EMPLOYMENT TRIBUNALS

Claimant: Miss A Collick

Respondent: British Telecommunication Plc

Heard at: Cardiff Employment Tribunal and remotely by video

On: 15, 16, 17 February 2022
18 March 2022 (in chambers)

Before: Employment Judge S Moore
Mrs L Bishop
Mrs A Burge

Representation
Claimant: Mr E Beese, CWU
Respondent: Mr Goodwin, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The claimant was unfairly dismissed and her claim for unfair dismissal succeeds.
2. The respondent has subjected the claimant to direct sex discrimination contrary to s13 Equality Act 2010. Remedy to be determined at a remedy hearing.

REASONS

Background and Introduction

1. The ET1 was presented on 27 February 2021. Early conciliation started on 20 January 2021 and ended on 10 February 2021. The claimant brought claims of unfair dismissal and sex discrimination. The Tribunal sat as a hybrid hearing with the members joining remotely. There was an agreed bundle of 266 pages. The respondent had added further pages to the bundle without having disclosed the documents to the claimant and without the

agreement of the claimant. The respondent subsequently withdrew the application to admit these documents.

2. The Tribunal heard evidence from Mr G Wiles, the claimant's line manager for the respondent and the claimant.

3. On 17 February 2022 it transpired during cross examination of Mr Wiles that potentially there were documents that had not been disclosed to the claimant specifically regarding the email from the claimant dated 20 November 2020 at page 208 of the bundle. This was a potentially important email as the claimant raised allegations in that email that she was being subjected to discrimination due to her gender. Mr Wiles told the Tribunal he had not been asked as part of disclosure to check whether there were any other emails sent or received in response to that email. Mr Wiles was released from oath to discuss this matter only with Mr Goodwin. As a result Mr Wiles identified there were further emails that should have been disclosed. These were subsequently sent to the Tribunal and Mr Beese. These have been added to the bundle at pages 269 - 272.

4. The Tribunal had concerns about the disclosure process and made an order for the Respondent to lodge a witness statement from the person within the Respondent who was responsible for disclosure in these proceedings. The statement was required to set out what steps were taken to ensure disclosure was properly conducted in accordance the order for disclosure and explain why the emails disclosed on 17 February 2022 were not disclosed under this order. The statement was also required to confirm the position in respect of searches undertaken to ensure that there was no further outstanding disclosure surrounding the email in question. In particular that all recipients of the email (and those to whom the email was forwarded) had undertaken appropriate searches to ensure there are no further emails that should be disclosed. These would include but not limited to Mr Neale, Mr Buckley, Ms Hughes, Ms Calladine and Ms Tait.

5. As a result, the respondent lodged a witness statement for a Rajneet Dhaliwal, paralegal and further documents were disclosed on 18 February 2022. Rajneet Dhaliwal was not the person who had dealt with disclosure. This had been conducted by another paralegal. It was unclear why that paralegal had not made the witness statement, except there was reference to them being "a previous paralegal."

6. We set out the relevance and findings in respect of these documents below at paragraphs 112-123. There remained no satisfactory explanation before us as to why the documents disclosed on 18 February 2022 had not been previously disclosed.

7. Three days had been allocated to hear this claim. At the end of the third day the Tribunal had heard the evidence but not reached the stage of submissions. Given the late disclosure, Mr Beese was provided with 14 days to review the newly disclosed documents and witness statement of Rajneet Dhaliwal and confirm whether he required further hearing time to ask questions or call any further witnesses. Mr Beese subsequently confirmed he did not require this and as such parties were directed to make

written submissions. The Tribunal met in chambers on 18 March 2022 to reach their decision.

8. We have decided to abbreviate the names of the comparators and individuals involved as their actual names are not relevant and some of the information we set out in our findings is of a personal nature. We did not consider that any Rule 50 orders were necessary.

The issues

9. The parties had agreed a partial list of issues prior to the preliminary hearing on 9 July 2021. The claimant was directed to complete the list of issues by adding the alleged less favourable treatment and comparator names in relation to the sex discrimination claim. The respondent was then required to lodge an amended response. The actual draft list as amended by the claimant was not in the bundle. This was sent separately to the Tribunal. This was discussed with the parties and it was agreed that Mr Goodwin would produce a final version for agreement. The final agreed issues were as follows.

10. Unfair Dismissal

a. Was the Claimant dismissed for a potentially fair reason pursuant to S98(2) of the Employment Rights Act 1996 (ERA), namely redundancy?

b. If so, did the Respondent act reasonably in treating redundancy as a sufficient reason for dismissing the Claimant, in that:

c. Did the Respondent have a genuine redundancy situation?

d. Did the Respondent carry out a meaningful consultation process with the Claimant and in particular did the Respondent embark on the consultation process with a closed mind? It is the Claimant's case that she was informed that she was the one "at risk"; the Respondent would not enter into any discussions about efficiency measures; the Respondent would not entertain any suggestions of how the Claimant's dismissal on the grounds of redundancy could be avoided including by selecting a male colleague who wished to leave, (a male radio rigging manager in the same pool as the claimant who we shall refer to as “Mr MA”).

e. Did the Respondent fairly select the Claimant for redundancy? It is the Claimant’s case that she was told by her manager that she was the one that was placed ‘at risk’/selected and ;
f. The respondent failed to provide a revised structure which prevented the claimant from submitting a counter proposal and;
g. The respondent advised the selection would be based on an interview procedure and failed to disclose that this only accounted for 60% of the scores with the remaining 40% of the scoring would be based on previous performance appraisals.

h. Did the Respondent consider alternative employment for the Claimant? It is the Claimant’s case that there was a suitable alternative that she applied for but her application was unreasonably rejected in favour of a male

colleague and a request for a review of this decision was met with no response. Specifically this was in respect of a role at Goonhilly ("the SatComs role" which was given to a male radio rigging engineer who we shall call "Mr MD").

i. The claimant maintains the respondent also failed to consider suitable alternative employment by failing to explore an expression of interest in voluntary redundancy by a "Mr AE" which would have enabled the Rigging Team to retain Mr MD and enabled the claimant to secure the SatComs role.

j. Was the dismissal of the Claimant fair in all the circumstances? In particular, did the Respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant pursuant to section 98(4) ERA?

k. The claimant complains that an additional layer of efficiency savings was introduced into the decision making process by the decision to decline to allow Mr AE to leave voluntarily.

l. Did the Respondent follow a fair procedure when dismissing the Claimant?

m. The Respondent confirmed in their submissions they do not pursue contributory fault or any Polkey adjustment.

n. To what extent, if any, has the Claimant mitigated her losses?
o. To what, if any, compensation is the Claimant entitled?

11. <u>Direct Sex Discrimination</u>

12. Who is the appropriate comparator for the purposes of the Claimant's claim of direct sex discrimination?

13. Did the Respondent treat the Claimant less favourably than it treated or would treat the relevant comparator?

14. The Claimant alleges the less favourable treatment to be her selection for redundancy, and in particular:

i) That there was a pre-designation of the Claimant for redundancy dismissal, in particular, the Claimant is referring to Mr MA[1] who refused to participate in initial stages of the redundancy process, yet was not placed at risk/ selected; and in particular she refers to the vacancy she applied for and for which she was rejected while her male colleague Mr MD was permitted to job shadow the position and was subsequently slotted into the position;
ii) Failing to select a male colleague (Mr AE) who wished to be made redundant.[2]

[1] MA was in the same pool as the claimant
[2] The issue with MD and Mr AE was not that they should have been placed in the pool with the claimant but that the factual matrix surrounding their roles was not properly assessed – had it been so, it could have resulted in the claimant avoiding redundancy. This is the alleged less favourable treatment because of the claimant's sex.

15. The Respondent denies any less favourable treatment occurred:

a. Mr MA was properly assessed in the pool alongside the Claimant and
b. if any unfairness/unfavourable treatment is established, it was not due to her sex;
c. There was no current vacancy for the 'Satellite Communications' role during the period the Claimant was at risk of redundancy and the Claimant did not have the skillset for such role.[3]
d. If any unfairness/unfavourable treatment is established, it was not due to the Claimant's sex but due to Mr MD having already experienced the role and having the skills for such;
e. The Claimant nor Mr AE put forward a formal 'job swap' nor was the Claimant suited to the role. If any unfairness/unfavourable treatment is established, it was not due to the Claimant's sex

16. If there was less favourable treatment was it because of/on the grounds of the Claimant's Sex, contrary to the Equality Act 2010?

17. If so, what compensation is the Claimant entitled to including the value of any award for injury to feelings?

The Law

Unfair dismissal

18. Redundancy is a potentially fair reason for dismissal under S98 (2) ERA 1996.

19. The reasonableness requirements arising from S98 (4) ERA 1996 were set out in a redundancy case of **Williams v Compair Maxim Ltd [1982] IRLR 83** (per Browne-Wilkinson J) **:**

20. Reasonable employers will seek to act in accordance with the following principles:

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

2. *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] Mr Beese objected to this being added to the list of issues as it had not been pleaded.

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.*

21. Regarding consultation, the EAT in **Mugford v Midland Bank [1997] IRLR 208** summarised the position as follows:

> *Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.*
>
> *Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.*
>
> *It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.*

Direct Sex Discrimination

22. Section 13(1) of the Equality Act 2010 ("EQA 2010") provides that direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic of sex than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

23. Under s136 EQA 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the

then Sex discrimination Act 1975). The Tribunal must approach the question of burden of proof in two stages.

24. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. To discharge the burden of proof "it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex," (per Gibson LJ).

25. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

26. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

27. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

<u>Findings of fact</u>

28. The claimant commenced employment on 27 March 1995. She formally had previous roles, her most recent role was that of Radio and Rigging manager which she commenced in June 2019. The claimant's role covered south-west England and south Wales. She managed 18 radio and rigging engineers whose job was to install and maintain the respondent's masts and towers, radio equipment and antenna. As well as team management, her day to day duties involved climbing the telegraph poles and setting up rigging systems. She also was able to identify faults and whilst the claimant had not passed qualifications in this regard, she had considerable experience on the job.

29. In March 2020, the respondent announced changes across the engineering services with BT technology. The radio and rigging teams and their managers would leave the current regional team structure with the electrical power teams and become a separate national team with their own senior

manager. In April 2020, the five other radio and rigging managers along with the claimant became one team and were appointed a new senior manager Mr Gary Wiles.

30. Mr Wiles allocated each manager a lead role within the team with the claimant taking the health and safety lead. This involved the claimant attending all health and safety meetings on behalf of radio and rigging across the whole of engineering services within BT technology. The claimant would then feedback information from these meetings on managerial conference calls.

31. The claimant's evidence was that generally Mr Wiles was seemed very aloof with her and contrasted behaviour towards her with friendly talkative and jokey behaviour with male colleagues. He generally avoided addressing the claimant and she would not hear from him on a day-to-day or regular basis. The claimant says she also found his attitude and demeanour to her dismissive. We find that was the claimant's perception but we do not find that Mr Wiles behaved in a discriminatory manner based on gender in his treatment of the claimant and the other male colleagues within the team. There was no evidential basis for making such a finding.

Policies

32. We had sight of a number of the respondent's policies in the bundle.

33. The first was a policy called "Consulting Manager's Guide to Reorganisation" dated June 2020. This was as the name suggested a guide for managers to help them support the business during reorganisation and possible redundancy. The guide set out some background information about redundancy collective consultation and individual consultation. It contained advice to the manager about their role during consultation and how to conduct consultation meetings. It also explained their role in respect of redeployment. Specifically the policy provided that the employee had to have the chance to challenge their selection and respond to any suggestions and support with their search for alternative roles. It also stated that the manager should at the final meeting confirm the decision in writing and the offer of an appeal.

34. Under redeployment an employee was entitled to be made a priority candidate for vacancies if they had been put at risk which would mean that they would be identified as such by HR by a flag on the respondent's internal system and have priority status for vacant positions.

35. We also had sight of a policy titled an "Employee's Guide to Reorganisation (Including Redundancy)". This was a document that had been included in the bundle by the respondent but was dated July 2021. We noted from the version control at the end of the document that the document had been created in June 2020 and updated on 8 July 2020 in respect of a wording "what happens at the final meeting section". It was then updated in January 2021 following a review. We find that this was the valid version at the time of the claimant's redundancy. The respondent has included it in the bundle and the version control only cited a review of a short extract of wording. The document provides in several places that the respondent allowed volunteers

from a selection pool to apply for discretionary enhanced terms where it "is reasonable to do so and supports the business objective." Where it is not reasonable (and an example is given "e.g. key skills") the policy states the respondent will always explain why (with rationale). This policy also states that the employee who is being made redundant has the right to appeal the decision.

Voluntary Redundancy

36. Under cross examination Mr Wiles was asked why voluntary redundancy had not been considered in the claimant's selection pool and the respondent's policy above was put to him. Mr Wiles' evidence was at the time this was not the procedure. We find that this cannot have been the case as it is the respondent's document in the bundle and the version control suggested that it was the procedure at the relevant time. Mr Wiles also told the Tribunal that he was informed by HR that they "were not going down the volunteer path". He told the Tribunal that he was told this during a FAQ call by Jessica Tate and Rachel Hughes, HR advisors. There was no explanation offered to Mr Wiles why this was the case and he did not question the decision.

37. We find that this was contrary to the respondent's policy that we have quoted above. There was no evidence before us that the volunteer route would have caused any key skills issues or that the decision to not accept volunteers had been explained. Nor had rationale been provided.

Policy titled "Our Guide to Pay and Benefits – discretionary enhanced redundancy (EVS Terms") New Policy"

38. This policy was also dated July 2021. The version control stated that it was a new document as of July 2021. This was the only evidence available and had been provided by the respondent as to the procedures when employees were offered enhanced terms if they accepted redundancy. For these reasons we make findings based on this policy wording.

39. Nowhere in that policy does it state that if an employee accepts the enhanced terms that they are not permitted to appeal their dismissal for reasons of redundancy. This was not a policy contained anywhere in any of the documentation before us. We noted under the notice period section it stated that EVS terms employees would be entitled to contractual notice and would usually be expected to work their notice period and sometimes that they may work their notice on garden leave. The policy provides that at the company's discretion if the employee is not required to work all or part of their notice, they may pay an equivalent to an amount of unworked notice known (PILON).

40. At section 13 of the policy, it provides that in a redundancy situation where the employee works all or part of their notice, their notice period commences on the day following the date the EVS Terms are formally accepted by the business.

Collective agreement

41. We also had sight of a collective agreement between the respondent and the CWU Trade Union (an extract). The agreement sets out the agreed redundancy terms that would apply to CWU representatives team members within the scope of the agreement (and so applied to the claimant). This provided that the respondent would only consider redundancy after considering voluntary means. The reference to voluntary redundancy was also referred to under "Considerations Prior to Redundancy" which stated that before formalising proposals which would include potential redundancy, BT and the union were jointly aimed to resolve identified surplus staff by voluntary paid leavers. It reiterates that the respondent will work with the union with a joint aim of achieving redundancies by voluntary means.

Job swap policy

42. The respondent has a policy called "Job Swap" which supports technology colleagues who are displaced from their roles through organisation change or transformation, to identify opportunities to swap roles with colleagues who are not in scope for the proposed changes but wish to volunteer to leave BT. If the swap is viable and approved, the voluntary leaver will exit the business on voluntary paid leaver terms in line with the EVS policy and the colleague displaced would transfer into their role. It provides that the job swap is undertaken on a voluntary basis by both parties proposing the swap and that includes taking on the attendance patterns of the role that the colleague is swapping into the required location. The colleague swapping into the role must have the same or similar skills, capabilities, and competence to carry out the role. If the two colleagues are in different locations this will not preclude considering a request for job swap but no relocation cost would be paid.

43. If someone wishes to make a request under the job swap policy, they are directed to submit details on a form which is then supposed to be added to the job swap role register. The swap is then considered by management.

Counter proposal process

44. This was a document provided in the bundle which appeared to be a process-based document in respect of the specific redundancy proposals affecting the claimant. The counter proposal process provided as follows (setting out relevant sections only).

45. During individual consultation, the respondent would have meaningful consultation and consider any counterproposals that may be put forward; individually consult with people who are affected by the proposal, making sure that they aware of the proposals, and consider what this means for them, how this might be mitigated and look at their options/potential attentive.

46. Counterproposals were explained as proposals which would be alternative ways of reorganising the business to meet the business challenges in response to the proposed organisational changes. It provided the employees who were affected by the proposals can submit their counterproposal as an individual. It provided that the respondent should fully consider the counter proposal with support from employee relations

team in the business area. It provided for a procedure and had a standard form to complete.

Redundancy Procedure

47. On 22 July 2020 there was an announcement within BT Technology of 217 redundancies across the division.

48. Following the general announcement to all staff regarding the 217 redundancies, Mr Wiles wrote to the claimant on 29 July 2020 explaining she was now to enter individual consultation and there would be a series of meetings over the coming weeks with a view to detail the proposed selection process and what this might mean to the claimant. The first consultation meeting was set for 5 August 2020 via a skype call.

Meeting 5 August 2020

49. The meeting notes set out as follows. Mr Wiles explained to the claimant that there were currently six Radio Rigging managers nationally and they were proposing to reduce the number to five. Over the coming weeks he would hold an interview which each of the persons in the pool. Mr Wiles said at the time of the meeting he had not seen the selection criteria but the questions would be around the current job descriptions and the focus of the interview would be confirmed in the invite. Mr Wiles explained to the Tribunal that he decided to use the interview procedure rather than selection matrix as he was fairly new to the role and did not have detailed knowledge of the persons within the pool to be able to select them through a matrix procedure.

50. As to the rationale underlying the decision to reduce the number of radio and rigging managers from 6 to 5, there was no information provided to the claimant save that there would be that reduction. The claimant asked Mr Wiles what the new proposed structure would look like and she was informed that he had not decided on structure would not be doing so until he had selected the five managers that would stay within the business. The notes of the meeting say that the claimant should have been given an opportunity to give counter proposals to the current proposal and she was provided six business days from the date of the meeting to issue any.

51. Under the section titled “Questions” in the notes, Mr Wiles recorded that the claimant asked about maps and the geographical basis of the new structure and stated, “she will be very willing to travel and adapt”. Accompanying the notes of the meeting was a checklist which prompted the manager Mr Wiles to complete a series of questions to ensure that the consultation meeting had covered everything it was supposed to have. Mr Wiles also explained that in addition to the interview the candidates would be able to fill in a document highlighting three technical competencies and this would be assessed as part of the interview process, although the completion of the document was not compulsory. This document was called “Selection Colleague Submission”.

52. On 14 August 2020, Mr Wiles sent the claimant the selection colleague submission blank document along with information about the structure of the interview process and the key components which had now been agreed. The interview would be made up of three parts:

a. Three technical competencies namely problem solving, communication and engagement skills, and business/financial acumen;

b. The BT values, ("Personal, Simple, Brilliant") and;

c. Three "connected leader" behaviours. The claimant was not informed at that time which of the "connected leadership" behaviours would be assessed.

53. On 21 August 2020, the claimant submitted her selection colleague submission form to Mr Wiles.

Interview

54. The claimant's interview took place on 26 August 2020. The interview was conducted by Mr Wiles with the support of Debbie Woodfield in HR. It appears by the time of the interview the claimant had been informed of the "connected leader behaviours" as the notes show a discussion on these. The Tribunal did not have sight of the all of the scoring within the pool[4] and have had not made any evaluative process in respect of other peoples scores. The scores themselves were not the subject of the challenge to the fairness of the procedure by the claimant.

55. The claimant had prepared some slides to use at her interview but was not permitted to use these by Mr Wiles. Mr Wiles explained that he wanted a level playing field for all of the people within the pool and it would not be fair to allow some to submit slides and use them to evaluate and others to not.

Mr MA

56. We pause here to set out our findings in respect of the parallel procedure that was running in respect of another colleague's experience during this selection process. Mr MA who was a male Radio Rigging manager on the same grade and role as the claimant and in the selection pool. Mr MA is also a comparator cited by the claimant in respect of her sex discrimination claim.

57. Mr MA's invitation to the interview process was sent much later than the claimant's on 25 August 2020 which was the day before the claimant's interview. Mr Wiles referenced the first individual consultation meeting that had taken place and the email largely followed the same structure as the claimant's regarding the interview procedure, except that Mr MA was told what the three connected leadership behaviours were that the interview would focus on. Mr MA's interview was set for 1 September 2020 at 3.00.

[4] These were the documents the respondent sought to add on the first day and after the claimant objected, were withdrawn so we have not considered them in these proceedings.

58. We then had sight of an email in reply from Mr MA sent at 12.32 on 1 September 2020 to Mr Wiles. This stated as follows:

> **"Dear Gary,**
>
> **As discussed last week, I am not proposing to attend the interview today at 3.00pm Tuesday 1 September 2020.**
>
> **There is little doubt in my mind that I would pass the interview today and I am sure very highly as well, as you know my basic salary is less than the C3 team members I manage, a grade I once held myself and aspired from for promotion to be a manager.**
>
> **To find myself seven years later on less than a C3, for at least the last two years and that amount only increasing each year I am finding very hard to swallow. I appreciate these are difficult times and many people are losing their jobs elsewhere. I have friends in that position. Here at BT, my team being paid more than their manager I cannot reckon with. I am embarrassed when the subject comes up with friends, who are shocked and can never understand it.**
>
> **I see no reason to attend an interview knowing I will be taking on more staff, that would need lot closer management, meaning a lot more traveling, earlier starts and later nights, knowing everyday they are paid more money than I am. I am also wondering what impact it may start to have on my health and wellbeing……**
>
> …….
>
> **I have given this matter a great deal of thought over the last five weeks and six days, every day including my two weeks on leave I found myself thinking and talking about it even when trying not to. I am aware of this decision may well put me at risk and I will accept the consequences. It is my understanding I have the option not to attend the interview. I would be grateful if you could confirm my understanding of this is correct please".**

59. Mr MA did not attend the interview on 1 September 2020. Mr Wiles was asked why in cross examination at the point of receiving this email from Mr MA did he not simply treat this as a very clear indication that Mr MA would be willing to accept voluntary redundancy and therefore that should have brought an end to the selection process. This would have left five radio rigging managers and there would be no need to continue onwards. Mr Wiles told the Tribunal that he had already asked whether volunteers would be allowed at an FAQ call with HR (see above at paragraph 36) and was told no although he was unable to offer any rationale (as provided for in the policy) why this would be the case. This approach was contrary to the various policies and collective agreement that mention voluntary redundancy set out above.

60. We find the next turn of events to have been irregular in the experience of this Employment Tribunal. On 8 September 2020, Mr Wiles sent an email to Mr MA effectively instructing him to attend the interview and that if he did not do so it may result in disciplinary action as a result of failure to comply with "lawful and reasonable direction". The email stated as follows:

"Last week you informed me you had chosen not to attend the interview I set up as part of the selection process. At the time you asked if you had the option not to attend. After seeking further guidance from the relevant support team it has come to my attention that asking you to attend an interview to give you an overview of you skills against your current role is classed as a reasonable management request as such you are expected to participate in the process….

I am conscious you were not aware of the mandatory requirement for your attendance at interview prior to the date of the previous scheduled interview. I therefore confirm that there will be no negative consequences for not attending your first scheduled interview on 1 September…. However, I feel it is important to inform you that if you do not attend the next interview without having acceptable grounds for being unable to attend and without attempting to reschedule this may result in disciplinary action as a result of failure to comply with 'lawful and reasonable direction'".

61. Mr Beese asked Mr Wiles about this in his cross examination. It was put to Mr Wiles that threatening Mr MA with disciplinary proceedings was completely outside of any policy in operation within the respondent and amounted to a threat. Mr Wiles accepted that there was no policy that he could point to which would support this approach but insisted that he had been told to follow this procedure after discussing it with HR and it was agreed that he could not remove himself from the selection procedure. It was also put to Mr Wiles that he made this policy up "on the hoof" as retaining Mr MA was key to the plans to make the claimant redundant, Mr Wiles disagreed.

62. The claimant's case was that everybody knew that Mr Wiles was desperate to keep Mr MA as he always relied on him and deferred his decision making on some issues until he has spoken with him and then went along with those views regardless of what we had spoken about. The claimant says at that point all of the other managers knew and realised a redundancy process was not going to be a level playing field as there was no way that Mr MA was going to be the one chosen for redundancy.

63. Following the claimant's redundancy ninety percent of her geographical patch was reallocated to Mr MA.

64. Mr Wiles' evidence, which we accepted was that Mr MA had not subsequently received a pay rise following his concerns he had raised about his pay. Mr Wiles also was asked if the respondent had a policy that compelled people to attend interviews if they are in the selection pool in respect of a redundancy situation and Mr Wiles told the Tribunal he had not come across any such policy but he had taken it to the relevant team and took advice of the HR professionals who advised him this was the correct course of action to take. He was asked how and when he had taken this advice from the HR professionals. Mr Wiles said that he spoke to the HR support managers on a bi weekly call that had been set up for managers and HR throughout the process. Mr Wiles said he spoke to them on Teams and did not specify any individual names. He was advised by Jessica Tait that he should take the above course of action and confirmed he believed that she confirmed this with Rachel Hughes. This then prompted him to write that email to Mr MA set out at paragraph 60 above.

65. Mr Wiles also confirmed that Mr MA did not put in any supporting documentation at the interview namely the selection colleague submissions form and even in the absence of completing such a form that he had outperformed the claimant at the interview.

66. It was the claimant's case that it was pre determined out of the whole pool that she would be selected. Whilst we do not find that it was pre determined

that the claimant would be selected, we do find that there was a pre determined decision that Mr MA would definitely not be selected for redundancy for the following reasons and that Mr Wiles and HR decided to find a way of retaining Mr MA in the process despite a very clear indication he wished to rule himself out. In doing so, they departed from all of the respondent's policies and the collective agreement in respect of firstly seeking volunteers. There was no evidence that the respondent had a rationale for ruling out volunteers in this particular redundancy process. We find it implausible that there would have been no email traffic around this decision between Mr Wiles and HR and that such an important question could have been raised and dealt with at an FAQ telephone call. Mr MA ruled himself out of the selection process by refusing to attend the interview, despite stating very clearly he understood the consequences at which point he was threatened with disciplinary action if refused to attend the interview. We find that these factors plainly point towards a pre determined decision to retain Mr MA.

Events September – October 2020

67. Thereafter followed a long period of delay between the interviews and the next stage in the selection procedure. This was very stressful period for the claimant due to the long delay and not knowing her future. The internal notes between Mr Wiles and HR reveal at this time the following happened.

68. As of 15 September 2020, the selection was still in process. On 28 September 2020, the notes record that the cases had been sent for a panel review. If there was any such review these notes were not in the bundle.

69. On 13 October 2020, the notes between Mr Wiles and HR show that Mr Wiles had made a decision that it was going to be the claimant that would be selected for redundancy and that HR were awaiting copy of the scoring which was a reference to the scoring from the interview which formed the basis of the selection. The notes noted that the claimant who was described in the notes as "EMP" needed to be allocated as a priority candidate. The following day the notes record that there had been a preparation call between HR and Mr Wiles where they had gone through the structure of the next consultation meeting (where the claimant would be informed of her selection) and advised him how to use the checklist and outcome letter. HR instructed Mr Wiles to ensure the claimant was made aware of the job swap process.

70. On 12 October 2020, the claimant was sent an invitation to her second consultation meeting. This was set for 19 October at 13.30 by Teams. Mr Wiles informed the claimant in the letter that he would be providing her with the selection outcome documentation (scoring) at that meeting. We note that to date this still had not been provided and it is therefore difficult to understand how the claimant could have engaged in consultation about her scoring at the planned meeting given that she did not know what her scores were.

71. On 14 October 2020, the claimant asked Mr Wiles to bring the meeting forward. She did not receive a reply to this email so chased it on 15 October

2020. The claimant told the Tribunal and we accepted her evidence that on 14 October 2020, Mr Wiles asked another radio rigging engineer to take the lead on a health and safety call and at this point she knew that she had been selected as she had been excluded from her usual role in leading on health and safety. Mr Wiles' explanation for asking the other manager to take the call was that he happened to be on a call with him and he had the knowledge. We did not accept this explanation and we accepted the claimant's evidence that this was insensitive decision for Mr Wiles to have taken.

72. On 15 October 2020, the claimant chased Mr Wiles to ask for the meeting to be brought forward. At this point the claimant's mental health was suffering and she told the Tribunal she knew she had been selected as all of her other colleagues had had their meetings and they told her that she was the one that was going to go. Mr Wiles replied that he was unable to reschedule the date of the call which would remain on 19 October 2020 but brought forward the time to the morning. This meant that another weekend of waiting to find the outcome albeit she said she knew what the outcome was.

73. The meeting took place on 19 October 2020 and we saw notes in the bundle of this meeting which started at 9.00. The meeting took no more than 20 minutes. We find this as the claimant produced her phone records showing that she contacted Mr Beese just after 9.22am following that meeting. The notes of the meeting were inadequate and incomplete. They record that the claimant was informed she was not selected from the pool and her current role had been selected for redundancy although at that stage it was at risk. A provisional date had been set for her last day of service to be 30 November 2020. The claimant says she was shown the EVR terms on the screen. The notes record that the claimant asked if she could see her own marks to check the scoring of the feedback and that Mr Wiles agreed that if the claimant would like them he would be happy to set up a following session to share the feedback. This was contrary to what the claimant had been told in the invitation letter that the selection scores would be available for her at that meeting. The checklist that Mr Wiles was supposed to complete was not completed. The claimant's evidence which we accepted was that after this conversation none of the other matters on the checklist were addressed. Mr Wiles instructed her to close her laptop down and take the rest of the day. In fact, the claimant was from that day forward not permitted to take part in the management team call that took place every morning or to undertake usual duties or to manage her team.

74. On 19 October 2020, the claimant was sent a letter setting out that she had been selected provisionally for redundancy and stated that the respondent would be consulting with a view to identifying available positions which may be appropriate and where redundancy was unavoidable every effort would be made to mitigate the consequences of it. The claimant was sent the enhanced terms and told that they would only be available until 2 November 2020. If the claimant did not accept by that time, she would be made redundant on statutory redundancy terms if she was made redundant. The attached EVR calculations were sent in a corrupt file and the claimant was unable to access them until 21 October 2020. Mr Wiles set up a further Teams meeting on 27 October 2020.

Satcoms Role

75. We now set out the findings of fact in respect of the "Satcoms" role which was a role the claimant relies on in respect of her unfair dismissal claim insofar as she says that the respondent had not given proper consideration to this being a suitable alternative role and also in respect of her sex discrimination claim as she relies on the treatment afforded to Mr MD and compares herself to that comparator.

76. One of the claimant's riggers in her team Mr MD had been (at the claimant's suggestion) seconded to a Satcoms role on the Avanti Contract at Goonhilly site in Cornwall. As of 6 October 2020, MD was two months into the six month secondment.

77. There were a number of contemporaneous emails around that time setting out the arrangements in respect of Mr MD's secondment. The reason Mr MD had been seconded to the Goonhilly site was that his rigging role had been quiet at that time and there were the resources available to allow him to support the contract and the succession planning.

78. On 6 October 2020, Mr Hartfield who was the Satcoms Operation Manager wrote to Mr Mark Cullender within BT. The subject matter of the email was *"Avanti FTE Succession Planning Escalation"*. In that email Mr Hartfield explained to Mr Cullender that the claimant (Mr MD's line manager) had confirmed that Mr MD's move across to the team had been "*blocked by Mr Wiles and Mr Adam Neale as they would not allow him to transfer without a direct one to one replacement*". Mr Hartfield also explained that due to new workloads within the radio and rigging team the claimant confirmed she was likely to have to pull Mr MD off his secondment to the team within the next few weeks to support a work backlog in rigging. Mr Hartfield told Mr Cullender that if Mr MD did not transition across to the team before the end of his shadowing period supporting the contractual FTE obligations and they lose another individual who was expected to retire, they would *drastically be unable to support a contractual customer requirement of resource and 24/7 callout to Goonhilly.* He highlighted possible outcomes of this were to happen and ended on asking whether or not they could discuss *at a higher level* the benefit of allowing Mr MD to move across and protect the service and relationship.

79. Mr Hartfield was of the mindset that he was very keen to retain MD in the SatComs role to the extent he requested going over the heads of Mr Wiles and his director to secure Mr MD's transition to the team.

80. Also on 6 October 2020 a Mr Hodge emailed a Mr Sullivan as follows:

"Hi Mathew,
As requested please see an update on the current succession planning on the Avanti Contract below:-

[Mr MD] from Technology's South West Rigging team TNS186 is currently 2 months into a full time 6 month secondment / work shadowing programme with Chris, Alex and Phil at Goonhilly with a view to a permanent transfer to the Technology Satcoms team TNK4A. [Mr MD] is really keen and enjoying the work and is popular and liked by both

Chris, Alex & Phil and the customer Adam and his colleagues at Avanti based at Goonhilly.

You may remember that when we were looking to fill the post some time ago we were prevented from advertising the post due to a recruitment ban within Technology which meant that the only way we were going to be able to fill the post would be from within Technology.
We were hoping to have made that sideways move for [Mr MD] permanent by now, however that has still not happened and there are complex reasons behind that, with FTE headcount challenges, possible redundancies across various Technology Lines of business, subsequent increased workloads across TNS1 etc.
However from within our Satcoms LoB we have the commitment / agreement at director level from Katie Brown TNK4 to make this move happen, and our Tier 2 Mark Cullender is continuing to negotiate with TNS1 both with his counterpart Gary Wiles and the director Adam Neale to overcome this hold up to make this all permanent.

I am hopeful that we can formalise this permanent transfer of [Mr MD], however if this cannot be concluded then the likely outcome would be that we would have to wait until Chris James exits the business which at the very latest would be September 2021, at which time the post would be advertised across the whole of BT to try and seek out a suitable applicant."

81. On 7 October 2020 Mr Cullender emailed Ms Brown as follows:

"Hi Katie
you may recall a while ago, that we'd agreed with Adam Neale, over a number of calls, to start training at MD (one of Adams guys) in the art and science of satcom, in order to address succession/efficiency, together with a contractual shortfall in FTE at Goonhilly.

Almost 3 months in and Amanda Collick, [Mr MD's] line manager, has confirmed that his move across to our unit has now been blocked by Gary Wilkes (sic) and Adam Neale as they will not allow him to transfer without a direct 1:1 replacement.

Please see Alistair summary below of where this now leaves us.
So much for well laid plans."

82. On 8 October 2020 Mr Wiles sent an email to his director Mr Neale denying that he had blocked MD's move. It is evident we did not have the whole email chain but Mr Wiles appears to have learned of the suggestion that he was blocking MD's move which he vehemently denied and stated he thought it was *"the right thing for both areas and for the individual who has a real desire for the workstream."* He also goes on to say this would allow one individual to leave and an efficiency created.

83. That email was subsequently forwarded by the director Mr Neale to Katie Brown who stated as follows:

"Katie

Response back from Gary. Overall, this is something that will be happening and just had a short blip, it was always the intention that we would need to borrow [Mr MD] at times unfortunately is one of those! The remarks from Mark about direct 1:1 replacements would be good to understand as this is not something that has ever been mentioned ever from us, we had always assumed he would be leaving ES and that in turn would create an efficiency down a road for D1 with my head count dropping by 1 and yours allowing someone to leave once [Mr MD] has trained up. Hope this makes sense."

84. Ms Brown replied as follows:

Thanks Adam — your understanding matches mine and Mark's ie we'd assumed at some stage [Mr MD] would move to us with his headcount and we'd lose one of our veterans, not that we would be doing a body-swap.

Can I share this with Mark or will Gary be contacting him directly?

85. From this exchange, we make the following findings. Mr MD was on an agreed six month secondment to Goonhilly. There was a firm agreement amongst senior managers that this would become a permanent transfer to that team either at the point the other individual retired in September 2021 or sooner if agreement could be reached.

86. At the time the claimant was at risk of redundancy there was still need for a Radio Rigging engineer within the claimant's team as evidenced by the claimant having to pull Mr MD back onto rigging around October 2020.

87. Mr Wiles insisted that there was no SatComs role available at Goonhilly. We are unable to accept this contention based on the evidence that we saw, it was quite clear that there was a role and that role was being undertaken by Mr MD who eventually was appointed to that role on a permanent basis in January 2021. We find this position untenable in light of the email correspondence we have referenced above. There was even acknowledgement that once Mr MD transferred this would create a further efficiency saving with Mr Wiles' team.

88. Whilst Mr Wiles maintained his position that there was no role, he agreed that if there had been a role that the claimant would have had priority status for that role.

89. At some point it occurred to the claimant that the Satcoms role was a potential alternative role to her being made redundant. Mr MD could move back to his rigging role and the claimant could take up the seconded position at Goonhilly. The claimant says that on a call with Mr Wiles she advised him about the job within the satellite Comms team at Goonhilly and suggested she be considered for it. The claimant accepted the job could not be advertised as there was a recruitment ban in place across the company. However we know that Mr Cullender had confirmed it could be filled from within Technology and therefore, potentially by the claimant.

90. On 27 October 2020, the claimant sent Mr Wiles an email about this conversation. In that email she references an update which suggests that she had discussed this with Mr Wiles. The claimant told Mr Wiles that she had spoken to Alistair Hartfield regarding the Satcoms job and he was happy to receive a person that would be willing to do the work and would like to join them. She stated "*I have told him how much I would love to do the role and advised that I had your support that he was happy to speak to you if you wished. I have explained the situation with regards to rigging team and current workloads we are not in a position to let [Mr MD] go across and he fully understood that. He said he would get back to me tomorrow once he had spoken to his manager Mark Cullender."* The claimant says that Mr Wiles advised that he would support the claimant and enquire further about it. What the claimant was told by Mr Hartfield and Mr Wiles was clearly completely at odds with the email discussions that had been going

on as we have set out above. There was an agreement in place that Mr MD would be taking the permanent position. This was kept from the claimant when she raised this suggestion.

91. On 28 October 2020, Mr Hartfield emailed the claimant as follows:

Can I just reconfirm please from our call yesterday, that the agreement for MD to transfer across to the TNK4A team has now gone and that Gary has indicated that yourself would become available in place of MD?

As we discussed, MD had indicated on Monday that it had been agreed that he was to move on Monday 9 th November[5].

Whilst the specific date is not confirmed in the email chain below, the agreement that MD was to move was by Adam and Gary?

….

MD's development to date on both the power team supporting antenna work and also his shadowing work to date with the team, puts him in a good position to become a valued, useful member of the team in the shortest period possible as he is some way down the development path already.

My goal is to support the team with someone who can develop the skills required to fulfil the role in the shortest timescale possible as it will put customers services at risk and strain on the remaining team whilst they complete their training and hence seeking confirmation that MD formally no longer available to support us, so we can begin to look at how to resolve."

92. The claimant told the tribunal that Mr Hartfield was incorrect in his assumption that Mr MD had undertaken development in the power team. The claimant told the tribunal that Mr Hartfield thought Mr MD had skills based on power team work and that he was mistaken. The claimant agreed however that whether Mr Hartfield was right or wrong, in his view Mr MD was best suited to the role but reiterated the point that this was based partly on a wrong assumption as Mr Harfield was wrong about Mr MD skill set in respect of the power team experience.

93. The claimant was asked in cross examination how the alleged prioritisation of Mr MD over her related to her being a woman (in context of the respondent's view that Mr MD was best suited to the role). The claimant stated she could do the job Mr MD was doing (the seconded role of which he was two months in), and could have undertaken work shadowing and did not see why she could not have been given the role. It was put to the claimant that the decision was not related to her sex, but on basis they got the skill set wrong. The claimant had not seen the job description for the Satcoms role until these proceedings. She insisted that she could have done exactly the same as Mr MD and she had the same skills if not higher. In the respondent's submissions, it was submitted at paragraph 47 that the claimant had conceded she did not have one qualification that Mr MD had but contended that this could have been rectified within one week. This does not reflect the Tribunal's note of evidence. At 11.19 on 17 February 2022 just after the claimant was sworn in, she told the Tribunal that she could have done all things contained in the job description of the SatComs role and did so in her Radio and Rigging Manager role on a daily basis including having a Bronze Level

[5] This is a further reason why we find there was a firm agreement Mr MD would be permanently transferring to this role as he had been directly informed as such as confirmed by Mr Hartfield.

Accredited learning Pathways accreditation which Mr MD did not have. She also had all the necessary qualifications and her substantive role was far more complex and detailed. Further at 12.02 the claimant specifically stated that she had the same skills as Mr MD.

94. We find that that there was no contemporaneous evaluation of the claimant's skill set as to whether she was suitable for the Satcoms role. We accepted the claimant's evidence that she would have been suitable in terms of her skills and experience in particular having the Bronze level accreditation which Mr MD did not have. Mr MD reported to the claimant. He had no particular skills or experience that we were taken to that made him more suitable than the claimant when considering the job description. There was evidence that a training programme was being planned and we do not know why that could not have equally applied to the claimant.

95. The claimant also did not accept that had any one of the 6 managers in the pool stated they wanted the SatComs job, male or female, the response would have been the same namely that Mr MD had been doing the role. The claimant told the Tribunal that the respondent behaved in this way "purely because I was a woman and that further, if Mr MA had targeted the Satcoms role he would have been permitted to move into it".

96. The claimant sent on the email from Mr Hartfield at paragraph 91 to Mr Wiles on 29 October 2020. She referenced that she would be calling Mr Wiles to discuss.

97. Mr Wiles did not reply to the claimant's emails of 27 or 29 October 2020. There was no explanation why he had not replied to these emails. Mr Wiles' witness statement was very unspecific about whether the SatComs job would have been a suitable alternative vacancy. He was asked about it in cross examination. He told the Tribunal that there was no Satcoms vacancy within the team that was advertised the claimant could apply for. We reject this evidence for the reasons outlined above. He accepted that Mr MD had been undertaking some additional tasks within the role of Satcoms Engineer and had been upskilled in the area under an arrangement facilitated by the claimant. He also accepted that eventually in January 2021 MD was transferred across to that team but at the time the claimant was seeking the alternative employment he insisted that the Satcoms role was not available and she did not apply for a role within that team.

98. The claimant told the Tribunal that the only feedback she had from Mr Wiles about Mr MD's role was at a Teams meeting on 12 November 2020. The claimant said Mr Wiles told her he had discussed the situation with Mr Hartfield and they both agreed that Mr MD had been shadowing. The claimant told the Tribunal she specifically recalls Mr Wiles saying to her *"he has been doing the job and we have to let him go don't we"*. She was very clear about recalling this form of words as she said when she heard them her heart hit the floor. The claimant also told the Tribunal that Mr Wiles told her he could make a further efficiency saving if he let Mr MD move into the Satcoms role. We accepted that claimant's evidence about what was said at this meeting regarding Mr MD.

99. The claimant's version of events is corroborated by the email that Mr Wiles sent to Mr Neale on 8 October 2020 (paragraph 82) as well as her email dated 12 November 2020 (see below). Mr Wiles refers to the status quo and allowing Mr MD to move would in addition allow one individual to leave (efficiency created). It was also corroborated by what Mr Neale told Ms Brown, that Mr MDs' move to Avanti would create an efficiency saving.

Mr AE

100. Mr AE is an employee who informed the claimant that he would be interested in taking voluntary redundancy so the claimant could have potentially fulfilled his role. Mr AE was a rigger managed by the claimant based in South Wales. On 29 October 2020, the claimant emailed Mr Wiles to advise that Mr AE had approached the claimant and asked her if there were any offers for those within Mr Wiles team who may want to leave the company. He wanted to know if there was an offer would there be conditions, deadlines and notice periods. He asked if this was something he needed to direct to Gary or via the claimant.

101. At this point is it important to recall that HR had instructed Mr Wiles on 14 October 2020 to ensure the claimant was aware of the job swap policy and he had not done so.

102. Mr Wiles said that he told the claimant to ask Mr AE to contact him directly to discuss but as he did not Mr Wiles took no further action to follow this up. Under cross examination, Mr Wiles made reference to the claimant potentially not being qualified to perform the role and also suggested that she would not have moved to South Wales. In regards to relocating we do not accept this evidence as it contradicted what the claimant had told Mr Wiles at her first consultation interview about being willing to relocate. In relation to having the correct skills set, we find the claimant was so qualified for reasons set out below.

103. The claimant says that after she sent the email about Mr AE Mr Wiles told her over the telephone, he would "take care of it and look into it". She disputed that Mr Wiles had asked her to ask Mr AE to get in touch with him directly. She accepted that she had not raised a job swap but explained that this was because she was not aware of the job swap policy at the time.

104. Mr Wiles' witness statement stated that the claimant "was aware of the job swap policy and criteria during his catch up calls and he had informed her if there were any suitable candidates for the swap she should informed him as soon as possible." It was put to Mr Wiles during cross examination that he had not discussed job swap with the claimant. Mr Wiles told the Tribunal that job swap at beginning of the process was not an option it was later agreed between the trade unions as another option to support the people, discussed in later calls. We found this evidence to be confusing as in the written statement Mr Wiles said he had made the claimant aware of the job swap policy but told the Tribunal that it was not an option at the beginning of the process.

105. The claimant's evidence was that she was never provided with the formal job swap policy by Mr Wiles.

106. We preferred the claimant's evidence as there was no evidence before us in any note or email that Mr Wiles provided the claimant with the job swap policy or ever discussed this with her. Had he done so we find it implausible that the claimant would not have followed the required procedure under that policy given how important the situation was to her.

107. The claimant was asked under cross examination why Mr Wiles alleged failure to progress related to her gender and his actions would have been the same whether it was a male or female. The claimant said that she believed it was a female who wanted a job held by a man and there is not a single female rigger in the whole of the UK. She also believed that if she had been male Mr Wiles would have done it straight away to keep him within the team.

108. The claimant was asked about the skill set for Mr AE's rigging role and whether she could have undertaken that role. Her evidence, which we accepted was as follows. The claimant performed all aspects of Mr AE's role on a daily basis in her role as a manager. There are three elements to the role;

- climbing masts and towers by a central metal ladder and going out onto an open framework of the tower;
- setting up a rigging system series of ropes and pulleys to lift equipment and;
- Installing and ascertaining faults on equipment.

As a radio and rigging manager the claimant made a point to climb with engineers on a daily basis and identify faults. The claimant was trained in climbing and rigging aspect of the role and from her time spent with engineers she could fault equipment. She was qualified in all requirements save identifying faults but could have obtained this qualification within a few weeks. However, this fault qualification was not necessary to hold the rigging role by way of example, one member of the claimant's team was trained to do rigging only.

<u>EVR terms</u>

109. The claimant had been informed that she had to accept the EVR terms by 2 November 2020 or lose the package. She accepted the package on 1 November 2020. She asked in a meeting on 12 November 2020 if she could work her notice to enable her to carry on looking for jobs but this was refused. The respondent's EVS policy provided employees would usually be expected to work their notice period. If they did not or only worked part of the notice, the notice period commenced on the day following the date EVS terms are formally accepted by the company.

110. On 6 November 2020, the claimant received a letter from Mr Wiles confirming the EVS terms were accepted. As such, the claimant's notice period began on 7 November 2020 in accordance with the policy (see paragraph 40 above) and she would be working part of that period up to 30 November 2020. In that letter he stated that they had considered any suitable alternative vacancies available and to date there had been none.

It confirmed acceptance of the agreement to leave on enhanced terms and that her last day would be 30 November 2020. Had the respondent permitted the claimant to work her entire notice period, it would have expired on 30 January 2022 which we note was likely to be after Mr MD's permanent move to the SatComs role.

Email dated 20 November 2020 raising sex discrimination

111. On 20 November 2020, the claimant emailed Mr Wiles and copied in Mr Neale and another director called Mr Buckle. The claimant asked Mr Wiles to review his position regarding the Satcoms role. She stated as follows:

"I would like to put it on record that before your phone call with me on 12 November 2020 you have never formally discussed that you wanted to make any efficiency changes/savings in my team.

It was me who made you aware of potential efficiency savings with Mr AE from my team who was about to retire next year, that should have satisfied the efficiency challenge that you have recently mentioned to me and would have accommodated MD staying in the radio rigging team with myself moving across to the Satcoms Team. Everyone happy, I avoid redundancy and you make efficiency savings……. I feel personally feel extremely let down, as I believed and put my trust in you when you said that you would give me your full support for the Satcoms job as a priority candidate…. It appears to me that you took the opportunity to approach to make another efficiency saving without declaring further surplus, therefore not having to go through another redundancy exercise within your team. I believe this approach is clearly disadvantaged me.

I thought that BT is committed to developing women in engineering roles due to it mainly being a male dominated environment. I now feel that I am being treated differently by you because of my gender, especially as everyone know that you gave another male colleague preferential treatment during the redundancy process.

I am formally requesting that you and senior management review the situation regarding the Satcoms job as per the redundancy process. As a loyal employee for twenty-five years, all I ask is that I am treated fairly and the same as my male colleagues. I look forward to your written response."

112. Mr Wiles was asked in cross examination whether he had sent this letter onto HR and he replied that he did not believe he did. When he was asked why not in the context of them being serious allegations he said that he could not remember. It was put to Mr Wiles again why did he and the other senior managers copied into the email ignore the request to review, given the sex discrimination claims made within that email. It was suggested that the claimant's concerns were not taken seriously and the lack of any response indicated "a boy's club approach" to the claimant's concerns. Mr Wiles' denied this to have been the case. His evidence was that he did not ignore the email and that he had informed the claimant of the rationale and set up two meetings but there had been a breakdown in communications at that point and she did not attend. He was pressed on why he did not formally respond in writing and he said that he was hopeful if they were able to speak, he could better understand her concerns. It was then suggested that it was implausible that there was not one single email about that email that the claimant had sent Mr Wiles. Mr Wiles told the Tribunal he could not remember sending the email onto anyone.

113. Mr Beese reiterated that he was concerned there had not been proper disclosure undertaken.

114. At this point Judge Moore asked Mr Wiles if he had been asked to check his emails as to whether or not he had sent that email on to anyone. Mr Wiles told the Tribunal that he had not been asked to check if he had sent that email to anyone but said he had been asked to disclose all information around this case.

115. It was at this point that a direction was made as a reference in paragraphs 4 - 6 above that the respondent revisit disclosure. Mr Wiles subsequently located emails indicating he had sent this email onwards and following this a further email chain was disclosed by the respondent on the second day of the Tribunal. These had not been disclosed and also not contained within the respondent's Subject Access Request response.

116. The email exchange showed the following:

117. Following the claimant sending the email on 20 November 2020, the Tribunal saw that Mr Neale (who was a director of the division and Mr Wiles' line manager) forwarded the email to HR namely Jessica Tate, Ellie Calladine and copied in Mr Buckle. He made no other comment other than as follows:

"Both, just an FYI. I notice you have been missed from the distribution so forwarded for your info.

118. This email in turn was subsequently forwarded to Ms Rachel Hughes in HR by Ms Calladine stating '*probably one for you to be aware of*'"

119. The next email in the chain is from Ms Hughes on 10 February 2021 to Ms Calladine, Ms Tate and Mr Wiles. This was the date early conciliation ended. Ms Hughes comments as follows:

"Morning can I just check if a response was sent to Amanda on the back of this email.

Thanks"

120. Mr Wiles responded to Ms Hughes on 12 February 2021, copying in Ms Calladine and Ms Tate.

"Thank you for your email. When I receive the email below from Amanda it was after we had discussed the Satcoms during our catchup meeting on 12 November. A meeting I put in place to support Amanda through the current process. On receipt of this email along with the second email I tried to schedule two meetings and attempted to call Amanda to discuss the issues. I received back confirmation that Amanda did not want to discuss the issues as she was feeling unwell and wanted me to reply based on the information supplied. I responded to both emails through the one response I sent to you[6]. With the option to talk further with myself or the HR business partner. I also sought support from the HR support team to ensure I was offering the right support in my actions where appropriate.

[6] This was reference to an email that we set out at paragraphs 124.

It was thought the best option initially was to talk over the issues. When this did not happen, I responded to the second email as previously stated. "

121. Ms Hughes replied to Mr Wiles on 19 February 2021. She asked Mr Wiles for a "bit of background on the Satcoms job" that the claimant was referring to and if it was a role impacted by the selection pool and reducing numbers or if it was a role outside the process. She said that she was happy to take a call if that was easier.

122. Mr Wiles replied as follows:

Rachael

"Thank you for your time earlier today to discuss the below as requested please see a few bullet points around what we discussed.

The Sat Comm role in question was outside of my area of responsibility but within DI.

The role in question was not a role that was available for a transfer or on any job system at the time Amanda was looking for a new role within the business The role is a C3 roll that requires both Radio and Rigging skill sets to facilitate and although Amanda did have the base climber qualification her skills and experience would not have been a straight match Amanda was a D grade leadership grade when she left the business Amanda was involved in the earlier discussions around utilising one of our C3 team members go gain further skill sets for a potential internal move to support this requirement and the role within our area"

123. That was the extent of the disclosure, the Tribunal was assured there was no other relevant emails. Mr Wiles's witness statement was silent on the discussions he had with HR on receipt of the claimant's email of 12 November 2020 and had made no reference to the subsequent discussion with Ms Hughes which they must have had on 19 February 2021.

124. Mr Wiles had been referring in his email to Ms Hughes of 12 February 2021 to an email he had written on dated 23 November 2020. For reasons that remained unexplained to the Tribunal Mr Wiles had responded to the claimant's email dated 12 November 2020, where she raised sex discrimination, not to the claimant but to HR. The recipients of that email being Ms Calladine and Ms Tate. We can only assume that Mr Wiles intended this to be some sort of draft response for a review by HR as it is written as if it was directed to be sent to the claimant but was not done so. In that email Mr Wiles explained and accepted that there was someone within the Satcoms Team retiring shortly and to facilitate that move they allowed one of the team (Mr MD) to support the site on a part-time basis to learn some of the skills. Mr Wiles accepted that they were exploring an option of the candidate moving and working back within the rigging team when required but no sign off had been agreed for this to happen. This was not a fair reflection of what had been agreed amongst the senior managers based on the email exchanges above and we found otherwise. He also did not inform HR that although the role could not be advertised that it could be filled form someone within Technology. He accepted they had an initial agreement in principle to progress and they were aiming for it to be completed in October 2020 but due to the demand in rigging it had been placed on hold. He accepted they were aiming for a January (2021) conclusion to the option and states:

> *"to your point we do need to work with the HR support team to make sure we are doing this in the right way. This does mean that due to timescales and the fact that this opportunity is not confirmed this will not be an opportunity we can support you with before your planned redundancy date scheduled for the end of November".*

125. Mr Wiles went on to say he strongly disagreed that he had given preferential treatment to others in the selection pool due to her gender.

126. On 23 November 2020 Mr Wiles sent Ms Calladine a copy of the job description for the Satcoms role. There does appear to have been conversations between Mr Wiles and Ms Calladine on that day as he references discussions that morning. Again none of this was mentioned in Mr Wiles' witness statement. He had obtained a copy of the Satcoms role job description by asking Mr Hartfield to send it to him. In the covering email of 23 November 2020, Mr Hartfield referred to discussions between Mr Wiles and himself that the role has been *vacant* (our emphasis) since September 2019. He acknowledged that they were unable to advertise the position but says it remains open and the part-time worker had accepted terms and would be leaving the business on 31 December 2020. Mr Hartfield goes onto praise MD's development and says it puts him in a very good position to pick up the role as essentially he is good way through the training required for the team and will be able to support the team fully in a significantly shorter time frame than if they look for a new candidate. Mr Hartfield said they were looking at a development package with external training and that was being prepared in order to further develop Mr MD and give him the challenge he was looking for. This does not sit at all comfortably with Mr Wiles' later email to HR claiming the claimant 's skills and experience would not have been a straight match as evidently neither was Mr MD's. It remains unexplained as to why the claimant could not have been equally considered for the training and development to enable her to fulfil the role.

127. We find that the claimant's notice period was curtailed so as to avoid any possibility she could apply for and be considered as a priority candidate for the SatComs role which Mr MD was confirmed into in January 2021. We make these findings for the following reasons. The curtailment of the notice period was against the usual policy and the purpose of the priority candidate procedures. The claimant only had three weeks to enjoy the priority candidate status as once she had been exited from the business this would have expired. We also had no explanation as to why the claimant could not have continued in her notice period searching for alternative employment. She had already been removed from her management duties ands involvement with her team, so there cannot have been a reason that the restructure needed to be progressed. Further, as shown by the email exchanges set out at paragraphs 78 – 83 and our findings at paragraph 85, at the time the claimant was selected for redundancy Mr Wiles was fully aware that there would be a permanent position in respect of the Satcoms role. We know that as of of 23 November 2021 Mr Hartfield had told Mr Wiles that the part time worker (at Goonhilly) had accepted terms and would be gone by 31 December 2020 thus confirming the start date for Mr MD. A

training package had been put in place for Mr MD. The email Mr Wiles drafted and never sent confirmed that Mr MD was originally envisaged to be in place permanently by October 2020 but this was looking like a January conclusion, when he must have been aware that if the claimant was retained for her notice period she would be a priority candidate for that role

Appeal

128. On 24 November 2019, the claimant wrote a further email to Mr Wiles appealing her selection for redundancy. She asked him to provide her with the notes from the consultation meetings which she had not had to date and the scoring from the interview process which she also had not been sent. Mr Wiles attempted to set up a number of meetings with the claimant to speak to her directly as referenced in his email to HR of 23 November 2020 but the claimant informed Mr Wiles on 26 November 2020 she was feeling very low and did not wish to speak to anyone at present. She asked for his response to the two emails that she had sent him namely the formal request for review of the Satcoms position and her appeal to be put in writing. Thus, he knew the claimant was requiring a written response to those emails yet still did not reply.

129. On 25 November 2020 Mr Wiles drafted another email in response to the claimant which appears to be dealing with the appeal email. Again, this appears as a draft to be sent to the claimant but instead sent to HR. We did not have sight of the email that was then sent to the claimant. It was common ground that the claimant was informed that she was not allowed to appeal her redundancy with the reason provided that she had accepted voluntary terms. Mr Wiles was asked on what basis the claimant was prevented from appealing her dismiss and he said that he was advised of this by HR.

130. On 30 November 2020, the claimant sent another email to Mr Wiles in which she references having been sent her scores and notes of the consultation meeting.[7] She advised she wished to put on record they were not a fair reflection of what was discussed and that she believed Mr Wiles had purposely left out key questions she had asked. The claimant also raised with Mr Wiles that on seeing her interview markings on 27 November 2020, he had applied markings for each category and a new box containing APRs. This was the first time the claimant became aware that he had operated hybrid type system part interview and part matrix.

131. With regards to the APR scoring, Mr Wiles had applied points based on previous performance ratings in appraisals. This would not have affected the outcome as all of the managers had previously received the same results in their APR's which transpired into the same scores. Mr Wiles agreed that he did not reply to this email. No response was ever sent to the claimant by anyone from within the respondent.

Conclusions

Unfair Dismissal

[7] The email sending the claimant her scores and notes of the consultation meeting is not in the bundle

132. We firstly consider whether the respondent has shown that the reason for dismissal was redundancy. We are satisfied it was so and there was a genuine redundancy situation. This is in respect of the wider redundancy exercise (217 redundancies within BT Technology) and also the selection pool specific to the claimant namely the Radio and Rigging Engineers.

Did the Respondent act reasonably in treating redundancy as a sufficient reason for dismissing the Claimant?

133. We have not needed to consider any challenges to the selection pool or the assessment procedure itself. Although the claimant was critical of some aspects of the interview (failure to consider the slides) this is not a case where there was a challenge to the scoring in comparison to the other employees within the pool. The claimant's challenge to the reasonableness was based on failures to consult meaningfully and failure to consider suitable alternative employment.

134. We have concluded that the respondent did not act reasonably in treating redundancy as a sufficient reason to dismiss the claimant for the following reasons.

Failure to consider voluntary redundancy

135. The respondent's policy and the collective agreement with CWU placed important emphasis on a commitment to consider voluntary redundancy. The employee focusing policy set out in paragraph 34 above provided in several places that the respondent allowed volunteers from selection pool to apply for discretionary enhanced terms where is reasonable to do so and supported business objective. The respondent retained the ability to not accept voluntary redundancies however in such circumstances the policy stated the respondent will always explain why with rationale. A particular example of the need to retain key skills is given as a reason why voluntary redundancy may not be sought.

136. Furthermore the collective agreement between the respondent and the CWU union provided that the respondent would only consider redundancy after considering voluntary means. This did not happen and we do not know why. The only evidence before the tribunal that the respondent had sought to implement their own policies in this regard was Mr Wiles's evidence that he raised the issue voluntary redundancies in the telephone call with HR (see paragraph 36 above). There was no evidence of any thought process regarding the rationale for not offering voluntary redundancies, nor of any discussions with the trade union as to why the respondent's policies and procedures as well as the collective agreement would not apply to this particular redundancy exercise.

137. When a potential candidate for voluntary redundancy came forward (Mr MA), this was refused. When Mr AE enquired (via the claimant) if he could take voluntary redundancy this was not followed through and the job swap policy was not disclosed to the claimant.

A lack of meaningful consultation

138. This is not a case where there was a complete lack of consultation. Mr Wiles held two consultation meetings with the claimant. However we have concluded that the consultation process was not genuine, meaningful or reasonable for the following reasons.

139. We have made findings that there was a predetermined decision to retain Mr MA. This was in our judgment cogently demonstrated by the treatment of Mr MA when he withdrew from the selection procedure in that he was threatened with disciplinary sanction. We found this to be a highly irregular approach particularly in light of the policies on seeking voluntary redundancies.

140. The respondent submitted that Mr MA had not volunteered for redundancy and once he was instructed to attend he gave a strong performance at interview, which is contrary to someone seeking redundancy. We are unable to agree with this contention. Mr MA clearly indicated that he was aware of the consequences of not attending the interview and the thought he had given to the consequences. He attended the interview as he was threatened with disciplinary action if he did not.

141. Put quite simply, if there was a genuine level playing field and every candidate within that pool was going to be given the same opportunity and there was no predetermination of who was going to go, that opportunity presented itself directly to Mr Wiles when Mr MA withdrew from the process. Had the respondent verified with Mr MA that he was definitely withdrawing from the process (notwithstanding how clear Mr MA was in his email about his intention and that he understood perfectly consequences of this decision) then this would have negated the entire selection process as the pool from six was reduced to five. Mr MA could have departed on a voluntary terms and the claimant's redundancy would never have happened. We make further findings regarding the treatment of Mr MA and the claimant in our findings under the sex discrimination claim below.

142. The consultation procedure did not follow the process set out in the respondent's own policies. The decision to select the claimant for redundancy was taken without ever providing her with the opportunity to challenge her selection or respond to suggestions. The claimant had no opportunity to challenge her interview scores as she was not provided with them until 27 November 2020 despite numerous requests. She was not provided with a copy of the consultation notes and when she was provided with them they were inaccurate or incomplete. The claimant was never provided with the rationale behind the decision to reduce the Radio Rigging Managers from six to five nor was she provided with any structure or geographical breakdown to enable her to make meaningful counter proposals.

<u>Refusal of an appeal</u>

143. The respondent's procedures provided for a right of appeal. The claimant was denied this right with the ostensible reason given that she had accepted EVR terms. This was also contrary to the respondent's EVR

policy. It is not always necessary in a redundancy situation for an employee to be provided with the right of appeal and this will not always follow that it will render the dismissal unfair. However when respondent's own procedures provide for right of appeal and they refuse to hear an appeal, with no reasonable or plausible explanation, we find this to be unreasonable.

Refusal to allow the claimant to work her notice period

144. In certain circumstances the respondent's policy provided that employees could be required not to work their notice period. We found above that the reason the claimant was prevented from working her notice curtailed her ability to search for alternative employment and also was for an improper reason namely to deny her the chance to be a priority candidate for the Satcoms role. It is envisaged in the EVR process and is evidently a supportive measure for someone who is trying to search alternative employment within their employer's organisation that they have as long as possible to do that before they depart that organisation.

Failure to search for alternative employment

145. Mr Wiles did not provide the claimant with a copy of the job swap policy despite being prompted to do so by HR

146. We conclude that there was no reasonable search for alternative employment and that the respondent actively and deliberately acted in a manner so as to block the claimant from becoming eligible for the SatComs role.

147. All of the contemporaneous communications set out in the emails between the various directors and managers regarding the SatComs role have led us to conclude that there was an absolute intention that Mr MD would transfer into this role on a permanent basis. After the claimant informed Mr Hartfield that Mr MD's move was being blocked, Mr Hartfield and Mr Cullender embarked on a pushback in respect of this decision at director level which clearly put Mr Wiles under pressure, as evidenced by his vehement denial that he had done so. There was no explanation for the tribunal to why the claimant could not have had the same treatment as Mr MD and gone into that secondment role and awaited a permanent solution as was afforded and planned for Mr MD. We particularly had regard to the fact that Mr Cullender confirmed the SatComs role could have been filled from someone within Technology as was the claimant. We did not accept that Mr MD had a better skill set than the claimant (see above) and in any event this was not in the minds of the respondent at the time the decision was taken.

148. There was a complete failure to follow up the proposal from Mr AE to take voluntary terms. It was incumbent on Mr Wiles to properly investigated the job swap proposal put forward by Mr AE via the claimant. It was not for the claimant to go back to Mr AE and tell Mr AE to contact Mr Wiles. We were unable to understand why Mr Wiles did not draw the job swap policy to the attention of the claimant when she raised the approach by Mr AE on

29 October 2020 given that only two weeks previously he had specifically reminded Mr Wiles to provide that policy to the claimant.

149. We did not accept Mr Wiles' evidence that the claimant would not have been suitable in terms of either a skill set or a geographical move to have job swapped with Mr AE. Mr AE reported to the claimant. The only job elements undertaken by Mr AE that the claimant accepted she was not officially qualified for was the fault identification although the claimant had considerable experience in this regard and could have obtained the qualification within a matter of a few weeks. The claimant at that time was living in Bristol and there was no evidence to suggest that she would not have been able to relocate to the geographical area covered by Mr AE indeed she had stated at her first consultation meeting that she was willing to consider moving. In any event, the respondent simply never investigated any of these matters. We therefore conclude there was a wholescale failure by the respondent to properly support the claimant in search for alternative employment.

150. For all of these reasons we find that the claimant's dismissal was unfair.

Direct sex discrimination

151. The less favourable treatment relied upon for the direct sex discrimination claim was the claimant's selection for redundancy. There is no dispute that a dismissal can amount to less favourable treatment.

152. The claimant has cited three comparators.

153. We deal first of all with Mr MD and Mr AE. We have concluded that they are not appropriate comparators as they were not in the same position in all material respects as the claimant. There were material differences between the circumstances of Mr AE and Mr MD. Neither were at risk of redundancy or in the same pool as the claimant. Mr MD was seconded into a role from his substantive role of Radio Rigger and he was not at risk of redundancy. Mr AE was also a radio rigger and not at risk of redundancy. For these reasons, any claim advanced on the basis of a comparison to Mr MD and Mr AE fails.

Mr MA

154. Given our findings (at paragraph 66) that there was a pre determined decision to retain Mr MA we have concluded that the claimant has shown that the respondent treated the claimant less favourably than Mr MA and she was not afforded the opportunity of any such pre determination. We therefore go on to consider whether this was because of the claimant's sex.

155. The respondent submitted that this disadvantaged all of the members of the pool of which there were two males and three females and there was no evidence that it was due to her sex. We remind ourselves that facts of a difference in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination. There must be other evidence.

156. In our judgment there is other such evidence when we look at the factual matrix as a whole, which is as follows:

157. Whilst we have found that Mr MD was not an appropriate comparator, the respondent's actions and behaviours regarding the treatment afforded to Mr MD amounts to " something more" than the less favourable treatment of the pre determination that Mr MA would be retained. This is because another male employee within the business had significantly greater effort put into retaining him into a role than the claimant.

158. The position with Mr MD was that although the claimant was at risk of redundancy and there was a position she could have undertaken, there was a distinctly different approach taken to the claimant and Mr MD when considering who could undertake the SatComs role.

159. There was a complete lack of proper consideration as to whether the claimant could have fulfilled this role. The claimant was more than qualified and experience yet she was not permitted to go onto the secondment. There was a significant and marked difference in the drive to retain Mr MD in the post compared to zero effort to investigate whether it would have been a suitable alternative to redundancy for the claimant. We observed from the email exchanges the considerable effort and drive from a number of senior managers that the decision to retain Mr MD was "a done deal." In particular the comment from Mr Wiles that he and Mr Hartfield had decided as Mr MD had been doing the role they had to "let him go." We also consider that the respondent's insistence that there was no role to be fulfilled was untenable and has undermined the respondent's credibility.

160. We found that there was a deliberate decision to curtail the claimant's notice period so that she would not be in a position to be a priority candidate for the SatComs role, when the respondent knew that the role would be made official January 2021.

161. In respect of Mr AE we find there was a lack of a credible explanation as to why the job swap policy was not provided to the claimant at the point of which HR instructed Mr Wiles to do so and then when she raised the possibility two weeks later. We also did not have a credible explanation to why this possible alternative solution to making the claimant redundant was not followed up.

162. We also consider the following further matters as evidence other than the less favourable treatment that has shifted the burden of proof to the respondent.

163. On 20 November 2020, the claimant wrote to Mr Wiles and copied in two senior directors. She requested a formal review of the decision around the SatComs role and specifically raised allegations of differing treatment due to gender, citing the respondent's stated aim of developing women in engineering roles due to a male dominated environment. Those concerns were not taken seriously and they were not responded to. The only response to that email before this Tribunal was that one of the directors sent

it to HR "just an FYI". There was no request to investigate, follow up or respond to the allegations of discrimination.

164. The claimant was preventing from appealing her dismissal contrary to all of the respondent's stated policies.

165. The respondent subsequently failed to disclose relevant documents regarding the email of 20 November 2020 and failed to address any of the factual circumstances that took place regarding what actually happened in respect of that email in their witness statements.

166. In respect of various departures from the respondent's own policies (failing to consider voluntary redundancy, failing to allow the claimant to work her notice period, failing to allow her to appeal, threatening Mr MA with disciplinary proceedings if he did not attend the selection interview) the only explanation provided was that Mr Wiles was told to do all of this by HR.

167. For these reasons we find that the claimant has shown facts from which the Tribunal could decide in the absence of any other explanation that the respondent has committed discrimination because of the claimant's gender.

168. We now turn to the respondent's explanation and whether the respondent can prove on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

169. We remind ourselves of the less favourable treatment that is the subject of the claim namely the selection for redundancy which resulted in the claimant's dismissal. We have found the claimant has shown she was treated less favourably that Mr MA as it was pre determined that he would not be selected for redundancy whereas the claimant had no such pre determination. In our judgment there was no reasonable explanation for the pre determination. The respondent has not in our judgment explained why they would threaten an employee who was very clearly indicating they would not take part in a redundancy selection process with disciplinary proceedings. We have commented that we found this course of action to be highly irregular and implausible position to have taken given the respondent want the Tribunal to accept there was a level playing field and that each candidate within the pool would be decided on its own merits. In light of this and all of the other prima facie facts set out at paragraphs 156 – 163) the respondent has not proved the unlawful discrimination did not occur.

170. We reject the respondent's explanation regarding the Satcoms role that there was no current vacancy for the reasons set out above. We also reject the explanation that if there was a vacancy any unfairness established was because Mr MD was already doing the role and had the skills (see above and in particular paragraphs 124, 126 and 147).

171. In respect of the explanation offered regarding the Mr AE situation. It is correct to say that neither Mr AE nor claimant put forward a formal job swap. However this was because Mr Wiles did not draw the job swap policy to the claimant's attention nor did he follow up the enquiry from Mr AE when it was incumbent on him to do both. We had no reasonable explanation for this

failure. Therefore in respect of these explanations we find that the respondent has not proved that the unlawful discrimination did not occur.

172. A remedy hearing shall be listed.

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Employment Judge S Moore

Date: 3 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 4 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche