EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111574/2019

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Held in Glasgow on 5, 6, 7, 8, 9 and 12 October 2020

Employment Judge	**L Wiseman**
Members	**F Paton**
	D Frew

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Ms Sinead Campbell — **Claimant**
In Person

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Tesco Personal Finance plc — **Respondent**
Represented by:
Mr D Hay -
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on the 11 October 2019 alleging she had been unfairly dismissed and discriminated against because of sex. The claimant complained about the fairness of her selection for redundancy and asserted her selection had been caused, or influenced, by the fact she worked part time.

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2. The respondent entered a response admitting the claimant had been dismissed for reasons of redundancy but denying the dismissal was unfair, and denying the dismissal had been caused or influenced by the fact the claimant worked part time hours.

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3. The claims to be determined by the tribunal were: (i) unfair dismissal (section 98 Employment Rights Act); (ii) direct discrimination (section 13 Equality Act).

The claimant alleged she had been treated less favourably than Andrew Binnie in 2017 when they had applied, and been interviewed for, the same post, which Mr Binnie was ultimately offered; and in 2019 when she and Mr Binnie had been in the pool for selection for redundancy which resulted in the claimant scoring lower than Mr Binnie; and (iii) indirect discrimination (section 19 Equality Act). The claimant believed the respondent had applied the provision, criterion or practice of requiring full time working hours for either the role of Customer Risk Assurance Manager in 2017 or for the new role of Senior Risk Control Manager in July 2019.

4. The tribunal heard evidence from:-

- Mr Roger Wilson, who had been employed with the respondent at the time of these events as a Projects Partner;
- Ms Claire Magennis, who had been employed by the respondent at the time of these events as Head of Risk. Ms Magennis was the claimant's line manager and had completed the scoring assessment of the claimant;
- Mr Barry Lawson, Risk Manager, who interviewed the claimant and Mr Binnie in 2017, and carried out the redundancy scoring assessment of Mr Binnie in 2019;
- Ms Debbie Walker, Director of Compliance and Conduct Risk, who heard the claimant's appeal;
- Witness X, a fellow part time worker;
- Mr Leighton Jones, Head of Banking Operations and Assurance and
- the claimant.

5. Mr Roger Wilson and Ms Claire Magennis gave their evidence via video conference. The remaining witnesses all appeared in person to give their evidence.

6. The tribunal was referred to a number of jointly produced documents.

7. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

8. The respondent is involved in the finance industry and operates throughout the United Kingdom.

9. The claimant commenced employment with the respondent on the 1 March 2010, until the termination of her employment on the 2 August 2019. The claimant was employed as a Risk Manager within the First Line of Defence risk function in the Commercial Current Design team. The claimant worked part time 20 hours per week over three days.

10. The respondent undertook a review of its business in 2018, when external consultants looked at the structure of the business and the opportunities to bring parts of the business together to make cost savings. The review affected nearly all Head Office areas except customer service.

11. The risk functions were the last to be reviewed and a decision was taken to bring the three risk teams together into two teams. The impact of this was that the number of Risk Managers would reduce from three to two. (There was no dispute regarding the fact one Risk Manager was unaffected by the review, and that this case focussed on the claimant and Mr Binnie).

12. An existing structure chart was produced at page 269, showing the First Line of Defence Risk Team in Commercial (where the claimant worked) and the First Line of Defence Risk Team in Customer (where Mr Andrew Binnie worked). The proposed model for the new structure was produced at page 272 which showed a new Centralised Controls Testing team, with one post of Lead Risk Manager, and one post of Risk Manager to be filled.

13. The claimant received a text message from her line manager, Claire Magennis, on the 17 June, to ask her to attend work the following day for a briefing regarding the restructuring.

14. The claimant met with Claire Magennis on the 18 June who provided her with a briefing letter from the respondent dated 18 June (page 253) to advise employees in the First Line of Defence teams about the restructure. The letter confirmed that currently the risk teams were split over three areas, being Commercial Risk, Customer Risk and CIO Risk. The restructure meant the teams would be consolidated into two new teams aligned under the Chief Customer Officer and the Chief Operating Officer (the team aligned under the Chief Operating Officer is the team relevant to these proceedings). The letter confirmed a decision had been taken to combine all controls testing responsibility under one Centralised Controls Testing team. This effectively meant the claimant's role and that of Mr Andrew Binnie would be merged into a new role.

15. The claimant understood her role (and that of Mr Binnie) was at risk of redundancy because of the restructure which meant only one person was required to lead the team, and there would be a vacancy for the other person as a Risk Manager.

16. The claimant attended her first consultation meeting with Ms Magennis on the 18 June. The notes of that meeting were produced at page 275. The notes provided Ms Magennis with a script to follow to ensure all necessary information was provided to the claimant. Ms Magennis provided details regarding the business rationale for the restructure, the purpose of consultation, the selection criteria (which had been agreed with the trade union) and the support available. Ms Magennis also issued the at risk letter (page 283). Ms Magennis confirmed to the claimant that if she was not successful in the assessment there was also a vacancy in Mr Leighton Jones' team. Mr Jones was a line manager with whom the claimant had previously worked very successfully.

17. The selection criteria being used by the respondent were performance, where the score would be taken from the most recent annual review rating; leadership behaviours, which comprised five behaviours to be assessed and technical role competencies, of which there were also five competencies to be assessed.

18. The claimant was assessed by her line manager Ms Magennis; and Mr Binnie was assessed by his line manager, Mr Lawson. Ms Magennis and Mr Lawson met with HR prior to carrying out the assessment. They were provided with advice regarding undertaking the assessment and with the job descriptions and scoring template. Ms Magennis and Mr Lawson raised a question at this stage regarding full time/part time working and the assessment, and they were told it had no influence on the scoring. They accepted this and applied this advice.

19. The claimant's scoring assessment was produced at pages 287 – 292. Ms Magennis gathered evidence to support her scoring of the claimant and made notes in her notebook (which she had typed up at page 440) prior to carrying out the assessment. Ms Magennis had regard to the claimant's appraisal, her knowledge of the claimant's performance, updates on work delivered, the annual review, feedback from stakeholders and her view of the claimant.

20. Mr Binnie's selection assessment was produced at pages 293 to 298. He scored a 5 for performance; 40 for leadership behaviours and 50 for technical competencies, to give a total score of 95.

21. Ms Magennis and Mr Lawson met after they had scored the claimant and Mr Binnie in order to calibrate the scoring to ensure a fair and consistent approach had been adopted in scoring the criteria. Ms Magennis and Mr Lawson challenged each other during this calibration process regarding evidence to support the scores given. Mr Lawson considered Ms Magennis had scored the claimant slightly harshly on some points. Ms Magennis accepted this and increased 2/3 of the claimant's scores to give the overall total of 87 points (being 7 for performance; 35 for leadership behaviours and 45 for technical competencies).

22. Mr Roger Wilson, Projects Partner, had a telephone call with Ms Magennis and Mr Lawson to discuss their scoring and the evidence to support the scoring. The purpose of this discussion was to ensure the scorers had the documents and evidence to support the scores they had awarded. Mr Wilson considered Ms Magennis and Mr Lawson had been diligent in coming to their

scores and had evidence to support the scores. He considered the number of "exceeds" was high, but the managers could support those scores.

23. Ms Magennis met with the claimant (by telephone) on the 21 June for the second consultation meeting (page 350). Ms Magennis confirmed to the claimant her scoring on the assessment and explained the rationale for the scores. Ms Magennis confirmed the claimant had come second in the process. A copy of the assessment was emailed to the claimant. The claimant was surprised to learn she had come second, and she challenged the scores she had been awarded for resilience and responsiveness.

24. Ms Magennis highlighted the alternative role available for the claimant in Mr Jones' team and confirmed it could be trialled for four weeks. The position in Mr Jones' team was considered more than suitable for the claimant because it was at the same grade as her current post. Mr Jones was a manager whom the claimant had previously worked with very successfully. The vacant role was essentially hers if she wanted it.

25. The claimant became upset during the meeting and Ms Magennis agreed to continue the meeting to the 25 June. The claimant wanted the assessment to be reviewed by an independent person and Ms Magennis agreed to find out about this prior to the meeting on the 25 June.

26. The claimant ultimately did not wish to proceed with the meeting on the 25 June in the absence of a representative. Ms Magennis handed the claimant an "outcome of selection" letter dated 25 June (page 316). The letter confirmed the claimant had scored lower than Mr Binnie which meant her role was formally at risk of redundancy. The letter confirmed the respondent would continue to consult regarding ways to avoid redundancy, including the availability of alternative roles. The claimant was encouraged to check for vacancies.

27. Ms Magennis offered the claimant an opportunity to meet with her and Mr Wilson to discuss the scoring of the assessment. The claimant refused this opportunity because she did not consider it to be an independent review of the scoring.

28. The claimant raised a grievance on the 3 July (page 370) in which she referred to issues regarding (i) inaccurate and inconsistent assessments; (ii) the fact she had scored the higher mark for performance; (iii) omission of key criteria (that is experience); (iv) Mr Lawson had previously expressed a preference for full time over part time working (in 2017) and (v) lack of due care and diligence throughout the process.

29. The claimant, having read the respondent's policies, and enquired of Ms Magennis, believed raising a grievance was the correct procedure to follow. Mr Wilson acknowledged he had given incorrect advice to the claimant regarding raising a grievance. The claimant was subsequently advised by HR that the claimant's document would be treated as an appeal against the redundancy process, with the discrimination alleged in the grievance added in to the appeal.

30. Ms Magennis met with the claimant on the 5 July for the third consultation meeting and the notes from that meeting were produced at page 337. Ms Magennis raised with the claimant the vacancy in Mr Jones' team. The claimant expressed a wish to conclude the grievance/appeal process before making a decision regarding that post. Ms Magennis confirmed the post would be held for the claimant until the other issues had been resolved.

31. Ms Magennis handed the claimant a letter dated 5 July (page 343) headed "Notice of Redundancy" confirming the claimant's last day of employment would be 2 August 2019.

32. The respondent's Redundancy Policy was produced at page 88 and provides that *"regardless of the number of employees that are potentially impacted, we will always seek to consult for at least 30 days".* The claimant's consultation period was 18 days (from 18 June to 5 July). Ms Magennis advised the claimant at the first consultation meeting that Mr Lawson had a pre-arranged holiday and the second consultation meeting could either be brought forward to take place before Mr Lawson went on holiday, or be delayed until his return. The claimant agreed she wished to bring the second consultation meeting

forward. The consultation period was compressed into a shorter timescale by agreement.

33. The claimant, notwithstanding the end of the consultation period on the 5 July, remained in the business until the 3 August and was, following her appeal, offered an opportunity to remain for a further two weeks to explore alternative employment. The claimant declined this offer.

34. The claimant's appeal was heard by Ms Debbie Walker, Director of Compliance and Conduct Risk. Ms Walker understood her role was to determine whether the process had been fair and whether there had been any discrimination.

35. Ms Walker wrote to the claimant on the 9 July (page 399) and arranged to meet with the claimant by telephone on the 10 July. Ms Walker was accompanied by a member of HR who took notes (page 400). Ms Walker understood from the claimant that there had been underlying confusion regarding the grievance/appeal point, but that the claimant was ultimately happy to proceed with an appeal. Ms Walker discussed with the claimant the specific points she wished to challenge regarding the scoring assessment. The claimant clearly felt she was the better candidate and that she should have scored higher than Mr Binnie. The claimant challenged the scores she had been given for resilience and responsiveness and also challenged the score Mr Binnie had been given for qualifications, in circumstances where the claimant believed her qualifications were superior to Mr Binnie's. The claimant also considered she had been discriminated against by Mr Lawson in 2017 when she lost out to Mr Binnie in getting a job, and that Mr Lawson had continued that discrimination in the selection process. The claimant believed Mr Lawson had a preference for full time employees.

36. Ms Walker informed the claimant that having read the documents and spoken with the claimant, she intended to speak to Ms Magennis, Mr Lawson, Mr Wilson and Mr Jones.

37. In 2017, following a restructure, the claimant noticed a role in Mr Lawson's area. The role was similar to the role the claimant had carried out for Mr Jones.

The claimant contacted Mr Lawson (page 183) to express an interest in the role (which was an existing substantive post being worked on the full time basis) and to enquire whether the fact she worked part time hours (3 days a week) would be an issue. Mr Lawson replied (page 183) thanking the claimant for her interest and saying he "was really looking for full time for this role." He asked if the claimant was looking to increase her hours. He confirmed he was happy to talk it through with the claimant.

38. Mr Lawson met with the claimant and told her he was aware from the current incumbent in the role that the team was split over three locations, and that some people in the Newcastle team were new and needed support and management, which would involve travel to that location. Mr Lawson had a concern regarding the time involved in travelling to three sites and providing support and coaching to the team in Newcastle. He explained these concerns to the claimant and confirmed that full time was not "a deal breaker" because there were ways round it, for example, senior people in Newcastle could be asked to take on line management responsibility for the team.

39. The claimant voiced concern regarding the base location for the post because she had difficulty travelling to Edinburgh. Mr Lawson confirmed the job could be based at any site including Glasgow.

40. Mr Lawson spoke with Mr Jones (the claimant's line manager at the time) regarding the claimant. He confirmed the claimant was a competent, sound performer in her role and he had had no performance issues with her. The issue of full time/part time working was not raised with Mr Jones.

41. Mr Lawson sent the CVs of six candidates for the role to Ms de Greef, the current holder of the role, to seek her informal views. He then interviewed six candidates including the claimant and Mr Binnie.

42. Mr Binnie was successful in obtaining the role. Mr Lawson considered the difference between Mr Binnie and the claimant was that Mr Binnie had an audit background which was the same background as Ms de Greef; the examples he had provided at interview were more suited to what Mr Lawson wanted the role to look like and Mr Binnie's knowledge, skills, audit

experience, discipline and experience were more in line with what he wanted from the role.

43. Mr Lawson provided the claimant with feedback following the interview, which focussed on Mr Binnie's experience and stakeholder examples being more relevant. The claimant did not challenge this further.

44. The respondent has two policies in place to deal with flexible working: a formal flexible working policy (for example, for those employees who wish to work part time) and an informal, smarter working policy, for employees who, for example, wish to work compressed hours, or some home working or different numbers of hours on different days. The respondent supports a large number of employees, at all levels, who work flexibly. Mr Lawson and Ms Magennis had a team of 10 and 20 employees respectively, the majority of whom worked flexibly either formally or informally. The respondent and it's managers make accommodations to full time posts which are worked on a part time basis.

45. Ms Walker met with Mr Wilson on the 15 July and the notes of that meeting were produced at page 413. Mr Wilson confirmed his role in the process had been to support Ms Magennis and Mr Lawson and to ensure they were able to substantiate their scoring. Ms Walker asked Mr Wilson if there had been any mention of the role being full time. Mr Wilson confirmed there had been a meeting before agreeing the selection criteria. Ms Claire Smith (Mr Wilson's line manager) had attended this meeting and confirmed it was not to be included in the criteria and that was the end of the matter.

46. Ms Walker met with Ms Magennis on the 16 July and notes of that meeting were produced at page 416. Ms Magennis provided Ms Walker with the rationale for her scoring (page 440) and (page 420). Ms Walker questioned Ms Magennis whether there had ever been any discussion about the role being full time. Ms Magennis confirmed there had not, and that she and Mr Lawson had been advised it was not to be taken into consideration. Mr Lawson had not ever said the role needed to be full time and that part time had never been an issue.

47. Ms Walker put all of the points raised by the claimant regarding her scoring to Ms Magennis.

48. Ms Walker met with Mr Lawson on the 18 July and the notes of that meeting were produced at page 467. Ms Walker questioned Mr Lawson about the issue of full time working. Mr Lawson confirmed Ms Smith and Mr Wilson had been asked at the start of the process and the "clear steer" was that full time/part time had no impact on the scoring and was not reflected in the criteria. Mr Lawson commented that he did think the role was full time, but there were many part time people in his team and accommodations could be made. Mr Lawson confirmed that notwithstanding his thinking it did not impact the scoring because accommodation could have been made.

49. Ms Walker also questioned Mr Lawson about the scoring and asked to be provided with a copy of Mr Binnie's CV. One issue raised by the claimant related to qualifications. The claimant is a Chartered Accountant and believed she should have scored more highly than Mr Binnie. Mr Lawson confirmed the role required an auditor. Mr Binnie was a qualified internal auditor with thirty years' experience. The claimant was an accountant with approximately 20 years' experience. Mr Lawson described Mr Binnie as a "spot on" match for the post: his skillset was more relevant to the job description for the role.

50. Mr Lawson told Ms Walker that Mr Binnie had adapted his approach and style to the needs of stakeholders and demonstrated an ability to listen to what stakeholders wanted and provide it. This was a requirement of the role going forward: that is, the ability to shift shape based on what the stakeholders wanted.

51. Mr Lawson described that both candidates were capable of doing the role but Mr Binnie's skillset was more relevant to the job description.

52. Mr Lawson confirmed he had interviewed the claimant and Mr Binnie two years previously and the redundancy scoring reflected his recollection from the interviews. He had asked for examples of how the candidates would be responsive and Mr Binnie had been more tuned into adopted methodology than the claimant.

53. Ms Walker met with Mr Jones on the 29 July and the notes of that meeting were produced at page 471. Mr Jones confirmed that in the discussions he had had with Mr Lawson in 2017 regarding the role, there had been no reference to the role requiring to be full time. Mr Jones commented that if the issue had been raised "this would have rung alarm bells with him".

54. Ms Walker did not rescore the assessment of the claimant and Mr Binnie. She considered the line managers were best placed to carry out the assessment. Ms Walker concluded, having had regard to the scoring assessments, the rationale for the scores and the calibration process, that the criteria had been reasonable and the process felt fair. Ms Walker concluded the issue of full time/part time had had no influence on the scores, and she took comfort from the fact that it had been Mr Lawson who had challenged Ms Magennis' scores and led to them being increased.

55. Ms Walker also took into account the respondent's approach to flexible working. Ms Walker described that *"flexible working is part of what [the respondent] does".* There are a significant number of employees working flexibly and Ms Walker considered the respondent was "very good" at giving flexible working and supporting it.

56. Mr Lawson's team post-restructure comprised 10 employees, the majority of whom were female and all of whom exercised a degree of flexibility in terms of days and hours worked. Mr Lawson supported flexible working and had, on occasion, worked flexible hours himself.

57. Ms Walker investigated the points raised by the claimant regarding care taken during the process: for example, the confusion regarding whether the claimant should raise a grievance or an appeal; being provided with consultation notes where part of a page had been covered by a post-it note and some handwriting had not been legible and the fact there was no commentary on the scoring assessment sheet to inform the employee of the factors taken into account. Ms Walker acknowledged these points were administrative, and although they had caused distress during the process they had not undermined the score.

58. Ms Walker decided not to uphold the appeal. Ms Walker met with the claimant on the 30 July to go through the appeal points and her decision, and the notes of this meeting were produced at page 473. Ms Walker explained to the claimant the approach she had taken and the decision she had reached in respect of each appeal point.

59. Ms Walker confirmed she had spoken with Mr Lawson regarding the 2017 interviews and that his position was that he had not explicitly stated the role had to be full time. Ms Walker understood the claimant had a contrary view. Ms Walker had taken into account the fact Mr Jones had been adamant that it had not been raised with him (in 2017), and she had taken comfort from the fact the People Team had given advice that full time/part time was not to be taken into account, or influence, the scoring assessment in 2019.

60. Ms Walker confirmed her decision in writing by letter dated 31 July 2019 (page 489). Ms Walker advised the claimant that an additional two weeks would be added to the redundancy process to give the claimant time to consider the outcome of the appeal and to decide if she wished to pursue alternative employment or redundancy.

61. The claimant did not take up the offer of a two week extension to the redundancy. The claimant's employment terminated on the 2 August 2019. The claimant was paid a redundancy payment of £5250; pay in lieu of notice of £9277.76 and a discretionary additional service payment of £7136.74.

62. The claimant did not apply for the vacancy in Mr Jones' team, or in Mr Lawson's team. The claimant considered she had lost trust in the respondent. This loss of trust was said to be based on her selection for redundancy, on the way the respondent had dealt with the redundancy exercise and on the fact everyone in the new structure in July 2019 (with the exception of the claimant) had been invited to attend a meeting. The claimant felt this publicised her selection for redundancy prior to the outcome of the appeal.

63. The claimant submitted a second grievance but the respondent did not take any action in respect of that grievance.

64. The claimant commenced alternative employment on the 1 September 2020 working 10 hours per week.

65. The respondent acknowledged the claimant had, from 2 October 2019, made suitable attempts to mitigate her losses.

5 **Credibility and notes on the evidence**

66. There were no issues of credibility in this case. All of the witnesses gave their evidence in a straightforward manner and endeavoured to answer the questions put to them.

67. The claimant called Witness X to give evidence because she allegedly was 10 having difficulties regarding her part time working hours. Witness X gave a full account of what had happened and asserted she had been told by Mr Binnie that she would need to increase her hours. Mr Lawson, when this was put to him, knew nothing of it. Mr Lawson did accept that he, generally, had made it known there were opportunities to increase hours worked if people wished to 15 do so.

68. We did not attach weight to Witness X's evidence for two reasons: firstly, because the evidence given by Witness X suggested there was more to her complaint about Mr Binnie than working hours and secondly Mr Lawson had no involvement in the matter and it was not suggested he had given Mr Binnie 20 an instruction to act as he allegedly did. We could not accept Witness X's evidence undermined the finding we made that the respondent has many employees working flexibly and that it supports those employees.

69. Mr Jones' evidence to this tribunal was very short. He confirmed the role for which the claimant had applied in 2017 was very similar to the role she had 25 performed when in his team. Mr Jones also confirmed that he had approached the claimant in 2019 regarding the vacancy in his team. He considered the claimant had the appropriate skills for the job and he was keen for her to pursue the role. The claimant thought about this for a week and then advised Mr Jones she wanted to pursue the appeal.

70. We found Ms Magennis to be a reliable witness. She had a good grasp of the issues and was able to explain the rationale behind her scoring of the claimant. We accepted Ms Magennis had collated the evidence to support her scoring of the claimant at the time she carried out the assessment, and not afterwards as suggested by the claimant.

71. We also found Mr Lawson to be a reliable witness. We accepted Mr Lawson supported flexible working because not only did most people in his team work flexibly, but he had, himself, worked flexibly for childcare reasons. The fact Mr Lawson considered a job was full time did not detract from the fact he identified and supported that accommodations could be made for part time working in the role.

72. We found Mr Wilson's evidence to be more general in nature and we put this down to the fact he had left the employment of the respondent and had not retained the detail of the redundancy exercise. His evidence contradicted that of Ms Magennis and Mr Lawson in one respect and that was with regard to the discussions with HR prior to the redundancy assessment being carried out. Mr Wilson told the tribunal that a question had been raised by Ms Magennis and Mr Lawson about whether full time working could be included as part of the criteria for assessment. Ms Magennis and Mr Lawson told the tribunal that the question raised about full time/part time working had been in the context of doing the assessment. We preferred the evidence of Ms Magennis and Mr Lawson regarding this issue because they were present at the meeting and directly involved, whereas Mr Wilson could only speak to his understanding of a meeting at which he had not been present.

73. We found Ms Walker to be an impressive witness who had carried out a very thorough investigation of the points raised by the claimant at the appeal.

74. We also found the claimant to be a credible witness (with one exception as set out below), although her view of events now was completely slanted towards supporting her claim. The claimant's position was that she had been discriminated against in 2017 when Mr Lawson preferred Mr Binnie over her for the post in his team, and this discrimination had continued in 2019 when

the scoring assessment had been completed. The claimant believed she had been discriminated against because she worked part time.

75. The claimant accepted she had contacted Mr Lawson in 2017 regarding the post and that she had enquired whether the fact she worked part time would be a problem. The claimant had been "surprised and indignant" when Mr Lawson advised the role was full time (although there was no suggestion of this at the time). The claimant believed she had been undertaking the same/similar role for Mr Leighton Jones, whilst working part time.

76. The claimant considered her interview with Mr Lawson in 2017 had gone very well. She had asked for feedback when advised she had not been successful, and thought the feedback had been "vague and woolly".

77. The claimant had occasion to chat with Mr Binnie and learned he did not have the same qualifications as she held. The claimant was dismissive of the qualifications Mr Binnie held. The claimant was also critical of the fact the interview pack notes had not been totally completed.

78. We noted there was no dispute regarding the fact Mr Lawson expressed the view on page 183 that he was *"really looking for full time for this role".* This however, was not the full picture of facts to be taken into account. Mr Lawson considered the role should be full time because the team was split over three sites, and some of the people on the team in Newcastle were new and required support and management. This would involve travel. Mr Lawson had a concern about the time involved in travelling to three sites and offering support and coaching to the team in Newcastle. Mr Lawson went on to say that accommodation could however be made for the role to be performed part time, and he referred, for example, to the team in Newcastle being line managed by a senior manager on site. We found Mr Lawson to be a credible and reliable witness and we accepted his evidence on these matters, which was supported by the fact that accommodations were made by the respondent in many full time roles worked on a part time or flexible basis.

79. We also had regard to the fact that Mr Lawson spoke with Mr Jones regarding the post and the claimant and there was no mention of the post being full time

and conversely, no concern expressed regarding the claimant doing the role on a part time basis.

80. We accepted the evidence of the respondent's witnesses regarding the view of the respondent towards flexible working. Ms Magennis had 20 employees in her team, the majority of whom had flexible working on a formal or informal basis. Ms Magennis described the respondent as having "widely embraced" flexible working, and that flexible working was standard across the organisation. Ms Magennis had no experience of the respondent requiring/demanding full time working. She considered flexible working a positive.

81. Mr Lawson viewed flexible working as "essential". He told the tribunal he was a single parent and understood the need for it. He had worked flexibly because of childcare. He was a big supporter of flexible working. Mr Lawson described that he had never worked anywhere more supportive of flexibility than the respondent. We, in addition to this, took from Mr Lawson's evidence that whilst a post may be described as full time, adjustments were commonly made to accommodate part time or flexible working.

82. Ms Walker described that flexible working was "part of what the [respondent] does". There was a formal flexible working policy and an informal smarter working policy, and a significant number of the respondent's employees worked flexibly. Ms Walker confirmed the respondent was very good at giving flexible working and supporting it. The informal working arrangements varied from compressed hours, to home working, to working longer hours one day to accommodate shorter hours the next etc.

83. The claimant had initially started work as a full time employee and had had her request to reduce her hours to work over three days per week granted. The claimant had flexibility in terms of the days worked each week.

84. There was no dispute regarding the fact that following the restructure employees in Mr Lawson's team (there was no evidence to clarify if this was specific to Mr Lawson's team or across the company generally) were asked if

anyone wished to increase their working hours, because there was scope to do so.

85. Witness X's evidence regarding part time working after being line managed by Mr Binnie was not positive. We did not, however, consider that evidence undermined the overwhelming evidence and our finding in fact that the respondent positively views, supports and accommodates flexible working.

86. The claimant was very critical of all aspects of the redundancy process which she believed had been tainted by Mr Lawson's preference for full time working. The claimant, in challenging the process, placed particular weight on the documents at page 299 – 303. On page 303, entitled Tesco Bank Selection Matrix, the scores of the claimant and Mr Binnie were shown, but the leadership and technical competency criteria were scored out of 10. This gave a total score out of 30. The document was incomplete because the scores for performance had not been entered. There was no dispute regarding the fact that if the scores for performance had been entered, the claimant and Mr Binnie would have scored the same.

87. We understood why the claimant placed such weight on this document, but we concluded that in fact the document was a red herring. We reached that conclusion because (i) there was no evidence to inform the tribunal who had prepared the document or why it had been prepared; (ii) it was clear – and accepted by the claimant – that the three criteria had not in fact been scored out of 10. Performance had been scored out of 10; leadership behaviours out of 50 and technical competencies out of 50; (iii) it was clear – and accepted by the claimant – that the scoring assessment carried out by Ms Magennis was that shown on page 287; (iv) it was clear – and accepted by the claimant – that she had scored 87 out of 110 and that Mr Binnie had scored 95 out of 110 and (v) the claimant scored less than Mr Binnie.

88. The respondent's witnesses were not able to explain who had prepared the document at page 303 or for what purpose. Mr Wilson confirmed he had seen the document before but did not know who had prepared it or for what purpose. Ms Magennis was unsure if she had seen the document previously

and confirmed she had not completed it and did not know how the scoring she had undertaken had translated on to the document. Mr Lawson had not seen the document at page 303 previously and when referred to it he confirmed he did not recognise the scores because his assessment had not been scored out of 10.

89. We concluded from the above that the document at page 303 was an HR/administration document produced for purposes unknown to the tribunal. We could not accept this document in any way undermined the scoring assessment process undertaken by Ms Magennis and Mr Lawson. We accordingly placed no weight on this document.

90. The claimant challenged the score Mr Binnie had been awarded for qualifications. Technical competency 5 was "audit related professional qualification with significant experience in implementation". The claimant and Mr Binnie both scored 10 for this competency. The claimant took issue with the score awarded to Mr Binnie because she considered he did not have a professional audit qualification. The claimant made reference to the job description for the role of Senior Risk Control Manager (page 392) where it stated "professional qualification essential".

91. The claimant is a Chartered Accountant. She made reference to a document from the Chartered Institute of Internal Auditors which detailed there were two professional qualifications and they were Certified Internal Auditor and Chartered Internal Auditor.

92. Mr Binnie's CV was produced at page 165. The CV confirmed Mr Binnie was a member of the Chartered Institute of Internal Auditors; he had taken four of the five exams necessary for the Chartered Institute of Internal Auditors and he had a certificate in Internal Audit and Business Risk.

93. Mr Lawson considered Mr Binnie had professional audit qualifications. Mr Binnie was a qualified internal auditor with many years' experience. The role required an auditor. Mr Binnie's skillset was more relevant to the job description for the role. Mr Lawson considered the issue raised by the

claimant turned on the interpretation of the word "professional" and he had not construed it as narrowly as the claimant.

94. The claimant, in her evidence to the tribunal, went beyond asserting there had been discrimination in 2019: she asserted Ms Magennis was party to Mr Lawson's preference for full time working; that Ms Magennis' assessment of her had been influenced by Mr Lawson's preference for full time and that during the calibration process there had been a conspiracy to increase her scores but not by too much. We could not accept the claimant's position regarding these matters because there was no evidence to support it. The claimant did not make known to anyone in the respondent (prior to her appeal) that she believed Mr Lawson had a preference for full time working. Accordingly, there was no basis for suggesting Ms Magennis was aware of any alleged preference, let alone supportive of it. Ms Magennis' evidence regarding flexible working and her support for it was not challenged, and was accepted by this tribunal.

95. There was no evidence of any conspiracy between Ms Magennis and Mr Lawson and there were no findings of fact from which to draw an inference of a conspiracy.

Respondent's submissions

96. Mr Hay referred to section 98 Employment Rights Act and to the definition of redundancy set out in section 139 Employment Rights Act. He also referred the tribunal to the cases of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** and ***Langston v Cranfield University 1998 IRLR 172*** where it was said the fairness of a dismissal in a redundancy case focusses on:

- whether there was a reasonable pool of employees drawn from which to select the redundant employee;
- whether the selection criteria used to select from the pool were reasonable;
- whether those criteria, being reasonable, were applied fairly;

- whether there was individual consultation or warning with the affected employee and
- whether there have been sufficient efforts to find alternative employment.

5 97. Mr Hay noted, in relation to the selection of the pool, that if the employer has applied its mind to the pool and has not done so unreasonably, that should be sufficient ***(Thomas & Betts Manufacturing Ltd v Harding 2980 IRLR 255).***

98. The appropriate test in relation to whether selection criteria are reasonable is not for the tribunal to substitute its own criteria, but to ask whether the criteria 10 used were such that no reasonable employer would have adopted them ***(NC Watling v Richardson 1978 ICR 1049).***

99. The appropriate question to ask in relation to whether selection criteria were applied in a reasonable way, is "was the scoring done in a reasonable way". The Tribunal is not to undertake a detailed assessment of the scores. It is 15 sufficient for the employer to show that a reasonable system for selection had been set up and administered fairly (***Eaton Ltd v King 1995 IRLR 75*** and ***British Aerospace v Green 1995 IRLR 437***). In ***Eaton*** it was also held that a manager is entitled to rely on the assessments made by his/her subordinates of employees in the pool and not be required to adduce such 20 evidence at the tribunal, subject to there being no reason to doubt the reliability of the information received.

100. The question of whether there was reasonable warning or consultation is a question of fact or degree as to whether the individual consultation was so inadequate as to render the dismissal unfair. A lack of consultation will not 25 automatically lead to that result: rather, the overall picture must be viewed up to the date of termination ***(Mugford v Midland Bank 1997 IRLR 208).***

101. The employer is not required to make exhaustive searches or efforts to find alternative employment. The question is what is reasonable for that organisation.

102. Mr Hay submitted the reason for the claimant's dismissal was redundancy in circumstances where there was a diminished need for employees to do work of a particular kind. Mr Wilson, Ms Magennis and Ms Walker all spoke to the restructuring and their evidence was not challenged.

5 103. The respondent undertook a substantial consultation exercise in this case. There were no fewer than three consultation meetings with the claimant, a further meeting regarding the scoring outcome was offered and there was a substantial appeal hearing.

104. The selection process was, it was submitted, eminently reasonable. Criteria 10 were discussed with the relevant trade union. They were fixed in respect of this particular pool by reference to the job criteria for the new role, and related to attributes considered relevant for that role. The criteria were rational, sensible and reasonable. The process for scoring was reasonable, with the line managers being best placed to do the assessment. Ms Magennis was 15 able to justify her scoring of the claimant and the calibration meeting was a control on the process which led to the claimant's scores being increased.

105. The respondent had taken all reasonable steps regarding alternative employment. The role in Mr Jones' department was at the same level of pay and terms and conditions as the claimant had enjoyed and was at an 20 equivalent level of seniority to the role which Mr Binnie secured. The claimant had spoken of a loss of trust in the respondent, but the claimant's line manager in this role would have been Mr Jones, with whom the claimant had worked and in respect of whom she still had a relationship of trust.

106. Mr Hay submitted the respondent had acted fairly in deciding to dismiss the 25 claimant for reasons of redundancy and in properly investigating her concerns about the redundancy process.

107. The complaint of direct discrimination was brought in terms of the 2017 interview process and the 2019 selection process. Mr Hay submitted the claim in respect of the 2017 interview process had been presented late, and was 30 not an example of continuous conduct. Further, it would not be just and equitable to extend time in circumstances where there had been no

satisfactory reason given for the delay. The claimant accepted she had done nothing about this matter at the time.

108. Mr Hay acknowledged, with regard to the 2019 scoring assessment that the claimant had been treated less favourably than Mr Binnie insofar as she had been scored at a lower level than him. There was no evidence however to support that the reason for the difference in scoring was due to the difference in sex between the claimant and Mr Binnie. The process undertaken by the respondent was objective, there was no suggestion the difference in scoring had any relation to the difference in working hours between the parties and the fact the claimant lost out to Mr Binnie in 2017 supported the fact the assessment in 2019 rated her lower. Even if that was wrong, there was no suggestion why part time working was a proxy for sex between the parties in this case, especially as the impugned decision-maker, Mr Lawson, was himself a lone parent. The "proxy" connection has not been established in this case. The tribunal should have no hesitation in accepting the evidence of Mr Lawson and Ms Magennis that the difference in sex (or indeed the fact of part time status) did not play a part in their decisions either in the recruitment exercise of 2017 or in the redundancy scoring exercise in 2019.

109. Mr Hay referred to the terms of section 19 Equality Act and asked whether the respondent had applied the provision, criterion or practice (PCP) of requiring full time working hours for either (a) the role of Customer Risk Assurance Manager in 2017 or (b) the marking of the redundancy assessments. Mr Hay noted the claimant had defined the PCP very broadly as a requirement by the respondent to work full time for the role of Customer Risk Assurance Manager, or in marking the criteria for the redundancy selection in 2019. Mr Hay submitted that in respect of the 2017 vacancy, the tribunal should have no hesitation in accepting the evidence of Mr Lawson that, whilst he indicated an initial preference for full time hours for the post (given the previous incumbent had been full time, and the demands of the role with new staff members and a new team in Newcastle with the need for travel) he was open to consideration of flexible arrangements of something less than full time

working hours if the claimant was the preferred candidate. Mr Hay submitted the PCP was therefore not applied by the respondent.

110. Mr Hay submitted that on the evidence there had been no suggestion that any such PCP was applied to the scoring process undertaken by Ms Magennis and Mr Lawson in respect of the claimant and Mr Binnie in 2019, and the claimant's own contention in this respect appeared vague and il-defined. The PCP, it was submitted, was not applied by the respondent in either scenario. Mr Hay acknowledged a question had been raised whether scoring should take account of full time or part time working, but both Mr Lawson and Ms Magennis confirmed they had been told "No" and had followed that advice.

111. Mr Hay submitted that if the respondent was considered to have applied such a PCP, there had been insufficient evidence to establish particular disadvantage to women. Whilst there was broad evidence that part time workers were women, the proportions of distribution in both Mr Lawson's team and Ms Magennis' team had not been provided. There had been no breakdown of numbers of men in women and, it was submitted, the claimant had not met the applicable standard of evidence required.

112. Mr Hay acknowledged the claimant relied on the disadvantage of not being selected for the role of Customer Risk Assurance Manager in 2017 and that she was selected for redundancy in 2019, however there was no evidence of group impact. Mr Hay invited the tribunal to dismiss the complaint of indirect discrimination for all of these reasons.

113. Mr Hay invited the tribunal to dismiss the claim. However, if the tribunal upheld the claim, he submitted no basic award was due to the claimant because she had received a redundancy payment; and the payment in lieu of notice and the ex gratia payment should also be taken into account. In terms of a compensatory award, Mr Hay referred to the vacant position in Mr Jones' team and submitted compensation should be reduced by 100% because the claimant did not take up this role. In terms of injury to feelings, there was no evidence to take an award outside the usual Vento bands. Mr Hay

acknowledged the claimant had been angry and upset and invited the tribunal to consider the top of the lower band at best.

Claimant's submissions

114. The claimant invited the tribunal to find she had been unfairly dismissed for the following reasons:

(i) there was a fundamental and obvious error in the 2019 end to end scoring process in that the score for her performance and that of Mr Binnie had been omitted from the total score. The total score had been used to derive the ranking which then confirmed who was at risk of redundancy. The claimant submitted that if the performance score had been correctly included, she and Mr Binnie would have had the same score, before taking into account qualifications and disciplinary criteria.

Mr Wilson had given evidence regarding the document and confirmed that Leadership and Performance should be converted to a score out of 10 by calculating an average score to ensure that Performance, Leadership and Competencies were scored equally out of 10 to give an overall total score of 30. Mr Wilson had also confirmed the document should have been completed prior to the candidates being informed of the outcome.

(ii) Mr Lawson stated that he wanted the new Senior Risk Manager role to be full time. This is discriminatory and consequently the less qualified, less experienced and lower performing full time male, Mr Binnie, was successful.

(iii) Ms Magennis knew, at the time of the first consultation meeting, that performance and leadership behaviours criteria had been agreed with the trade unions; that Mr Lawson had chosen the selection criteria for technical competencies and that initial scoring would be out of 10 for performance, out of 50 for leadership behaviours and technical competencies. Ms Magennis did not tell the claimant any of this information.

(iv) Ms Magennis' scoring of the claimant was rushed. This conclusion was supported by the fact Ms Magennis performed assessments for two other candidates on the same day; collated and documented evidence to support the claimant's assessment; performed her own calibration exercise; attended a meeting with Mr Lawson to calibrate the assessments of the claimant and Mr Binnie and produced the document entitled Supporting Evidence in respect of the claimant.

(v) There was an inconsistent application of the criteria by Ms Magennis and Mr Lawson.

(vi) Mr Wilson did not review any evidence provided by Ms Magennis and Mr Lawson to support their assessments. Accordingly, the evidence Mr Lawson used to support his assessment of Mr Lawson was never validated.

(vii) The scores given to Mr Binnie were known to Mr Lawson and Ms Magennis during the calibration exercise.

(viii) Mr Lawson could not recall whether any of Mr Binnie's scores had been changed in the calibration exercise.

(ix) Mr Lawson used his knowledge of the claimant from 2017 when rationalising the assessment. Ms Magennis had no such knowledge of Mr Binnie.

(x) Mr Lawson assessed Mr Binnie over a longer time frame.

(xi) The claimant strongly challenged her scores for responsiveness, but was not permitted to provide evidence to prove her scores were inaccurate.

(xii) Mr Binnie does not have a professional audit qualification and therefore cannot have significant experience in implementation of the professional qualification. The claimant believed Mr Binnie should have scored a much lower score for qualifications.

(xiii) The claimant asked for an independent review of the scores to be carried out but this did not happen.

(xiv) The concerns raised by the claimant in her grievance letter were not investigated completely. The respondent failed to follow the grievance procedure, and failed to allow the claimant to appeal against the decision.

(xv) The individual consultation process was not meaningful, genuine or procedurally fair. The process was rushed and the claimant had not been provided with a complete set of legible notes following each meeting. The consultation process finished notwithstanding the respondent being aware the claimant had raised a grievance.

115. The claimant considered all of the above points arose as a direct consequence of Mr Lawson's discriminatory requirement for the Risk Assurance Manager role in 2017 and the Senior Risk Control Manager in 2019 to be full time. Consequently in the 2017 and 2019 selection process, the less experienced, less qualified and lower performing full time working male was the highest scoring candidate over the claimant, a part time working female who was made redundant.

116. The claimant considered she had been treated less favourably than Mr Binnie in regard to the interview for the role of Risk Assurance Manager in 2017, because:-

(a) Mr Lawson required the role to be full time;

(b) Mr Lawson was accompanied by another Risk Manager at Mr Binnie's interview, but was not accompanied at the claimant's interview (because of a conflict of interest). This made it more difficult for the claimant to challenge her performance at the interview;

(c) Mr Lawson confirmed in evidence that Mr Binnie did not have the ideal qualifications, but the claimant did;

(d) There was no documented evidence that Mr Binnie performed better at interview than the claimant;

(e) Mr Jones confirmed the claimant had the relevant skills and qualifications for the role and

5 (f) Mr Binnie had no experience of 1st Line of Defence, compared to the claimant who had 13 years'.

117. The claimant considered she had been treated less favourably than Mr Binnie in the selection process for redundancy because:-

(a) Mr Lawson asked whether full time could be part of the selection
10 criteria;

(b) Ms Magennis devoted less time to carrying out the assessment than Mr Lawson;

(c) Ms Magennis was too harsh in the initial assessment and increased the claimant's scores during the calibration process. Mr Lawson, in
15 contrast, had been too lenient with Mr Binnie's assessment;

(d) the claimant should have scored more highly than Mr Binnie for qualifications and experience;

(e) Mr Lawson had access to Mr Binnie's CV, which covered his career history;

20 (f) Mr Wilson and Ms Magennis both stated that even if the claimant's grievance was upheld, Mr Binnie would not be moved from the role;

(g) the points raised in the grievance were not fully investigated and

(h) the selection matrix document supported the claimant's position.

118. The claimant submitted the respondent had applied a provision, criterion or
25 practice of requiring full time working hours for the role in 2017 and the redundancy in 2019, and this was supported by the following points:

- part time working is more likely to be used by females than males;

- Mr Lawson raised the issue of full time working again at the start of the selection process;
- there was no independent assessment of the scoring;
- the respondent did not intend to move Mr Binnie from the role in 2019 even if the claimant's grievance was upheld;
- the PCP is still being applied as evidenced by Witness X's evidence and
- there was no legitimate aim for the application of the PCP.

119. The claimant argued the discriminatory acts in 2019 were a continuing act of discrimination which started in 2017. The claimant acknowledged no discriminatory acts had occurred between 2017 and 2019 because she had not worked for Mr Lawson. Mr Lawson had been involved in the decision - making in 2017 and again in 2019. The claimant invited the tribunal to allow her claim in respect of the 2017 role to proceed.

Discussion and Decision

Direct Discrimination - Timebar

120. The claimant brought a complaint of discrimination in which she argued that she had been treated less favourably than Mr Binnie, and the reason for the less favourable treatment was because of sex. The claimant alleged there had been two instances of discrimination and they were (i) in the selection exercise for the role of Customer Risk Assurance Manager in 2017 and (ii) in the redundancy selection exercise which took place in 2019.

121. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another person (B), if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Section 123 Equality Act sets out the time limit for bringing a claim, and it provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. The section goes on to provide

that conduct extending over a period is to be treated as done at the end of the period.

122. The first issue for this tribunal to determine is whether the complaint relating to the 2017 interview process was submitted in time, and if not, whether it was presented within such other period as the tribunal considers just and equitable; or, whether the conduct complained of in 2017 was part of a continuing course of conduct which concluded with the claimant's redundancy.

123. There was no dispute regarding the fact the interview process concluded on the 5 July 2017 and the claim form was not presented until the 11 October 2019. The claim was presented over two years late. The claimant argued the recruitment exercise was part of a continuing course of conduct because both exercises had involved Mr Lawson.

124. We had regard to the case of ***Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548*** where the Court of Appeal clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in the case of ***Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530.*** It was said that tribunals should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer. We also had regard to the case of ***Aziz v FDA 2010 EWCA Civ 304*** where the Court of Appeal noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor was whether the same or different individuals were involved in those incidents.

125. We, in considering the substance of the complaints in question, noted that in 2017, the decision regarding the recruitment of a person to the vacant role was that of Mr Lawson. He interviewed the six candidates, scored their responses to the questions and decided to whom the post should be offered. This must be contrasted with the situation in 2019 when Mr Lawson was involved in assessing Mr Binnie and Ms Magennis assessed the claimant. Mr Lawson and Ms Magennis then met to undertake a calibration exercise where

scores awarded were discussed and challenged and the evidence for scores considered. We acknowledged that on the face of it Mr Lawson could be said to have been involved in both the 2017 and 2019 exercises, but his role in each was significantly different. We say that because Mr Lawson did not assess the claimant in 2019 and his participation in the calibration exercise led to some of the claimant's scores being increased.

126. This was not a situation where Mr Lawson adversely influenced the claimant's score; nor was it a situation where Mr Lawson chose selection criteria which would disadvantage the claimant. We concluded that whilst Mr Lawson had a role to play in the 2019 selection exercise, that role was not in relation to the claimant. We accordingly could not accept this was a case where the same individual (Mr Lawson) had been involved in the two situations.

127. We decided, having had regard to the above points, that the recruitment exercise in 2017 and the redundancy selection exercise in 2019 were not a continuing act. We say that because the situations were entirely different, caused by different factors and whilst Mr Lawson was the decision-maker in 2017 but he was not involved in the claimant's assessment or redundancy in 2019.

128. We next considered whether the claim in respect of the 2017 recruitment exercise had been presented within such further time as was just and equitable. We, in considering this matter, had regard to the fact the claimant offered no real explanation for not proceeding with a claim earlier. The claimant was aware of the facts: she did not accept Mr Lawson's decision, or his explanation regarding the scoring and she believed she had more experience and qualifications than Mr Binnie. The claimant had the information she required to raise a claim, and could have raised the claim earlier but chose not to do so.

129. We decided, having had regard to the above points and the length of time which elapsed before the claim was raised, that the claim in respect of the 2017 recruitment exercise was raised out of time and a tribunal has no jurisdiction to determine the matter.

Direct Discrimination

130. We decided – should we have erred in our decision regarding timebar – to go on to consider whether the claimant was treated less favourably than Mr Binnie when she was not successful in being recruited for the Customer Risk Assurance Manager post in 2017. Mr Hay, in his submission, accepted the claimant had been treated less favourably than Mr Binnie in circumstances where she was scored at a lower level than him. Accordingly, the question for the tribunal to determine is, was the reason for the less favourable treatment because of sex.

131. The claimant's claim was brought as one of sex discrimination rather than part time workers discrimination. The claimant conflated the two characteristics on the basis of her belief that more women than men worked part time. The claimant however brought forward no evidence to support that position either generally or specifically within the respondent's workforce. We decided to proceed to determine the claim notwithstanding the claimant brought the case as one of sex discrimination based on part time working and used those terms interchangeably and as a proxy for one another.

132. There was no dispute regarding the fact the claimant spoke to Mr Lawson in 2017 regarding the vacant position and it was she who raised the issue of whether her working hours (that is, part time) would be a barrier to being considered for the role. Mr Lawson responded that he was really looking for full time for the role. Mr Lawson met with the claimant to talk through the role and to explain why he wanted full time. He also made clear to the claimant that full time was not a "deal breaker because there are always ways round it, for example, senior people in Newcastle could be asked to take on line management of the team".

133. Mr Lawson spoke with Mr Jones, the claimant's previous line manager, who confirmed the claimant was a competent, sound performer in her role and that he had had no performance issues with her. Mr Lawson, following the interviews, described the claimant as a "very close second" to Mr Binnie The difference was that Mr Binnie had an audit background, which was the same

background as the previous post-holder. The examples given by Mr Binnie at interview, and his knowledge, skills and experience were more suited to and in line with what Mr Lawson wanted from the role. Mr Lawson specifically referred to Mr Binnie giving examples at interview where he had dealt with senior managers in the Bank. This was important because an audit may disclose information the senior manager may not want to hear, but the information needs to be presented.

134. We acknowledged the claimant did not agree with Mr Lawson's assessment, however the issue for the tribunal is whether the reason for the claimant's lower score at interview was because she was a female (who worked part time). We, in considering this matter, had regard to two matters. Firstly, we had regard to the evidence of Mr Lawson as set out above. We found Mr Lawson to be a credible witness and we had no reason to doubt his evidence that notwithstanding there were reasons to explain why he would prefer a full time role, the fact an employee worked part time was "not a deal breaker". We considered Mr Lawson's evidence was given support by the fact (i) he identified an adjustment which could be made if the post-holder was part time, (ii) by the fact adjustments to roles to accommodate flexible working were common and (iii) by the fact of the respondent's position regarding flexible working.

135. Secondly, the respondent's witnesses all spoke of the respondent positively supporting flexible working. The respondent has a formal and an informal flexible working policy. The claimant did not challenge that fact many of the respondent's employees work flexibly. Ms Magennis told the tribunal that of the 20 people in her team, the majority of them had flexible working on a formal or informal basis. Ms Magennis also told the tribunal that flexible working was "widely embraced" within the organisation and that flexible working was standard across the organisation.

136. Mr Lawson told the tribunal that after the restructure in 2019, all of the 10 people in his team exercised a degree of flexible working. Mr Lawson viewed flexibility as "essential" and he was a "big supporter" of flexibility in the

workplace. Mr Lawson was a single parent and had worked flexibly for a period of time.

137. Ms Walker told the tribunal that "flexible working is part of what [the respondent] does". She referred to the formal and informal policies and to the fact there were a significant number of employees who worked flexibly. She described the respondent as being "very good at giving [flexible working] and supporting it".

138. We also had regard to Mr Jones' evidence when he told the tribunal that the issue of full time working had not been raised by Mr Lawson with him, and that if it had, it would have rung alarm bells with him.

139. The claimant relied on the evidence of Witness X to demonstrate employees who worked flexibly had issues with it. We could not accept that Ms Witness X's evidence demonstrated this. We say that because it was clear from her evidence that Witness X had an issue with Mr Binnie which did not wholly concern flexible working and which was, as yet, unresolved.

140. We accepted the evidence of the respondent's witnesses and found as a matter of fact that the respondent employed a significant number of employees who worked flexibly, and that the respondent's ethos was to give and support flexible working. Mr Lawson and Ms Magennis were each supportive of flexible working and the respondent's ethos.

141. We concluded, having had regard to the above points, that notwithstanding Mr Lawson's expression of a preference for a full time role, the claimant did not score less than Mr Binnie at interview because of her sex/part time working. We say that because (i) Mr Lawson made clear there were always ways to work round any issue and there was no evidence to suggest he would not have been prepared to make any adjustments necessary to accommodate the claimant's working hours; (ii) the overwhelming evidence supporting the fact the respondent generally, and including Mr Lawson and Ms Magennis, were supportive of flexible working and (iii) the fact Mr Lawson gave a credible explanation why Mr Binnie had been the better candidate for the role.

142. There was no dispute, in relation to the 2019 assessment, that the issue of full time/part time working was discussed with HR prior to carrying out the redundancy selection assessment. Mr Lawson told the tribunal there had been a general briefing by HR regarding how to conduct the scoring exercise. HR had made it clear that full time/part time working was not a consideration in the assessment. Mr Lawson and Ms Magennis had accepted this and it had not been discussed again.

143. Ms Magennis told the tribunal that she and Mr Lawson had asked HR during the briefing, about part time working in respect of the assessment and had been told it had no influence on the scoring. She and Mr Lawson had accepted this and applied it, and there had been no further discussion about it.

144. Mr Wilson told the tribunal that Mr Lawson and Ms Magennis had asked if full time working could be a criterion, and had been told no. Mr Wilson had not been present at the briefing meeting with HR. We preferred the evidence of Mr Lawson and Ms Magennis regarding this matter because they had direct knowledge of it and were present at the briefing meeting.

145. The claimant invited the tribunal to find that Mr Lawson had asked, at the HR briefing, for full time working to be a criterion. We could not make this finding because we preferred the evidence of Mr Lawson and Ms Magennis, and found as a matter of fact that part time/full time working in relation to the assessment was raised, and that they were told by HR it had no bearing on the assessment. This was accepted and applied by both Mr Lawson and Ms Magennis.

146. The claimant did challenge two of her scores (for resilience and responsiveness) and also challenged Mr Binnie's score for qualifications. The claimant did not expressly suggest in cross examination of Ms Magennis, that she had been given a lower score because she worked part time. The inference the claimant invited the tribunal to draw was that Mr Lawson had generously scored Mr Binnie and had done so because he worked full time.

147. The claimant did challenge the score given to Mr Binnie for qualifications. The claimant believed her qualification (Chartered Accountant) was "better" than

the qualification Mr Binnie held. The claimant scored the maximum points for her qualification. The claimant believed Mr Binnie should have scored less than her.

148. The technical competency to be assessed in relation to qualifications was "audit related professional qualification with significant experience in implementation". The claimant considered Mr Binnie did not have a professional audit qualification. The claimant in support of her position made reference to a document from the Chartered Institute of Internal Auditors which detailed there were two professional qualifications and they were Certified Internal Auditor and Chartered Internal Auditor.

149. Mr Binnie's CV was produced at page 165. The CV confirmed Mr Binnie was a member of the Chartered Institute of Internal Auditors; he had taken four of the five exams necessary for the Chartered Institute of Internal Auditors and he had a certificate in Internal Audit and Business Risk.

150. Mr Lawson considered Mr Binnie had professional audit qualifications. Mr Binnie was a qualified internal auditor with many years' experience. The role required an auditor. Mr Binnie's skillset was more relevant to the job description for the role. Mr Lawson considered the issue raised by the claimant turned on the interpretation of the word "professional" and he had not construed it as narrowly as the claimant.

151. We accepted Mr Lawson's explanation for two reasons: firstly, because we found Mr Lawson to be a credible witness and secondly because his assessment had been subject to a calibration exercise with Ms Magennis and discussion with Mr Wilson, where the focus had been on evidence to support the scoring awarded. The assessment had also been subject to investigation at appeal. We also took into account the fact Mr Lawson did not know, when carrying out the assessment for Mr Binnie, what scores the claimant may be given by Ms Magennis.

152. We concluded, having had regard to the above points regarding the 2019 scoring exercise, that there was no evidence to suggest the claimant had been scored lower than Mr Binnie because she was a female who worked

part time. Conversely, there was no evidence to suggest Mr Binnie had been scored generously because he was a man working full time.

153. We decided, for the reasons set out above, to dismiss this claim.

Indirect discrimination

5 154. We had regard to the terms of section 19 of the Equality Act which provide that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's, if A
10 applies or would apply it to person with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts or would put B at that disadvantage and A cannot show it to be a proportionate means of achieving a legitimate aim.

15 155. The first issue for the tribunal to determine is did the respondent apply the provision, criterion or practice of requiring full time hours for either the role of Customer Risk Assurance Manager in 2017 or the marking of the redundancy assessments in 2019. We have set out above that Mr Lawson did indicate an initial preference for full time hours for the post of Customer Risk Assurance
20 Manager in 2017, but was open to consideration of flexible arrangements if the claimant was the successful candidate at interview. Mr Lawson told the tribunal, and we accepted, that part time working was not "a deal breaker" and that there were always adjustments which could be made. Mr Lawson went on to give an example of just such an adjustment, using the senior managers
25 in Newcastle to manage the new team, which would reduce the need for travel and one-to-one support for members of that team. We concluded, that whilst Mr Lawson may have expressed a preference for a full time role, that did not of itself mean the PCP had been applied. There was no evidence to suggest full time hours were required for the role: in fact, the evidence supported our
30 finding of fact that the respondent supported flexible working and readily made accommodations to allow for flexible working.

156. We decided, for these reasons, that the respondent did not apply the provision, criterion or practice identified by the claimant: there was no provision that the post-holder had to work full time hours.

157. We have set out above the fact Mr Lawson and Ms Magennis did, at the HR briefing in 2019, raise a question regarding whether the scoring should take account of full time or part time working. Mr Lawson and Ms Magennis both accepted they had been told the issue had no impact on the scoring, and both accepted and applied this. We were accordingly satisfied that in relation to the redundancy assessment, there was no requirement to work full time.

158. We concluded, for these reasons, that the complaint of indirect discrimination must fail because the claimant has been unable to show that the provision, criterion or practice was applied by the respondent.

159. We should state that if we had found the provision, criterion or practice as defined by the claimant had been applied, the claim would have been unsuccessful in any event because the claimant did not bring forward any evidence to establish particular disadvantage to women. The claimant relied on a general position that more women than men work part time, but there was no information to inform the tribunal about the numbers of men and women employed by the respondent, or the numbers of men and women who work flexibly. This was in sharp contrast to the evidence of the respondent's witnesses which was to the effect that very many of the respondent's employees work flexible hours.

160. The claimant also failed bring forward any evidence to demonstrate group impact, which is a necessary part of a complaint of indirect discrimination.

161. We decided, for the reasons set out above, to dismiss this complaint.

Unfair Dismissal

162. We firstly had regard to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages: firstly, it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons set

out in section 98(1) and (2). Secondly, if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair. This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

163. The respondent in this case admitted dismissing the claimant and asserted the reason for the dismissal was redundancy.

164. The definition of "redundancy" is set out in section 139 Employment Rights Act, which provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to "(b) the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish".

165. The first issue for this tribunal to determine is whether the respondent has shown the reason for the dismissal was redundancy. The claimant did not challenge the reason for her dismissal, beyond asserting there was no genuine redundancy situation, but beyond making that statement, she did not challenge the evidence of Mr Wilson.

166. Mr Wilson gave evidence regarding the background to, and need for, the redundancies which took place. We accepted his evidence that there had been a review of the business in 2018, which had looked at the structure of the business and opportunities for bringing parts of the business together to make cost savings. A decision was made to bring the three Risk teams together into two teams.

167. There was no dispute regarding the fact the claimant and Mr Binnie were assessed and the person who scored the higher mark (Mr Binnie) was offered and accepted the role of Lead Risk Manager. The claimant scored the lower mark and was offered, but rejected, suitable alternative employment. The claimant's employment, in those circumstances, was terminated. The reason for the termination of employment was because the claimant's post was redundant. The reason for the dismissal was redundancy.

168. We were satisfied the respondent had shown the reason for the dismissal was redundancy, which is a potentially fair reason for dismissal in terms of section 98(2)(c) Employment Rights Act. We must now go on to consider whether dismissal for that reason was fair or unfair.

5 169. We were referred to the case of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** where the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The factors suggested that a reasonable employer might be expected to consider were:

- whether the selection criteria were objectively chosen and fairly
10 applied;
- whether employees were warned and consulted about redundancy;
- whether, if there was a trade union, the union's view was sought and
- whether any alternative employment was available.

170. We also had regard to the ***House of Lords case of Polkey v A E Dayton***
15 ***Services Ltd 1988 ICR 142*** where it was said that if an employer is to be considered to have acted reasonably in dismissing an employee in a redundancy case, the procedural steps necessary will involve warning and consulting affected employees, adopting a fair basis for selection and taking reasonable steps to redeploy affected employees.

20 **The selection criteria and their assessment**

171. The claimant did not take issue with the fact the pool for selection comprised her and Mr Binnie. The trade union was consulted regarding the redundancies and the selection criteria were agreed with the trade union. The competencies to be assessed under the criterion of technical competencies were suggested
25 by Mr Lawson, having had regard to the job description, and were subject to consultation with Ms Magennis and Mr Wilson. A score of 10 for performance, 50 for leadership behaviours and 50 for technical competencies was available. We were satisfied that the criteria used by the respondent fell within the band of reasonable criteria which a reasonable employer might have

adopted. We say that because the criteria to be used were considered by the employer, relevant to the role/s created, reasonable and consulted upon and agreed with the trade union.

172. The claimant did argue experience should have been a separate criterion. The respondent rejected that suggestion because experience was included and covered as part of the competencies assessed. Further, it appeared the claimant only made this criticism of the selection criteria because she considered she had more experience than Mr Binnie and would have scored a higher mark than him. We were satisfied the selection criteria were reasonable (and included experience as part of the competencies assessed) and were agreed with the trade union: in those circumstances we could not accept the claimant's position the criteria were flawed because they had not included experience.

173. The claimant was critical of the fact not all of the criteria were objective. We could not accept that criticism because the criteria were not limited to simply reflecting the personal opinion of the selector: they were verifiable by reference to documented evidence. One of the key roles of Mr Wilson, following the calibration exercise, was to question Ms Magennis and Mr Lawson whether they had evidence to support their scoring. This was also an issue raised during the appeal investigation carried out by Ms Walker, who wanted Ms Magennis and Mr Lawson to produce the evidence relied upon to support the score which had been given.

174. We next asked whether the selection criteria were applied in a reasonable way. The claimant considered she should have scored more highly in two respects (resilience and responsiveness) and she challenged the score given to Mr Binnie for qualifications which she felt should have been lower. We reminded ourselves that it is not for this tribunal to decide whether we would have awarded a higher or lower score. In the case of ***Buchanan v Tilcon Ltd 1983 IRLR 417*** the Court of Session held that where an employee's only complaint is unfair selection, all that the employer has to show is that the method of selection was fair in general terms and that it was reasonably applied to the employee. Where the tribunal had (in that case) accepted the

senior official doing the selecting had made his decision fairly, using information he had no reason to question, to demand that he set up the accuracy of that information by direct evidence was unreasonable and unrealistic.

5 175. This case was subsequently followed by the EAT in ***Eaton Ltd v King 1995 IRLR 75*** where it was held that all the employer has to show is that it had set up a good system of selection which had been reasonably applied. Further, in ***British Aerospace plc v Green 1995 ICR 1006*** (Court of Appeal) it was stated that "So, in general, the employer who sets up a system of selection
10 which can reasonably be described as fair and applies it without an overt sign of conduct which mars its fairness will have done all that the law required of him." It was recognised that evidence of bad faith or discrimination would mar the fairness of the process.

176. The respondent in this case used Ms Magennis, the line manager of the
15 claimant, and Mr Lawson, the line manager of Mr Binnie, to undertake the assessments. The claimant did not dispute the line managers were best-placed to undertake the assessments. Ms Magennis and Mr Lawson, having carried out the initial assessment, undertook a calibration exercise. The purpose of this exercise was a "check and balance": it was an opportunity for
20 Ms Magennis and Mr Lawson to check they had assessed the criteria in the same way; to challenge the scores awarded by the other; to look at the information relied upon to award the scores and to consider whether any scores needed to be adjusted.

177. The calibration process in this case worked well insofar as it identified Ms
25 Magennis had scored the claimant slightly harshly in respect of some criteria. This resulted in two or three of the claimant's scores being increased.

178. The final check and balance put in place by the respondent was for Ms Magennis and Mr Lawson to meet with Mr Wilson to satisfy him they had evidence to support the scores awarded.

30 179. The claimant raised a number of points in relation to the assessment process, which included (i) the assessment carried out by Ms Magennis had been

rushed; (ii) there had been an inconsistent application of the criteria because "met" and "exceed" had not been defined; (iii) there had been no independent validation of the assessments; (iv) Mr Binnie had been assessed over a longer period and (v) Mr Binnie should have had a lower score for qualifications.

5 180. Ms Magennis rejected the suggestion her assessment of the claimant had been rushed. She accepted she had carried out two other assessments on the same day as doing the claimant's, and had undertaken the calibration discussion with Mr Lawson. Ms Magennis considered all of this was well within a day's work. We accepted her evidence that she had taken the assessment
10 process "extremely seriously" and considered it her responsibility to do it "fairly and accurately". We concluded the mere fact Ms Magennis had carried out three assessments on one day, did not, of itself, indicate the assessment process had been rushed.

181. The respondent, in its performance/appraisal process uses the terminology of
15 "missed", "met" and "exceeds". This is language which is familiar to the managers and employees. We could not accept, in those circumstances, that any failure to define the terms was unreasonable. We also noted a calibration process is used in the end of year performance review, and we took from this the fact Mr Lawson and Ms Magennis would have been familiar with, and
20 comfortable, engaging in that process.

182. There was no dispute regarding the fact there was no independent validation of the assessments. The onus on the respondent is to set up a system of assessment which could reasonably be described as fair. We asked ourselves whether the system adopted by the respondent could reasonably be
25 described as fair, or whether it was one which fell outside the band of reasonable systems which a reasonable employer might have adopted because there was no independent validation. We have set out above the fact the assessments were subject to a calibration exercise. We also noted that the use of calibration and challenging scores awarded by other managers was
30 a familiar process for the respondent's managers, who use it as part of the year end performance review, when each manager's assessment of performance is calibrated across the department and managers are subject

to questions regarding their assessments. We considered that in these circumstances both Mr Lawson and Ms Magennis would have been familiar with the calibration process which involved looking at the assessment and being questioned about the scores awarded.

183. We acknowledged the respondent could have had an independent validation of the assessments, but our task is not to look at what the respondent "could" have done. The question is whether the lack of an independent validation rendered the process unfair. We, in considering that matter, were satisfied that the process adopted by the respondent fell within the band of reasonable processes which a reasonable employer might have adopted: it was a fair and reasonable process, and the lack of an independent validation process did not undermine that conclusion.

184. The claimant believed Mr Binnie had been assessed over a longer period because Mr Lawson had had access to his CV which covered a 25 year period. Ms Magennis had not referred to the claimant's CV, but had relied on her experience of working with the claimant for two years, and the information provided to her by the claimant during performance reviews and one-to-one meetings. The claimant supported her point by referring to Mr Binnie's assessment, where it was noted in respect of technical competency 3, that Mr Binnie had "25+ years of running and leading internal audit functions."

185. We noted that both the claimant and Mr Binnie scored the maximum mark of 10 for this competency. The claimant could not have scored a higher mark even if her CV had been available: accordingly her argument must be that Mr Binnie should have scored a lower mark. We could not accept that argument because it is not the task of this tribunal to determine what score Mr Binnie should have been given. Further, there was no evidence to support the contention that Mr Binnie only scored 10 because he had 25 years' experience. Mr Lawson was not, for example, asked if he knew of Mr Binnie's length of experience without reference to the CV. Indeed, he may well have known this in circumstances where he had interviewed him only two years previously.

186. The issue of the score awarded to Mr Binnie for qualifications is dealt with above and not repeated here, except to say that we accepted Mr Binnie's explanation for the score awarded. We acknowledged the term "professional" may have been open to interpretation, and that the claimant considered her qualifications superior to Mr Binnie's. However, there was nothing to suggest Mr Lawson had erred in awarding the score to Mr Binnie.

187. We were satisfied, having had regard to the case law set out above, that the employer had set up a system of selection which could reasonably be described as fair. We acknowledged that in the ***British Aerospace*** case referred to above, the Court recognised that evidence of bad faith or discrimination would mar the fairness of the process. The claimant asserted there had been discrimination in circumstances where the respondent had preferred a full time employee in the assessment. This matter is dealt with above where we decided to dismiss both the complaints of direct and indirect discrimination. We were, for those reasons, satisfied there was no evidence of discrimination to mar the fairness of the redundancy procedure adopted by the respondent.

Warning and consultation

188. We must now consider whether employees were warned and consulted about the redundancy process. Individual consultation should normally include:

- an indication or warning that the individual has been provisionally selected for redundancy;
- confirmation of the basis for selection;
- an opportunity for the employee to comment on his/her redundancy selection assessment;
- consideration as to what, if any, alternative positions of employment may exist and
- and an opportunity for the employee to address any other matters s/he may wish to raise.

189. There was no dispute regarding the fact collective consultation with the trade union took place, although no details were provided regarding that consultation beyond the fact the selection criteria were agreed with the trade union. There was also an individual consultation process to provide advice to employees affected by the redundancy. Ms Magennis undertook the individual consultation with the claimant.

190. The claimant received a letter dated 18 June 2019 inviting her to the first consultation meeting, which took place that day. Ms Magennis had a script for the meeting to ensure all relevant information was provided to the claimant. The claimant was advised of the business rationale for the redundancy; the purpose of the consultation; the fact her job role was in a pool for selection; the proposal to reduce the number of people performing the same role from 2 to 1; the fact she would be scored against a selection matrix and that the person with the lower score would be at risk of redundancy and redeployment would be discussed; the selection criteria to be used; the result of the scoring exercise would be disclosed at the next meeting and the timescales to be followed.

191. The claimant did not dispute the above information had been provided, but challenged that she had not been given an adequate explanation of the criteria. We could not accept this criticism in circumstances where we accepted Ms Magennis' evidence that the claimant had been advised of the criteria to be used, why those criteria were being used and that they had been agreed with the trade union.

192. The second consultation meeting took place on the 21 June. The purpose of the meeting was to advise the claimant of the outcome of the scoring and the rationale for the scores given. There was an opportunity at this meeting for the claimant to understand and discuss Ms Magennis' justification for the scores. The claimant took up this opportunity and challenged the scores she had been given for resilience and responsiveness. The claimant became upset and asked Ms Magennis about whether the scores could be looked at by someone independent, and she also asked about challenging the scoring

outcome. The meeting was continued to the 25 June whilst Ms Magennis made enquiries about the matters raised by the claimant.

193. The meeting on the 25 June did not in fact proceed because the claimant did not wish to proceed without a representative.

5 194. The third consultation meeting took place on the 5 July. The purpose of the third consultation meeting was to address alternative employment and confirm the employee would be redundant if no suitable alternative employment was found or accepted. The claimant was aware of the role in Mr Leighton Jones' team which had been identified as suitable for her, and which 10 was being held pending the end of the redundancy exercise. The claimant did not want to make a decision regarding the role until her grievance had been dealt with.

195. The claimant was critical of the consultation process because (i) her request for an independent review of the scores was not granted; (ii) she requested 15 that no decision be made regarding redundancy until the outcome of the grievance and (iii) she thought the consultation period was 45 days.

196. There was no dispute regarding the fact the claimant was offered and rejected the opportunity to meet with Mr Wilson and Ms Magennis to discuss the scores. The claimant did not consider this to be independent. The issue was 20 considered by Ms Walker as part of the appeal, but Ms Walker rejected it on the basis she did not know the claimant and Mr Binnie well enough to assess them and that the line manager was best placed to carry out the assessment. We considered that simply because the claimant's request was refused it did not make the process unfair. We have stated above that we were satisfied the 25 respondent put in place a system of selection comprising criteria agreed with the trade union which were assessed reasonably by the relevant line manager and calibrated. The respondent had put in place a good system of selection which had been reasonably applied. The fact the respondent rejected the claimant's request for an independent review of the scoring assessment did 30 not render that system of selection unfair. We were entirely satisfied that in circumstances where senior management had satisfied itself there was

evidence to support the scores awarded, and a calibration process which had resulted in the claimant's scores being increased, they had acted reasonably.

197. The respondent decided not to delay the claimant's final consultation meeting pending the outcome of the claimant's grievance/appeal. We acknowledged some employers may well have agreed to delay the third consultation meeting, whilst others may have acted as this employer did. The question we must ask ourselves is whether the decision not to delay fell within the band of reasonable responses which a reasonable employer might have adopted. We were satisfied the decision did fall within the band of reasonable responses in circumstances where the outcome of the grievance/appeal could have impacted on the scoring or redundancy itself.

198. The claimant believed the consultation process ought to have been 45 days. This was an error on her part. We acknowledged the respondent's Redundancy Policy referred to a 30 day consultation period, but there was no dispute regarding the fact the claimant agreed to curtail that period rather than encounter some delay due to Mr Lawson's holiday. Ms Magennis clearly raised this with the claimant during the first consultation meeting, and the claimant agreed she wished to proceed to the second consultation meeting without delay. We, in addition to this, noted the claimant did not suggest in her evidence that she had been disadvantaged by the length of the consultation period.

199. There was no dispute regarding the fact the respondent considered the issue of suitable alternative employment. The respondent's position was that it had always intended the two candidates to remain in employment because there were two positions available (Lead Risk Manager and Risk Manager). The claimant was made aware of the Risk Manager role, and also of the vacant role in Mr Jones' team, which was considered entirely suitable for her. The claimant ultimately did not express an interest in either position because she considered her trust in the employer had broken down.

200. We acknowledged the claimant was dismayed at scoring lower than Mr Binnie and that she placed responsibility for that squarely at Mr Lawson's door.

However, we could not accept there was any basis for suggesting the loss of trust was with the respondent as a whole, or indeed with Mr Jones. The claimant had had a very successful period working for Mr Jones, and he clearly thought very highly of her. The role in his team was at an equivalent level and with a manager she respected and trusted. We considered we were supported in this by the fact the claimant, in her evidence, told the tribunal that she trusted Mr Jones and that it was the respondent's policies, procedures and Mr Lawson she did not trust. We concluded for these reasons that the claimant unreasonably refused this alternative employment.

201. We were satisfied the respondent had taken all reasonable steps to identify and offer suitable alternative employment.

202. We concluded, having had regard to all of the above points, that the consultation process followed by the respondent was fair and reasonable.

Procedure

203. We next considered the procedure followed by the respondent when dismissing the claimant. There was no dispute regarding the fact there was confusion over whether the claimant should raise a grievance or an appeal. She was advised initially to raise a grievance, and then told it should be an appeal. In any event the matter was dealt with as an appeal against redundancy with the discrimination element of the grievance included. The claimant accepted in her evidence that the key point for her was to have her complaints listened to and investigated, and this is what happened. Accordingly, we were satisfied the confusion caused no disadvantage to the claimant.

204. The claimant also took issue with the fact the matter was dealt with as an appeal rather than a grievance because if it had been a grievance she would have had a right to appeal the outcome. We, in considering this matter, had regard to the fact the claimant's argument presupposed a grievance would have been heard by Ms Walker, with a right of appeal against her decision. In fact, although the grievance procedure gave the claimant a right of appeal, a grievance would usually be heard by a line manager and the appeal heard by

a more senior manager. We considered that in real terms the claimant had raised issues with her line manager (Ms Magennis) and had then had an opportunity to have those issues investigated by a senior manager (Ms Walker). We concluded that in circumstances where the claimant agreed the essential point was for her to have her complaints listened to and investigated, and that was done by a senior manager, there was no unfairness to the claimant resulting from the procedure followed by the respondent.

205. Mr Wilson told the tribunal in his evidence that even if the grievance/appeal was successful it would not change the fact Mr Binnie had been appointed to the post. Ms Walker, when asked about outcome options, told the tribunal that she would have to discuss it with HR but had assumed the claimant would get the role. There was no definitive position regarding this matter and clearly it was a matter upon which the respondent would require to seek advice from HR and legal. In any event, whilst the claimant was critical of Mr Wilson's evidence regarding this matter, it had no impact on the fairness of the dismissal in circumstances where the appeal was not upheld.

206. Ms Walker conducted a very thorough investigation of the points raised by the claimant at the appeal. Ms Walker met with the claimant to understand the points she wished to raise; agreed whom the claimant wished her to speak to (Ms Magennis, Mr Wilson, Mr Lawson and Mr Jones) and then met with those people to investigate the various points.

207. Ms Walker looked at the scoring given to the claimant, reviewed the evidence to support those scores and understood the rationale for the scores. She also looked at Mr Binnie's scores, and the calibration process. Ms Walker told the tribunal that "the process felt fair to [her]". The assessment criteria seemed reasonable and had been applied reasonably and fairly. Ms Walker recognised there would always be challenges when there were two people in a pool for selection, but she took comfort from the fact that the calibration process resulted in the claimant's scores being increased.

208. One of the issues raised by the claimant in her appeal was that Ms Magennis' justification for the scores had not been included on the assessment. The

claimant questioned whether the reason for this was because Ms Magennis had not gathered evidence prior to carrying out the assessment. Ms Walker investigated this point with Ms Magennis and was provided with the evidence relied upon by her. We, in considering this matter, found as a matter of fact (accepting the evidence of Ms Magennis) that she gathered information prior to carrying out the assessment and noted it in her notebook. Ms Magennis had her notes typed up prior to the second consultation meeting (page 440). Ms Magennis, when asked by Ms Walker about this, prepared a further document (page 443)

209. Ms Walker also explained to the claimant why it was not possible for her to undertake an independent review of the scoring for the claimant and Mr Binnie. Ms Walker considered she was not best placed to do this because she did not know either of the candidates. Ms Walker was entirely satisfied that the line managers were best placed to carry out the assessment and be questioned about it.

210. Ms Walker also investigated the claimant's concerns regarding the interview process in 2017 and the selection process in 2019 and her belief she had been given lower scores because she was a female working part time. Ms Walker, having interviewed Mr Lawson, was satisfied there were reasons why Mr Binnie was the preferred candidate in 2017, and those reasons did not relate to the fact he worked full time. Ms Walker was also satisfied that the scores awarded to the claimant and Mr Binnie in 2019 were supported by evidence and that the issue of full time/part time working had not influenced the scoring process.

211. We were satisfied the claimant had an opportunity to put forward all of the points she wished to make in her appeal and to have them investigated by Ms Walker.

212. Ms Walker, as stated above, carried out a very thorough investigation of the points raised by the claimant. Ms Walker, in the outcome of the appeal, very fairly and reasonably recognised that some parts of what the respondent had done had not been good practice. For example, providing copies of the notes

of the consultation meeting which included a post-it note which covered parts of the notes; Ms Magennis' justification for the scores not being included on the assessment and the confusion regarding whether to raise a grievance or an appeal. Ms Walker was however satisfied that whilst these errors should not have occurred, they had not disadvantaged the claimant in the process.

213. We concluded, having had regard to all of the above points, that the respondent followed a fair procedure when dismissing the claimant. The respondent warned and consulted the claimant; made her aware of the criteria to be used; relied on the line managers, who were best placed, to carry out the assessments; put in place a calibration exercise as a check and balance; gave the claimant an opportunity to understand her scores, the justification for them and an opportunity to challenge them with the line manager and gave the claimant an opportunity to appeal. We acknowledged (as Ms Walker did) that the procedure was not perfect, however the onus on the employer is not to carry out a perfect procedure, but to carry out a reasonable procedure. We asked whether, notwithstanding the imperfections in the procedure, was it a procedure which fell within the band of reasonable responses which a reasonable employer might have adopted. We were entirely satisfied, for the reasons set out above, that the respondent's procedure did fall within the band of reasonable responses.

214. We decided the claimant's dismissal was fair and we decided to dismiss this complaint.

215. We, in conclusion, decided to dismiss the claim in its entirety.

Employment Judge: **L Wiseman**
Date of Judgment: **28 January 2021**
Entered in register: **29 January 2021**
and copied to parties