Chief Statistician - assessor - member of Interview panel – and moderator panel  
James Hawkins – Director of Insurance and Risk – First Appeal Officer  
Ian Lowry – Director Product Development – Second Appeal Officer  
Jennifer Renwick – HR Consultant – Investigated the grievance  
Carl Vincent – Chief Financial Officer – heard grievance appeal  
Sarah Hall-Croft – HR manager – attended the grievance  
Sharon Goodall – Senior HR Manager
9. All witnesses gave their evidence under oath having produced a written statement.
10. Counsel for the parties made helpful submissions. Both were invited to present written skeletons if they wished, and Ms Niaz-Dickenson chose to do so.

### **Claims**

11. The only claim in the ET1 grounds was that of unfair dismissal for the following reasons
  - (i) the scoring threshold was set after the assessment scores were finalised,
  - (ii) the panel changed the scoring matrix from 1-4 to 0-3 without informing or consulting C which unreasonably reduced his score.
  - (iii) The panel failed to take mitigating factors into account:
    - (a) his unusually high workload and involvement in the selection process of grade 6 and seven
    - (b) his personal life
    - (c) past performance.

12. The claimant was legally represented when the ET1 was lodged and has remained legally represented.

**Law**

13. The relevant sections applicable to this unfair dismissal claim are S98(4) and S139 Employment Rights Act 1996. Redundancy is a potentially fair reason for dismissal under section 98 (2) (c).

14. S 98(4) [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
- (b) shall be determined in accordance with equity and the substantial merits of the case.

15. S 139 provides

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

16. The Tribunal has had regard to the following case referred to by the respondent namely:

**Williams v Compare Maxam Ltd 1982 IRLR 83**

1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
  2. *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
  3. ***Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.***
  4. ***The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.***
  5. *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment*
17. In addition, counsel for the respondent has referred the following cases to me and I have taken them into account, namely

British Aerospace plc v Green and Ors [1995] ICR 1006

Mitchells of Lancaster (Brewers) Ltd v Tattersall [2012]

Swinburne and Jackson LLP v Simpson [2013] UKEAT/0551/12/LA

Nicholls v Rockwell Automation Ltd [2012] UKEAT/0540/11/SM

Murphy v Epsom College [1984] IRLR 271

## Findings of Fact

1. Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.
2. The Claimant was employed as a Band 8c Information and Analysis Lead (IAL) Manager in the Information Analysis and Statistics (IA&S) Profession within the Data, Insight and Statistics (DI&S) Directorate. He headed up the Adult Social Care Analytical team in Leeds. His service began on 29 June 2009 and ended on 1 May 2019.
3. In 2018 the respondent had begun the process of reorganisation which was likely to lead to redundancy in some departments. The respondent has a number of policy documents which inform managers as to how to conduct such reorganisation and redundancy. These documents include NHS Digital Selection Process Guidance and Wave One Organisational Change Toolkit.
4. The reorganisation was to be implemented in phases and the claimant's role was considered in the first phase (Wave One). The workforce was divided into various sectors and a senior manager was charged with developing the plan for each sector in a document called Proposal for Change.
5. Mr Nelligan was charged with developing the redundancy plan for the directorate in which the claimant worked following the guidance in the above documents. In conjunction with Mr Roebuck and HR, he drew up the document called a Proposal for Change for the IAS and DM Professions (band 8C, & and 6) (Proposal for Change). This was issued in October 2018 and applied to the claimant.
6. The Proposal for Change identified the staffing complement under consideration as being approximately 190 people and further divided them into role-based pools. The claimant was in the cohort called Band 8c Information and Analysis Lead Managers (Leeds).
7. The document records that there were 11 people in the same pool as the claimant and that there is to be a reduction to 9 i.e. two people can expect to be made redundant.
8. The Proposal for Change (which was the principal document for communicating to staff in the directorate what to expect from the process) sets out that the employees in the same pool as the claimant would be assessed on the basis of

the application form they would be required to complete and an interview which included a management presentation. The criteria upon which they were to be judged, were relevant qualifications and skills and relevant experience. The document also sets out provisions as to scoring and weighting.

9. The respondent excluded a member of staff on maternity leave from the selection process and she retained her position.
10. The respondent applied the selection measures to the remaining 10 members of staff and ranked them in accordance with the score they were awarded. The claimant was given a score of 58.8% and was ranked seventh out of 10. The respondent dismissed the four lowest scoring members of staff including the claimant. There was a significant margin between the claimant and the person who was in eighth position who scored 49.07%. The claimant was eventually scored 58.8% and ranked seventh. The person in sixth position scored 59.95% on the amended Table and was retained.
11. This meant in effect that the claimant was not dismissed by reason of the proposed reduction in headcount which, if taken alone would have resulted in only the two lowest scoring members of staff being dismissed.
12. The claimant was dismissed because the respondent had set a proficiency bar of 60% and his score at 58.8% was just under that threshold.
13. Mr Nelligan and Mr Roebuck, explained that the Proposal for Change contemplated not only a reduction in headcount, but the introduction of a new job description for those people in the claimant's pool. The old job description was in the bundle together with the tracked changes, showing the amendments and additions to that old job description that were introduced to reflect the future role of an IAL manager.
14. Mr Roebuck, who I find to be an honest witness, explained that whereas under the old role managers were in broad terms generalists and the directorate reactive, it was envisaged that in the future the managers would be required to adopt a more specialist role. Members of the pool were asked to identify which of the four specialisms they were interested in. The new job description was issued to all in the pool, including the claimant, together with the application form at the start of the process. Mr Roebuck described it as expecting the managers to move from being gifted amateurs to specialised experts in particular fields.
15. The claimant was most interested in the specialism called 'business intelligence'. Mr Roebuck explained that in terms of business intelligence the directorate would be expected to work in a more proactive way, developing in conjunction with their customers more dynamic ways in which to present, access and use data. This would require a new way of working and approach to customers and involve developing an expertise in new software to achieve significant improvements in frequency, timeliness, and granularity of data (the capacity for the customer to drill down into the data independently).
16. Mr Roebuck fairly accepted that the claimant in the role he currently did, had undertaken some aspects of the role envisaged for a manager in business intelligence. However, he said in terms that the claimant had not been working at the level of specialism expected for the future, but had assumed some aspects of the work, such as developing dashboards, using software which was about to be replaced.

17. Under cross examination, the claimant accepted that there was a genuine change of direction within the directorate and that such a change was necessary. The claimant in his ET1 and during his appeal has not complained that the change was not substantial enough to constitute in effect a new position.
18. Taking into account the evidence of Mr Roebuck and the claimant and considering the job description and the changes made to it and the concessions made by the claimant I find that the respondent in its future plans had no place for the old-style generalist IAL manager and that the new role was substantially different from the old.
19. The selection criteria adopted to select the two managers to be made redundant, was also intended to serve a second purpose, namely to ensure that each retained IAL manager had the ability to carry out the new style role. The proficiency bar by which the selection panel determined that question was set at 60%.
20. Mr Nelligan had responsibility for drawing up the Proposal for Change document that was circulated to staff as part of the statutory information procedure.
21. The Proposal for Change did not set out (as it should have done) what percentage of the overall score should be assigned to the interview and what should be assigned to the application form or how the scores from the application form and interview process should be combined to produce a single composite score and did not set out the pass mark or cut off score.
22. Mr Roebuck, in his original statement in the grievance investigation, said that he had inherited a mess. Although he sought to present his views in somewhat more diplomatic terms at the tribunal hearing I formed the clear impression that it remained his view that he had inherited a mess.
23. The respondent later on commissioned a review of the first phase (Wave One) and a report was published, called '*Lessons Learned from Org2 - Wave One: Outcomes from the Independent Review undertaken by Members of the NHS Digital Leadership Programme*'. That report highlighted a number of serious criticisms of the Wave One process (of which the claimant's dismissal was part) to the effect that there were serious shortcomings, caused or exacerbated by the rushed nature of the programme and incomplete plans. I did not hear from Ms Sue McClay, who was the HR manager assigned to the Process for Change relevant to the claimant. I did hear from Ms Goodall, who is now a senior HR manager, but at the time was assigned as a peer of Ms McClay to a different directorate. Ms Goodall asserted that such criticisms could not be levelled at the claimant's directorate. However, as she was not directly involved I find her evidence to be less reliable than that of Mr Roebuck, whose own evidence reflects the findings in the Lessons Learned document.
24. The Proposal for Change departed from the overarching guidance documents (The Selection Guidance and the Tool Kit) in a number of critical ways, how the scores were to be arrived at and what pass mark was to be applied was not set out in advance. The guidance documents clearly anticipated that

- the pass mark score should be established before any assessments were made and that there should be anonymisation.
25. Staff consultation began in September 2018, when initial information was circulated. The proposal to change document was issued to staff on 12 October 2018 and on 15 October 2018 application forms were issued to the claimant and the rest of his pool with attached guidance and new job descriptions. The claimant accepts that the respondent briefed him clearly on the matter and he understood the respondent's plan overall and accepted why it was necessary. The claimant makes no complaint for want of consultation.
  26. The interviews for the managers in the claimant's pool began on 2 November 2018 and the claimant was interviewed on 7 November 2018, all interviews were completed by 15 November. His invitation was issued on 24 October 2018 and he accepts that he had 23 days' notice of the interview in which to prepare.
  27. Throughout this period the claimant was busy with his ordinary workload, but in addition had taken on extra responsibilities for briefing and coaching the more junior grades six and seven and on the day before his interview the claimant was asked to individually a technical skills test for band six and seven staff as a consequence of which he missed a senior management meeting convened to discuss the cultural leadership programme.
  28. The claimant's application form was marked by two senior people not on the interview panel and they gave the claimant scores based on the guideline boxes in the proposal for change document and awarded a score between one and three (experience) and one and four (qualifications, knowledge and skills).
  29. The claimant was interviewed on 7 November by a panel comprising Sue McClay from the HR department, Matt Nelligan, Chris Roebuck and Daniel Ray. The interviews were scored on a scoring matrix of 0 to 3, 0 demonstrating no evidence that the candidate had met the criteria and 3 showing that a candidate had demonstrated a higher level of experience. The questions were in two parts the first relating to managerial skills in the form of a presentation, the second relating to questions, including questions specifically geared to the specialism the candidate had identified. The claimant had identified business intelligence as his favoured specialism.
  30. After the completion of the interviews, the interview panel formed a moderation panel to consider the outcome of the scoring. After the interviews were completed and scored and after the application forms scored, Mr Roebuck had concerns about the process and then set about changing various aspects of the scores. I am satisfied that he did so with good intentions to achieve a greater mathematical cohesion. These matters should have been included in the Proposal for Change document and preceded the scoring of the interviews and the application forms. The Proposal for Change did not include how the interview process should be scored, set the marking regime to begin at one even if the candidate failed to demonstrate any ability or potential, did not include the distribution of the scores as between the form and the interview and the weighting to be given to each or how the scores should be combined to produce a composite score for ranking purposes, nor did it set out what the pass mark should be or how it should be set.



31. Mr Roebuck took the view that the scores allocated to the application form which were based on a marking system beginning with one (as set out in the Proposal for Change document) were not logical or compatible with a scoring system adopted for the interviews, which began at zero. Mr Roebuck therefore set about reducing each person's scores by one in each category. Although this appears to be even handed the mathematical effect of this had a greater adverse impact on those at the lower end of the scale than those at the higher end of the scale. This method departed from the Proposal for Change document which had been the principal vehicle through which the staff had been briefed and staff consultation had taken place.
32. The scores had at first been combined to form a percentage share one third for the application form scores, one third for the first part of the interview (managerial skills) and one third for the second part of the interview (the specialism). Mr Roebuck considered this to be not a reasonable distribution and the panel agreed to change the distribution to a 50-50 split.
33. The adjustments to the scores by the zeroing mechanism adopted impacted more adversely on those with the lowest scorers. In the claimant's case, it would not have changed his position in the rankings, although but for the zeroing ring mechanism he would have attained a score of over 60%. I make no finding that Mr Roebuck and the panel adopted this practice to disadvantage the claimant.
34. The mathematical effect of the change in this distribution of scores from 3x1/3 to a 50-50 split advantaged the claimant and slightly increased his final score.
35. At some point before 22 November 2018 the respondent recognised that there was also a disparity in the scores awarded to the claimant by those marking the application forms. The company policy as set out in the guidance documents was that such a disparity should be resolved through moderation. Mr Roebuck did not adhere to that route, but on 22 November 2018, arranged for a third marker to be appointed and thereafter the scores were averaged. Although strictly speaking, this method fell outside the official method of dealing with such as disparity, the claimant conceded that this was a potentially fair way of dealing with it. It was the unchallenged evidence of Mr Roebuck that this had the effect of increasing the claimant score and moving him up one place in the ranking.
36. The above adjustments to the marking system were made at Mr Roebuck's instigation, and I accept that the adjustments he made with the support of the panel were designed to ensure fairness and mathematical rigour and were not designed to disadvantage the claimant. As set out above in some instances he was advantaged.
37. Although the claimant has made complaints about the scoring process and particularly where the steps taken are not in conformity with the respondent's guidance documents he has not sought to demonstrate that he was unfairly

marked per se. The one exception is the interview mark of 0.5 given by Mr Daniel Ray which appears to be out of line with the other scorers. The claimant contends that this should have been referred to the panel for reconsideration through a moderation process and that had this been done Mr Ray's score would have been levelled up and as a consequence his overall score would have been lifted over the 60% threshold. The claimant accepts that averaging the scores, although a departure from the practice envisaged in the guidance documents, was not an unfair approach to such an outlier. There is no evidence to support the contention that had a moderation process been adopted Mr Ray's score would have been uplifted as much as the claimant asserts, if at all.

38. Mr Nelligan and Mr Roebuck gave evidence to the effect that the claimant did not perform well at the interview. Mr Roebuck was somewhat surprised because knowing the claimant's work he felt the claimant should have done better and expected the claimant to be successful in the process. The claimant himself accepts that he did not perform well during the interview and attributes that to an exceptionally busy workload and certain difficulties in his personal life which prevented him from properly preparing.
39. The claimant had three weeks in which to prepare for the interviews, and complete the application form. He accepts that he was ill-prepared for the selection procedures and had failed to prioritise his time to concentrate on his own preparation. The email, which issued the application forms put employees on notice that if they required adjustments, they should ask. Another manager also involved in the selection process of lower grades requested and was granted a deferment of her interview date in order to have more time to prepare. The claimant made no such request.
40. Although the claimant was unable to attend the Change Champions workshop which took place the day before his interview because he was invigilating the test of the lower grades he did not raise that as a matter of concern at the time or claim that he was likely to be disadvantaged in the interview because he had not attended and he did not ask for any adjustments as a consequence.
41. In the circumstances I find that the scores awarded to the claimant were fair and appropriately calculated to produce a final score of 58.8% and a ranking of seventh place.
42. On 27 November 2018, a spreadsheet, was commissioned showing a breakdown of all the scores for the people in the pool and their ranking, but the first moderation meeting convened for 28 November had to be deferred because of the mathematical errors in the spreadsheet. These errors did not affect the claimant.
43. A corrected spreadsheet was presented to the panel later on 28 November 2018. This showed the breakdown of the scores of everyone in the pool and

their ranking and was colour-coded to show those scoring over 70% and those scoring between 60 and 70% and those scoring less than 60%. The spreadsheet was then annotated with the initials of the individuals in the pool. Therefore, during the moderation panel meeting the Panel members knew precisely who had scored what and where they ranked and when they drew the line at 60% they knew precisely that those who were over the line would be retained and those who were under it and would be dismissed.

44. The main task for this moderation panel was to set the pass mark. The panel comprised Mr Nelligan, Mr Roebuck, Mr Ray and the HR adviser, Ms McClay. The purpose of the pass mark was said to be for the purpose of establishing a proficiency bar to ensure that the respondent retained only managers in the pool who met or had the potential to meet the requirements of the new IAL managers role. They set the pass mark at 60% and by so doing, the claimant fell outside the retained cohort. By so doing they increased the number of redundancies in the pool from the intended two redundancies to four dismissals.
45. I find this approach of setting the pass mark after the selection interview and testing process had taken place and the scores awarded and set out on a spreadsheet annotated to reveal the names of the individuals in the pool so that the panel members were able to tell exactly who was above and below the line was not transparent or fair and did not comply with the spirit or intentions of the respondent's guidance documents and good industrial relations and equal opportunities practice.
46. It took the panel three meetings to set the pass rate during which they invited an outsider (Mr Dave Roberts) to join them, during the meetings they discussed named individuals and referred matters to even more senior managers, included in the documents are references to the chief executive officer as having had some involvement.
47. The explanation the respondent witnesses have given for imposing the pass mark after the event deliberately knowing the impact on the individuals in the pool, is that they were afraid of putting the pass mark too high and by so doing make too many people redundant, which would have such an adverse effect on that part of the directorate that the section would 'fall over' according to Mr Roebuck, by which I understood him to mean that the section would collapse because of the loss of key workers. Mr Nelligan accepted in answer to a question from me that this pass mark was therefore something of a movable feast in that it could go up or down depending on the desired outcome of the panel setting it. Mr Roebuck accepted that it was a movable line, but that because of the demands of the new role it was not realistic to expect it to be set below 60%. However, in the first record of his interview with Ms Rennick during the grievance investigation, Mr Roebuck is recorded as saying 60% was a middle position although he subsequently amended that note to say that the cut-off point was 60% and no allowance would be made for people under that threshold. Nevertheless, I find that there was a distinct possibility that if it

suited the panel a figure lower than 60% might well be set and it was not an objective measure at all.

48. What is clear from the nature of the panel discussions and approach is that this pass mark was movable and was not an objective test of ability and the panel set the benchmark pragmatically to meet their objective of retaining about two thirds of the managers in the pool.
49. The other side of this coin is that their objective might well be to let one third of the managers go to make way for 'new blood'. Mr Roebuck denied that this was the panel's intention, but volunteered that it had this effect. The effect of drawing the line at 60% was to create an outcome whereby six managers were retained and four managers were designated as redundant.
50. Mr Roebuck is recorded in the report of Alison McTrusty Senior HR manager dated 11 February 2019 as saying '*there was a strong desire from the management chain above me to be at the radical end of the spectrum in moving people out who did not do well in the selection process to create space for recruiting new skills*'.
51. It was Mr Roebuck's evidence that once the pass mark had been set. The steer from the most senior management was to stick to it and make no allowances for those falling under the line. The fact that the claimant had 10 years' service as a senior analyst with no performance or disciplinary issues, and undertook in his old role, work which overlapped with the new specialism of business intelligence, and his score was only marginally under the 60% was not taken into account by the panel.
52. On 3 December 2018 the respondent sent the claimant, a letter notifying him that he was at risk of redundancy. This was followed by a consultation meeting with Mr Nelligan and Ms McClay on 16 December 2018 and a further consultation meeting on 7 January 2019. As part of the arrangements for those at risk of redundancy staff affected had access to all employment opportunities available and the claimant accepts that there was no suitable alternative employment which might have been offered him.
53. On 17 December the claimant appealed against his redundancy selection. The grounds of his appeal focused on work pressures and in particular his involvement in the selection process of the grades six and seven; failure to take account of his past performance; other work commitments preventing him from attending key development events such as the change Champion workshop held on 6 November; personal reasons connected to the health of the close family member for whom the claimant was responsible. The appeal was heard by James Hawkins, the director of assurance and risk, supported by Alison McTrusty, senior HR manager. The appeal was not upheld.
54. Some months earlier, the claimant had experienced difficulties because of the health issues of a close family member. At the time he was supported by his

line manager, Mr Dave Roberts and there was no reason to expect that the respondent's managers would not be similarly supportive about a new family crisis involving a different family member. Although the claimant mentioned the circumstances to Chris Roebuck he had not asked to be relieved of any duties as a consequence, nor had he asked the time off, nor had he asked for any adjustments to the selection process.

55. The claimant was issued with a detailed outcome letter on 25<sup>th</sup> of January 2019 and offered the opportunity of a telephone discussion with Mr Hawkins, which he took up.

56. On 21 February the claimant submitted a further appeal, arising out of additional evidence not previously available. This appeal was dealt with by Mr Ian Lowry, director in the product development directorate, supported by Sue Hurst of the HR Department. The basis of the appeal was that

- the selection panel had wrongfully reduced each of the scores awarded by one point which have a consequence of reducing his score from 63.3% to 58.8%.
- Mr Ray 0.5 score from the interview should have been moderated and not average and had moderation taken place. It would have raised the claimant score above 60%
- Mr Roebuck could have done more to help the claimant in preparing for the selection panel.

57. Mr Lowry did not uphold the appeal and a detailed outcome letter was sent to the claimant on 27 March 2019 and a further meeting was convened with Mr Lowry on 1 April 2019 to discuss it, and any continuing concerns.

58. On 24 April 2019 the claimant submitted a grievance which was investigated by Jenny Rennick and HR consultant employed by a firm of solicitors. The complaints were that the redundancy selection process was unfair and premeditated; the appeal process was protracted and still not resolved; these processes impacted on the claimant's mental well-being and welfare. Ms Rennick went to great lengths to investigate the claimant's concerns and produced a considerable body of documentation having interviews with almost everyone engaged in the selection process and the appeals. She prepared a substantial report.- Health and Social Care Information Centre. 17 515 Private and Confidential: Investigation Report. Ms Rennick partially upheld the grievance and made recommendations.

59. Her conclusions are as follows.

- 1 There is no evidence to show that the selection process was premeditated:
  - o In view of TC's experience, knowledge and skills, there were frustrations that TC didn't perform better in the selection process, however, the message from higher up in the organisation was that

directorates had to be pragmatic in their approach to the process and more flexible and innovative in the way in which they used their resource. Whilst objective, this approach seemed rather binary and mechanical to employees and appeared to lack compassion or empathy.

- -The scoring methodology was not properly considered until later on in the process and whilst the amendments may have seemed the logical thing to do, they were convoluted and confusing; however, the amendments were applied consistently.
- Had TC specifically and explicitly flagged that he was struggling with his workload or his mental wellbeing then it is clear that the organisation would have offered him support. TC said himself that he just got on with it so whilst it would not be unreasonable to assume that he was coping, the business could have done more to outline its expectations in terms of pastoral care for all colleagues, regardless of their seniority.

2. It is evident that the appeals process was protracted and that his expectations were not adequately managed during this time, but unfortunately, this was not an experience unique to TC and this was acknowledged by the managers who were interviewed. The business had not previously experienced a scale of change such as with Org2, and consequently, the HR and Org2 teams were overwhelmed with not only BAU, but the additional work relating to Wave One activity. There is no evidence that TC's appeals process remains unresolved.

3. It is evident that the duration of the Wave One processes has impacted TC and his perception of NHSD, and there should have been a more conscious consideration of the wider impact of such activities on TC and the staff population as a whole.

60. Since the claimant was selected for redundancy a number of additional appointments have been made which have increased the IAL managers to 13. This includes one external appointment, who I infer from the evidence of Mr Roebuck underwent a recruitment process, not unlike the claimant selection process. However, at least two people have been redesignated IAL managers and have transferred into the claimant's cohort from another part of the business without undergoing the same selection process as the claimant. There have also been at least two temporary upgrades of existing staff who have remained in that acting up role for many months.

## Conclusions

- 61. The claimant was dismissed by reason of redundancy, which is a potentially fair reason under section 98(2) ERA 1996.
- 62. The respondents adopted a selection procedure in which the claimant was part of a pool of 10 people employed as the Information and Analysis Lead ("IAL") Managers (Band 8c). With the exception of a female IAL manager who was

absent on maternity leave all 10 managers were subjected to the same procedure.

63. That procedure comprised the completion of an application form (which was marked) and an interview (including a presentation) with a panel of more senior managers who scored that and then formed a moderation panel to review the scores and set the pass mark. The application form and interview process was not unfair in its inception. The panel set relevant questions and an apparently common marking strategy for each manager.
64. The respondent had developed overarching guidance documents for the use of the managers who were devising the selection procedures applicable to the various pools. The selection procedure directly applicable to the claimant's pool was set out in the Proposal for Change.
65. The claimant came up for selection in the very first phase of a companywide 'transformational change' before the managers and the HR Department had properly got to grips with the procedures as was highlighted in the Lessons Learned document.
66. Because of this, after the interview process had been completed the managers involved realised that a number of matters relating to the marking would have to be reconsidered. I was impressed by Mr Roebuck as an honest witness, and I have no doubt that the steps taken to 'zero' the application form marks, to introduce a third marker rather than to undergo a moderation process, and to average the interview scores to counteract the effect of outliers, were designed to be fair. However, these are all matters which should have been resolved in the Proposal for Change before any of the managers were subjected to the selection procedure. This was a flawed system which Mr Roebuck was trying to correct after the event.
67. Despite having set out in the Proposal for Change that the cohort needed to be reduced by two the respondents went on to declare four people as being redundant, including the claimant. This was determined by the application of a pass mark of 60%, which was said to be a proficiency bar to determine whether the managers were deemed to be capable of undertaking the new role as set out in the revised job description.
68. The claimant fell under the 60% pass mark by a very small margin, his score being 58.8%. No account was taken of the Claimant's past performance in the selection procedure. The claimant had been in post for almost 10 years, there have been no issues at all with his performance and Mr Roebuck accepted that there was an overlap between the role presently undertaken by the claimant and the specialism of business intelligence anticipated in the job description for the future. Given the claimant's past record, it was a decision lacking in empathy to adhere so strictly to the 60% bar (once it had been set), particularly as it was not an absolute and objective measure of proficiency (as set out below). Another panel, another appeal officer, another employer might well have relaxed the bar so as to include the claimant in the retained pool given his past record. However, I cannot say that no reasonable employer would have relaxed the bar in the circumstances, and there is some force in the respondent's argument that given this was part of a large company wide exercise, it was important not to set such a precedent.

69. However, the circumstances in which the pass mark was arrived at was completely unsatisfactory. It was set by the panel after the scores were known and when the panel knew precisely which candidate had scored what and who would be dismissed after the imposition of the 60% line. That is not a transparent process and opens the procedure up to criticisms of prejudice and bias. This suspicion is exacerbated by the fact that other managers who were not part of the panel were let into the decision-making process and individuals were discussed by name during the meetings between the 28 30 November.
70. I find that the pass mark was not an objectively set criteria on which to judge suitability for the new roles, but a movable measure designed to retain a minimum number of existing managers sufficient to run the business but to exclude others, including the claimant. I do not accept that it was outside the contemplation of the panel to select a pass mark below 60%. I find there was a distinct possibility that had it suited the panel to impose a lower pass mark they would have done so.
71. The claimant was dismissed as a consequence of the imposition of this arbitrary pass mark once the scores were known and after it was known that the claimant would be dismissed as a consequence and I find his dismissal to be unfair in all the circumstances of this case.
72. However, had this figure of 60% been set before the application form and the interviews had taken place or marked, then there is at least a 50% chance that the pass rate would have been set at 60% in any event. That being the case, the claimant would have failed to pass it and would have been selected for redundancy. The claimant accepts that that he went into the process without properly preparing and agrees that he did not perform well at interview. Although his explanation for his want of preparation was that he had been diligently working and taking on extra work to assist the respondent in the selection procedure for the grades six and seven, he had over three weeks to prepare, it was up to him to prioritise his preparation and if necessary, to ask for an adjustment by way of more preparation time and/ or relief from the additional work, this he failed to do. The respondent is not responsible for the claimant's lack of preparation.
73. The Claimant has now secured alternative employment within the public sector and confirms that he has suffered no pension loss and given his redundancy payment seeks no order for compensation or remedy other than a declaration.
74. In the circumstances I make no order for remedy other than a declaration that the Claimant has been unfairly dismissed.

**Employment Judge C O'Neill**

14 November 2020.