# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N A Ashraf

**Respondent:** SGL Co-Packing Ltd

**Heard at:** Manchester (by CVP) **On:** 2-5 February 2021 (and 17 March 2021 in chambers)

**Before:** Employment Judge Phil Allen
Ms M T Dowling
Mr D Lancaster

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Ms A Smith, counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not treated less favourably because of race and his direct race discrimination claims do not succeed.

2. The claimant was not unreasonably refused to be permitted to take time off as required by section 52 of the Employment Rights Act 1996 and his complaint for time off does not succeed.

3. The claimant's complaint that the respondent was in breach of section 1 of the Employment Rights Act 1996 when the proceedings began, does not succeed.

By a majority (2-1, Ms Dowling dissenting) the judgment of the Tribunal is that:

4. The claimant was not unfairly dismissed. His unfair dismissal claim does not succeed.

# REASONS

## Introduction

1. The claimant was employed by the respondent from 10 April 1989 until the termination of his employment by reason of redundancy on 7 August 2019. The claimant was employed as a Warehouse Supervisor. He was given notice on 16 May 2019. The claimant alleged that his dismissal was unfair. He also alleged that he was subjected to less favourable treatment because of his race in 18 specified ways in the period between 23 July 2004 and 7 August 2019. The claimant also alleged that he was not allowed reasonable time off to seek new employment during his notice period in breach of sections 52 and 54 of the Employment Rights Act 1996, and that he did not have a statement of terms and conditions of employment.

2. The respondent defended all of the claims and contended that the dismissal was fair by reason of redundancy.

## Claims and Issues

3. This case has a lengthy procedural history and has been considered at four previous preliminary hearings on: 3 October 2019; 16 March 2020; 5 May 2020; and 9 November 2020. Following the first of these preliminary hearings, Employment Judge Dunlop had identified a proposed List of Issues. The claimant had subsequently made applications to amend the claim, but those applications had been refused. Accordingly, the List of Issues to be determined by this Tribunal remained the list which had been appended to the Case Management Order following the hearing on 3 October 2019.

4. The claimant defines himself as Asian. He alleged in his race discrimination claims that he has been treated less favourably on the ground of being Asian.

5. The claimant had originally brought a claim for breach of contract in respect of notice, but that claim had been dismissed on withdrawal.

6. The List of Issues to be determined was as follows:

**Jurisdiction**

1. **In respect of any alleged acts of discrimination which occurred on or before 17 February 2019, does the Tribunal have jurisdiction to hear those claims?**

2. **In respect of the allegations of discrimination which relate to the period 1994 to 17 February 2019, do they form part of a continuing act under section 123(3)(a) of the Equality Act 2010?**

3. **In respect of any alleged acts of discrimination which are out of time, would it be just and equitable for the Tribunal to extend time?**

**Direct Race Discrimination**

4. **Did the Respondent treat the Claimant less favourably than it treated or would have treated another person of a different race, in the same material circumstances as the Claimant? The Claimant alleges that the following amount to acts of less favourable treatment:**

**(i) An alleged failure by the Respondent to offer the Claimant a promotion to Warehouse Manager on or around 23 July 2004 and 6 October 2008.**

**(ii) An alleged failure by the Respondent to promote the Claimant to the role of Warehouse Manager on or around 14 May 2013.**

**(iii) An alleged failure by the Respondent to offer the Claimant a promotion to Warehouse Manager on or around 5 September 2013.**

**(iv) An alleged failure by the Respondent to offer the Claimant the opportunity to attend a health and safety manager course on or around 2014. The Claimant says that Shelli Sagar was given the opportunity to attend the course.**

**(v) An alleged failure by the Respondent to promote the Claimant to Production Manager in 2017, and Operations Manager in or around 2019. The Claimant says that Vlad Kukjan was promoted on both occasions.**

**(vi) An alleged failure by the Respondent to promote the Claimant to Warehouse Manager on or around 28 April 2017.**

**(vii) An alleged attempt to demote the Claimant to Warehouse Manager on or around 12 April 2017.**

**(viii) An alleged failure by the Respondent to offer training courses to the Claimant in 2018 when others were given this opportunity (Ethan Howarth, Warehouse Supervisor and David Thomason, Warehouse Manager).**

**(ix) An alleged attempt by the Respondent to demote the Claimant in or around October 2018 to perform general warehouse duties.**

**(x) An alleged attempt by the Respondent to demote the Claimant to Stock Controller on or around 3 April 2019.**

**(xi) An alleged attempt by the Respondent to demote the Claimant to Stock Controller on or around 24 April 2019.**

**(xii) An alleged failure to allow the Claimant the opportunity to attend an external Forklift Truck Driver refresher course in or around April/May 2019.**

**(xiii) An alleged failure by the Respondent to offer the Claimant an FLT Instructor course in or around July 2019.**

**(xiv) An alleged reduction in the Claimant's working hours from 25 March to 7 August 2019.**

**(xv) An alleged failure by the Respondent to inform the Claimant of job opportunities advertised on Paragon during his notice period (15 May to 7 August 2019).**

**(xvi) The Claimant's dismissal on 7 August 2019.**

**(xvii) An alleged failure by the Respondent to provide the Claimant with meeting minutes following the meeting of 18 June 2019.**

**(xviii) The alleged conduct of the HR representative at the appeal meeting of 18 June 2019 going beyond the role of note taker and intervening in the meeting.**

5. **If the Claimant received the treatment set out at paragraph 4 above, was this treatment less favourable than the treatment given to the comparators identified by the Claimant or hypothetical comparators?**

6. **In respect of the comparators, the Claimant relies on the following actual comparators:**

**(i) Vlad Kukjans**

**(ii) Shelli Sagar**

**(iii) Matt Caroll**

**(iv) Mahmood Sayadnaward**

**(v) Mark Ashworth**

**(vi) Ethan Howorth**

**(vii) Lynn Williamson**

7. **The appropriate hypothetical comparator relied upon by the Claimant in respect of all allegations is a white male in the Claimant's role. The Claimant defines his race as Asian.**

8. **Whether the comparators referred to at paragraph 6 and 7 above are the correct comparators for the purposes of section 23 of the Equality Act 2010;**

9. **If the Respondent did treat the Claimant less favourably than the identified comparators, whether this was because of his race.**

**Remedy**

10. **If the Claimant succeeds in his claim of direct discrimination, is he entitled to any remedy from the Respondent, including:**

    **(i) a declaration that he has been discriminated against pursuant to section 124(2)(a) Equality Act 2010; and/or**

    **(ii) an award for injury to feelings**

    **(iii) loss of earnings (including future loss of earnings)**

    **(iv) aggravated damages**

    **(v) compensation in respect of personal injury**

    **(vi) ACAS uplift or reduction in compensation**

**Unfair Dismissal**

11. **Was the reason for the Claimant's dismissal redundancy (as defined by 139(1) of the Employment Rights Act 1996) and therefore a fair reason pursuant to section 98(2) Employment Rights Act 1996?**

12. **If so, did the Respondent act reasonably in treating this as a sufficient reason for dismissing the Claimant, applying section 98(4) Employment Rights Act 1996 and in particular applying the guidelines from *Polkey v AE Dayton Services Ltd [1987]* as follows:**

    **(a) before dismissing the Claimant on 7 August 2019, did the Respondent warn and consult the Claimant individually, specifically allowing the Claimant to:**

        **(i) challenge the basis for his selection for redundancy and comment on the selection criteria and pool;**

        **(ii) suggest ways to avoid redundancy;**

        **(iii) address any other matters and concerns he may have; and**

        **(iv) consider alternative positions that may exist.**

**(b) before 7 August 2019, did the Respondent apply a fair selection criteria to an appropriate pool of candidates for redundancy? and**

**(c) did the Respondent consider suitable alternative employment for the Claimant as an alternative to redundancy?**

**Based on the answers to these questions, the Tribunal must establish whether the Respondent's conduct and decision to dismiss the Claimant falls within the band of reasonable responses available to an employer in the circumstances.**

12. **If the Tribunal finds the termination of the Claimant's employment was unfair, should any compensation awarded to the Claimant be reduced to reflect:**

**(i) The fact that the Claimant's employment would have been terminated in any event (in reliance on *Polkey v AE Dayton Services Ltd [1987]*); and**

**(ii) Any failure by the Claimant to mitigate his losses?**

**(iii) A failure to follow the ACAS Code of Practice (or alternatively whether there should be an uplift in compensation in this respect)**

**Failure to Allow Reasonable Time Off**

13. **Was the Claimant permitted reasonable time off during working hours to look for a new job and/or to arrange training for future employment, when under notice of dismissal by reason of redundancy for the period 15 May to 7 August 2019 pursuant to section 52 Employment Rights Act 1996.**

14. **Is the Claimant entitled to compensation (up to a maximum of 40% of a week's pay)?**

**Failure to provide a Statement of Terms and Conditions**

15. **Did the Respondent provide the Claimant with written particulars of his terms and conditions of employment within 2 months of the commencement of his employment pursuant to section 1 and 3 of the Employment Rights Act?**

16. **If the Tribunal finds that the Respondent did fail to provide the Claimant with written particulars of his terms and conditions of employment, to what award of compensation is the Claimant entitled?**

7. At the start of the hearing it was confirmed that this remained the List of Issues which the Tribunal needed to determine. It was agreed that, as part of the liability decision, the Tribunal would determine issue 10(vi), 12(i) and 12(iii) (of the second number 12). The other remedy issues, which would not be determined at the same time as the liability issues, were identified as being: 10(i)-(v), 12(ii) (of the second 12), 14 and 16.

8. The name of the respondent was confirmed and, by consent, amended to be SGL Co-Packing Ltd.

**Procedure**

9. The claimant represented himself at the hearing. Ms Smith, counsel, represented the respondent.

10. The hearing was conducted by CVP remote video technology. Both parties and all witnesses attended and gave evidence remotely. The public was able to attend the hearing remotely.

11. An agreed bundle was presented to the Tribunal in advance of the hearing which was in excess of 795 pages. The Tribunal read only the pages from the bundle to which it was referred either in a witness statement or by the parties during the hearing.

12. The Tribunal was presented with statements from the following witnesses, who also attended the hearing and gave evidence: the claimant; Mr Carl Kovacs, the respondent's Group Human Resources Adviser; Mr Vladimir Kukjans, the respondent's Operations Manager; and Mr Darren Jackson, the respondent's Factory Manager. The statements of each of the witnesses were read on the morning of the first day. After each witness had confirmed the accuracy of their statements, they were cross examined and asked questions by the panel.

13. On the morning of the first day two issues were raised by the parties, which were determined by the Tribunal as follows:

(1) The claimant objected to the provision of a supplemental witness statement by Mr Kovacs. The Tribunal determined that it would consider the supplemental witness statement as it appeared that the reason for the supplemental statement was to correct an error in the original statement. There was no prejudice to the claimant as he would have the opportunity to cross examine Mr Kovacs on the supplemental statement.

(2) The respondent applied for the Tribunal to identify a number of paragraphs (and in some cases the content of certain paragraphs) of the claimant's witness statement as not being relevant to the claimant's claims. The Tribunal considered this application carefully and, in particular, the authority cited by the respondent's representative (**HSBC Asia Holdings BV v Gillespie [2011] IRLR 209**). The Tribunal took into account that where evidence did not directly relate to any of the pleaded acts in the claim, the Tribunal had power to make a judgment as to whether that evidence was sufficiently relevant to the pleaded issues to be admissible.

A number of the paragraphs identified were of considerable vintage. The Tribunal considered that, in a number of cases, the evidence identified was insufficiently relevant to be admitted. However, for some of the paragraphs identified the Tribunal determined that the evidence might be relevant to the issues to be determined, and therefore did not make the order sought in relation to those paragraphs. Accordingly, the Tribunal identified that the following paragraphs of the claimant's witness statement were not sufficiently relevant to be admitted: 4.2; 4.3; 4.4; 4.5; 5.1; 6.1; 6.4; 8.1-8.3; and 27.

14. After all of the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's representative provided a submission document which detailed each of the allegations, the relevant evidence, and the respondent's position in respect of what had been shown by the evidence submitted. The respondent's representative also made oral submissions. The claimant relied upon, and made reference to, a skeleton argument document which he had prepared and handed up at the start of the hearing. Members did not see this until submissions were made. He also made lengthy oral submissions.

15. At the end of the hearing, the Tribunal highlighted that it was grateful to both the claimant and the respondent's representative for the manner in which the hearing had been conducted. The Tribunal also highlighted to the claimant that it understood how difficult it can be for an unrepresented claimant to represent themselves at a lengthy hearing.

16. Judgment was reserved and accordingly the Tribunal provides the Judgment and Reasons outlined below.

**Facts**

17. The Tribunal heard, in the course of the four days of the hearing, a considerable amount of evidence in relation to a number of matters. Recorded in this Judgment is only the evidence as it relates to the issues which needed to be determined.

18. The claimant commenced employment with the respondent on 10 April 1989. The parties had been unable to identify a document containing the claimant's terms and conditions of employment which had been issued at the date that his employment started. Included in the bundle (62) was a statement of terms and conditions dated 17 December 1998, which was signed by the claimant on that date. In submissions, the claimant also confirmed that he had been provided with a statement of terms and conditions in 2015. Included in the bundle (and referred to below) was a further statement of terms and conditions which was signed by the claimant in May 2013, but the content of that statement appeared to relate to a trial period only (which was not in fact ever undertaken).

19. The Tribunal understands that the respondent has a handbook which includes many of the standard procedures. The Tribunal was referred to an Equal Opportunities policy. No redundancy policy or procedure was provided to the Tribunal. In his answers to questions, Mr Kukjans made reference to such a policy or procedure, but the Tribunal finds that one did not in fact exist.

*2004-2010*

20. The claimant was the Warehouse Supervisor. He was paid based upon an hourly rate and with overtime at enhanced rates. In July 2004 the respondent advertised for the role of Warehouse Manager. The claimant's evidence was that he raised concerns with Mr Michael Cahill, the Managing Director, and explained that he believed he was actually managing the warehouse in his role as Warehouse Supervisor. The claimant's evidence was that the advert for the vacancy was then removed and the role was not filled. Mr Kovacs' evidence was that that anyone who had been employed by the respondent at the time and who would have been able to deal with this allegation, had long since left the respondent's employment (Mr Kovacs himself having not been in employment at that time).

21. The claimant was absent from work for a period from 30 June 2008 until a return to work meeting on 6 October 2008. Mr Kovacs' evidence was that a meeting was held at which it was agreed that the claimant would take on a less laborious role on his return to ensure that his back problems were not exacerbated (that having been the reason for his absence). Mr Sharrock was recruited at that time as a Warehouse Manager. He was recruited either during the claimant's sick leave, or shortly thereafter. The respondent's evidence was that the decision was made because the claimant and another Warehouse Supervisor were absent on ill health grounds at the same time, and because this was a lead-up to the respondent's busy season (that is the period from June onwards when work was undertaken in preparation for Christmas). Mr Kovacs' evidence was that the reason for Mr Sharrock being recruited, and the reason why the claimant was not offered the promotion, was that the claimant had only returned to work at that time after his long period of absence, and Mr Sharrock had been recruited because of worries about the supervision and control in the warehouse. It appears that the relevant decisions at the time were made by Mr Murray, the then Operations Manager.

22. Mr Sharrock left the respondent's employment in 2010. Thereafter, there was nobody holding the position of Warehouse Manager.

*2013*

23. In mid-2013 there were discussions held with the claimant about his role and a possible alternative. The discussions arose because the claimant had been undertaking significant amounts of overtime and because of the cost of him doing so for the respondent.

24. There was some confusion and lack of clarity in the evidence heard by the Tribunal about what exactly happened in 2013 and what the claimant was offered.

25. Mr Kovacs' evidence was that the claimant was promoted to Warehouse Manager in 2013. This was to be on a consolidated salary, which would mean that he would not be paid overtime pay for additional hours undertaken. However, as the claimant did not wish to take on the role, following a period of sickness absence, his evidence was that the claimant did not in fact become Warehouse Manager. In his first statement he had thought that the claimant had undertaken the role on a trial basis, but he had corrected that in his supplemental statement to acknowledge that he did not do so.

26. In an email sent by the claimant on 10 July 2019 (455) the claimant himself confirmed that in 2013 the Warehouse Manager's job was offered to him, but he stated that when the respondent wrote the contract it stated "Warehouse Supervisor". The notes of the appeal meeting on 18 June 2019 (437) recorded the claimant confirmed, in that meeting, that when he had been offered the Warehouse Manager job he had turned it down.

27. The documents provided to the Tribunal commenced with a letter stated to be from Mr Kovacs but signed by Ms Bell (74) which offered the claimant an appointment as Warehouse Supervisor as a salaried role. This was confirmed by a subsequent email from Mr Kovacs on 29 May 2013 (76) and the statement of terms and conditions referred to above (77) to which the claimant had added in manuscript that it was for a trial period, when he signed it. That document records the job title as Warehouse Supervisor.

28. Mr Kovacs wrote to the claimant on 8 July 2013 (79) following a meeting, in which he said that the claimant was not prepared to accept the change of role and status. There was a lengthy email from the claimant dated 22 July 2013 (80) in which he objected to the changes, which appears to have been considered as a grievance. Notably that email does not explicitly complain about the title of the role offered, but rather it focuses upon other things about which the claimant was not happy. The claimant used strong terminology suggestive of discrimination "*I felt I was being victimised harassed and discriminated against on a number of occasions… I feel I got discriminated*". Ms Bell, the General Manager, responded on 9 August 2019 (83) and gave a more detailed response on 21 August 2013 (84). She said in the latter "*Your job title under your most recent contract of employment (dated 15 July 2005) is Warehouse Supervisor. We have not at any time proposed to change your job title in any way. If you feel that the title of 'Senior Warehouse Supervisor' would more accurately reflect your value to the business, then this is something we can discuss before we issue you with a new contract*".

29. Mr Kovacs' supplemental statement recounted how the claimant had commenced a period of sickness absence in 2013 and therefore never took on the alternative role. It was the respondent's understanding that the claimant did not wish to accept a salaried position.

30. The claimant's evidence was that he took legal advice in 2013 (having already done so in 2008 and he did so again in 2019). He also stated that he visited the Citizens Advice Bureau for advice at the time of his grievance in 2013.

31. Based upon the evidence available, it appears that the claimant was verbally offered the role of Warehouse Manager in 2013, as both Mr Kovacs and the claimant (at 455) recount. However, the written offer made was not for the role of Warehouse Manager, but rather for the claimant to become salaried whilst remaining in his existing role. The claimant rejected that offer and therefore remained as Warehouse Supervisor paid on an hourly basis.

32. In the list of issues, the claimant's allegations included that the respondent had failed to offer the claimant a promotion to Warehouse Manager on or around 5 September 2013. This date appears to be approximately when the claimant returned to work following his ill health absence. The Tribunal heard no evidence that a Warehouse Manager was appointed at this date.

*2014*

33. Ms S Sagar was the respondent's Quality manager. It was the respondent's evidence that Ms Bell decided to provide Ms Sagar with health and safety training, as it was decided that Ms Sagar was to also take on the role of Health and Safety Manager. The structure charts provided to the Tribunal show Ms Sagar as being recorded as the Quality Manager and Health and Safety Coordinator from 2011 onwards. Mr Kovacs' evidence was that the decision to train Ms Sagar and ask her to take on health and safety responsibilities, was a logical extension to her existing role due to a degree of overlap and common capability requirements with her pre-existing duties.

34. The claimant was not offered equivalent health and safety training. He was generally responsible for health and safety issues as a Warehouse Supervisor. He did not have any particular responsibility for health and safety issues in a way which was comparable to Ms Sagar. The claimant did not raise a complaint about the lack of health and safety training at the time.

*2017*

35. In 2017 the respondent placed an advert for the role of Production Manager on its noticeboard. Mr Jackson's evidence was that the role was advertised on the company's noticeboard and that employees were told that anyone could apply for it within 28 days. His evidence, which the Tribunal accepts as true, was that this was in accordance with the respondent's standard practice. This was a salaried position. Mr Kukjans applied for the role. The claimant did not apply for the role. Mr Kukjans was appointed to the role.

36. On or around 28 April 2017 the respondent advertised on its noticeboard the role of Warehouse Manager. Mr Jackson's evidence was that the job was advertised internally for 28 days and no employees applied for it. Mr Jackson's evidence was also that he spoke to the claimant personally about the opportunity and gave him the job description and asked him to consider it. The claimant's evidence was that the vacancy would not really have existed if the respondent had wanted him to do the job, and that he had not understood that Mr Jackson giving him the job description was an encouragement for him to apply for the role. The Tribunal found Mr Jackson's evidence about his approach to the claimant, and why he gave him the job description, to be entirely credible. The Tribunal finds that Mr Jackson did give the job description to the claimant for the reasons he explained. The claimant did not apply for the role. As a result, the role was filled by an external candidate, Mr Thomason.

37. Mr Jackson's evidence to the Tribunal was that in his time with the company they had always advertised internal vacancies on the noticeboard and allowed those within the company to apply for the roles, with only one exception. The one exception was Mr Kukjans' appointment to Operations Manager in 2019 (see below), when the role offered was effectively a variation to his role as part of a restructure. The Tribunal accepted Mr Jackson's evidence, which it found to be genuine and credible.

38. As part of the claimant's case, he contended that there was an alleged attempt to demote him on or around 12 April 2017. This was recorded in the List of Issues as being a demotion to the role of Warehouse Manager. When clarification was sought on this during the hearing, as Warehouse Manager would have been a promotion for

the claimant and not a demotion, the claimant contended that the allegation related to him being demoted to Team Leader. This allegation arose from the 2017 job description for the role of Warehouse Manager which was included in the bundle (385). That job description included a structure chart showing the role of Warehouse Team Leader reporting to the Warehouse Manager. There was in fact no such role as Warehouse Team Leader and it appears that the information was included in the job description in error, as it should have referred to Warehouse Supervisor. There was no evidence before the Tribunal that the respondent had ever endeavoured to change the claimant's job title to Team Leader or provided him personally with an alternative job description for a different role. He remained Warehouse Supervisor throughout the relevant period.

*2018*

39. The claimant alleged that the respondent failed to offer him training courses in 2018 when others were given opportunities, placing particular reliance upon Mr Howarth, another Warehouse Supervisor, and Mr Thomason, the Warehouse Manager. The Tribunal was provided with training records for the claimant that showed that he had undertaken various training courses. The claimant did attend an induction update training course in June 2018. The claimant's verbal evidence was that he had been informed by Mr Thomason that an external training provider, TRS, was on site providing training to Mr Howarth and Mr Thomason. The evidence of Mr Jackson and Mr Kovacs was that Mr Howarth was given training and was given the opportunity to complete the Level 2 Apprenticeship in Business Improvement Techniques because at that time he was stepping up into the Warehouse Supervisor role and needed the additional training. The claimant had significantly more supervisory experience than Mr Howarth, and the respondent's evidence was that the course would have been unsuitable for him. The respondent denied that Mr Thomason was provided with training by TRS, but acknowledged that he was providing training on the Warehouse Management System used by the respondent (PackManager). The PackManager training was provided because he was a new recruit and needed to be trained in the use of the system. The claimant did not raise any grievance or other complaint about the non-provision of training at the time. His evidence was that he did not know what training was being provided to the other two named individuals, save for what he said Mr Thomason had told him.

40. In his statement, but not as a ground of complaint, the claimant referred to role erosion starting in June 2018. This appears to relate to the fact that the respondent appointed Mr Howarth as a Warehouse Supervisor around that time. In his verbal evidence, the claimant referred to Mr Howarth's role as being one of mini Warehouse supervisor. He was clearly dismissive of Mr Howarth's ability in the role. The Tribunal accepts the respondent's evidence that, in fact, following his promotion, Mr Howarth fulfilled the same role as the claimant as they were both in the role of Warehouse Supervisor, albeit (as the respondent accepted) Mr Howarth had considerably less experience in the role than the claimant.

41. In October 2018 the claimant returned to work after a period of sickness absence. The claimant complains that he was demoted on his return to perform general warehouse duties. Mr Jackson and Mr Kukjans' evidence was that the respondent understood the claimant to have returned to work following a period of lower back pain and that the claimant informed them that the claimant's doctor had

suggested lighter duties. There was no medical evidence of this requirement, but, in order to accommodate the lighter duties, Mr Jackson did arrange for the claimant to be given stock controller duties. This was less pressurised and the duties were given in an attempt to assist the claimant's return to work. There was no evidence before the Tribunal that the claimant was demoted at the time or that his role was changed (or that the respondent attempted to do so).

*Restructure and redundancy*

42. In early 2019 the respondent brought in a consultant. The respondent's evidence was that in 2018 it had experienced difficulties during its peak period which had caused interruptions to production and therefore lost profit and business. The claimant disputed that the issues which had arisen were as a result of the warehouse as opposed to other parts of the site, nonetheless the Tribunal accepts that the issues in 2018 led to the appointment of the consultant and to the consultant's recommendations. The Tribunal was provided with a document dated 26 March 2019 (404) which outlined a proposed restructure to the warehouse. The respondent's evidence, which the Tribunal accepts, was that the restructure proposals were directly as a result of the external consultant's advice.

43. Part of the proposal was that the role of Warehouse Manager would cease to exist. Some of his duties would be transferred to the Operations Manager, who would then have responsibility for performance in the warehouse as well as for production. Other duties would be assigned to those appointed to three new roles of Warehouse Coordinator.

44. With effect from 31 March 2019 Mr Thomason, the Warehouse Manager, left the respondent by reason of redundancy. During the hearing the claimant raised various issues in relation to Mr Thomason's departure and the timing of it. The Tribunal does not find that the timing of his departure had any material impact on the material issues for the claimant's claims.

45. Mr Kukjans was appointed to the role of Operations Manager. As described above, this was a role which was not advertised, as the respondent did for other vacancies. The respondent's evidence was that this was in practice a change to Mr Kukjans' role, not a new role. Essentially Mr Kukjans' previous role as Production Manager (that is a salaried role more senior than the Warehouse Supervisor) was expanded to include responsibility for warehouse matters and was retitled as Operations Manager. No role with the title of Production Manager existed after the change. The respondent's evidence was that this job would have been too big a jump for the claimant, representing a significantly more senior role than the Warehouse Supervisor role which he fulfilled. The Tribunal accepts that evidence.

46. The roles of Warehouse Supervisor also ceased to exist under the consultant's proposals and the restructure implemented as a result. The three new Warehouse Coordinators would work on a rotating two-shift or three-shift pattern, ensuring that there was on-site responsibility for the warehouse throughout the hours that the warehouse operated. Part of the rationale for the reorganisation stemmed from the fact that those within the warehouse responsible for its supervision and management, were previously only at work during core times. The new proposed structure would ensure that there was someone within the warehouse, responsible for the warehouse, throughout all the hours of operation. The respondent's evidence was that the

Warehouse Coordinator roles differed from the Warehouse Supervisor roles in terms of some responsibilities.

47. On 29 March 2019 Mr Jackson made an announcement to staff about the proposed changes in the warehouse (407). Mr Jackson met with the claimant, Mr Howarth (the other Warehouse Supervisor), and Mr N Mahmood (Warehouse Team Leader). These were the three individuals placed at risk of redundancy (in addition to Mr Thomason) as a result of the proposed restructure. The Tribunal was shown the detailed explanation for the proposed changes in a document (408).

48. The two Warehouse Supervisors (the claimant and Mr Howarth) were treated in exactly the same way. They were both warned that their roles were at risk or redundancy on 27 March. They were consulted. They were given the opportunity to apply for any of the vacant roles. There were three roles within the warehouse which were available: Warehouse Coordinator (there were three to be appointed); Warehouse Planner; and Warehouse Stock Controller. Mr Howarth applied for the role of Warehouse Coordinator and was appointed to one of the new posts. Two others were subsequently appointed to be Warehouse Coordinators. Mr Mahmood, who was also at risk, applied for and was appointed to the role of Warehouse Planner.

49. Consultation meetings were held with the claimant on: 3 April; 10 April; 15 April; 25 April and 15 May. The respondent's evidence was that there were other conversations with the claimant in-between those meetings. The consultation meetings were not noted or recorded, so the Tribunal did not have the benefit of a record of exactly what was discussed. On 24 April (410) Mr Kovacs wrote to the claimant to confirm what had been discussed in the previous meetings. That letter recorded Mr Kovacs' understanding that the claimant had expressed an interest in the Stock Controller role. A copy of the advertisement for the role was provided with the letter. The Tribunal accepts the respondent's evidence that the job descriptions for the Warehouse Coordinator and the Warehouse Planner roles were also provided to the claimant during the process. The letter also recorded that the claimant had requested details of his potential redundancy payment, and this was confirmed in the letter.

50. On 29 April 2019 the claimant wrote to Mr Kovacs and referred to the meetings on the dates recorded above. He also referred to the letter from Mr Kovacs. He stated:

> *"In response the three alternative employment roles that have been offered to me: Stock Controller, Warehouse Planner, Warehouse Coordinator, I have taken the decision to decline these three job offers, reason being is there are significant changes to the terms of the jobs offered which also can cause disruption to my family/personal life."*

51. Mr Kovacs evidence was that he had not previously identified the reason provided by the claimant in this letter and he confirmed that, with the benefit of hindsight, he could have discussed the hours of work/shift patterns for the role with the claimant in more detail. He gave evidence about other roles for which the shift pattern had been able to be varied.

52. The Stock Controller role was an alternative role which was offered to the claimant as part of the redundancy process. It was entirely reasonable for the respondent to suggest that the claimant consider doing that role (as an alternative to redundancy), as he had the skills to do it. It would have been, as the respondent

accepted, a demotion for the claimant. It is unsurprising that the claimant did not wish to accept either that role, or the role of Warehouse Planner (which would also have been a demolition). The Tribunal does not find that the claimant was forced to accept the role or that there was a demotion of the claimant to the role. He was offered it. The respondent provided information when he expressed an interest. He was not required to accept it.

53. The role for which the respondent expected the claimant to apply, was the Warehouse Coordinator role. This was a role which was comparable in terms of seniority to the Supervisor role which the claimant fulfilled. It was not the promotion which the claimant was seeking, albeit it differed in some ways to the previous role. As advertised, the claimant would need to accept a pay reduction to accept it. As advertised, it also involved working a shift pattern which involved a greater number of unsocial hours.

54. The internal job advertisement for the Warehouse Coordinator role recorded the pay as being £10.76 to £12.26 per hour dependent upon shift (415). Mr Howarth accepted that role and was paid at those two rates, one being the core rate and one being the out of hours enhanced rate.

55. Mr Kovacs' evidence was that, had the claimant raised the hours and the required two/three-shift system, it may have been possible to change the pattern so that the claimant did not have to undertake a three-shift rotation pattern. It was also Mr Kovacs' evidence that had the claimant raised the rate of pay for the role as an issue, that was something that could have been discussed in more detail with him. However, as Mr Kovacs' and Mr Kukjans' understanding was that the claimant was categorically rejecting the role, and that he was in fact rejecting the role because it was not a promotion for him, those matters were not explored.

56. On 13 May 2019 the claimant was sent a formal letter inviting him to the final meeting to discuss the potential redundancy situation (416). That letter outlined that the next meeting would take place on 15 May. It confirmed that the purpose of the meeting was for Mr Kukjans to deal with the potential redundancy of the claimant's role as Warehouse Supervisor and the claimant's expressed view from his letter that he was not interested in any of the alternative roles available. The letter said:

> *"The implication of this is that it is likely that we will have to issue you with notice of termination of your employment with SGL Co-Packing Ltd on grounds of redundancy."*

57. The final paragraph of the letter made it clear that a possible outcome was that the claimant's employment would be terminated. He was given the right to be accompanied.

58. The meeting on 15 May 2019 was conducted by Mr Kukjans. Mr Kovacs attended as notetaker, albeit the Tribunal was not provided with any notes. Mr Kukjans' evidence was that the claimant repeatedly said, in the meetings held with him, that none of the roles would provide him with career growth. His evidence was also that the claimant was unable to explain why none of the alternative roles would be suitable for him. The claimant did not, in this meeting, raise disruption to his family life as a concern, nor did he raise the rate of pay for the alternative roles. Mr Kukjan's evidence was that the claimant was told in the meeting of 15 May that, if he did not accept any

of the alternative positions, it was likely that his employment would be terminated on the grounds of redundancy. Mr Kukjans' evidence was that he told the claimant that they wanted him to apply and to remain with the company, however as the claimant remained disinterested, Mr Kukjans took the decision to terminate the claimant's employment by reason of redundancy.

59. The claimant's employment was terminated and he was given twelve weeks' notice. This was confirmed in a letter of 16 May written by Mr Kovacs (417). Both Mr Kovacs and Mr Kukjans were clear in their evidence that the decision was Mr Kukjans', which is what the letter records (albeit written by Mr Kovacs). The letter confirmed that during the notice period the claimant would remain employed. The letter recorded that:

> *"During our discussions yesterday, you asked us to correct our interpretation of your reasons for declining the alternative roles which you were asked to consider. Specifically, you said that we had previously stated that you were 'not interested' in these roles. You asked us to note that, it was not that you lacked interest but rather that you 'do not consider them to be suitable'."*

60. The letter concluded with an expression of regret that the reorganisation had led to the redundancy of the claimant's job role.

61. The letter also stated:

> *"We have however confirmed that subject to prior agreement from Vlad, you will be released to attend interviews with any future or potential employer. Otherwise, you are expected to work normally through your notice period."*

62. The 16 May letter also made reference to vacancies in other areas of the business, including the Finance and Planning Teams, and recorded that the claimant had said these were not of interest to him. The claimant did raise in the Tribunal hearing the issue of other roles elsewhere in the respondent's business. The respondent's evidence was that roles in other areas were raised with the claimant, but that he expressed no interest in any of them, and/or said that they did not represent career growth for him.

*FLT Training and working hours*

63. Around this time, the respondent paid for a number of employees to undertake a forklift truck driver course. It did not arrange for the claimant to do so. The respondent's evidence was that the course cost £3,500. The claimant had a certificate from previous training he had undertaken in 2012 (340) which recorded that the recommended refresher date for the training was 5 May 2019. The evidence of the respondent's witnesses was that this was not a date which was required for the qualification to remain valid. Mr Kukjans' evidence was that the certificate remained valid for five years from the date of training (rather than the three years which was recorded by the recommended refresher date). The respondent's evidence was that the claimant was not placed on a forklift truck driver course around this time because it was expensive and he had not indicated that he wished to be considered for any role for which forklift truck driving was a requirement.

64. In 2019 the respondent had seen a significant downturn in business as a result of a reduction in the orders placed by a major client. The claimant accepted that, due

to poor sales, there was a reduction at that time. This resulted in a period of short-term working. The respondent's evidence was that all employees were put on short-term working hours from 25 March to 20 May, and this was then extended to 21 June 2019. From May 2019 short-term working was applied to all staff at risk of redundancy.

65. The claimant alleges that this was not applied to all staff, and placed significant emphasis on a table (491) which showed that a few employees of the respondent in the warehouse worked longer hours during this period. The respondent's evidence was that, as part of the restructure, some employees needed to work longer hours in order to get ready for the new season. There was a lot of work to be done and the new appointees to the roles needed to undertake the work in order to ensure that arrangements were in place. The respondent's busy season begins in June. The claimant was therefore working fewer hours than certain other named individuals prior to, and during, his notice period. The respondent also acknowledged that it had failed to pay the claimant the correct amount due during his notice period and it only rectified this in a payment made on 22 July 2019 (after the Tribunal claim had been issued, but when the error was identified).

*Appeal*

66. The claimant appealed against his dismissal on 20 May 2019 (419). As his grounds of appeal he said "*Reason is that I feel I am being made redundant as a person and not the restructure of the roles/responsibilities within the warehouse operation in the company. The resolution to this is a better career prospective along which I can retain some of my warehouse duties in the company*". The claimant was invited to an appeal hearing to be heard by Mr Jackson, the Factory Manager (421). The appeal meeting took place on 18 June 2019 and was attended by the claimant, Mr Jackson, and Mr Kovacs as a notetaker. The claimant confirmed at the start of the meeting that he did not intend to involve a companion and was happy to proceed without accompaniment.

67. Mr Kovacs took handwritten notes of the appeal. At the end of the meeting the claimant requested a copy of the handwritten notes. Mr Kovacs' evidence was that he had written the handwritten notes on a document which had been prepared by the company's solicitors which contained some content which the claimant was not entitled to see. As a result, he declined to give the claimant the handwritten notes at the end of the meeting but confirmed that he would type them up and provide them later in the day. The notes taken were typed and sent to the claimant that day (434).

68. The claimant also contends that Mr Kovacs took a more active role in the meeting than was appropriate for a notetaker. The notes record Mr Kovacs as having answered questions directly addressed to him by the claimant, but taking no other part in the meeting (save for the discussion about the notes at the end). The Tribunal accepts the evidence of Mr Kovacs and Mr Jackson, as supported by the notes, that Mr Kovacs did not take a more active role in the meeting.

69. In the meeting, Mr Jackson explored with the claimant why he thought he was being made redundant *"as a person"*, which is what he had contended in his appeal letter. The claimant commenced the appeal by highlighting that he felt he had been singled out. The claimant said he was the only supervisor: but was corrected by Mr Jackson who highlighted that Mr Howarth had also been a supervisor. The claimant's view was that the warehouse coordinator role was not a move forward but was just

part of his job. The claimant agreed that the respondent did consult. The claimant's stated position was that his job was still there to be done. The claimant restated that his aim was for better prospects, which is what he had said in his appeal letter. The notes of the appeal hearing (437) recorded that, when the claimant was asked what would be the perfect outcome for him from the appeal, he replied "*A better career prospect – keep some of my job with better career prospects. Better than I am doing. A better title, better pay, better hours, less responsibility. I want a better career. The same as I see with other people.*"

70. The claimant entered his claim at the Tribunal on 19 June 2019, the day after the appeal hearing. Mr Jackson provided his outcome of the appeal in a lengthy letter of 3 July (443). The letter confirmed that Mr Jackson had made the decision to uphold the original decision to terminate the claimant's employment by reason of redundancy. The letter stated that if the claimant wished to be considered for any of the alternative positions available within the warehouse, he should let Mr Jackson know. Mr Jackson's very clear evidence to the Tribunal, in response to a question asked, was that if the claimant had indicated that he wished to accept the Warehouse Coordinator role even after the appeal decision had been reached, the respondent would have appointed him to that role.

71. Following receipt of the appeal decision and the appeal notes, the claimant emailed Mr Kovacs on 10 July 2019 (455). That email contained a list from the claimant of the ways in which he contended the notes of the appeal hearing were inaccurate. In the Tribunal hearing, the claimant maintained that the notes were fundamentally inaccurate. However, the email of 10 July 2019 highlights only limited amendments. In the email, the claimant again referred to the need for better career prospects.

72. In his evidence to the Tribunal, the claimant suggested that Mr Kovacs laughed at him in the appeal meeting and that Mr Jackson found it amusing. Both Mr Kovacs and Mr Jackson denied this; Mr Jackson arguing strongly that he did not conduct the meeting in that way. The Tribunal does not accept this aspect of the claimant's evidence about the meeting to be accurate or credible. Had the claimant believed that the respondent's attendees had conducted themselves in the meeting in the way he described to the Tribunal, he would have raised it in his email of 10 July 2019. That email did raise issues which the claimant believed were inaccurate in the notes, but did not make any reference to him being laughed at in the meeting. In respect of any issue where there was a conflict of fact between the claimant and the respondent's witnesses in relation to the redundancy exercise or the meetings held relating to it (including the appeal), the Tribunal preferred the evidence of the respondent's witnesses which it found to be genuine and credible.

73. Following the claimant's email, Mr Jackson provided a further lengthy letter to the claimant which outlined the respondent's position and the reason for redundancy, on 25 July 2019 (458). He acknowledged that some points raised by the claimant at the appeal meeting were not included in the notes of the meeting. In the meantime, the respondent had decided that the claimant did not need to work the remainder of his notice period and, as of 22 July, he was able to remain at home for his notice period, which was confirmed in writing on 19 July (457).

74. On 11 June 2019 the claimant had emailed Mr Jackson in relation to being released to attend interviews. In that email the claimant explained that he had been to the local Job Centre and had been informed that he was allowed time off work for job searching. Mr Kovacs had responded at some length on 13 June (422) confirming that the claimant's position was correct, and outlining the process to be followed if the claimant wished to take time off. The claimant's evidence to the Tribunal was that he did not in fact ever request any time off to undertake his job search, something which was confirmed by Mr Kukjans.

75. The Tribunal was shown a job advert for the role of Production Planner (505) which had been posted by an external agency on 20 June 2019. The advert did not record that it was about a role at the respondent, but Mr Kovacs did concede that it was highly likely that it was. The job advert referred to the post of Production Planner as being one which reported to the Warehouse Supervisor. As the job advert was posted on 20 June 2019, at a time when the claimant had been told that his role had ceased to exist, the claimant contended that it demonstrated that in fact the Warehouse Supervisor role remained. Mr Kovacs evidence was that the advert was placed without the respondent having seen it and without its express authority. His evidence is accepted. The Tribunal also accepts that the role of Warehouse Supervisor ceased to exist when the restructure in 2019 was undertaken.

76. The claimant's employment ultimately terminated on 7 August 2019, following a period of garden leave. Following the appeal meeting, there was no evidence of any further attempts being made by the respondent to endeavour to identify alternative employment for the claimant, or to explore with him whether he could be persuaded to accept the role which it had been identified was most suited to him. In his claim form (9), entered whilst the claimant was still employed, he said "*I herby would consider another job with assaciated employer or if it is with same employer the different job title/having a different manager or even working for the admin/customer service manager retaining some of my warehouse duties*".

**The Law**

*Discrimination*

77. The claimant claims direct discrimination because of the protected characteristic of race. The claimant has identified specific comparators and also relied upon a hypothetical comparator. The comparison is whether he was treated less favourably than the identified comparators or a hypothetical comparator.

78. Section 13 of the Equality Act 2010 provides that:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

79. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which include the employer: dismissing the employee; not affording the employee access to opportunities for promotion, transfer or training; or subjecting the employee to any other detriment.

80. In this case, the respondent will have subjected the claimant to direct discrimination if, because of his race, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

81. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

82. In short, a two-stage approach is envisaged:

(1) At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than a comparator or than hypothetically he could have been (but for his race); there must be something more.

(2) The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

83. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the Employment Appeal Tribunal summarised the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: 'Why was the claimant treated in the manner complained of?'"**

84. In **Hewage v Grampian Health Board** [2012] ICR 1054 the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong** [2005] ICR 931, as refined in **Madarassy v Nomura International PLC** [2007] ICR 867. In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

85. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council** [1998] IRLR 36**.**

*Time limits for discrimination claims and jurisdiction*

86. In relation to continuing acts of discrimination, section 123(3) of the Equality Act 2010 records that:

> "*For the purposes of this section –*
>
> *(a) Conduct extending over a period is to be treated as done at the end of the period; and*
>
> (b) *Failure to do something is to be treated as occurring when the person in question decided on it.*"

87. The leading authority is **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530. The Tribunal should not, when considering what amounts to a continuing act, focus on the concepts of policy, rule, scheme, regime or practice. The focus should be upon whether the alleged discriminator was responsible for an ongoing situation or a continuing state of affairs. The question is whether what is alleged is an act extending over a period, as distinct from a series of unconnected or isolated specific acts.

88. **Lyfar v Brighton & Sussex University Hospitals Trust** [2006] EWCA Civ 1548 highlights that Tribunals should look at the substance of the complaints in question, as opposed to the existence of a policy or regime, and determine whether they can be said to be part of one continuing act by the employer.

89. **Aziz v FDA** [2010] EWCA Civ 304 shows that one relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor.

90. The second relevant area of law on time, is the just and equitable extension. That is provided for in section 123(1)(b) of the Equality Act 2010 which states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable".*

91. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 is a case in which the Court of Appeal stated in relation to the Tribunal and the potential exercise of the discretion *"There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule".* The onus to establish that the time limit should be extended lies with the claimant.

92. The most important part of the exercise of the trust and equitable discretion is to balance the respective prejudice to the parties.

93. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are:

- the length of, and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the relevant respondent has cooperated with any request for information;
- the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
- the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

94. Subsequent case law has emphasised that these are factors which should usually be taken into account, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

*Redundancy*

95. For the claim for unfair dismissal, as in all such claims, the starting point is section 98 of the Employment Rights Act 1996.

> *"***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."**
>
> **"A reason falls within this subsection if it…is that the employee was redundant."**
>
> **"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – 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 shall be determined in accordance with equity and the substantial merits of the case.**"

96. Section 139 of the Employment Rights Act 1996 defines redundancy:

> **"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 – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or 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."**

97. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on the business decision to make redundancies.

98. In determining whether a redundancy situation exists, **Safeway Stores plc v Burrell** [1997] ICR 523 tells us, a Tribunal must decide:

(a) Was the employee dismissed?

(b) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

(c) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

99. The question is whether there has been a diminution or cessation in the requirement for employees to carry out **work of a particular kind**. This is not a test which requires the respondent to cease doing that work, it is focussed on whether there is a reduced requirement for employees to carry out the particular kind of work.

100. In **Williams v Compair Maxam Ltd** [1982] IRLR 83, the EAT set out the standards which should guide the Tribunal in determining whether a dismissal for redundancy is fair under section 98(4). Browne-Wilkinson J, expressed the position as follows (including only the factors relevant to this case):

*"… there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*

*(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

*(2) ….*

*(3) … the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

*(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria ….*

*(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

*… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."*

101. The House of Lords in **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 summarised the relevant procedures required in a redundancy dismissal in the following terms:

"… *in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation*."

102. In **Langston v Cranfield University** [1988] IRLR 172, the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

103. On pools for selection, in **Capita Hartshead Ltd v Byard** [2012] IRLR 814, having reviewed the case law, Silber J at para 31 gave this summary of the position:

*"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);*

*(b) "…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 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."*

104. On consultation, the EAT in **Mugford v Midland Bank** [1997] IRLR 208, summarised the state of the law as follows:

*"It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."*

105. Glidewell LJ said in the case of **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price** [1994] IRLR 72:

*"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:*

*'Fair consultation means:*

*(a) consultation when the proposals are still at a formative stage;*

*(b) adequate information on which to respond;*

*(c) adequate time in which to respond;*

*(d) conscientious consideration by an authority of the response to consultation."*

106. Section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case.

107. The ACAS code of practice on disciplinary and grievance procedures is something which the Tribunal is required to take into account where it applies, however the code itself states that it applies only to disciplinary and grievance situations in the workplace (and therefore not to a redundancy process).

*Polkey*

108. Following the House of Lords decision in **Polkey**, the chances of whether or not the claimant would have been retained in employment must be taken into account when calculating the compensatory award. This can be applied by the Tribunal taking the approach of reducing by a percentage the compensation, to reflect the chance that

the claimant would still have lost his employment if the employer had followed a full and fair procedure. Alternatively, if the Tribunal decides that the dismissal would have occurred in any event, but it would have been delayed if a fair procedure had been followed, the compensatory award ought to reflect the additional period for which the employee would have been employed had the dismissal been fair.

109. In **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274, the EAT noted that a **Polkey** reduction has the following features:

> *"the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done … the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.*"

*The right to time off*

110. The right to time off is governed by sections 52-54 of the Employment Rights Act 1996. Section 52 provides that an employee who is given notice of dismissal by reason of redundancy is entitled to be permitted by his employer to take reasonable time off during the employee's working hours to look for new employment or make arrangements for training for future employment. A complaint under section 54 is one that the employee's employer has "*unreasonably refused to permit him to take time off as required by Section 52*".

*The right to a statement of terms and conditions*

111. Section 1 of the Employment Rights Act 1996 details an employee's right to a statement of terms and conditions and what that statement must contain. Enforcement/remedy is dealt with in section 38 of the Employment Act 2002. That provision applies (in summary) where the claimant succeeds in one of his other claims and (under sections 38(2)(b) or 38(3)(b)) "*when the proceedings were begun the employer was in breach of his duty*". Accordingly, the remedy in section 38 only applies where there was not a statement in place when the proceedings were begun, it does not provide for a remedy for a previous period of employment when a statement may not have been in place.

*Submissions*

112. The respondent's representative's submissions focussed on the facts in the claim, rather than citing extensively from the law. The representative did outline the key legal issues, but referred only to **Williams v Compair Maxam** as case law. The respondent's representative emphasised, on a number of occasions, that the Tribunal must consider the range of reasonable responses when reaching its decision on the unfair dismissal claim. It is, of course, important that the Tribunal does not substitute its own view for that of the respondent when considering whether the claimant should

have been made redundant (and the Tribunal has been careful to ensure that it has not done so). The range of reasonable responses test also has application when considering issues such as the appropriate pool, as is explained in the extract from the **Capita Hartshead** judgment cited above. However, the Tribunal does not agree with the respondent's representative's submission (if that is what she intended) that the dismissal as a whole should be considered fair if it falls within the range of reasonable responses of a reasonable employer, as in a redundancy case the necessary considerations are whether the appropriate steps have been undertaken as explained in the legal section above (and, in particular, the requirements of selection, consultation, and seeking alternative employment).

113. In terms of her submissions on the facts, the respondent's representative did emphasise that, whilst the respondent did not agree with the claimant's evidence on a number of factual issues, it was not putting forward the argument that the claimant had deliberately lied under oath. Rather, it was the respondent's position that the claimant saw everything through the prism of his case and that his evidence was therefore incorrect on occasion on that basis.

114. The claimant had prepared a lengthy written skeleton argument which was considered alongside his verbal submissions. The document referred to a number of authorities. Unsurprisingly for an unrepresented claimant, not all of the authorities cited appear necessarily to relate to the issues to be determined in the claim, nor do they necessarily confirm the point being addressed in the skeleton argument. Nonetheless the Tribunal has considered those authorities where appropriate to do so. The authorities referred to were: **UPS Ltd v Sammakia** UKEAT/0199/09; **Cordant Security Ltd v Singh** UKEAT/0144/15; **Hogg v Dover College** [1990] ICR 39; **Michalak v Mid Yorkshire NHS Trust** [2007] EWHC 2469; **P v Nottinghamshire County Council** [1992] IRLR 362; **Madarassy** (see above); **Transport for London v Aderemi** EAT/0006/11; **Igen v Wong** (see above); **Carry All Motors Ltd v Pennington** [1980] ILRL 455; **Chagger v Abbey National plc** [2010] IRLR 47; and **Nagarajan v London Regional Transport** [1998] IRLR 73. The claimant also provided a copy of a first instance Tribunal remedy Judgment in the case of **Hastings v King's College Hospital NHS Foundation Trust** 2300394/16, and made reference to a 2017 case of **Massamba v Travel & Tours Ltd** which the Tribunal has been unable to locate.

**Conclusions – Applying the Law to the Facts**

115. In considering the claimant's race discrimination claims, the Tribunal has focused upon the direct discrimination alleged as listed in allegation 4 of the list of issues.

*Allegation 4(i) – 23 July 2004*

116. What is alleged relates to a decision in 2004 and a decision by Mr Cahill. The relevant facts are addressed at paragraph 20 above. In determining this allegation, the Tribunal started by looking at the jurisdiction issues (issue 1-3), involving as it does an alleged event which occurred approximately 13 years prior to 17 February 2017.

117. This was a decision made by a completely different person to those who made the decisions in subsequent allegations, including any in-time allegations. It was about whether or not a role was advertised in 2004. This was long before the other

allegations arose. On the claimant's own evidence, the advert was withdrawn and the role was not filled at that time. The Tribunal does not find this allegation to be one which can genuinely be described as part of a continuing act with any subsequent allegations and, in particular, with any subsequent allegations which may have occurred after 17 February 2019 (or been part of a continuing act ceasing after that date).

118. In terms of the just and equitable extension of time, this was an issue that the claimant did not raise formally with the respondent until he entered his claim at the Tribunal. The claimant is not someone who was backwards in coming forwards, and indeed he raised a grievance alleging discrimination in 2013, but did not mention this issue. The claim relates to a decision which was made approximately 13 years before the claim was entered at the Tribunal. There is significant prejudice to the respondent as a result of the delay, as (see paragraph 20 and the evidence of Mr Kovacs) anyone who had been employed by the respondent at the time and who would have been able to deal with this allegation, had left the respondent's employment long before the time of the claim. Whilst the claimant will be unable to have a potentially meritorious claim determined, he is able to receive a decision in the discrimination claims which he has brought within time. The claimant received legal advice in 2008 and 2013 and spoke to the CAB in 2013, so he was either advised about time limits in discrimination claims or could have obtained such advice from those he spoke to, but did not enter a claim until 2019. The Tribunal finds that it is not just and equitable to extend time.

119. The Tribunal does not have jurisdiction to consider this complaint.

*Allegation 4(i) – 6 October 2008*

120. As detailed at paragraph 21 above, the reason for the respondent appointing Mr Sharrock to the Warehouse Manager role in October 2008 rather than the claimant, was because the claimant had been absent on ill health grounds (as had the other Warehouse Supervisor) and therefore the appointment was made to cover sick leave, because of the impending busy season, and because of worries about the supervision and control of the warehouse.

121. The Tribunal does not find that the claimant was treated less favourably than a hypothetical comparator of a different race whose circumstances were not materially different, as the evidence was that he was treated in the same way as the other Warehouse Supervisor in post at the time, who had also had a period of ill-health absence, in not being appointed to the role or offered the promotion. Focussing on the critical question outlined in **Johal** (why was the claimant treated in the manner complained of), the claimant was not denied the offer of the promotion because of his race, he was denied it for the reasons explained by Mr Kovacs. The claimant has not demonstrated the "something more" which would reverse the burden of proof.

122. In any event, the Tribunal also does not have jurisdiction to consider this complaint. The decision appears to have been made by the Operations Manager at the time, Mr Murray. He is not the decision-maker in subsequent decisions. It was a decision made four and a half years before the next act complained of. It is not a continuing act with the subsequent allegations, being decisions made much later by other decision-makers. It is not just and equitable to extend time for the same reasons described in paragraph 118 (albeit the delay is less and the respondent does not have

the same difficulty in evidencing what occurred, but nonetheless the cogency of the evidence will have been significantly affected by the delay).

*Allegation 4(ii) – 14 May 2013 and Warehouse Manager role*

123. The Tribunal does have significant concerns about the claimant's treatment in or around May 2013. As explained at paragraphs 23 to 31 above, the claimant does appear to have been offered a role as Warehouse Manager, but the documentation at the time records the role offered as being Warehouse Supervisor only, and Ms Bell's outcome to the grievance referred to the possibility of the role being a Senior Warehouse Supervisor, but makes no reference to Warehouse Manager.

124. It does appear that the treatment of the claimant was somewhat unfair. It would appear to be the case that this decision is the backdrop to the claimant's feelings of grievance in relation to later decisions. Whilst it is clear that the claimant did not wish to accept a salaried position, there is a significant lack of clarity in the evidence before the Tribunal about why the claimant was not offered the Warehouse Manager position as a salaried employee in writing. What the document records is him being offered his existing Warehouse Supervisor role on a salaried basis.

125. However, there is no evidence before the Tribunal that the reason for the claimant not being promoted to Warehouse Manager at that time, was the claimant's race. The claimant has not demonstrated the "something more" required to reverse the burden of proof. As **Zafar** demonstrates, unfair treatment of an employee by an employer does not of itself establish discrimination because of race, without the something more being present.

126. In any event, the Tribunal does not have jurisdiction to consider this complaint. The decision-maker at the time was Ms Bell, albeit that Mr Kovacs was also involved in the decisions reached. She is not the decision-maker in subsequent decisions. It was a decision made approximately four years before the next act complained of which relates to promotion. It is not a continuing act with the subsequent allegations, being decisions made much later by other decision-makers.

127. It is not just and equitable to extend time for the reasons described in paragraph 122 above (and 118). As is recorded at paragraph 30 and as the claimant confirmed, the claimant did take legal advice and advice from the CAB in 2013 about this issue, and he did produce a grievance letter which was full of legal terminology and alleged discrimination. He chose not to pursue a Tribunal claim at the time. The allegation is considerably out of time, being one that was entered at the Tribunal approximately six years after the event alleged. Particularly because the claimant obtained advice at the time and the length of delay which will have impacted on the cogency of the evidence (as was demonstrated by Mr Kovacs' changed and confused evidence about what occurred), it is not just and equitable to extend time.

*Allegation 4(iii) – 5 September 2013*

128. The Tribunal was unable to identify any alleged less favourable treatment which occurred in September 2013, save in relation to the matters already addressed in relation to allegation 4(ii).

*Allegation 4(iv) – health and safety training in 2014*

129. The evidence on this allegation is addressed at paragraphs 33 and 34. The claimant was treated differently to Ms Sagar in that she was provided with health and safety training and the claimant was not. Non-provision of training can be less favourable treatment. However, Ms Sagar was not a valid comparator for the claimant as she was in a different situation, being a Quality Manager with responsibility for health and safety, when the claimant was not. The structure charts show Ms Sagar having responsibility for health and safety. A hypothetical comparator in the same circumstances as the claimant would be a Warehouse Supervisor and not a manager with particular health and safety responsibility. There is no evidence that the claimant was treated less favourably than such a hypothetical comparator would have been.

130. The Tribunal finds that the reason for the treatment was not race. The Tribunal understands the logic that the Quality Manager should take responsibility for the health and safety role and therefore be given the opportunity to attend a health and safety training course. The claimant's evidence was that he did not know why Ms Sagar was given this opportunity, he just objected to the fact that he had not received the training when she had. The reason the claimant was not provided with the same training, was not race. The claimant has also not shown the "something more" required to reverse the burden of proof.

131. In any event, the Tribunal does not have jurisdiction to consider this complaint. It was not a continuing act with any of the later allegations. The decision maker was Ms Bell. The decision was made in 2014, when the next allegation regarding training related to training four years later. The claim was entered out of time, being entered approximately five years after the act complained of, when the cogency of the evidence will have been adversely affected. The exercise of the discretion to extend time is the exception and not the rule. It is not just and equitable to extend time.

*Allegation 4(v) – Production Manager in 2017*

132. As addressed at paragraph 35, the claimant did have the opportunity to apply for the Production Manager role in 2017 as the respondent advertised it. The claimant was not treated less favourably than either Mr Kukjans or a hypothetical comparator, as he was equally as able to apply for it. The claimant was given the same opportunity to apply, but chose not to do so.

133. The reason for the difference in treatment between Mr Kukjans and the claimant, was that Mr Kukjans applied for the job, it was not race.

134. If the allegation was that the respondent did not simply promote the claimant to the vacant role without any advert or process, the claimant was not treated less favourably than Mr Kukjans (who was not simply promoted) or a hypothetical comparator (who also would not have been) and the reason for the decision was not race. The respondent followed its standard practice, as found at paragraph 37 above. The claimant has not shown "something more" which would reverse the burden of proof.

*Allegation 4(v) – Operations Manager in 2019*

135. As recorded in the decision on the facts at paragraphs 37 and 45 above, this was in practice a change to Mr Kukjans' role, not a new role. The role was not advertised, unlike the other roles. Essentially, Mr Kukjans' role as Production Manager was expanded to include responsibility for warehouse matters and was retitled as Operations Manager. This role would have been a significant promotion for the claimant.

136. Mr Kukjans was not an appropriate comparator for the claimant in 2019, as Mr Kukjans was in a more senior role than the claimant and (by 2019) had significantly more experience in a more senior role. The comparator who is closer to the claimant is Mr Howarth, who was also a Warehouse Supervisor and who was also not promoted to Operations Manager. A hypothetical comparator in the claimant's role with the same experience as the claimant would not have been treated differently.

137. In any event, the reason why Mr Kukjans was given the role was because it was effectively an expansion of his existing Production Manager role. The reason for the difference in treatment was not race. As recorded at paragraph 45, the Tribunal accepts the respondent's evidence about why the claimant would not have been appointed to this role.

*Allegation 4(vi) – Warehouse Manager 28 April 2017*

138. As recorded at paragraph 36 above, the role was advertised and the claimant did not apply for it. The Tribunal has accepted Mr Jackson's evidence that he gave the claimant the job description and encouraged him to apply. The claimant did not do so.

139. Whilst the reason why the claimant said that he did not apply was because he did not feel he would be appointed to the role (stating that the very existence of the advert meant he was not to be appointed), the Tribunal does not find that this assists the claimant in his claim for direct discrimination. The claimant was not in fact treated less favourably than any other employee of the respondent (or any hypothetical comparator) as he was able to apply, but did not. There was no less favourable treatment of the claimant. The reason the claimant was not appointed was because he did not apply. That is not on the grounds of race. Unfortunately, the claimant did not take this opportunity to apply. Clearly, had the claimant applied for the role and then been rejected, the reason for rejection would have been considered. That did not occur.

140. If the allegation was that the respondent did not simply promote the claimant to the vacant role without any advert or process, the claimant was not treated less favourably than a hypothetical comparator (who also would not have been simply promoted) and the reason for the decision was not race. The respondent followed its standard practice, as found at paragraph 37 above. The claimant has not shown "something more" which would reverse the burden of proof, particularly where Mr Jackson actively gave the claimant the job description and did so as an encouragement for him to apply for the role.

*Allegation 4(vii) – alleged demotion 12 April 2017*

141. As recorded in paragraph 38 above, the Tribunal has not found that the claimant was demoted to Warehouse Team Leader on or around 12 April 2017. The fact that a job description for another role erroneously included reference to a Warehouse Team Leader, did not amount to a demotion of the claimant or less favourable treatment of him. The Tribunal does not find that the inclusion of information in the job description was on the grounds of the claimant's race.

*Allegation 4(viii) – training courses in 2018*

142. As recorded at paragraph 39 above, there were good and valid reasons given by the respondent for the training that was offered in 2018 to Mr Howarth and Mr Thomason. The claimant was offered training by the respondent, but not the specific training identified for, and provided to, Mr Howarth and Mr Thomason

143. Mr Howarth may have been an appropriate comparator for the claimant in terms of fulfilling the same role as he did, but in respect of this allegation his circumstances were materially different as a result of his limited experience and new appointment to the role (which the claimant had fulfilled for many years). A hypothetical comparator with the same time and experience in the role as the claimant would not have been treated any differently to the claimant.

144. Mr Thomason was in a more senior role than the claimant, but in any event his circumstances were materially different because he was a new recruit to the company requiring training on the systems used by the company. An appropriate hypothetical comparator for the claimant would have been someone with the same length of service as the claimant and the same experience of the respondent's systems, and they also would not have been given the training provided to Mr Thomason.

145. The reason why the claimant was not given the training that was provided to Mr Howarth and Mr Thomason was due to his experience and for the reasons explained at paragraph 39 and above, it was not race.

*Allegation 4(ix) – general warehouse duties in October 2018*

146. As recorded at paragraph 41, the reason why the claimant was asked to undertake warehouse duties in 2018 was because he was returning from ill health absence and the duties were seen as a way of assisting his phased return to work. The claimant was not demoted.

147. The claimant was not treated less favourably than any comparator in the same circumstances as him, or any hypothetical comparator. In any event, the reason for the decision was not the claimant's race.

*Jurisdiction (and allegations 4(v) to 4(ix))*

148. In relation to allegations 4(v) to 4(ix), the Tribunal has not addressed in the decision made for each allegation the time/jurisdiction issue. For each of those claims, the matters alleged may have been part of a continuing act with subsequent allegations, if those allegations had been found to have been discriminatory. As the Tribunal has not found that the claimant was discriminated against in any of the ways

alleged for which the claim was entered in time (relying upon the alleged act alone), any continuing act cannot have continued and ceased in time. Therefore, for the reasons already explained for allegations 4(i) to 4(iv), the claim for all of these allegations (except for the second part of 4(v)) was entered out of time and, particularly taking into account the claimant's previous legal advice and access to advisers, the Tribunal does not find it just and equitable to extend time. However, in addressing those allegations in this Judgment, the Tribunal has focussed first upon determining the allegations themselves as if the Tribunal had jurisdiction to consider the claims.

*Allegations 4(x) and 4(xi) – demotion to stock controller in April 2019*

149. As explained in paragraph 52 above, the claimant was not demoted to Stock Controller in April 2019. Rather, the claimant was offered the Stock Controller role as potential alternative employment when his role was placed at risk of redundancy. Some emphasis seems to have been placed on the Stock Controller role by the respondent as it was believed that the claimant had expressed an interest in fulfilling the role.

150. The claimant was treated in exactly the same way as his comparator, Mr Howarth, who filled the same role as the claimant at the time. Mr Howarth was also offered the Stock Controller role. This may not have been discussed as extensively with Mr Howarth, as he accepted the Warehouse Coordinator role when the claimant did not, but the reason for the further discussion about the role was because the claimant remained at risk of redundancy, it was not race.

*Allegations 4(xii) and 4(xiii) – FLT refresher course*

151. The factual issues regarding these allegations are addressed at paragraph 63. The forklift truck driver course was expensive. The reason why the claimant was not put on that course at the time was because it was expensive and he had not indicated that he wished to be considered for any role for which forklift truck driving was a requirement. The reason for this decision was not the claimant's race. A hypothetical comparator in materially the same circumstances as the claimant would not have been put on the course paid for by the respondent.

*Allegation 4(xiv) – reduced working hours*

152. As explained at paragraphs 64 and 65, all of the respondent’s employees were placed on short-term working. There were some exceptions to this, including Mr Howarth, one of the claimant's named comparators, during the period when the claimant was either working under notice or it was clear that he was not interested in fulfilling the new roles.

153. Whilst the claimant may have been treated less favourably than one of his named comparators (Mr Howarth), the Tribunal finds that the reason for the less favourable treatment was not race, but rather the fact that Mr Howarth had a role in the new structure which required him to work additional hours as a result of the new structure and to prepare for the busy season.

*Allegation 4 (xv) – informing the claimant about job opportunities*

154. In the list of issues what was recorded was that there was an alleged failure by the Respondent to inform the Claimant of job opportunities advertised on Paragon during his notice period (15 May to 7 August 2019). In fact, in the course of the hearing, it became evident that what was recorded on the List of Issues was not the claimant's actual complaint. The Tribunal was shown a job advert for the role of Production Planner (505). This advert was placed by an external agency. The claimant's complaint was not a failure to offer him the advertised role, but rather that that job advert referred to the Production Planner as reporting to the Warehouse Supervisor. As the job advert was posted on 20 June 2019, at a time when the claimant had been told that his role had ceased to exist, the claimant contended that it demonstrated that in fact the Warehouse Supervisor role remained.

155. The Tribunal accepts the evidence of the respondent's witnesses (see paragraph 75), and Mr Kovacs in particular, that the company placing the advert had done so without the respondent's authority and that the reference to Warehouse Supervisor was an error. The Tribunal accepts the respondent's evidence that the Warehouse Supervisor role was ceasing to exist as part of the restructure and did so. The reason that the role ceased to exist was because of the proposed reorganisation of the warehouse, a decision reached based upon the recommendations of the external consultant brought in to advise following the issues in 2018.

156. As a result, the advert does not demonstrate that the claimant was treated less favourably, and, in any event, the reason for the error in the advert was not the claimant's race.

*Allegation 4(xvi) – dismissal*

157. The fairness of the dismissal and the process followed is considered in more detail in relation to the claim for unfair dismissal below. However, with regard to the claim that the claimant's dismissal was less favourable treatment on the grounds of race, the Tribunal does not find that was the case.

158. The claimant's role as a Warehouse Supervisor ceased to exist. The reason that the role ceased to exist was because of the proposed reorganisation of the warehouse, a decision reached based upon the recommendations of the external consultant brought in to advise following the issues in 2018. The decision was ultimately made by Mr Kukjans and the Tribunal accepts Mr Kukjans' evidence on the reason for his decision to dismiss the claimant. The reason for his decision was that the Warehouse Supervisor role was ceasing to exist as a result of the restructure and the claimant had refused the alternative jobs that were available. The decision was upheld by Mr Jackson on appeal, who upheld the dismissal of the claimant for the same reason (and indeed who made it clear that if the claimant wished to accept an alternative role he would not be dismissed).

159. The claimant was treated in the same way as the appropriate comparator, Mr Howarth, who was also a Warehouse Supervisor. Both the claimant and Mr Howarth were placed at risk of redundancy and consultation was commenced with each of them. The claimant was ultimately treated less favourably than Mr Howarth as he was dismissed, when Mr Howarth remained employed, but that was because Mr Howarth accepted the alternative role of Warehouse Coordinator. A hypothetical comparator in

the same position as the claimant, that is a Warehouse Supervisor placed at risk of redundancy who did not accept any of the alternative roles offered, would have been treated in the same way as the claimant – he would have been dismissed after consultation.

160. There was no evidence before the Tribunal that the decision was based on the claimant's race, nor did the Tribunal see any evidence that genuinely supported that contention. The reason for the decision was because the claimant's role had ceased to exist and he did not wish to apply for the other roles, it was not race. The claimant has not shown the "something more" which would reverse the burden of proof.

*Allegation 4(xvii) – failure to provide minutes on 18 June 2019*

161. This allegation relates to the handwritten notes of the appeal hearing taken by Mr Kovacs, which he refused to provide to the claimant at the end of the meeting (see paragraph 67). The Tribunal accepts the reason provided by Mr Kovacs for not providing the notes of the meeting, that is that he had written them on a document which had been prepared by the company's solicitors (and which included content which was not to be provided to the claimant). The typed notes were provided the same day. The reason why the claimant was not provided with the notes/minutes was not the claimant's race. A hypothetical comparator in the same circumstances would also not have been given the handwritten notes. The claimant has not shown the "something more" which would reverse the burden of proof.

*Allegation 4(xviii) – the conduct of Mr Kovacs at the appeal meeting*

162. The Tribunal would highlight that it is always better practice, if possible, for those attending an appeal hearing on behalf of an employer, to be individuals who have not been involved in previous steps or decisions. As the writer of the letter which had confirmed the claimant's dismissal (albeit not the decision-maker), Mr Kovacs attendance at the appeal hearing as note-taker was less than ideal.

163. Mr Kovacs did, however, attend the appeal in a note-taker role only. He was someone with experience of taking notes. Mr Jackson explained that the respondent is a small company, and that there was no one else who could do it and had the experience of doing so. As recorded at paragraph 68 above, Mr Kovacs' involvement in the meeting was limited to answering questions and discussing the issue of the notes.

164. Paragraph 72 addresses a particular allegation made by the claimant about Mr Kovacs conduct in the meeting. The Tribunal does not find that allegation to be credible for the reasons explained at paragraph 72. The Tribunal does not find that the conduct of the meeting was inappropriate in the way that the claimant alleged in his evidence.

165. Accordingly, the Tribunal does not find that the claimant was treated less favourably by Mr Kovacs in his conduct in the appeal meeting. There was no unfavourable treatment. Mr Kovacs attendance at, and conduct in, the meeting, was not on the grounds of race.

*Comparators (6-9 in the list of issues)*

166. The Tribunal has addressed each of the allegations of direct race discrimination above and considered any of the named comparators where there is evidence that they might be an appropriate comparator in respect of each allegation.

167. As is recorded in relation to a number of the allegations, Mr Howarth was in a comparable situation to the claimant in 2019 at the time of being placed at risk of redundancy, in that he was also a Warehouse Supervisor. He was treated in the same way as the claimant, save that once he accepted one of the alternative roles his position differed to that of the claimant. It was identified in the course of the hearing that the rate of pay offered for the role of Warehouse Coordinator may have been more attractive to Mr Howarth because he was on a lower pay rate than the claimant prior to the reorganisation, but that does not alter the fact that Mr Howarth and the claimant were treated comparably and consistently in terms of the roles offered and the process undertaken.

168. Ms Sagar, was a comparator for allegation 4(iv). Mr Kukjans was a comparator for allegation 4(v). In relation to Mr Carroll who is named as a comparator, the Tribunal understands he was an Engineering Manager. There was no evidence whatsoever presented in the hearing as to why he was a valid comparator.

169. In relation more generally to Mr Ashworth, Ms Williamson, Mr Sayadnaward and Mr Kukjans, these were people who the claimant identified as having been promoted or moved into another role after 2016, when the claimant said that he was not promoted or given comparable opportunities. The Tribunal has addressed in relation to Mr Kukjans, why he was appointed to other roles in respect of allegation 4(v) above. For the claimant, the respondent has provided evidence why he was not given an alternative role. The reason why the claimant was not promoted or given an alternative role was not his race. The claimant has not shown the "something more" which might reverse the burden of proof. The fact that other employees were appointed to other roles (or promoted) and their ethnicity differed from the claimant's, does not (without more) prove that the claimant was discriminated against on the grounds of race.

*Failure to allow reasonable time off (issue 13)*

170. As is addressed in the explanation of the law above (paragraph 110), section 54 of the Employment Rights Act 1996 enables the claimant to pursue a complaint that the respondent has "*unreasonably refused to permit him to take time off as required by Section 52*". For a claim to succeed, that requires that a respondent refused to permit a claimant to take such time off. As is recorded at paragraph 74, the claimant's evidence was that he did not in fact ever request any time off to undertake his job search. As a result, the claimant's complaint cannot succeed, as he was not contending that he was not permitted to take time off. The claimant's complaint regarded the wording used in the decision letter when he was first informed about what he could and could not do during the notice period, but the wording of the letter does not provide the basis for a complaint where the claimant was not in fact refused time off.

*Statement of terms and conditions (issue 15)*

171. As is recorded in the facts above, the claimant did have a statement of terms and conditions from at least 1998 and he himself accepted that he was provided with a statement of terms and conditions in 2015. An individual is unable to pursue a complaint to the Employment Tribunal regarding the historic non-provision of a statement of terms and conditions. The issue the Tribunal needs to determine when considering such a claim under section 38 of the Employment Act 2002, is whether the claimant had been provided with a statement of terms and conditions prior to the date when proceedings were begun.

172. It was not in dispute that the claimant had been provided with a statement of terms and conditions prior to issuing his claim. Whether the claimant had been issued with a valid statement of terms and conditions in the period from his recruitment in 1989 until 1998, is not an issue which the Tribunal needs to determine.

*Unfair Dismissal*

173. The Tribunal finds that, in answering the questions it must decide, following **Safeway Stores v Burrell**:

(a) the claimant was dismissed;

(b) the requirements of the respondent's business for employees to carry out work of a particular kind, did cease – that is for employees to carry out the work of Warehouse Supervisor; and

(c) the dismissal of the claimant was caused by that cessation (and the claimant's unwillingness to accept any of the other roles which were available).

174. The Tribunal finds that the reason for the claimant's dismissal was redundancy. The Tribunal accepts the respondent's evidence about the reorganisation and the reasons for it. Whilst the claimant objected to issues in the warehouse being held responsible for the problems in 2018, it is not part of the Tribunal's role to look at the business rationale for the decisions that were reached. Based upon advice from a consultant, the respondent decided to reorganise the warehouse, and that reorganisation resulted in the role of Warehouse Supervisor ceasing to exist.

175. In terms of selection, the Tribunal finds no issue whatsoever with the fact that the two existing Warehouse Supervisors were placed at risk of redundancy in circumstances where that role was ceasing to exist. The respondent was able to identify the pool of those placed at risk as being those in the role ceasing to exist, something which certainly fell within the range of reasonable responses. The respondent applied its mind to that selection. The respondent did not apply a selection criterion as such, it was the individuals in the roles ceasing to exist (in the case of the claimant being the Warehouse Supervisor role) who were placed at risk of redundancy.

176. In terms of consultation, the claimant was informed about what was proposed and at least five meetings were held with him to discuss what it meant and the options open to him. The claimant was formally invited to a final decision meeting, with the

invite letter making clear what the potential outcome of the meeting could be. The claimant was able to raise anything he wished to at the meeting at which a decision was made. Following the decision, an appeal process was conducted, during which the process was further explained to the claimant and the options discussed with him.

177. In terms of alternative employment, the respondent explained to the claimant the alternative vacancies which were available and provided job descriptions or adverts for each of the roles available in the warehouse. The alternatives were discussed with the claimant and he was given the opportunity to apply for the alternative roles which were available. The Tribunal also accepts that the respondent explored other available options in the business in discussions with the claimant.

178. The issue which the Tribunal has found the most difficult to determine (and indeed on which the panel has not agreed), is whether the consultation undertaken, and the exploration of alternatives, went far enough to mean that the dismissal was fair in the circumstances and in accordance with equity and the substantial merits of the case. The Tribunal recognises that: it is a question of fact and degree to consider whether the consultation was so inadequate as to render the dismissal unfair; the consultor is not obliged to adopt any of the views expressed in consultation; there must be conscientious consideration of the response to consultation; and (as cited from the **Williams v Compair Maxam Ltd** Judgment above), an employer must do as much as is reasonably possible to mitigate the impact on the workforce of the proposed redundancies. Whether the respondent did what it should have done to meet this final requirement (see the end of the extract quoted at paragraph 100 of this Judgment, above) in order to render the dismissal fair, is something about which the Tribunal panel disagrees.

179. The majority of the Tribunal has particularly noted that the claimant himself did not express in clear terms in the meetings held with him that his reasons for rejecting the roles were either pay or hours. Despite what was said in the 29 April email, the reason that the claimant gave Mr Kukjans for rejecting the roles was that they were not a promotion for him, and that was both Mr Kukjans' and Mr Kovacs' understanding at the time the decision to dismiss was made. This was also consistent with what the claimant said in his appeal letter (419 – the resolution he was seeking was better career prospects) and what he explained to Mr Jackson in the appeal hearing (see, in particular, paragraph 69 above and the notes of the appeal (437)). Mr Jackson's evidence was clear, that the claimant could have accepted the Warehouse Coordinator role at any time even after the appeal decision had been made. The claimant neither did so, nor did he say that he would accept it if the hourly rate was changed or the hours of work altered. When he was given the opportunity in the appeal hearing to explain the outcome he was seeking, he focussed upon his desire for career progression and effectively concentrated on unrealistic expectations for the outcome of a process where his role had ceased to exist.

180. The Tribunal panel is unanimously of the view that the claimant thought that he could persuade the respondent to offer him a promotion as part of the consultation, if he maintained his position of rejecting the available roles. However, the letter of 13 May (416) inviting the claimant to the decision-meeting was very clear about the implications for the claimant if he did not accept any of the roles available. The decision that Mr Kukjans reached following this meeting was that the claimant was to be made redundant because he had not accepted any of the alternative roles. Even in the

appeal hearing when the implications of maintaining his position were clear, the claimant did not accept the Warehouse Coordinator role, nor did he further explore the rate of pay or hours for that role with Mr Jackson.

181. The Tribunal finds that, based in particular on what the claimant himself said and recorded in documents during the redundancy and appeal process (such as those referred to in paragraph 179), the claimant would not have accepted the Warehouse Coordinator role irrespective of whether the rate of pay or hours were varied for him, as the claimant was intent on obtaining career progression or promotion from the process.

182. The claimant was an employee with 30 years' service who was placed at risk of redundancy. Whilst the respondent offered the claimant the alternative roles available in the warehouse, it did not proactively explore with him his reasons for rejecting the alternative roles which were available and, in particular, the role of Warehouse Coordinator which the respondent had expected him to accept. Mr Kovacs, in answer to questions, confirmed the absence of exploration with the claimant about pay, or the hours when he would be expected to work if he accepted the role. Mr Kovacs evidence was that, for both of these issues, the respondent could have been flexible. He explained to the Tribunal that, had he understood that the hours were a sticking point for the claimant, he would have been able to put in place an alternative shift pattern for the claimant, as he said he had done in other cases. As Mr Kovacs overlooked the reason given by the claimant in his letter of 29 April 2019 for rejecting the roles, this was never actively discussed with the claimant. Mr Kovacs said in evidence that, with the benefit of hindsight, he could have done things differently. No trial period was actively offered in the alternative roles, nor was the claimant encouraged to accept any of them on a trial basis – something the Tribunal would expect to see.

183. As cited above, **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price** tells us that fair consultation means: consultation when the proposals are still at a formative stage; adequate information on which to respond; adequate time in which to respond; and conscientious consideration by someone in authority of the response to consultation. The Tribunal panel unanimously agrees that the first three of these were present in this case. The majority, also finds that the last required element was also present, where the claimant was repeatedly offered the alternative roles thought suitable, and declined to accept them for reasons of career-progression, as he explained.

184. Ms Dowling, as the minority, disagrees that the respondent did genuinely conscientiously consider the consultation and the issues raised by the claimant. In the context of what is recorded in paragraph 182, there was an onus on the respondent to proactively explore with the claimant the role which had been earmarked for him and to discuss why exactly he was rejecting that role, whether the factors which were stopping him from accepting it could be addressed, and why his desire for career progression could not be addressed in the redundancy exercise. The letter of 29 April was taken by the respondent as a rejection of the roles, when in practice it was an invitation to explore the issues and (hopefully) to find a mutually agreed solution. In practice, in the decision meeting, the respondent appears to have gone through the motions rather than to have genuinely, and empathetically explored with the claimant why he was rejecting the role which would be the best fit for him, and what more could

have been done to persuade him to accept it. During the notice period no further efforts were made to remove any blockers to the claimant being able to accept an alternative role, even after the claimant re-stated his wish to remain in employment with the employer in his claim form (see paragraph 76). She finds that the respondent did not do as much as was reasonably possible to mitigate the impact on the claimant of the proposed redundancies.

185. As a result, the majority of the Tribunal has found that the dismissal was not unfair, and the claimant's claim for unfair dismissal does not succeed. For the reasons explained, the minority found the dismissal to be unfair.

*Polkey (issue 12(i))*

186. As a result of the decision of the majority of the Tribunal, it is not strictly necessary for the Tribunal to also consider issue 12(i) in the List of Issues, which is whether any compensation awarded to the claimant should be reduced to reflect the fact that the claimant's employment would have been terminated in any event (relying upon the case of **Polkey v AE Dayton Services**). As explained in the law section above, this requires the Tribunal to decide what were the chances that this employer would have fairly dismissed, that is that the dismissal would have occurred in any event. Even had the dismissal been found to be unfair (for the reasons explained for the minority), the Tribunal unanimously finds that the claimant would still have been dismissed in any event. That is, the chances of him being dismissed at the same time were 100%. That is because the claimant would not have accepted the Warehouse Coordinator role irrespective of whether the rate of pay or hours were varied for him, as the claimant was intent on obtaining career progression or promotion from the process (something which was unrealistic and would not have been offered by this respondent as part of the process).

*ACAS code (issues 10(vi) and 12(iii))*

187. As the ACAS code of practice states that it applies to disciplinary and grievance situations, and the decision to dismiss was by reason of redundancy, it did not apply to this case. In any event the respondent followed a full and fair procedure in making the decision to dismiss and in hearing an appeal. Mr Kovacs attendance as a note-take in the appeal meeting would not have breached the ACAS code, even had it applied.

**Summary**

188. For the reasons explained above, none of the claimant's claims have succeeded.

Employment Judge Phil Allen
Date: 17 March 2021

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON
23 March 2021

FOR THE TRIBUNAL OFFICE

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