Case Number: 2409483/2020

EMPLOYMENT TRIBUNALS

Claimant: Kayleigh Maguire

Respondent: WM Morrison Supermarkets Plc

Heard at: Manchester **On**: 28 February and 1 March 2022

Before: Judge Miller-Varey sitting alone

Representation

For the Claimant: Mr N Gerrard (Claimant's Representative, USDAW)

For the Respondent: Mr Welch (Counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well-founded and is dismissed.

REASONS

1. These reasons make reference to page numbers. Unless otherwise stated, these relate to the correspondingly numbered pages of the hearing bundle.

2. By a claim issued on 31 July 2020 the Claimant seeks compensation for unfair dismissal from the Respondent, a national supermarket chain. The Respondent denies that the dismissal was unfair, contending that it was for the potentially fair reason of redundancy or some other substantial reason justifying her dismissal.

THE ISSUES

3. I prepared a draft list of issues. The reason for the dismissal was agreed (paragraph 5 of the Claimant's written submissions), such that the issues to be determined became:

i. Did the Respondent act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

(a) The Respondent adequately warned and consulted the Claimant;

(b) The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

(c) The Respondent took reasonable steps to find the Claimant suitable alternative employment; and

(d) Dismissal was within the range of reasonable responses.

ii. If the dismissal was unfair for procedural reasons would or might the Claimant have been dismissed in any event such that any compensation should be reduced or extinguished in accordance with the principles in **Polkey**?

THE HEARING

Preliminary matters

4. The Respondent identified in the ET3 [p.28] that the name of the Claimant's actual employer is Wm Morrison Supermarkets Plc (and not "WmMorrisonsplc"). The Tribunal raised the question of possible substitution at the beginning of the hearing. Mr Welch believed the Respondent may now have reverted to using the earlier name but indicated he would take instructions in due course. The Tribunal did not revisit this point before close of submissions. These reasons and resulting judgment are directed to the company who was the Claimant's employer in March 2020. Any necessary application for formal substitution of the Respondent currently named, will be considered if made within 28 days of this decision being sent.

Procedure, documents and evidence heard

5. The hearing bundle comprised 455 pages of documents, together with a 33-page separate witness statement bundle.

6. I decided that the Respondent should lead evidence first. The claim is connected to the implementation of a programme of national restructuring by the Respondent. The Claimant was employed within its store in Morecambe, Lancashire, which for organisational purposes falls within the Respondent's North West region. The Respondent called evidence from the following witnesses:

   Martin Wood – Store Manager at the Morecambe store at the material time;

Paul Halliwell – Store Manager at the "Atlas" Bolton store of the Claimant and appointed to conduct the Claimant's appeal from her dismissal; and

Andrew Holsten – the Respondent's then Regional Manager for the North West.

7. I then heard evidence from the Claimant. She called no additional witnesses.

8. All witnesses gave evidence by way of witness statement which I had read in full before they gave their oral evidence. All witnesses were cross examined.

9. The evidence was given across two days, with the Respondent's three witnesses concluding on day one and the Claimant delivering her evidence in full on day two. I then proceeded to hear submissions. The Respondent had prepared written submissions to which Mr Welch also spoke. Mr Gerrard provided detailed oral submissions which he immediately afterwards submitted in written form, providing a copy to the Respondent.

FINDINGS OF FACT

10. Having considered all the evidence, I find the following facts on the balance of probabilities i.e., on the basis of what I think is more likely than not to have happened. The parties will note that not all the matters that they told me about are recorded in my findings of fact. That is because I have limited them to points that are relevant to the legal issues.

11. In addition to the three witnesses, there are 5 further members of the Respondent's staff it is necessary to refer to in these findings. It is convenient to identify them in one place:

    (a) Kate McCabe - Head of People at the time;
    (b) Amy Swift – Regional People Manager for the North West region at the time;
    (c) Tracey Phillips - Regional People Manager responsible for appointing the appeal team of Paul Halliwell and Cat Wilkinson;
    (d) Cat Wilkinson - People Manager and notetaker for the Claimant's appeal; and
    (e) Graham Corpe – fellow level 2 manager at the Morecambe store and friend of the Claimant.

12. The Claimant commenced employment with the Respondent on 24 April 2015. Within the structure of the Respondent, the position of the Claimant was that of a level 2 manager. She first started in that role on or around 20 May 2019.

13. As a level 2 manager, the Claimant's usual work comprised elements of management together with work on the shop floor on a par with employees who replenished goods. Those latter activities are referred to internally by

the Respondent as “colleague tasks”, and the staff who undertake them are known within the Respondent’s structure as “colleagues”. From time to time the Claimant assumed responsibility as Manager In Charge (MIC), for which she had been trained. In essence that meant she was authorised to have responsibility for the store in the absence of the store manager or other manager of a level higher to her. I find that at the time of these events, although not all level 2 managers were MIC-trained, it was a fairly standard expectation of the role, and therefore not a differentiating feature of talent or performance, comparing one manager to another.

14. The Claimant reported to the trading manager of the store, who in turn reported to Mr Martin Wood, the store manager. The Claimant was one of 15 level 2 Managers.

15. In January 2020 the Respondent issued a briefing pack (“the pack”) to its store managers, including Mr Wood, entitled “Retail Management Review”. It indicated that following careful review of manager roles in store, the Respondent was proposing *“a flatter management team of broader manager roles all at work level 3"*. Such managers would be released from the routine completion of colleague tasks with those hours instead being backfilled by investment in more pairs of hands across shop floors. The new managers would only carry out manager and leadership activities.

16. The purpose of the pack was to support the respective store managers and store “people managers” communicating and managing the consultation activity affecting their particular store team. The process would begin with briefings first to trade union representatives and then to affected managers on 23 January 2020. The remainder of the activities were planned to be completed by 6 April 2020. By that date, exiting managers were expected to have left the business (by 27 March 2020) and the new structure would be live (by 30 March 2020) [p.75].

17. The intended roles of the people manager and store managers (and deviation from them) are a central plank of the Claimant’s case.

18. What the pack proposed was this:

a. The store manager and store people manager were to be present to deliver the briefings and one-to-one meetings in accordance with preprepared scripts to different groups of interested parties, including level 2 managers

b. Both should ensure they were scheduled to work where possible in order to meet the timelines.

c. They should set up a consultation file containing a section for each affected manager.

d. If at any point during the consultation period either the store manager or people manager was out of the business then this should be discussed and

planned with the regional manager, and regional people manager, in order to create a local plan to ensure timescales were still achieved [p.76]

e. In terms of applying the selection criteria, they should jointly score the affected managers' self-assessment statements against the Respondent's Ways of Workings descriptors [p.107]. They should both conduct their leadership-based interviews, too. [p.107].

19. In the Morecambe store, there was no people manager in post at the time of the pack being released. Sometime before, that person had taken on a different role in the store. She was involved in the process to the extent only of compiling a blank consultation file for each of the managers to be reviewed. After that, the remainder of the process was dealt with entirely by Mr Wood. He did not have responsibility for scoring the former Morecambe People Manager.

20. Around a week and a half into the restructuring activities, Mr Wood approached Amy Swift, the regional people manager, regarding the question of support. She indicated there was no spare people manager to undertake the task at the Morecambe store. Ms Swift offered potential assistance from the people manager in the Clevely store, Ms Jenna De Rose. However, Mr Wood did not pursue this because he felt on a practical level it would not be feasible for Ms De Rose to meet the requirements in her own store as well as his. He reflected that it would add complexity and could be problematic if she was able to participate only in part of the process. Mr Wood had other email communication with Ms Swift, to which I will come in more detail.

Overview of individual consultation and selection

21. The pack provided that every member of the management team should have an individual consultation meeting with the store manager and people manager during the week commencing 27 January 2020 [p.101]. This was to run in parallel with trade union consultation. In all, impacted managers were expected to have a minimum of three consultation meetings including an initial interim and final meeting. All managers were to be taken through a period of consultation and through a detailed leadership selection criteria.

22. The Claimant takes issue with the fairness of the selection criteria in general, as well as how it was applied in her particular case.

23. All level 2 managers were in the pool for selection for work level 3 manager roles.

24. The overall criteria by which successful managers were to be chosen was specified in the pack as follows:

a. At the first individual consultation meeting, affected managers would be asked to provide the Respondent with their role and location preference [p.179]. This was done by way of each manager completing a standard, pre-

printed form in manuscript. The form included 3 numbered spaces within a defined box in which the managers were asked to state, in order of preference, the roles they would be prepared to be considered for e.g., petrol station manager, meat and fish manager. The form contained 5 such similar spaces for store preference. It included other questions such as the maximum number of hours and availability across different days. It specifically asked "*would you consider nights?*" for which a *"yes"* or *"no"* only was possible.

b. The purpose of gathering this information was for use in the regional ranking exercise [p.106] i.e., following the selection process, managers would be placed into roles at a regional group level based on their selection criteria scores *"suitable skills and experience and where possible the preference they provide"* [p.101].

c. The selection criteria comprised three elements**.** A "my performance" rating which had regard, to performance and talent assessments made already during the manager's current role. The second was an individually scored statement of evidence against the Respondent's ways of working descriptors. The third was a ways of working interview.

d. Returning to the my performance rating this in turn had four component elements being: (a) 2019/20 Mid Year "my performance score" (0 - 5 out of a maximum of 5), (b) 2019/20 end of year "my performance calibration score" (0-5 out of a maximum of 5) (c) 2019/20 Mid Year Talent Potential Rating (1,3 or 5 out of a maximum 5) (d) 2019/20 End of Year Talent Potential calibration score (1,3 or 5 out of a maximum 5). The grading of 1, 3 or 5 for talent was dependent on the classification of the manager's potential as well placed (1), growing (3) or accelerating (5).[p.149].

e. This led to a "my performance score" out of a total of 20 for each candidate.

f. All affected managers were asked to submit a statement to describe how they delivered against the work level 3 ways of working descriptors. They were five descriptors, with the statement attracting a maximum of 5 points for each descriptor, depending on the quality of evidence furnished. A detailed scoring matrix was provided, with three possible scores out of 5 available only. Limited evidence attracted 1 point, some evidence attracted 3 points and strong evidence attracted 5 points [pp.129 - 130]. The maximum total score for the interview was 25.

g. All affected managers would take part in a leadership-based interview conducted by the store manager and the people manager. This was a competency style interview. The questions were all prescribed within an interview pack. Store managers were instructed to print off a complete pack for each candidate and make sure they completed all the sections. There was space for notes after each question, and space to include the applicable score. For each available score for each domain, a narrative description was given for the available scores, which were again 1,3 or 5 out of 5. These

were indexed to the strength of the supporting evidence supplied by the candidate [pp.194 -204]. The maximum score was again 25.

h. The pack provided that managers should have the opportunity to be consulted on scores given in the selection process and *"any feedback should be considered with [the] regional team"* [p.107]. I find this was expected at the time an outcome had been made provisionally because the feedback process was described as potentially affecting other people's scores [p.107] It was also stressed that a detailed rationale should be captured for decision-making during selection to ensure the Respondent could demonstrate transparency should anyone choose to appeal [p.108]

i. In terms of a formal appeal, the pack emphasised that unsuccessful managers had the right to appeal the decision once the outcome had been delivered. I find this was a reference to the final decision. In that situation the affected manager should be talked through the appeal process. Logically this would be by the store manager or store people manager. The appeals process was described in the pack. It comprised submitting grounds of appeal and a preferred outcome via a specific link on "My People Policies" page in My Handbook. It was required to be done within 5 days of receiving the outcome letter. The Regional People Manager would then arrange for a hearing with an independent appeals manager [p.108].

The process as applied to the Claimant

25. I find the Claimant's myperformance rating was completed by Mr Wood in January 2020 in advance of him being aware of the restructuring process. The mid-year scores for performance and talent had been logged previously onto the system. In his evidence to the Tribunal Mr Halliwell - himself a store manager – corroborated Mr Wood account that all calibrated year end scores for level 2 managers had been "locked in" having first been through a regional calibration process which involved checks that no one store manager was scoring their managers differently to another. The regional calibration took place some weeks previously.

26. The Claimant's actual scores were 2/5 (mid-year my performance), 2/5 (end of year my performance), 1/5(mid-year talent potential) and 1/5 (end of year talent potential) [pp.221 - 222]. I find that in keeping with the Respondent's standard approach, the two mid-year scores were capped because of how recent her May 2019 appointment as a level 2 manager was. This was a standard practice for managers new to role and is even referenced expressly on the selection criteria form in the case of performance scores [p.221]. In terms of the end of year scores, they were not dictated but were matters of assessment by Mr Wood. They were reached without any formal appraisal. They were the result of his ongoing assessment. This in turn was based on his dealings with the Claimant (which I accept the Claimant described accurately as a 5 minutes conversation around 2-3 times a week), as well as conversations he had regularly with the level 3 managers with

whom he was working for 80% of his time on the shop floor. When he marked the Claimant, he did not document the rationale for the scores given. These were added to the overall selection criteria sheet on 23 February 2020.

27. On 23 January 2020 the Claimant was part of a briefing at which the restructuring proposals were set out. Mr Wood wrote to her the same day in a four-page letter explaining the proposed changes in detail [p.166]. The implications for the Claimant's role were described. There would be a reduction in the number of management roles and she was advised she was at risk of redundancy.

First one to one meeting

28. On 27 January 2020 Mr Wood held the first one-to-one consultation meeting with the Claimant. The consultation checklist at appendix 4 [p.134] specified tasks to be completed at the initial one to one meeting and provided boxes to be ticked. It specifically mentions that in preparation for the selection criteria the managers should be asked whether they agree with *"my performance score"* and give them a chance to comment. I am satisfied that "my performance rating" encompassed both the mid-year performance *and* talent rating and the end of year performance *and* talent rating – having regard to what is said on page 106 which paraphrases all the four components as "my performance rating"

29. Mr Wood's evidence to the Tribunal was that he could not remember whether or not he informed the Claimant of her my performance score on 27 January 2020. He did accept, however, when put to him, that it was within the guidance document and an important part of the process. I find this evidence - of not recalling – conflicts with his earlier witness statement (at paragraph 18) and the completed checklist [p.230] in which he says positively that he did so on 27 January 2020.

30. I find he did not share the Claimant's "my performance" score with her.

31. The notes of the meeting at p.168 make no reference to it. The scores were not collated in writing by him until some weeks later on 23 February [p.230]. Moreover, I am certain that the Claimant would then have made the enquiries she would later make about potential challenge processes. I find she was engaged throughout the consultation process. She had expressed concern previously about her the mid-year scores when the threat of redundancy was not on the horizon. She also had convictions about the importance of manager in charge training and experience warranting a higher score. I accept entirely therefore that she only got her my performance scores on 6 March 2020.

32. In terms of what did happen: I am satisfied that the Claimant received from Mr Wood on 27 January 2020 the ways of working pack to prepare for her statement and the role preference and information form.

Second consultation meeting

33. The Claimant attended a second one-to-one consultation with Mr Wood on 31 January 2020. This lasted just short of 30 minutes. She was given a copy of the selection scoring [p.174].

34. Following these meetings, Mr Wood sought help in relation to making notes for the interviews [p.176]. Amy Swift offered the services of graduate apprentice Jai Roberts, purely as a note taker for the interviews [p.176]. Mr Wood had declined buddying up for help from Ms De Rose. Mr Wood accepted the note taker and made arrangements with him. In common with other staff leading the restructure, Mr Wood received new information in relation to night working [p.178] that an additional question would be asked in the interview so that the Respondent could understand which mangers currently on days would preference being selected into a night role if that was all that was available over being made redundant. Accordingly, a column was to be added to the ranking document so that managers who would be interested in this could be filtered. The role preference and information form remained unaltered from that contained in the pack, which had already been handed to the Claimant.

35. The Claimant completed her role preference and information form on 9 February. The Claimant gave the management roles she was interested in in the following order: Home Delivery, Petrol Station and Nights. She was given the chance to indicate up to five preferred stores. She identified Morecambe only. Morrisons' nearest other stores are Blackburn, Bolton, Preston and Fylde Coast, the nearest of which is 40 minutes' drive away.

36. In addition, the Claimant indicated, consistent with her first answer, that she would consider nights.

The self-assessment and interview

37. The Claimant completed a typed ways of working document (running to 5 pages) on 9 February 2020 and attended her interview on 10 February 2020

38. As I have mentioned, the ways of working self-assessment statement was intended to be jointly scored by a People Manager and the Store Manager in line with ways of working descriptors [p.107].

39. The interview period under the pack was to be between 10 and 24 February [p.73], with scores being consolidated from selection criteria and managers ranked at a store level in preparation for regional group ranking on Tuesday 25 February. The Claimant was one of the first to be interviewed.

40. So far as the questions were concerned, the Claimant's interview was conducted according to the pack specification [p.188 - 200].

41. Jai Roberts took detailed notes, running to 8 pages in manuscript. These were not placed in the standard form which provided boxes for notes under each question with space for the resulting score underneath. Mr Roberts

notes refer at the end to "night manager" [p.220] from which I am satisfied that this was mentioned in accordance with the revised guidance and the newly included question at p.201 i.e., in the event that there are only night manger roles remaining, would your preference be to be placed into a Night Manager role or to be provided with your redundancy illustration? The Claimant, I am satisfied, confirmed this would be her preference.

42. The scoring of both the Claimant's statement and interview was done solely by Mr Wood. It did not take place contemporaneously as the pack expected. It took place on 23 February 2020, the date given on the top of the selection criteria document for the Claimant which covered her scores across all areas [p.221]. That document - as originally drafted by Mr Wood on 23 February - gave some explanation in the final column *"selection evidence and rationale"* for the "my performance" scores. He included no information at all in that column in relation to the statement or interview. Only the numerical score was included in the form. This was despite the pack stipulating that as much detail as possible was needed for the sake of transparency. Mr Wood says this was his approach to scoring all other managers and that he did them all on 23 February 2020 which took him the full day. He accepted that he did not use the time available on the day for scoring each individual (the pack contemplated 30 minutes at the end of each interview) because it was draining. He also had the full notes of the interview to go back to.

43. Mr Wood in fact completed the rationale for the interview scores and the ways of working document only after the Claimant lodged her appeal on 27 March. He only did so then because Sarah Hesmondhalgh, people manager, asked him to, because of the appeal. He never did provide rationale for the other level 2 managers. It follows that the rationale could not have been shared with any managers, including the Claimant, at the time.

44. He says that in completing the marking rationale for the interview and ways of working statement he was not retrospectively scoring the Claimant but, in essence, providing the rationale he had already employed when giving the scores on 23 February 2020. What I do have are both her statement and her interview notes. There is certainly no obvious disconnect or illogicality which the Claimant has pointed to between the rationale and her interview or statement. In other words, there is no manifest lack of cogency or relationship to what the Claimant actually said or wrote. It was put to Mr Wood that his purpose in approaching the task in the way in which he did - in particular withholding from a contemporaneous score, corralling the scoring into a single day, and omitting rationale – was "a *quick fix to get the outcome he wanted"* in the Morecambe store. He denied that. I am not satisfied there was any such motivation. Relevant here is that the Claimant mentioned for what I find is the first time in her evidence to the Tribunal her opinion that Mr Wood did not like her. The reason she gave when asked for

the basis of this was "a feeling", to which she then added that he barely spoke to her. She did not put an allegation of direct bias in her appeal grounds nor raise it in her witness statement. I exclude that there was any personal animosity between Mr Wood and the Claimant or that deliberate bias was practiced against her by him or that she was treated in a particular, pre-determined way in order to prefer other candidates who were favoured by Mr Wood. There is no persuasive evidence to support such a finding. During evidence and submissions, the question of flawed scoring for two other candidates was raised. I do not find this evidence of bias but of lack of attention to detail. I will return to this below.

45. The scores that she achieved were: 17 out of a possible 25 for the self-assessment and 15 out of 25 for the interview. Together with her my performance rating this gave her a total of 38 out of 70, the single lowest score of all of the 14 managers being evaluated by Mr Wood. The spectrum of other overall scores being from 39 (two managers) and 55 (one manager).

46. Mr Wood then placed the scores into a ranking sheet for his store. They were then sent by him to the regional manager and regional people manager. From there they were transferred into a regional ranking document. In accordance with the pack, senior management then placed managers into roles based on their role preference location, performance and selection and skills and experience. The scores for all level 2 managers were not before me, only those from the Morecambe store [pp.224 (a)&(b)]. I accept the evidence of Mr Holsten that he and Ms Swift included the Morecambe scores on a large regional spreadsheet. He had no previous dealings with the Claimant at all. The approach they took was to look at the manager's score, compare it to the score of other managers who wanted a role in that location. I accept it worked in this way (as Mr Holsten described in his statement):

"Miss Swift and I followed a strict process of looking at a score of a colleague, and then comparing the score to other colleagues who wanted a role in that location. For instance, if there were 10 managers and only 9 positions and all managers chose the same preference or location as their first preference, the manager that scored the lowest would be displaced. We would then look at that manager's second preference and look at that column on the regional spreadsheet, and if they scored highly enough in comparison to others who chose that location as an option (irrespective of whether this was first, second etc), they would be placed at this location. We wanted to follow a consistent, fair and transparent approach, and place as many colleagues as possible.

As Miss Maguire chose Morecambe as her only location preference, her options were limited. Miss Maguire scored a total of 38/70 and this was the lowest in the Morecambe store. Due to this, and Miss Maguire's only location preference being the Morecambe store, she was almost instantly displaced. As can be seen from the excel, for each of Miss Maguire's role preferences, there were colleagues who chose each of these as their first preference and scored higher than her. Each of those roles were given to the colleague who scored the highest and where it was their first role preference.

As can be seen on page 74, the next step involved me and Miss Swift meeting the Head of People i.e. Kate McCabe, and the Safe Hands Operations Manager, Colin Pearce to undertake a calibration session. This discussion took place to ensure that Ms McCabe and Mr Pearce were agreeable with the decisions that Miss Swift and I had made in placing the managers. We considered difficult factors such as colleagues who had the same scores, same roles and location preferences but with only one position available. Discretion would only be used in situations like these and the position would ultimately be given to the colleague who had the longer length of service within the business. However, this did not apply to Miss Maguire at any stage of the decision process and the decision to place her was made solely on her score i.e. no other colleague received the same low score and therefore no additional layer of discretion had to be applied. I believe that it was evident from Miss Maguire's scores and limited preferences, that there was no other option for her than to be displaced and be unsuccessful in obtaining a role. This had also happened to other colleagues who had only put one location preference and had scored lower than other colleagues."

47. Pausing here, the Claimant's representative has drawn attention to anomalies in the scoring of two other level 2 managers from the Morecambe store. Each had been given a score for a component in the selection criteria which, in accordance with the scoring matrices, were not "available" scores and which could not therefore be correct. One was an interview score of 16 out of 25 and the other was in relation to a self-assessment statement, also scored 16 out of a possible 25. However, in the range between the minimum score of 5 and the maximum score of 25 for each of those components, only odd numbers could be awarded. I deal in my conclusions below with the relevance of this. It was never identified at a regional level.

48. Mr Wood then received an email from Ms Swift to indicate who had been successful. The Claimant was not successful.

The provisional outcome meeting

49. A meeting followed between Mr Wood and the Claimant on 28 February 2020 for the purpose of confirming the provisional outcome [pp.225 – 226]. There was no separate notetaker on this occasion. The notes are a single side of A4 [p.226] and the only documented contribution of the Claimant was to ask what job role she would now be looking at. He replied that he had not got that far yet. The Claimant is recorded as confirming that she had no further questions beyond this.

50. The notes are not full or reliable as to the extent of what was discussed:

51. Mr Wood accepted during the internal appeal and in his witness statement (paragraph 21) that contrary to the notes, the Claimant *did* ask on 28 February about how she could appeal the decision. I find she did so because, as she told the Tribunal, she was *"floored and angry"* about the decision, having gone into the meeting believing she would be appointed as a level 3-night manager. Mr Wood also recalled when later talking to Mr Halliwell that the Claimant had cried when told [p.303]. The Claimant, I find,

to be someone of conspicuous intelligence. During the hearing she was strikingly articulate in many of her answers and prepared to challenge, respectfully, the premise of questions put to her by Counsel. In moments this made her reluctant to accept even less contentious points without complete proof. She was, however, in limited moments, also quite emotional too. It follows that being upset and asking questions with clarity and force during the same meeting are in no sense incompatible for her. I find she expressed her view clearly that the outcome was unfair. Mr Wood indicated that he did not know how she could appeal. At this stage, the only guidance on appeals was contained in the pack and related to challenges to final outcomes. This was not mentioned to the Claimant. Her score was not shared with her at that stage.

52. On 4 March 2020 the Respondent rolled out guidance [p.239 - 241 - "the new appeal guidance"], for how to deal with appeals from managers who wanted to challenge either their scores or the roles into which, if successful, they had been placed. This came via email to Mr Wood. The key points were:

    a. The aim stated at that stage was to resolve as many potential appeals or concerns as possible during the week of 4 March 2020, informally, before moving into a formal appeal process.

    b. Therefore "where a manager asked for rationale or clarity", information should be provided.

    c. It provided a list of information that should be provided which specifically identified each of the scores as well as the "overall score" and highest and lowest score that resulted in someone being place into a role, and their position in the regional ranking.

    d. If as a result of that informal process any manager "wishes to appeal their scoring or outcome decision" then further guidance was provided, namely:

        "...[this] must be submitted through My Morri with the subject of "CASTLE: SELECTION APPEAL". This will ensure we can filter selection related appeals and respond to them as quickly as possible."

    e. Appeals filed via the Castles route would be collated and guidance issued on how to deal with them from Monday 9 March [p.240]. The deadline for any manager wishing to appeal their scoring or outcome decisions was specified in bold text as close of business on Monday 9 March 2020.

    f. The document went on to distinguish this from a formal appeal process which would arise after termination of their employment via redundancy. The new appeal guidance suggested that this route

could be used by those who might feel their Castles Appeal had not been responded to with enough detail.

g. The document concluded that *all appeals* needed to be heard and concluded no later than 24 April but ideally within 2 weeks of the employee's termination date.

53. The new appeal guidance was only brought into the proceedings as a consequence of a specific disclosure application in 2021. The Claimant in her evidence cast some doubt about why it had not been referred to sooner than that. She was reluctant to accept that it was a contemporaneous document. I am satisfied this comes from a place of dissatisfaction with the Respondent but there are no credible grounds to challenge that it did exist. Although not directly named, I find it was referenced in the interview with Mr Wood that later took place as part of the internal appeal investigation in July 2020. It has not been created after the fact to repair the Respondent's processes. As I will describe, I am also satisfied that Mr Wood had at least some level of familiarity with it.

54. A further meeting followed on Friday 6 March. Only the Claimant and Mr Wood attended this meeting and the notes again run to half a page of A4. They are again not accurate in that they do not reflect the full extent of what was actually discussed. The scores *were* shared with the Claimant, which *was* mentioned in the notes. No rationale or other detail about them was shared with her. Her interview and ways of working rationale had yet to be written.

55. It is not mentioned in the notes but I find the Claimant reiterated her request for details of how to appeal. I find Mr Wood said the timeframe was 10 days from her meeting outcome (i.e., 28 February) and directed her to My Morri. The Claimant accepted in her evidence before the Tribunal that using My Morri was mentioned to her. She therefore calculated that she had 3 days to lodge an appeal.

56. The only appeal process that could have been apposite at this stage was the one under the new appeal guidance. I find that Mr Wood was not confused about that fact because 10 days from the provisional outcome – though not the way the time limit was expressed within the new appeal guidance - *was* Monday 9 March. That was the deadline recorded in the new appeal guidance. In contrast, a period of 10 days nowhere fits with the overarching appeal right (for which a 5-day time limit was specified – see paragraph 24i above). In addition, there is no reference to "MyMorri" within the earlier appeal guidance for appeals against final outcome.

57. I am inclined to accept therefore that he had some regard to the contents of the new appeal guidance, as he says he did. I am also satisfied that at this stage the Claimant was in her enquiries not explicit or clear that she

definitely would be appealing. Mr Wood indicated that the Claimant remained equivocal about her intention to appeal both at the meeting on 28 February and subsequently. He characterised the conversation on 28 February as *"she didn't directly tell me she wanted to appeal"* and said during the conversation in March she was not certain if she wanted to go ahead because her friend had got the job.

58. This is broadly correct although her friend's position was not much mentioned. I find that the Claimant was however repeatedly seeking the appropriate information so that, as she told the Tribunal, she could *"go away and make a sound and reasonable choice"*. This was not because she was equivocal about the soundness of her scoring – she was determined it was wrong - but as she also said in her evidence: *"I didn't think that I needed to tell the person I was questioning and appealing his decision to get the correct procedures*". I reflect that the Claimant was facing a direct challenge to the decision of a superior member of staff who would foreseeably continue in that role in the event of a successful challenge and potentially also if she decided to step down to a colleague role. On an interim basis too, he remained in a position of greater authority.

59. I find the extent of the *accurate* information she got from Mr Wood was: the amount of time remaining to make an appeal and a direction to look at My Morri. The Claimant did accept the latter in her evidence before the Tribunal and the focus became that she was not provided with any other information in accordance with the new appeal guidance, in particular that an appeal made using the Castle Appeals heading would be expedited or indeed details of the appropriate heading to use.

60. The Claimant has been consistent in her original appeal letter [p.249], in her internal appeal hearing [p.276], in her witness statement and in her evidence before the Tribunal about a response she received from Mr Wood when she asked him for information specifically about challenging her grade or score. She said that Mr Wood rolled his eyes and said she needed to address a letter to him. I accept what she says, albeit as she volunteered in her evidence - without prompting - it occurred on the shop floor and not during the formal 6 March 2020 meeting as her witness statement perhaps implies. Mr Wood disputed this allegation but I prefer the Claimant's account. Although Mr Wood claimed this would be unprofessional and therefore uncharacteristic of him, I find the redundancy process was complex. Despite his previous experience of restructuring, it did place significant demands upon him. These were heightened by the absence of a people manager to share the responsibility and administration with. I have no doubt that reopening the selection scores would be a source of frustration, as adding to his already large workload, including managing the store. Although he admitted errors in his evidence, he was keen to move away from acknowledging and talking about them. I accept he was not receptive or open to the Claimant on this subject.

61. On the other hand, I conclude that having highlighted the deadline and the correct route for sending an appeal, Mr Wood was not seeking to actively misinform the Claimant so as to suppress any challenge to the scoring or overall outcome. Quite simply, such a purpose could not be guaranteed by his actions; an appeal sent via My Morri could have been picked up without the use of the Castles Appeal title.

62. What the Claimant did not receive from him was the clearest account of process available to a party appealing. There was no clear distinction drawn by him between an appeal against the outcome and an appeal against the scoring. By this point, two discrete processes had emerged. There was no attempt to encourage informal resolution which - since it followed that she was mentioning a challenge to a score – might have been attempted consistent with the pack. And the reference to MyMorri without the subject line which the guidance mandated was incomplete, and to say the least, sub-optimal.

63. Additionally, his reference to a letter to him was entirely misplaced.

64. In terms of the understanding of the Claimant, she told the Tribunal she did not know that she had a right to challenge her scores – which belief endured until the appeal meeting when Mr Halliwell said that she could. The thrust of her evidence was that the appeal guidance had in fact only been disclosed very late in the proceedings, following a hostile disclosure application, and came to her attention for the very first time in September 2021.

65. The Claimant did not go to MyMorri and lodge an appeal. This was because she did not think that 3 days gave her adequate time to appeal and she was upset and angry. I find she was under some stress, trying to work and reeling from what I am satisfied - subjectively - was a considerable shock. She explained that she did not seek additional time because she did not think she could and is habitually punctual. I accept this. The Claimant places some weight on her professional performance and suffered a significant blow to her confidence with, as she saw it, the shock news of her selection against all the other level 2 managers in Morecambe.

66. At the meeting on 6 March, the Claimant was told that she could have a full-time position in the cake shop. She was told her leaving date would not be until the week ending 16 March 2020.

67. The Claimant attended a further meeting on 26 March at which she was given her redundancy illustration. The Claimant wished to leave earlier than what had by that stage become an intended departure date in May, because she had secured alternative employment. The earlier leaving date was accordingly agreed. The day following the Respondent sent her an outcome letter. In its penultimate paragraph it gave details of the right to appeal against the outcome.

68. The Claimant lodged her appeal on 27 March citing 6 grounds [p.249 – 250].

69. The appeal took place via phone call on 25 June 2020 [pp. 274 – 278] and was conducted by store manager Paul Halliwell with Cat Wilkinson, People Manager present as a notetaker.

70. Mr Halliwell was familiar with the restructuring process as he had been undertaking it within his own store. He had also dealt previously with several internal appeals in relation to unconnected matters.

71. The notes were typed up and sent to the parties. There was no explicit mention within the appeal interviews or investigations of the new appeal guidance although, I find, it was referenced in the interview with Mr Wood [p.300 and p.308].

72. The Claimant was represented by Mr Nick Gerrard, who represents her in these proceedings too.

73. The meeting was adjourned on the first occasion in order to allow further investigation to take place by the appeal team. The elements of that investigation were:

a. He asked Amy Swift about her awareness of the lack of a store people manager in Morecambe. She advised that Kate McCabe, Head of People, was also aware [p.309]. Amy Swift also confirmed to Cat Wilkinson that support had been offered [p.286] in the form of a notetaker or sharing a people manager from the Clevely's Store. This caused Mr Halliwell to exclude that there was some fundamental flaw and for example, that the Respondent would not have allowed selection to proceed at all without the participation of a people manager at the Morecambe store. Rather they were relying on mitigations. Cat Wilkinson also pursued whether Amy Swift had been notified of any appeal by the Claimant. She had not [p.287]. He also dealt with the point about whether selecting night shift in the role preference gave an advantage [p.287]. Ms Swift indicated that as a result of the process I have described earlier (paragraph 34), the willingness to do nights if facing redundancy was placed on a tracker. She confirmed it would not make any difference to the scoring. Amy Swift suggested in a later email that the scoring should be checked to see if it was in line with Mr Wood's. [p.286].

b. Mr Halliwell also spoke to Tracey Phillips, then then regional people manager who appointed him for the appeal. He asked whether making an appeal during the consultation process would have made a difference. There is no note of their conversation. I accept the evidence of Mr Halliwell who I found credible and open about the advice she gave. Ms Phillips essentially gave her blessing that the appeal being looked at by Mr Halliwell should encompass the question of whether a timely appeal from the scoring via the Castle Appeal route by 9 March 2020 would have made a difference.

c. In the event I am satisfied he did this through, effectively, a ghost scoring exercise. As he answered Mr Gerrard in cross –examination, even though he found no evidence from Mr Wood that an appeal had formally been

raised, he followed the Claimant's point about a lack of information having been provided. I find he was concerned about this and therefore *"conducted his investigation to resolve that outcome"*.

d. This involved working with Cat Wilkinson to go through the ways of working document and interview, to see how they would have scored the Claimant. They had the Claimant's own self-assessment and what I find are fulsome notes of the interview from Mr Roberts, for this purpose. Mr Halliwell gave convincing evidence that this extended to my performance score. His view was that he too would only put the Claimant in the category of well-placed for talent and the Claimant's core example would not mean that she was overperforming. He also examined closely the explanation of Mr Wood for giving her an end of year 2 score for my performance and was satisfied that was supportable. I also accept his evidence to this Tribunal that having ghost-scored the Claimant, he picked up with Ms Swift that the Claimant had been unsuccessful on the regional pooling with that score. The outcome therefore remained unchanged.

e. On 7 July 2020 he interviewed the note taker from the Claimant's interview, Jai Roberts. He elicited his role (degree apprentice brought in to upskill and get experience), involvement in scoring (none), why the interview form had not been used to keep notes, and how in his own words he thought the interviews had gone [p.295 - 296]. He was specifically asked whether Mr Wood had tried to get answers out of certain candidates. Mr Roberts said Mr Wood was uniform and *"everyone got the same".*

f. On 9 July 2020 Paul Halliwell interviewed Martin Wood. He covered areas such as the lack of involvement of a people manager, and the basis of the Claimant's scoring for performance and talent. He asked why the Claimant had a rationale on her form and other candidates did not. Mr Wood gave explanations.

g. He obtained and reviewed the full files of the managers to whom the Claimant had made reference at the first appeal meeting as receiving potentially different treatment (because they succeeded despite barely trying or in her estimation because they added a fourth role preference), as well as her own full file.

74. The appeal meeting was reconvened on 21 July. During that meeting Mr Halliwell reported back on the results of his investigations. He specifically said that he could deal with a challenge to the scoring there and then [p.333 and p.334 top].

75. The appeal was ultimately refused on the basis that there was no evidence to suggest colleagues were treated differently or evidence that would change the scoring of the process. Mr Halliwell confirmed his decision in a letter of 24 July 2020

76. In respect of being well-placed rather than growing, the point was made that Mr Wood had been able to describe why well-placed was the correct description.

77. Overall, I am satisfied that Mr Halliwell approached his job as an independent appeal officer with both seriousness and independence. This is revealed by the scope and depth of his investigation. A particular example is that he, before the Claimant ever had sight of the documents, queried with Mr Wood in interview why no rationale had been provided for two other managers at all, but had been for the Claimant. He also had no difficulty in his evidence saying that he was *"not impressed"* with Mr Wood's notes. Mr Halliwell had no agenda to uphold a particular outcome.

The Law

78. I summarise the key legal principles that apply to the case.

79. There is agreement between the parties that the reason for the dismissal is for the potentially fair reason of redundancy (Claimant's written submissions, paragraph 5).

80. A redundancy may be unfair under the general unfair dismissal provisions contained in s.98(4) of the Employment Rights Act 1996 (ERA)

81. The statute provides that where the employer has demonstrated the potentially fair reason for the dismissal, the question of fairness (or unfairness) 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. This is to be determined in accordance with equity and the substantial merits of the case.

82. As I am satisfied that the reason for the dismissal was redundancy, neither side bears a burden of proof and the issue of fairness is a neutral one for me to decide.

83. I extract the following further principles from the case law, particularly apt to a claim for unfair redundancy.**Williams and Ors v Compare Maxam Ltd [1982] ICR 156 EAT** set out guidelines, by which a reasonable employer would approach redundancies, namely:

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

84. The EAT did emphasise however in that case that the standards were not immutable in that they related to a particular point and time. Also, they do not have the quality of principles of law. They are part of assessing whether at each stage of the process the employer has acted within the range of responses of a reasonable employer.

85. Polkey applies so that a finding of unfair dismissal will follow if there was a procedural failure causing unfairness. The question of whether the employee would have been dismissed in any event (i.e., if there had been a fair procedure), is only relevant to the amount of compensation payable.

86. The ACAS code of practice on disciplinary and grievance procedures has no application.

87. It is not a requirement of procedural fairness in a redundancy dismissal that the employee be given a right or opportunity to appeal. Rather the absence of an appeal is *"just one factor of the many factors to be considered in determining fairness"* (as per Lady Smith in **Taskforce (Finishing & Handling) Ltd v Love EATS 0001/05**. However, it is open to a Tribunal to conclude that the failure to grant a right of a appeal is a matter which, in the particular circumstances of the case, caused the dismissal to be unfair because it is outside of the band of reasonable responses (**Gwynedd Council v Barrat and anor 2021 IRLR 1028 CA.)**

88. Agreed or customary arrangements for redundancy are not afforded a particular status within the legislation. I do not deal with the law as it relates to contractually agreed redundancy procedures or collective agreements since the Claimant's case as not been put on that basis, nor is it obvious to me that such a case falls to be made by reference to the Respondent's retail review or ongoing collective consultation set out in the pack, to which I will come.

89. Returning to the selection criteria, it must be objective, clear and transparent. The incorporation into the criteria of matters of judgment will not cause the dismissal to be unfair *per se.* The EAT has expressly acknowledged that matters of judgment are capable of being assessed in an objective and dispassionate way. (**Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT 0605/11**)

90. An element of subjectivity will not be fatal. (**Mental Health care (UK) Ltd v Biluan and anor EAT 024812**).

91. There is a statutory requirement to consult with appropriate representatives where collective redundancies are proposed. This can be considered on the question of fairness under 98(4).

92. The principle more commonly applied in conduct dismissals, that defects in the dismissal are capable of being cured on appeal *does* apply: **Lloyd v Taylor Woodrow Construction 1999 IRLR 782** and **Whitbread and Co plc v Mills 1998 ICR 776 EAT.** I specifically asked both representatives about this and they agreed with this legal proposition.

93. Following **Taylor OCSD Group Ltd ICR 1602,** such remedying is not uniquely available in cases where the appeal is by way of rehearing.

Conclusions

94. I turn now to my conclusions, taking each head of alleged unfairness put forward by the Claimant. It is right to say these enlarged beyond the formally pleaded allegations during the hearing, and particularly during submissions. Mr Welch, quite correctly and creditably, took no procedural point about this. They are further facets of alleged unfairness and disclose no new claim. It is also right to reflect that the Claimant does not (with respect to Mr Gerrard who advanced her claim with commitment and care) have professional legal representation.

Overarching unfairness -(a) national selection criteria inherently too subjective

95. The Claimant challenges that the selection criteria, on any view, were insufficiently objective and measurable. In particular, the Claimant says the criteria referred to in paragraph 25 above were almost wholly subjective and as a consequence, open to predetermined bias.

96. I reject this submission.

97. Of relevance here is that a range of measures were included and how they were obtained. The two biggest contributors to the Claimant's overall score (i.e., 50 out of the available maximum of 70) derived from the interview and ways of working statement and had detailed scoring matrices which were required to be supported by a bespoke rationale. Although therefore – as primarily intended – it was the assessment of the particular people manager and store manager that counted, this precluded or at least substantially diminished, the risk of subjectivity.

98. The 4 "my performance" components flowed from the assessment of the store manager only. However, it is clear from Mr Halliwell's evidence that there are some established parameters, particularly around "new to role" scores that are available. Even more importantly, there had been a calibration process in relation to half of those scores.

99. None of this incorporated any unjustifiable subjectivity. It is inevitable that for all but the most factual metrics like attendance record, the measuring of performance involves the exercise of judgment by other people. However, all managers in the company were benchmarked according to the same range and these were recorded.

Overarching unfairness - (b) too much subjectivity in permitting a store manager to proceed alone, in whole or part.

100. The above therefore deals with the situation primarily envisaged by the pack, in which both the people manager and the store manager together rate the employee in the respects indicated. As I read the pack, the Respondent did contemplate expressly the possibility of the store manager working, at least sometimes, in isolation to a people manager. I accept that this introduced a greater potential for bias. However, the store manager, when and if acting alone, was not permitted to deviate from the applicable selection tools. Applying those according to the relevant matrices, the Respondent in its approach was not sanctioning or embedding a criteria that had ceased to be objective and measurable. It simply had greater potential for being less optimally objective. That is not the same thing as being subjective. Again, I make no criticism of the selection structure overall because it did not specifically bar a store manager from acting alone or furnish any different process other than consultation with regional managers as to how the store manager should then manage the situation.

Unfairness in the way the process was applied to the Claimant

Deviation from the pack – a general point

101. I begin with a general point. In my judgment, the benchmark of fairness is not compliance with the process. I consider the Respondent needed to meet her legitimate expectations and act within the parameters of what was promised. However, a lack of complete or strict compliance with the process does not drive or require a finding by me of unfairness. The reverse is also true. I must make a holistic assessment of fairness having regards to the matters in s.94. The Claimant advanced a number of matters which I deal with in turn.

(a) Absence of people manager in Claimant's case/ actual bias against the Claimant and/or in favour of others

102. In her witness statement the Claimant specifically references that the presence of a people manager would avoid any *potential* favoritism or bias. However, she has not cited any reason in that statement either that she thought Mr Wood was biased or that she ever communicated such a

suspicion or belief to the Respondent. That emerged in questioning for the first time. It was based on a feeling and, she said, experience. This is too vague to support an assertion of bias. In addition, it is worth noting that the absence of a people manager was not of Mr Wood's design, and he was acting without one, with the knowledge of the Head of People. In the circumstances, the Respondent was not knowingly allowing someone to conduct the process who was ill disposed to her or otherwise unsuitable.

103. On the other hand, it is right to say that the scoring for selection purposes ended up in the hands of one person for what amounted to the lion's share i.e., the interview and statement. (The other scores had been "locked in" or "calibrated" previously so these were not open to be manipulated, had there been such a motivation.) About this a couple of things can be said. First, it applied equally across the piece to all affected managers. The Respondent had no reason to be concerned that Mr Wood would bring anything different to the Claimant's scoring. Secondly, despite the undoubtedly large size of the Respondent's organisation, I find it was not outside the range of reasonable responses – given the available people manager resource at the time – to allow the store manager to proceed on his own. It did not introduce unreasonable subjectivity.

104. I have excluded bad faith in the scoring. I am also not satisfied on the balance of probability that in the Claimant's case the scores were for any other reason unjustifiably low in all the circumstances i.e., that they were wrong and that she simply *could not be* the lowest scoring candidate in the Morecambe store. Ms Maguire certainly impressed me as a bright, self-possessed woman with a clear desire to succeed in her career. However, two things are relevant. One I have not seen or, save for the disclosure of their scores, am I otherwise aware of the qualities of the other candidates. The anecdotal information she raised about another successful candidate not even trying was not supported by any direct evidence. Secondly, it is not for me to substitute my own judgement as to whether or not I think the Claimant should have been retained as having a clear promise as a future manager.

(b) Failure to score contemporaneously and inbuilt bias because of the Claimant's newness to her role

105. I do not accept that the admitted failure of the store manager to score the candidates contemporaneously with their interviews created unfairness or disadvantage to the Claimant. The gap between the date of her interview and her scoring was logically at the higher end of the spectrum, at 13 days. The material point is that all candidates were scored in this way. There is no clear basis on which to infer or assume this created any unique disadvantage to the Claimant. I follow an argument that the passage of time causes the performance of a candidate to be less clearly remembered and therefore the resulting score has the potential to less faithfully reflect their performance - but logically that must be for good or for bad. I did ask Mr

Gerrard to put to the witness specifically the basis on which he claimed this disadvantage for the Claimant. He did not articulate this beyond suggesting that she would have been disadvantaged compared to candidates seen one to three days before the scoring. That does not deal with my point, and I am not satisfied on the evidence that any unique or worse disadvantage accrued to the Claimant because of the delay.

106. The Claimant says it was unfair that as a manager her performance rating was capped because of her newness. In reality this brought – to a limited extent - an additional element of length of time in the role which affected her. I accept that in the events which happened, it did have that effect. However, I am persuaded by the evidence of Mr Halliwell that it was an embedded policy. It follows that it was applied uniformly. In the circumstances of her store this was apt to affect the Claimant's position (she was one of three only of the level 2 managers that scored the same mark here) but in circumstances when she went into a regional pool, it would have affected other candidates to like degree.

(c) Evidence of anomalous scoring for other candidates

107. It is trite that a dismissal may be unfair even where the conduct complained of is straightforwardly incompetence. Having excluded bias, and seen Mr Wood's embarrassed reaction when confronted about this matter in cross examination, I am satisfied this was caused by error. Logically this could arise in one of three ways: the result of error in transposing the scores, incorrect arithmetic in calculating them (there were 5 underlying parts to each "incorrect" even score) or in deciding them without proper regard to the applicable parameters. I am persuaded the cause is more likely to be one of the former two. They were relatively isolated errors having regard to the overall set of numbers in the Morecambe spreadsheet. Although Mr Wood did fall short in a number of areas, I am satisfied that he did have a good grip on the various scores available. I am persuaded by the Respondent's submission that factually, the scale of the transcription or arithmetic error would not be of any magnitude or consequence and certainly not such as to affect the outcome for the Claimant, given her preferences for a level 3 role. I will return to this when dealing with the effect of the appeal below. For present purposes, the simple point is that when set alongside my other findings, I find the fact of the clear anomalies *not* to be evidence of unfairness.

(d) Underscoring of My Performance, specifically talent score

108. I conclude there was no underscoring of the Claimant's my performance score. Mr Halliwell investigated this aspect thoroughly and fairly and the Claimant's score was reasonably warranted, on an objective basis.

(e) Another candidate who succeeded was given a fourth role preference

109. Again, Mr Halliwell gathered clear, cogent evidence that the inclusion of a fourth role preference added no advantage to Mr Corpe. It did not corrupt or alter the outcome of the Claimant. Having looked at his form, I see that Mr Corpe added the words in manuscript, unprompted by the Respondent. The entire effect was neutral and no more than a reiteration of a positive answer to the question later expressed in the same form about willingness to work nights. Mr Holsten was clear that the manuscript addition was not in any way taken into account at a regional level.

(f) Lack of information or adequate information about her right of appeal

110. Contrary to the Respondent's submission, I find there was unfairness here. I find the circumstance of Mr Wood alone dominating the process, including controlling relevant information, and being the manager of the Claimant's store, constituted unusual factors meaning that for a redundancy, an appeal avenue both for scoring and substantively, was necessary to ensure fairness. The Respondent had catered for this. There was then actual unfairness in not giving the Claimant complete and accurate information about how to challenge her scoring in accordance with the new appeal guidance. The reference to My Morri and 10 days was not enough in the circumstances. This was not abrogated because the Claimant had not nailed her colours to the mast in front of Mr Wood. I found he was in no doubt about her dismay and anger at the outcome, and by necessary implication, the evaluations he had made. He was in a position of relative power and, as the only source of information, stood as the sole de facto gatekeeper to an appeal. In the absence of a people manager, he should have realised this. It was not sufficient in those circumstances that he did not fully explain the expedited procedure available using a specifically entitled email. This would have reassured the Claimant that a national protocol had been devised precisely to look into disputed scores. He confused the issue in fact, with reference to a further letter by the Claimant to him. She could only interpret this as having to set out in detail her own criticism of her overall boss, directly to him. The fact the Claimant did not in fact go onto My Morri is not determinative. She was by this stage flummoxed and felt fobbed off. Had she been aware that her employer had fixed an expedited process – that was not required to be channeled via Mr Wood and that would be looked at - I am satisfied she would have used it. I reject that her friendship with Mr Corpe would have stopped her from making a challenge, such was her sense of injustice.

The effect of the appeal

111. As I have set out, unfairness can be remedied on appeal. I consider the appeal was undertaken with significant attention and care. I am satisfied it harnessed elements of a review and a rehearing and that the Claimant was faithfully rescored. This was in addition to the Respondent satisfying

itself that there was no evidence of bias and thoroughly examining all of the other points of appeal. The conclusion of the appeal was that the Claimant's scoring was in all the circumstances right. The question then arises as to whether this *in fact* had the effect of remedying the unfairness I have found. Inevitably, the matter cannot be precisely remedied in the sense of affording to the Claimant the right to have her scoring appeal dealt with regionally in March 2020, whilst her dismissal was still provisional. This would have unearthed far sooner Mr Wood's deficiencies in late scoring and the absence of documented rationale. However, I consider such an appeal then is more likely than not to have reached the same conclusion as Mr Halliwell reached. By revisiting the scoring, he placed himself in the position of being able to reflect on any adjustment there ought to have been to her score. He was then in a position to feed this into the substantive appeal about the unsuccessful outcome. Amy Swift had confirmed to him that the Claimant had been unsuccessful on the regional pooling of the original score which he found, alongside Ms Wilkinson, was the correct score.

112. The appeal did not consider the effect on the Claimant's regional pooling of the two candidates whose scores included errors. That is because it was raised in the hearing for the first time. It is quite a forensic point and Mr Halliwell cannot be criticised for not picking it up. For the reasons given, the Claimant has not persuaded me that this is a marker of unfairness or absent the errors, her outcome would have been different.

113. Beyond these points and returning to the list of issues, I also conclude there was fair and sufficient warning of the threat of redundancy. There was concurrent and wide-ranging consultation with the recognised unions. The Respondent found and offered to the Claimant suitable alternative employment in the Cake Shop.

114. It follows that whilst the Claimant experienced some unfairness in her original dismissal, this was remedied on appeal. Her dismissal on the basis of redundancy was in all of the circumstances within the range of reasonable responses. Her complaint accordingly fails.

Case Number: 2409483/2020

Tribunal Judge A Miller-Varey
(acting as an Employment Judge)
22 April 2022

Sent to the parties on: 27 April 2022

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For the Tribunals Office