Claimant: Mr. S Devis

Respondent: IBM United Kingdom Limited

Heard at: Birmingham Employment Tribunal by CVP

On: 3, 4, 5 and 6 November 2020

Before: Employment Judge Cookson sitting alone

Representation
Claimant: In person
Respondent: Ms K Davies (counsel)

JUDGMENT

1. The claimant was unfairly dismissed contrary to s94 of the Employment Rights Act 1996 (ERA) but any compensatory award shall reduced by 70% to take account of the chance that the claimant would have been dismissed had a fair process been followed in accordance with s123(1) of the Employment Rights Act 1996.

2. Remedy will be determined at a future hearing.

REASONS

Introduction

1. The claimant was employed by the respondent, a company which provides IT, technology, hard and software, new business solutions and services, latterly as a client support manager, from 6th August 1998 until dismissal with effect on 2nd July 2018. By a claim form presented on 11th September 2018, following a period of early conciliation from 16th July to 16th August 2018, the claimant brought complaints unfair dismissal and breach of contract (the implied term of mutual trust

and confidence (although that breach of contract claim has not been pursued). The respondent's defence is that it dismissed the claimant for redundancy following a fair procedure in compliance with s98 Employment Rights Act 1996.

2. This case was listed for a two-day hearing in June 2019. An administrative error led to the case being transferred to the Employment Tribunals in London. When the error was discovered the case was remitted to Birmingham and listed initially for case management before Employment Judge Richardson on 3 October 2019.

3. The case was listed for a final hearing on 29, 30 June, 1 and 2 July 2020. Unfortunately due to the covid-19 pandemic that hearing could not go ahead and that hearing was converted to a further case management hearing before Employment Judge Miller.

4. At the hearing on 29 June 2020 Employment Judge Miller considered, amongst other matters not relevant to my considerations, an application made by the claimant to amend his claim to change the date of the commencement of his employment with the respondent from 6 August 1998 to an earlier date in 1995. That application was refused. The claimant disagreed with that decision and made an application for that decision to be reconsidered. That application was refused on 30 September 2020.

Applications considered at this hearing

5. At the outset of this hearing the claimant restated that application to amend his claim to change the commencement date of his employment as shown on the claimant. Not surprisingly the respondent objected to the amendment. I refused that application. This is a matter which was determined by Employment Judge Miller. He has considered whether his decision was correct and is satisfied that it was. There is a public interest in the finality of judicial decisions, unless they are appealed and overturned by a higher court. Without that finality litigation matters could not progress. The respondent has prepared for this four-day hearing on the basis of the decision made by Employment Judge Miller.

6. The claimant also made an application to amend his claim to include a claim for age discrimination. That application was made on 13 October 2020 by email (it can be found at page 25au of the bundle). The substance of the application is very brief. In the email the claimant states *"Mr Devis, born on 5 December 1972, was aged over 45, with 23 years of IBM service at the time of his redundancy. Mr Devis has testified that IBM backward engineered an unfair and elaborate discriminatory Resource Action programme throughout his witness statement, for a predetermined personal selection outcome, to implement his redundancy in disguise via SRP – he was the victim of their scheme based on conscious biased predictive analysis and manipulation of personal information. However, it is now evident based on the following cases and new facts that IBM has systematically targeted older workers for redundancy to build a younger workforce, whilst insisting these cuts were justified by a legitimate need for cost-saving measures*"

7. The respondent objected to the application by letter dated 14 October (page 25aw) and raised 4 main objections, (a) the claimant had failed to identify any facts or

matters in relation to his own case that could form the basis of an age discrimination claim instead relying on other claims against the respondent or cases in the US against other companies in the IBM group;(b) the claimant failed to offer any reason that supports an assertion that it would be just and equitable to extend the time limit when it was plainly substantially out of time; (c) the claimant failed to offer any reason for his delay in making this application; and (d) he would not suffer any prejudice if the application were to be refused.

8. I heard brief additional submissions from the parties in support of their written applications.

9. I refused the claimant's application to amend his claim and gave oral reasons for that decision. Written reasons for that decision were requested by the claimant and I give them here. My reasons for the decision are as follows:

    a. The claimant does not identify any prohibited conduct which he says he was subject to and it is not suggested that this is a claim which is foreshadowed in the claim form. The allegation set out in the application to amend is made in the very broadest terms and the facts that the claimant refers to in support of that application are simply references to various cases, including a claim from 285 UK members of the IBM pension scheme bringing claims for constructive dismissal and age discrimination in 2010 which had been settled on confidential terms, and two claims under US age discrimination legislation which had been upheld.

    b. Those are not sufficient grounds on which to present a claim for discrimination. To succeed in a claim an individual must identify the less favourable treatment which they allege falls within the scope of one of the specified categories of prohibited conduct under the Equality Act and they are required to identify facts from which an inference of discrimination could be drawn. The terms of the claimant's application to amend do not explain in any meaningful way at all what claim he wishes to bring. For there to be meaningful claim to which the respondent could respond he would have to provide a significant amount of further particularisation. The claimant has not explained precisely what less favourable treatment he says he was subject to. Even if an employer has been found to have unlawfully discriminated against one employee that of itself is not evidence that another employee has been discriminated against, the claimant must still assert some factual basis for his claim and this claimant has not done that.

    c. In terms of the reasons for delay in making his amendment application, the claimant says that he only became aware of the US and the UK tribunal cases referred to above while preparing for this hearing but that is not, in my view, a good reason for the delay in bringing forward a claim that he believes that he was subject to age discrimination. The claimant has not pointed to any evidence disclose to him or referred to any facts relating to his claim which has led him to believe he was subject to discrimination. My assessment might well have been different if the claimant had pointed to something in the witness evidence or documents which he had not previously been aware to explain why this claim had not been presented

earlier.

d. In my view these inadequacies mean that it is extremely unlikely that it would not have been in the interests of justice to allow the claimant to amend his claim even if this application had been made a much earlier stage. However here I am faced with the additional consideration: that this application jeopardises a substantive hearing which has been listed for many months and which is itself a rearranged hearing. The lateness of the application is entirely of the claimant's making. I recognise that as a litigant in person the claimant may not have appreciated the significance of ensuring his claim was fully pleaded when the claim was made but this claim has already been case managed on two separate occasions. In particular before Employment Judge Miller there had been extensive discussion about the issues and the claimant had sought to amend his claim then. Employment Judge Miller took significant time and care to identify the issues the claimant wished to raise at this hearing and those are the matters which the respondent has prepared to deal with today. There would be significant prejudice to the respondent if this hearing was adjourned to add an additional vague and unspecific claim because the preparation for the case would have to be revisited to answer that new claim. The entire litigation process would have to be revisited because a discrimination claim may require new documentary evidence to be found and disclosed and new witness evidence to be prepared.

e. I have also taken into account that the discrimination claim is made substantially outside the primary time limit, the claimant's employment having terminated in 2018. The claimant has given no indication why it would be just and equitable to extend time to enable this claim to be considered and although time limits are not determinative in applications to amend, they are a significant consideration in the balancing exercise where a new ground for claim is raised.

f. Even if the claimant had been able to provide fully particulars of his claim before me at this hearing, and he gave no indication that he could; and the respondent was able to deal with those allegations without adducing further evidence which is far from certain, this hearing could not go ahead because a discrimination claim can only be determined by full tribunal. Accordingly, this hearing would have to be adjourned in any event wasting costs and creating delay. This case has already been subject to significant delay. The question for me to consider is whether I should take a step which will create further delay. Delay affects the cogency and reliability of evidence to be considered and increases the difficulty of the task for a later tribunal to determine the facts relevant to the claim of unfair dismissal which had been brought in time, as well as the new claim if that was allowed to proceed. I am asked to create delay in this case in order to allow the claimant to advance what appears to be a highly speculative claim despite the impact on the evidence and the inevitable prejudice to the respondent if this case does not go ahead as listed.

g. I have taken into account the overriding objective in Rule 2 of the Tribunal

Rule of Procedure and after carrying out a balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment, I determined that it would not be in the interest of justice to allow this application to amend.

10. The List of Issues

a. In the course of the case management of this matter a list of issues was identified in which the claimant posed a number of highly specific questions. Employment Judge Miller refused to allow him to include some matters which raised issues not relevant to unfair dismissal. The scope of the list of the issues can be found by referring to the case management order of 30 September 2020 which slightly amends the draft list of issues attached to the case management summary of 29 June 2020 but which can only be understood by also referring to the claimant's application to amend that list. Unhelpfully no version of the amended list of issues had been produced by either party at the start of the hearing but the respondent's solicitors helpfully produced an amended list in the course of the hearing. The claimant did not agree with their document and sought to argue that other matters should be included but I am satisfied that the document produced by the respondent's solicitors accurately reflects the list of issues agreed by Employment Judge Miller.

b. I have taken into account the list of issues when considering my judgment in this case. However, I have not answered each question in terms because I did not find the list helpful in applying the law and I do not consider that it would be propionate for me to be required to make explicit findings about matters which I do not consider helpful to my determination of the claim which has been made, that is to determine whether the claimant was unfairly dismissed. I have used the list of issues to help me understand the specific grounds on which the claimant says that the respondent acted unfairly. I have considered whether particular things happened and summarised in the conclusion the significance I have attached to those things in terms of the reasonableness of the respondent's actions.

c. I have made findings of fact in relation to matters which I consider to be relevant to the issues to the legal issues I have to consider in order to determine fairness.

11. In reaching my judgment I have considered:

a. a bundle of documents prepared by the respondent ("the Bundle") which is numbered to 824 pages;
b. the evidence given in the claimant's witness statement ("C1") and his oral evidence;
c. the evidence in witness statement and given orally by:
    i. Anthony Dawson Chief Transformation Officer of Technology Support Services United Kingdom and Ireland ("R1");

ii. Andrew Williams, Project Manager in the Infrastructure Services business unit ("R2");
iii. Andrew Jones Service Delivery Leader ("R3");
iv. Michael Johnson, European Solution Design Leader in the Technology Support Services Unit ("R4").

d. A list of issues prepared by the respondent at my direction to amend the draft lists prepared by the parties to incorporate Employment Judge Miller's comments on the issues (as set out in his reconsideration judgement) which I have set out below.
e. An agreed cast list and chronology prepared by the respondent ("R5")
f. A lengthy opening submission document produced by Ms Davies ("R6") which was relied in as closing submissions which were supplemented orally;
g. A bundle of authorities produced by the respondent ("R7")
h. Opening submissions produced by the claimant ("C2");
i. Closing submissions produced by the claimant ("C3") supplemented orally.

Findings of Fact

12. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

13. I will note one matter at the outset. Neither the claimant nor the respondent referred me at any time to a document setting out the redundancy process. I was taken to slides setting out a process which was discussed with employee representatives but I was not taken to a policy or procedure document. It seems surprising that no such document was produced but if one existed it did not feature in the evidence presented to me by the parties.

14. The claimant has a 2:1 BA (Hons) Degree in Technical Communication. After a period of time providing services via a temporary employment business, the claimant began employment on 2 August 1998.

15. In August 2001 the claimant joined Technology Support Services (TSS) which is part of IBM's Global Technology Services (GTS) Business unit. The claimant enjoyed a successful career within the respondent moving between various roles until he became Client Support Manager in June 2014 working on the Santander (Produban UK) account. He was involved in the implementation of a "Santander Multi-Vendor Agreement" for maintaining both IBM logo and systems manufactured by third party providers.

16. The respondent's business has seen various changes to its focus in terms of business. Mr Dawson in R1 explained that due to changing market conditions and the evolving nature of customer demands, the strategic focus of TSS has shifted from its hardware businesses and towards maintaining equipment manufactured by third party providers (known as Multi-Vendor Services "MVS"). It is significant

that the profit margins in these areas are lower than the respondent had previously enjoyed.

17. During 2017, IBM identified that the decline in the "IBM Logo Business" was accelerating and in light of the resulting reduction in profit margins, a decision was taken to initiate a restructuring programme, referred to as "Resource Action" within TSS which would result in a reduction in the number of employees in various roles, including service manager roles. One of the ways that the respondent determined that it would save cost was by increasing the transfer of work to overseas operations, referred to as "offshoring", including to the Bulgaria business which is part of the IBM global group. I accept the evidence of the respondent witnesses that this offshoring has been an increasing trend within IBM's UK business. When he was the claimant's line manager, Mr Williams had tried to highlight to the claimant the risk that offshoring might pose to roles like his and had encouraged him to widen his skills and think about other opportunities. In cross examination when challenged about whether this was evidence that he had some advance warning of the restructuring, Mr Williams pointed to the fact that in the time he managed the claimant's team they reduced in number from ten to three. In simple terms he though the "writing was on the wall". I accept that when Mr Williams referred to the risks to the claimant's role he did not do this because he had some advance warning of specific plans in relation to the claimant's work, but that he recognised an underlying trend which meant that more and more work would be moved from the UK.

18. It is common ground between the parties that much of the claimant's role is now performed by an employee of an IBM group company in Bulgaria. They disagree about whether the job done by that individual is exactly the same as the claimant's job, but I do not find it necessary to make an explicit finding about that.

19. The claimant was aware that the respondent regularly reviewed its workforce requirements. One of the reasons why he suggests that his dismissal by reason of redundancy was unfair was that there had been previous redundancy programmes and he had not been selected for redundancy previously (paragraph 81 of his statement). That is illogical. In the redundancy process leading to his dismissal the claimant asked for his previous scoring in earlier redundancy exercises but this was refused because he was told they were not available and were not relevant to this redundancy exercise.

20. In preparation for the restructuring process, the respondent established an Employee Consultation Committee ("ECC") to facilitate collective consultation. Mr Dawson at this time was Director of TSS which meant that he oversaw sales, service delivery and operations. He explained that TSS operates as a discrete entity within the respondent, with its own budget, profit and loss accounts, team structure and HR support. Mr Dawson was appointed as the Employee Consultation Committee Chairman, Executive Sponsor and Co-Chairperson. The establishment of the ECC was announced by email to employees on 27 November 2017. That was an initial warning to the workforce of impending redundancies.

21. The claimant's partner was diagnosed with a serious illness on 20 November 2017. He was candid that this, entirely understandably, affected his engagement with

initial announcement. Following this the claimant spent some time working from home which helped him to support his partner and assist with hospital appointments.

22. A process then followed for the nomination and appointment of employee representatives. On 4 December 2017 it was announced that three employee representatives had been nominated to represent employees alongside one GMB union representative who represented a number of employees who had transferred into TSS with protected trade union representation. The collective consultation committee compromised two management representatives and the four employee/trade union representatives. A secretary to the committee was also appointed.

23. The representative for the Service Management/Operations business area that the claimant belonged to was James Loftus. The employee representatives completed an online course to help them understand and undertake their role and they were provided with a briefing document at the end of ECC meeting one (pages 273a-n of the Bundle) various documents and a Q&A template for employees to submit any queries they had to their ECC representative (pages 263 to 271). The Bundle includes lists of questions which were raised with ECC representatives and considered in the course of meetings by the ECC committee and a list of their answers to those questions which was made available to all employees.

24. The respondent does not widely recognise any independent trade unions to collectively represent its workforce. The claimant appears to be critical of that in his witness statement, but I note that employers in the UK are only required to recognise trade unions in particular circumstances and he does not suggest that any of those circumstances apply here nor is it suggested that the respondent had breached the collective consultation requirements set out in Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA). I have attached no weight to this.

25. In his witness statement (paragraph 25) the claimant says, *"The three appointed employee representatives were also instructed not to consult collectively with employees and could therefore only consult with their constitutes on a 1-2-1 ad-hoc basis making it impossible for them to individually consult with 780 constituents what had been discussed during meetings".* I was not taken to evidence of any such instruction not to collectively consult and I accept the evidence of the respondent's witnesses that the nature of the engagement between representatives and their constituents was left to the representatives. I accept the respondent's evidence that the representatives were given time off from their duties and provided with the facilities to enable them to engage if and how they choose with those they represented. There was no check by the respondent on the extent that any engagement was taking place and there was no wider employee information and engagement process run, for example, by HR to supplement the information provided to the workforce beyond the summarised minutes of ECC meetings and question-and-answer documents reflecting matters which the representatives raised in meetings, including on behalf of individual members of the workforce.

26. I accept the claimant's evidence that he did not find his representative was accessible and he was unable to contact him when he tried. I do not find that there was any barrier as such placed in the way of engagement between the employee representatives and their constituents by the respondent, but I also find that the respondent did not take steps to ensure that employees were being provided with a particular level of information about the redundancy process by the representatives and I accept the claimant's evidence that he felt largely in the dark.

27. ECC members were required to sign a non-disclosure agreement to protect business information discussed at ECC meetings. Mr Dawson explained in his statement that this was because information about past redundancy exercises had been leaked to the press. It is my industrial experience that such non-disclosure agreements are sometimes seen in collective consultation situations and their use here cannot be regarded as exceptional. It can be seen from the bundle of documents that a large number of the documents shared with the ECC were not made available to the wider workforce. Documents 33, 34, 36, 37, 39, 41, 47, 50, 52, 55, 57, 60, 62, 65, 68, 73, 78, 97 in the Bundle are documents setting out information relevant to decisions taken in the collective consultation process which are marked "Employee Restricted". This meant that wider workforce did not have access to much of the information explaining the collective process which has been presented to me by Mr Dawson and I accept the claimant's evidence that he has been many of these documents for the first time in preparation for this hearing.

28. The first ECC meeting took place on Wednesday 6 December 2017. The slides presented at the meeting outlined how TSS UK planned to restructure by reducing the number of employees in some TSS teams by various means, including a continuing shift of work offshore.

29. In accordance with the statutory timescales, the collective consultation process was scheduled to last for at least 45 days and would have ended on 31 January 2018. However, the process took much longer and did not conclude until 14 March 2018. In all, 13 weekly ECC meetings were held. The Bundle contains the minutes of each ECC consultation meetings, and I accept that those minutes are an accurate record of those meetings.

30. At the first ECC meeting on 6 December 2017, the scope of the redundancy selection was discussed, that is which employee would be put at risk. Initially all 780 employees within TSS were identified as being in the scope of the programme with an initial plan to reduce the headcount of TSS employees in the UK by 153.

31. The ECC agreed that voluntary redundancies would be considered but the respondent decided that there would not be any enhancement of the statutory redundancy payment. Despite that, when volunteers were eventually sought, a number of individuals did volunteer for redundancy reducing the number of required compulsory redundancies by 21. In the course of this hearing the claimant sought to suggest that the respondent was obligied to enhance voluntary redundancy payment to secure volunteers.

32. Other ways to mitigate the impact of compulsory redundancies were also considered. On behalf of the workforce several proposals were made including deeper than planned cuts to agency workers, a shorter working week and a generalised pay cut for all TSS employees. I accept that the respondent's evidence that those those proposals were considered during ECC meetings but rejected.

33. I accept Mr Dawson's evidence that the ECC were consulted with about a process for the implementation of compulsory redundancies involving individual consultation, access to outplacement services and employees placed at risk of redundancy being encouraged to search and apply for any suitable alternative roles within via the respondent's internal job search facility, "GOM". Managers would be expected to encourage and assist employees to look and apply for alternative roles but no vacancies were to be ring fenced for redundant employees and there would be no process of matching redundant employees to any possible alternative employment. It would be up to displaced employees which vacancies they applied for. The evidence of what the employee representatives were the told the process would be is found in the slides from the meeting.

34. The proposed selection criteria and process for scoring employes were discussed with the ECC representatives during the first consultation meeting. These are significant for the issues in this case. The proposed scoring criteria were: (a) role relevance; (b) something called "Level versus Position Reference Guide Band"; (c) skill level; (d) potential; (e) approach to work; and (f) performance.

35. The scoring for two of these, "Role Relevance" and "Level versus Position Reference Guide Band" was predetermined based in the respondent's assessment of the need for certain roles moving forward (in terms of role relevance) and how an employees' pay compared to other employees in the same role. In essence that meant employees in those roles would be more likely to be selected for redundancy.

36. The proposed selection ranking criteria were agreed with the ECC representatives at the second ECC meeting. In terms of role relevance, roles were to be identified as falling into one of three categories: growing, maintaining or declining. Employees deemed to be in 'growth' roles were automatically awarded a score of 20, employees in 'maintain' roles were awarded 10 and those in a 'declining' role were scored 0. The claimant's role was identified as "declining" alongside other roles in the areas of "Support", "Operations" and "Service Management". The category roles were replaced was based on an assessment of how crucial it was felt by the respondent to retain each type of role in the UK and Ireland based on the respondent's strategy and expected future requirements. I accept the claimant's evidence that he was unaware that his role had been categorised as declining before the individual consultation meetings.

37. The criterion of 'Level versus Position Reference Guide Band ("PRG")' referred to an assessment of the relationship between the actual role an employee did and their "PRG" band which is essentially their salary band. Mr Dawson gave evidence, which was not contested, that for historical reasons, (such as previous TUPE transfers following business acquisitions by IBM) TSS had some employees performing the same job role at different PRG bands. The scoring was weighted in

favour of employees working in a role above their PRG band so in essence employees being paid less than what could understood to be the expected rate for their role were less likely to be made redundant.

38. It worked like this. The band that had the highest number of individuals within that pool was considered to be the 'correct' pay band for employees within that pool. TSS employees who were employed in a band beneath the most commonly occurring band for their role were considered to be operating at a level above their PRG Band and were automatically awarded a score of 10. Those at the same band as the most commonly occurring band were considered to be performing a role within their PRG Band and were scored 5. Those employed at a band above the most commonly occurring band were considered to be performing a role that could be performed by a lower PRG band and were scored 0. These calculations are shown at page 554 of the hearing bundle. In the service management pool, there were employees from band 5 to band 9. There were 36 employees out of 65 at band 7, so this was the most commonly occurring band. Band 7 employees (including the claimant) received a score of 5 out of 10.

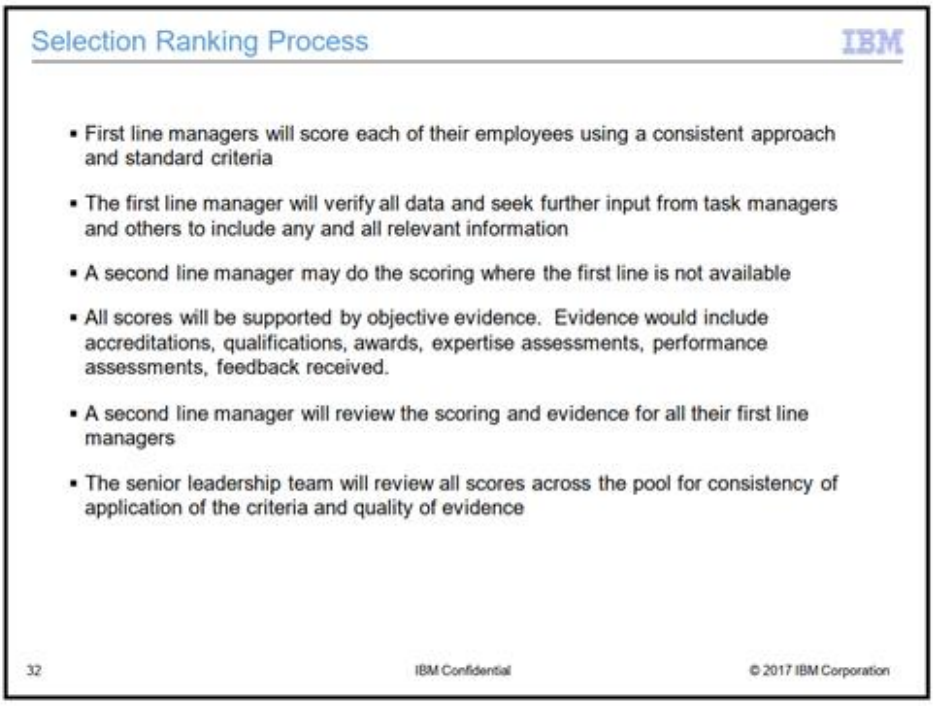
39. In his witness statement the claimant argues that this criteria is *"Automatic HR prepopulated flexible possible banded 0, 5 or 10 with an awarded score 5 – purely subjective opinion not evidence-based or related to employee personal performance on HR Checkpoint (with ACE peer feedback) and PBC assessments with line management sign-off* " However, that is not true. This scoring is reached using the formula set out above. I can see that the claimant disagrees with the fact that this criteria is used at all, but the scoring is objective in that it does not require a manager to reach a personal decision.

40. The ECC members discussed and approved the proposed ranking criteria at the second ECC meeting on 13 December 2017. No material changes were made to the criteria.

41. After the selection criteria had been agreed with the employee representatives, training was given to all TSS managers on the scoring process. The slides from this training are at pages 250 to 254 of the Bundle. I was told that this was intended to ensure managers approached the exercise fairly and consistently across the board and I have no reason to doubt that intention. The employee representatives were invited to attend these training sessions, to ensure they were comfortable that the respondent delivered the training as agreed at the ECC. The claimant's representative, James Loftus, attended one of the training sessions. Mr McGugan, the claimant's line manager also attended that training as did Mr Williams who was involved in his scoring.

42. In his statement at paragraph 34 Mr Dawson says *"Employees' individual scores for the remaining criteria of Skill Level, Potential, Approach to Work and Performance were awarded based on their line manager's assessment and in line with the relevant guidance set out at slides 13-16 in the presentation at page 277 in the Bundle. This included looking at Checkpoint and ACE which are IBM's appraisal and feedback tools.*" However the following slide, also on p277, also

forms part of the guidance which the employees representative were told the scoring managers would follow.



32

43. Although two of the scores (role relevance and level v PRG) had been prepopulated, the scoring managers were given the opportunity to make representations if they thought their teams should be treated as exceptions to the application of that scoring. Mr Dawson explained that a number of managers did make representations, although he concedes that few were agreed. No suggestion was made by the claimant's manager that the claimant or his team should be an exception.

44. In relation to the actual scoring of the claimant for selection for redundancy I received evidence from the claimant, Mr Williams and Mr Jones. Mr Jones is the Service Delivery Leader for TSS. He was the claimant's "third line manager" in that he managed Mark Younger, who in turn managed Mr McGugan. Mr Williams was the claimant's line manager from January 2015 to September 2017. He then moved into a new role and Mr McGugan took over as the claimant's line manager. I did not receive evidence from Mr McGugan who is no longer employed by the respondent. The redundancy programme was announced in November 2017 so relatively soon after Mr McGugan began managing the claimant. The respondent's procedure required scoring based on the previous two years' performance. For this reason Mr Williams scored the claimant with Mr McGuhan.

45. I accept Mr Williams evidence that he had a long meeting with Mr McGugan lasting between 3 and 4 hours when they discussed each of the scores for the team that that Mr Williams's had previously managed which he thought might have covered some 15 or so individuals. Mr Williams' evidence was that they discussed the scores and agreed them, but it was Mr McGugan who recorded the scores and

prepared the documents. The commentary which Mr McGugan recorded was cut and paste from appraisal documents so reflects some comments that Mr Williams had made at the time of s in question. Mr Williams' explanation of the claimant's scores are set out in paragraphs 7 to 10 of his statement and he also provided an explanation for the reasons for his scores to Mr Johnson during the appeal process. These are included in the appeal documentation referred to below.

46. The score sheet completed by Mr McGugan is included in the bundle at page 490 to 493. The scores are set out at page p491 with comments at page 492 and a spreadsheet containing various comments at p493 which clearly includes extracts from appraisal documents. It is noticeable that not all of the comments made by Mr Williams in his statement are reflected in the document at p493 and I have considered that further below. The claimant did not meet with Mr McGughan or Mr Williams to discuss this scoring so the claimant was never given an opportunity to discuss the scoring with those who had scored him or make representations to them about the scores.

47. The respondent accepts that the claimant and other employees had not been told that their appraisal documents could be used in this way but argues that it did so to ensure that scoring was evidence based. The claimant argues that because he was not warned about this the respondent was not entitled to use this data in this way and the respondent acted unfairly. I have discussed my conclusions in relation to that below. It is not in dispute between the parties that the appraisal documents were used, it is the reasonableness of using them which is in dispute.

48. In his statement Mr Jones refers to the fact that in early January 2018, he and Mr Dawson were made aware that Mr McGugan had asked his direct reports to provide him with evidence to assist him with the scoring process (page 286a). On 5 January 2018 in an email Mr Jones told Mr McGugan that he needed to base his judgements on "objective evidence" (page 293a). Mr Jones' email to Mr McGugan is critical in its tone. However, Mr McGugan had only been managing the claimant and others for a very limited period of time when he was asked to score them. He was based in Scotland and the claimant worked at a client site in the Midlands. This appears to have been an attempt by a manager to ensure that he took into account relevant matters he might not have been aware of in connection with employees he presumably did not know well and had limited day to day contact with. It is illogical to say a manager's opinion about performance is "objective" but what an employee says about themselves is "subjective". Both opinions are subjective. Whilst referring to appraisal documents which predate the redundancy process means that the commentary referred to is not influenced by the redundancy itself, appraisal documents are not objective, they reflect what managers' opinions were at the time of that appraisal.

49. Mr Williams explained his scoring of the claimant in his statement (R2). He said that he gave the claimant the second highest possible score for skill level (14 out of 20) but for potential and performance he was given the second lowest possible scores, 7 out of 20. In his statement Mr Williams' reasons for those scores were that in his view the claimant had failed to use his skills to develop himself, he tended to over complicate matters and that although he did his job well, he "only did what was required" and did not make himself as "visible" within the business as Mr

Williams believed he should have done. He also did not consider that the claimant was particularly good at administrative matters.

50. In terms of "approach to work", Mr Williams scored the claimant 10 out of 20, assessing that he worked effectively but within the expected role definition. He says "I was also aware that Stefan had to travel a long way to work, and travel was mentioned as an element in the criteria." However, the scoring criteria themselves do not suggest that a long commute to work should be negatively assessed. The criteria suggest that what is important is the claimant's willingness to be flexible about location and there is no evidence about that I was taken to in the course of the hearing about that in appraisal documents. However, in the reasons Mr Williams' gave to Mr Johnson for his scores contained in documents Mr Johnson refers to in his evidence (p502 of the Bundle, para 15 of Mr Johnson's statement, R4) Mr Williams stated that *"Stefan seemed reluctant to travel and was a pain for him"*. There appears to be no supporting evidence for this.

51. In his statement the claimant sets out the scores he should have received. In essence he says that he should have received the second highest possible scores for each criteria and he says the scoring for role relevance and level v PRG should not be included.

52. It is not possible for me to say what scores the claimant's should have been given nor would it be appropriate for me to speculate about that. It is not for me to say that certain criteria should be disregarded altogether.

53. What I find based on the evidence of the appraisal records, the commentary attached to the redundancy scoring and what is recorded in the appeal documents is that that the redundancy scoring of the claimant was largely based on the Mr Williams personal assessment of the claimant, except in relation to the "pre-populated scores". The fact that the scores given to the claimant reflect Mr William's scores and comments suggest that it was his views which were most significant in the scoring process, perhaps not surprising given the short time Mr McGugan had managed the claimant. The travel issue which seems to have been a significant influence on the approach to work score is not referred to in the appraisal documents or the scoring document. This meant that at the next stage there was no way other managers would be aware of all the reasons for the scores given to determine if they were fair or appropriate at the normalisation stage nor in due course would the claimant be able to make any representations about whether those views were fair to Mr Jones in the individual consultation stage. Given the emphasise given to objectivity and that scoring would be supported by evidence set out in the manager's training it seems implausible to me that the employee representatives could be said to have agreed to the scoring of the claimant in this way.

54. After managers had scored employees, the draft scores were all subject to an internal moderation process referred to as "normalisation" intended to ensure a consistent approach across the different pools and between different managers. This involved a review of scores by senior managers. There was a normalisation meeting for the "service management" pool which included the claimant and the operations pool on 19 January 2018, conducted by a conference call. Mr Dawson's

witness statement states that "*each employee was discussed in turn by the manager who scored them, and reasons explained for the scoring, with examples given"*. The other managers were then able to comment and input if they disagreed with the scoring. This may have been the process on paper, but it was accepted by the respondent's witnesses that little more than an hour was taken for the first exercise covering the 75 employees in the claimant's pool and that not every score would be considered. It is not possible that "each employee was discussed in turn with a discussion about the reasons for scoring" given the time allowed for this review process. On the basis of the evidence, I find that this was no more than a cursory review of scoring.

55. There were then further high-level meetings looking at normalisation across the groups which respondent's witnesses explained looked at for outliers in scoring for example by looking at the top and bottom sections of the scoring and the evidence to be used to score each individual, particularly in the scoring ranges where a tie-break might come into play. A final normalisation meeting, was conducted on 31 January 2018. Mr Jones was involved in the "sign off" of the scores although he acknowledges in his statement that this was done without actual knowledge of the employees involved. In his statement Mr Jones says *"I did not recommend any adjustments to Stefan's scores as I deemed them to be appropriate and justified*" but there is no evidence that Mr Jones took any steps to assess accuracy of the scores on an individual basis. This was no more than a rubber-stamping exercise.

56. In early February 2018, a list of employees at risk based on the initial scoring was prepared by Mr Dawson.

57. The claimant had scored 43 out of 110. Mr Dawson's evidence was that within the service management and operations pool employees who scored above 57 were safe from redundancy, employees who scored 53 or below were placed at risk of redundancy. Six employees scored 55, and so there was a tie-break assessment which resulted in two of the six employees with a score of 55 being placed at risk of redundancy in order to meet the headcount reduction target for that pool.

58. Mr McGugan was directly affected by the redundancy programme, and for this reason the respondent determined that it was inappropriate for him consult with the claimant. The individual consultation process with the claimant was assigned to Mr Jones, although Mr Jones himself acknowledges that he had very little knowledge of the claimant.

59. Mr Dawson's evidence was that the final ECC consultation meeting took place on 14 March 2018. At that meeting the timeline for redundancies was outlined to the representatives. At risk meetings were scheduled to take place on 20-21 March 2018. All managers of employees who had been identified as being 'at risk', with the exception of managers who themselves were 'at risk', received training on how to conduct the individual consultation process. Notifications of redundancy dismissals were scheduled to be sent to the selected employees on 6 April 2018 with any subsequent redundancy dismissals were anticipated to take effect on 15 June 2018.

60. Although the headcount reduction target for TSS at earlier stages of the collective consultation process was 153, at the meeting on 14 March 2018 that target was reduced to 125 (page 375). As a number of voluntary redundancies had been agreed this meant that the number of compulsory redundancies required was identified as 104.

61. At the final ECC meeting the selection pools were agreed with the ECC representatives. There were seven pools in total. TSS was initially split into three groups: “Sales and Offerings”, “Service Delivery” and third group described as “everybody else”. The three groups were then split into sub-groups to form pools of individuals doing similar roles. The claimant was placed in the Service Management and Operations Group of 125 employees. This Group was subject to a headcount reduction target of 61. The claimant was placed into the Service Management pool which compromised 75 employees with a target reduction for this group of 41.

62. In his witness statement the claimant appears to challenge that he was included in the correct pool although I do not find his evidence on this matter very easy to follow. I accept the respondent’s evidence that that the claimant was included in a pool of other service management employees.

63. Following the meeting on 14 March 2018 Andy Roberts (Head of TSS UKI) approved the final TSS scores on 19 March 2018. After the scores had been signed off by Mr Roberts, the respective line managers then sent invitations to all employees provisionally selected for redundancy inviting them to individual consultation meetings.

64. Mr Jones informed the claimant on 19 March 2018 by email that he had been put at risk of redundancy and the correct process was followed in accordance with the ranking criteria and invited him to attend an “At Risk” individual consultation meeting on 21 March 2018 at the respondent’s office in Warwick.

65. The note of the claimant’s first individual consultation meeting on 21 March 2018 is at page 433 of the bundle. The consultation meetings appear to have all followed a similar pattern and the same issues arose at several of the meetings. The claimant wanted to record the meetings but Mr Jones refused to agree to this. During the first meeting, Mr Jones and the claimant discussed the scores he had been given. Mr Jones would not however tell the claimant what score he would have to have given not be at risk. Mr Jones’s evidence was that this was because it was not part of the process.

66. In the course of submissions there was discussions about the timing of the process and why the claimant was not told during the consultation process what the cut off score for redundancy was. Ms Davis suggested to me that the claimant could not be provided confirmation of the cut off score for redundancy because it was not known until the conclusion of the consultation process. However, the evidence of the respondent’s witnesses appears to be consistent. The scoring process was undertaken in December and January. A process for checking scores was undertaken in late January and senior managers including Mr Jones confirmed the scoring in late January. The voluntary redundancies reduced the number of the

posts which would be redundant but that was known in mid March. Consultation with employees began in March after the pools for selection had been approved. It is clear from the evidence presented to me that by the time the individual consultation process began the respondent had already decided in precise terms exactly how employees had been scored, how many employees were to be made redundant and what the pools for selection would be. I find that what score would have been required to "save" an employee from redundancy was known during the individual consultation process. No reason for not telling the claimant what the cut off score was offered except that it was not the agreed process.

67. The claimant was not provided with a copy of his scores and the reasons document at this first meeting. In fact the claimant's evidence was that he was not shown that document until 24 April 2018 when he was shown a copy by Mr Jones. Mr Jones conceded that he did provide the document but did not do so as part of the formal process. This means the claimant was only provided with the detail of the reasons for this scoring until after he had been given notice of termination. The claimant wanted to see the scores of his colleagues, but this was refused on grounds of confidentiality.

68. The claimant felt that the pre-population of scores was unfair and argued to Mr Jones that the identification of his role as being "in decline" was unfair because the function he performed would still be required, albeit it would be carried out "offshore". Mr Jones evidence was that he discussed with the claimant why he had been given particular scores according to the notes he had received and confirmed after the meeting that previous manager and client feedback. There was a conflict of evidence between the claimant and Mr Jones and the claimant on how detailed these discussions were. The notes of the meetings do not assist me. In light of some of the comments made by Mr Jones in the course of his evidence that he thought the "claimant should concentrate on redeployment ", and the lack of any detail about discussions in either the witness statement or the notes of the meeting I have preferred the evidence of the claimant that these discussions about scoring were brief. In any event it is difficult to see how the claimant could have a meaningful discussion with Mr Jones if he was not given a copy of his scoring and the document setting out reasons for that and given time to consider the comments. I accept however that there were discussions about the role relevance scoring and there were some discussions about the other scores. This is not a case where the claimant was not provided with any information at all. Most significantly I find that because the redundancy scoring process for the claimant had already been subject to normalisation and had been confirmed by Mr Jones, Mr Jones had no intention of revisiting any of the scoring and he thought that the claimant was wasting his time in trying discuss those scores. Mr Jones told the claimant that if he remained dissatisfied, he would have the option of appealing his scoring in the event he was dismissed.

69. Following the first meeting the claimant sent Mr Jones a list of questions and points, to which he responded on 27 March 2018 (pages 427 to 430). The claimant sought information about the scores of other employees which was refused.

70. The claimant met again with Mr Jones on 27 March 2018. At this meeting, the claimant asked Mr Jones about the appeals process but Mr Jones told him that the

appeals process would be announced once decisions had been made on redundancies, despite the discussion at the previous meeting when the claimant had been told that if he was dissatisfied with his scores he would be able to appeal. The claimant's interest in the appeals process at this stage was therefore understandable. Mr Jones evidence in his witness statement was that *"we then had a discussion about redeployment options, as this was what I thought Stefan should focus on at that stage"* and he *"encouraged Stefan repeatedly to look at alternative roles within IBM*". There was a discussion about Mr Jones getting in touch with some of his contacts in the Security Services unit of the respondent to see if there were any roles there that he could apply for, and the claimant explained he had started looking at vacancies on GOM (Global Opportunities Market), an IBM search engine for roles available internally.

71. The claimant was invited to a further consultation meeting with Mr Jones on 4 April 2018, where possible redeployment was discussed again. Mr Jones states in his witness evidence that *"I really tried my best to encourage Stefan to accept the commercial reality that his existing role was in decline and to seek to redeploy into another area. It had been well known for some time the client support role that he was performing was in decline*".

72. On 9 April 2018 Mr Jones met with the claimant to give him a letter confirming his dismissal by reason of redundancy (page 474). The letter confirmed a leaving date of 2 July 2018 unless suitable alternative employment could be found before that date.

73. Mr Jones met with the claimant again on 16 April 2018 and 24 April 2018 when he encouraged the claimant to look on the GOM internal vacancy website and also to attend a career counselling session offered by a company which had been retained by the respondent to help employees at risk of redundancy. They discussed a number of roles. I accept that Mr Jones sent the claimant's details to some of his contacts and encouraged him to apply for roles which might have been a higher grade than his current role.

74. The claimant emailed an appeal against dismissal on 17 April 2018 (page 482) giving reasons for appeal including that *"my low criteria scores do not reflect my record of employment on IBM Tools: PBC, Checkpoint, ACE Feedback and my manager's summary explanations given against each criteria are both contradictory with selective plagiarised wording lifted from IBM Tools*", on the basis of an 'equitable principle of fairness' and he asked for disclosure of how he had compared to others and what evidence had been used for the scoring.

75. On 25 April 2018 the claimant was told that Michael Johnson, who is the respondent's European Solution Design Leader in TSS. Mr Johnson is an experienced and senior manager who is approved by the respondent to grievances and appeals against grievance outcomes and redundancy dismissals. Mr Johnson had never worked with the claimant and indeed had never met him.

76. The claimant objected to Mr Johnson considering his appeal because he did not believe that Mr Johnson was impartial.

77. Mr Johnson emailed that claimant on 27 April 2018 to arrange a call with him to discuss the matters he had raised, to seek further clarification on the issues. They arranged to speak on Thursday 3 May 2018 by telephone. During that telephone meeting on 3 May 2018, Mr Johnson suggested to the claimant that that his appeal was "on the basis that IBM had acted in breach of its contractual duty of mutual trust and confidence as it had carried out an unfair selection process in the redundancy programme" and the claimant agreed with this.

78. Mr Johnson sent the claimant a meeting note setting out the scope of what would be considered. The claimant emailed with back with various comments and to raise a further issue he wished to be added which incorporated into a revised version of the document (pages 494 to 495). The scope of matters to be considered by Mr Johnson were a mixture of grounds of appeal and requests for further information, such as sight of other TSS employees' ranking scores against the criteria (with names removed names for confidentiality purposes).

79. Mr Johnson interviewed a number of individuals including Mr Jones, Mr Williams, Mr Younger, the claimant's "second line manager", and Mr Portlock who was the Delivery Project Executive on the Santander account on 14 May 2018, and a number of other individuals. The claimant suggested nine individuals that Mr Johnson should interview. Mr Johnson interviewed three of these individuals, Adrian Portlock, Lee Simkin and Allan Johnstone. He decided not to interview the client managers that the claimant had requested because he thought that was inappropriate. I accept that many employers and perhaps most would be unwilling to ask a client to become involved in the scoring of employees for redundancy and that this reasonable. Mr Johnson also asked Mr Williams, Mr Portlock, Mr Simkin and Mr Johnstone to score the claimant against the redundancy criteria. The scores given varied but all scored the claimant less in total than the 57 out of 110 which was the "safe score". One of the managers, Mr Johnstone gave the claimant a score of 55 out of 110, which would have placed him in a tie-break situation where he would have been assessed against other employees who had scored 55 and would potentially still have been placed at risk of redundancy. Mr Johnson and Mr Johnstone then discussed the "tie break" rules, under the respondent's procedure. Mr Johnson concluded that it was likely that the claimant would have been placed at risk, even if he had scored by Mr Johnstone.

80. Although there is no evidence that any of the managers undertook the extensive scoring process as required by the process which had been agreed with the employee representatives I accept that on the balance of probabilities even if the claimant's scoring had been discussed with him and a wider range of managers at the time there is a significant likelihood that the claimant would still have scored less 55 or less in the scoring process. That is because even if the claimant had scored 15 for approach to work as he asserts if he had been awarded 7 for either potential or performance he would still have scored 55 and been at risk under the tie break rules.

81. Mr Johnson's findings on the appeal are set on the dismissal appeal report at pages 506 to 509). In the summary he concluded that

> After reviewing all the evidence provided and interviewing seven individuals, I can conclude that SD was treated fairly and equitably. The overall final score of 43 is an accurate assessment against the criteria agreed with the ECC. I can find no evidence of SD being unfairly selected for redundancy.

82. In the section before that he states

> As part of the investigation MJ interviewed seven individuals (listed above). No evidence was brought forward which contradicted the final scoring awarded to SD. In addition information provided during the interview process validated the original score given.
>
> A Williams also confirmed whilst being interviewed that he had conversations with SD around the longevity of the Client Support Manager role and specifically on the Santander account.

83. Mr Johnson's approach appears to have been that because he concluded that the claimant would have received the same or a similar score if he had been scored by one of the other managers he approached he would have not been unfairly dismissed by reason of redundancy but he did not consider matters of substantive fairness such as whether the claimant had been scored by Mr McGugan and Mr Williams in accordance with the respondent's process which had been agreed with the employee representatives and whether the consultation process had been carried out fairly. Rather his approach was to look at the accuracy of the score. Mr Williams provided him with information which was not included in the original scoring and indeed Mr Johnson's comment that *"in addition information provided .. validated the score"* appears to acknowledge that, but this had implications for fairness was not considered. I find that the appeal process did not correct or address the unfairness the claimant had been subjected to.

84. The appeal outcome was sent to the claimant on 24 May 2018 (page 533). In sending information to the claimant a mistake was made and the claimant was sent date about another employee which he was subsequently asked to delete. I accept that was an error and there does not appear to have been any detriment to the claimant as a result.

85. On 7 June 2018 the claimant submitted a grievance regarding the redundancy selection process which was referred to Mr Peter Hope, Vice President of Banking and Financial Markets Enterprise UK. On 3 July 2018 Mr Hope informed the claimant that he was not raising any new or different points to the ones that had been investigated as part of his dismissal appeal and no further action was taken.

86. The claimant was not successful in any of his applications for alternative employment and his employment ended on 22 July 2018. It is not in dispute that the GOM system was available to the claimant and that he used it to apply for alternative employment. It is accepted by the respondent that vacancies offered via this system are not ring-fenced to redundant employees.

87. In the list of issues the claimant raised the following *"(d) Did R consider roles that are not vacant, as well as those that are, referred to as 'bumping'? If not, was it required to do so?"*. The respondent's evidence was that it does not take the approach of dismissing employees from roles which are not redundant to offer those roles to employees whose roles have disappeared, and I accept that evidence.

88. In his statement the claimant says "187. Mr Devis will state that the IBM CSM contractor position performing the Santander Technical Stores role-based onsite at Leicester where the Claimant worked, had regular interaction, assisting when needed and reported to the same manager should have been offered to Mr Devis by the Respondent, but this suitable alternative employment was not considered by IBM nor was he in scope of the RA programme for reasons unknown." I accept the respondent's evidence that this role was significantly less skilled than the role which the claimant undertook and that in any event the individual is not an employee of the respondent and that as a result this role was not "suitable alternative employment" which was available for the claimant.

89. On 5 November 2018 Mr Portlock contacted the claimant to tell him about a role which had come up within his team. The claimant was interviewed for that role on the 18th November 2018 but the job was subsequently offered to another applicant. In his witness statement that claimant alleges that "Mr Devis's application may well have been blocked via an IBM Business Partner at the request of IBM" but I was not taken to any evidence to support that allegation and, in any event, I note that this vacancy arise after the claimant's employment with the respondent had ended. I do not find it necessary to make any further findings about that role.

90. **The law**

The relevant statutory provisions which fall to be determined in this case are:

91. **s98 Employment Right Act ERA**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

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

(2) A reason falls within this subsection if it—

[….]

(c) is that the employee was redundant,

[…]

(4) 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.

92. **s139 Redundancy ERA**

(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.

Unfair Dismissal

93. Where an employee argues that his dismissal was not by reason of redundancy, the statutory presumption under S.163(2) ERA that a dismissal is for redundancy does not apply and the employer must show the reason for dismissal.

94. For a dismissal to be by reason of redundancy, a redundancy situation must exist bearing in behind the statutory definition or disappearing work or a reducing requirement for work of a particular kind. However, it is not for tribunals to investigate the reasons behind such situations. A good commercial reason was enough to justify the decision to make redundancies (*James W Cook and Co (Wivenhoe) Ltd v Tipper and ors* 1990 ICR 716, CA). An employer does not have to show that redundancies are required to save a business. It may simply decide that it can produce the same results in what it considers to be a more efficient way.

95. In *Murray and Another (A.P.) v Foyle Meats Limited (Northern Ireland)* 1999 ICR 827 HL), Lord Irving of Laird found that in order to determine whether the

requirements of a business for employees to carry out work of a particular kind, or have ceased or diminished requires the tribunal to ask two questions of fact: *"The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation*"

96. Guidelines for what might be expected of a reasonable employer in making redundancy dismissals was set out in *Williams and ors v Compair Maxam Ltd* 1982 ICR 156, EAT. In assessing these guidelines I must ask myself whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

97. The steps suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to follow were:
    a. to give as much warning as possible of impending redundancies;
    b. to 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 by seeking to agree with the union the selection criteria;
    c. even if no agreement is reached, to establish objective 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;
    d. 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.
    e. to see if the employee can be offered alternative employment.

98. Although the principles were expressed as applying in a situation where an independent trade union is recognised, the principles are generally accepted to have a wider significance to most redundancy cases.

99. In this case the list of issues identifies the following issues *"whether the respondent set fair criteria for selection for redundancy that were capable of objective assessment and measurement? In particular:*
    a. did R identify an appropriate redundancy pool and role description to select C
    b. did R design a fair and transparent RA programme to satisfy ERA and pass the test of reasonableness: to warn, consult and adopt a fair criterion to select C?
    c. did R ask C to provide evidence against undisclosed proposed ranking selection criteria without guidelines or explanation?
    d. if so, how was this evidence used?"

100. Accordingly the law relating to the identification and application of the pool for selection for redundancy is relevant to my considerations.

101. In the absence of a customary arrangement or agreed procedure that specifies a particular selection pool, employers generally have a good deal of flexibility in defining the pool from which they will select employees for dismissal (*Thomas and Betts Manufacturing Co v Harding* 1980 IRLR 255, CA). However, the employment tribunal must be satisfied that the employer acted reasonably in the circumstances. The case of *Taymech v Ryan* [1994] EAT/663/94 confirmed that that "the question of how the pool should be defined is primarily a matter for the employer to determine".

102. My attention was rightly drawn to the guidance in *Capita Hartshead Ltd v Byard* UKEAT/0445/11/R. The Honourable Mr Justice Silber reviewed relevant authorities and said the following

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

a. "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]

b. [9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

c. "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan [1994] EAT/663/94);

d. The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

e. Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.".

103. I must judge the employer's choice of pool by asking myself whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in *Kvaerner Oil and Gas Ltd v Parker and ors* EAT 0444/02, '*different people can quite legitimately have different views about what is or is not a fair response to a particular situation … In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band*.'

104. Generally in order to ensure fairness, the selection criteria applied to the chosen pool must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service. However, the fact that certain selection criteria may require a degree of judgement on the employer's part does not necessarily mean that they cannot be assessed objectively or dispassionately.

105. In *Swinburne and Jackson LLP v Simpson* EAT 0551/12 the EAT stated that *'in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real-world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness*.' In *Mental Health Care (UK) Ltd v Biluan and anor* EAT 0248/12 Mr Justice Underhill observed *'The goal of avoiding subjectivity and bias is of course desirable but it can come at too high a price; and if the fear is that employment tribunals will find a procedure unfair only because there is an element of "subjectivity" involved, that fear is misplaced.'*

106. Provided an employer's selection criteria are reasonable, a tribunal should not subject them or their application to over-minute scrutiny — *British Aerospace plc v Green and ors* 1995 ICR 1006, CA. Essentially, the task I am required to undertake is to satisfy myself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. Employers are given a wide discretion in their choice of selection criteria and the manner in which they apply them. I am only be entitled to interfere in decision making in those cases which fall outside the range of approaches a reasonable employer could take.

107. It is rarely appropriate for a tribunal to embark upon a detailed critique of certain individual items of scoring for the purpose of determining whether it was reasonable to dismiss the claimant as redundant unless this is to determine whether there has been an obvious error or there has been bad faith. In *Buchanan v Tilcon Ltd* 1983 IRLR 417, Ct Sess (Inner House), the Inner House of the Court of Session held that where an employee's only complaint is unfair selection, all that the employer has to prove is that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned. In *Eaton Ltd v King and ors* 1995 IRLR 75, the EAT held that all the employer had to show was that it had set up a good system of selection which had been reasonably applied. This approach was approved by the Court of Appeal in *British Aerospace plc v Green and ors* 1995 ICR 1006, CA (which examined an employment tribunal's powers to order discovery of assessment forms by claimants who made general complaints about an employer's selection process). The Court, in refusing to grant an order for discovery, noted that if a system of graded assessment were to function effectively, its workings were not to be subjected to over-minute analysis. That was true both at the stage when the system was actually being applied and when its application was being questioned at a tribunal hearing. The Court added: *'To allow otherwise would involve a serious risk that the system itself would lose the respect with which it is at present regarded on both sides of industry, and that tribunal hearings would become hopelessly protracted*.'

108. In terms of the extent to which an employee has a right to know how he or she fared in the assessment process, a failure to disclose to an employee selected for redundancy the details of his or her individual assessments may give rise to a finding that the employer failed in its duty to consult with the employee. In *John Brown Engineering Ltd v Brown and ors* 1997 IRLR 90, EAT, the EAT held that the employer's refusal, as a matter of policy, to disclose the marks of those selected for redundancy rendered its internal appeal process a sham. The employees' subsequent dismissals were accordingly unfair for lack of proper consultation. The EAT pointed out that a fair redundancy selection process requires that employees have the opportunity to contest their selection, either individually or through their union. However employees are not entitled to compare their own scores with those of employees who have been retained.

109. This principle was confirmed in *Boal and anor v Gullick Dobson Ltd* EAT 515/92. There, employees complained that the consultation with them over their proposed dismissals for redundancy was rendered defective by the employer's refusal to disclose details of how their rivals for redundancy had been assessed. They argued that they could not challenge the decision to select them if they were unable to draw comparisons between the way in which they had been assessed and the way in which those retained had been assessed. The EAT rejected that argument. The duty on the employer was to act reasonably within the terms of S.98(4) ERA. It could not be said that an employer was under a duty to provide an employee selected for redundancy with all the information on which the decision to dismiss had been based so that the employee could examine it, point out any mistakes that might have been made, and require the employer to go through a revision exercise. If this were required, the employer would not be able to carry out the redundancy exercise at all; it would lead to an 'intolerably protracted and utterly impracticable process'. Moreover, the disclosure of such information to employees would involve breaches of confidentiality and would destroy the morale of both workers and management.

Consultation

110. Guidance as to what constitutes 'fair consultation' was provided in *R v British Coal Corporation, ex parte Price* (No.3) 1994 IRLR 72, Div Ct. Lord Justice Glidewell said that *"fair consultation means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration by an authority of the response".*

111. The importance of following proper procedures was made clear by the House of Lords in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL. In that case, Lord Bridge stated that: *'In the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.*'

112. An employer should not assume that individual consultation is unnecessary where consultation with the appropriate representatives and employers should not

assume that employees are privy to consultation with their union over redundancies, and that they should themselves ensure that the staff are aware of what is going on (*T and E Neville Ltd v Johnson* EAT 282/79 and *Huddersfield Parcels Ltd v Sykes* 1981 IRLR 115, EAT).

113. The relationship between collective and individual consultation was considered by the EAT in *Mugford v Midland Bank plc* 1997 ICR 399, EAT. On appeal, the EAT noted that collective consultation often concentrates on such matters as selection criteria and general arrangements for redeployment and that unions seldom wanted to be involved in the actual selection of individuals for redundancy. Once individuals had been identified for redundancy, consultation between the employer and the individual employees becomes important, even if there has already been extensive consultation on a collective level. It is a question of fact and degree for a tribunal to decide whether the consultation that had taken place was so inadequate as to render the dismissal unfair.

Information to be provided in the consultation process

114. In the List of Issues the claimant has raised of questions about the provision of information, whether the respondent was required to provide the claimant with the "normalisation" guidance provided to manager, was the respondent required to provide the claimant with anonymised data regarding other employees' ranking scores, showing Role Description, Criteria and Score and whether the respondent informed the claimant of the "cut off" score for being put at risk of redundancy and if not, was the respondent required to have done so? In relation to other employees' data I note the relevance of the case law above.

115. In terms of information about an employees' selection, in *Pinewood Repro Ltd t/a County Print v Page 2011* ICR 508, EAT, the EAT underlined the importance of providing an employee with adequate information in order to give him or her the opportunity to challenge a selection for redundancy. In that case the employee, P, did not receive his actual scores. He raised a number of queries in relation to these but was not provided with an explanation as to how they had been calculated. When his appeal against his redundancy selection was dismissed, P brought an unfair dismissal claim before an employment tribunal. The employment tribunal found that P's redundancy dismissal was unfair on the basis that he did not have an opportunity during the consultation process to challenge his scoring since PR Ltd had not explained how the scores had been arrived at. On appeal, the EAT upheld this finding, stressing — after referring to Glidewell LJ's comments in *R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price* — that fair consultation involves the provision of adequate information on which an employee can respond and argue his or her case.

116. The list of issues identifies a number of matters in relation to alternative employment as follows

"2.11. Did R make reasonable efforts to ensure C was able to obtain any suitable alternative employment that was available? In particular:

(a) Did R produce guidelines to determine how it will choose to select employees to make any offer of alternative employment to C? If not, was it required to do so?
(b) Did R make adequate provisions to ring fence suitable positions for C preventing relevant positions being advertised externally or oversees? If not, was it required to do so?
(c) Did R follow an impartial and just treatment or behaviour without favouritism regarding C and redeployment?
(d) Did R consider roles that are not vacant, as well as those that are, referred to as 'bumping'? If not, was it required to do so?
(e) Did R give C the opportunity to relocate with the role?"

117. In *Thomas and Betts Manufacturing Co v Harding* 1980 IRLR 255, CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work. This does not mean, however, that an employer is obliged by law to enquire about job opportunities elsewhere and a failure to do so will not necessarily render a dismissal unfair.

118. In terms of the appeal stage, case law has established that a failure by the employer to consult an employee before dismissal can be cured at an appeal hearing after the date of dismissal provided the appeal is sufficiently thorough (*Lloyd v Taylor Woodrow Construction* 1999 IRLR 782, EAT).

"Polkey reduction"

119. A 'just and equitable' reduction under S.123(1) ERA should be applied where the unfairly dismissed employee could have been dismissed fairly at a later date or if a proper procedure had been followed (Polkey v AE Dayton Services Ltd 1988 ICR142, HL). This reflects the basic principle that *'it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed'* (W Devis and Sons Ltd v Atkins 1977ICR 662, HL). The burden for proving that an employee would have been dismissed in any event was on the employer. If a reduction is made, the tribunal must explain its reasons.

120. If there has been a merely procedural lapse or omission, it may be relatively straightforward to envisage what the course of events might have been if procedures had stayed on track. However, if what went wrong was more fundamental, it may be difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to 'embark on a sea of speculation'. (King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)).

121. It is important to acknowledge that does not mean that it will not be just and equitable to apply a Polkey reduction if there is substantial as well as procedural unfairness and the tribunal must have regard to all of the evidence, including any relevant evidence from the employee.

122. There is relevant guidance on how to approach this issue in *Software 2000 Ltd v Andrews and ors* 2007 ICR 825, EAT. In that case the EAT reviewed the leading and identified the following principles which emerge from those cases:

"(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.

(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. (He might, for example, have given evidence that he had intended to retire in the near future).

(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 of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But 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."

Submissions

123. Ms Davis presented me with a 39 page opening submission document which she supplemented with oral submissions. The claimant presented 8 pages of opening submissions and 11 pages of closings submissions which he briefly supplemented orally. I have not sought to summarise those submissions here and I have no doubt that if I seek to do so I will do one or both a disservice. Where relevant I have referred to the submissions below.

Discussions and Conclusions

Reason for dismissal

124. The first matter I have determined is what was the reason for the claimant's dismissal. The decision to dismiss the claimant was taken by Mr Jones. He did so based on the information he had received about what was called, rather obliquely, a "Resource Action programme" but might be more usually referred to

as a collective redundancy exercise. I have accepted the evidence of Mr Dawson that the respondent that the Resource Act programme was undertaken because the respondent had decided to substantially reduce its UK workforce, including by moving jobs which had done within the UK to lower cost locations.

125. In his submissions the claimant says at paragraph 7 *"The Claimant contests that his role still existed when he was dismissed by the Respondent and his redundancy was not correct or appropriate within the resource actions. This is because there is strong evidence that a named individual from the same TSS European business unit backfilled the Claimant on the active support contract he worked".*

126. I acknowledge that the claimant believes very strongly that the respondent's "offshoring" policy is unfair. The transfer of roles from the UK to countries with lower costs is not without controversary of course, but it is not unlawful. The statutory definition of redundancy clearly anticipates the scenario where an employer still has a requirement for work to be carried out somewhere does not require employees to do work of a particular kind in the location where the employee in question worked. That is the situation which applied to the claimant.

127. I have asked myself the questions posed by Lord Irving of Laird in *Murray and Another (A.P.) v Foyle Meats Limited (Northern Ireland)*. The first is does one or other of various states of economic affairs exist? My answer to that question is yes, because the requirement for work of a particular kind, that undertaken by the claimant, had ceased or diminished in the location where he was employed, which meets the definition of redundancy in s139(1)(b)(ii) of the Employment Rights Act. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs, "the causation question". My answer to that question is also yes too. I am satisfied it was that state of affairs, the reduction of the respondent's workforce, which caused Mr Jones to terminate the claimant's employment.

128. The claimant has referred on various occasions to the issue of performance and the fact that he had not been subject to performance improvement plan. It appears that because "performance" was one of the selection criteria, he considers that he was unfairly dismissed for lack of performance. However, the respondent did not dismiss the claimant because it believed he could not do his job to the required standard. The cause of the claimant's dismissal was the reduced requirement for employees to do work of a particular kind.

129. I find that the respondent has shown that the reason for the claimant's dismissal was that he was redundant which is a potentially fair reason falling within s98(2) ERA .

The fairness of the decision to dismiss

130. Having determined that the reason for the claimant's dismissal was a fair one I must determine whether the respondent employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant taking into account the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s98(4) ERA.

131. In considering whether the decision to dismiss the claimant fell within the range of a conduct a reasonable employer could have adopted I have used the guidelines

set out in *Williams and ors v Compair Maxam Ltd* 1982 ICR 156, EAT as my starting point. In assessing these guidelines I must ask myself whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

132. I have noted above the factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider and which I have set above. I recognise that these guidelines do not change the statutory test but they are a useful list to look at the different aspect of what might be expected of a reasonable employer and for that reason I have considered each of the matters on the list below.

Warning of redundancies and the collective consultation process

133. The respondent undertook an extensive collective consultation process and although the workforce did not have access to information about all of those collective discussions they had warning that redundancies were to be made and were provided with summaries of meetings and provided with answers to some questions which were raised at the ECC meetings.

134. The respondent's evidence was the dissemination of the collective consultation process to the workforce was left to the appointed employee representatives but the risks of such an approach can be seen in this case. The claimant did not receive information from his representative other than the summarised minutes of meetings and the question-and-answer documents. The employee representatives clearly had large consistencies and perhaps it is not surprising that the claimant struggled to make contact with his representative to raise matters which concerned him or to ask questions especially when he was based at a client site and had been working from home because of his partner's situation. It might be expected that the representatives themselves will have felt wary about the information they could provide to individual staff members beyond the minutes and agreed questions because of the danger that if they did so they would breach the non-disclosure agreements. In terms of the relationship between the collective redundancy consultation and the question of individual unfairness what is significant was how the respondent ensured that the workforce were provided with an explanation about how the outcomes of the collective process were applied to them at the individual consultation stage. The respondent could not abdicate its responsibility in this regard to the employee representatives, but I find no unfairness in the fact the claimant was largely unaware of the detail of the collective consultation process. I am satisfied that the collective consultation process did mean that the claimant and his colleagues were warned of impending redundancies.

135. The guidelines in *Compair Maxam* were set for a situation where there is recognised trade union. There was no such union here (at least in relation to the area of the business where the claimant was employed) but the respondent collectively consulted with employee representatives about the need for redundancies and potential mitigation for compulsory redundancies were discussed. The respondent sought volunteers for redundancy.

136. The list of issues refers to the following

"Did R make appropriate efforts to mitigate the need for redundancy actions? In particular did and/or should R have considered:

(a) Temporary stoppages: sabbaticals, unpaid leave, holidays and lay-offs?

(b) Reducing hours: short/part-time working or flexible working, overtime bans and role share?

(c) Reducing payroll costs: salary sacrifice, pay freezes, pay cuts, pension changes, withdrawal of bonus, company car allowance, medical benefits, recruitment freeze, withdrawing new role offers and early retirement?"

137. Different employers will consider different mitigating factors. What is reasonable for one employer to consider may not be relevant to another. There is no checklist of matters which an employer must consider. I am satisfied that the respondent did collectively consult about mitigation for the redundancies and the respondent acted reasonably in this regard. The respondent did not act unreasonably by choosing not to enhance the voluntary redundancy payments on offer.

The selection criteria

138. In this case the employer agreed the approach which would be taken in relation to which employees would be considered as potentially being at risk with a group of employee representatives. All employees in the relevant business unit were considered to be at risk. The issue of which employees will be considered for redundancy is a matter which should be left to an employer, unless the approach taken is one that no reasonable employer could adopt. Here the respondent cast the net as widely as it could have done and I cannot find that approach is unreasonable, in particular because it been collectively consulted upon and agreed.

139. Turning then to the selection criteria applied to the employees, as the Compair Maxam guidelines themselves acknowledge, it is generally the case that an employer acting reasonably will adopt objective criteria. If the employer adopts that approach it is not for an employment tribunal to interfere with the criteria chosen. I have also reminded myself of the EAT comments in *Swinburne and Jackson LLP v Simpson* EAT 0551/12 that employers sometimes need to make *"tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity"* and that a procedure should not be found to be unfair simply because "there is an element of "subjectivity" involved" (*Mental Health Care (UK) Ltd v Biluan and anor).'* Some of the criteria adopted by the respondent were subjective because they used criteria for which guidance had been provided but which did require the managers to make their own personal assessments about how someone scored. This is evidenced by the fact that a number of senior managers who presumably had all received the same training about scoring, gave the claimant quite different scores when they are asked to score the claimant by Mr Johnson. However, the fact that subjective criteria were used does not in itself mean that the respondent acted in a way which an employer acting reasonably could not do.

140. The respondent's adoption of those criteria may not have been unreasonable but I consider that no reasonable employer would have adopted such criteria and then applied them to an employee in the way the criteria were applied to the claimant. The emphasis on the use of objectivity in the scoring process suggest the respondent recognised the risks of using the subjective criteria it had adopted. The employee representatives were told about a robust process which would be evidence based and subject to checks by other managers but in practice the respondent did not take those steps. The fact that Mr Williams could place such weight on the travel issue in the reasons for scoring the claimant as he did without the scoring record referring to this shows a lack of transparency in the scoring and that the risk of personal bias or bad faith was not avoided. The robust normalisation and checking process described to the employee representatives was in practice a rubber-stamping exercise and there was no meaningful check that the selection criteria had be fairly applied to the claimant.

141. In this context the failure to discuss the claimant's scoring with him before it was finalised is significant. If there had been discussions the claimant would have had the opportunity to answer or challenge the with attached to some of the concerns. In *R v British Coal Corporation, ex parte Price (No.3)* 1994 IRLR 72, Div Ct. Lord Justice Glidewell said that "*fair consultation means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration by an authority of the response*". Although that is describing collective consultation, individual consultation must be understood to incorporate similar principles. Consultation requires discussions before a decision is taken. The claimant was not consulted with about his scores by the scoring managers. If he had the record of the scoring could have identified any objections to the matters taken into account which Mr Jones would have been aware of before he determined that the scores were appropriate. Mr Jones did not consult the claimant about his scores he told him what they were and that if he objected his only means of challenge would come post dismissal. That is not consultation it is notification. The fact that the claimant was also not told how his score related to the "safe score" only added to the lack of transparency at this stage of the process. The result was that the claimant was denied a meaningful explanation for his selection for redundancy and I consider that no employer acting reasonably would have denied an employee the opportunity to comment on scoring against criteria which contain a significant subjective element before those scores are confirmed. However it was reasonable for the respondent to refuse to provide the claimant with the scores of his colleagues.

142. I have not found that the claimant was incorrectly scored. My finding of unfairness is based on the failure of the respondent to ensure that the process it had required its managers to undertake had been undertaken and the fact that the on the balance of probabilities I have found that the selection criteria were not fairly applied to the claimant and his scores may have been unfairly tainted.

143. Despite the claimant's objections, the use of appraisal documentation was an attempt to bring an element of objective assessment to the scoring process. Those are documents which can be expected to be balanced because they included comments from the individual and which had used to assess the claimant's

performance for matters such as pay and promotion. The use of the appraisal document had been the subject of collective consultation. For the avoidance of doubt I accept that it was reasonable for the respondent to use the appraisal documents for the purposes of redundancy scoring in principle but the way those documents were used lacks transparency and objectivity.

144. The redundancy selection criteria did contain two objective elements, those are the role relevance and level v PRG criteria. The claimant's scores for those elements can be worked out by simply understanding the formula and which categories of pay band and role the claimant falls into.

145. The list of issues refers to the following at 2.4

> "In relation to two of the criteria, was R entitled to use non-personal, pre-populated scores? In particular:
>
> (a) Did R warn and act fairly by the application of non-personal HR pre-populated weighted awarded scores to C's overall personal performance ranking score?
>
> (b) Did R communicate a transparent procedure and intended application to C regarding non-personal pre-populated HR weighted awarded scores for personal performance ranking? Specifically: 'Role Relevance' (GROWTH, MAINTAIN, DECLINE) and Level vs PRG?
>
> (c) Was R required to provide C with the "ranking selection criteria" guidance?"

146. These criteria had been the subject of collective consultation. The claimant was unhappy about the use of these criteria but the respondent was not required to consult with him about which criteria it used, in the sense of seeking to reach agreement with him about that. The way these criteria were scored did make it make significantly more likely that employees in particular pay grades or as in the case of the claimant, particular roles would be made redundant but I accept an employer acting reasonably may determine that some criteria require particular weighting. These scores are "pre-populated" because the scoring managers had no discretion about the scores given. The claimant was told these scores by Mr Jones. There was a discussion about why the claimant's role was assessed as "declining" I accept that the respondent acted with the range of conduct which a reasonable employer could be expected to adopt in this regard. The claimant received the same score for Level v PRG as the majority of his colleagues and this too was a criteria which had been determined by the respondent after collective consultation. I cannot find that the respondent's approach falls outside the range of reasonable responses to the decision it was taking.

147. I accept that the respondent also considered the final pool into which the claimant was placed at the final stage of its process, which resulted in the claimant being in a pool alongside other service management colleagues. That this was determined by the respondent after collective consultation. Taking into account the guidance in *Capita Hartshead Ltd v Byard* above I accept that the respondent acted reasonably in this regard and there was no unfairness in the claimant being selected for redundancy based on his score by reference to other employees in the

service management pool, the unfairness came for the scoring and individual consultation process.

Seeking alternative employment

148. The list of issues raises the following matters (2.9)

> Did R make reasonable efforts to ensure C was able to obtain any suitable alternative employment that was available? In particular:
>
> a. Did R produce guidelines to determine how it will choose to select employees to make any offer of alternative employment to C? If not, was it required to do so?
> b. Did R make adequate provisions to ring fence suitable positions for C preventing relevant positions being advertised externally or oversees? If not, was it required to do so?
> c. Did R follow an impartial and just treatment or behaviour without favouritism regarding C and redeployment?
> d. Did R consider roles that are not vacant, as well as those that are, referred to as 'bumping'? If not, was it required to do so?

149. My conclusion is that the respondent did make reasonable efforts to ensure that the claimant was able to obtain any suitable alternative employment. There was an internal website which he could and did access. I am satisfied that Mr Jones provided him with reasonable encouragement and support in that process and on an equal footing with the others selected employees he was dealing with. The respondent was undertaking a large scale redundancy exercise and in that context it is not surprising that there were not significant numbers of vacancies for the claimant to apply to. I did not find any barriers to the claimant obtaining alternative employment that was available. I accept that employers will take a range of approaches to ring fencing alternative employment and I do not accept that an employer has to ring fence vacancies for redundant employees to fall with the range of reasonable responses.

150. In terms of bumping the nature of the selection process which was undertaken, that the lowest scoring employees in each particular category were selected for redundancy, seems to preclude "bumping" as described in this question. Any employees in comparable roles to the claimant who scored less than him would also be redundant. If they were not redundant this presumably means that they scored better than the claimant and it is difficult to see circumstances in which it would have been reasonable for the respondent to displace a higher scoring employee to provide a vacancy for the claimant.

The appeal process

151. The claimed was allowed an appeal against his dismissal. I am satisfied that Mr Johnson was an appropriate person to consider that appeal. In terms of fairness given that this stage of the process happened after the claimant had been dismissed the significance of the appeal is whether any unfairness in the earlier process was corrected by the appeal. However, although Mr Johnson concluded

that "*After reviewing all the evidence provided and interviewing seven individuals, I concluded that Mr Devis had been treated fairly and equitably*" Mr Johnson conclusion on fairness appears to have been reached because he considered that the correct score had been given. The full scoring process supported by evidence as required by the ECC agreed process was not undertaken by the managers Mr Johnson spoke to. Although he found that "Information provided during the interview process validated the original score given". Mr Johnson did not, apparently, identify that reasons for scoring given to him by Mr Williams referred to matters which are not set out in the record of the reasons for the scoring and addressed his mind to possibility of bias that raised.

152. The claimant had already been dismissed. The appeal stage could have sought to correct the matters of unfairness in the scoring process which I have found but did not so.

Conclusion

153. I have not accepted many of the claimant's arguments about why he says the respondent acted unfairly but I have found the respondent acted in a way no reasonable employer could in a relation to a number of key respects in the redundancy process in particular:
    a. because there was an absence of a genuine consultation process with the claimant about his selection for redundancy in particular by giving him the opportunity to comment on his scores before they were finalised;
    b. because the respondent failed to to ensure that the scoring of the claimant was undertaken in accordance with the process it had agreed with the employee representatives to ensure the scoring of against criteria which would require a personal assessment by managers was supported by evidence and was undertaken as objectively as possible with a normalisation process to ensure that scores were justified in circumstances. There was a significant absence of transparency in the scoring process;

    In consequence the claimant's dismissal did not fall within the range of conduct which a reasonable employer could have adopted in the circumstances. The respondent acted unreasonably when it treated redundancy as sufficient reason for dismissing the claimant taking into account equity and the substantial merits of the case.

154. Although the claimant sought to argue before me that his scores were incorrect, I have not undertaken the process of re-scoring them nor would it would be appropriate for me to do so. What I accept that the evidence has demonstrated in the evidence is that it is likely that if the respondent's redundancy selection process has been carried out fairly the claimant would still have been selected for redundancy and would still have been dismissed at the conclusion of the process. I accept that likelihood is significant but the respondent has not provided me with sufficient objective evidence about scoring for me to conclude that the claimant's dismissal was inevitable.

155. In the circumstances I conclude that the appropriate reduction to be applied to the compensation to be awarded to the claimant under the Polkey principles I have referred to above is 70% to reflect a 70% chance that he would have been dismissed in any event.

Remedy and orders

156. The parties are encouraged to seek to resolve the issue of compensation between themselves without a further hearing, if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined by me at a remedy hearing the date of which will be notified to the parties by a separate notice.

157. I consider that the following orders will ensure the efficient conduct of the remedy hearing if it is required and **accordingly the parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):**

Statement of remedy / schedule of loss

158. The claimant must provide to the respondent, copied to the tribunal, **by 4pm on 12 February 2021** an updated Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the remedy hearing and how those amount(s) have been calculated together with copies of any documents not already included in the bundle of documents and/or statement of evidence that he wishes to rely upon at the remedy hearing.

Counterstatement of remedy / counter- schedule of loss

159. The respondent must provide to the claimant, copied to the tribunal, a counter schedule of loss if it disagrees with the claimant's schedule by **4pm on 26 February 2021** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

Remedy bundle

160. The claimant must prepare a paginated file of documents ("remedy bundle") relevant to the issue of remedy and in particular how much in compensation and/or damages he should be awarded if he wishes to rely on documents not already included in the Bundle and provide the respondent with a 'hard' and electronic copy of it by **12 March 2021** . The documents must be arranged in chronological or other logical order and the remedy bundle must contain the up-to-date schedule of loss and any counter schedule of loss at the front of it.

161. **5 working days before the remedy hearing electronic copies of the following documents must be lodged with the Tribunal**

a. The remedy bundle by the claimant,

b. if either party is relying on witness statements, a copy of each witness statements must be lodged by whichever party is relying on the witness statement in question;
c. copies of any written opening submissions / skeleton argument must be lodged by whichever party is relying on them / it.

162. **Public access to employment tribunal decisions**: The parties are reminded that all judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

163. Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

164. Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Cookson

25 January 2021