# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms A. Agbelie**

**Respondent:** **HSBC Global Services UK Limited**

**Heard at:** **East London Hearing Centre**

**On:** **2-4 May 2023**

**Before:** **Employment Judge Massarella**

**Representation**
For the Claimant: Mr S. Rahman (Counsel)
For the Respondent: Ms D. Masters (Counsel)

# RESERVED JUDGMENT

**The judgment of the Tribunal is that: -**

1. **the Claimant was dismissed for redundancy;**

2. **the dismissal was unfair, having regard solely to the Respondent's failure to consult as to the criteria to be applied in selecting employees for redundancy;**

3. **there will be a remedy hearing at which the Tribunal will determine compensation; among other issues, the Tribunal will consider the chance that the Claimant would have been fairly dismissed, had consultation about the selection criteria taken place;**

4. **the Claimant's application for anonymisation of the judgment is refused.**

# REASONS

## Procedural history

1. The case was presented on 15 July 2020, after an ACAS early conciliation period between 14 May and 21 June 2021. The ET1 included claims of disability discrimination as well as the claim of unfair dismissal.

2. The case was originally listed for final hearing in November 2021, but it was postponed because the Claimant applied to amend her case. The discrimination claims were initially case managed as being in relation to an actual disability; it later shifted to claims relating to a perceived disability; later still it reverted to a claim about an actual disability.

3. There were numerous preliminary hearings for case management. I do not record the subject of them in any detail as they are matter of record. Suffice it to say that, following a preliminary hearing on 6 February 2023, the disability discrimination claims were struck out because of the Claimant's non-compliance with unless orders relating to the disclosure of medical records.

4. Consequently, the only remaining claim is one of unfair dismissal. At a readiness hearing on 4 April 2023, the issues were set out by EJ Moor (below at para 8).

**The hearing / the issues**

5. The case was floating on the first of the three days assigned to it. It did not come before me until 12:30 on the first day after another case settled. At that point, the Claimant still had not arrived at Tribunal and was not expected until 14:00. I agreed to delay the start of the hearing until 15:00 and then again to 15:30 to allow Mr Rahman (the Claimant's Counsel) to take instructions when she arrived.

6. In the event, the Claimant did not arrive until 14:40 and Mr Rahman asked that evidence should not begin until the following day; the Claimant had told him that she was suffering from stress and agitation as she had been unable to sleep the previous night. Ms Masters (Counsel for the Respondent) did not object to this adjustment. I agreed, observing that it was essential that evidence and submission be completed within the remaining two days, given that the case had been on foot for several years and considerable judicial and other resources had already been assigned to it. A timetable for cross-examination was agreed; oral submissions were limited, by agreement, to 45 minutes each.

7. Mr Rahman cross-examined the Respondent's witnesses for most of the second day, towards the end of which the Claimant began her evidence. Ms Masters cross-examined her for the rest of that day and most of the third day. I then heard oral closing submissions. Ms Masters had produced a helpful opening note, Mr Rahman a helpful closing note. There was an agreed bundle of authorities. Judgment was reserved. I am grateful to both Counsel for their assistance in concluding the hearing within the time available.

8. The issues were as set out by EJ Moor after the preliminary hearing on 4 April 2023:

    1. What was the reason for the dismissal and was it potentially fair? The Respondent says redundancy. The Claimant will say that redundancy was a pretext for dismissing her because of her previous ill-health.

    2. Did the Respondent act reasonably or unreasonably in treating the reason as sufficient for dismissal in all the circumstances? The Claimant relies on the following sub-issues.

2.1 Did the Respondent adequately consult with the Claimant in the alleged redundancy process?

2.2 Did the Respondent adequately investigate the impact on her performance or its rating in 2018 of her mental health condition?

2.3 Did the Respondent adequately consider the impact on her performance or its rating in 2018 of her mental health condition?

2.4 Was it reasonable for the Respondent to take into account the Claimant's 2018 appraisal in selecting her for redundancy because her performance in that year was affected by her mental ill health?

2.5 Did the Respondent adequately consider alternative employment, as set out in the Claimant's grievance appeal submissions.

3. If the dismissal was unfair: what were the chances that the Claimant would have been dismissed in any event ('the *Polkey* question').

3.1 The Respondent will say that there was 100% chance of the Claimant being dismissed, even if the 2018 performance appraisal was not taken into account.

3.2 The Respondent will say that, even if there was any procedural unfairness, there was 100% chance of the Claimant being dismissed in any event.

4. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? The Respondent will say that there was blameworthy conduct here in the prior behaviour of the Claimant in 2018.

4.1 If so, would it be just and equitable to reduce the Claimant's compensatory award?

4.2 If so, by what proportion?

5. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? The Respondent relies on behaviour in 2018 which it says was blameworthy conduct.

5.1 If so, to what extent?

9. Two points of disagreement arose in the course of the hearing.

10. In the middle of cross-examining the Respondent's final witness, Mr Rahman sought to take an additional point: that the dismissal was unfair because the Respondent had failed to investigate the impact of the Claimant's health on her performance in 2017, as well as 2018 (the year identified in the list of issues). I did not permit him to do so for the following reasons.

11. Plainly the point does not appear in the agreed list of issues. A list of issues is not set in stone, but there must be a good reason for revisiting it, especially in a case which has been the subject of repeated, intensive case management over a period of years.

12. This is not a case where the list does not accurately reflect the pleaded case. The point does not appear anywhere in the pleadings, nor in the Claimant's witness statement for this hearing, nor was it a point the Claimant made at the time, as reflected in the contemporaneous notes of two internal hearings, the accuracy of which she does not challenge in her statement.

13. Mr Rahman argued that a change of representation in terms of his instructing solicitor (which he told me occurred shortly before the readiness hearing at the beginning of April before EJ Moor) justified revisiting the agreed issues. Even if that is correct, there was no explanation as to why the point could not have been raised sooner, for example in correspondence between the readiness hearing and this hearing.

14. I concluded that it would be unfair to require the Respondent to meet a case advanced for the first time in the dying moments of cross-examination of its final witness, and of which the Respondent had had no notice, let alone any opportunity to take instructions and deal with the point in an orderly way in its witness statements. Given the time constraints, had I allowed the point to be taken, it would have necessitated an adjournment of the hearing. The prejudice to the Respondent was obvious and serious. I concluded that it was not in the interests of justice, nor in accordance with the overriding objective, to permit the point to be taken.

15. Shortly after I had given that decision, Mr Rahman sought to pursue another new point in cross-examination: that the Respondent had failed to consider 'bumping' another employee to avoid making the Claimant redundant. That too was an issue which had never previously been raised. I observed that, as a matter of fairness to the Respondent, if the Claimant wished to take the point, she should have identified the individual who she says should have been bumped before the final hearing (and, indeed, before the conclusion of her case). Mr Rahman did not disagree. I did not allow him to pursue the matter.

**The evidence**

16. I heard evidence and submissions on liability, *Polkey* and contribution.

17. There was an agreed bundle of 1,357 pages. As for witnesses, I heard from the Claimant and, on behalf of the Respondent, from: Ms Jaya Ramaswamy (Senior Manager, Risk and Compliance Assurance Service); Mr Lee Fesel (Global Head of Risk Stewardship and Reporting for Regulatory Compliance); and Ms Jaclyn McEwan (Director, ASP Head of Risk Advisory, Global Banking).

**The Claimant's rule 50 anonymisation application**

18. At the end of the hearing, after closing submissions had been made, Mr Rahman raised the possibility of an anonymisation order under rule 50. I said that a formal application in writing should be made. On 5 May 2023, the Claimant's representatives made a written application on her behalf for her

identity to be anonymised in this judgment. The Respondent lodged written submissions, opposing the application on 9 May 2023. The Claimant's representatives made further submissions in reply on 18 May 2023.

19. In correspondence I offered the parties an opportunity to request a hearing and/or to submit additional evidence; they both invited me to deal with the application on the papers on the basis of the material already submitted.

20. I apologise to the parties for the delay in promulgating this judgment which was caused in large part by the competing demands of other cases.

**Findings of fact**

The Claimant's role

21. The Claimant commenced employment on 16 January 2017 in the role of Senior Manager (grade GCB4) in the Financial Crime Risk Assurance ('FCRA') team. The team was involved in the prevention of financial crime in a wide range of risk categories, including money-laundering, sanctions, tax evasion, bribery, corruption and fraud.

22. The Claimant was responsible for leading and participating in financial risk assurance reviews, issue validation across the jurisdictions where HSBC has a presence in Europe, and general stakeholder management. The role was very technical, intellectually demanding and required strong leadership and interpersonal skills. It involved reviewing other employees' work and engaging with stakeholders. She was required to defend her risk analysis to more senior members of staff. Her line manager was Ms Maxine Gosling.

The Claimant's initial allegations of intrusions into her privacy

23. From December 2017 onwards, the Claimant began to raise concerns with Ms Gosling that she was the subject of intrusions into her privacy (variously described as monitoring or observation), including being watched at home and photographs of her being shared without her permission. She thought it might be connected to her previous employment, but her concerns also extended to her colleagues, who denied any involvement.

24. On 21 December 2017, Ms Gosling referred the Claimant to Occupational Health ('OH') with her consent and a report was produced by Ms Emma Stevens (Deputy Occupational Health Team Manager) on 2 January 2018. The Claimant told Ms Stevens that she had no current health concerns and no history of psychological ill-health; she had not seen her GP and was not suffering from stress. Ms Stevens advised that the Claimant was fit and well, with no underlying medical condition.

25. I observe at this point that this is the first in a series of OH and other medical reports, to which the Claimant was taken in cross-examination. As usual, each report sets out the information the Claimant provided at the consultation. In her oral evidence, the Claimant repeatedly sought to distance herself from the statements she is recorded as having made at the consultations. I concluded that this was because they were inconsistent with her case in these proceedings. I am satisfied, on the balance of probabilities, that the reports accurately reflect what she said at the time.

The 2017 appraisal

26. The Respondent operates an annual performance appraisal system under which each employee receives a grade for the calendar year. The ratings are used to assess the behaviour and technical performance of each employee and are applied to decisions, including bonus decisions. The available ratings for behaviour are unacceptable, good, strong and role model; the ratings for performance are inconsistent, good, strong and top.

27. On 16 January 2018 an appraisal meeting took place between the Claimant and her manager in relation to her previous year's work. Her performance was rated 'good' and her behaviour 'strong'. She did not challenge those ratings at the time.

Further privacy concerns raised by the Claimant in 2018

28. In late February/early March 2018, Mr Daniel Selby took over from Ms Gosling as the Claimant's line manager. Almost immediately the Claimant began to raise with Mr Selby further privacy concerns, including that her colleagues had obtained, and were sharing, her medical records; that her previous employer was investigating her; that she was being followed outside work; and that her phone and electricity were being monitored. Mr Selby engaged with her concerns and sought to reassure her, insofar as he could. With her consent, he referred her to OH.

29. On 10 April 2018 Ms Stevens produced a second OH report. The Claimant reported no mental health concerns (including stress). Ms Stevens informed her that the business had requested an independent medical assessment 'given the slightly unusual concerns raised by her'. The Claimant did not consent.

Performance and behaviour concerns raised with the Claimant in 2018

30. Between 18 April 2018 and 3 October 2018, Mr Selby met with the Claimant on more than ten occasions to give her feedback about her performance and her conduct. The feedback (which was, in part, passed to him by other colleagues) was consistently negative. It included instances of the Claimant returning work which was incomplete, not to the required standard, or carelessly expressed; refusing to comply with requests; and being rude and abrupt in her communication with colleagues. The Claimant responded defensively to the feedback. She refused the offer of further training to enhance her skills.

31. Part-way through that period, on 10 July 2018, Mr Selby told the Claimant that he proposed to put her on a three-month performance improvement plan ('PIP'). The plan required improvement in the Claimant's performance and behaviour. The Claimant refused to co-operate, and the plan was never implemented.

32. Other than the fact that these meetings occurred, and that this feedback was given, I heard no direct evidence as to these performance/conduct concerns. Mr Selby was not called to give evidence. His concerns were set out in some detail in the documents to which the Claimant was taken in broad terms in

cross-examination; however, the specific matters were not explored in any detail with her.

The capability process

33. On 6 August 2018, the Claimant was asked to attend a capability hearing on 23 August 2018, which she did. At the meeting she raised concerns regarding data and surveillance breaches. She said that these were causing her anxiety and distress, which might be affecting her performance.

34. In a letter of 13 September 2018, HR wrote to her saying these concerns would be taken seriously, that the capability process would be put on hold and that they would like to refer her to OH to understand the impact of these issues and how support might be provided. She was also referred to the Respondent's 'Open Line' employee assistance programme, which is a 24-hour confidential counselling, advice and information service.

The Claimant's grievance of September 2018

35. On 18 September 2018, the Claimant raised a grievance alleging that there had been a breach of her personal data while she had been charging her personal phone on a work laptop; she alleged harassment and emotional abuse by certain named colleagues as a result of that breach.

36. On 2 October 2018, Ms Stevens produced a further OH report. The Claimant continued to maintain that she had no health concerns; Ms Stevens again suggested an independent assessment, to which the Claimant now agreed.

37. The Claimant attended a grievance meeting on 10 October 2018, chaired by Mr Simon Lilly (Head of Client Services, UK).

38. Mr Lilly produced the grievance outcome on 14 November 2018. He found there was no evidence of a breach of the Claimant's data at work, nor of harassment/emotional abuse by colleagues. He expressed his concern that the Claimant's mental health might be driving some of, or all her fears about surveillance.

The medical evidence in late 2018

39. Meanwhile, on 24 October 2018, Dr John Sterland (Consultant Occupational Physician) produced a report. He recorded that the Claimant did not believe she had any mental health issues. Dr Sterland identified:

> 'She has ongoing anxiety. There is some vulnerability here that may have contributed to background factors causing reduced self-confidence, then worsening and systematisation of perceived feelings.'

40. Dr Sterland hoped that the Claimant could be persuaded to see her GP and noted that she did not want to be away from work.

41. On 8 November 2018, Dr Christopher Stoot (Chief Medical Officer, Consultant Occupational Physician) wrote to Ms Stevens, attaching Dr Sterland's report, and stating that the Claimant presented with symptoms of paranoid schizophrenia. He wrote that the examining clinician agreed with this diagnosis. Dr Stoot advised that, given the Respondent's duty of care, both to

the Claimant and to her colleagues, the Claimant should be excluded from the workplace, pending medical intervention and support.

42. On 9 November 2018, HR queried the diagnosis, given that it was absent from the Sterland report. Ms Stevens contacted Dr Stoot for comment, which he provided promptly. He explained that the diagnosis was implicit in Dr Sterland's conclusions and confirmed that the latter had agreed with it in discussion with him.

The Claimant's leave of absence in 2019/further medical investigation

43. On 13 December 2018, the Claimant was told that Ms Ramaswamy would be taking over from Mr Selby as her line manager, which she did at the beginning January.

44. On 8 January 2019, Ms Ramaswamy and Mr Redman required the Claimant to take a period of medical leave from work because of concerns about her mental health.

45. On 15 and 29 January 2019, the Claimant attended two psychiatric assessments by Dr Krishnendu Nandi. He produced reports about the Claimant's health. He stated that he had not seen 'any evidence of any mental health problem' and had not offered or recommended any treatment. He recorded that the Claimant did not report any stress or anxiety, nor did she report any obsessive, manic or psychotic symptoms.

46. Asked if she rejected Dr Stoot's diagnosis of paranoid schizophrenia at the hearing, the Claimant was evasive, stating that she 'could not answer' and 'could not diagnose herself'. I am satisfied that she did reject it at the time and continues to do so now. In her witness statement (paragraph 8) she recounted how she had refused to leave the office when asked to do so, observing that Dr Stoot's report 'had only listed signs, not a diagnosis'. She also emphasised (paragraph 10) that Dr Nandi found that 'I did not have any chronic physical health conditions or psychiatric problems', that 'his report contradicted Dr Stoot's findings' and 'confirmed I was fit to return to work and did not have any symptoms as indicated earlier'. In her oral evidence she maintained that it was 'not relevant for me to be out of the office'. I note also what she told Dr Cheesman in February 2019 (below at para 49).

47. On 6 February 2019, Ms Ann Grant (Employee Relations Manager) made another referral to OH. The focus was on whether the Claimant's performance was being affected by any medical issues.

48. On 11 February 2019, the Claimant was seen by Dr Mark Cheesman (Chartered Health and Occupational Psychologist). Dr Cheesman interviewed the Claimant and conducted standardised tests of cognition and personality and psychological function. He recorded that her results placed her in the 'normal' range for anxiety, depression and stress. There were no significant issues with psychological functioning, other than the score in the 'mild' range for somatic complaints.

49. Dr Cheesman produced a psychological capacity assessment report on the same day. He recorded that the Claimant said 'that she had been told that there is nothing wrong with her'. He diagnosed 'low cognitive function'. Dr

Cheesman suggested that the Claimant's condition 'would be expected to have a profound impact on her ability to meet the demands of her role' and 'assessment would indicate that she would not be able to cope with her current role.' The Claimant rejected that assessment in her oral evidence. This was the only report which reached this conclusion.

50. On 26 February 2019, Dr Stoot wrote to the Respondent, commenting on the Cheesman report. He recommended that robust medical investigations were needed by the Claimant's GP.

51. On 7 March 2019, Ms Grant wrote to the Claimant, asking her to share Dr Cheesman's report with her GP, and to liaise with the GP to obtain a full diagnosis and treatment plan. The Claimant replied on 14 March 2019 to Mr Redman, confirming that she had contacted her GP and would keep him updated.

52. On 8 April 2019, the Claimant wrote to Mr Redman and Ms Grant to say that she had seen her GP, Dr Rana, that afternoon, who had told her that she was fit to return to work with immediate effect.

53. The Claimant spoke to Ms Stevens two days later and told her that she had attended her GP and provided her with a copy of Dr Cheesman's report. She said that she was then referred to the Community Mental Health Team (CMHT) for an assessment, which took place on 4 April 2019. The Claimant told Ms Stevens told her that the assessment lasted about an hour. She said that she had then seen her GP again, who had been updated with the findings of the assessment, and the GP said that she was fit to return to work. Further, the GP said that she would not be initiating any treatment or further investigations of her mental health and would not extend her sicknote. That is consistent with the GP record of 17 April 2019, in which Dr Rana recorded that the Claimant had told her that 'she does not perceive any difficulties at work'. She wrote: 'it does not appear that she has a medical disorder and neurology referral is unlikely to help'.

54. Ms Stevens decided to write to the Claimant's GP to ask for a copy of the report from the CMHT. On receipt of that report, Dr Stoot would review it and provide further guidance.

55. The CMHT report (by Dr Ofor) was duly sent to the Respondent on 24 April 2019. Dr Ofor stated that there were no mental health issues, no symptoms of psychosis or mood disturbance and no anxiety disorder. He did not recommend any treatment. He went on:

> 'Her main concern is the psychologist's suggestion of a cognitive impairment. She is not aware of any issue with her cognition until the assessment. She has also informed [me] that her performance at work has not been called into question. I will therefore recommend a referral to the Neurology Service with regards to this concern.'

56. On 24 April 2019, Dr Stoot produced an OH report. He endorsed the suggestion of a neurology service referral. However, as set out above, the Claimant's GP (who had seen the Ofor report) had already decided not to pursue this option. No further steps were taken, either by the GP or by the Claimant, in this regard.

57. I infer from all the evidence above that, at the time, the Claimant was content with the position as it stood. There was no evidence before me to support her assertion, raised for the first time in oral evidence, that she took steps to arrange a neurology assessment through BUPA which only did not take place because she was dismissed. She had ample to time to follow through with that option before the consultation process began some five months later.

The Claimant's return to work in July 2019

58. Ms Ramaswamy had finalised the Claimant appraisal for 2018 by 29 January 2019 (i.e. within the usual timeframe), based on in the information provided to her by Mr Selby. She graded the Claimant 'inconsistent' for performance and 'unacceptable' for behaviour. She did not communicate this to the Claimant because the Claimant was on leave and Ms Ramaswamy did not think it appropriate.

59. The Claimant returned to work on 6 July 2019 on a phased return. The next day she met with Ms Ramaswamy. Ms Ramaswamy did not want to overwhelm her immediately on her return. She gave her straightforward tasks to ease her back into work. The Claimant struggled even with those, and Ms Ramaswamy received negative feedback about the Claimant, to which the Claimant was not receptive.

60. Ms Ramaswamy also waited until 12 August 2019 before telling the Claimant about the outcome of her 2018 appraisal. The Claimant took the news badly and asked that the ratings be changed. Ms Ramaswamy declined to do so and directed the Claimant to HR and/or Mr Selby, who was responsible for the ratings.

The Respondent's restructuring exercise in September 2019

61. In September 2019, the Respondent reviewed its structure and announced that it would be undergoing a restructure. The rationale for the exercise was in part to cut cost, in part to create a more robust and joined-up operation and in part because automation meant that fewer employees were needed to perform certain activities. The programme was across the bank.

62. The Respondent's evidence as to the rationale for the restructuring and the process of pooling was unchallenged by Mr Rahman.

63. As part of this restructure, HSBC proposed to make fifteen roles redundant in the FCRA and Regulatory Compliance Risk Assurance ('RCRA') teams, across eight selection pools.

64. The Claimant's role sat within the first selection pool, which consisted of twelve GCB4 Testing Senior Managers. The proposal was to remove one of the roles (a reduction from 12 to 11 posts). There was also a proposal to remove one of the GCB5 roles.

65. The decision and timing of how many roles for each function should be made redundant was decided by the Global Head of Compliance Assurance.

66. There was a single reference in the documents to collective consultation having taken place. This was in a PowerPoint slide, which described the

redundancy process as part of a presentation 'Enabling you to be a Great Consultation Manager'. The slide showed a 'project timeline', which gave the following dates:

> 'Collective consultation with Unite & NCM[1]
>
> Start date 29 August
>
> End date 12 September.
>
> Individual consultation
>
> Start date 17 September
>
> End date 31 October.'

67. This indicates that there was a plan to have collective consultation with the unions; it does not demonstrate that the consultation took place.

68. The only other evidence I saw was a single line in the notes of the meeting of 17 September 2019 (see below), when Mr Redman was recorded as saying:

> 'RR also confirmed that this risk assessment approach had been subject to discussions with the unions.'

69. I heard no other evidence as to what the collective consultation consisted of and what, if anything, was agreed (as opposed to discussed). None of the witnesses referred in any detail to this process in their statements.

70. Ms Ramaswamy's evidence, which I accept, was that the decision as to which employees would be selected for redundancy was made centrally by HR based on a scoring/ranking sheet designed by HR, which scored employees on the basis of their performance and behaviour ratings received over the previous three years (2016 to 2018). In her statement (paragraph 25) Ms Ramaswamy specifically said that:

> 'I understand that the decision to use performance scores from the past three years was something that was decided by the Bank's HR team in consultation with Senior Management.'

71. I note that she makes no reference to the unions being consulted about that decision. Accordingly, there was no evidence before me that the unions agreed the selection criteria and I find, on the balance of probabilities, that they did not.

72. The ratings translated into a set of points; negative points were assigned for lower ratings. This was purely a mathematical calculation; there was no scope for the exercise of any personal judgment or discretion at the selection stage.

73. A default rating of 'good' performance and 'strong' behaviour was applied when there was a missing annual rating, unless the individual had higher performance and behaviour ratings in the year prior to the missing year, in

[1] National Council of Managers

which case that higher rating would be applied. Only where scores were tied would criteria-based interviews be conducted.

74. HR then asked senior managers to inform the employees who were at risk of redundancy and to implement the redundancy process, as required by HR. The focus of that process was largely on redeployment.

75. The Claimant was given the default rating of good/strong for 2016 (when she was not employed by the Respondent); as set out above, her rating for 2017 was good/strong; her rating for 2018 was inconsistent/unacceptable. This translated into the following points: 11.25/22.5 for 2016; 33.75/67.5 for 2017; and -67.5/-67.5 for 2018. This gave rise to a total of 0; the Claimant was ranked 12th of the 12 managers in her pool. The top score in the pool was 660.

76. If the Claimant had been given the same rating for 2018 as she had achieved in 2017, that would have translated into 67.5/135 points. Her total would then have been 337.5, which was still below that of the manager ranked 11th, which was 348.75.

<u>The individual consultation process</u>

77. The Claimant returned to full-time hours on 2 September 2019.

78. On 17 September 2019, the Claimant attended a meeting with Mr Redman and Ms Ramaswamy, at which he was told that she was at risk of redundancy. Mr Redman explained the rationale for the redundancy exercise, what the criteria were, how they were applied, and the fact that the Claimant had scored lowest in her pool, resulting in the decision to put her at risk of redundancy.

79. He explained that the consultation period would last for 45 days and would end on 31 October 2019. Mr Redman went on to talk about redeployment and explained that the Claimant could apply for roles advertised on the Respondent's intranet. He told her that she could have time away from the office during the consultation period to look for redeployment opportunities. She could also contact the independent external company (Working Transitions) through which the Respondent offered support, including coaching, to affected employees; she did not do so. She was also provided with a brochure and FAQs document and a letter which formally notified her that her role was at risk of redundancy.

80. The Claimant continued to attend the office because she could not access the Respondent's systems remotely as she did not have the latest BlackBerry technology. The Claimant had successfully applied for a new BlackBerry. For security reasons, she was required to collect it from the mailroom. She refused to do so, requiring it be delivered to her desk. Consequently, she never received it.

81. On 1 October 2019, the Claimant attended an individual consultation meeting with Mr Redman and Ms Ramaswamy. Mr Redman gave the Claimant a copy of the selection criteria and explained that, even if her 2019 rating was changed to the default, she would still be rated lowest. He explained that the only way in which she could challenge the 2018 rating would be by raising a grievance; she said that she had already decided to do so. He told her that the primary driver for eligibility for an alternative role was meeting the skill and

technical criteria; performance rating was secondary. The Claimant said that no hiring manager would consider her current 2018 ratings; she said that the issues regarding the invasion of her privacy had had an impact on her mental well-being; and this had not been considered or reflected in the 2018 rating.

82. I reject the Claimant's assertion (made for the first time late in her oral evidence) that Mr Redman said to her: 'now take this money and sell your house and leave this country.' There is nothing to corroborate her assertion that such a remark was made at this or any other meeting. I have no doubt that, if it had been, it would have featured in the Claimant's grievance and, indeed, in her witness statement in these proceedings.

The Claimant's grievance about her 2018 appraisal outcome

83. On 4 October 2019, the Claimant lodged a grievance against her 2018 appraisal outcome. Mr Lee Fesel (then Global Head of Governance and Reporting, Regulatory Compliance) was appointed to hear it. The Claimant complained that the allocation of her 2018 ratings was done without involving her and it had had a detrimental impact, including on the recent selection process. There was no reference to her mental health having impacted on her 2018 performance, nor to her having the condition of low cognitive functioning.

84. On 11 October 2019, Mr Fesel invited her to attend a meeting and to provide any relevant documentation beforehand. On 17 October 2019, the Claimant indicated that she would not be providing documentation in advance of the meeting. After the meeting she sent him a number of documents, including Dr Sterland's report of 24 October 2018. She did not provide him with a copy of Dr Cheesman's report. The Claimant's explanation in cross-examination was that she only provided Mr Fesel with documents which were relevant to her 2018 rating. I infer from this that she did not regard the possibility that she had a condition of low cognitive functioning as relevant to that issue. She did not mention it during the process.

85. The meeting took place on 23 October 2019. Mr Fesel sent the Claimant the notes from the meeting later the same day; she did not challenge the notes; I am satisfied as to their accuracy. At the meeting Mr Fesel asked the Claimant what she felt her rating should have been for 2018; she replied that it should 'at least have been the same as it was in 2017'.

86. There was a discussion about the fact that, even if the rating were changed, the Claimant still be at risk of redundancy. However, the Claimant's trade union representative emphasised the importance of the 2018 rating in two other respects: its monetary impact; and the impact of her rating on her chances of securing alternative employment, which he described as the Claimant's 'primary goal'.

87. During the meeting the Claimant referred to 'personal issues which she believed had impacted her overall performance'. She said that she had challenged the PIP on the basis that it would not resolve 'the underlying drivers of performance issues namely the sharing of personal information in the office'.

88. There was an exchange between Mr Fesel and the Claimant's trade union representative, who raised the issue of mental health and said that in this case

'it is difficult to pinpoint an exact date when this became a concern'. The note continues:

> 'LF specifically asked if this or equality formed a key component of the grievance. BS noted that whilst this was not the basis for the grievance there is concern that early warning signs in relation to AA's mental health may not have been managed or dealt with appropriately. BS further noted that the organisation had made great strides in recent months in improving its understanding and awareness of mental health and its management but this may not have been as well understood or recognised in the function for AA in 2018.'

89. Thus, insofar as the Claimant's mental health was raised at all in this meeting, it was raised by her representative, tentatively, and in the context of a confirmation that it was 'not the basis for the grievance'. I infer this was because the Claimant did not regard her mental health as the key factor, which she believed to be the intrusions into her privacy, which the Respondent had not dealt with their satisfaction. I accept Mr Fesel's evidence that the Claimant declined to share with him the detail of the reasons for her sickness absence. There was no mention of low cognitive functioning.

90. Mr Fesel contacted Ms Ramaswamy and Mr Selby to discuss the grievance. Mr Selby provided Mr Fesel with information on 25 and 29 October 2019, including an updated record of his performance management of the Claimant. Mr Fesel met Mr Selby and Ms Ramaswamy on 31 October 2019; he met Mr Redman on 7 November 2019; he sought additional information from Mr Selby on 15 November 2019. I am satisfied that Mr Fesel carefully considered the evidence provided to him, including by the Claimant.

91. On 15 November 2019, Mr Fesel rejected the Claimant's grievance. He concluded that her underperformance and unacceptable behaviour were not isolated or sporadic, rather they were persistent and systemic. He considered that Mr Selby had done everything he could to support her in improving her performance and behaviours but that she had failed to engage with the opportunities he offered. He concluded that the ratings were justified in the circumstances.

92. The Claimant was informed that she had a right of appeal against the outcome, which she did not exercise.

<u>Further consultation</u>

93. Meanwhile, on 31 October 2019, the Claimant attended an individual consultation meeting with Mr Redman and Ms Ramaswamy. They informed her that she would be dismissed on notice, with a termination date of 29 February 2020. This was recorded in a letter to her dated 1 November 2019, which began:

> 'We recently wrote to you to inform you that your role was at risk of redundancy. We have since undertaken a redundancy consultation exercise with you to take into account your comments and suggestions. Regrettably, your role has now been confirmed as redundant.'

94. Insofar as it was suggested that any 'comments and suggestions' about the redundancy exercise the Claimant might make could make any difference to a process which was clearly set in stone, that was, in my view, unrealistic.

95. The Claimant had previously been told that her access to the Respondent's FCRA systems would stop on 1 November 2019 but that she would be able to keep her laptop and BlackBerry and would maintain access to the Respondent's intranet so that she could apply for internal roles. Although she had not collected her BlackBerry, she was able to continue to visit the Respondent's main offices to access the network.

Attempts to secure alternative employment for the Claimant

96. The Claimant's case was that the Respondent failed adequately to consider alternative employment for her, as detailed in her grievance appeal submissions. In that submission she identified 10 jobs for which she had applied. By the time she attended the appeal hearing, she had withdrawn from two of them.

97. At the meeting with Ms McEwan on 17 December 2019, the Claimant said that she was 'not actively applying for alternative roles at present'. She expected the Respondent to present her with roles which they felt were suitable.

98. Ms Ramaswamy sent a job list every Monday to the Claimant's personal email address. Later in the process, Ms Ramaswamy also followed up on the status of any outstanding applications and sought feedback, which she provided to the Claimant.

99. A monthly one-to-one meeting was offered to discuss her job search. The Claimant did not attend the December 2019 meeting. On 14 January 2020, Ms Ramaswamy and Mr Redman met the Claimant to discuss her search for alternative roles. The Claimant said that some of the roles which were on the spreadsheets that Ms Ramaswamy sent her on a weekly basis were not available on the portal. Ms Ramaswamy and Mr Redman looked into this, but they could not establish the cause of this discrepancy. Nonetheless, the next day, Ms Ramaswamy contacted Ms Nelson and others, identifying a number of roles based in Paris that may have been suitable for the Claimant, explaining that they were not available on the internal recruitment job portal. The response was that roles in other countries would only show on the portal if the employee changed the country profile; if the Claimant was interested in any of the Paris-based roles, she could contact Ms Caroline Fortes, who was in charge of recruitment in France.

100. It also emerged that the Claimant had been applying for jobs as an external, rather than an internal candidate. This had various consequences: it meant that the fact that she was at risk of redundancy was not flagged when she made an application; it also meant that her managers were not aware of her applications when she made them (they learnt about them only when they met Ms McEwan as part of her appeal process); on the other hand, it meant that the fact that she had scored poorly in her 2018 appraisal was concealed from the recruiter.

101. On 21 January 2020, Mr Redman emailed the Claimant, drawing her attention to two roles which she might want to consider.

102. On 5 February 2020, Ms Ramaswamy shared with the Claimant feedback from the recruitment team in Hong Kong regarding roles she had applied for.

103. Ms Ramaswamy met with the Claimant on 12 February 2020. On the same day, the Claimant wrote to Ms Ramaswamy, identifying a number of roles which she wanted to apply for and asked for her help sending on her CV. On 14 February 2020, Ms Ramaswamy wrote to the Claimant saying that she had forwarded the CV to the relevant individuals. On 18 February 2020, Ms Ramaswamy wrote to the Claimant again, identifying potential roles and highlighting in particular compliance and audit roles at a GCB4 grade.

104. Ultimately, the Claimant was unsuccessful in all the jobs she applied for, indeed she did not get to the interview stage. The fact that she was at risk of redundancy would only have been an advantage to her at that stage and only in respect of jobs where she was otherwise on a par with another candidate.

The Claimant's appeal against redundancy

105. On 18 November 2019, the Claimant lodged an appeal against the redundancy decision under the Respondent's UK Security of Employment Policy. Ms Jaclyn McEwan was assigned to hear it.

106. The Claimant's grounds of appeal were: that she had been unfairly selected for redundancy, in particular by reference to an unfair application of her 2018 ratings and a lack of consultation around those ratings prior to selecting for redundancy (Ground 1); that she had been unreasonably refused an offer a suitable alternative employment (Ground 2); and that she had received limited assistance and support from the Respondent in respect of redeployment opportunities (Ground 3).

107. On 10 December 2019, the Claimant was invited to an appeal hearing on 17 December 2019.

108. In relation to Ground 1, the Claimant expressed the view that her performance and behaviour ratings had been adverse affected by her mental health problems. She did not provide Ms McEwan with Dr Cheesman's report, nor did she mention low cognitive functioning. Her union representative, Mr Statham, recognise that the purpose of the hearing was not to challenge the ratings and acknowledged that the Claimant had not appealed Mr Fesel's decision in relation to it. He also acknowledged that, even if the Claimant's ratings were increased to match the previous year, she would still be at the bottom of pool.

109. As for Ground 2, the Claimant provided a list of ten roles she had applied for as part of the redeployment process. She said that she had not been interviewed for any of the roles and she felt that she had been unreasonably refused an offer a suitable alternative employment. Mr Statham explained that four out of ten of the applications had been unsuccessful, one had been withdrawn because it was a first-line role and the Claimant was looking for a second-line technical role, and the others were ongoing. The Claimant refused Ms McEwan's offer to obtain more detailed feedback on the roles for which she had been unsuccessful; she said she did not want feedback, she just wanted a new role; she confirmed that she had not applied for any other role since submitting her appeal. She explained that her expectation was that the Respondent would give priority to people at risk of redundancy.

110. As for Ground 3, the Claimant maintained that she had had insufficient support from Mr Redman and Ms Ramaswamy. She raised the lack of remote access to apply for internal roles and complained of a lack of meetings with management. Mr Statham said that, if the Respondent were found not to have provided the Claimant with sufficient support, her notice period should be extended.

111. Ms McEwan met Ms Ramaswamy and Mr Redman on 9 January 2020 to discuss the issues which the Claimant had raised. They explained that they had tried to assist the Claimant, but she had not responded to their attempts or allowed them to help; they were not aware that the Claimant had applied for any specific roles; they were surprised to learn that the Claimant had said that she wanted more contact with them; they both expressed their willingness to support her.

112. During her investigations, Ms McEwan discovered that the Claimant had been applying for roles as an external candidate. For the reasons given above, she concluded that, on balance, this would probably have worked to her advantage.

113. On 14 January 2020, Ms Remy Kingsley (Head of Resources – Global Functions UK and Europe) provided further information in relation to roles which the Claimant had applied for, including Head of FCC Monitoring Advisory, Head of Data Quality Issue Management and Remediation and Programme Director. She explained that the Claimant had been rejected on the basis that she did not have the necessary experience, as identified in the relevant job descriptions. Further, on 15 January 2020, Ms Stephanie Nelson (Employee Relations Manager) sent the job descriptions to Ms Ramaswamy and Mr Redman. They confirmed that the Claimant did not have the relevant skills.

114. On 30 January 2020, Ms McEwan gave her decision about the appeal.

115. In relation to Ground 1, Ms McEwan concluded that, although there may have been a link between the Claimant's poor health and her performance and behaviour ratings in 2018, the redundancy selection criteria were fair, having regard to their objective nature, and had been applied fairly. She tested whether there would have been a different outcome if the Claimant's ratings had been aligned with her ratings in previous years and confirmed that she would still have been the lowest scoring employee.

116. In relation to Ground 2, she was satisfied that the Claimant had not been selected for the UK-based roles because she did not have the necessary skills and experience. She was not satisfied that there was evidence that the Claimant had been unreasonably refused an offer a suitable alternative employment. She suggested that the Claimant keep Ms Ramaswamy informed of any future applications she made, particularly if he was not selected for interview for a role that she considered suitable. She reiterated that both Ms Ramaswamy and Mr Redman were committed to helping her with a job search and encouraged her to engage with them.

117. As for Ground 3, Ms McEwan concluded that the Claimant had failed to collect a company phone which had been offered to her; by way of alternative, the

Respondent had arranged access for her to company premises. She rejected the suggestion that there was a lack of support from management; on the contrary, she concluded that the Claimant was failing to engage in any additional support offered by the bank.

118. In the circumstances she considered that it would not be appropriate to extend the Claimant's notice period.

Termination of employment

119. The Claimant's employment came to an end on 29 February 2020.

**The law**

Unfair dismissal: redundancy

120. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

121. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
> **…**
>
> **(c) is that the employee is redundant …**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

122. A redundancy situation is defined by s.139 ERA.

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**

> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business—**
>
> **(i) for employees to carry out work of a particular kind, or**
>
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
>
> **have ceased or diminished or are expected to cease or diminish.**

123. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

124. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, and the employer redistributes, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30).

125. It is not for the Tribunal to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

126. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at [18]).

> **'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.**

127. At [19] the EAT identified five principles, which have subsequently been applied on many occasions in Tribunal decisions on collective redundancies.

> **19. […] in [the experience of the two lay members], there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:**
>
> > **1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**

> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
>
> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
>
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.**
>
> **The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'**

128. In *Polkey v A E Dayton Services (formerly Edmund Walker (Holdings) Ltd)* [1987] IRLR 503, Lord Bridge said this:

> **'in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness posed by s.57(3) [now s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken.'**

129. In *Mogane v Bradford Teaching Hospitals NHS Foundation Trust* [2023] IRLR 44, the EAT held at [24]:

> **'It seems to us that the formative stage of a redundancy process is where consultation ought to take place according to the principles in *Williams* and the cases developed from it. The reason for consultation to take place at a formative stage is because that means that a consultation can be meaningful and genuine. That must mean that consultation, for a process to be fair, should occur at a stage when what an employee advances at that consultation can be considered and has the potential to affect the outcome.'**

130. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In *Thomas & Betts*

*Manufacturing Ltd v Harding* [1980] IRLR 255 it was held that employers need only show that they have applied their minds to the problem and acted from genuine motives. In *Mogane*, the EAT held (at [25]) that the correct question is: 'is it a pool that a reasonable employer could adopt in all the circumstances?'

Anonymisation of judgments under rule 50

131. Rule 50(1) of the Tribunal Rules provides that: 'A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person […]'

132. Rule 50(2) provides that: 'In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.'

133. The Tribunal has a power under rule 50(3)(b) to make an order that:

> **'the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of an anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record'.**

134. 'Convention rights' has the meaning given to it in section 1 of the Human Rights Act 1998, that is the rights and fundamental freedoms set out in the European Convention of Human Rights, Articles 2-12 and 14. The rights the Claimant relies upon are the article 3 right ('No one shall be subject to torture or inhuman or degrading treatment or punishment.') and the article 8 right ('Everyone has the right to respect for his private and family life, his home and his correspondence'.)

135. In *A v Sec State for Justice* UKEAT/0263/17 the EAT emphasised that Rule 50 requires application of two matters: first, the Tribunal must decide whether there is any basis under Rule 50(1) allowing for an order. The restriction on public disclosure can only be imposed insofar as the Tribunal considers that it is necessary for at least one of the three specific matters set out in Rule 50(1) (in this case the Claimant relies upon his alleged need to protect his Convention rights); and second, the Tribunal must give full weight to the importance of the principle of open justice (article 6) and to the right to freedom of expression (article 10).

136. In *BBC v Roden* [2015] IRLR 627 (at [50]) Simler P explained why open justice was so important:

> **'The default position in the public interest is that judgments of tribunals should be published in full, including the names of the parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction … The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear.'**

137. Simler P gave further guidance in *Fallows v News Group* [2016] ICR 801 (at [48]):

> **'(i) That the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice;**
>
> **(ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, Courts and Tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, Courts and Tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation;**
>
> **(iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the Employment Tribunal proceedings are essentially private and of no public interest accordingly;**
>
> **(iv) It is an aspect of open justice and freedom of expression more generally that Courts respect not only the substance of ideas and information but also the form in which they are conveyed […]**

138. There is no general exception to open justice where privacy or confidentiality is in issue. Anonymity will only be granted where it is strictly necessary, and then only to that extent, whether or not the parties have a strong view either way, and whether or not the press is particularly interested in the case. This point was made in *F v G* [2012] ICR 246 and referred to in *Roden* at [47].

139. If the basis for the restriction under Rule 50(1) is Convention rights, then the Tribunal must undertake a proper evaluation of those rights and give full weight to the right of freedom of expression and the principle of open justice, balancing one against the other before reaching a decision (*In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, *Campbell v MGN Ltd* [2004] 2 AC 457). The Tribunal must decide was whether not granting the anonymity order would entail an infraction of the claimant's article 8 rights which was outweighed by the derogation that granting the order would entail, from the principle of open justice at common law and as articulated in the corresponding countervailing Convention rights (*F v J* [2023] EAT 92 at [16].)

140. In *F v J* at [19], HHJ Auerbach provided a helpful summary of the stages in proceedings when information enters the public domain:

> **'[…] the existence of a claim does not automatically enter the public domain by virtue of it being presented as such, still less the contents. Nor indeed does it enter the public domain by virtue of it not being rejected upon initial consideration, and the respondent being notified of it. Nor does that occur by virtue of the entering of a response to it, as such. As and when there is a hearing, essential details, including the parties' names, will be published on the tribunal's hearing list, but not substantive details of the contents of the claim itself. The position will, however, subject to any order the tribunal makes under rule 50, change as and when there is a public hearing. However, case management hearings in the employment tribunal are, as this one was, ordinarily conducted in private.'**

141. In *Bensaid v UK* (case no 44599/98) (2001) 11 BHRC 297 (at [47]). The EHRC held that:

> **'Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings…The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.'**

## Conclusions

<u>The potential relevance of the Claimant's health condition</u>

142. The Claimant's case is that her dismissal was unfair because she underperformed in 2018; her underperformance was due to her belief that she was being spied on; this in turn resulted from low cognitive functioning. She complains that the Respondent failed adequately to investigate, or to consider, the impact on her performance or its rating in 2018 of her mental health condition; and that it was unreasonable for the Respondent take into account the Claimant's 2018 appraisal in selecting for redundancy because her performance in that year was affected by her mental ill-health.

143. I accept Ms Masters' submission that the only mental health condition which is relevant to the issues set out above is that of low cognitive functioning. That is the condition on which the Claimant expressly relies in her witness statement (at paragraphs 23-25); and that is the condition to which the Claimant repeatedly returned in the course of her oral evidence.

144. The Claimant articulated her case at paragraph 25 of her statement:

> 'I maintain that the main reason for my dismissal was due to my cognitive deficit and not a redundancy. The Respondent claimed to be unhappy with my increasing agitation about the breach of my privacy and the fear that I was under inappropriate surveillance and monitoring by some colleagues at work and home via my phone and laptop. I maintain that this behaviour was due to a deficit in my perceptual reasoning resulting from my cognitive impairment. However, the Respondent failed to adequately investigate the underlying cause of my cognitive function deficit as identified in Dr Cheesman's report of February 11, 2019.'

145. It became clear to me in the course of her evidence that the Claimant rejects any other mental health diagnosis, just as she rejected them at the time. Indeed, it will be apparent from my findings of fact above, that she also rejected the diagnosis of low cognitive functioning at the time, even though she now seeks to rely on it. That has consequences for her unfair dismissal claim.

146. There are three substantial difficulties with the Claimant's case in this respect.

147. Firstly, there was limited medical evidence at the time of the redundancy exercise that the Claimant had the condition of low cognitive functioning: Dr Cheesman was the only practitioner to refer to it. The Claimant was positively resistant to following up on the point, despite encouragement from the Respondent.

148. Secondly, all the evidence suggests that the Claimant did not accept that she had a problem with low cognitive functioning. She did not raise this condition,

or Dr Cheesman's report, at any point during the redundancy consultation process as being relevant to her 2018 performance; nor did she raise it during the grievance/appeal process into the 2018 appraisal. Her own GP concluded that there was no issue with low cognitive functioning and declined to go down the route of a neurological referral.

149. Even now, the Claimant does not accept that the Cheesman report accurately sets out what was said in her meeting with him and what tests were undertaken; she does not accept Dr Cheesman's core conclusion that she was unfit to do the job she was employed to do by reason of low cognitive functioning.

150. Thirdly, there was no medical evidence before me to support her contention that her concerns about privacy in 2018 were caused, or contributed to, by a condition of low cognitive functioning.

151. In light of this, I accept Ms Masters' submission that, even if I were to accept that the Claimant had the condition of low cognitive functioning, there was no unfairness in the redundancy exercise on account of that condition. Specifically, the Respondent cannot be said to have acted unreasonably in not making further investigations into the condition, and not taking it into account when considering her 2018 appraisal, in circumstances where the Claimant did not accept that she had the condition.

<u>The reason for the dismissal</u>

152. I am satisfied that there was a genuine redundancy situation: the Respondent reviewed its structure and announced a restructuring exercise, as a result of which the number of roles in the FCRA and RCRA teams would be reduced by fifteen. The exercise was not targeted at the Claimant. There is no evidence at all that redundancy was a pretext for dismissing her for previous ill-health.

153. I am satisfied that the sole reason for the Claimant's dismissal was redundancy.

<u>The selection of the pool for redundancy</u>

154. I have concluded that the Respondent turned its mind to the question of pools and adopted a reasonable approach. The Claimant was in a pool of people in the same job as her and there was a proposed reduction from 12 to 11 posts. There was no suggestion by Mr Rahman that the identification of the pools disadvantaged the Claimant, or that she was assigned to the wrong pool.

<u>Consultation</u>

155. The consultation process started in good time. The selection criteria were objective and were applied across the board; there was no suggestion that they had been designed with a view to targeting the Claimant; I accept Ms Masters' submission that selection for redundancy was a matter of 'pure maths'; there was no discretion within the system adopted and, as such, no scope for biased, human intervention.

156. Although I have found that there was some evidence that a collective consultation exercise with the unions was planned, and a single reference to

there having been 'discussions' with the unions, I have also found there was no cogent evidence that a formal collective consultation exercise actually took place or that the unions agreed the selection criteria (paras 66-71).

157. I turn, therefore, to the question of whether there was individual consultation as to the selection criteria to be applied. Although the Claimant's dismissal was not inevitable - because there remained the possibility that she would secure a suitable alternative role - the decision to put her at risk of redundancy was a *fait accompli*. The criteria had already been fixed before the first meeting the Claimant had on 17 September 2019, i.e before the first individual consultation meeting. The purely mechanistic process of applying those criteria and the decision to place the Claimant at risk of redundancy had both already taken place.

158. Meaningful consultation, whether collective or individual, is a fundamental aspect of a fair dismissal for redundancy. I have concluded that did not take place here because of the absence of meaningful consultation in relation to the basis for selection, i.e. the selection criteria. In failing to consult about the criteria, the Respondent's approach to the exercise fell outside the band of reasonable responses.

159. It is possible that consultation might have led to the same criteria being adopted, and would have made no difference to the eventual outcome, but the authorities are clear that I cannot have regard to that at the liability stage; that is a matter to be considered at the remedy stage.

160. For this reason alone, I have concluded that the dismissal was unfair.

161. To be clear: I have concluded that the Respondent acted reasonably in seeking to identify alternative roles for the Claimant and supporting her in applying for them: Ms Ramaswamy, in particular, sent the Claimant a job list every Monday to the Claimant's personal email address, followed up on the status of outstanding applications, sought feedback, which she provided to the Claimant, and forwarded the Claimant's CV in respect of jobs the Claimant was interested; she identified specific roles she thought were particularly suitable; a monthly one-to-one meeting was offered to support the Claimant in a job search; and Mr Redmond drew the Claimant attention to specific roles. Insofar as the Claimant experienced technical rather difficulties in identifying or accessing roles, the Respondent acted reasonably in resolving them.

162. Accordingly, I am satisfied that, in this respect, the Respondent's approach fell within the band of reasonable responses. I note that, in his closing submissions (at paragraph 3), Mr Rahman accepts that 'the only aspect of the consultation requirement that had been satisfied is in respect of suitable alternative work'.

**Contribution**

163. I can see that conduct issues were raised with her. They were not the subject of concluded capability or disciplinary proceedings, which might have given rise to evidence on the basis of which I could have made reliable findings, on the balance of probabilities, that the issues raised with the Claimant were well-founded. Nor were the specific issues put to her in terms in cross-examination.

164. I am not satisfied there is a sufficient evidential basis on which I could conclude that that the Claimant contributed to her dismissal by her own blameworthy conduct.

**Remedy**

165. I set out to hear evidence and submissions on *Polkey*. The parties addressed me as to what would have happened, in the context of the selection criteria which were adopted and applied, if the adjustment to the Claimant's scores which she sought had been made. I accept the Respondent's submission that she would still have scored lowest.

166. However, I did not hear evidence or submissions from either party as to what would have happened had there been consultation as to whether the selection criteria were fair and reasonable: the Claimant led no evidence as to what other criteria would have been adopted; the Respondent led no evidence as to what would have happened, had the Claimant - or anyone else, including the unions - proposed different criteria.

167. That matter will have to be explored at the remedy hearing. I give both parties permission to lead further evidence, if so advised, and to make submissions in relation to this issue, as well as to issues of compensation more generally.

**The application for anonymisation**

168. The Claimant made her application under rule 50 for an anonymisation order in an email dated 5 May 2023. The Respondent replied, opposing application, in an email of 9 May 2023. The Claimant made further submissions in an email of 18 May 2023. Attached to this second email was a copy of the Claimant's medical records. There was no separate medical report from the Claimant's GP.

169. In their two emails, the Claimant's legal representatives made the following points on her behalf.

    169.1. The Claimant is a vulnerable person, who suffers from mental health issues. The application refers to 'low cognitive defect' (presumably a reference to low cognitive functioning).

    169.2. No details of the Claimant's mental health have previously been published in these proceedings. The Claimant became worried about publication when her Counsel reminded her about it towards the end of the hearing. She then instructed him to make the application.

    169.3. Information about the Claimant's mental health is highly sensitive and confidential. Knowing that the public has access to her confidential information is likely to cause a further detriment to the Claimant's mental health. The detriment goes beyond mere social embarrassment. The application refers to the Claimant suffering from anxiety and stress and having suicidal ideation; her medical records refer to paranoia.

    169.4. Publication would also be detrimental in terms of the Claimant's employability. It would open her up to the possibility of discrimination

on grounds of disability in that it might cause her not to be selected for interview for jobs.

169.5. The case does not raise issues of public importance (or, as the Claimant's representatives expressed it: 'national security, public safety of the economic well-being of the country' [*sic*]).

169.6. When weighing the interference in the Claimant's article 8 rights against the importance of open justice, the scales tip in the Claimant's favour.

169.7. Full publication of the proceedings would result in 'ongoing harm, mental torture and degrading treatment under article 3'.

170. The Respondent made the following submissions in reply.

170.1. The Claimant, who has been professionally represented 2021. She has been aware throughout of the public nature of Tribunal judgements. The issue of privacy was mentioned by her Counsel at the aborted final hearing in November 2021, but no application was made until after the end of closing submissions in the present hearing.

170.2. There is no medical evidence as to the potential impact on her health of a public judgment. The Claimant did not seek to give any evidence on these matters at the hearing.

170.3. Her application consists of bare assertions. Those assertions are inconsistent with the issue being raised at the conclusion of evidence, apparently as an afterthought.

170.4. The Tribunal is required to give due weight to the principle of open justice. The Respondent relies on the passage in *Roden* at [31]: 'it is not unreasonable to regard the person who initiates proceedings as having accepted the normal incidence of the public nature of court proceedings so that in general such party has to accept the embarrassment and reputational damage inherent in being involved in litigation.'

170.5. It is a fundamental misunderstanding of the legal position to assert that a public judgment would not be proportionate because the case does not raise issues of public importance. Anonymity is the exception to the rule.

170.6. Article 3 is not engaged. No information has been provided about why the publication of the judgment in the usual way would breach the claimant's right to be free from torture or inhuman or degrading treatment. That is a bare assertion, lacking in credibility.

171. As I recorded above, I gave the Claimant's legal representatives an opportunity to lead further evidence and/or to request a hearing before I determined this application, but they declined to do so and invited me to deal with the application on the papers and the evidence already submitted. That

did not include a witness statement from the Claimant or a medical report from her GP on this issue.

172. The only medical evidence to which I was referred were the Claimant's medical records. In the section 'active problems' a 'stress-related problem' is recorded on 16 May 2023; and a 'mental disorder' is recorded on 19 April 2023, the only particulars of this being an apparent reference to a diagnosis in 2018 ('likely paranoid psychosis of unknown duration'). In the section 'significant past problems' there is a one-word reference to 'suicidal', dated 5 October 2022.

173. There was no specific evidence, medical or otherwise, as to any purported link between the publication of the judgment in full and any impact on the Claimant's mental health.

174. I agree with the Respondent's submission that no information has been provided as to why the publication of the judgment in the usual way would breach the Claimant's right to be free from torture or inhuman or degrading treatment. Article 3 is not engaged.

175. As for article 8, this judgment contains details of the following: OH assessments and their conclusions; concerns expressed by others about the Claimant's mental health, including a single diagnosis of paranoid schizophrenia, with which the Claimant and others disagreed; a diagnosis of low cognitive function, which the Claimant did not accept at the time, although she now relies on it as part of her case; countervailing opinions expressed by treating clinicians that she had no significant mental health problems at all; and the brief details contained in the Claimant's medical records set out above.

176. I accept that there will be some interference in the Claimant's article 8 right to respect for private life, to the extent that her ability to choose whether or not to inform others about these private matters is likely to be undermined by the unredacted publication of this judgment online. I observe that the picture that will emerge will be nuanced, insofar as the judgment records the contradictions and disagreements about the Claimant's mental health, including her own strong views, across the relevant chronology.

177. How weighty is this potential interference in the Claimant's Convention rights?

178. Right up until the end of the hearing there had been no application for a privacy order of any sort. The final hearing was held in person in public at East London Employment Tribunal. There was no suggestion that the hearing, or any part of it, should be held in private. The case name was displayed, as is usual, on the cause lists, and on the door of the Tribunal hearing. The Claimant was not inhibited from making her claim. I find that she must have known from the outset that it would involve giving evidence in public about her medical history and that there would be a public judgment.

179. Further, she was professionally represented throughout the proceedings and an application for a privacy order could have been made at any stage. I accept the Respondent's submission that, if the Claimant's concerns were as serious as she now suggests, it is very surprising that an application was not made sooner.

180. Although it is submitted on the Claimant's behalf that publication is likely to have a detrimental effect on the Claimant's mental health, there is no evidence to support that contention from the Claimant herself, despite my opening the door to further evidence and a further hearing. Nor is there any medical evidence to support it. The medical records make no reference to the proceedings/prospective publication of the judgment, let alone any reference to a causal link between the proceedings/publication of the judgment and any impact on the Claimant's mental health, references to which are, in any event, extremely brief, uninformative and lacking context.

181. There is no evidence to support the submission that the information about the Claimant's health contained in the judgment would deter potential employers; the submission is entirely speculative.

182. I have concluded that there is no sufficiently cogent evidence to suggest that publication will have a serious adverse effect on the Claimant's mental health. I have concluded that publication will amount only to a limited interference in her article 8 rights, insofar as it will disclose information which she would prefer to remain private.

183. Turning to the principle of open justice, I remind myself that the reporting of court proceedings without restriction is a particularly important aspect of open justice and the default position is full publication; that there must be clear and cogent evidence that harm will be done by full publication to the privacy rights of the individual so as to make it necessary to derogate from the principle of open justice. Anonymity will only be granted where it is strictly necessary.

184. The fact that there is no particular public interest in the fact of the Claimant's case is not a material factor. The Convention rights to freedom of expression and open justice are rights that reside with the public, not just the press.

185. Having regard to my conclusion that the interference with the Claimant's article 8 rights is limited, I have concluded that the transparency required by the principle of open justice, including the requirement for public access to judicial proceedings or pronouncements, outweighs that limited interference. I am not persuaded that anonymisation of the judgment would be a proportionate step or is strictly necessary.

186. For these reasons, the Claimant's application is refused.

**Next steps**

187. The parties must write to the Tribunal by no later than 28 days after the date on which this judgment is sent out, providing their dates to avoid for a one-day remedy hearing. I will then list the hearing and give directions.

188. If the parties reach agreement as to compensation, they must inform the Tribunal immediately.

**Employment Judge Massarella**
**Date: 27 July 2023**