Neutral Citation Number: [2022] EAT 170

Case No: EA-2020-000776-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 December 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

UNILEVER DE CENTROAMERICA SA de CV **Appellant**

- and –

MRS A PIRIE **Respondent**

- -
- -

Yvette Genn (instructed by DAC Beachcroft LLP) for the **Appellant**
Nigel Porter (instructed by Spencer West LLP) for the **Respondent**

Hearing date: 20 October 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant, who had worked for the respondent's global Group for a number of years, was dismissed upon the expiry of a fixed-term assignment in the UK at the end of August 2016. In its liability decision the tribunal had found the dismissal to have been unfair in part in relation to the handling of the possibility of alternative employment in what were referred to as BFS roles. In March 2016 the claimant had been told of potential BFS roles in Poland, but not told that they could be done in the UK, as it was thought that she would not be able to get the requisite visa. The tribunal had held that the claimant should have been offered the UK option, and the visa issue discussed with her.

In a further decision following a remedy hearing the tribunal calculated the compensatory award on the basis that, had she been offered the option of doing a BFS job in the UK, the claimant would have taken that up, and there was a 50% chance that the requisite visa would then have been obtained.

The respondent presented evidence to the remedy hearing which it argued showed that, in the event, the claimant would not have been put into a BFS role, as there would have been no such post available at the relevant time. The tribunal concluded that it had been determined by the liability decision that there *was* a job available, and so this issue could not be raised or revisited at the remedy stage. It erred by doing so. On a fair reading, the liability decision had only made findings of fact about the position when the roles were discussed with the claimant in March 2016, at which point they were described as a potential, and not guaranteed. While the respondent had not, at the liability hearing, advanced any case, or evidence, that in the event the claimant would not have been put into a BFS role, it was entitled to raise this contention as a *Polkey* point at the remedy stage. Evidence from both sides relating to the issue had been presented at the remedy hearing. The tribunal should have made findings about it, when assessing the compensatory award. The matter was remitted for it to do so.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal worked for the Unilever group of companies from 1998 until 31 August 2016. The first respondent in the employment tribunal was the particular company which employed her at the time of her dismissal. I will refer to it as the respondent.

2. The claimant claimed that she had been subjected to detriments, and unfairly dismissed, because she had made protected disclosures. There was a full merits hearing in 2018 before EJ Freer, Ms J Forecast and Ms M Foster-Norman, sitting at Croydon. In a reserved decision the tribunal found that the claimant had made some protected disclosures. It upheld two of the complaints of detrimental treatment for having done so. It did not find the claimant to have been dismissed for the sole or principal reason that she had done so; but it did find her to have been ordinarily unfairly dismissed.

3. Following a preliminary remedy-related hearing in 2019 there was a further remedy hearing in 2020. In its judgment the tribunal made a basic award of £9919.50 and a compensatory award of £78,862. This is my decision on the respondent's appeal in respect of the compensatory award.

The Employment Tribunal's Decisions

4. The tribunal's liability decision began with an opening overview, a reference to the list of issues, and a note that it was agreed that in the first instance the tribunal would address liability only. There is then a section relating to the law, and then a long section headed: "Facts and associated conclusions." The salient factual background found by the tribunal may be summarised as follows.

5. The Unilever Group's global operations are divided into eight geographical clusters. These include Europe and Latin America (LATAM). The claimant is of Costa Rican nationality. Her first job with the Group was in El Salvador, which was treated as her home country. It is within the LATAM cluster.

6. Over the years the claimant had eleven roles in various global locations. Employees of the

Group are typically employed on terms that reflect the market where they are working, known as local terms. However, International Assignment ("IA") contracts were given to some employees who were considered to be high flyers. These would be for fixed terms and designed to enable them to gain skills and experience that would then be transferable within the Group. IA contracts were considerably more valuable in terms of the pay and benefits package than local terms.

7. IA contracts were, typically, for three-year fixed terms with the possibility of a limited renewal. They were used exceptionally, and over the relevant period their use was reduced for cost-saving purposes. In addition, in around 2015 a global finance restructuring programme was started, called "Future Finance". It involved a headcount reduction and a reduction in IAs.

8. The claimant was given an IA contract with a fixed term from 1 September 2013 to 31 August 2016 under which she was employed as Global Finance Director, Business Partner for Financial Services, Information Management Services and Business Excellence Services, based in Kingston-upon-Thames in the UK. Work Level ("WL") codes denote the seniority of a role. That role was coded WL3B, which is Director level.

9. At the time the Group operated a process called Listing by which some employees were specifically identified for potential promotion. During 2015 the claimant was considered for Listing, but ultimately not listed. It was envisaged that her IA contract would not be renewed when it expired in August 2016. Over the months leading up to its expiry, there were various developments touching upon the question of what, if any, role within the Unilever Group the claimant might move in to at the end of the IA fixed term, or, possibly, sooner. There were protected-disclosure detriment complaints relating to a number of things that happened during that period. The tribunal made findings of fact about these matters in a section of its decision sub-headed "Alternative Roles."

10. At this time the claimant's line manager was Gopalan Natarajan. Also involved at points were the Global HR Director for Finance – Sangeeta Rajalakshmi, and the HR Director, Legal, for Unilever

plc – Alice Taylor. All of them gave evidence at the liability hearing, as did others who had had some involvement at points. Matters covered in this part of the liability decision include the following.

11. A Finance Director position in the Caribbean was due to become vacant and two new roles were created to replace it. The claimant was among those interviewed for one of these roles, but, ultimately, she lost out to someone else.

12. Ms Rajalakshmi considered the claimant's UK visa position. The matter was complicated. In summary, Ms Rajalakshmi concluded that the claimant could not continue to work long term under her existing visa, and that it would not be possible for her to get a visa that would allow her to move into a new permanent or long-term position with the Group based in the UK. The tribunal accepted that this what Ms Rajalakshmi genuinely thought was the position. The tribunal found that, having so concluded, she told Mr Natarajan simply that it was not possible to extend the claimant's UK visa.

13. There is then a section headed "BFS Roles" which I need to set out in full.

> **"225. Around early March 2016 Mr Natarajan was informed by Ms Rajalakshmi of potential WL3 'BFS' roles in finance in Katowice, Poland. The positions would be on local terms and as the Claimant's IA role was coming to an end, any position for her would be on local terms moving forward. Mr Natarajan thought these would be a good fit because they were global ETS roles.**
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> **226. Mr Natarajan had a discussion with the Claimant and at the same time he gave feedback on the Greater Caribbean role. The Claimant said she might consider the move if it was not on local terms, but had wanted to go back to Costa Rica.**
>
> **227. Mr Nagarajan had rated the Claimant as 'middle/middle', a 'white box' candidate in March 2016.**
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> **228. In an e-mail from Mr Litmanovich to Mr Kitsos dated 29 March 2016 (page 181) it is mentioned that "there will be no IA terms for white box candidates". The Tribunal accepts that this was the policy of Unilever at that time. It is consistent with Ms Rajalakshmi's evidence that IA terms would only be given if the person was Listed or considered to be "top talent", which was classified as a 'green box' candidate. Therefore, although Ms Rajalakshmi had described the Claimant as 'top talent' in her March 2016 e-mail to Mr Kitsos, as a middle/middle, white box, candidate the Claimant was not going to be considered for another IA role after 10 years on IA terms. That is consistent with the pre-alleged disclosure 2015 e-mails that discuss the IA coming to an end and the Claimant taking up a role back in LATAM.**
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> **229. The Claimant did not want to move to Poland, mainly because she and her**

> **family did not speak Polish and local salary rates would be too low as she confirmed in evidence to the Tribunal.**
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> **230. Ms Taylor created an e-mail on 21 March 2016 that set out for headcount planning purposes WL3 roles and opportunities for Finance Directors, which confirmed the potential BFS roles and their locations (page 169). At this stage these were not guaranteed roles, for example the role in Greece on the list did not materialise. Mr Natarajan was not provided with this document.**
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> **231. The Claimant was not advised of similar roles that were available in the UK. Two of the BFS roles were uncertain as to location, being either in Kingston or Port Sunlight in the UK, or in Katowice, Poland. Ms Rajalakshmi accepted in cross-examination that the BFS jobs could have been in Kingston or Port Sunlight.**
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> **232. Mr Natarajan was clear in his mind and confirmed he was told by HR that the Claimant would not get a Visa to work in UK.**
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> **233. Mr Natarajan considered that the BFS posts were only in Poland and indicated that to the Claimant in good faith.**
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> **234. The Tribunal concludes that it was Ms Rajalakshmi's belief that the Respondent could not extend the Claimant's IA contract and could not employ her indefinitely on local terms in the UK because of Visa limitations. Whether that view was right or wrong, the Tribunal concludes that this is what she thought at the time and is not inconsistent with the advice she had received from Deloittes and internally. Having regard to Ms Rajalakshmi's mental processes, the Tribunal concludes on a balance of probabilities that is the reason for her actions at the time and for the nature of the guidance given to Mr Natarajan. That is also the reason why Mr Natarajan acted as he did and did not consider the Claimant for permanent UK based roles. The Tribunal concludes that those actions were not influenced by any of the Claimant's protected disclosures."**

14. The tribunal went on to find that consideration was given to possibly offering the claimant a position in El Salvador, but the position "did not ultimately materialise as the incumbent did not move." The claimant's details were also passed on to a manager responsible for filling a "potential position in Greece" but he did not shortlist her as he felt there was an alternative stronger candidate. A role for a Finance Director for Deos (deodorants) in the UK was advertised internally. The claimant saw this and applied for it in May 2016. Ms Rajalakshmi had not passed on the details of this position because she assumed, in view of her understanding of the visa position, that it would not be an option for the claimant. In the event, having applied, the claimant was interviewed for it, but another candidate who was considered to have more relevant experience was appointed.

15. The tribunal concluded this section with the observation that the claimant had not identified

any other roles "that she contends were available and which she could or was prepared to undertake."

16. The tribunal went on to find that the principal reason for the claimant's dismissal was that her fixed-term contract had come to an end, which amounted to a substantial reason of a kind falling within section 98(1)(b) **Employment Rights Act 1996**.

17. The tribunal went on to find that, applying section 98(4), the dismissal was unfair. The further particular passage in its reasoning that is material to this appeal was as follows:

> **"367. There was a genuine belief in the reason for dismissal by the First Respondent.**
>
> **368. However, the Tribunal concludes that part of the process relating to the Claimant's dismissal was delegated by the First Respondent to the HR facility of the Second Respondent.**
>
> **369. Although the position regarding visas was within the range of reasonable responses (indeed it was probably correct), it was objectively unreasonable for the UK BFS positions and the Deos role not to be brought to the Claimant's attention, or be offered to her but subject to local terms and obtaining a suitable visa or visa extension, and also through not explaining to the Claimant the understood potential difficulty over obtaining visas.**
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> **370. The Claimant may have had some input into the visa issue and perhaps have gained some support for her applications. Further if Ms Rajalakshmi felt reasonably able under Unilever processes to allow the Claimant to apply for the Deos role knowing of the visa situation but with a view that if she was the best candidate that was "something that would be looked at" and if the Claimant was the best candidate for the role then the necessary application for her to work in the UK would at least be made, then the same approach could reasonably have been adopted with regard to the UK based BFS posts. It was objectively unreasonable not to raise these matters with the Claimant for her input when she was facing the termination of her employment and had expressed a view to being potentially amenable to working on local UK terms and conditions.**
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> **371. Any *Polkey* considerations are a matter for the remedy hearing. In that respect it should be noted that outside the positions mentioned above, the Claimant has not identified any post for which she would have applied and which the Respondent failed to consider. The Claimant suggested in evidence that she had purchased a house close to school in anticipation of staying in the UK, but in fact she had purchased it in 2013."**

18. The tribunal considered two further issues said to bear on the fairness of the dismissal. One was the failure to share with the claimant certain tax advice that had been received regarding the treatment of potential severance payments, and what was written in the "at risk" letter about that. The tribunal considered the handling of that to have been unfair. The other concerned whether the

respondent should have considered placing the claimant in a short-term UK position, on the basis that there could be a limited extension of her Tier 2 visa. The tribunal found that failure was not unfair. Its overall conclusion, applying the language of section 98(4), was that this was an unfair dismissal.

19. There was a preliminary hearing in 2019, specifically to consider a particular issue relating to the losses that did or did not flow from two protected-disclosure detriments that had been found. At that hearing both counsel also queried whether, for the purposes of unfair dismissal remedy, the Deos role should be considered, in light of the tribunal having found that the claimant had been considered for that role but had been unsuccessful. This led to the tribunal, by way of reconsideration of paragraph [369] of the liability decision, deleting the words in the third line: "and the Deos role".

20. There was then a further remedy hearing in January 2020 at which Ms Rajalakshmi appeared again as a witness. In that decision, in its discussion of the compensatory award, the tribunal began by setting out again the text of what it had said in paragraphs [230], [231], [369] and [370] of the liability decision. Having done so it continued as follows.

> **"26. The Tribunal concluded that a potential BFS role was available for the Claimant to be situated in the UK and it was not open for the Respondent to re-argue at the remedy hearing, as it did, that no such role existed.**
>
> **27. If the Respondent's contention is correct, it would imply that the Tribunal made a finding of unfair dismissal on the basis that the Respondent failed to offer to the Claimant a role that did not exist. The Tribunal did not make any such conclusion.**
>
> **28. Paragraph 230 quite clearly says 'at that stage'. The remaining paragraphs find as fact that the Poland roles that became available could have been done in the UK.**
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> **29. The Tribunal relied principally upon the evidence of Mr Natarajan and Ms Rajalakshmi at the liability hearing.**
>
> **30. It was Mr Natarajan's evidence that: "by early May there was only really going to be an exit. I was still persisting with the Kato roles but she had closed her mind and I had no other roles".**
>
> **31. The facts were that the BFS roles were in existence and they were roles that could have been done in the UK.**
>
> **32. There was no evidence from the Respondent, for example, that having offered the two posts in Katovice to the Claimant, had she confirmed she was interested the Respondent would have said that actually the roles did not exist.**

> **33. The questions put to the Claimant in cross-examination during the liability hearing were on the basis that she could have accepted those jobs and the fact that they were on local terms was no reason to turn it down. Indeed the Respondent's submission at the liability stage related to the Claimant's "reasons for not accepting the role in Poland" and also "If the other BFS roles were going to locate into Kingston/Port Sunlight the question is did SR either block C from access to those opportunities . . .".**
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> **34. It was Ms Rajalakshmi's evidence at the liability hearing when having identified that there were three BFS positions she was asked: "So [the BFS role] could have been in Kingston or Port Sunlight?" Ms Rajalakshmi answered: 'Yes". Ms Rajalakshmi stated that UK based jobs were not offered to the Claimant for visa related reasons.**
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> **35. The Claimant acknowledged the position in paragraph 5 and 30 to 32 of its Skeleton Argument provided at the outset of the Remedy hearing: "The subsequent position adopted by the Respondent (after the Preliminary Hearing and Judgment) raise the contention that in fact there were no other roles to which the claimant could have been deployed". The matter was expressly discussed at the start of the remedy hearing.**
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> **36. Concerned that the Respondent did not miss an opportunity to put questions to witnesses on the issue of a UK based BFS role, the Tribunal raised the matter at the end of the Claimant's cross-examination. Counsel for the Respondent stated that she was surprised by the Tribunal's view on the matter. However it is noted that the Respondent addressed the issue in its written Outline Submission, at paragraphs 14 to 22 in particular, which was prepared before the matter was raised by the Tribunal.**
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> **37. It was confirmed on behalf of the Respondent's that no further examination of any witnesses was required and the Tribunal was invited by the Respondent to review its liability decision on the existence of a UK based BFS role.**
>
> **38. Time limits aside, the Tribunal is entirely satisfied that the Respondent's failure to offer the Claimant a BFS role that could have been done in the UK, but subject to local terms and obtaining a suitable visa or visa extension, was part of the reason for the finding of unfair dismissal, as the Tribunal considers is adequately set out in the liability decision reasons. There is nothing to reconsider.**

21. The tribunal then went on to find that, had the claimant been offered a BFS position to be undertaken in the UK, she would have accepted it. However, it also concluded that there was a 50% chance that the requisite visa would not have been secured. It calculated the compensatory award by reference to the remuneration that the claimant would have received in a BFS role in the UK. After factoring in mitigation and various other matters, and applying a 50% reduction in view of the visa issue, the figure produced comfortably exceeded the agreed figure for the cap on the amount of a compensatory award in this case; and so the tribunal awarded that maximum amount.

The Grounds of Appeal

22. At both the hearings in the employment tribunal, the respondent was represented by Ms Genn, and the claimant by Mr Porter, of counsel. Both appeared again on the appeal.

23. The starting point for the grounds of appeal is the respondent's case as to what, on a correct reading, were the material findings of fact that were – and, importantly to its case, were not – made in the liability decision. In particular, the respondent contends that, in the liability decision, the tribunal found that the BFS roles that were discussed with the claimant in March 2016 were at that point only potential, but not guaranteed, roles. They could potentially be done based in Katowice in Poland, or Port Sunlight or Kingston in the UK. It was assumed, however, that, because of the visa position, only Poland would be an option for the claimant, so she was not told about the UK option. She was not interested in such a position in Poland. So the discussion went no further.

24. What, however, says the respondent, the tribunal did *not* make any finding about in its liability decision was whether there was, in the event, such a role available for her to take up at the relevant time. That was an issue that it had raised for consideration at the remedy hearing. The respondent had presented further evidence to the tribunal at the remedy hearing, relevant to that issue, by way of two further witness statements, with exhibits, from Ms Rajalakshmi.

25. The grounds of appeal are in narrative form, overlap and incorporate elements of argument. In broad summary, the principle contentions advanced by the three grounds together, and Ms Genn in argument, are as follows.

26. First, in so far as the tribunal proceeded in the remedy decision on the footing that it had made a finding in the liability decision that there was a UK BFS role available for the claimant, it erred. No such finding had been made. Secondly, in so far as it purported to make such a finding in the remedy decision, that was perverse, because neither the evidence given at the liability hearing, nor that given at the remedy hearing, supported such a finding. In particular, while Ms Rajalakshmi had

agreed at the liability hearing that the *potential* BFS jobs discussed in March could in principle be done from the UK, no evidence had been given at that hearing, that any actual vacancy for such a BFS job was subsequently confirmed. Further, it is said, the burden of Ms Rajalakshmi's evidence at the remedy hearing was that, in the event, there was no such vacancy in the relevant time window when the claimant was at risk. The tribunal is said, further or alternatively, to have erred because it failed, in its remedy decision, to address that evidence at all, or to explain why it did not accept it.

27. It is further contended that the tribunal erred by revisiting in the remedy decision, evidence that had been given at the liability stage, in order purportedly to make good its findings in the liability decision, without putting the parties on notice that it was considering revisiting those earlier findings.

28. Ms Genn told me that the respondent had not sought to appeal the liability decision on this point, precisely because it considered that no finding on it had yet been made. She agreed that, at the remedy hearing, the respondent had invited the tribunal to reconsider its liability decision, but that was because it was suggested at the remedy hearing that it had already been decided that a vacancy was available. The respondent's primary position was that the tribunal had not so found in the liability decision; but if the tribunal concluded that it had done so, then the respondent's fall-back position was that that finding should be reconsidered and corrected.

29. Ms Genn acknowledged in the course of argument that the grounds of appeal did not include a challenge to the tribunal's decision to refuse that reconsideration application. But the grounds did, separately, contend (without prejudice to the other points of challenge) that the EAT should consider the liability and remedy judgments as a single whole, and conclude that the tribunal overall reached a conclusion on the existence of an actual BFS role that was not open to it.

30. In summary, for the claimant it is contended that, on a correct reading, the tribunal did make a finding of fact in the liability decision that there *was* a BFS role available for her to take up in the UK, subject only to the necessary visa being obtained. It then properly, in the remedy decision, relied

on that earlier finding. This appeal was in effect an impermissible attempt to appeal out of time the finding that had been made in the liability decision. It was irrelevant whether such an appeal against the liability decision *might* have succeeded on perversity grounds. The EAT could not, when considering this appeal against the remedy decision, go behind the liability decision.

31. Further, as there was no basis to revisit the finding in the liability decision on the point, the tribunal therefore had not needed in its remedy decision, to consider the further evidence presented by the respondent at the remedy hearing on this topic. As I have noted, Ms Genn acknowledged that there was no appeal against the refusal of a reconsideration. But Mr Porter's position was that, in any event, the tribunal was not wrong to refuse a reconsideration. Mr Porter also did not accept that (even had it been susceptible to challenge) the finding which, on the claimant's case, the tribunal had already made in the liability decision was perverse; nor did he accept that, had the tribunal needed to consider Ms Rajalakshmi's further evidence given at the remedy hearing, that evidence showed that the claimant would not have been put into a BFS position in the UK at the relevant time.

32. As for the tribunal's discussion in the remedy decision, of the evidence that had been presented at the liability hearing, Mr Porter submitted that, at its highest for the respondent, that discussion could be said to have been superfluous and unnecessary. But the inclusion of this passage did not show that the tribunal had, overall, erred, in proceeding on the factual basis that it did.

33. Following the appeal having been directed to proceed to a full hearing, the respondent had applied for the EAT to request the judge's notes of evidence from the liability hearing. An EAT judge initially refused that, but after the Court of Appeal gave permission to appeal, it was agreed that such notes should be sought. However, the employment judge had then reported that the notes of evidence from the liability hearing, save those of the evidence of Ms Rajalakshmi, had apparently been destroyed. The notes of her evidence at the liability hearing had been extracted when the tribunal was considering the remedy decision, and so had survived. In these circumstances, the materials in my bundle for this appeal hearing included the employment judge's notes of Ms Rajalakshmi's

evidence at the liability hearing, notes made by the respective parties' representatives of various witness evidence at the liability hearing, and the witness statements and documents to which they referred, that were before the tribunal for the remedy hearing.

34. The parties' respective cases were developed further in their written skeleton arguments, and in oral submissions at the hearing of this appeal. I will refer to particular points of significance as they arise in the course of my discussion.

Discussion and Conclusions

35. The starting point is that, as there has been no appeal from the liability decision, nor any from the tribunal's refusal, at the remedy stage, to reconsider that decision, I cannot go behind the findings in the tribunal's liability decision. Nor can I accede to the respondent's invitation to treat the liability and remedy decisions, for the purposes of this appeal, as a composite whole. However, as I have explained, there is a dispute as to what pertinent facts, on a correct reading of the liability decision, the tribunal actually found. That is something I do need to address; and it is where I should start.

36. The meaning of a tribunal's decision in principle falls to be determined by a fair objective reading of the ordinary meaning of its contents, reading individual phrases or passages in the context of the decision as a whole. It is not to be determined by reference to how either of the parties may, subjectively, have read it, though it should be read within the context of matters about which they would have a shared understanding, such as expressions that had a particular meaning in the respondent's organisation, though that might not be picked up by a stranger reading the decision.

37. In this case two general features of the liability decision may also be noted. The first is that, as the tribunal recorded at [7], it was agreed in this case that "in the first instance the Tribunal will address liability only." The second is that, having determined what protected disclosures the claimant made, there then followed a long section, part of which concerned the topic of alternative roles, in which the tribunal made its factual findings about various particular matters said to have been

influenced by the protected disclosures and/or to affect the fairness of the dismissal. It also set out in this section, its conclusions as to the protected-disclosure detriment issues, as it went along. Then, in a final section, it considered the reason for dismissal, and, having determined that it was for a fair reason, finally considered whether, in light of its earlier factual findings on the question of alternative roles, and other relevant matters, the dismissal was or was not fair, applying section 98(4).

38. I have set out earlier, the two passages in the liability decision said to form the relevant backcloth to the grounds of appeal in respect of remedy. The first is the passage headed "BFS Roles" – paragraphs [225] to [234]. That is the passage in which the tribunal made its essential findings of fact on this topic. The second is paragraphs [368] to [371]. That is the pertinent part of the final section in which the tribunal came to its conclusions on the section 98(4) issue. Though the parties' interpretations were ostensibly diametrically opposed and irreconcilable, reading these two passages together and in the context of the decision as a whole, in my judgment a clear picture emerges.

39. The wider context described in the decision, of the passage concerned with the BFS roles, was that it was known, months in advance, that the claimant's IA contract would be expiring at the end of August, that she would not receive another or an extended IA contract, and that another role needed to be found for her. HR, and other managers, were on the lookout for roles or opportunities, that might be considered suitable for her, and in which she might be interested.

40. Within that context, the passage at [225] to [234] is concerned with the position in March 2016, and what was understood, and discussed, about the potential BFS roles identified at that time. As the tribunal found, a review of what was planned and projected at that point, had identified that these plans included two specific roles at WL3 level for Finance Directors, which Ms Rajalakshmi considered should be shared with Mr Natarajan at that point, so that he could find out whether the claimant was interested in them, albeit on the footing that they would be in Poland. Further, Mr Natarajan thought these roles would be a "good fit" for the claimant [225]. The clear sense of this passage was that these roles formed part of a concrete plan, notwithstanding that they were "potential"

roles [225] which were not guaranteed at this stage, and (as the tribunal was told happened in relation to the role in Greece) there was a possibility that they might not "materialise" [230].

41. What this passage does *not* contain, is any finding that, for any reason, the two BFS roles that were discussed with the claimant in March, did fail, like the Greece role, to materialise. But nor does it contain any finding about what transpired in relation to them in the period up to the end of August, either way. Mr Porter submitted that [231] amounted to a finding that there were firm BFS roles available to be taken up by the claimant in the UK. However, in the context of the passage as a whole, I do not think it can be read that way. While the tribunal refers there to "similar roles available in the UK" that, is plainly not, in context, a finding that there were other roles available in the UK, different from, and additional to, the roles referred to at [225] or [230]. The whole passage at [225] to [234] is referring to the potential roles, which Ms Taylor's spreadsheet identified could be done either in Poland or in the UK, but which were described to Mr Natarajan, and hence to the claimant, as being in Poland. The reference at [231] is to the claimant not having been advised in March that *those* roles could also be done in the UK.

42. Nor do I think it is correct to read what the tribunal said at [231] – [234] as amounting to a finding that the potential roles which were discussed in March became confirmed roles at some later point. That passage is all about the fact that, in the March plan, it was identified that two of the BFS roles could potentially be done in the UK, but the claimant was not told that, and about why not. As the closing words of [234] make clear, the focus in these paragraphs was on Ms Rajalakshmi's (and Mr Natarajan's) thought processes in that regard at this time, and why the option of doing these potential permanent roles in the UK was not offered to the claimant at that time.

43. Having completed its fact-finding about what happened in March in relation to the BFS posts, and determined the protected-disclosure detriment issue relating to that particular episode, the tribunal moved on to other topics. It did not return to this subject until the concluding section relating to the fairness of the dismissal. I turn then to that later passage.

44. Mr Porter submitted that, at [369], the tribunal made a specific finding of fact that there were, in fact, firm "UK BFS positions" available for the claimant to take up. Such a finding was, he argued, implicit in its finding that it was unreasonable for those positions not merely not to have been brought to the claimant's attention, but also for them not to "be offered" to her.

45. However, I do not agree with that reading of paragraph [369]. Though tribunals do sometimes, in the course of reaching their conclusions, also make further factual findings which supplement those that they have made earlier, neither this paragraph, nor the passage of which it forms a part, reads that way. Rather, the whole of this section reads as setting out purely evaluative conclusions, as to the fairness or not of the dismissal for the purposes of section 98(4), which wholly draw upon, and refer back to, the findings of fact made at various stages earlier in the decision.

46. The natural reading, within that context, of paragraphs [369] and [370] is that the tribunal is referring specifically to its earlier findings at [225] to [234] about what happened in March, and drawing the conclusion that it was unfair that the claimant was (as it had earlier found) not *at the time of that conversation*, offered the option of doing the BFS roles in the UK. I do not think it correct to read the reference at [369] to "the UK BFS posts", nor the use of the phrase "or be offered to her", as signifying that the tribunal was referring to something other than that earlier conversation.

47. What was meant, in this context by "or be offered" is complicated by the fact that this phrase referred (prior to correction) to both the Deos and BFS roles (the former of which the claimant was interviewed for). But I note that, when considering another position, the tribunal also found (at [171]) that in some instances internal appointments were made without any internal competition for the post, as happened when the claimant moved to her IA role in the UK. Against that backcloth, I think the sense of the tribunal's conclusion is that, in March, the respondent could and should have offered the claimant one of the potential BFS roles in the UK without more ado; but I do not think it can have meant that there should have been a wholly unconditional offer, given its finding that "at this stage

these were not guaranteed roles", and that the visa issue would need to be confronted.

48. All of that is reinforced, I think, when one reads on to paragraph [370]. The tribunal spells out there its point that, just as Ms Rajalakshmi felt able (once she found out about it) to allow the claimant to continue with her application for the Deos role, knowing of the potential UK visa problem, but on the basis that if she was judged to be the best candidate then that was "something to be looked at" and "the necessary application for her to work in the UK would at least be made", so "the same approach could reasonably have been adopted with regard to the BFS posts". The tribunal adds that it was unreasonable not to "raise these matters" with the claimant "for her input" given that she was facing the termination of her employment and had indicated that she was "potentially amenable" to working on UK local terms and conditions. All of that, it appears to me, conveys that this is what the tribunal concluded should fairly have happened in March.

49. I agree with the tribunal's observation in the remedy decision that it did not find in the liability decision that there was in fact no such role available for the claimant; and I agree that, if it had, it would plainly not have found that she was treated unfairly in that respect. But the finding of unfairness that it did make in relation to the BFS roles related to what happened (or did not happen) in terms of the communications with the claimant about that in March 2016.

50. It appears to me that the respondent did not, in its evidence or argument at the liability hearing, raise any issue about the BFS roles envisaged in the March email, and which were discussed with the claimant, not having eventuated. If it had, one would have expected the liability decision to refer to it. My impression is that therefore the tribunal, and the claimant, may have assumed, at the time of the liability hearing and decision, that, had the claimant been told of the UK option, and indicated that she wanted to pursue it, the only other issue that would then need to be resolved, affecting whether she would then have been given such a position, would be the visa issue.

51. However, I do not think that the findings in the liability decision precluded any other such

issue being raised at the remedy stage. As the tribunal noted, at [371], in keeping with what it had said at [7], "[a]ny *Polkey* considerations are a matter for the remedy hearing." Accordingly, what the tribunal needed to decide, arising from the remedy hearing, in respect of this aspect, was what would, or might, have happened, had the claimant, in March 2016, been offered, in principle, the option of doing the BFS jobs in the UK. Two *Polkey* issues obviously arose: would the claimant have indicated that she did want to do one of the BFS jobs on local terms in the UK; and would the necessary visa have been obtained? But the respondent was not precluded from raising other issues, so long as they related to points that had not already been determined by the liability decision's findings of fact.

52. In her witness statement for the remedy hearing (which was in my bundle) the claimant traced the correspondence following the first remedy judgment being promulgated in October 2019. She documented how it became apparent that the respondent was asserting that, in the event, there was no BFS vacancy that she could have taken up. She cites a letter in which her solicitors then wrote: "In your more recent correspondence you have said there were no BFS roles. You never raised that at the liability stage: you have not proven that, and the burden is on the Respondent to do so."

53. That appears to me correctly to have stated precisely how matters stood. The issue may have come as news to the claimant and her team, because it had not previously been raised. However, as it had also (on a correct analysis) not previously been determined, it was open to the respondent to raise it, provided that the claimant had fair notice, and a fair opportunity to address it. But the onus was also on the respondent, who asserted and relied on the contention that, even if the visa could have been obtained, the claimant would not have been put into such a post, to make it good in evidence.

54. I was not told whether there were any further directions or applications between the two remedy hearings. But it is clear that a remedy bundle was prepared, including material disclosed by the respondent relating to this issue, witness statements were exchanged, in which the claimant and Ms Rajalakshmi both included sections devoted to this issue, and Ms Rajalakshmi also tabled a supplemental statement in reply to certain points that the claimant had made in her statement. It

seems to me that the upshot was that this issue, as such (including any live applications or case management points that may have been raised in relation to it) fell to be considered by the tribunal at the second remedy hearing along with the other *Polkey* and remedy points.

55. The tribunal therefore needed to make further findings of fact in the remedy decision about this issue. That fell to be done by drawing on such findings as it had made in the liability decision, that it might consider provided relevant background facts, and the totality of the evidence available to it, which might be relevant to that question, including any such evidence given at both the liability and the remedy hearings. That included a consideration of the evidence relating to this issue that had been tabled at the remedy hearing, by way of documents, and from Ms Rajalakshmi and the claimant. Accordingly, I conclude that the tribunal erred in its remedy decision by failing to proceed on that basis, and failing to make further findings of fact on that point.

Outcome

56. The appeal must, therefore, be allowed. At the hearing before me both counsel made submissions about what consequential orders I should make in that event. As I have already noted Ms Genn (putting, she acknowledged, her case at its very highest) submitted that the evidence presented at the remedy hearing pointed inevitably to the conclusion that, in the event, the claimant would not have been put into a BFS position in the UK. Mr Porter firmly disagreed. I confine myself to saying that I cannot conclude that the evidence presented to the tribunal at the two hearings would admit of only one factual conclusion on the question of whether, had the claimant indicated that she wished to do a BFS job in the UK, she would, provided that the visa could be obtained, have been given such a role. As that issue will require further consideration and determination by the tribunal, I refrain from commenting further on the written and documentary evidence that was shown to me.

57. Ms Genn submitted that, were I of that view, the matter should be remitted to a differently constituted tribunal, as the error was a serious one, and in view of the observations the tribunal had made in the course of the remedy decision, about the implications of the evidence that had been

presented at the liability hearing. The evidence relating to this issue needed to be heard afresh. She also submitted that the tribunal would, on remission, also need to consider afresh the question of whether the claimant would, in principle, have wanted to do a BFS job in the UK, and as to the chances of the visa having been obtained.

58. Mr Porter submitted that the matter could and should be remitted to the same tribunal. There was, in principle, no need to hear any further evidence. Nor was there any reason to disturb the existing findings, that the claimant would definitely have opted for a UK BFS job if given the chance, and that there was a 50% chance of the requisite visa being obtained. The tribunal still had its notes of evidence from the remedy hearing, as well as of the evidence of Ms Rajalakshmi at the liability hearing. The tribunal's decisions were overall thorough, wide-ranging and could not be described as significantly flawed. The tribunal's correction of its initial conclusion in relation to the Deos job demonstrated its professionalism, and that it would not be wedded to its own previous views.

59. I have concluded that the tribunal's findings that, had she been offered the option of doing a BFS job in the UK on local terms, the claimant would have wished to do so, and that there was a 50% chance that the requisite visa would have been obtained, do not need to be reopened or revisited. The reasoning leading to those two conclusions is not affected by the issue as to whether the respondent can show that, in the event, she would not have been put into such a role.

60. I also consider that that issue can and should be remitted to be decided by the same three-person tribunal panel, if they can be convened to do so. I will not tie the tribunal's hands in terms of case management, but, if it goes back to the same panel, I do not think that the evidence previously presented on this issue necessarily needs to be reheard. It will also be open to the tribunal to decide, if sought, whether any further disclosure needs to be directed, or supplementary statements permitted. I suspect, though I will not trespass on the tribunal's territory, that the focus on remission is likely to be on the evidence (documentary and from witnesses) touching on this point presented at the remedy hearing, together with any supplementary evidence that may be directed or permitted. That is

evidence about which the present tribunal has as yet expressed no views, as such, and in relation to which the parties will be equipped to make detailed submissions. There is no reason at all to doubt that the tribunal panel can and will come to the task conscientiously and with open minds.

61. I will therefore allow the appeal, and remit the matter to the tribunal to decide (a) whether, or what the percentage chance is, that, had the claimant been told in March 2016, that it was an option for her to do one of the potential BFS jobs that were discussed in the UK, and had she indicated that she wished to pursue that option, then, if the visa had been obtained, she would in the event have been placed into such a post; and (b) hence, taking account of all the previous findings made in relation to remedy, and the conclusion on this point, what the compensatory award should finally be.

62. I will direct that these questions be remitted to be determined by the same tribunal panel, if it can be convened, but will otherwise leave further case management to the tribunal.