Case Number: 2206692/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J. Richardson	**V**	**OMD EMEA Limited**

Heard at: London Central (by video) **On**: 8 and 9 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms R. Owusu-Agyei (of Counsel)

For the Respondent: Mr S. Steen (solicitor)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

Reserved Judgment

1. The claimant was unfairly dismissed.

2. The respondent is ordered to pay the claimant compensation for unfair dismissal of £29,694.35 comprising of:

2.1 Basic Award:	£6,456
Less SRP received	(£6,456)
Total Basic Award	£nil

2.2 Compensatory Award:

2.2.1 Immediate Loss (between the effective date of termination and the date of the loss assessment – 12/03/21) (net)

Loss of salary and benefits:	£47,950.49
Less Credit for:	
Holiday Pay received:	(£2,092.99)
Notice Pay received:	(£17,005.54)
Loss of statutory rights:	£500
Immediate Loss	£29,351.96
"Polkey" 50% reduction	£14,675.98
Total Immediate Loss	£14,675.98

2.2.2 Future Losses (net):

Continuing at a monthly net rate of £6,128.13	
for 3 months	£18,384.39
And continuing at a rate of 25% of previous remuneration	
for 6 months	£9,192.16
Future Losses:	£27,576.55
"Polkey" 50% reduction	£13,788.30
Total Future Loss	£13,788.30

Total Compensatory Award	£28,464.28

Grossing up net total compensatory award:

balance of £30,000 allowance not used by SRP		(£23,544.00)
amount to be grossed up:		£4,920.28
After grossing up	@ 20%	£6,150.35

Adding back tax-free amount: £23,544.00

Total Compensation for Unfair Dismissal: £29,694.35

For the purposes of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996:

(a) The Prescribed Element is: £14,425.98 = £14,675.98 (lost earning up to the date of the conclusion of proceedings – 12 March 2020) less £250 (compensation for loss of statutory rights reduced by "Polkey" 50% reduction);

(b) The Prescribed Period is: 17 July 2020 (EDT) to 12 March 2021 (conclusion of the tribunal proceedings);

(c) The total monetary award is: £29,694.35;

(d) The excess of the total monetary award over the Prescribed Element is: £15,268.37.

3 The claimant's claim for breach of contract fails and is dismissed.

REASONS

Claim

1. By a claim form presented on 12 October 2020, the claimant brings claims for unfair dismissal and breach of contract (notice pay). The claimant claims that he was dismissed unfairly, and that the respondent was in breach of his contract of employment by failing to pay him in full in lieu of six months' notice. The claimant does not accept that there was a redundancy situation and that he was dismissed by reason of redundancy.
2. The respondent accepts that the claimant was dismissed but denies dismissing him unfairly. It avers that there was a genuine redundancy situation, and that the claimant was dismissed by reason of redundancy and it was a fair dismissal within the meaning of section 98(1) of the Employment Rights Act 1996 ("ERA"). It further avers that if the dismissal were found to be procedurally unfair, the claimant would have been dismissed in any event and therefore any compensation award must be reduced accordingly.

3. The respondent denies that the claimant was entitled to six months' notice of the termination. It avers that under his contract of employment, the claimant was entitled to two months' notice, and the respondent paid him in lieu of notice for three months and therefore paid in excess of his contractual entitlement.
4. The claimant was represented by Mr S. Steen (solicitor) and the respondent by Ms R. Owusu-Agyei (of Counsel). I am grateful to both representatives for their submissions and assistance to the tribunal.
5. I heard evidence from six witnesses, for the respondent: Ms K. Parker (former Chief Client Officer of the respondent), Ms L. Kell (Group Managing Partner of the respondent) and Ms N. Ladwa (Business Partner in the People Team at the respondent); and for the claimant: Ms T. Whamond (former respondent's Head of People), Mr C. Farrow (former Executive Director of the respondent) and the claimant himself. All witnesses gave sworn evidence and were cross-examined.
6. I was referred to a bundle of documents of 297 pages the parties introduced in evidence.
7. At the start of the hearing, I discussed with the parties the issues I needed to determine.

Breach of Contract

8. The issue I need to decide is whether the claimant's contract of employment was effectively varied to increase his notice entitlement to six months. The claimant says that when he was promoted to the Executive Director ("ED") role in July 2015 he received a letter confirming his promotion, which stated that his notice period was increased to six months. He was unable to find a copy of that letter. He says it was the respondent's policy to have all EDs on six months' notice and submits oral and written evidence, including witness evidence of Mr C. Farrow and Ms. T. Whamond, in support of his contention.
9. The respondent denies that the promotion letter issued to the claimant varied his notice entitlement. It relies on the terms of the agreement and an electronic copy of the promotion letter it was able to find, which confirms the claimant's promotion to ED but does not vary his notice period. It states that

all other terms and conditions of employment remain unchanged. The claimant disputes that it is a true copy of the promotion letter he received.

Unfair dismissal

10. To resolve the complaint of unfair dismissal, I need to answer the following questions:

    10.1 Was there a redundancy situation?

    10.2 If the answer is yes, was the claimant dismissed for that reason?

    10.3 If I find that he was not dismissed for redundancy, the claimant's dismissal would be unfair. The respondent did not plead in the alterative any other reason for the dismissal.

    10.4 If I find that the claimant was dismissed for redundancy, the next question is whether the respondent acted reasonably in treating that reason as a sufficient reason for dismissing the claimant. I must determine this question in accordance with equity and the substantial merits of the case.

    10.5 If I determine that the claimant's dismissal was procedurally unfair, I will then need to decide whether, if a fair procedure had been followed, the claimant would have been dismissed in any event and/or to what extent and when ("Polkey issue").

    10.6 Finally, if I find that the dismissal was unfair, in deciding what compensation should be awarded to the claimant, in addition to the Polkey issue, I will need to asssess the claimant's financial losses arising from the dismissal and whether he took reasonable steps to mitigate them.

Findings of Fact

11. The respondent is an international media communications agency. The claimant was employed by the respondent from 3 November 2008 until his dismissal on 17 July 2020. His last position with the respondent was an Executive Director in the respondent's Client Services department. He was promoted into that role in July 2015 and received a letter confirming his promotion. The content of that letter is in dispute. The claimant did

not have a direct line manager. He was part of a team of EDs and Managing Partners ("MPs") reporting ultimately through to Ms K. Parker, the Chief Client Officer.

12. Ms Parker was a member of the respondent's senior leadership team ("SLT") with specific responsibilities for managing clients' relationship, together with a broader responsibility for managing the respondent's organisation.
13. On the next level below the SLT in the respondent's business structure are Group Managing Partners ("GMP"), who are responsible for managing larger groups of clients, and executives in the "Strategy and Specialist Teams" (Marketing, Intelligence, Performance), who are responsible for their specialist area.
14. Below the GMPs are Client MPs and Client EDs, who are responsible for day-to-day running of client relationship on specific client accounts. Client EDs are typically line managed by Client MPs. Ms Parker had about 46 MPs and EDs within her line of command and had indirect oversight of all client facing employees of the respondent, about 188 people.
15. The respondent operates on an annual financial plan basis, and its payroll and headcount for the operating year are linked to that annual financial plan. The respondent's financial plan for 2020 anticipated an increase in revenue. However, due to the pandemic its clients in the UK and globally reduced their spend, and the respondent's revenue started to decline quickly, causing a significant impact on the respondent's income and revenue forecast for the year.
16. The respondent was given a mandate from its head office in New York to make significant cost savings. It was given a specific costs saving's figure it had to achieve.
17. The respondent implemented various costs saving's measures by stopping recruitment, placing staff on furlough, and in introducing temporary salary cuts for the SLT. These measures were not sufficient to attain the costs saving's target mandated by the head office.
18. The respondent decided that it needed to reduce its headcount by removing roles at the MP / ED level of the business, but the reduction should apply only to employees in those roles earning £80,000 or more.

19. In or around May 2020, the respondent identified a pool of MPs and EDs. From the total of 46 MPs and EDs, 20 MPs and EDs working in the Client part of the business were placed in the pool, including the claimant. Excluded from the pool were employees on maternity leave and those on secondment to the respondent's clients.
20. The respondent devised selection criteria based on a template from its sister UK agency. Each person in the pool was scored against 10 criteria: Lead Self, Client Builder/Relationship, Commercial Acumen, Team Player, Craftmanship, Attention to Detail, Industry Knowledge, Business Specific, Operation and Administrative Efficiency, and Time Management/Productivity.
21. Each criterion had a short narrative in the scoring sheet. For example, "Commercial Acumen" was described as: "*Understands and makes well informed decisions across the commercial area in order to drive business growth. Demonstrates effective management of financial hygiene including; timely and accurate submission of timesheets, reconciliation, query resolution etc, looks for opportunities to increase revenue and to minimise costs and write offs*"; and "Team Player" as "*This is about giving and getting the best from the team and working in a productive way, through collaboration, not only in PHD but also with clients, partners and others. Factors to be assessed; giving their best and getting the best from the team, displays teamwork, can do attitude and effective collaboration, goes above and beyond for the immediate and wider agency team e.g. volunteers to put self forward for extra curricular activities*."
22. Each criterion was scored from 1, being poor to 4, being excellent. The scoring was done by two groups of scorers: the SLT group and by the Specialist and Strategy GMPs group. The SLT group consisted of Ms Parker and two Client GMPs into whom EDs and MPs in the pool reported (Ms Jen Meyer and Mr Phil Grimmet). The Specialist and Strategy GMPs group comprised of two GMPs (Laura Kell and Kate Ivory).
23. The respondent did not wish to have MPs, who were direct line managers of EDs in the pool to score them, because MPs were also in the pool and essentially were in competition to stay in the job with their direct reports.

24. There were two scores. The first score ("Assessor 1" score) was from the SLT group, which was Ms Parker's score averaged with the score from one of the two Client GMPs. The second score ("Assessor 2" score) was the average score provided by the Specialist and Strategy GMPs group. Both scores were added together to give the total score against each criterion. Some criterion had a weighting factor, in which case the final score for that criterion was multiplied by that factor. The total score of the person in the pool was the sum of all criteria's total scores.
25. The scoring took place on 21 May 2020. The claimant was scored by Ms Parker and Ms Meyer for the SLT scoring group, and by Ms Kell for the Specialist and Strategy GMPs group. Ms Meyer scored the claimant "3" on all 10 criteria. Ms Parker scored the claimant "3" on six criteria, "2" on two criteria and "1" on two criteria. Ms Kell scored the claimant "4" on three criteria, "3" on six criteria and "2" on one criterion. Ms Kell provided a short positive narrative with her scores.
26. Having first provided her scores, Ms Meyer subsequently withdrew them because she felt she did not have sufficient interactions with the claimant to form a view against the set criteria. Ms Parker decided that only her scores should be used as the SLT group scores.
27. The claimant's total combined score was 130. There were 5 lower scores and 14 higher scores. The next higher score was 133. The respondent made some arithmetical mistakes in calculating scores of five persons in the pool. However, these mistakes do not change the claimant's score or his ranking.
28. After the scoring had been done and the employees in the pool ranked by their score, the SLT reviewed the list by moving from the lowest scored employee upwards to determine how many employees they needed to make redundant to meet the savings target. The result was the bottom six employees, including the claimant. On this basis the respondent set the cut off score as 130, being the claimant's score.
29. Having identified the six employees for redundancy, the respondent then consulted with its head office in New York to check whether they could proceed with all six, as some of them worked on what the respondent considered business critical accounts and thought that their dismissal

could cause negative impact on the respondent's business with those clients. The respondent refers to that as a "business continuity" review. The result of that was that two out of the six were removed from the list for redundancies and kept their jobs.

30. On 16 June 2020, the respondent invited the claimant on a "heads-up" MS Teams call during which informed him that his role had been provisionally selected for redundancy. It explained that it was due to continued reductions in client scopes and revenue, which had resulted in the requirement to reduce the cost base of the senior client leadership. The claimant was told that after the scoring exercise of all MPs and EDs his score was one of the lowest, and therefore his role was potentially at risk of redundancy and that there would be a consultation process over the coming weeks.
31. On 18 June 2020, the respondent wrote to the claimant confirming that his role was provisionally selected for redundancy and inviting him to the first consultation meeting on 22 June 2020.
32. The consultation meeting was attended by Ms Parker, Ms Ladwa and Ms Patel (as a note taker) and Ms Kell (as the claimant's support companion). Ms Parker explained the scoring criteria. She said that before arriving to her scores she had consulted with Mr Neil Hurman, who had worked with the claimant in the past, took into account her discussions with her predecessor, Mr A. Tomkins (who had left the company in February 2020) and had reviewed the claimant's latest performance appraisal. She said that she had taken scores from Ms Meyer or Mr Grimmet, but they had declined to score the claimant in many areas and therefore she had decided not to use their scores. She said, she would be happy to go back to them and ask to score the claimant, if the claimant wished her to do so. Ms Parker did not tell the claimant that Ms Meyer had scored the claimant on all ten criteria and subsequently had withdrawn her scores. The claimant requested to see the criteria and the scoring notes and said that he would submit his questions after seeing those. The claimant was informed about possible alternative roles, told that a list with those would be sent to him and that his redundancy pay would be calculated by the statutory formula.

33. On 22 June 2020, Ms Ladwa sent to the claimant the minutes of the meeting, a blank criteria assessment form and a list of vacancies.
34. On 29 June 2020, the claimant sent to Ms Ladwa a list of questions. There were 470 questions in the document about the selection pool, process, scoring and business rational. The respondent answered 36 general questions but did not provide answers to specific questions on each of the criterion and questions addressed to individual scores seeking detailed justification for their scores. The respondent also provided the claimant with his total score against each of the criterion on 1 July 2020, and on 3 July 2020 added the maximum score available for each criterion.
35. On 6 July 2020, at the second consultation meeting attended by the same people, the claimant's scoring was discussed, in particular with respect to his low scores on Team Player, Commercial Acumen and Craftmanship criteria. Ms Parker told the claimant that the scores would not be changed. I accept the claimant's evidence on this. This question was put to Ms Parker on cross-examination. Her response was vague. She did not deny saying that. She only pointed out that the quote in the claimant's handwritten notes did not have her name written next to it. She also said that there needed to be significant reasons to change the score and that she had not before been through a redundancy process and had not been given legal or HR advice that score could be changed.
36. It was agreed at the second consultation meeting that the respondent would be sent a combined feedback from the scorers. On 8 July 2020, Ms Kell sent to Ms Ladwa her feedback on the claimant's score against Commercial Acumen, Team Player and Craftmanship. The feedback was positive. Ms Parker made changes to Ms Kell's write-up and in such modified form it was forwarded to the claimant on 9 July 2020. The changes made to the feedback made it less positive. Some comments were changed from being positive or neutral to give them more negative connotations.
37. At the hearing Ms Parker denied making any changes to the document. However, Ms Ladwa, who was also a respondent's witness, was clear in her evidence that it was Ms Parker who had made the changes. She suggested that Ms Parker might have forgotten that, due to the passage of

time and her leaving the respondent. I find that Ms Parker was responsible for making the changes to Ms Kell's feedback note. The respondent did not send to the claimant Ms Kell's original version.

38. The third consultation meeting took place on 13 July 2020. Ms Kell did not attend that meeting because she felt uncomfortable acting as the claimant's representative when she was one of the two scores. The feedback was discussed at the meeting. Ms Ladwa also read out some of Ms Kell's original feedback. Ms Ladwa confirmed that no alternative role had been found for the claimant and he would be dismissed with effect from 17 July 2020, which was confirmed in a letter of 13 July 2020.
39. The claimant appealed his dismissal. His appeal was heard by Ms Gina Ramson-Williams on 17 August 2020. She rejected his appeal and confirmed the dismissal decision.
40. The respondent paid the claimant his statutory redundancy, for accrued but untaken holiday and three months' salary in lieu of notice.

The Law

41. Section 139 (1) of ERA defines redundancy as follows:

> "an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
> the fact that the requirements of that business—
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
> have ceased or diminished or are expected to cease or diminish"

42. The law relating to unfair dismissal is set out in section 98 of ERA.

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

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

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

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

…….

(c) is that the employee was redundant;"

43. In determining whether an employee was dismissed for reason of redundancy the tribunal must decide:

(i) was the employee dismissed?

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

(iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution? (Safeway Stores plc v Burrell 1997 ICR 523, EAT).

44. It is for the employer to prove the asserted reason for dismissal. If it fails to do so, the dismissal will be unfair. A reason for dismissal is "is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee." (Abernethy v Mott, Hay & Anderson [1974] ICR 323).

45. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

"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."

46. Procedural fairness is an integral part of the reasonableness test is section 98(4) of ERA. In redundancy dismissal "*the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation*" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL).
47. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (Williams v Compair Maxam Ltd [1982] ICR 156).
48. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the tribunal should be slow to interfere with the employer's choice of the pool. However, the tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances.
49. The selection criteria must be objective and not merely reflecting personal opinions of scorers. It must be verifiable by reference to objective data. The fact that certain selection criteria may require a degree of judgement on the employer's part does not necessarily mean that they cannot be assessed objectively or dispassionately (Mitchells of Lancaster (Brewers) Ltd v. Tattersall (UKEAT/0605/11/SM) .
50. Provided the employer's criteria are objective and their application were reasonable (to be assessed by the test of the range of reasonable

responses), the tribunal must not engage in a re-scoring exercise. However, where there is clear evidence of unfair and inconsistent scoring the resulting dismissal is likely to be unfair. (British Aerospace plc v Green and ors 1995 ICR 1006, CA)

51. A fair consultation would normally require the employer to give the employee "*a fair and proper opportunity to understand fully the matters about which [he] is being consulted, and to express [his] views on those subjects, with the consultor thereafter considering those views properly and genuinely*." (per Glidwell LJ in R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72) cited with approval and as applicable to individual consultation by EAT in Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT "*when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests*". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT)
52. If the tribunal decides that the dismissal is procedurally unfair, as part of considering the issue of remedy it ought to consider the question whether the employee would have been fairly dismissed in any event, and/or to what extent and/or when. This inevitably involves an element of speculation. However, the tribunal may reasonably take the view that based on the evidence available it might be too speculative and uncertain to try and predict what might have happened if a fair procedure had been followed (Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT).

Discussions and conclusions

Unfair dismissal claim

Was there a redundancy situation?

53. The claimant submits that the respondent failed to provide any evidence of its restructure in the form of budgets, structure charts, organograms etc., to show that there was a genuine redundancy situation. It says a mere assertion that it was given by its head office a savings target (which was not disclosed in the proceedings) is not sufficient to show that there was indeed a redundancy situation with the meaning of the s 139 (1) of ERA. Further, the claimant's clients were not reducing their spend and therefore there was no diminution of his work.
54. The respondent says that the contemporary documents (heads up talk notes, letter inviting the claimant to the first consultation meeting) and witness evidence of Ms Parker show that there were reductions in the revenue due to the respondent's clients curtailing their spend, which necessitated the respondent taking costs saving measures. As part of such measures the respondent decided that its requirements for employees to carry out work of a particular kind had diminished or were expected to diminish. It was that state of economic affairs that caused the respondent to dismiss the claimant, and the tribunal must not engage into an in-depth analysis of the economics of the situation.

55. While I find that the real impetus for the redundancies was the costs saving mandate issued by the head office in New York, nevertheless, I find that due to the decline in revenue, the respondent was in the economic situation where its requirements in employees to carry out work of a particular kind were diminishing or expected to diminish. The fact that the volume of the claimant's work was not diminishing or even if it was not expected to diminish is irrelevant. The statutory test is not whether the requirements for an individual employee (the claimant) to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish, but employees in general. Therefore, I find that there was a genuine redundancy situation.

<u>Was the claimant dismissed for redundancy?</u>

56. I am also satisfied that there is clear causal link between the redundancy situation and the claimant's dismissal. The claimant did not argue that he was dismissed for some other reason. Based on the evidence I heard I find there were no such other "hidden" reasons to dismiss the claimant.
57. Therefore, I find that the claimant's dismissal was by reason of redundancy.

Did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant?

58. Now I need to decide whether the dismissal was fair or unfair by reference to the statutory test in section 98(4) of ERA.
59. The claimant submits that the process was unfair because the respondent failed to properly consult with the claimant. He submits that the respondent had taken the decision to dismiss him before it opened the consultation. The consultation was not genuine, information was withheld, questions not answered, there was no consultation on the need for redundancies and on the scoring method. No proper considerations were given to avoiding redundancies.
60. The claimant also says that the pool was unfair because it had both EDs and MPs, who are more senior and experienced, and because some EDs and MPs were excluded from the pool. The respondent did not score everyone in the pool but only 20 out of 46, the criteria was not objective, the scoring process was unfair, the application of the criteria by Ms Parker was unfair because she did not have sufficient and correct information about the claimant to fairly assess him and apply her scores, and therefore she did not score him objectively. There was a lack of consistency and clarity in the whole process. Two of the selected employees were simply "saved" by the New York head office without any fair selection applied. The appeal process was unfair because it was not a re-hearing and was not done by an independent person. The was no proper quality control of the scoring exercise.

61. The respondent reminds me that I must not fall into the error of substitution, and that the redundancy process did not need to be perfect or even good. It needed to be within the range of reasonable conduct open to a reasonable employer. The respondent says that all the steps taken by the respondent were within the range.
62. It argues that it was reasonable for the respondent not to inform the claimant and other selected employees about their roles being at risk of redundancy until after it had done the selection. Informing all employees in the pool would have caused unnecessary uncertainty in the team, which could have had further adverse consequences on the respondent's business.
63. Further, it argues, that the selection of the pool was reasonable. It was open to the respondent to include in the pool only MPs and EDs earning £80,000 and more, and to exclude employees on maternity leave and on client secondments.
64. It says the criteria was objective. It did involve the scorers exercising their value judgment, however, that does not mean that the criteria were outside the range of reasonable responses. It refers me to the EAT judgment in Mitchells of Lancaster (Brewers) Ltd v. Tattersall (UKEAT/0605/11/SM) in support of that contention.
65. It further submits that the application of the criteria was reasonable. Ms Parker was sufficiently informed by her own observations of the claimant's work and his participation in business meetings. Before scoring him, she had spoken with other senior employees who worked with the claimant and had reviewed his latest performance appraisal. Because the claimant did not have a direct line manager that was the best she could do in the circumstances. The claimant himself could only suggest one other person, Mr Jennings, who he thought was a suitable scorer for him. However, Mr Jennings was himself in the pool, and therefore it would not have been appropriate for him to score the claimant.
66. It argues that it was reasonable to exclude Ms Meyer's scores because she did not feel comfortable scoring the claimant due to her limited knowledge of his work. Ms Parker did not need to find another SLT scorer, and it was reasonable for her to use her scores only. Similarly, the

claimant was scored only by one scorer from the Specialist and Strategy GMPs group, Laura Kell, because Ms Ivory also felt that she could not score him. 50% of the scores of Ms Parker and Ms Kell are the same, 30% vary just by one point, one score – by 2, and one by 3 points. The claimant does not dispute Ms Kell's scores. Ms Parker's scores are within the range of reasonable responses and the tribunal must not engage in the re-scoring exercise.

67. It further argues that it was equally reasonable for the respondent to apply a further criterion of "business continuity" and deselect two employees because the respondent had decided that their dismissals might jeopardise business critical accounts they worked on.
68. Finally, it submits that the consultation was genuine and reasonable. There were three consultation meetings, at which the claimant was given ample opportunity to air his concerns, those were conscientiously considered, the respondent provided the claimant with reasonable information before the meetings and answered all critical questions. It provided the claimant with available alterative roles. It was not obliged to create roles that did not exist in the organisation. The claimant was allowed to appeal his dismissal. His appeal was properly dealt with. There is no requirement for dismissal appeals to be dealt with as a re-hearing. The appeal was heard by a senior HR person, who was not involved in his scoring or otherwise in the selection process.
69. On the Polkey issue, the respondent argues that if there were any flaws in the selection process, even with those flaws corrected the claimant would have still been dismissed because there were no other roles in the respondent's organisation and any re-scoring exercise based on the evidence would have resulted in the same score for the claimant.

70. I shall deal with each element of the process and then look at the process as a whole.

71. I find that it was within the range of reasonable responses for the respondent to conduct the redundancy exercise by first selecting employees in the pool and then informing them that their roles were

provisionally selected for redundancy. In my judgment, it was not unreasonable for the respondent to consider that telling all Client MPs and EDs that they might lose their jobs could have had an adverse impact on the business, in the circumstance where it was already suffering declining revenues and operating in very uncertain business conditions caused by the pandemic. I do not accept that the respondent was obliged to consult the selected employees about the need for redundancies of the selection method. The respondent was not in the situation which required a collective consultation, which would have necessitated discussing these issues with the employees' representatives.

72. However, having chosen that route, the respondent was still required to conduct the subsequent individual consultation procedure in a fair way, which, in my judgment, required the respondent to be open to the possibility of the selected employees not being ultimately dismissed.
73. I find that, having chosen the six lowest scored employees by moving up the list to reach the costs saving target, and then having the "decision to move ahead" on four out of six "endorsed" (as Ms Parker put it in her witness statement) by the head office, it had gone beyond what it then described as a "provisional selection of a role", and had constrained its ability to avoid dismissing the selected employees.
74. I find that when the decision "*to move ahead with the proposed redundancies*" of four employees, including the claimant, had been "endorsed" by the head office, the respondent had effectively decided to dismiss them for redundancy before informing them and before going through a proper individual consultation process. There was nothing more "provisional" about the claimant's redundancy. The option of the claimant retaining his role was no longer open. The only possible escape route was for him to find another suitable role within the respondent, but those did not exist.
75. Therefore, I find, that the consultation process was flawed because the respondent put itself in the position where it was unable to make any other decision to avoid the claimant's dismissal, irrespective of how persuasive the claimant's arguments might have been about flaws in his scoring.

76. The respondent was simply not prepared to change the score. I accept the claimant's evidence that it was how Ms Parker put it to him. That is not surprising, because having linked his score of 130 as the cut off score to the committed costs saving target, and having the claimant's dismissal "endorsed" by the head office, the respondent put itself in the position where it had to defend the claimant's 130 score come what may.
77. All other options were unattractive. Increasing the claimant's score would have meant either missing on the costs saving target or having someone else selected instead of the claimant. However, the next lowest scored candidate at that stage would not have been informed that his position was at risk and could have equally challenged their scores. Starting a new consultation process with such replacement candidate would not only have delayed the process but there would be no guarantee that the respondent would not end up in the same situation again. It would be equally unattractive to run the whole selection process from the start.
78. In judgment, this predicament explains the respondent's conduct during the consultation process, including the respondent not being transparent and open that Ms Meyer had scored the claimant and then withdrew her scores, not providing the claimant with his score breakdown, modifying the positive feedback provided by Ms Kell. I find that those actions of the respondent further aggravated the unfairness of the consultation process.
79. I also find that the respondent failed to properly consider alterative options to the redundancy, other than sending to the claimant a list of available roles outside his skills set. The respondent says that the claimant never suggested any alterative options, such as part-time working or furlough, and if he had the respondent would have considered those. However, the duty is on the respondent to consult with the view of avoiding dismissal, including by considering alterative options. The fact that the claimant did not suggest those options himself, in my judgment, does not negate the respondent's duty to genuinely apply its mind to such options. I find that it did not do that. This, by itself, would not have been enough to turn into unfair what otherwise was a fair redundancy process. However, in the circumstances, it was a further procedural flaw adding up to the already seriously flawed process.

80. In summary, I find that the consultation process was not fair and genuine and it was not conducted in accordance with the principles endorsed by the EAT in Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT. (see paragraph 51 above).

81. I find that the respondent did genuinely apply its mind to the selection pool and the pool it chose was within the range of reasonable responses. The choices of not including all MPs and EDs in the pool, or having MPs and EDs in the same pool, or including in the pool only those earning £80,000 or more, in my judgment, were perfectly open for a reasonable employer to take.

82. I find that the selection criteria chosen by the respondent were such that required the scorers to exercise their judgment based on their personal knowledge of the claimant's performance and personal characteristics. It was more akin to a performance review. However, I do not find that the chosen criteria were such that it would not have been open to a reasonable employer to choose. Further, each headline criterion was supplemented by short narratives giving the scorers reference points by which to assess the candidates.

83. However, I find that having chosen such criteria, to ensure that the scoring was done in a fair and consistent way the respondent needed to take sufficient steps to enable the scores to exercise their value judgment based on correct, relevant, and as far as reasonably possible, complete information.

84. I find that Ms Parker did not have all relevant information to apply her scores against the criteria. I find that because on her own evidence she never worked directly with the claimant and never been with him in the same business meeting. She did take steps to inform herself by speaking to other business leaders, however, those who she had spoken with also had limited and not up to date knowledge of the claimant's work. Her comments during the consultation meetings that her scores were based on her perception of the claimant and how she saw him against his peers further show that her scoring was a perception based and done on the

basis of how she saw the claimant in comparison to his peers, whom she might have known better. Her scores also appear inconsistent with the claimant's latest performance appraisal, which she said she had reviewed before scoring him "*to sense check the position I had taken*". Further, in applying her scores, she used incorrect information, for example about the claimant's work on the UEFA pitch, when in fact he did not work on it.

85. On many criteria her scores were lower than, and on two criteria at the opposite ends with, Ms Kell's scores, who knew the claimant's work much better. He scores were also consistently lower than Ms Meyer's, who was closer to the claimant's work and yet felt not close enough to score him fairly. This, in my judgment, should have caused Ms Parker to pause and consider whether she applied her scores correctly. She did not.
86. Further, her justifications for low scores on "Team Work" and "Commercial Acumen" do not easily match with the description of those criteria. On "Team Work" (she scored the claimant 1 – poor), the criterion the candidate should be assessed by reference to: "*This is about giving and getting the best from the team and working in a productive way, through collaboration, not only in PHD but also with clients, partners and others. Factors to be assessed; giving their best and getting the best from the team, displays teamwork, can do attitude and effective collaboration, goes above and beyond for the immediate and wider agency team e.g. volunteers to put self forward for extra curricular activities*". However, the feedback provided to the claimant after his first consultation meeting explains his low score by the claimant in his interaction with SLT (which he was not a part of) not being sufficiently "*hands up*" and that "*As a leadership team it more often or not feels like Ed is asking - what can the business do for me rather than what can I do for the business*". This suggests that the score was done by reference to how the SLT perceived the claimant's interaction with them, where the assessment criterion calls for a much wider assessment: collaboration with colleagues, clients, partners and others.
87. Similar, the Commercial Acumen criterion is explained in the scoring matrix as: "*Understands and makes well informed decisions across the commercial area in order to drive business growth. Demonstrates effective*

management of financial hygiene including; timely and accurate submission of timesheets, reconciliation, query resolution etc, looks for opportunities to increase revenue and to minimise costs and write offs."

88. Ms Parker scored the claimant on Commercial Acumen 1 – poor, and the justification for the score was that "*the biggest outage has been a lack of drive to really push the agenda on clients beyond scope, a defeatist/ reserved attitude vs others in the peer set*." This is not only a vague and highly subjective assessment but appears to be far away from the "*understand and makes well informed decisions across the commercial area*" and "*demonstrates effective management of financial hygiene*" reference points. On the latter, the respondent did not produce any evidence to show that it had reviewed the accuracy and timeliness of the claimants' submissions of timesheets, or how well he was dealing with query resolutions, or looking to increase revenue or minimise costs.
89. I find that by that stage it was still not too late for the respondent to be able to run a fair process and rectify those mistakes. This could, and in my judgment, should have been done during the consultation process. However, as I found, the respondent did not run a fair consultation process, it closed its mind on any possibility of reviewing the claimant's score and therefore missed that opportunity.
90. I find the respondent's additional "business continuity" criterion and its application were unfair. While I do not fault the respondent on the underlying business rational, it provided no evidence to show how that criterion was formulated and applied why the claimant did not "score" enough to be deselected as his other two colleagues. It appears that it was a decision taken by someone in the head office in a conversation with Ms Parker purely on their subjective views.
91. I accept that not dismissing the two claimant's colleagues does not mean that his dismissal was unfair. However, it was the respondent's case that "business continuity" was used as an additional selection criterion and therefore, in my judgement, it had to demonstrate what it was and how it applied it to the claimant.
92. Further, it was Ms Parker's evidence that by deselecting the two employees the respondent "*had to look elsewhere for other ways of*

making additional costs savings". She says: "*This did not affect the Claimant's at risk status*". I disagree. I find, this further cemented the claimant's dismissal because by not dismissing him against the head office endorsement, the respondent would have moved further away from its costs saving target and would have had to look for other ways to make it up.

93. I accept the respondent's argument that there is no legal requirement for an appeal in redundancy dismissals or for an appeal to be by way of a re-hearing. I also accept that Ms Ramson-Williams was sufficiently senior and independent to hear the appeal. However, in my judgement, the appeal did not rectify any of the procedural unfairness issues that had already been caused by the unfairness in the selection and the consultation process. Ms Ramson-Williams dismissed the claimant's arguments, which, of course, was open to her. In doing so, she also made comments, which, in judgment, cast further doubt on the fairness of the selection. In her appeal letter she wrote: "*To be clear, the threshold* [the 130 score] *was not the sole factor in deciding on whether a role would be placed at risk of redundancy*.", and "*Your role was placed at risk, not due to any pre-existing criteria or as a result of any pre-determined decision as you stated at your appeal meeting, but rather due to an objective evaluation being carried out by independent assessors that resulted in you scoring one of the lowest scores, alongside the other assessment criteria used in reaching that decision*" (my underlying). It is not clear from the letter, and Ms Ramson-Williams did not give evidence to the tribunal, whether she was referring to the "business continuity" criterion or some other "factors" and "assessment criteria".
94. Therefore, the fact that the opportunity to appeal was given to the claimant, and best, is neutral for the respondent, and in my judgment does not help it to show that the dismissal was fair.

95. I shall now step back and look at the whole process and consider whether those procedural flaws have made the respondent's decision to dismiss the claimant in those circumstances fair or unfair, or using the statutory

language - "*whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [redundancy] as a sufficient reason for dismissing the employee"*. I must answer this question in accordance with equity and the substantial merits of the case.

96. For the reasons set out above, I find that in the circumstances, the respondent's decision to dismiss the claimant fell outside the range of reasonable responses open to a reasonable employer and therefore his dismissal was unfair.

Polkey issue

97. Now I need to consider whether if a fair process had been followed the claimant would have still been dismissed and/or to what extent and when.
98. The two principal flaws in the process, which, in my judgment, made the dismissal unfair were: (i) the respondent failing to engage in a fair and genuine consultation with the claimant and (ii) Ms Parker's scoring the claimant against heavily value judgment based criteria without having sufficient information and knowledge to fairly exercise her judgment.
99. It appears that there could have been multiple outcomes if a fair process were followed. The respondent could have been scored higher by Ms Parker, but then the cut off score could have been moved, with the claimant's score still falling below it.
100. However, his higher score could have been enough for him to overtake the next person on the list. The claimant argues that if Ms Meyer's scores were used, he would have scored 137. This would have been enough for him to overtake the next two higher scored employees in the pool, 133 and 136. However, I heard no evidence on how these two candidates were scores and their scores could have been equally challengeable by them.
101. If the "business continuity" selection criterion had been applied transparently and fairly the claimant might have also been deselected, but so could the employees, who scored 133 and 136.
102. If the consultation process was fair and genuine, the respondent might have found itself in the position when it had to rerun the whole selection

process to make it fair. However, it could have still resulted in the claimant's selection for redundancy.

103. In these circumstances, and with very limited evidence available on other candidates scores and on the application of the "business continuity" selection criterion, I find that if a fair process had been followed the claimant would have had a 50% chance of not being selected and dismissed for redundancy. I, therefore, will apply 50% reduction to my assessment of his losses.

Mitigation and Remedy

104. I find that the claimant did take reasonable steps to mitigate his loss. Since his dismissal he made over 190 job applications. He acted promptly. So far, he was unable to secure a job. He has registered a limited company to offer his services as a consultant.

105. I find that although the claimant has not been able to secure an alterative occupation, with his experience and expertise I do not accept that he would not be able to secure a job in the next nine months, as set out in his schedule of loss.

106. From his job searches and applications, it appears that there are many available roles in his sector of expertise. He clearly has a strong professional background and relevant business experience. The downturn in the economy in 2020 due to the pandemic is likely to ease off this year. The lockdown is set to be lifted in June giving a further recovery boost to the economy and the job market. Therefore, I estimate that the claimant would be able to secure an alternative source of income within the next three months at 75% of his past salary and benefits, and at 100% within the following six months after that.

107. The only evidence on the discretionary bonus in the bundle is the bonus letter of 20 May 2015 awarding the claimant £3,750. I accept the respondent's evidence that in 2020 it was implementing various costs saving measures, including salary cuts for the SLT. Therefore, I find that on the balance of probabilities, the claimant would not have been awarded

a discretionary bonus in 2020, and there is no proper evidential basis to include the figure of £5,000 (gross) for the loss of discretionary bonus.

108. Because the claimant is in receipt of the Universal Credit benefit, under regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996, there is a prescribed element to the award. Further details as set out in the Annex to the judgment.

Breach of Contract

109. The claimant submits that I should accept his evidence that he received a letter of promotion stating that his notice period had been increased to six months.

110. He says the letter produced by the respondent is irrelevant. It was only a template, and when that template was merged with his details from an excel spreadsheet, there would have been further manual changes made to the final letter by adding a paragraph stating that his new notice period was six months.

111. He relies on evidence of Ms Whamond that it was the respondent's policy to give six months' notice to EDs, and evidence of Mr Farrow, who was promoted to the ED role in 2016, that he too received a similar letter stating that his notice period had been increased to six months. He also relies on anonymised promotion letters issued to other EDs in April 2015 and contracts of employment of newly hired EDs in 2015 and 2016 containing six months' notice.

112. Finally, he points out inconsistency in the respondent's case that the claimant's contractual notice was two months, when in its HR system it was recorded as three months, and that was the length of notice that was given to the claimant.

113. The respondent says that the contract is clear. It says the contractual notice is two months. It contains the entire agreement clause and a clause which says that any variation of the terms must be in writing. The only written document is the promotion letter of 20 July 2015 which does not contain any terms changing the claimant's notice entitlement, but on the

contrary, states that except for the new salary and the ED title all other terms and conditions remain unchanged.

114. The respondent evidence is that if a manual change had been made to the claimant's promotion letter, the amended version of the letter would have been saved in the merge file, and the 20 July 2015 in the version, which states that the notice terms remain unchanged, is the only letter in that merge file.

115. Further, it says, because the claimant was entitled to 11 weeks statutory notice, the respondent simply rounded it up to 3 months exercising its discretion. It is irrelevant what the HR system shows as the claimant's notice, and anyway, it does not show that his notice was six months.

116. Finally, it submits, that the letters issued to others EDs are irrelevant, and there were other promotion letters with no notice variations. The respondent relies on a list it produced showing all EDs promoted and hired from 2014 to 2020, with their notices varying from two to six months.

117. Having considered all the evidence in front of me, I find that it would be perverse for me to find as a fact that the claimant's contract was validly varied to increase his notice entitlement to six months.

118. His evidence is that he recalls receiving such a letter. All other evidence advanced by the claimant at best show that it would not have been inconsistent with the respondent's policy for him to receive such a letter.

119. However, I do not accept that on that evidential basis I must simply ignore the electronic copy of the 20 July 2015 letter as being irrelevant. The evidence I heard concerning the process of creating the claimant's promotion letter are not sufficient for me to conclude that the copy in the bundle, which has an electronic signature applied to it, is not a genuine copy of the letter that was issued to the claimant, and certainly, not sufficient for me to find that a different letter, changing his notice entitlement to six months, was indeed issued to the claimant.

120. For these reasons, I find that the claimant has failed to prove that the terms of his employment contract were validly varied to increase his notice entitlement to six months.

121. It follows that his claim for breach of contract fails and is dismissed.

_____
Employment Judge P Klimov
12 March 2021

Sent to the parties on

11/09/2021

For the Tribunals Office

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