EMPLOYMENT TRIBUNALS

Claimant:	Mr M Buckley	3315387/2020
	Mr A Warsama	3315388/2020; 3315399/2020
	Mr G Williams	3315389/2020; 3315400/2020
Respondent:	Car Giant Ltd	R1
	Mr Chico Obhari	R2
Heard at:	Watford Employment Tribunal	(In person)
On:	**31 July; 1 to 4 August; 7 to 9 August 2023**	
Before:	Employment Judge Quill; Ms K Charman; Mr D Wharton	

Appearances

For the claimant: Mr S Martins, consultant

For the respondent: Mr N Brockley, counsel

JUDGMENT

1. By a unanimous decision, the complaints of unfair dismissal by each claimant are each not well-founded and are dismissed.

2. By a unanimous decision, the complaints of harassment related to race by each claimant all fail and are dismissed.

3. By a unanimous decision, the complaints of direct discrimination because of race by each claimant all fail and are dismissed.

REASONS

Introduction

1. This was a 8 day hearing. It was conducted in person.

2. References such as [Bundle XXX] are to the pages in the hearing bundle.

The Claims and The Issues

3. The list of issues (for liability) had previously been agreed as follows [Bundle 126-7].

Time limits/limitation issues

16.1 Were all of the Claimant's complaints presented within the time limits set out sections 123(1)(a) and (b) EqA 2010 and sections 1 1 1(2)(a) and (b) Employment Rights Act 1996 ("ERA 1996"). Dealing with this issue may involve consideration of whether time should be extended.

Unfair dismissal

16.2 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) ERA 1996. The Respondent asserts that the Claimants were dismissed for reasons of redundancy or alternatively some other substantial reason

16.3 If so, was the dismissal fair or unfair in accordance with section 98(4) ERA 1996 ERA section 98(4), and, in particular,
16.3.1 Did the Respondent carry out meaningful consultation
16.3.2 Did the Respondent adopt a fair selection process
16.3.3 Did the Respondent consider suitable alternative employment
16.3.4 Did the Respondent comply with the collective redundancy process as set out under section 1 88 TULCA
16.3.5 Did the Respondent in all respects act within the so-called 'band of reasonable responses'.

Direct discrimination because of race

16.4 Did the Respondents subject the Claimants to the following treatment:
16.4.1 Selecting them for redundancy in May 2020 in the absence of a selection matrix;
16.4.2 Failing fairly, adequately, or at all to follow the selection matrix throughout the redundancy process;
16.4.3 Dismissing them.

16.5 Was that treatment "less favourable treatment", i.e. did the Respondents treat the Claimants as alleged less favourably than they treated or would have treated others ("comparators*') in not materially different circumstances. The Claimants rely on the following actual comparators, together with a hypothetical comparator:
16.5.1 Mr Buckley: Jose Freitas de Encarnacao and 'Gino';

16.5.2 Mr Warsama: Marcio Soares, Stewart Dabin, Mr Gomes Gomes and Maerk Wejman
16.5.3 Mr Williams: Hasu Pamer, Carlos Rodriguez, Mustafa Ashur and Eduardo Carvalho

16.6 If so, was that because of the Claimants' race or because of the protected characteristic of race more generally.

Harassment related to race, religion or belief or sexual orientation

16.7 Did the Respondents engage in the conduct at paragraph 16.4 above

16.8 Was that conduct unwanted

16.9 Did it relate to the protected characteristic of race

16.10 Did the conduct have the purpose or (taking into account the Claimants' perception, the other circumstances of the case and whether it was reasonable for the conduct to have the relevant effect) the effect of violating the Claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimants.

Remedy

16.11 If the Claimants succeed, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimants are awarded compensation and/or damages, will decide how much should be awarded.

4. It was confirmed on Day 1, that the protected characteristic in relation to the harassment complaints was race, and race alone, for each allegation and each claimant.

5. It was also confirmed that there was no application to amend any of the claims and that both sides agreed that the list of issues was still accurate and was the one on which we should base our decisions. It was confirmed in closing submissions that it was accepted that the dismissal reason was redundancy in each case.

The Hearing and The Evidence

6. The first hour or so of Day 1 was a case management hearing conducted by a judge only (EJ Quill). The remainder of Day 1 was reading by the whole panel, and the oral evidence started on Day 2. By agreement, the Respondents' witnesses went first. Oral evidence concluded at the end of Day 6 and submissions were first thing on Day 7.

7. We had a main bundle in which the last numbered page was 289. Between them, the parties appear to have done a very poor job of preparing for the hearing, and regularly throughout the hearing further documents were disclosed by one party to

the other. On Day 2, for the reasons which we gave at the time, we refused to allow the Respondent to add a document to the hearing bundle which (it transpired, in answer to panel's questions) had been created around the same time as their witness statements were being prepared, (which was in the two week or so period running up to the start of the hearing). The original document from which the data in the newly-created document was said to have been collated had not been disclosed to the Claimants and the Respondent objected to disclosure of the whole document. Following our decision, Mr Brockley asked for it to be noted that he had expressly said that he was aware that the Respondents' stated reason for objecting to the disclosure of the whole document (namely data protection) was not a strong argument, given the contents of other documents that were already in the bundle. We made no further order for the original document to be disclosed, given that the Claimants were not asking for such an order, or for sight of it. We pointed out that there was nothing to stop the Respondents disclosing the whole document if they had changed their mind about objecting, and that, following such disclosure, either side was potentially at liberty to make a further application. No such further application was made.

8. Subject to that, in the main, the late disclosure items were added to the bundle by consent.

9. The Respondents' witnesses were the Second Respondent, Sergio Gomes, Mark Cullen and Michael Holohan.

10. The Claimants' witnesses were each of the claimants. Each of the witnesses had prepared a written statement which they swore to (after making several amendments, in many cases) and answered questions on oath.

The Findings of Fact

Introduction

11. These findings are all unanimous, unless expressly stated otherwise.

12. The first respondent operates as a retailer of used vehicles. It purchases these items, for example, at car auctions. As well as staff involved on the sales side and offering finance to customers. It also has workshop employees who are involved in working on the vehicles which have been purchased and improving them prior to their being offered for sale to the public.

13. The second respondent is a long time employee of the first respondent and he was, at the relevant time, its the general manager.

14. All three claimants are also long-term employees. All of them were dismissed as a result of a redundancy exercise which commenced in around May 2020. All of them

were told about the dismissals in July, with letter following shortly afterwards. All of them had their appeals heard and rejected by the second respondent.

15. As per the list of issues, they each bring the same complaints of unfair dismissal and harassment related to race. They also each bring complaints of direct discrimination, which in each case are based on the same factual allegations as the harassment, but each of the claimant's - as well as using hypothetical comparators – relies on different proposed actual comparators.

Start of pandemic / Warning of collective consultation

16. At the start of the Covid pandemic, the first respondent employed approximately 708 employees.

17. In March 2020, because of the Covid pandemic and the national lockdown, the respondent had to cease its retail operation and also cease its purchase of stock. Almost all staff were placed on furlough with the exception of those who were essential to the business which included security, some payroll staff and some senior managers.

18. Most of those who were on furlough did not receive any top up. In other words, the amount that was paid to them was the 80% figure for which the respondent was able to receive reimbursement from the government's Coronavirus Job Retention Scheme ("CJRS"). As the letter on [Bundle 131] demonstrates, there were at least some employees and for at least a limited period of time, some elements of top up.

19. As per [Bundle 133], the respondent wrote to its employees on 2 May 2020. The letter was in the name of Michael Holohan, managing director, who was one of the witnesses in the hearing.

19.1. The letter informed employees that the respondent was not generating revenue, but was still incurring very significant expenditure every week. Our finding is that that is true. The respondent was incurring significant expenditure; this was not simply staffing costs, which were to some extent being reimbursed by the government, but was more generally in connection with the costs of looking after large sites filled with a lot of stock and equipment. Furthermore, even taking account of CJRS, there were staffing costs.

19.2. The letter referred to the possibility of making redundancies and said that if that did happen then they would affect most departments. With that in mind, there would need to be collective consultation, which would require employee representatives.

19.3. The letter said that at present they did not know the numbers but that staff would be divided into groups and each group would lack one or more elected representatives.

19.4. The letter also said that at the time of writing (2 May 2020), it was not the intention to make redundancies, while CJRS was still in operation.

First Claimant

20. The first claimant, Michael Buckley was employed as a window fitter. He had worked for the respondent since approximately 31 March 2008.

21. Mr Buckley believes that he was the first such specialist windscreen fitted to be employed by the first respondent and prior to that they had contracted out for the fitting of windscreens. He has been told over the years by the respondent and senior employees working for the respondent that he is offered great value to the business and in particular, offered a great value for money in comparison to the contract and out and has therefore helped to increase company profits significantly over the years. As well as being an experienced fitter himself. He has trained new employees who have come into the business.

22. The claimant accepts that there was another windscreen fitter named Gino who had been there longer than him.

23. There was another employee named Jose. Jose started working for the respondent on or around 28 May 2019. It is the claimant's opinion that Jose was appointed in 2019, without competitive interview / selection process because Jose has friends and family already working in the business.

24. Jose was a trainee windscreen fitter. His role as a trainee meant that he could be allocated other duties as well. The trainees could change batteries, change tyres et cetera when somebody was required to do that.

25. We also accept that there is another trainee windscreen fitter called Cameron. He was also taken on in 2019, shortly before Jose. It was the claimant's opinion that Cameron was not a trainee windscreen fitter and that he worked in another department. However, we accept that Cameron was, like Jose, a trainee windscreen fitter. The fact that he worked in other departments is consistent with the respondent's evidence that the trainee windscreen fitters also learned other skills and were available to be allocated other duties as and when required.

26. For the purposes of these proceedings the claimant describes his race as white Irish. He was born in Ireland and his nationality is Irish. This was widely known because he spoke of it at work. None of Gino, Jose or Cameron were white Irish

Second Claimant

27. The second claimant, Aden Warsama, began working for the respondent in around 2008. By the time is relevant to this dispute. He was a production manager and had held that role for some time.

28. He worked in the paint shop. Prior to lockdown the paint shop had two shifts described as early and late. The claimant worked on the late shift. The production manager for the early shift was called Stewart.

29. The change over in shifts occurred at 3:30 PM in the afternoon and the late shift continued until around 11 PM. From around 3:15 PM to 3:30 PM, the Claimant was present and working and there was a handover so that the late shift could carry on with any unfinished jobs from the early shift. Where necessary, at the end of the late shift notes would be left so that the early shift could resume any unfinished work from the late shift.

30. In addition to these two production managers in the paint shop (Stewart and the Claimant), there was a trainee production manager called Marek. Marek worked on the late shift with the claimant immediately prior to the pandemic. The claimant regarded him as his assistant manager.

31. For the purposes of this claim, the claimant regards his race as black British. In the paint shop the other production manager and the trainee production manager were not black British.

Third Claimant

32. The third claimant is George Williams. He started working for the respondent in around May 1992. The Claimant is a trained and fully qualified mechanic.

33. The claimant has worked in a number of different departments over the years because the respondent has a number of different departments which use trained mechanics.

34. At the times, relevant to this dispute, he worked in a part of the business described as Unit 5. Unit 5 had a number of different subdepartments. The claimant was a supervisor. As a whole, Unit 5 had eight supervisors. Immediately prior to the pandemic, the claimant had been working in a subdepartment called Fast Fit, along with another supervisor, Carlos.

35. For the purposes of this claim, the claimant describes his race as black British. Another one of the supervisors, Richard was also recorded as black British in the respondent's statistics. Like the Claimant, Richard was also dismissed in this round of redundancies. The other six Unit 5 supervisors were not black British.

Some, not all, staff are brought off furlough

36. Having remained closed throughout the whole of April, and then resumed internet only sales in early May, towards the end of May, the respondent began making plans to reopen to face to face customers on a limited basis, with effect from 1 June.

37. Because of the social distancing guidance that was still in place at the time, it was the respondent's opinion that it would not be able to fully open to the public and it was also the respondent's opinion that it would not require (and it would not be practicable for it to have) its entire workforce resume working on 1 June 2020.

38. It was the opinion of senior managers, including the second respondent that the very existence of the first respondent was under threat by the economic pressure caused by the pandemic. It was their opinion that, in order to survive, this period of resuming trading in June was going to be crucial and that it was important to sell as many vehicles - and therefore generate as much revenue as possible - during this period. They had in mind, amongst other things, that the future course of the pandemic was uncertain and there was no guarantee that there would no be no further resumption of stricter lockdowns in the future.

39. Knowing that they would not be bringing back every member of staff, it was the first respondent's priority to ensure that those staff that it did bring back with those who would be most able to assist it in its short-term objective of selling as many vehicles as it could as quickly as it could.

40. One of the people in charge of the exercise of deciding who would come back was the second respondent. He arranged for a meeting of managers so that a discussion could take place.

41. This meeting took place on 25 May 2020. The purpose of the meeting was not to discuss who would be made redundant. The purpose of the meeting was specifically to decide which employees would be told that they were being brought back from furlough.

42. Employees who were not being brought back would simply remain on furlough. The respondent did not think it was necessary to consult employees or invite expressions of interest. As far as the employer was concerned, it had the absolute right to require employees to return from furlough and resume their normal duties, if those employees were instructed to do so.

43. We accept that the individuals present at the meeting were those named in paragraph 7 of the second respondent's witness statement. As well as the second respondent, one of the attendees was one of the witnesses in these proceedings named Mr Sergio Gomes, Paint Shop Performance Manager. Mark Cullen (Unit 5 Assistant Manager) did not attend the 28 May meeting. However, his colleague, Mr Hamed Wahabi (Unit 5 Manager) did attend. One of the attendees was named Marco; he was the Valet Bay manager at the time.

44. We have listened to some audio recordings made by Marco and read some messages sent by him. We have also heard what Mr Williams recalls hearing from Marco.

45. As well as hearing directly from Mr Gomes and from the second respondent, we also accept the evidence of Mr Holohan that, after receiving the claim forms in this litigation, he spoke to the other attendees at the meeting to obtain their version of events.

46. Our finding of fact is that - contrary to what Marco may have said later - the second respondent did not inform the meeting that he had already made up his mind that particular individuals would be dismissed by reason of redundancy.

46.1. There was a disagreement between the second respondent and Marco during the meeting about an individual on Marco's team, but that concerned whether that person should be put back from furlough or not, and not about whether they would be made redundant or not.

46.2. In due course, Marco applied for voluntary redundancy and the second respondent supported that application. However, the application was later refused by the directors.

46.3. Our finding is that Marco was clearly very aggrieved by that refusal. He was also aggrieved by the second respondent respondent's actions in August 2020. His perception of events - whether rightly or wrongly - was that the second respondent had purported to cancel some leave which Marco had booked and had purported to insist that Marco cancel his plans for a trip abroad because of concerns that requirements for quarantine and self-isolation might prevent Marco returning to work on time after his trip.

46.4. Regardless of the specific cause of the dispute, from September 2020 onwards, Marco was not attending work. He was still on the books as an employee until around October 2021. In June 2021, he left a series of voice messages for Mr Williams. At the time, he knew that Mr Williams had commenced proceedings against the respondents.

46.5. In around October 2021 (which was around the same time as his settlement agreement with the respondent), he sent a text message to Mr Williams.

46.6. Given the passage of time between 25 May 2020 and when Marco made these later audio and text messages, and also given the fact that Marco was himself in dispute with both respondents, and given his obvious animosity to the second respondent, and given the fact that Marco has not attended the tribunal and given any evidence, Marco's accusations carry little weight.

46.7. In any event, we accept the witness evidence from the second respondent and from Mr Gomes which we have heard about this 25 May 2020 meeting.

47. None of the three claimants were instructed to come back from furlough with effect from 1 June 2020. In fact, none of them were instructed to come back from furlough

at all prior to the termination of their employment. From the start of their respective furlough periods, each of the claimants attended the workplace only to attend meetings in connection with the redundancy exercise. However, our finding is that it is not true that they had been selected for redundancy prior to the Respondent's re-opening on 1 June 2020, or prior to the collective consultation mentioned below.

Collective Consulation

First Meeting – Monday 15 June 2020

48. The second and third claimants were each elected representatives. The first meeting of representatives took place on 15 June 2020.

49. The second claimant was representative for group Q.

49.1. As is shown by bundle 141 group Q was paint shop late and included 24 employees in total.

49.2. Paint shop early was a different group, Group P, and that included 55 employees. Paint shop early had three representatives, one of whom was Stewart.

50. The third claimant was a representative for group S. He was one of three representatives for group S. There were 65 employees in total in group S.

51. As of 15 June, the proposal was that there would be 15 people made redundant from paint shop and 13 from Unit 5. The first claimant was within Unit 5 (though not a supervisor).

52. At the meeting on 15 June, the representatives were told that the respondent was proposing to reduce its workforce by around 20%. Around 661 of the 708 total employees were identified as being affected by the proposals. It was proposed that around 141 of the 661 affected employees would be made redundant. It was made clear that this was a proposal and that it might change over time.

53. The representatives were given information about how the trading had been over the two weeks since the business had reopened.

54. One of the proposals mentioned was that paint shop early and late would be combined. The plan was to take the 15 redundancies across the two shifts, and by implication it would not matter which shift a person had been on prior to pandemic.

55. The representatives were informed that there would be a selection matrix. They were told they would receive blank templates on approximately the Wednesday (15 June being a Monday).

56. They were given some indication of what the factors in the matrix would be including attendance, performance and reliability. They were told that different weightings would be given to the different factors.

57. They were told that the plan was that the dismissal decisions would be made around 31 July 2020. Representatives were told that agency worker arrangements had already ceased. They were told that voluntary redundancy applications would be considered that it would be up to the respondent to decide whether or not to accept them. Any employee had the opportunity to apply for voluntary redundancy and to ask for details of the package before doing so. Such applications were to be made by the following Friday 19th of June.

58. It was acknowledged that staff were on furlough and that the representatives would be given contact information to contact the individuals within the group.

59. Mr Williams and the other two Group S representatives decided that one of them would liaise with the people who were back off furlough and Mr Williams and the other representative would each do half of the people who were still on furlough.

60. Although Mr Williams does not specifically recall speaking to the first claimant, the first claimant does recall speaking to Mr Williams to receive feed back from the consultation, and we accept that that is what happened.

61. In response to questions at the meeting, the managing director made clear that they were open to suggestions for avoiding redundancies. In particular, if everybody in a group was willing to reduce their hours so as to avoid losing individuals, then that could potentially be considered. Mr Holohan did not think that zero hours contracts would be workable. Rather, his position was that where employees were still required, they would be retained on their existing contracts (subject to any agreed reduction to specified, but reduced, hours).

62. He made it clear to the representatives that as far as the respondent was concerned all of the employees in the groups for which representatives had been elected were potentially at risk and the selection from within each group would be made after considering the matrix.

63. He stated that, regardless of whether somebody was on or off furlough as of 15 June, they were potentially equally at risk. The second claimant asked whether people who were more versatile or more experienced would be less at risk and Mr Holohan answered that every department would have its own matrix and criteria, and that versatility might be more relevant in one department or another.

64. Across the meetings, the third claimant did not need to ask any questions himself because he was satisfied, having listened to what was said in those meetings, that the questions which he otherwise had were all asked by other representatives.

65. In response to a question about when people would know whether voluntary redundancy had been approved. They were told that it would be decided after the scoring matrix had been completed so possibly around three weeks after 15 June.

66. In response to questions, the managing director answered that the employees at risk would include managers and including those managers who were doing the scoring, but those managers would not be scoring themselves. Furthermore, when there was more than one manager in a department it would vary from case to case about which of those managers would do the scoring for those within the department.

67. The next steps were for the representatives to feed back to the people in their group and to gather views and to meet again on Monday, 22 June.

Second Meeting – Monday 22 June 2020

68. Both the second and third claimants attended the meeting on 22 June 2020. [Bundle 142].

69. Some resignations had occurred. These were not voluntary redundancies. But they did serve to reduce the number of people at risk from 141 to 138. They were one each in sales, valeting and PSI Unit 5.

70. The matrix that had been due to be sent by the previous Wednesday had not yet been sent. It was emailed to the representatives later that day, 22 June. The representatives were given one week to gather feedback on the matrix.

71. Although not mentioned in the meeting itself, it was decided that for Unit 5, there would be one matrix for the supervisors and another one for the rest of the team who were not supervisors.

72. It was also decided in due course, that in the paint shop there would be a redundancy pool of the managers separate from the other employees. Each of the second and third claimants became aware of these issues during the collective consultation, albeit not expressly recorded in the minutes of the meetings themselves.

73. It was confirmed that following the collective consultation, the decisions would be made on 9 July to provisionally select people for redundancy and that there would be individual consultation with those people who were provisionally selected (and only those people). The deadline for submitting applications for voluntary redundancy was extended to ensure that those interested had received details of the figures from HR before they had to make their application.

Third Meeting – Monday 29 June 2020

74. The third collective consultation meeting was on Monday, 29 June 2020. Again, Mr Warsama and Mr Williams attended.

75. As of this stage, the representatives were still divided amongst the original 27 (or so) groups.

76. There were some further resignations and so the number at risk was down to 133. One of these was in Unit 5, two were in valeting and one collection driver.

77. The representatives had received the selection matrices (blank) prior to this 29 June meeting. Five of the representatives had sent feedback prior to the meeting. Mr Holohan invited any other oral feedback on the matrix.

78. The representatives were informed that no-one at risk would see all of the scores. People who were provisionally selected for redundancy would see their own scores, but nobody else's. People who were not provisionally selected for redundancy would not see any of the scores. The managing director, said that he and HR would review the scores and it would be their role to ensure that there was consistency and fairness.

79. Although written comments on the matrix were supposed to have been submitted prior to the meeting, one of the representatives asked to do it later that same day immediately after the meeting, and there was no objection from the respondent to that.

80. Neither the second or third claimants made any submissions in relation to their groups. The first claimant did not make any suggested comments to his representative about the matrix.

81. Questions were asked about whether the individual consultation meetings would be in person or by phone and it was suggested that it would be in person, by default, and that was HR's preference, but that phone was also possible depending on the circumstances.

82. For the purpose of scoring performance, the period was going to be the year ending February 2020. March 2020, was not going to be included. It was a 12 month period.

83. It was reported that 32 applications for voluntary redundancy had been received. All were to be considered, but not all would be accepted. We accept that that is what did, in fact, happen.

84. A question was raised about the furlough scheme. The answer that was given was that the respondent did intend to use the furlough scheme (ie CJRS) and carry on using it. It was said that had it not been for the existence of that scheme, there would have been a lot higher number of people at risk.

85. Mr Holohan explained during the tribunal hearing, and we accept that it was his and the board's genuine opinion, that the redundancies had to be made in any event, regardless of furlough and/or CJRS coming to an end. For the viability of the

business, it was important to make the selection decisions at this time, rather than defer them because of the uncertainty about how long the government scheme would last for, and because of the length of time it took to make redundancy decisions, and because of the length of notice periods. The respondent decided that it could not take the risk that CJRS would come to an end before it had effected the terminations of employment.

86. Furthermore, as he said at the meeting were costs associated with the continued employment of the individuals, even those who were on furlough and for whom a rebate was being claimed.

87. Furthermore, as Mr Holohan said in the meeting, this was a first round of redundancies and was based on projections for the future which were considered to be optimistic but not wildly and unrealistically optimistic. It was his opinion that there was a significant chance that the trading might not live up to these projections and that, if so, there might need to be a further round of redundancies. He believed that delaying decisions on this first round of redundancies would present too high a risk to the prospects for the business's survival, as it would delay their ability to assess whether this round of redundancies had been sufficient, or whether further measures were necessary.

88. The second respondent's opinion was even gloomier than that. In the second respondent's opinion, this round of redundancies at this time was essential in order to save the business and it might not be sufficient. It was the second respondent's opinion that if this first round of redundancies, coupled with some decent trading figures, did not work out, then the business as a whole might face closure within a fairly short space of time.

89. As mentioned on 1 June 2020, significant numbers of staff had come off furlough as the business reopened to face-to-face customers, having previously reopened front line sales during May.

90. The numbers and identities of people who were off furlough did not remain constant. From time to time some other people were brought back off furlough or returned back onto it. As of 29 June, approximately 40% were on furlough. Trading figures had not held up and it had been necessary to increase the number of people who were back on furlough.

91. The managing director stated in the meeting that selection for compulsory redundancy / voluntary redundancy, and decisions about who would be on and be off furlough were not linked. It was said that if the respondent believed that there was going to be a long-term need for a particular individual, but they were not needed in the immediate future, then that person would not be made redundant but would be kept on furlough. It was said that it was not the intention to make people redundant if doing so was likely to mean that they needed to take on new staff within a couple

of months. We accept that these were the genuine opinions and intentions at the time.

92. It was reported by the respondent that none of the groups had unanimously agreed to reduce salary for everyone in a group rather than making redundancies within that group.

93. The next steps were that if there were any final points about the matrix, they needed to be put forward immediately, because scoring was going to start that week. The representatives were encouraged to go back to their groups and obtain any final feedback points from the groups because the following Monday was to be the final consultation meeting as part of the collective consultation.

Fourth and final collective consultation meeting – Monday 6 July 2020

94. The final meeting took place on Monday, 6 July. Mr Williams and Mr Warsama both attended.

95. Further resignations were reported one in valeting and one in Unit 5. There were 131 proposed redundancies and there would not be any redundancies in valeting or in collection drivers.

96. The intention was to finish the scoring that week and to notify people who were provisionally selected later that week.

97. This meeting represented the close of the collective consultation. The managing director invited the attendees to remain as employee representatives in the event that there might be a further round of redundancies in due course.

Individual Consultation

98. Each of three claimants got a letter by email on 10 July 2020, which had the heading provisional selection for redundancy.

98.1. The letters were worded similarly. Each of them referred to a letter of 2 May 2020 (and we have two versions of the 2 May 2020 letter in the bundle) and a letter of 12 June 2020 (which neither side has produced).

98.2. Each of the letters contained a list of bullet points which the respondent said it was willing to discuss during the individual consultation. These included the reasons for making redundancy; how the selection pools were identified; the selection criteria; how the selection criteria were applied; why the position was provisionally selected for redundancy; the terms on which any redundancy would take place; possibilities for alternative employment within the company; any ideas, the individual might have for avoiding redundancy or for why the individual should not be selected for redundancy.

99. We will now discuss each of the claimants separately.

Individual consultation /decisions - First Claimant

100. The communication to Mr Buckley said that he could click on a link to view the list of the proposed redundancies. [Bundle 166] appears to be the list that he was supplied with. It identified that there had been 13 collection drivers affected by redundancy exercise, but that by this stage none were at risk. There were 19 employees in driver site and two of those 19 would potentially to be made redundant.

101. No detailed breakdown of PSI Unit 5 was given beyond the notification that 65 employees had been affected by the exercise and 14 were at risk. The claimant was one of the 14 provisionally selected for redundancy.

102. The letter itself did not state that he had been put in a selection pool of two windscreen fitters, which included just him and Gino. Likewise, the letter did not give any information about the trainee windscreen fitters.

103. In fact, the panel does accept that the respondent had decided that there would be around 56 redundancy pools in total. In other words, some of the groups for which employee representatives, had been elected had been further subdivided for the purposes of creating redundancy pools.

104. The panel also accepts that the respondent had decided that the only two windscreen fitters it had on its books, namely the claimant and Gino, would form a redundancy pool and that it had decided it only needed one windscreen fitter.

105. The Respondent had also decided that the two trainee windscreen fitters would be in a separate redundancy pool (and the two of them were the only people in that pool). The reason they were separate is that they did not perform identical duties to the windscreen fitters. We are satisfied that each of these decisions was rational. The manager who met the claimant during the individual consultation meetings was Mark Cullen who was a witness in the proceedings. Mr Cullen himself did not decide on these subdivisions of the groups, ie the pools that were drawn up prior to the provisional selection exercise and individual consultation process. As far as Mr Cullen was aware it was the second respondent who did.

106. In fact, we accept that - as per the managing director's evidence - the general manager was one of those who had input into the decision, but the decision as to how the pools were finally decided upon for Unit 5 was not the general manager's decision alone. It was a decision taken at senior manager level, in consultation with HR. It was based on an assessment of which job roles were most needed, and how many employees were needed for each job role.

107. The claimant attended his first consultation meeting on 17 July 2020. He had the option to be accompanied but chose not to be. Mr Cullen was accompanied by his

manager, Mr Wahabi. Mr Cullen had a pro forma which included some preprinted information which he read out to the claimant. The answers that the claimant gave were noted on the pro forma and also Mr Wahabi made some handwritten notes.

108. As noted in section 3 of the pro forma the claimant was given details of his own scores on the redundancy matrix. He was not given anybody else's scores.

108.1. The claimant had been given 2 from managerial skills and he queried that.

108.2. In fact, the respondent had given the same score to Gino, the only other person in the pool.

108.3. Although the claimant was not given details of Gino's score. We accept that as per [Bundle 287] Gino's overall score was 2690 and the claimant's overall score was 2610.

108.4. The scores were almost identical except that the claimant was scored very slightly less for flexibility. The main difference was that for reliability the claimant was scored significantly less. When marked correctly out of 10, (rather than 20, as Mr Cullen had done, at first, as shown on 287), the score for reliability came out of the four.

109. Although the documents were disclosed very late in the proceedings (and although there is not necessarily a good reason for the lateness of the disclosure), we do accept that the evidence disclosed during the hearing demonstrates that the reliability score was created by HR, using HR records, and created by applying a set formula (to take account of lateness and absence, including the reasons for the absence and how late the person actually was) across the whole company, not just Workshop, not just Unit 5, and not just windscreen fitters.

110. Over the course of his meetings, the claimant was informed about potential vacancies. Apart from those which were specifically mentioned to him, he said he would be willing to undertake driving duties as an alternative to windscreen fitting. There were no vacancies for drivers. The respondent did have a need for people to perform driving duties. However, it was not proposing to dismiss any of its existing drivers and to replace them with any of those who were provisionally selected for redundancy from the roles. The reason the respondent was making such a large number of redundancies, approximately 20% of its overall workforce, was because it regarded itself as being in an urgent situation which required immediate savings and immediate action to generate as much income as possible. It did not believe that it had the time or resources to retrain anybody for any new jobs, where it already had existing staff filling those jobs.

111. One of the vacancies it did have was in payroll and there is a slight dispute between Mr Cullen and the claimant about exactly what happened. The notes simply record

the claimant as saying he was not interested in payroll. Mr Buckley's recollection is that he expressed an interest, but was immediately told by Mr Cullen that he, the claimant, would not be likely to have the qualifications needed for the vacancy.

112. Regardless of who is right about that, on 21 July 2020, the feedback from the first consultation meeting was provided to the claimant in writing and he was given a list of the current vacancies which included payroll. He was told that if he was interested, then he should provide a copy of his CV and a covering letter to Mr Cullen as soon as possible. The claimant did not do that.

113. The claimant says that this is because he had been discouraged by what Mr Cullen said during the first meeting, but regardless of that, he did have the opportunity, had he wanted to do so, to put forward his CV and he chose not to do so.

114. The same letter said, amongst other things, that there were 14 employees being made redundant from PSI. The letter asserted that the selection criteria to be used had been discussed via the elected representative, as well as directly with him at the individual consultation meeting. There was no direct challenge by the claimant to those comments. In any event, there was a further meeting on 24 July at which he had the opportunity to raise further points if he wished to do so.

115. The same attendees went to the 24 July meeting. According to the notes, various vacancies were listed to the claimant and he said he was not interested in any of them, and that he wished to remain as a windscreen fitter. He was told that if the provisional decision was confirmed then his termination date was likely to be 23 October 2020.

116. A letter was received by the claimant which summarised what had been discussed at the second consultation meeting. It stated he had been told about vacancies and had said he did not wish to be considered. The claimant did not challenge that assertion at the time, or in his appeal meeting.

117. The letter told him that the proposed final meeting was 31 July and that this meeting might result in termination of his employment. He was told he could be accompanied to it. He was also told that if he failed to attend without adequate reasons, then that might result in the termination of his employment in his absence.

118. According to the respondent and Mr Cullen the meeting did take place, and in the following circumstances. A proposed in-person meeting had been due to take place at 1:30 PM. The claimant had not attended. Having taken HR advice and having liaised with the claimant by phone, Mr Cullen's account is that the meeting did take place by phone at 4:30 PM. The document on page 181 states that that is what happened. The handwritten notes at page 183 have the time simply recorded as 1:30 PM at the top of page. However, as per page 184, the time of the end of the meeting is recorded as 1635. We infer that the heading at top of page had been

written in readiness for the meeting before it was known that the Claimant was not going to turn up.

119. Even though no specific mention of the meeting being my phone is included in the handwritten notes, the letter sent after the meeting dated 4 August 2020, [Bundle 185], says that the meeting was conducted by telephone. The claimant did not challenge this assertion during his appeal meeting.

120. Furthermore, at paragraph 16 of his witness statement, the claimant says that he was made redundant following his final consultation meeting on 31 July 2020, and refers to the pages in the bundle which include the notes of that meeting produced by the respondent.

121. When Mr Cullen gave evidence, he was not challenged in cross-examination on the assertion that there had been a meeting on 31 July. Following the Claimant's later oral evidence, which said that there was no meeting on 31 July (by telephone or at all), the panel decided to recall Mr Cullen and we asked him some questions and allowed both sets of representatives the opportunity to ask Mr Cullen some questions.

122. Our finding is that the meeting did take place. Mr Cullen's recollection is accurate. The notes made are genuine.

123. This was three years ago. We do not think that Mr Buckley was deliberately lying to the tribunal when he denied that this meeting took place. He simply did not recall it accurately at the time he was giving his oral evidence.

124. Following the meeting a letter dated 4 August 2020 (which confirmed what he had been told orally on 31 July, namely that he was been dismissed with 12 weeks notice), Mr Buckley appealed. The appeal decision maker was the second respondent.

125. During the appeal meeting second respondent asked the claimant what were his grounds for appeal. The claimant said that it was the points system which was unfair. He was asked which part and said all of it. The second respondent discussed it all with him and noted that he got several 10 out of 10, as well as one nine. He scored lower managerial responsibilities. He also scored low on reliability, that having been done by HR.

126. The claimant accepted that the respondent was making reductions in staff because of the pandemic. However, the Claimant argued that other people had been employed for a shorter period of time, and the Second Respondent's reply was that there were only two windscreen fitters, and the decision was between the two of them. According to the notes there was no challenge to what was said about there

being only two windscreen fitters, or about the selection pool which the Claimant was in consisted of just those two. We accept the notes are accurate about that.

127. The second respondent repeated that there were only two windscreen fitters and asked the claimant to comment on why the claimant had been chosen to be the one employee, out of that pool of two, to be made redundant. The claimant said he did not know. The Second Respondent told him that his reliability score was the main reason. He said the scores came from HR and the claimant said that he understood.

128. The claimant did not raise in the meeting any concerns over the reliability score or ask any further questions about it. He did raise a question about the managerial score and was told that both he and the person he was competing against had scored similarly.

129. The meeting took place on 26 August and the Claimant and the Second Respondent signed the notes as accurate. We do not accept that the claimant was intimidated into signing either the appeal notes or the notes of the first two individual consultation meetings. The reason he did not sign the notes of the third meeting is that it was conducted by telephone.

130. Following the meeting, the claimant was given the written notification of the outcome by letter dated 16 September 2020. The letter accurately reflected the contents of the meeting and the factors that the second respondent had taken into account when deciding to reject the appeal. The claimant believes that he got the impression during the meeting that his appeal had failed. Regardless of whether he got that impression or not, we accept the notes are accurate and that the Claimant was told at the end of the meeting that the second respondent would consider the appeal. We accept he did so, and that he rejected it for the reasons set out in the appeal outcome letter.

Individual consultation /decisions - Second Claimant

131. Turning now to the second claimant. As mentioned, he got a similar 10 July letter. He also attended a consultation meeting on 17 July. The consulting manager was Mr Sergio Gomes who was a witness in the case. The notetaker was David. The claimant declined the opportunity to be accompanied. As with the first claimant, a similar pro forma was used, which had some preprinted information on it, which was read out to the claimant during the meeting.

132. There is a significant factual dispute between the second claimant and Mr Gomes about a particular matter.

133. On Mr Gomes's case:

133.1. Immediately before the meeting started, and immediately before entering the room (where David was located waiting), he spoke to the second claimant to have an informal discussion with him about the role of Valet Bay Manager ("VBM").

133.2. This was on the basis, he says, that - at the time - it was anticipated that Marco's application for voluntary redundancy would be accepted and that there would be a vacancy for VBM.

133.3. Mr Gomes claims to have told the second claimant that it was not definite that Marco was leaving but that, provided Marco did leave there would potentially be an opportunity for the claimant to take over the role of VBM.

133.4. He claims that it was offered to the Claimant on the basis that potentially the Claimant and Marek would both have a trial in the role. He says that if the claimant had said yes to this, he would have been offered a trial with the potential opportunity to move into the role if Marco did in fact leave. He says the claimant flatly refused this.

133.5. He claims that the reason it was not documented is that it was not an official offer. He claims that there was no discussion with HR about the offer, but he had been authorised by the second respondent, the general manager, to make this informal approach.

134. The claimant's account is:

134.1. Before meeting Mr Gomes, he had spoken to Marek and found out from Marek that Marek had moved across to the valet bay and was doing a role there.

134.2. David, the note take in the meeting on 17 July, was Marco's assistant manager in Valet Bay. Marek told the Claimant that it was anticipated that Marco was leaving and that it was expected that David would move up to the role of VBM. Marek told the Claimant that he was potentially going to work in valet bay as assistant to David in other words, taking over David's previous role.

135. Taking the evidence as a whole we are satisfied that the claimant's recollection is closer to being accurate. It does not follow that Mr Gomes is deliberately lying.

135.1. However, Marek had started in the new role on 10 July. This was the same date that those people who were selected for potential redundancies were notified about the individual consultation.

135.2. As per the collective consultation notes, it had always been envisaged that the voluntary redundancy decisions would be made to coincide with those selections.

135.3. We therefore infer that, by 17 July, it would have already been known that Marco’s voluntary redundancy application had been rejected. We also note that in his written statement, Mr Gomes spoke (in paragraph 36) about Marek “later” taking the role that the claimant had previously rejected. There is an inconsistency between the Claimant rejecting the offer on 17 July and the word “later”, at least if paragraph 36 is intended to refer to Marek first going to valet bay.

135.4. One possibility which we considered was whether Mr Gomes had had a conversation with the claimant on the day of one of the earlier collective consultation meetings. However, none of the witnesses say that that is what happened and therefore we do not make that inference.

135.5. Rather on the balance of probabilities, our finding is that what happened is as follows. Having spoken to Marek about Marek's new role, the claimant raised some questions about it with Mr Gomes. This conversation is what Mr Gomes now recalls three years later as his proactively making an offer to the claimant.

135.6. Although it was suggested to us by the claimant's representative in closing submissions that Marek had been offered the VBM role by July 2020, based on the evidence we received from the witnesses, that is not correct. That is looking at things with hindsight, and it was not known in July 2020 that Marek would eventually become VBM. What actually happened was that David originally stepped up as acting VBM and Marek originally acted as assistant, on the same pay he had had when in paint shop. Things changed later on, but, as of July 2020, neither the Second Claimant, nor Marek, nor Mr Gomes knew that the person stepping into the assistant role would later become VBM.

135.7. As of 17 July, the claimant did not know that the role Marek had undertaken with effect from 10 July would later become VBM. However, that was not because information was concealed from him; it was because nobody knew that yet.

135.8. Therefore, our finding is that while there was a discussion about the role in valet bay, the claimant was not pushing for that role to be taken from Marek and given to him instead. If he had been seeking that outcome, we believe that there would have been some contemporaneous letter or email from him at the time making that point. At the very least, he would have raised it in his appeal and he did not do so.

135.9. We accept that both the claimant and Mr Gomes were doing their honest best to accurately recall the conversations from three years ago, but both of their memories (like Mr Buckley's) have become confused by the passage of time. Their 2023 memories have been affected by the fact that, by 2023, they now have knowledge that they did not have at the time (that following Marco's eventual termination of employment, which the claimant thinks was 2022, but we accept, was 2021), Marek became VBM.

136. The notes of the 17 July meeting between the Claimant and Mr Gomes are at [Bundle 234]. Unlike Mr Wahabi when accompanying Mark Cullen, David did not make separate and additional handwritten notes. There is only the added information on the pro forma to note answers to specific questions. The Claimant noticed at the time that these were the only notes being made.

137. It is entirely feasible that the claimant did make other points that are not recorded (whether because they did not fit neatly into a particular category in the pro forma, or for any other reason). As we have just said, we do think that there probably was a discussion on 17 July between Mr Gomes and the claimant about Marek's role. It is entirely possible that the claimant did ask Mr Gomes whether his redundancy selection had been influenced by any previous matters, such as when he had complained about the incident referred to in paragraph 8 of his witness statement.

138. Regardless of whether he did ask that or not, Mr Gomes's told him that the scores which the claimant had been given were accurate, and that the selection had been based solely on the selection matrix, not any other reason.

139. The claimant was only shown his own scores, which came out to an overall total of 1245. We do accept that the claimant's scoring was as shown on page 259 of the bundle in isolation, and as per page 285 of the bundle, where his own score and those of Stewart and Marek are shown together with the breakdowns for each.

140. All of three of them were very close. Stewart came out slightly higher with 1265. Marek was next with 1260 and the claimant was third out of those three with 1245. The other two been employed longer but that did not matter as all scored the maximum for length of service. All scored the same flexibility. The claimant came out highest for technical knowledge. All scored the same for communication skills. All got the maximum for disciplinary record. The claimant and Stewart both got the same for managerial skills and responsibilities. All got the same for data accuracy. Stewart got slightly higher for organisational skills, but the claimant got the same as Marek for that. The most significant difference was in terms of reliability: the claimant scored seven; Stewart scored eight; Marek scored nine. As previously mentioned, reliability scores were based on the formula which HR had used for all departments.

141. The claimant asked in the meeting to see all of the Fusion records (which gave details of working times, latenesses and absences, together with reasons) because he was confident that Stewart’s reliability was actually worse than his. The claimant's only period of non-attendance had been a comparatively short period of absence because of surgery. He was confident that Stewart had much worse absence than him.

142. Because he was surprised that his reliability score could be lower than Stewarts (although he did not have Stewart scores in particular, or anybody's apart from his own), he asked to see all of the Fusion records, although he had Stewart, particularly in mind. He was confident that if the respondent had given him a lower score than Stewart, it must have been an error, and speculated that he might have been incorrectly recorded as late when he was not. He thought that seeing the Fusion records might show that there were “mis-swipes” (which HR had incorrectly classified as lateness).

143. “Mis-swipe” is the Respondent’s terminology for the following practice. The employees in the respondent's workshop, upon arrival, were supposed to tap a card reader to show that they had arrived. They also use the card reader system throughout the day to record the time spent on various work activities as well break times and leaving time. Employees who turned up late were not paid for the period of work that they missed. They would only be paid from their actual start time, not the time they had been supposed to arrive. So, if they failed to record their arrival time accurately, then that could result in a failure to be paid for all the hours that they had actually been at work. However, sometimes through oversight somebody could fail to tap in properly on arrival, and only realise later in the day. If that happened they could let their manager know. Provided the manager was satisfied, the Fusion record could be amended. This would mean their start time, and hours worked would be added back on for pay purposes. This amendment would be shown in the records as a “mis-swipe”. In other words, as an authorised manual override. Mis-swipes might still have some adverse consequences for the employee as their error might affect their bonus, but the correction would at least mean that they would get paid for the hours that they had worked. Further, it would not be recorded as a “lateness” for disciplinary purposes.

144. The tribunal has now seen the Fusion records, and the claimant saw at the time (albeit he only got them on 31 July, at the end of the last meeting with Mr Gomes, despite having asked for, and chased, them earlier). The Claimant does not now argue that there had been an incorrect categorisation of anything as a lateness when it should have been recorded as a mis-swipe instead. He does not necessarily accept that his reliability score should have been low in comparison to his colleagues, but he does accept that the score was not the result of HR counting mis-swipe days as lateness days.

145. There is a minor difference of opinion between the claimant and Mr Gomes in that Mr Gomes thinks that he told HR to provide the Fusion records to the claimant and that they did so. The claimant is certain that he still had not received them by the time of the third consultation meeting and on that occasion, Mr Gomes printed them off and handed them to him. In the circumstances, the claimant is more likely to have an accurate memory of who provided him with the fusion records and we accept the Claimant’s recollection is accurate.

146. The claimant was refused access to anybody else's matrix scores or anybody else's Fusion records.

147. The claimant expressed the view that the respondent was getting rid of too many managers from the paint shop given that the early and late shifts were being combined. As part of this argument, he raised the issue of Marek moving to valet bay. He did not raise it on the basis that he rather than Marek should be moved to valet bay, but rather on the basis that, given the respondent was moving Marek to

valet bay, just leaving Stewart to manage paint shop (the two combined shifts) meant there were not enough managers and the Claimant should therefore be retained.

148. The Claimant was told that positions available were payroll adviser, valet and trainee smart repairer. He said he would let the respondent know in due course if he was interested in those positions. His suggestion for avoiding redundancy was to help Stewart run the Department, and he did not have other suggestions.

149. He received a letter dated 21 July 2020 to confirm what had been discussed on 17 July. Although the letter was written by HR, rather than by Mr Gomes we think it likely that if the claimant had actually been offered a role in valet bay, then this would have been noted in this letter. It was not noted in this letter because it was not offered. The letter briefly addressed what the claimant had said about reliability and said the figures would be more information would be provided at the next meeting. The Claimant did not challenge the contents, or ask for more information to be added. We infer that he was satisfied with the explanation given to him in the meeting about Marek's role and was not seeking more information or to challenge the Respondent's decision about the role offered to Marek. The Claimant did not suggest at the time that there were other points he had made in the meeting that had not been captured in the letter (whether questions about whether his selection was based on having raised race discrimination issues in the past, or at all).

150. The next meeting took place on 24 July and the same attendees were present. The notetaking was done similarly. The claimant signed these minutes as he did the previous ones. The claimant was told that scores from other employees would not be issued to him for reliability, or anything else. He was told that this was because of data protection.

151. Regardless of what Mr Gomes might have thought was the position previously in relation to valet bay, by 24 July Mr Gomes knew that Marco's voluntary redundancy application had been refused and he gave that information to the claimant. This information was accurate. It is clear that Marco could have been given voluntary redundancy and somebody else slotted into his therefore vacant position. However, the directors decided that they did not wish to make a redundancy payment to him, and did not wish to give him voluntary redundancy and that was a decision that the business was lawfully entitled to make. They did not refuse Marco's voluntary redundancy in order to make sure that this managerial role was unavailable for the Claimant.

152. In terms of the positions that had been offered to him, the Claimant said that they did not suit him. He was offended that he was offered the positions mentioned. The positions he said he was potentially interested in were prep and paint or team leader.

153. A letter dated 28 July 2020 was sent to him which accurately recorded what had been said in the meeting, including about the reliability scores and vacancies.

154. He was invited to a further meeting on 30 July and told that that meeting might result in the termination of his employment.

155. That meeting of 30 July did take place with the same attendees as previously. The Claimant had been offered the opportunity to be accompanied, as with the other meetings, and he declined. Again, he signed the minutes of the meeting.

156. No suitable alternative role or trial periods had been identified. The preprinted information was read out to the claimant which included information that he was to be made redundant and he was to be given 12 weeks' notice and his last day of employment would be 23 October 2020.

157. As mentioned above, immediately after the meeting, Mr Gomes printed a copy of the Claimant's own Fusion records for the years 2019 and 2020 and gave them to him.

158. A letter dated 4 August 2020, was sent to the claimant. It accurately set out what he had been told in the meeting.

159. The claimant did exercise his right to appeal. The only ground he stated was that he did not think the dismissal was fair because he did not think his reliability was the worst out of the managers.

160. He attended an appeal meeting with the second respondent on 25 August 2020. The notes are accurate. It was a fairly short meeting starting at 3:09pm and finishing at 3:25pm. The second respondent mentioned that the claimant scores been quite high with just one score as low as seven, and that was for reliability. The claimant disagreed with that score, pointing out that he believed he had been in more often than other managers. The only absence he had had was for surgery.

161. The second respondent said that the overall reliability score was over many categories, not just sickness absence. He said it was necessary to reduce staffing levels. He said that they were combining the early and late shift and could not keep the production managers from both shifts. He said that the respondent had two very good managers in paint shop, but only one was needed, and they could not keep both. This was his genuine opinion.

162. He expressed the opinion that the early shift managed by Stewart had required the production manager to perform several activities which the claimant had not been doing. The second respondent said that the early shift had been bigger and accepted that that was part of the reason that Stewart appeared to have been doing more duties. He said that the claimant had performed well in his role, but the early shift manager had been undertaking more responsibilities.

163. The claimant queried why the second respondent was saying that it was just a straight decision between him and the other production manager Stewart when he

had previously been told that there had been a pool of three. The second respondent said that the decision had just been between him and Stewart.

164. The claimant had not seen Stewart's scores, and he expressed the view that he and Stewart should really have scored more or less identically except that he, the claimant should have done better on reliability than Stewart. The second respondent said that the scoring for reliability had been done by HR and it been the same companywide for fairness.

165. At the end of the discussion, the second respondent said he would uphold the decision to dismiss the Claimant. He noted that on a pro forma which he and the claimant each signed. He confirmed that decision by letter dated 24 September 2020. The letter accurately reflected what had been discussed in the meeting, including what the second respondent and the Claimant had each said in the meeting about managerial responsibilities. He also said that he was satisfied that the reliability scores were fair and accurate.

166. The letter reflected his genuine views and accurately reflected the reasons he had in mind on 25 August when he rejected the appeal.

Individual consultation /decisions – Third Claimant

167. Turning now to the third claimant, Mr Williams. He was also invited to a consultation meeting. This took place on 15 July 2020. The arrangements were similar to those for the first claimant. Mark Cullen conducted the meeting and he was accompanied by Hamed Wahabi. Mr Cullen had a printed pro forma from which he read out certain preprinted information and Mr Wahabi took handwritten notes.

168. We accept the scores from the matrix that were supplied to the claimant in the meeting were those written in box three of the form [Bundle 196] and in paragraph 55 of Mr Cullen's witness statement.

169. The documents in the bundle, at page 287, is an earlier and incorrect version of the matrix which Mr Cullen had corrected prior to sending out the letters to those provisionally selected for redundancy. The incorrect version of the matrix on 287 did not show scores out of 10 for each category, but scores out of a different number depending on the weighting for each factor. However, we accept that, when corrected, the claimant was still one of the four supervisors (out of eight) in Unit 5, who were the lowest scoring and, therefore, provisionally selected for redundancy.

170. He was notified that there was potentially a vacancy for payroll clerk and confirmed he was not interested in that.

171. The claimant stated in the meeting that he disagreed with the scores for data accuracy managerial skills for organisation. The claimant amplified by saying that he had worked for a long time in the company, including in several departments. He

said he did not think the scoring was explained clearly. He believed that his own scores should have come out as at least being equal to all the other supervisors. He made the point that there had been other redundancies in the past and he had not been affected by those and that (by implication) his skills and abilities had been sufficient for his retention on those occasions and there should not be a different outcome this time. Mr Cullen asked him if he understood the matrix and the claimant said that he understood it perfectly. He expressed the view that the respondent had made it clear that it did not want him.

172. Before the meeting came to a close, it was adjourned while Mr Cullen and Mr Wahabi had a discussion about what had been said up to that point. After the adjournment, Mr Cullen reported that on this occasion, the reason for the redundancy exercise was Covid that, even though the claimant had not been previously selected for redundancy as part of any previous exercise, the reasons for the proposals were different on this occasion, and the Respondent had decided that it did need to make staffing reductions in the workshop.

173. The Claimant was asked after the break that he to explain why he said he thought he had been discriminated against. In context, it seems likely to the panel that the reason Mr Cullen and Mr Wahabi had had the break in the meeting was that the Claimant had used this word before the break, and it was this in particular that they thought they needed to discuss between themselves before continuing. Given the training which Mr Cullen said he had had (and the other managers also said they had had equalities training), it seems likely that Mr Cullen and Mr Wahabi did understand that the word “discrimination” in the context used by the claimant was making some suggestion of a potential contravention of the Equality Act. They may not have had the name of that particular piece of legislation in mind or been aware of the exact section numbers or definitions, but they had enough knowledge to be aware that the law prohibits discrimination based on particular characteristics, including, for example, age, sex, race, disability. Having heard the word used, and having had a discussion between themselves about it, they gave the Claimant an opportunity to explain why he had used it.

174. The claimant accepts that he made no express reference to race or skin colour or any other protected characteristic when answering the question. As far as the claimant is concerned it was clear that he was implying race discrimination, and he believes that Mr Cullen and Mr Wahabi knew that that was what he was suggesting, including in relation to his specific point that the overall score he had been given was lower than some of the other supervisors, even though he had been there longer. He did not state that there were any examples of discrimination that had to be investigated; his comments were solely about the scoring.

175. Mr Cullen asked him which supervisors he had in mind and the claimant replied that he was as good as all of the others. His answer indicated that he thought all of the

eight supervisors were potentially as good as each other and that he thought that the respondent was (incorrectly) arguing the contrary. Mr Cullen said he could not talk about anybody else's scores. He said that the claimant's scores had been done based on his role as supervisor in Fast Fit, but, because the claimant had raised that he was not happy with the scoring, he, Mr Cullen, would look in more detail at how everybody else had been scored and would compare to the claimant's marking. He said he would still not be able to talk about the other scores with the claimant but would look in more detail at the other scores in readiness for a further discussion about the claimant's own scores at the next meeting.

176. A letter was sent after the meeting which the claimant received which touched on several of the points discussed in the meeting and but did not go into detail about the points just mentioned.

177. The second meeting took place on 22 July and the same people attended [Bundle 206]. We accept that the positions mentioned at 7(a) of the pro forma were mentioned to the claimant. The claimant was not interested in any of them. There has apparently been some misunderstanding in that the respondent suggested in this litigation that the Claimant might have expressed an interest in one of those posts, but we think the claimant's recollection is more likely to be accurate and he tells us that he certainly was not interested in any of them. The claimant made clear that he would like to continue in his existing role, as a supervisor within Unit 5, regardless of subdepartment.

178. We accept the handwritten notes which start on 207 are accurate and they show that Mr Cullen reported back that the claimant had challenged the score on some categories, and was given feedback. The claimant asked for more details of the criteria Mr Cullen said that the criteria was based on his job role. It was pointed out that he scored the maximum in several categories. It was pointed out that, like several other employees had also scored a number of maximums. Mr Cullen effectively stood by the view that the scoring for managerial skills and responsibilities, organisational skills and data accuracy (and everything else) were accurate. It was suggested that the supervisors' daily workload of staffing issues seemed to have been taken on more by other supervisors than by the Claimant (in terms of things for which there was a documentary record, at least).

179. The Claimant was asked if he had any other proposals and said no. He was asked if he had any interest in the vacancies and said no. He was told there would be a further meeting and that potentially, at the further meeting, he might be told that his he was being dismissed and if so, the notice period would be to 23 October. He asked if he would need to work that and was told that he could remain on furlough for it.

180. A letter dated 27 of July 2020 was sent to the Claimant and he received it. It accurately reflects what was said at the meeting, including about data accuracy, managerial skills and organisational skills.

181. The claimant's third meeting took place on 29 July. The attendees were the same, and the claimant signed the notes as accurate. It was a fairly short meeting as there were no new developments and it was confirmed to the claimant that the decision was that he was being dismissed with notice. He received a letter dated 3 August 2020, which confirmed that.

182. The claimant appealed. He asked for details of the appeal policy and a copy of the new business model for the department. He also said he previously requested criteria for the matrix form and had not been provided with them.

183. The second respondent was the decision-maker for the appeal. The meeting was on 26 August 2020. It lasted about 20 minutes.

184. The claimant was asked to explain his grounds. He said he disagreed with his matrix scores because the scores for data input, management skills and flexibility were too low. He received two sevens and an eight for those. The second respondent said he thought those scores were reasonably high but that the pool was all of the supervisors in Unit 5, and other people in that pool had also scored highly.

185. There was a discussion with the claimant about whether his skills were transferable to the other departments within Unit 5. This was not something that had been expressly raised with Mr Cullen. The claimant also said that he did not know why Carlos had been picked to stay rather than him.

186. The second respondent expressed the view (consistent with what Mr Cullen had said, though Mr Cullen had not mentioned any specific names) that Carlos appeared to be doing a lot of the management functions for which there was documentation such as inductions and other types of meeting with staff. The claimant disputed this. The second respondent said that he accepted that the claimant could probably do the activities in principle, but the paperwork demonstrated that Carlos had been doing it more often. The Second Respondent expressed the view that staff tended to go to Carlos rather than the claimant when they needed a supervisor. The claimant made the point that even if that was true that it was not the case that he, the claimant was passing work to Carlos. The second respondent said he would look into the point in more detail.

187. There was no mention of any alleged race discrimination either in the Claimant’s appeal letter or in what was said in the meeting.

188. The second respondent agreed to look into the points that had been raised in the meeting. We are satisfied he did so. We do not accept that he informed the claimant within the meeting itself that the appeal had been dismissed.

189. The second respondent asked Mr Cullen for more information to justify the scores and the document at page 226 of the bundle is what Mr Cullen produced. A statement from an employee in the parts department was also produced at and that appears at bundle 227. Both of these items were dated 26 August 2020. That is not implausible, given that the meeting with the claimant finished at 10:30 AM.

190. We accept that the claimant was not been supplied with these documents until a short time before the tribunal hearing, as a result of the Respondent's failures to comply with tribunal orders, but we are satisfied that the documents are genuine and that they were produced on (approximately, at least) the dates stated on them, and that the second respondent took them into account before making his decision on the appeal.

191. The appeal outcome was communicated to the claimant by letter sent by email dated 22 of September. The appeal was rejected. The second respondent commented on the only things that had been raised with him in the meeting. We accept that the letter expresses his genuine opinion on the matters stated. He was satisfied that the scores which Mr Cullen and Mr Wahabi had allocated to the claimant were justified by the evidence.

The Law

192. The burden of proof provisions are codified in s.136 Equality Act 2010 ("EQA") and s.136 is applicable to all of the contraventions of EQA which are alleged in these proceedings.

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

193. It is a two stage approach.

193.1. At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

193.2. At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

193.3. If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

194. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

195. Discrimination because of race, and harassment related to race, are not the types of behaviour that people readily admit to, even in contemporaneous documents. Indeed, the contraventions of EQA can occur without the perpetrator even being consciously aware that their decisions or conduct were influenced by race. Therefore, tribunals must be astute to notice relevant evidence that the contravention did occur, or might have occurred.

196. That being said, the burden of proof does not shift simply because, for example, the claimant proves that there was a difference in race between claimant and a comparator, and a difference in treatment. Nor does it shift simply because, for example, claimant proves that they have been treated less favourably than a comparator. Those things potentially indicate the possibility that there was discrimination or harassment. They are not sufficient in themselves to shift the burden of proof; something more is needed.

197. It does not necessarily have to be a great deal more. Depending on the circumstances, it could - in an appropriate case - be a non-response from a respondent or an evasive or untruthful answer from an important witness.

198. In terms of assessing the burden of proof provisions as per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering any one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Harassment

199. Harassment is defined in s.26 of the Act.

> **26 Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

200. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

201. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which we can infer that the conduct could be so related then the burden of proof shifts.

202. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appel said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a “humiliating environment” when he heard of it some months later is a distortion of language which brings discrimination law into disrepute. When assessing the affects of any one incident of serval alleged harassments then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself but in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Direct Discrimination

203. Direct discrimination is defined in s.13 EQA.

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

204. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

205. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

206. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

Unfair Dismissal

207. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

208. Section 98 ERA states, in part:

> (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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

209. Provided the respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

210. In considering this general reasonableness, taking into account the respondent's size and administrative resources. Typically, the tribunal's analysis includes the question of whether the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, the tribunal decides whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached.

211. In carrying out the analysis, it is important for the tribunal to make sure that it does not substitute its own decisions for those of the employer. In particular, it is not relevant whether the tribunal members would have applied a sanction short of dismissal, or carried out a further stage of investigation, etc, so long as the employer's decisions were not outside the band of reasonable responses.

Redundancy

212. Section 139 ERA states in part

(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.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

213. As regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunal must remember that it is guidance, and does not replace the wording of section 98(4). where Browne-Wilkinson J

213.1. The employer should 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, either with the Respondent, with an associated employer, or elsewhere.

213.2. The employer should consult (usually with representatives) 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 should seek to agree the selection criteria with the representatives, and be willing to continue to engage about the processes for applying those selection criteria

213.3. The employer should 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.

213.4. The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations as to errors or unfairness in the selection.

213.5. The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

214. In Elkouil v Coney Island Ltd [2002] IRLR 174 at [14]:

> The warning, the giving notice of risk, that is spoken of there is an essential prerequisite of the consultation process, because without it the representatives of the employee will not be able to formulate a strategy or consider what suggestions they can put to the employer. In this case it is true that a single person was being made redundant and no union was involved, but the principles are exactly the same.

215. The nature of fair consultation was considered in R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [1994] IRLR 72 at [24]:

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
>
> *Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation*.

216. In Compair Maxam, it was emphasised that

> The purpose of having, so far as possible, objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for quite other reasons, e.g. for union activities or by reason of personal dislike.

217. In Teixeira v Zaika Restaurant Limited Neutral Citation Number: [2022] EAT 171, the EAT pointed out that it was established by Capita Hartshead Ltd v Byard [2012] ICR 1256 that the tribunal must not substitute its own views, for that of the employer, on the issue of the appropriate pool from which the employee to be dismissed might be selected. That applies even if the pool consists of just a very small number.

218. When deciding on whether the dismissal was fair or unfair, the tribunal's analysis might include, as well as the size and resources of the employer; whether it has relevant policies and procedures, and if so have they been followed; has it followed the same method and processes as in previous similar exercises, and, if not, was there a reason for acting differently this time; was there an urgent need to act quickly to save the business. There is no single uniform process for redundancies that must

be followed by every single employer. It is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant.

Analysis and Conclusions

219. The analysis is as follows. For each of the three cases, the claimant conceded that the dismissal reason was redundancy. They each challenge the fairness of the decisions to dismiss them, as well as the fairness of process leading up to the decisions, and allege there were contraventions of EQA.

220. In relation to each of the claimants, we are satisfied that there was no predetermined plan to get rid of any of them at all for any reason. It follows that we are satisfied that there was no predetermined plan to get rid of them because of their race. That, of course, does not eliminate the possibility that race played an unconscious part in the decision making. Some of the scoring was subjective and had to be performed by the managers. Unlike the HR scores for reliability, for which there was a preplanned system of allocating particular marks based on number of times late, duration of lateness, etc, the managerial scores had no predetermined written marking system. Across the whole of the company different managers may have applied different criteria and/or may have had different things in mind for what would be for example, a "5" or an "8" and so on. The significance of this is lessened by the fact that individuals were not competing with everybody in the company but only within their own smaller groups.

221. In terms of the groups which led to the employee representatives being selected to represent certain categories, to some extent this was done prior to consultation, as was inevitable, because the first respondent had to make decisions about how many employee representatives would have to be selected and for which groups of affected employees. These initial groups, of which there were about 27, appear to us to have been rational and sensible. In any event, once the collective consultation was underway, there was the opportunity for the employee representatives to argue for different groups. Nothing was preplanned or inevitable at this stage, and the collective consultation shows that changes were made, sometimes reducing the number of employees at risk because of, for example, resignations or other developments. The situation was highly fluid at the time, and the groups were given feedback about how the sales performance was materialising during June.

222. We are satisfied that this exercise was done with the genuine intention of listening to points that were made and to consider suggestions that were made which might help the business to survive and/or which might potentially reduce the numbers of required redundancies. The minutes of the collective meetings reflect that a fairly large number of questions were asked during the meetings and the notes reflect that sensible and thoughtful answers were given at the time. Two of the claimants had a direct opportunity to raise any points that they wished to raise during those meetings.

The other claimant had the indirect opportunity to raise via his representative anything that he wanted to raise. Both Mr Buckley and Mr Williams did not have any questions to ask for which they had not already received an answer. Mr Warsama appears to have asked around three questions during the meetings and in each case he was given an answer.

223. Mr Williams knew that it had been decided that within the Unit 5 group the supervisors and non-supervisors would be treated separately. If he had any objections to that or queries about it, he had the opportunity to raise it then. This would include, for example, any suggestion that he or any other supervisor should be given the opportunity to bump the non-supervisors in the event that they were not amongst the highest scoring supervisors in the scoring matrix. That is, he did not suggest in the collective consultation that a supervisor identified for redundancy should, instead of being dismissed, move into one of the filled non-supervisor roles and that one (more) of the non-supervisors be made redundant to create a vacancy for that to happen.

224. Although the notes of the collective consultation do not seem to make it as clear (in comparison to the clarity regarding Unit 5) that it had been decided the paint shop would be dealt with in a similar way (ie that managers and non-managers would be treated separately), we are satisfied that Mr Warsama understood that. In any event, he also had the opportunity to suggest that managers would be given the opportunity to bump nonmanagers, should the need arise.

225. None of the claimants specifically suggested that “bumping” be used during the consultation. In any event, we accept that the Respondent had sound reasons not to adopt it, namely that the existence of the business was under threat, and where they already had employees in particular jobs, and working efficiently, the priority was to use those resources to generate income as quickly as possible to help the survival of the business and to save the remaining jobs. The employer’s assessment was that it could not spare the time and resources to transfer employees from posts that were under threat to posts that were already filled. It is not the panel’s role to substitute our decision on this point for the Respondent’s.

226. For all three claimants, during the individual consultation they were not given copies of the scores of the other employees. They did not, therefore, have the chance to comment specifically on other scores. This is consistent with what had been expressly stated during the collective consultation.

227. They did each however, have their own scores and they had the opportunity to argue for why they should be given a better score in any given category. Their own scores were the subject of meaningful consultation. Although none of the scores were changed by Mr Cullen or Mr Gomes during the initial meetings, or by Mr Obhari on appeal, the employees’ arguments were listened to, and they were given reasons that the Respondent stood by the scores that had been allocated.

228. Dealing now with each claimant.

Mr Buckley

229. In relation to the first claimant, Mr Buckley, there is no indication in the collective consultation meeting notes that it was expressly stated at that stage that windscreen fitters would be in a pool by themselves. There was, therefore, no specificity that there would be two people in that pool. Likewise, it not expressly stated the trainee windscreen fitters would be in a pool of two people by themselves, and not combined in a pool with the windscreen fitters.

230. However, we are satisfied that during the individual consultation meetings, the claimant had every opportunity to ask for more information, if he needed/wanted more information about who else was in the pool with him.

231. It might not have been until the appeal meeting that he was expressly told that it was just a pool of 2, namely him and Gino. However, we are satisfied that during the collective consultation the Respondent had given the employee representatives the opportunity to raise any specific queries about how the pooling would be done from within the groups.

232. We are also satisfied that the respondent's approach to these two pools for windows windscreen fitters and trainee windscreen fitters respectively was a rational one. It had decided that it needed to make around 20% reduction in staff and it knew that those redundancies had to be found somewhere. As part of that process, the respondent had decided that it could make do with only one windscreen fitter rather than two going forwards and that led in turn to a decision that either the claimant would be a person selected for redundancy or Gino would be a person selected. It could potentially have been either of them. However, the claimant's reliability led to the decision that his score was lower and that he would, therefore, be the one selected, and Gino would be retained.

233. Had the claimant wished to raise issues at the time that there were good reasons for his non-attendance at work (eg that it was disability-related and/or industrial injury related reasons) and that any of his absence should have been disregarded or treated differently, he had the opportunity to raise that either during the three consultation meetings, or at the appeal, but he did not do so.

234. In terms of the decision not to bump one of the drivers and allocate a driving post to him, the respondent had rational reasons for not doing it. Mr Cullen did not think it was appropriate in all the circumstances. Had the claimant wished to pursue it further with the general manager during the appeal, he could have done so, but he did not.

235. For these reasons we are satisfied that the claimant's dismissal was fair in that there was adequate consultation. Our specific answers to the questions in the list of issues are:

235.1. Re 16.3.1 respondent did carry out meaningful consultation.

235.2. Re 16.3.2, it did adopt a fair selection process.

235.3. Re 16.3.3, it did consider whether there was suitable alternative employment. It made the claimant aware of which roles were available and he did not apply.

235.4. Re 16.3.4, section 188 of the 1992 act is not directly in issue in the proceedings. It is nonetheless correct that, as per the Compair Maxam guidance, there was adequate collective redundancy consultation.

235.5. Re 16.3.5, the selection of the claimant for redundancy was not an unreasonable selection in all of the circumstances. It was a decision that was open to a reasonable employer in the situation in which Car Giant found itself in June to October 2020, even taking account of the existence of CJRS. The Claimant had an appeal which was dealt with fairly. The process followed as a whole, including the collective consultation, the decisions about which method would be used for individual consultation, the decisions to provisionally select for redundancy prior to the individual consultation meetings, and the appeal, the First Respondent acted within the bands of reasonableness for an employer of its size and resources.

236. In terms of the EQA allegations, our decision is that – for each one of the claimants – Allegation 16.4.1 fails on the facts for both harassment and direct discrimination. It is not true that any of the claimants were selected for redundancy in May 2020 and it is not true that any of the claimants were selected in the absence of a selection matrix.

237. For each claimant, for Allegation 16.4.2, it is our decision that the respondent did, in fact, follow the selection matrix. On a conscious level, at least, each of the First and Second Respondents intended the collective and individual consultation to be fair and adequate, and that the process not because of, or connected to, race. For each claimant, whether there was any unconscious bias in the exercise forms part of our analysis of Allegation 16.4.3 (dismissal).

238. For the first claimant, Mr Buckley, in terms of Allegation 16.4.3, it is true that the respondent dismissed the claimant and it is true that it was unwanted conduct. However, no facts have been proven from which we could decide that it was related to the claimant's race. On the contrary, we are satisfied it was not related to his race.

239. In terms of the direct discrimination allegations, it is our decision that Jose is not an actual comparator. We have considered section 23 EQA and there are material

differences between the claimant's situation and Jose's, namely that Jose was a trainee and the claimant was not. Gino is an actual comparator.

240. The reason why Jose was not dismissed was that Jose was a trainee and the respondent believed that it should retain the trainees because, amongst other things, they were flexible and they could carry out other duties, apart from windscreen fitting. That was an important asset given the overall reduction in staff numbers.

241. The Claimant suggests that the trainees might have been kept on because they were cheaper than him. The Claimant argues that the (alleged) fact that Jose had friends and family high up in the company meant that Jose was safe. Even if those suggestions are true, that does not assist the Claimant's direct discrimination claim.

242. The reason Gino was retained (and the claimant was dismissed) is that the respondent had decided that it would keep one out of two windscreen fitters and that Gino scored better in the selection matrix.

243. There are no facts from which we could conclude that the decision to dismiss the claimant was because of race or that a hypothetical comparator whose circumstances were exactly the same as the claimant's but who was not white Irish (i) would have scored higher and/or (ii) would not have been dismissed.

Mr Warsama

244. In relation to Mr Warsama, the second claimant, the points which he raised during his consultation meetings were addressed. On the assumption that he did (as he alleges) ask whether he had been selected because of previous complaints about race discrimination, the respondent informed him that he his selection had been based on the scoring matrix and the scoring matrix only.

245. It is true there was a significant delay in letting the Claimant have his own Fusion records, and in fact, he did not get them until after the meeting at which he had been informed he was dismissed on 30 July 2020. However, the Fusion records did not in any event, support any suggestion that the respondent had made mistakes due to not properly re-categorising incorrectly recorded "lateness" as "mis-swipe", or counting mis-swipes as lateness when scoring reliability.

246. We are satisfied that the evidence of his absences in the period of 12 months up to the start of the pandemic, or else up to the end of February, matched the information that was taken into account by HR when coming up with his reliability score.

247. In terms of his not being provided with details of other people's attendance records, it was reasonable for the respondent to decline to provide that, because of confidentiality and/or data protection reasons. However, the panel has seen that the information that was given to HR. It appears to have been applied by HR rationally and consistently. It does not seem that the claimant was mistaken about Stewart's

attendance or that he was misled about it either. Rather, the respondent made a decision (which we are satisfied was applied for the whole company, for employees in every pool, group or department) about how to treat various different types of absence for scoring purposes. There was nothing irrational about the claimant's suggestion that his sickness absence was fully justified and fully certified and fairly brief, and that it should not have been such that it caused him to receive a low score for reliability. That being said, there was also nothing irrational about the respondent's approach to the reliability score. The attendance and lateness records for everyone in his pool were reasonably good. The Claimant's score across the whole matrix was fairly high, but that was the case for Stewart as well.

248. During the tribunal hearing, there are some gaps/inconsistencies in the respondent's explanation for specifically what happened in relation to VBM and Marek and the information given to the claimant about valet bay. As we said in the findings of fact, although we find that Mr Gomes was a truthful witness, we do think that his recollection is incorrect. It was incorrect for understandable reasons, and we do not find that the inaccuracies in his witness testimony were suspicious.

249. During the appeal meeting, the general manager said that there had just been a pool of two, and so there was a straight choice between the claimant and Stewart. The documents the respondent has produced imply that Marek was in the same pool prior to the decisions about which voluntary redundancies would be approved, and who would be provisionally selected for redundancy, and invited to individual consultation meetings. Marek did score higher than the Claimant, but the respondent has not suggested that the reason Marek started the valet day role was because he scored higher than the claimant in the pool.

250. The claimant was not given details prior to 10 July that Marek was potentially moving to the assistant role in valet bay on a trial basis. We are satisfied that it was on a trial basis and also satisfied that the claimant became aware of that (albeit it was Marek who told him not the respondent). The claimant had this information prior to his 17 July meeting and prior to his appeal. He had the opportunity, if he wished to do so, to make a written assertion that he rather than Marek should be offered the trial as assistant manager in valet bay. During the appeal, as well as in the second and third consultation meetings, he had the opportunity to raise any points he wanted to raise. He did not express any interest in any of the roles that were mentioned in the minutes and nor did he suggest that there was a reason to take the role from Marek and give it to him or else allow him and Marek to compete for it or share it.

251. In all the circumstances, therefore, although the lack of clarity over that valet bay role is a defect in the procedure, it is not such a serious defect as to take the matter outside the band of reasonable responses.

252. In relation to the list of issues on page 126 of the bundle for the unfair dismissal, our answers to the questions at paragraph 16.3 are as follows. We are satisfied the

respondent carried out a meaningful consultation and that it adopted a fair selection process and that it considered alternative employment and that it carried out a reasonable collective consultation and that the process as a whole, including the appeal process was within the band of reasonable responses.

253. For all three claimants, Allegation 16.4.1 fails on the facts.

254. In relation to the Allegation 16.4.2, we are satisfied that the respondent did follow the selection matrix for the second claimant and it did so fairly and accurately.

255. For the harassment allegation 16.4.3, the First Respondent did dismiss the claimant (the Second Respondent did reject his appeal). The dismissal was unwanted conduct. There are no facts from which we could conclude that the decision to dismiss Mr Warsama, including the decision to refuse his appeal was related to race.

256. In terms of direct discrimination, the list of issues contained four proposed actual comparators. During closing submissions, it was confirmed that the Claimant was no longer seeking to rely on Sergio Gomes as an actual comparator. The remaining three were Marek, Stewart and Marcio Soares.

257. Our decision is that Marcio Soares is not an actual comparator because he worked in a different area; he was the production manager for the smart repairs department. The respondent conducted a scoring exercise which included several people with job titles at smart repairer or trainee smart repairer from the paint shop early shift. It also included a controller Leszek and smart repairer/team leader Stephan in a group of two, for which there was a scoring exercise done. It did not, however, include the production manager for smart repairs within a pool of employees at risk.

258. We accept the general manager's explanation that smart repairs was regarded as a stand-alone process. There were vacancies within that area that were mentioned during the individual consultation. The respondent made a decision that it was not going to place the production manager for that area at risk of redundancy.

259. The claimant had the opportunity, if he had wished to do so, to make his case during individual consultation stage for why he should be offered that role, or at least why Marcio should have been placed in the redundancy pool as well.

260. We do not have matrix scores for Marcio and so it is not known whether or not the Claimant would have outscored him. However, in any event, we do accept that the respondent took a rational approach. There are no facts from which we could conclude that the decision not to place Marcio in the redundancy pool (or not to bump him, and place the Claimant in his post) was because of race.

261. Of the other comparators, Stewart's and the Claimant's roles were similar enough to potentially be a valid comparator. The reason that the claimant was selected for redundancy rather than Stewart was because of the selection scores. There are no

facts from which we could conclude that the selection scoring was influenced (whether consciously or unconsciously) by race. There are not facts from which we could conclude that the decision to dismiss the lower scorer (as between the Claimant and Stewart) was because of race.

262. Marek appears to have been placed in the same selection pool as the claimant (at least at the stage at which the document on page 285 was produced). That makes him a potential actual comparator, notwithstanding the fact that his job title was trainee production manager, rather than production manager.

263. There was a difference in treatment between Marek and the claimant which we have discussed extensively above. Although it was not a separate discrimination or harassment complaint, during cross-examination of the Respondent's witnesses, the decision to bring Marek (and not the Claimant) back from furlough in June was challenged. It may well be true that the Claimant could have carried out the estimator activities that Marek was tasked with, but that would not be sufficient for us to conclude that the reason that Marek was chosen to come back from furlough was race. What is potentially more important is the fact that the claimant did not go to valet bay in July and Marek did. In due course, albeit quite a long time afterwards. This led to Marek becoming Valet Bay Manager. We were satisfied, on the facts that the role which Marek went into in July 2020 was more junior than the claimant's role as production manager, paint shop late; it was not VBM at that time.

264. Given that the claimant was at risk of redundancy, it would have been better practice for the respondent to have expressly and in writing formally made the claimant aware of the possible opening in valet bay. To repeat, rather than arguing that Marek was allocated that role because of the scoring in the selection matrix, both Mr Gomes and the second respondent have been adamant that they would have been keen for the claimant to take that role and that he could have had it (or a trial for it at least, in competition with Marek, perhaps) but the Claimant declined that.

265. However, notwithstanding the failure to formally set out the position in writing, we are satisfied that Mr Gomes genuinely formed the opinion (whether rightly or wrongly), that the claimant was not interested in the role. As we discussed for the unfair dismissal complaint, even if Mr Gomes was wrong, the Claimant had the opportunity to raise the argument during the appeal stage (that he could take a junior management role in valet bay, instead of Marek) and did not do so. There are no facts from which we could conclude that Marek went to valet bay (rather than being dismissed) and that the Claimant did not go to valet bay (with Marek being dismissed instead of Mr Warsama) was because of race.

Mr Williams

266. In relation to the third claimant, he challenged the matrix scores and was given a detailed explanation for his own score.

267. After he had used the word discrimination during the first consultation meeting, the respondent did not formally go down a separate grievance procedure. That is an option that would have been open to them. However, the respondent had a break in the meeting and after the break asked the claimant to explain his use of the word in more detail. He made no specific reference to race or colour. He expressed the view that, because of his length of service and experience, he should not have been one of the four Unit 5 supervisors (out of eight) who were the lowest scoring. In those circumstances, it was not outside the band of reasonable responses for the Respondent to continue to address matters via the individual consultation process; it was not an unfair procedure to omit to put things on pause while there was a separate grievance procedure.

268. During that meeting, and subsequent meetings, the employer did seek to discuss further with him what the scoring had been and why. He was given some detailed feedback at the second consultation meeting, in particular. Furthermore, after the appeal hearing, the second respondent investigated further, before deciding to reject the appeal on the basis that he was satisfied that the scoring had been fair.

269. Answering the questions in paragraph 16.3 of the list of issues: the respondent did carry out meaningful consultation; it did adopt a fair selection process; it did let the claimant know about what alternative employment was theoretically available. There was a reasonable collective redundancy consultation exercise. The decision to dismiss four out of the eight supervisors was not unreasonable and nor was the decision, based on the scoring, that the claimant to be one of those four were dismissed.

270. In relation to the alleged EQA contraventions based on Allegation 16.4.2, the claimant was chosen after the respondent had followed the selection matrix.

271. The claimant was dismissed, and it was unwanted conduct that he was dismissed. However, there are no facts from which we could conclude that the decision was related to race.

272. In relation to direct discrimination, the four comparators mentioned by the claimant are the four supervisors who were retained rather than dismissed.

273. They are potentially valid actual comparators in the circumstances, in the sense that their role was the same as the claimants. A relevant difference between them and the claimant was the scoring outcomes. There are no facts from which we could conclude that the claimant would have been scored differently if his race was different, or if the race of any of the comparators had been different.

274. The reason the Claimant was dismissed was because he was one of the four lowest scorers out of the eight, according to the selection matrix.

Conclusion

275. For these reasons, all of the complaints by all of the claimants against each respondent failed.

Employment Judge Quill

Date: 21 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....15 September 2023.....

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FOR EMPLOYMENT TRIBUNALS