Case No: 1802864/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Gillatt**

Respondent: **ASE Plc**

Heard at: **Leeds by CVP** **On: 8 – 11 February 2021**

Before: **Employment Judge Maidment**
Members: **Mr K Smith**
Dr PC Langman

Representation
Claimant: **In person**
Respondent: **Miss K Barry, Counsel**

RESERVED JUDGMENT

1. The claimant was unfairly dismissed – his claim is well founded and succeeds. However, had a fair process been carried out and all defects cured, the claimant would, with a 100 per cent degree of certainty, have been fairly dismissed by reason of redundancy in any event. No compensatory award therefore falls to be made and, given the claimant has received a statutory redundancy payment (extinguishing any entitlement to a basic award), no further remedy issues arise.

2. The claimant's claims of disability discrimination and victimisation fail and are dismissed.

REASONS

Issues

1. The claims in these proceedings arise out of a redundancy exercise conducted by the respondent, which provides business management services to the motor industry. The claimant was put in a pool of 'at risk' employees and selected for redundancy on the basis of a point scoring exercise which the claimant maintains, amongst other things, was unfair and, in particular, predetermined to achieve a desired result i.e. his dismissal and the retention of another individual.

2. The claimant's primary complaint is indeed of unfair dismissal where he raises complaints focused on his selection/scoring and a flawed consultation process. As regards scoring, he contends that he was downgraded because of a final written warning which was "manifestly inappropriate".

3. He also brings complaints of disability discrimination. The claimant suffers from diabetes and the respondent accepts that he was at all material times a disabled person because of this impairment. A complaint of direct discrimination is additionally based upon his association with his daughter as a disabled person by reason of her having severe learning difficulties. Again, the respondent accepts that the claimant's daughter was at all material times a disabled person.

4. The claimant complains of direct disability discrimination in his dismissal in respect of his working from home due to his diabetes affecting his scoring (also pursued as a complaint of unfavourable treatment arising from disability) and his working from home to care for his daughter also adversely affecting his scoring.

5. A related complaint alleging a failure to comply with the duty to make reasonable adjustments is brought, reliant on the selection criteria used as the relevant provision, criterion or practice. The claimant maintains that he was disadvantaged when compared to a non-disabled person because of his homeworking and contends that, as a reasonable adjustment, his scoring or the criteria ought to have been altered.

6. Finally, the claimant complains of victimisation with the protected act relied upon being a complaint in January 2019 regarding the respondent's attempt to change his homeworking arrangements. The respondent does not accept that this amounted to a protected act. The detriment complained of is then the claimant's dismissal.

Evidence

7. The tribunal had before it an agreed bundle of documents numbering in excess of 714 pages. The claimant also had compiled a bundle of 14 additional documents.

8. The claimant gave evidence on his own behalf followed by his witness and former account manager colleague, Mrs Bhavini Chauhan. On behalf of the respondent the tribunal then heard from Mr David Yorke, Regional Director, Mrs Caroline Mayoh, former Senior HR Manager and Mr Robert Jones, CEO.

9. Not all matters raised in the claimant's 69 page witness statement were relevant to the issues before the tribunal. All of the claimant's contentions have been considered, although not necessarily expressly referred to below. In preliminary discussion with the tribunal, the claimant had referred to an additional complaint he might wish to bring of harassment by a particular service desk manager, details of which were included in his witness statement, but after consideration no application to amend was pursued by him.

10. Having considered all relevant evidence, the tribunal made the following findings of fact.

Facts

11. The respondent provides accountancy and business management services for the automotive industry. The claimant was employed in its UK and Ireland Business Management team as one of 3 senior account managers. The team was managed by Mr David Yorke, Regional Director, and consisted of 2 auditors, 3 senior account managers, 4 account managers and 3 assistant account managers. The claimant had been employed by the respondent since 2010. He is a qualified chartered certified accountant, a qualified accounting technician and had in excess of 40 years' experience working in the motor industry, including as a dealership owner.

12. The claimant suffers from diabetes. He was diagnosed in around 2017. He also has a daughter with learning disabilities.

13. The claimant's case was that following the appointment of his current manager, Mr Yorke, around September 2018 there had been a continuous campaign against him as he was unwilling to comply with Mr Yorke's instruction to relinquish his home working status – the claimant worked predominantly, but not solely from home. He said that he was told verbally that he had to attend the office on a daily basis, Mr Yorke's initial comment being that he couldn't have people coming and going as they pleased and that there were going to be changes. The tribunal does not accept that he was ever told that he had to be in the office every day.

14. In 2017 the claimant was asked to complete a homeworking risk assessment. Clair Dyson, People and Development Director, emailed him on 25 October 2017 saying that she was aware that he was home based, but did not have a copy of any formal or official notification. The claimant responded saying that he did not think that there was a form in place. He told the tribunal that he had an agreement already to work from home which had been reconfirmed "on a full-time basis" from October 2015. The tribunal accepts that he had an agreement to work from home, albeit not exclusively.

15. On 3 January 2019, Mr Yorke sent an email to the claimant on a number of points, but where he also raised that he was under pressure to stop working from home. Mr Yorke knew nothing of any agreement the claimant had had in the past. On 24 January 2019 Mr Yorke emailed the business management team regarding a change to an action point in meeting minutes in connection with homeworking. There was a change to point 10 to refer to a board directive that each team member be in the office for at least 5 days per month, excluding days in for meetings. In response, the claimant asked for a meeting with Mr Yorke and HR. Mr Yorke sought to set up a meeting together with Claire Taylor, interim HR Director. She emailed Mr Yorke on 24 January saying that she assumed the reference made to point 10 of the action points was about having visibility in the office up to 5 days a month. She went on that, if the claimant couldn't fulfil this, they would need to understand why and if he needed to put in a formal flexible working request or if any mutual compromise could be reached. She continued that there was nothing on file which detailed a permanent home working arrangement. She said it appeared that this had increased over time and was possibly more a preference than a necessity. She said that

she understood that Mr Fazal, Chief Commercial Officer, had identified the need for the team to be more visible and cohesive, but that there was no expectation at "close periods" to be in the office as it was understood that there was a need for concentration at this time which could be easier from home. The reference to "close periods" was when dealerships had to make their monthly submissions – the date differed from one car manufacturer brand to another.

16. The claimant set out his position in an email of 24 January 2019. He said that he believed a directive to change his agreed homeworking conditions was unreasonable and probably unacceptable. It was a breach of an agreement. He said that would not have accepted the offer of employment at the outset without the ability to work from home as the cost of travel alone would have made this a non-starter, nevermind the actual travel time involved. He referred that it had become usual for many of the team to work from home. The directive, he said, gave carte blanche to all team members to be in the office only 5 days per month. He set out the reasons why he would be adversely affected in terms of quality of life and stress. He listed parental responsibility, travel time and cost, work/home life balance, medical issues and back problems. He then elaborated on some of those headings. He referred to his daughter being one of the reasons he had previously requested the honouring of the working arrangement on a full-time basis. This was because the family no longer had the support of elderly grandparents and of their son. He then referred to his own prescribed medication. He said that it had to be taken 1 hour before food in the morning with a further medication, with food, in the morning. He said that the first medication would need to be taken at around 4:30am for a second tablet to be taken with his breakfast and for him then to get into the office for 8.00am. This would result in a 14 hour day. He then gave more details regarding his back problem, his travel time and costs of travel to the office.

17. The claimant agreed that there was no reference to a breach of the Equality Act in these representations. He agreed that he had not said anything about disability discrimination. His reasoning behind this letter, he said, was that he had an agreement which was being breached. He told the tribunal that his back problem was not the reason for him needing to work from home. The reason was the travel time and costs which made it not economic to work in the office and family problems. He had taken the job on the basis that he could work from home and the respondent's HR department, through Tracey Ellam, had been made aware that he had a disabled daughter. In October 2015, his personal circumstances had changed (the source of care for his daughter) and a working from home arrangement had been agreed on a full-time basis with Ms Ellam. He said that he could still go to the office whenever he needed to, for example for training or meetings. He also travelled to Ireland, sometimes for a week in each month. His need had nothing to do with his diabetes at that time which was only diagnosed in 2017. That subsequently, however, had become an issue. Working in Ireland was no problem he said because he would be staying in a hotel, near to any dealership, and could manage his diabetic condition the same way he did when working from home.

18. The claimant said that he had first told the respondent of a link between his homeworking and diabetes at the meeting which then took place on 29 January 2019. He was not, he said, contending that there was a link

between him providing that information and his dismissal. The link was that Mr Yorke was trying to rescind his agreement because he had a general problem about the claimant working from home, not his disability.

19. The claimant met with Mr Yorke, who was accompanied by Sarah Ellerby of HR, on 29 January 2019. The claimant expressed the view that he felt the change would be in contravention of his agreed terms. He referred to the issue of travel time and cost. The claimant lived over 50 miles from the respondent's Manchester office but the journey to work involved a route which could take around 2 hours each way. He also referred to parental responsibilities, work/life balance, medical issues and back problems. After the claimant had left the meeting, Mr Yorke was noted as saying to Ms Ellerby that Mr Fazal was not happy with a lack of presence in the office and that the board was not happy about working from home. It was then noted that the minutes of the meeting were to be reviewed with Mr Fazal and Ms Taylor. They were expecting a minimum of 5 days a month in the office, but that this would not be required during close periods.

20. Ms Ellerby then emailed the claimant and Mr Yorke on 1 February 2019 saying that she had suggested at the meeting that she would clarify with Mr Fazal his expectations. She said that she was certain a reasonable solution was achievable and that a presence in the office would not be required during close periods recognising the need for concentration then, which was made easier by working from home. The request for office presence of up to 5 days was to ensure the provision of support to colleagues and sharing of information. She noted that the claimant had said at the meeting that he would be happy to come into the office for up to 5 days and that, having looked at the office access swiping records, could see that he already came into the office on average 3 – 5 days per month and therefore "there is no change to this". The claimant disputed by a return email that he had said that he was happy to come in 5 days each month. He said that he may have said that he would probably do this with Toyota implementation anyway. The claimant told the tribunal that he was not prepared to compromise and a removal of his homeworking would make his position untenable. He said that he was, however, happy to work up to 5 days per month in the office. When suggested in cross examination that he was being inflexible, he said that was possibly correct and that he could be stubborn.

21. The claimant agreed before the tribunal that, after his email of 1 February, he just carried on working as before. Whilst he had been told that he could contact HR if the situation was not resolved, he understood, from the email from Ms Ellerby, that Mr Yorke was going to come back to him, after discussing the matter with Mr Fazal. He did not chase Mr Yorke for any further response.

22. The evidence was that the majority of the claimant's team worked a significant part of their time from home. Mrs Chauhan said that she had no formal home working agreement in place, but was able to work from home when she wanted both before and after the issue was raised in early 2019. She continued working from home as before and said that as far as she was concerned the issue "went away"

23. The claimant received confirmation of a final written warning by letter of 3 October 2019 from Mark Fennelly, Director - Head of Global Consulting.

This followed a disciplinary hearing the previous day and a prior investigation meeting on 23 September 2019 conducted by Mr Fazal. Mr Fennelly had considered 2 allegations. The first related to the claimant on 19 August 2019 participating in an inappropriate email exchange with Katie Dixon, the content of which had become more widely known to the service desk team. The second was that, on 6 September 2019, the claimant had spoken to Gary Roberts of infrastructure in an aggressive and heated manner when he had an issue with his laptop whilst in Ireland. In his outcome letter it was noted that the claimant accepted his part in both instances and had apologised. His comment that "people from Yorkshire are more direct" was noted but found not to excuse the use of foul/abusive language. As regards the email exchange it was felt that the claimant has not shown regard for acceptable behaviour at work. The claimant could have stopped the email interaction. This was further an inappropriate use of working time and of the respondent's email system. As regards the incident involving Mr Roberts, whilst the claimant had said that he had not sworn "at" Mr Roberts, he had still used offensive language. The claimant's previous record and length of service was said to have been taken into account. The sanction of a final written warning was viewed as reasonable. The warning was to remain live for a period of 12 months. The claimant was given the right of appeal to Vicky Read.

24. He told the tribunal that he chose not to exercise that right because he felt that he would not get a fair hearing. He felt that Mr Fazal's involvement at an early stage meant that there would be no change in the decision-making and that Ms Read had herself been involved in supplying some of the evidence which had been held against him. He described Mr Fazal's conduct of the investigation meeting as being "abhorrent". When questioned as to why had not appealed, he said that the final warning was only manifestly inappropriate if it was used in a different situation i.e. in his redundancy selection. He had no reason at the time to believe that there would be any repeat incident or reason to challenge the decision. He said that a verbal or written warning at the time would have been appropriate.

25. It was raised by the claimant that there had been an incident involving an account manager, Sam Philips who had been absent without leave and had not managed to attend a meeting with BMW. However, that was not treated as a disciplinary issue. Nor was any absence counted against him. The tribunal accepts, on the basis of Mr Yorke's evidence, that Mr Phillips had let him down in not attending a client, but that he had been ultimately sympathetic due to a particular domestic incident affecting Mr Phillips, which had caused this failing. Mr Philips had attended and led the meeting with BMW by Skype.

26. The claimant told the tribunal that the email issue for which he had been disciplined had been one of office banter and that his reference to an individual as being the next person who should be sacked had been taken as a joke. That individual had said in an investigation meeting that he had laughed at the time. As regards the incident with Mr Roberts, he had telephoned him with an IT problem from Dublin airport and, when he had been asked what he had done, he explained that he had just "shut the fucking laptop." He said that Mr Roberts had said that, if he was going to swear, he would not help him and had terminated the telephone call. He said that Mr Roberts had not made a complaint.

27. The claimant said that he had not raised his voice to Mr Roberts as he was sat in an open area in Dublin airport. Mr Roberts account at the time, as emailed to Ms Ellerby on 6 September 2019, was that the claimant had raised his voice and started swearing and continued to do so after Mr Roberts had asked him not to do so as he was trying to help the claimant.

28. By the second half of 2019, consideration had been given to reorganising the claimant's team due to the loss and anticipated loss of some accounts. Mr Yorke had started to think about the account manager role in circumstances where there was no clear distinction between the role of a senior account manager and account manager. They were all doing the same job he said. When he had asked people in the team and HR as to what the difference was, he said that no one knew. The claimant's uncontested evidence was that the difference arose from ex-dealership accountants being appointed as senior account managers, whilst employees engaged as assistant account managers, as they had previously been known until given the title of account managers in 2015, had typically operated at the level of an assistant accountant in a motor dealership. When their titles changed to account manager, the existing account managers were retitled as senior account managers. The tribunal has no evidence that there was then any material difference in duties between them.

29. Also, in Mr Yorke's considerations was that assistants provided support for some but not all of the senior account managers and account managers. He considered that there was a need to have a higher level of account manager (key account executive) dealing with clients and identifying business opportunities, with a lower level of employee checking dealer submissions, running standard processes and therefore freeing up the more senior roles to concentrate on less routine tasks and growing the business. This also, he felt, would give a clearer team structure to which people could be added if the respondent was successful in gaining additional clients.

30. Mr Yorke anticipated a reduction in headcount and started to work up a draft structure, grouping vehicle brands together accounting for each different brand having a close period at different times in the month and the need for this to be spread out in a workable manner for each (senior) account manager. Whilst the claimant, now having in these proceedings seen this draft structure, understandably considered that individuals had already been earmarked for each role in line with the existing brands they worked upon, the tribunal accepts no such allocation had taken place and that Mr Yorke genuinely did not view the exercise as so straightforward. Nor was he aware initially of the depth of the headcount reduction he would be required to make – he thought that only 1 person would be lost.

31. By early 2020 the respondent had lost the Kia UK contract which the claimant had been working upon and it was anticipated that the Vauxhall account, looked after by another account manager, would be lost later in the year. From February 2020 as well as continuing to manage Kia Ireland, AGCO and Mercedes Ireland, the claimant had enough time to provide (non-dealer facing) assistance to others on the BMW and Mazda accounts. The claimant by this stage was concerned regarding his future position.

32. Mr Yorke had begun working with a recently appointed HR professional, Andrea Livingston, regarding any proposed new structure and how this might be implemented. He emailed her on 9 March 2020 with some observations on the draft structure. He noted that it had been discussed that if the brands per role were presented then "it will be obvious what the plan is". Again, the claimant is understandably suspicious that the allocation of roles had been predetermined, but the tribunal accepts that Mr Yorke had not yet got to that stage and that his comment related to inevitable assumptions which would be made. The tribunal notes also, in this context, that there was reference to one of the senior account managers, Nick, currently not using assistants, but Mr Yorke wanting him to do so "in the plan". The tribunal accepts that this was hypothetical.

33. Mr Yorke went on to give his thoughts on a scoring matrix to be used in a redundancy selection exercise. The first criterion referred to was success in upselling additional services to clients. He said that he felt that this might be a good one to use and should carry high points as it fitted with the plan and was easily measurable. He noted: "some will argue that it's difficult to sell to their brands though and that is true to some extent." Mr Yorke also referred to "flexibility/availability/diversity", "team player", "remaining client base experience and satisfaction" and "adhering to standard procedures…" Again, the tribunal accepts that these were initial thoughts to be discussed with HR.

34. Mr Yorke's considerations were inevitably fluid due to uncertainty as to when Vauxhall would leave and in anticipation that Jaguar Land Rover would be gained as a client. There were also discussions, at a level more senior to Mr Yorke, regarding the depth of cost saving cuts required. These continued even after an announcement had been made of potential redundancies driven, not least, by the coronavirus epidemic and an anticipation that revenue would fall in line with a decline in motor sales. Whilst the respondent had a proportion of guaranteed income flowing from fixed term contracts with brands, the majority of its income remained variable and susceptible to market conditions.

35. On 19 March, Mr Robert Jones, CEO, issued an announcement to all staff. This referred to 70% of the income in business management being variable with an impact having been noted already on spend in markets where the coronavirus had taken hold, including in the UK. A number of roles would therefore be at risk of redundancy and a 4 day working week was being introduced. Those who were in an "at risk of redundancy" pool would be informed the following day.

36. On 20 March 2020 Mr Yorke was told that he himself was at risk of redundancy. At very short notice a Skype call was set up for the claimant's team to hear an announcement from HR that they were all at risk of redundancy, but that no decision would be made until they had gone through a consultation process. The call took place at the same time as the government announced the introduction of the furlough scheme. The claimant received an individual letter from Caroline Mayoh, Senior HR Manager, confirming his at-risk status. It was stressed that this was only an initial proposal. There would be a consultation process and the first individual consultation meetings would be held on 23 or 24 March.

37. Mr Yorke was told on 23 March that he was no longer risk of redundancy. A further update was issued to staff on that day. It was said that the respondent had decided to review proposed measures in the light of the furlough scheme and that individual consultation meetings due to be held that day and the next were to be postponed until later on in the week.

38. On 24 March, Mr Yorke was involved in discussions with the board regarding possibly furloughing 2 roles which were predominantly dealership based. There was doubt at the time as to whether furlough was available in respect of positions which were not regarded as having any future viability. He was also told at that point that there was a need to lose 3 positions overall in the redundancy exercise – there would be a need for 3 key account executives in contrast to the existing 3 senior account managers and 4 account managers, with 4 newly created positions of BM Process Executives assisting the key account executives. On 25 March Mr Yorke arranged individual one-to-one meetings with his team. HR sent out a FAQs document which covered the possibility of people volunteering for redundancy and shorter working hours.

39. Mr Yorke met with the claimant on 27 March by Skype. He went through a pre-prepared script which repeated the rationale for a redundancy exercise and other cost saving measures including short-term working, not replacing leavers and a request for voluntary redundancy. The claimant queried whether headcount reduction had been considered already and therefore whether the coronavirus had been used to bury bad news. He asked what the overall headcount reduction would be and whether other departments and markets would be affected. Mr Yorke generally took the position that he would note down questions and pass them to HR so that they could be answered in the future, usually using further FAQ documents. The claimant was told that he was at risk as reductions were being considered in the position he held. Before the next consultation meeting, the respondent said that it would hope to be in a position to give more detail including making job descriptions available so that he could decide whether he wished to put himself forward for one of the roles in the new structure. He was told that selection for available roles would be based on performance record, conduct record, attendance record and how well an individual's skills and experience matched those required. The claimant would have an opportunity to present himself in a personal statement when he applied for the role. The claimant asked how performance criteria would be judged as "this seems subjective". He suggested that his own disciplinary record had been "trumped up" to disadvantage him. The claimant confirmed that he would not consider voluntary redundancy as an option. Whether he would consider a part-time or job share role would depend on what was offered. The claimant queried further whether they could be confirmation that he would not suffer detrimental circumstances "to my current lifestyle". The claimant explained to the tribunal that this was a reference to his home working. He was told that any questions which arose subsequently could be emailed to Mr Yorke or he could contact one of the Ignition Forum team. This was a staff consultative body formed of individuals who had nominated themselves rather than who had been elected by the workforce. The claimant said that Sam Phillips, one of the account managers, was on the forum and that he believed at the time that he was going to "take my role".

40. Andrea Livingston wrote to the claimant on 27 March, after the consultation meeting, summarising the information provided and setting out in a document the selection criteria which the respondent proposed using. This consisted of 4 categories: performance record, skill/competence, conduct record and attendance record. A grid was provided which showed a possibility of 15 points available under each of the first 2 categories and 5 points for each of the conduct and attendance categories. Definitions of intermediate point scores available were provided in the grid.

41. The selection criteria were shared with the Ignite forum which did not raise any concerns or objections.

42. Mr Yorke met with HR on 30 March to review final job descriptions. This included the job description for the role of key account executive which was, as explained, the higher level position envisaged in the new team structure replacing the senior account managers and account managers. The claimant was sent the notes of the first consultation meeting on that day.

43. On 31 March the claimant received an email from HR which referred to the preparation of a FAQ document to answer a number of the questions asked at the various individual consultation meetings. The claimant was told that second consultation meetings were planned currently for 2 and 3 April. He was also provided with the key account executive job description and others, including that of the more junior process executive role.

44. The key account executive role was said to be predominantly Manchester office based as teamwork was paramount. It went on that working from home might be allowed at the discretion of the line manager particularly if an individual faced a significant journey to the office and during certain project work. Under principal accountabilities, it was said that individuals would be set their own annual upsell target and must be able to delegate work to the new lower level BM process executives.

45. On 2 April Mr Yorke emailed each member of the team number of documents including the promised FAQs, final job descriptions, individual redundancy illustrations (for information only and not indicative of any likely outcome), the scoring matrix and organisational chart showing the current and proposed structure. The proposed structure reflected the need for only 3 individuals in the position of key account executive rather than the current structure which included 3 senior account managers and 3 account managers. The key account executive job description had been amended in terms of location to specify simply that it was Manchester office based. Mr Yorke told the tribunal that this was to "future proof" the role description if they ever had to recruit externally or were in a position where someone needed to be in the office all of the time during a period of training. The tribunal accepts that this did not signify an end to the availability of homeworking, which has indeed continued. Salary ranges were also now added. The range for key account executive was set at £35,000 – £55,000. Mr Yorke described this as including an element of future proofing if there were to be future promotions or recruitment into that role.

46. A number of the claimant's questions were answered in the FAQs document. Employees were informed that assessment of performance would be based on the previous 12 months' performance against objectives.

They would have the opportunity to provide evidence on their personal statement and the scoring matrix would be shared with them individually so they would have an opportunity to input to the final scores.

47. The claimant's second consultation meeting took place on 3 April with Mr Yorke. The claimant was told that he remained at risk of redundancy. The claimant asked why a new role had been created, which was explained to be a process executive position. He said that the only position he felt he could apply for was that of key account executive. He would consider a job share role if suitable and available. The claimant told the tribunal that he was not going to apply for a demotion. The claimant asked for clarity regarding the role now being said to be office-based. He was told that he could follow the respondent's homeworking policy and request flexible working. The claimant told the tribunal that he felt that he should not have to go through the procedure when an agreement had been in place for him to work from home since 2015. Mr Yorke confirmed that he would be asking HR for documentation relating to the outcome of previous discussions in early 2019 regarding homeworking. The claimant was sent the notes of the meeting and homeworking policy later that day.

48. Mr Yorke emailed the claimant on 7 April regarding homeworking. He confirmed that this would be on a fair and reasonable basis and not part of the selection criteria. The claimant said in evidence that he did not believe what he was being told. The claimant was then sent on 9 April a further FAQs document answering questions raised by employees at the second consultation meetings. It referred to performance and skill/experience being weighted in the selection process more heavily than conduct and absence. It also confirmed what the claimant had already been told concerning homeworking.

49. The claimant produced a personal statement in support of his wish to be selected for the new key account executive position. He referred to maximising profitability but made no specific reference to upsell. The statement reflected his view that the key account executive was, for the large part, the same as his existing role, referencing his performance in it and his qualifications.

50. Prior to the third consultation meeting with the claimant, Mr Yorke met with Andrea Livingston on 14, 15 and 17 April over Skype to discuss his scoring of those in the pool for selection as key account executives. HR also supplied the scoring to be inserted into Mr Yorke's grid in respect of absence and conduct.

51. The initial advice of Ms Livingston was for Mr Yorke to look at the most important aspects of each job. As regards the key account executive, Mr Yorke considered this to be generating extra income, i.e. upsell, particularly given the challenging environment and that it was high on the board's agenda. It was a key part of the new role and had been a topic in every team meeting for quite a while. On discussion they took the view that the performance score should be strongly influenced by upsell performance. Mr Yorke also understood that it was acceptable to give scores anywhere within the points range of 1 – 15, which he felt was helpful in enabling him to differentiate. He did not have a scientific system, he said, as to the points awardable for any specific attribute.

52. Mr Yorke then went through the figures available for upsell for each of the candidates for the whole of 2019 and also during 2020. The upsell figures were updated every time there was a new sale. It enabled him to see each person's rank within the team. The claimant said that some training he had agreed to provide to a client was not reflected, but this had not been agreed and undertaken by the time of the selection exercise.

53. Mr Yorke also copied over each employees' latest appraisal. He then added some brief notes on each individual starting with upsell and what he knew about any feedback from clients and whether they interacted well with colleagues. Against the claimant he made a note of "low upsell" and referenced a Toyota Ireland complaint as well as an issue with Mazda. He noted that the claimant had said in his appraisal that he was mainly interested in dealer assistance and problem solving. He referred to the claimant having not been accepting of assistance in the past "because he wants to go into a meeting knowing he has checked every dealer submission". He also put together brief notes against each individual in a form which he described as a brain dump of any points which came to mind. He said that a number of the points noted were not relevant, but he thought it best to put everything down. Under the claimant's name, he included a comment: "Diabetes in more recent years since not working in the office". He said that his knowledge of the claimant from when he had first worked with the team was that he was often in the office, but that he understood that his reduced attendance was partially to do with his suffering from diabetes. He said that he knew that this was a disability having been trained in equality and diversity issues in June 2019. His evidence was that this did not affect his scoring of the claimant at all and that he did not consider his diabetes as a negative. He said that he included similar types of comments about other employees referring to one with a history of stress and an individual being the sole breadwinner. This was an individual he said who spent only around half her time in the office and who was not selected for redundancy. Mr Yorke pointed out that some of the points he had included in the brain dump for the claimant were positive in terms of his work with particular brands and him being "low maintenance". Mr Yorke then put his scores into a working document and added some rationale next to each to support the score and to assist in subsequent discussions with HR. He said that he did not know whilst he was scoring who would come out on top and was surprised how close some of the scores were after he had finished.

54. He described then spending several hours with HR going through the scores during which he was challenged by Ms Livingston and had to justify the basis of his scoring.

55. He gave the claimant a score of 8 under performance which represented him falling just short of "meeting all objectives". He considered that less than full marks were appropriate particularly due to the claimant's low upsell performance when compared to other individuals in the pool. He recognised that there was an argument that some would find upsell more difficult due to the brands they worked for, but said that everyone had to work with what they had. Some individuals who had achieved significant upsell had done this despite the brands not being managed from the UK. The claimant had more dealers to sell to than others, including those who looked after a greater number of brands. The claimant's upsell figure for the year 2019

was £19,738. Due to a lack of upsell during 2020, this was also his figure looking back over a 16 month period. This meant that the claimant was ranked fourth out of the senior account managers and account managers for the year 2019 and sixth if the preceding 16 months were taken into account. The highest achiever had achieved sales of £92,013, followed by account managers with sales of £46,010 and £47,642.

56. The claimant's latest monthly check-in record on 9 March (conducted by Mr Yorke) covering his goals and performance, noted that upselling and offering solutions was a key responsibility. It said that upsell targets were going to be allocated to each manager "taking into account their particular brands and potential based on the past and what we know". Another goal for the claimant was to participate in more DBS training (a software system used by some client brands) as the whole team needed to be up to speed in this area. The claimant told the tribunal that there was (in his view) no need for him to be skilled in DBS. Looking at the claimant's performance over the last month in upsell he was rated as 5 out of 10 and placed in a "yellow" category in between "green" and "red". His rating was similar under the category of contributing "to team reports, upsell tracker and red flags. Only if there is something constructive to say, positive or negative."

57. Some other individuals in the selection pool handled a higher number of brands and submissions that the claimant. It was clear to the tribunal that individual account managers did not decide which accounts they worked on and that the claimant had at various times overseen a greater portfolio of brands. Mr Yorke had not been aware of that at the time. This was reflected adversely in the performance score.

58. The score also reflected that there had been a verbal complaint from Toyota Ireland earlier in the year, around January 2020. Mr Yorke understood from Mr Fazal that this related to the claimant having made disparaging comments about the respondent when visiting a dealer. The claimant had not been given this information at the time and Mr Yorke accepted that it had not been regarded as a disciplinary issue. The claimant said that he had just been told that Toyota had an issue with the claimant taking calls. He said that he had not been with a Toyota dealer in Ireland since June 2019. Also, Mr Yorke was aware that, whilst the claimant had not worked for Mazda for some time, there had been a conversation with Mazda regarding them having a new account manager and they had specifically requested that not be the claimant. Mr Yorke recalled the Mazda conversation being in Summer 2019 during which he had been told that the claimant was not great at adapting his style. There had been no reason to discuss this with the claimant at the time as he wasn't managing the Mazda account. He recognised that, if he had raised it, the claimant would have been angry and would have sought more information. The claimant's more recent work on the Mazda account had been in checking submissions only, not dealing with the client. Had it not been for the customer relationship issues, Mr Yorke said that the claimant would have been awarded an additional point for performance.

59. Mrs Chauhan in evidence to the tribunal said that some staff took a dislike to the claimant because he just said things as they were. She described him as "direct".

60. Mr Yorke also explained that the score reflected that the claimant had mentioned in his appraisal that he was mainly interested in dealer assistance, whereas the new role was more client focused. In Mr Yorke's email to the claimant on 3 January 2019 he had recognised that it was hard to get someone to check his dealers and trust them, but said that it must be a better use of his skills and experience to manage more and do less work checking submissions, while still keeping his hand in, checking the known difficult ones. He encouraged the claimant to use a particular individual who was described as great at checking submissions and running the processes and suggested finding more people like her to free up account managers to manage and upsell. Mr Yorke felt that others had used more initiative to find more efficient ways of working. The key account executive role had a greater emphasis on generating extra sales, spending more time with the brands rather than the dealers. His view was that the claimant was reluctant to give up some of the submissions work to more junior assistants which would be a requirement for all the key account executives.

61. The claimant pointed out that Mr Yorke had commented in his 9 March 2020 email that one of the ultimately successful candidates, Nick Tyler, was not using assistants. Mr Yorke said that he had not been scored down for that because he knew he welcomed support when available and had used assistants in the past. Mr Tyler, at the time, had fewer dealers per brand and therefore fewer submissions to administer. Mr Yorke, in contrast, had written to the claimant as above asking why he did not use assistants.

62. Mr Yorke had originally scored the claimant with the top mark of 15 under the criterion of skill/competence together with 2 other account managers. After discussion with Ms Livingston and on being put on the spot when justifying the scores, he had believed that his scoring did not properly differentiate the claimant from other individuals who merited higher scoring under this category. In particular he believed that others had greater technical skills in the respondent's internal systems and interacted more than the claimant with the respondent's technical department. This was important as there was more future focus on systems and creating efficiencies through the use of technologies. They had shown more proactivity (as demonstrated in their appraisals) in supporting others and mentoring within the business. Ms Livingston had questioned how the claimant could be given the highest mark available when he did less than others. Mr Yorke was referred to some comments Ms Livingston made on the claimant's appeal where she described her role as to calibrate the marks across the candidates and to listen to the evidence to ensure the marking was being applied consistently. She had said: "In other words, if someone had top marks but there were a few areas they fell down on and someone had marks deducted I challenged the consistency of the marking." She said that she did not challenge the evidence being used because she had no history with or preconceptions of any of the candidates. Mr Yorke described her as forcing him to think about how he had scored individuals. The claimant was downgraded to 13 points. Another of the individuals who had received top marks was downgraded to 14 points and another (Sam Phillips) from 13 points to 12 points in this category.

63. Mr Yorke rejected the accusation that he was influenced by the claimant working from home. From early 2019, Mr Fazal had commented that he felt

that the team was working from home too much. Mr Yorke had noticed when he rejoined the team the amount of email traffic which he felt would be reduced if people were able to talk face-to-face. However, the intention was never to stop people from working from home but to reduce it where possible. He had thought that the issue had been closed early in 2019 after the claimant had met with him and HR. The claimant continued to work from home as did many of his colleagues, coming in for meetings and on occasional days. He thought at the time that, from the claimant's point of view, this was because of his diabetes and the fact that he lived so far away from the office. He had known that the claimant's daughter had health issues but had only been reminded about these since the claimant had commenced these employment tribunal proceedings.

64. The claimant worked from home the majority of the time. Another individual who worked as an account manager worked from home around 95% of the time but was successful in securing a role as key account manager in the new structure and was likely to continue to work mainly from home. Tracey Oakes who was successful in attaining a key account executive role worked from home around 60% of the time. An accounts assistant who always worked in the office wasn't successful in the redundancy process. Sam Phillips was successful in gaining a key account executive role and worked from home around 70% of the time. Mr Yorke himself typically worked from home on 1 or 2 days each week. Board members also worked from home.

65. Mr Yorke said that he did not recognise Mr Phillips as being his "golden boy" as suggested by the claimant (and Mrs Chauhan, albeit not in those express terms). He considered that Mr Phillips had his strengths and weaknesses. He had achieved additional marks because of his strength in the respondent's software systems. The respondent operated 2 separate software systems, one known as rapid and the system called DBS run by a third party in Vienna. This was particularly relevant to BMW, but the respondent had bought out the third party and other brands were moving over to that system. Mr Phillips knew the system very well and helped others deal with technical issues. The respondent was moving to a new version of this system and needed to retain DBS skills. Mrs Chauhan when she gave evidence was disgruntled that Mr Phillips had been given an opportunity to undertake additional training in Vienna which was not open to others, but did give her own view that, amongst the team, Mr Phillips was regarded as the individual with the greatest technical skills.

66. The new key account executive role was to involve greater use of internal tools to enable smarter submission checking.

67. The scoring was finalised by Mr Yorke only on 17 April, with the final consultation meeting due to take place on 21 April. Mr Yorke explained that he had been instructed by HR on 20 April not to share the scores with the individuals selected for redundancy because that would mean them getting into lengthy discussions with a lot of further meetings and this would probably not achieve anything. He was told to send the scores to the individuals immediately after the meeting. He was told to stick to the script provided and to keep all meetings to a maximum of 30 minutes duration. He accepted that the claimant might have given him further information which could have influenced his thoughts regarding the scoring.

68. A final score sheet was produced which gave the claimant 26 points out of a maximum of 40. The key elements under consideration for the performance criterion were said to be "upsell, handling large number of accounts, managing multiple and varied client relationships in a professional manner, driving profitability/optimising efficiency." The claimant was given 8 points out of 15 with comments in the "rationale" section being: "upsell low, experienced in managing accounts, enjoys assisting dealers and solving problems, has not really demonstrated leadership in improving profitability/efficiency, has some client relationship challenges"

69. The claimant was given 13 points out of 15 under the criterion of "skill/competence", the key skills being defined as: "flexibility, able to manage diverse range of products and activities, ability to support others, self-motivation & management with minimal reference upwards, ability to interact effectively with staff & clients at all levels." The "rationale" for that score was stated as: "good all-round experience, no evidence of ability to adapt style to suit client (flexibility), has supported colleagues since losing Kia UK account, self managing."

70. The claimant was given 1 point out of five in respect of conduct record. That was applicable to anyone with a current final written warning. He was awarded 4 points out of 5 in respect of attendance which represented "some absence but below average for selection pool (or company)".

71. The 2 highest scoring individuals achieved 39 and 37 points respectively. The lowest successful individual in attaining a key account executive position scored 32 points with 12 points awarded in respect of both the performance and skills categories and 4 points in respect of both the conduct and attendance criteria. As will be explained, the claimant's scoring was uplifted to a total of 27 points on appeal. The 3 other unsuccessful candidates scored respectively 26, 24 and 22 points.

72. The claimant's third consultation meeting with Mr Yorke took place by Skype on 21 April. The claimant was informed that he had not been successful in being selected for a key account executive position. He was told that he would be given a copy of his scores along with the respondent's rationale following this call. The claimant said that he was not surprised as he felt everyone had gone out of their way to accommodate Sam Phillips. The claimant was told that he would now be made redundant and served with notice of termination. He would have the option to go on furlough during his notice period. He was told that he had the right to appeal this decision. The claimant said that he did not believe his current role was redundant and believed that his scoring had been subjective.

73. Later on that day, the claimant was emailed a copy of the notes of the final consultation meeting together with his individual scores under each criteria which included Mr Yorke explanation as to what he was assessing and his rationale for the points awarded. He also received the generic scoring matrix defining what particular point scores represented in each criterion.

74. The claimant received written confirmation of his redundancy on 22 April and that his employment would end on 20 July. This repeated his right of

appeal. The claimant did appeal on 22 April against his dismissal. He said that he believed that the role was not redundant and that the selection process was "unfair/biased". The claimant separately asked Mr Yorke and HR for evidence of his recorded sickness and all documents relating to the final written warning he had received in October 2019. He also asked for his contract of employment and raised the issue of access to his emails. He received a copy of his contract of employment promptly. He was also by email of 23 April invited to a Skype appeal hearing on 29 April in the presence of Mr Rob Jones and Caroline Mayoh. He was given a 3 hour period of access the following day to collate any emails he felt were relevant to his appeal.

75. The claimant replied on 24 April asking what score he would have needed to have achieved to have not been selected for redundancy and for other documentary evidence. In response he was told that scores of 31 and below were unsuccessful. Further explanation was given of his scoring. He was also supplied with Mr Yorke's initial working scoresheet for him together with his comments on the claimant and the final working document following the calibration exercise conducted with Ms Livingston. He was also sent his latest appraisal and the March 2020 "check-in" document. His timesheet covering is one recorded period of sickness absence was provided as well.

76. Shortly before the appeal meeting the claimant submitted a fuller document setting out his grounds of appeal. The claimant referred to the working from home documents, suggesting that there had been resistance in the past to his homeworking which contributed to the decision to make him redundant. As regards the final written warning he received, he contended that this had been manifestly inappropriate and explained why he had not appealed the time. He disputed that the key account executive was in reality a new role and felt that this had been "deliberately manufactured" to remove him and for him to be replaced by a junior team member who is known by the team as "David's Golden Boy". He then went on to dispute the point scoring. He referred to having had more limited opportunities due to the low spending accounts he had overseen and their non-UK base. He said that there had been no previous concerns raised regarding his upsell performance and contended that his performance had been good in the context of the brands and dealerships which he looked after. Under skill/competence he maintained that the assessment had been subjective and referred to praise he had received in terms of customer relations. He said that the alleged Toyota complaint held against him had not been put in writing. He said that he had been told at the time by Mr Fazal that Toyota's issue was that he had refused to speak to their staff for the first 2 weeks of any month. He said that any negative comment in relation to Mazda was hearsay - there had been no issues when he had managed the account round 5 years previously.

77. The claimant said that he had often been in positions where he had little resource available to call upon in terms of his use of assistants. When he did use assistants, he had been put in an embarrassing situation where data had been inaccurate.

78. Under attendance, he considered it totally unreasonable to be marked down for taking 2 hours off during a day due to a migraine/stomach upset. According to the timesheet for the week he had already worked in excess

of 50 hours. He said that at the time Mr Yorke had insisted that he enter a sickness absence for the hours taken off on the respondent's system. The claimant had also been supplied with the document which Mr Yorke has termed as his "brain dump". The claimant commented on those notes. He found the comments regarding the claimant being argumentative and aggressive to be extremely offensive. He was similarly offended by the reference to diabetes.

79. The appeal meeting duly took place by Skype on 29 April and lasted just under 1 hour. At the start of the meeting, the claimant asked for Ms Mayoh's handwritten notes to be provided as soon as the meeting had ended. He was told that there would be a delay in sending those as she did not have access to a scanner. Mr Jones queried then why the claimant did not record the meeting. The claimant responded that he did not know how to do so on that system. In fact, the claimant was already recording the meeting. It is noted that he had also covertly recorded the consultation meetings with Mr Yorke and the investigation meeting with Mr Fazal which led to his final written warning the previous year. The respondent's disciplinary procedure prohibited the recording of disciplinary hearings. The claimant considered that the prohibition was limited to hearings of that nature.

80. Mr Jones had not read the claimant's detailed appeal submission in advance of the meeting and asked the claimant to go through it. Prior to the hearing, Ms Livingston added some comments on the points the claimant raised. Mr Jones raised various questions as the claimant went through his document.

81. A copy of the handwritten and typed notes of the appeal was sent to the claimant on 29 April. At the hearing the claimant had also requested additional documentation relating to the working from home issue and disciplinary warning the previous year. Those were sent to him on 1 May. He was told that the respondent would come back in due course with its response on his appeal, but if he felt there was anything additionally he wished to raise in the light of this documentation, he should do so as soon as possible. Further documentation relating to the disciplinary warning was provided on 4 May together with further correspondence regarding homeworking.

82. Mr Jones told the tribunal that he had spoken to HR about the disciplinary and attendance scoring, to Mr Yorke about the Mazda issue and to Mr Fazal about the Toyota complaint. Mr Fazal emailed him on 1 May regarding the feedback from Toyota Ireland. He referred to the claimant making disparaging comments about Toyota Ireland in front of the dealer and vice versa. In front of both, the claimant was said to have made negative comments regarding the respondent and often made references to challenges working for the respondent which the client felt were inappropriate. He said that this left the client thinking that the claimant was tarnishing their view about the professionalism of the respondent and that he was asked to remove the claimant from the account. The prime contact at Toyota was said to have stated to Mr Fazal that without that change "the project would not be continued".

83. Mr Jones read the documentation relating to the final written warning and believed that it had been reasonable for the claimant's score to be affected

by this on the basis that it was on his file and had not been appealed. Whilst he had not been involved in the decision, he considered that the claimant had been at fault in the way he had communicated with staff.

84. Mr Jones had discussions with HR whilst he was considering his final decision, but it is clear was in a position to quickly give his view as to the way his thoughts were going so as to enable HR to prepare a detailed report regarding the claimant's redundancy and contentions as to its unfairness. He did not go back to Mr Yorke at any stage to discuss further his scoring of the claimant.

85. The claimant was provided with notification that his appeal had been unsuccessful by email on 6 May. The claimant agreed in evidence that Mr Jones had been very thorough in his response but said that he did not expect him to say that any mistake had been made. The claimant's representations regarding his attendance score were accepted and he was awarded an additional point. The marks awarded to other individuals at risk had also been reviewed with consequential adjustments made – 2 individuals had previously been penalised for visits to doctors and dentists. The 3 individuals placed above the claimant did not get any increase to their scores.

86. Mr Jones said that he had reviewed the claimant's upsell figures and agreed with the score based on the claimant's ranking which he said would have been lower had they looked at only a 12 month period. It was accepted that the claimant had at times previously managed a significant number of accounts. At the time of the selection process he was managing 4 accounts. Client relationship issues he felt couldn't be ignored. It was felt that the claimant had resisted checking assistance in the past and there was a concern he would want to continue trying to do his own role as well as that of others. Of the 7 candidates the claimant was the fourth highest ranking for performance and on balance Mr Jones found there to have been a fair and balanced assessment of all candidates in this area.

87. Mr Jones explained that, if the claimant had been successful in his appeal, he would have had to have reopened the process as there was still the need to take the same cost out of the business. Had 2 candidates received equal points then no consideration had been given as to how to differentiate between them, but Mr Jones, before the tribunal, considered that they would then have had to have dug deeper into issues of skills and performance.

Applicable law

88. Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides:

> "*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*
>
> *the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

89. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the ERA. Redundancy itself is defined in Section 139(1) of the ERA as follows:

> *"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
> *(a) the fact that his employer has ceased or intends to cease—*
> *to carry on the business for the purposes of which the employee was employed by him, or*
> *to carry on that business in the place where the employee was so employed, or*
> *(b) 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."*

90. In **Murray –v- Foyle Meats Ltd 1999 ICR 827** the House of Lords considered the test of redundancy and Lord Irvine suggested that Tribunals should ask themselves two questions. Firstly, does there exist one or other of the various states of economic affairs mentioned in the section? Secondly, was the dismissal wholly or mainly attributable to that state of affairs?

91. Section 98(4) of the ERA provides:

> *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *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."*

92. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions

over the years, but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where employees were represented by an independent union. In the Williams case it was stated:

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

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

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

93. The Tribunal also refers to the case of **Capita Hartshead Limited v Byard [2012] IRLR 814** and in particular a passage of Silber J as follows:

"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:-

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

'[9]… The courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn' (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother [2005] All ER(D) 142(May));

'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 will be

difficult for the employer to challenge it where the employer has genuinely applied his mind [to] the problem' per Mummery J in Taymech Limited v Ryan [1994] EAT 663/94, 15 November 1994, unreported):-

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

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.".

94. Provided an employer's selection criteria are objective, a Tribunal should not subject them or their application to over minute scrutiny – see **British Aerospace plc v Green 1995 ICR 1006**. In **Swinburne and Jackson LLP v Simpson EAT 0551/12**, the EAT stated that: "in an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgement and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness." However, where there is clear evidence of unfair and inconsistent scoring the dismissal is likely to be unfair.

95. Employers using performance as a selection criterion need to ensure that employees are compared fairly. That was not the case in **Griffiths v GEA Denco Ltd ET Case No. 1316291/09** where G was placed in a pool with other sales engineers with products which were difficult to sell when compared to other sales engineers.

96. An employee's previous disciplinary record, is sometimes used as a criterion in a redundancy selection exercise. In the context of a conduct dismissal, it was said in the case of **Davies v Sandwell Metropolitan Borough Council 2013 IRLR 374, CA**, that it is not for the tribunal to reopen a prior final warning and consider whether it was legally valid. Questions of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it, or whether it was "manifestly inappropriate" are all relevant to the question of whether dismissal was reasonable. However, only rarely would it be legitimate for a tribunal to go behind a final written warning given before dismissal. Where there had been no appeal against a final warning, there would need to be exceptional circumstances for a tribunal to, in effect, reopen the earlier disciplinary process.

97. Whilst the question of what constitutes fair and proper consultation will vary in each individual case, consultation involves giving the employee a fair and proper opportunity to understand fully the matters about which he is being consulted on, to express his views on those subjects with the consultor thereafter considering those views properly and genuinely. It was suggested in **John Brown Engineering Ltd v Brown 1997 IRLR 90 EAT** that a fair

process would give an individual employee the opportunity to contest his selection which would involve allowing him to see the details of his individual redundancy selection assessment.

98. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

99. The Claimant complains of direct disability discrimination based on his own disability and by association with that of his daughter. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) 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."* In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".*

100. The Act deals with the burden of proof at Section 136(2) as follows:-

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

101. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

102. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

103. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

104. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

105. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

106. The tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

107. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

108. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

109. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

110. Pursuant to section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *B does a protected act; ….*

111. Sub-paragraph (2) of this section provides:

> *(2) Each of the following is a protected act –*
>
> *making an allegation (whether or not express) that A or another person has contravened this Act,;*

112. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the claimant to prove facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent has contravened Section 27. The burden then passes to the respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the discrimination claim.

113. It is clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" (more than trivial) on the employer's decision making, discrimination would be made out.

114. Applying the legal principles to the facts as found, the Tribunal reaches the following conclusions.

Conclusions

115. The tribunal deals firstly with the claimant's complaints of discrimination and victimisation.

116. The complaint of direct disability discrimination is that the act of dismissal was less favourable treatment because of the claimant suffering

from diabetes and/or the claimant's daughter being disabled by reason of her learning difficulties. No facts have, however, been found from which the tribunal could reasonably conclude that either the claimant's disability or that of his daughter was in any sense whatsoever the reason for his dismissal or selection for redundancy. The tribunal accepts that the claimant was selected for redundancy purely on the basis of his scoring against the selection criteria. The criteria themselves did not involve consideration of disability status, nor is there any evidence that Mr Yorke applied them so as to penalise the claimant for his own or his daughter's disability status. A case was never in reality advanced by the claimant, nor certainly put to Mr Yorke, that his assessment of the claimant was tainted by claimant or the claimant's daughter as disabled persons.

117. The complaint was more appropriately pursued as one of discrimination arising from disability, in that the claimant's argument was that he was penalised or viewed unfavourably by Mr Yorke because he had an arrangement to work for the majority of his time from home which arose out of, at least in part, him suffering from diabetes and the difficulties he had in taking his medication if he had to undertake a significant journey from his home to the Manchester office. The tribunal notes that in this type of discrimination complaint, the claimant is not able to rely on another person's disability.

118. The tribunal has obviously found that there was an attempt in early 2019 to limit homeworking or at least to ensure that employees were in the office 5 days each month. The claimant's evidence was that he was happy to attend the office up to 5 days each month, but that he felt the respondent was seeking to breach an agreement he had reached with the respondent which allowed him to work from home on the understanding that he would attend the office for necessary training or particular meetings. The respondent was never seeking to eliminate homeworking, but sought to address a concern that a number of staff had limited visibility due to the extent to which they worked from home. This indeed certainly did not apply solely to the claimant in circumstances where a significant number of his colleagues worked a significant proportion of their time from home. The evidence is that the respondent did not in fact seek to interfere with the claimant's arrangement or that of other staff, who all continued to work as they had done before. In the claimant's case, there was evidence that he already attended the office with sufficient regularity to satisfy the respondent and the matter was effectively closed as at January/February 2019.

119. The redundancy selection criteria did not involve any express consideration of the amount of time an individual spent working from home. The tribunal concludes that it did not play a part at all in Mr Yorke's assessment of the claimant. In particular, Mr Yorke did not downgrade the claimant under the criterion of performance due to any issues he had with the claimant working from home or arising out of that working practice. The closest the claimant comes to being able to shift the burden of proof onto the respondent is the reference to diabetes which Mr Yorke made in his "brain dump" of comments about the claimant. The tribunal, however, has accepted Mr Yorke's explanation as to the nature of this brain dump and

that the comment played no part whatsoever in his assessment of the claimant. The comment is not precisely worded but is suggestive of a factual statement that the claimant had worked from home more since his diagnosis of diabetes. The claimant also relies on the change to the key account executive job description when addressing the issue of location. However, the evidence is of a recognition that employees were still able, particularly if their individual circumstances created a difficulty for them, to work from home as was published to the entire team at risk in the FAQs document. The evidence is not of key account executives now, following the restructuring, being office-based.

120. Again, the claimant's difficulty in this complaint of discrimination is that a significant number of his colleagues worked a significant amount of time from home. As Miss Barry pointed out, if this had been a factor in the redundancy exercise, then a number of people would have been marked down. They were not. A person who worked the majority of their time from home was successful in obtaining one of the key account executive roles. Individuals who were predominantly office-based were made redundant. This is not indicative of the respondent penalising homeworkers in selecting employees for redundancy.

121. The respondent clearly at times has had an issue with the amount of homeworking and a lack of general visibility, but did not allow this to creep into its consideration of individuals in the redundancy selection exercise which, again, would have had consequences for a number of employees, not just the claimant.

122. The claimant's additional complaint of a failure on the respondent's part to make reasonable adjustments overlaps with that of discrimination arising from disability. Within this complaint, he maintains that the respondent, in its choice of selection criteria, applied a practice which disadvantaged the claimant because of his need to work a significant period from home when compared to a non-disabled employee. Again, the claimant was not disadvantaged by the selection criteria which did not involve any consideration of homeworking and were not of such a nature as to make it more difficult for the claimant to score more highly because he spent a significant period of time working from home. The claimant was criticised at times for lack of interaction with direct colleagues or IT technicians, but in circumstances where the respondent recognised that he was able to have those interactions whilst working predominantly from home as indeed had employees who were scored more highly than the claimant.

123. The claimant's complaints of disability discrimination must fail and are dismissed.

124. The claimant brings a separate complaint of victimisation. In terms of a protected act, the claimant relies on the document he submitted in January 2019 in support of his homeworking arrangement and it continuance. The

tribunal refers to its findings above as to the nature of this communication and the claimant's evidence as to its intended meaning. The claimant did not, nor was he seeking to, complain or suggest, whether expressly or by inference, that the respondent was unlawfully discriminating or about to discriminate against him or fail to comply with any Equality Act duty, it being fully understood by the tribunal that there is no need for the claimant to have referred specifically to the legislation or to any potential legal causes of action. The claimant was simply seeking to maintain his existing working arrangements and to make it clear to the respondent that he had an existing agreement which he expected the respondent to honour. There was no protected act.

125. In any event, the tribunal concludes that this communication and the claimant raising issues regarding homeworking in early 2019 was not in any sense whatsoever a reason for Mr Yorke scoring the claimant as he did so as to put him at risk of redundancy resulting in his dismissal. There was nothing problematical or objectionable in the way the claimant raised the homeworking issue and, again, it is clear that the matter was regarded by everyone as effectively closed, such that staff continued to work as they were without any attempt by the respondent to intervene. The claimant's complaint of victimisation must fail and is dismissed.

126. The tribunal now turns to the claimant's complaint of unfair dismissal.

127. The tribunal is satisfied that the claimant was dismissed by reason of redundancy, a potentially fair reason for dismissal. There was, on the evidence, a clear reduction in the need for employees to carry out work of a particular kind. The respondent determined, in the context of a reduction in business and for reasons of greater efficiency, that it had a reduced need for senior account managers and account managers. Indeed, it had no future need for either in circumstances where it determined that the appropriate structure in the business management team was for a smaller number of key account executives concentrating on client relationships and driving revenue, all supported by a lower level of business management process executives who would carry out the menial but time-consuming checking and process driven tasks so as to free up the key account executives to concentrate on growing the business.

128. The tribunal is satisfied that the respondent acted within a band of reasonable responses in determining the pool of selection. The respondent did indeed give this significant and genuine consideration. It considered that there was a need for 3 key account executives and that the work to be undertaken in those positions was most closely aligned with those who held the senior account manager and account manager roles. It concluded, reasonably, that there was no differentiation which could be made between the tasks and responsibilities of senior account managers when compared to those who possessed simply the title of account manager. The differentiation by title between people was a matter of almost historical accident which no one could now explain or justify and the situation had, as a matter of fact, developed that, whatever their title, each of these

individuals looked after a group of car manufacturer brands and their dealership network and sought to service them and develop business opportunities with them in much the same manner. There was no hierarchy between the senior account managers and account managers in terms of any line management responsibility or upward reporting lines. There was no allocation of prestige brands, for instance, to senior account managers rather than account managers. The respondent had created a role of key account executive which had significant similarities with the role undertaken by both senior account manager and account manager but with a marked change in emphasis and where it was reasonable to pool all of the incumbents together, presuming a wish for them to be considered for the position of key account executive, and assess their relative attributes against the new key account executive job specification.

129. The respondent then devised selection criteria which formed a balanced assessment of skills and performance including allowance made for attendance record and conduct. Such criteria were reasonable as a tool for selecting employees for redundancy in that they focused on matters which could reasonably be considered to be relevant to the person's ability to carry out the role of a key account executive and where the criteria were capable of objective assessment. That is not to say that the assessment of, in particular, "performance" did not involve an element of personal judgement by their manager. The employees did not carry out a role with defined KPIs, which would have enabled an almost mathematically objective assessment. Mr Yorke knew well the capabilities of those within the selection pool and was able to make an assessment and to score points against each individual under each criterion where he had been provided with a points scale with an explanation as to what particular point scores represented to enable scoring against defined benchmarks.

130. The respondent failed, however, to adopt a fair process as regards individual consultation. The claimant was taken through a carefully devised process of individual consultation meetings, with copies of the meeting notes provided thereafter, good communication with the workforce regarding the respondent's proposals and rationale and with information given to staff by way of FAQs documents. However, the claimant arrived at the third and final consultation meeting with a knowledge only of the assessment criteria – having been told previously that he would have the chance to have an input into his scores. He was dismissed then without having been provided with his individual scores and any information regarding the score he would have needed to have obtained to be safe in the process. He had no idea how he had been scored against each criterion or of the rationale behind that scoring. This was not something which Mr Yorke would engage with at the consultation meeting, despite the claimant's numerous attempts to get him to do so. He was under an instruction simply to get through the meeting in the time allocated by sticking to a pre-prepared script which did not give the claimant any of the information he would actually have wanted and which would have enabled him to query or mount any challenge to the decision to terminate his employment. Mr Yorke had been told that to get into such discussions would involve further protracted meetings which would achieve nothing. The respondent had effectively made a conscious decision not to consult on the basis that the scores would

be provided after the notification of selection for redundancy with a right of appeal granted if an individual then wished to pursue the matter. That is not, the tribunal finds in the circumstances, a meaningful process of consultation or a course of action which falls within a band of reasonable responses. Simply leaving it to the chance of an employee appealing to achieve a fair and reasonable consultation process is an unreasonable approach to a redundancy exercise.

131. The respondent seeks to argue that any earlier defects were in any event cured by the claimant's subsequent appeal. The tribunal recognises that it is often unhelpful to seek to determine whether an appeal has occurred by way of a review or complete rehearing. An appeal is part of the overall process and the tribunal must step back at the end of the process and consider, as a whole, whether the claimant has now been fairly treated.

132. The tribunal notes in this context that an individual dismissed by reason of redundancy is in a more difficult position than, for instance an employee dismissed by reason of misconduct. An employee dismissed by reason of misconduct may successfully appeal and be quite straightforwardly reinstated into his position. In a redundancy situation, a successful appeal might (and on Mr Jones' evidence would in this case) have involved a reopening of the exercise as there would still have been a need to eliminate cost. This would have involved employees previously informed that they were safe being put at risk again and an element of re-scoring or further consideration of the assessments made of them.

133. The claimant did appeal and that was therefore a chance for the respondent to rectify the earlier failings in the process. On consideration, the tribunal is not, however, satisfied that the appeal achieved that resolution.

134. The claimant by the stage of his appeal hearing had received his scores, the explanation for his scoring and all of Mr Yorke's material working documents which disclosed his thoughts. He was able to put together coherent and detailed grounds of appeal.

135. The appeal hearing was not, however, as arranged, ever going to produce a full and wide-ranging discussion of the justification for the claimant's scoring as would have been required to result in a reasonable process overall. Mr Jones had decided not to read the claimant's grounds of appeal in advance, but instead to allow the claimant to go through those at the appeal hearing itself. He had therefore undertaken no prior investigation regarding the basis for the claimant's scoring and the claimant's contentions regarding the scores awarded. He was not in a position to discuss in a meaningful way how the claimant had been assessed and to answer the claimant's contentions.

136. Whilst Mr Jones did interject and ask a number of questions during

the claimant's presentation, much like Mr Yorke, the direction he had received from HR was to follow a process, say little and for a decision to be given thereafter (crafted by HR).

137. Whilst the claimant requested and was provided with additional documentation after the appeal hearing, including correspondence regarding homeworking, this latter correspondence was provided to the claimant only shortly before Mr Jones' decision rejecting the claimant's appeal was published. The claimant was never going to be given the opportunity to consider the additional documents disclosed and make representations which could be considered by Mr Jones in advance of the decision, let alone the opportunity to actually discuss them with him. Shortly after the appeal hearing, HR commenced writing a detailed report which would act as a justification for the claimant's dismissal and form the basis for Mr Jones' almost inevitable rejection of the appeal.

138. Mr Jones did investigate a number of the claimant's contentions prior to issuing his decision. Investigation was, however, unreasonably limited in the circumstances. He spoke to Mr Fazal about the Toyota complaint. He received further information from Mr Fazal as to what that related to. He did not, however, pass this onto the claimant or ever give the claimant an opportunity to discuss the issue and, in particular, to seek to persuade him that he ought not to have been adversely scored as a result. Mr Jones spoke to Mr Yorke about the Mazda issue, but that indeed was the only thing, on his own evidence, that he discussed with Mr Yorke. He did not discuss Mr Yorke's basis for scoring the claimant or raise with him the claimant's contentions that this scoring was flawed.

139. Mr Jones spoke to HR regarding the attendance and disciplinary scores (only). This aspect of his enquiry was productive in that the claimant was considered to have a reasonable argument for not being penalised for his single and very short period of sickness absence. However, no questions were asked regarding the assessments made of the claimant under the other criteria.

140. The claimant did not have the benefit of a meeting to discuss what Mr Jones had learned but simply then received the written appeal decision. By that point it still cannot be said that the claimant had had the benefit of meaningful consultation where he was able to properly understand, challenge and have considered by Mr Jones the assessment scores which placed him at risk of redundancy. The appeal in this case was not conducted in a manner which cured the defects in the earlier consultation or where the tribunal, standing back, can regard the claimant overall as having had the benefit of a reasonable process of consultation.

141. The claimant's complaint of unfair dismissal must therefore succeed (due to lack of reasonable consultation).

142. The Tribunal must then consider, pursuant to the principle set out in the case of **Polkey**, whether, had the defects in consultation been rectified, the claimant would and with what degree of certainty have been dismissed fairly in any event by reason of redundancy.

143. The claimant's score under attendance was uprated to, therefore, give him a total score in the redundancy assessment of 27 points. He would then still have required an additional 5 points to draw level with the lowest scoring of those successfully retained in the key account executive positions.

144. The claimant was reasonably scored under the criteria of conduct with just 1 point allocated on the basis of his final written warning. There were two issues of misconduct which resulted in that final written warning. The issue regarding the inappropriate email correspondence appears, if not trivial, to be at the lower end of the potential disciplinary scale, with the conduct towards the infrastructure technician clearly of a potentially more serious nature given the clear offence and upset caused by the claimant's inappropriate conduct. This appears to have been a situation where a range of disciplinary penalties might have been reasonably adopted by the respondent but where the tribunal cannot say that a final written warning was manifestly inappropriate. Again, the claimant did not appeal the warning and there is no evidence of bad faith or ulterior motive. The claimant, in evidence, at one point said that it was only manifestly inappropriate if used in a future context, i.e. the redundancy scoring, which he had not anticipated at the time. He might have thought that he had little chance of a more favourable decision on appeal, but he made the choice not to contest it and it was reasonable for the respondent to mark the claimant down accordingly in the redundancy selection exercise upon the basis of this warning having been given and being live on the claimant's file.

145. As regards the claimant's score under the criterion of skill/competence, there was a downgrading after moderation with Ms Livingston from an initial score awarded by Mr Yorke of the maximum of 15 to a score of 13 points. The tribunal is satisfied that the change to his scoring took place after what was a genuine and thorough moderation process, where Mr Yorke was challenged to justify his scores by a human resources professional who has no personal knowledge of the claimant and was able to consider Mr Yorke's justification of the scoring of individuals under this category without any preconceptions. He was not alone in being adversely affected by the additional scrutiny. The tribunal considers the final score to have been reasonably and objectively awarded in circumstances where Mr Yorke's evidence is clearly to the effect that a score of maximum points in this category would not have been justifiable and would not have recognised a reasonable differentiation between others in the assessment exercise. Clearly there was evidence, for example, of Tracey Oakes being proactive in training and supporting others which would have justified her ranking more highly in this category than the claimant. Furthermore, the claimant's technical skills and lack of experience in the DBS system, which was, on the evidence, clearly a material future requirement within the respondent, reasonably translated to a further loss of a point when compared to the

maximum available. The claimant scored still very highly under this criterion, but was reasonably scored at a level 2 points below the maximum in circumstances where the claimant could not have argued, had there been a full and fair consultation process, for any further enhancement.

146. That leaves the claimant in a position where, to have any prospect of safety in the redundancy exercise, he was going to have to be able to persuade the respondent that he ought to have scored 5 additional points under the criterion of performance, an uplift from a score of 8 to 13 points.

147. The claimant was downmarked because of the view taken of his performance on upsell. Had the tribunal not found that the claimant was unfairly dismissed by reason of lack of individual consultation, it would have considered, in any event, that the claimant was unreasonably judged on his upsell performance. It is clear that Mr Yorke realised that this would be a controversial measure in circumstances where individuals' opportunity to upsell was to a material extent affected by the brands they were responsible for. In the check-in document, when future targets were raised with the claimant for upsell, it was recognised by Mr Yorke that there would need to be differential targets for the account managers dependent upon the brands they looked after. However, in Mr Yorke's assessment of account managers against this criterion there was no allowance for those differences. The claimant did have more difficulties than others in achieving significant upsell. There was no reasonably level playing field when this criterion was assessed which could in turn have resulted in an unfair score. On the other hand, the tribunal notes that others had achieved upsell figures more than double the claimant's. The claimant's figures were less than half of the top three assessed. There is also corroborative evidence that this was not an area in which the claimant was strong and one which he did not see as a priority. The claimant's most recent check-in illustrates his performance on upsell regarded by Mr Yorke as needing an improvement in circumstances where this was genuinely seen as a priority by the respondent. The claimant in his personal statement had an opportunity to blow his own trumpet, if he had been able to, in terms of what he had been doing to enhance revenue for the respondent and in circumstances where was well aware of the priority the respondent gave to upsell. Other than a single mention of driving profitability without specific examples of steps taken or achievements, he provided Mr Yorke with no basis for scoring claimant more highly. Whilst, had a fair process been followed and this criterion fairly assessed, the claimant might have achieved an enhanced score, the tribunal is able to safely conclude that this would have involved a small uplift only.

148. The only other area where the claimant might be found to have been unreasonably assessed was a downmarking on the basis of the number of accounts handled. Mr Yorke, on his own evidence, failed to recognise and was unaware that in the past the claimant had managed simultaneously a large number of brands. By chance of opportunity and memory, he knew more of what other account managers had done in the past. The claimant was therefore effectively unfairly penalised by the timing of the redundancy selection exercise and Mr Yorke's lack of investigation into the past. Again, however, the tribunal is able to conclude that a reasonable assessment of

the claimant would not have produced anything more than the addition of a single point in the scoring exercise. This was not an area where any special emphasis was given.

149. The claimant was reasonably penalised in respect of the Toyota issue. The Mazda issue is more problematic in terms of the claimant's point scoring in that it was recognised that every account manager would have issues from time to time in terms of relationships with particular brands and some people would not be the best fit for every client through no fault of their own. Nevertheless, client relationships were important and the Toyota issue would have involved an adverse scoring. The same would apply to the claimant's assessed lack of ability to show innovation in creating efficiencies and in the evidenced reluctance of the claimant to use assistants, even when available, in circumstances where he rendered himself less efficient by having to expend more time on menial tasks rather than trusting others with routine dealership checking. This had been brought to the claimant's attention as a concern during his employment. It was important in the key account executive position going forward that the post-holders concentrated on areas where they could grow the business and provide enhanced value, allowing more junior employees to carry out the more routine tasks to free them up to do so.

150. In essence, the performance failings reasonably concluded to be possessed by the claimant would inevitably have involved him receiving a score (well) less than the 13 points necessary for him to have had any chance of safety in the redundancy selection exercise. The enhancements he could have achieved had he been reasonably assessed (after reasonable consultation) under the factors of upsell and the handling of numerous accounts would not have been sufficient to bridge the gap from 27 to 32 points. The tribunal can reach that conclusion on the evidence and without embarking on an impermissible sea of speculation.

151. The tribunal is able, therefore, in all of the circumstances to reach a conclusion that, had a fair process of consultation and selection been followed the claimant would, with a 100% degree of certainty, have been fairly dismissed by reason of redundancy. Nor would his period of employment have been prolonged in circumstances where he was served with and remained in employment in any event during a lengthy period of notice.

152. In the circumstances there is no need to make any finding on the respondent's alternative submission that it would not be just and equitable to award the claimant compensation arising out of his covert recording of meetings.

Employment Judge Maidment

Date 5 March 2021