Neutral Citation Number: [2023] EAT 129

Case No: EA-2021-000794-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 November 2023

Before:

HIS HONOUR JUDGE BEARD
CHARLES EDWARD LORD OBE
MRS ELIZABETH WILLIAMS

- -

Between:

JOSEPH DE BANK HAYCOCKS **Appellant**

- and -

ADP RPO UK LTD **Respondent**

- -
- -

Mr Horan (instructed under the Direct Access scheme) for the **Appellant**
Ms Ashiru (instructed by Bingham Mansfield) for the **Respondent**

Hearing date: 20 September 2023

- -

JUDGMENT

SUMMARY

Unfair Dismissal & Redundancy

The ET had overlooked aspects of the issue of consultation in its deliberations. It is for the ET to conclude whether the decision to dismiss for redundancy is reasonable within the meaning of Section 98(4) ERA 1996. However, in doing so an ET has available to it guidance as to general principles provided in various appellate decisions. The ET is entitled to depart from that guidance where a decision to dismiss is reasonable but should, in those circumstances, provide its explanation as to why the decision was reasonable despite the general principles. An important general principle is that consultation in a redundancy situation should take place at a formative stage where an employee or representative is given adequate information and time to respond and where genuine consideration is given to the response. In this case consultation took place much later than the formative stage and the ET erred in concluding that the consultation was reasonable in the absence of an explanation why the general approach did not apply. The appeal did not correct the failure to meaningfully consult at the formative stage and the dismissal was unfair.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. We begin by indicating that this is a unanimous decision. We should also make it clear that the lay members of this panel have been of particular assistance to the judicial member. Their experience of modern good industrial relations practice has particularly informed the conclusions reached. The guidance as to the approach to be taken to redundancy situations set out below reflects that experience.

2. This is an appeal arising out of the judgment of Employment Judge Goodman sitting alone following a two-day hearing in July 2021. We shall refer to the Parties as they were below, as Claimant and Respondent. Mr Horan represents the Claimant; he did not appear at the Employment Tribunal ("ET") hearing. Ms Ashiru represents the Respondent; she was Counsel for the Respondent at the ET hearing.

3. At the outset of the hearing Mr Horan for the Claimant indicated that of the three grounds of appeal with permission only one ground was pursued; that there had been a failure to consult properly. The claim before the ET challenged multiple aspects of the Respondent's dismissal of the Claimant; however, the one remaining ground of appeal is summed up by Mr Horan in his skeleton argument as follows: the consultation exercise was not a fair consultation exercise; the Claimant had raised consultation as a central issue before the ET; there was, effectively, a decision to dismiss three weeks before commencement of consultation; and the ET had not considered the consultation issue adequately or at all.

FACTS FOUND BY THE EMPLOYMENT TRIBUNAL

4. The Respondent is a UK subsidiary of a United States company which also operates subsidiaries in other countries. During the relevant period the Respondent employed 50-60

people, although another UK subsidiary (which provided HR support to the Respondent) employed approximately 900 people. The claimant was amongst 16 people in the UK employed to recruit employees for a single client company: Goldman Sachs. In March 2020 the coronavirus pandemic reached the UK and demand for new employees to be recruited for the client diminished to estimated 50% of that beforehand. At the end of May 2020, the decision was taken to reduce the recruitment workforce.

5. At the beginning of June the UK manager was given a standard matrix of criteria from the US parent company to be used to mark for selection (see paragraph 26 ET Judgment). She was asked to assess and mark her team members using the criteria. The 16 person team were scored 1 to 4 on each of 17 entirely subjective criteria, the Claimant coming last in the rankings. The scoring undertaken by the manager was in good faith and was not affected by any conscious bias. The Claimant was not able to demonstrate that he should have scored higher. The ET makes a finding that the scoring took place at the beginning of June 2020 before the later decision on 18 June (para 26) on how many employees would be made redundant. Insofar as the planned reduction affected the Claimant's cohort of employees this would mean a reduction from 16 to 14, a loss of two roles.

6. On 19 June 2020 the Respondent set a timetable for the redundancy process. The initial consultation meeting was to be held on 30 June 2020. This was to be followed by a consultation period of 14 days, with those leaving being informed at a meeting on 14 July.

7. The Respondent called the Claimant to a meeting on 30 June 2020 and he was told there was a requirement for redundancies. It was explained that the purpose of the meeting was to inform him of the situation. The Claimant was also told that he could ask questions and could suggest alternative approaches to the reduction in demand. The Claimant was invited to a further

meeting on 8 July 2020. A final meeting was held on 14 July 2020 where the Claimant was handed a letter of dismissal. In these meetings the Claimant was unaware of what scores he had achieved and was not given the scores of the other 15 as a comparison.

8. During the course of the consultation process a volunteer from the Goldman Sachs team came forward. As a result only the Claimant was the subject of a compulsory redundancy dismissal.

9. The Claimant appealed against the dismissal, asserting his belief that he had been scored too low. He complained that the dismissal was procedurally unfair, with the criteria used being entirely subjective. He complained he had not been given information about the scores in order to challenge the scoring. An appeal meeting was held on 10 August 2020. Although the Claimant did have his scores by the time of the Appeal meeting, the Claimant was never shown the comparative scores of his colleagues.

EMPLOYMENT TRIBUNAL CONCLUSIONS

10. The ET accepted that the Claimant knew nothing about his scores until after dismissal but concluded that the appeal process was carried out conscientiously. This involved an investigation of the issue the Claimant had raised about his manager's knowledge and ability to carry out the scoring. The ET found that, despite knowing the identity of the others on the list, the Claimant had not demonstrated to the ET that his score should have resulted in a higher ranking. In terms of the issue of consultation, the ET does not deal with this directly. However, it is fair to say that as part of the conclusions that the ET considers, its findings are that the Claimant's criticisms of both the selection criteria and the pool chosen by the Respondent have not been borne out.

SUBMISSIONS

11. Mr Horan referred us to paragraphs 52 to 57 of the ET judgment contending that there is no discussion about the formative stage of the process of redundancy. He argued that the ET considered that the scores of other candidates were relevant as it took account of them in its conclusions, but it did not deal with the issue of consultation on the scores and the criteria that underpinned them. The absence of consultation at a stage where real change could be considered by the employer meant that possibilities of a different outcome were missing. He stated that the broad concept of consultation meant that there could be wide speculation as to what differences there might have been if consultation took place at an early stage; it was not only the potential for an impact on the criteria or scoring. He even suggested that this could be to the point of abandoning the need for redundancies (this followed a discussion with the bench about the consultation with JCB workers who took a pay cut to avoid redundancies). He makes the point that there is nothing within the factual findings or the conclusions of the ET that explains why there was an absence of that early consultation but finds that, nonetheless, there was reasonable and a fair consultation in the circumstances. He contended that there was no meaningful consultation because by the time the Claimant was engaged all the meaningful decisions had been made, even the marking, and were, effectively, set in stone. The consultation was not real or transparent in his submission.

12. Ms Ashiru reminded us that the test was that set out in s. 98(4) ERA 1996. She also made the point that redundancy is a particularly difficult area of unfair dismissal claims because it involves choices being made between employees who are otherwise satisfactory. She argued that there was no challenge to the good faith of the manager who carried out the scoring as could be seen in paragraph 52 of the ET judgment. She argued that the ET was required to consider processes overall and the selection criteria used and scoring is only part of the process. She referred to **Mugford** (below) and argued that the absence of consultation at one stage is not important if, looked at in the round, the overall process was choosing fairly

between employees and that consultation should not be raised to a pre-requirement of fairness. She pointed to the fact that there had been three meetings where the Claimant had the opportunity to respond (whilst accepting that the last meeting was pre-prepared for dismissal if nothing was raised). She contended that the appeal had corrected any error in not providing scores and that overall corrected any failings in the consultation. The timing of the scoring should not affect the fairness of the dismissal as it did not matter. She argued that the employer was not obliged to disclose scores during the process. She further argued that, even if the process was found to be unfair, the findings the judge made are fatal to the claim on a **Polkey** basis and "therefore" we should find a 100% chance of dismissal in any event and it would not be proportionate to have a fresh hearing.

THE LAW

13. Section 98(4) of **The Employment Rights Act** 1996 provides:

> ***"98***
> ***…***
> ***(4) Where the employer has fulfilled the requirements of subsection (1) [in this case, redundancy], 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."***

14. We were referred to a number of authorities beginning with **British Coal Corporation Secretary of State for Industry ex parte Price & Others** dealing with the issue of what the requirements of a reasonable consultation would entail per Glidewell LJ:

> **"*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 p19, 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*.'**

Glidewell LJ continued:

> "***Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consulter thereafter considering those views properly and genuinely***."

15. In **British Aerospace PLC v Green & Ors.** [1995] IRLR 433 the issue of examining the scores of other employees was raised. The case involved a redundancy situation where 530 employees were to be made redundant out of a workforce of 7000 and 235 brought claims of unfair dismissal. The employer disclosed the applicants' scores and assessment notes. The applicants sought an order for the employer to provide copies of the scores and assessments for all those who had not been dismissed. Waite LJ having set out the relevant facts said this:

> ***"The use of a marking system of the kind that was adopted in this case has become a well-recognised aid to any fair process of redundancy selection. By itself, of course, it does not render any selection automatically fair; every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinised officiously."***

He goes on to indicate that there were policy reasons for not allowing such levels of disclosure which would cause protracted proceedings before the Industrial Tribunal (as it was then). This was qualified to an extent by indicating that the rules at that time allowed a claimant to avoid the strictures of formal pleadings and informally express its case. He specifically refers to the then practice of the progressive raising of issues and that disclosure can be considered as and when an issue is raised. It can be seen that the ratio of this case is in respect of discovery of documents before the ET, it is not an authority which supports a proposition that the failure to give comparative scores during the course of a redundancy process will always be fair. The case deals with the issue of relevance and the relationship between issues raised and their relationship to the material sought. However, in **Camelot Group Plc v Hogg** [2011] UKEAT 19/10/BI Lady Smith appears to indicate that a failure to provide information on scores requested by an employee will not lead to unfairness. However, a more careful analysis of the Judgment is that although a dismissal will not automatically be fair, it is the context of the

circumstances in which information is or is not provided that is of importance and that the ET has to "*stand back and ask whether, overall, there was a fair redundancy process*".

16. In **Mugford v Midland Bank** [1997] IRLR 208 consultation had taken place with a union but not individually with the employee. The EAT reviewed the authorities on consultation and set out that these established three principles: in the absence of consultation with either a trade union or an employee the dismissal will normally be unfair, unless a reasonable employer would have concluded that consultation would be an utterly futile exercise in the circumstances; consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy; it will be a question of fact and degree for whether consultation was so inadequate as to render the dismissal unfair and a lack of consultation in any particular respect will not automatically lead to that result. The case also indicates that the appeal tribunal should not elevate individual consultation prior to dismissal as a pre-requirement for a fair dismissal.

17. In **Lloyd v Taylor Woodrow Construction** [1999] IRLR the EAT found that there was no distinction between a failure in consultation in redundancy dismissals and conduct/capability dismissals as to whether an appeal could correct an earlier stage of a process which would otherwise be unfair. However, that conclusion was based upon the concept of a rehearing being necessary. The decision in **Taylor v OCS** [2006] IRLR 613 in the Court of Appeal made the position clearer indicating that it was not necessary for there to be a rehearing but for an ET to "*consider the fairness of the whole of the disciplinary process*" with Smith LJ going on to say:

> ***In saying this, it may appear that we are suggesting that ET's should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.***

18. We were also referred to **Mental Health Care (UK) Ltd v Biluan & Anor** [2012] UKEAT 0248_12_2802. Giving the Judgment of the EAT Underhill P (as he then was) made the following points about the issue of consultation which were part of the grounds of appeal and were approved by the tribunal (albeit that the appeal was dismissed for other reasons). The ET in that case had held:

> **"There was a total lack of proper consultation within the meaning set out by Lord Justice Glidewell in *R v British Coal Corporation* that:**
>
> ***"Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond (c) adequate timing in which to respond (d) conscientious consideration by an authority of a response to consultation.*"**
>
> **There was no such consultation in this case. There was no consultation as to the criteria to be used. There was no consultation with the claimants as to how it might be possible to avoid these redundancies. The claimants were never given their scores so that there was no discussion with them as to their accuracy or fairness or otherwise. There was in fact no meaningful individual consultation at all. The "consultation" that the respondents relied on were meetings of the whole workforce where management told the workforce what was happening. There was no trade union representation nor any individual representatives as far as the workforce was concerned in this case."**

The EAT, on that issue, set out the submissions of Counsel for the Appellant criticising the decision as: there was no consultation about selection criteria, but that was not necessary in a case where there was no consultation at a collective level; there was no consultation about whether there were any alternatives, but that too was not necessary in the circumstances; employees were not told their individual scores, but that was not fatal to the fairness of the process; there was individual consultation because employees selected for redundancy were offered consultation about the possibility of alternative employment. There were other criticisms which are not relevant to the facts of this case. The EAT Judgment on this reads as follows:

> ***Mr McCracken's points are well-founded. It is inevitable that the character of the consultation that is reasonable and appropriate may differ to some extent in cases where there is collective consultation with a trade union or other representatives and in cases where there is not. The scope for useful consultation on such issues as avoiding the redundancy situation altogether or the choice of selection criteria may well be less in the latter case; the focus for individual consultation will normally be on the circumstances involving the individual's particular case, and in particular – though not necessarily only – the chances of alternative employment.***

> ***It seems to us that the Tribunal took no real account of this.***

19. Mr Horan referred us to the recent decision of this tribunal in **Mogane v Bradford Teaching Hospitals NHS Foundation Trust & Anr.** [2022] EAT 139; [2023] IRLR 44. The facts of that case involved selection from a pool of one. In that case on the issue of consultation, reference was made to the continuing relevance of **Williams v Compair Maxam Ltd** [1982] ICR 156 and the five principles which have been applied to collective redundancies, which in terms of consultation are: as much warning as possible of impending redundancies and consultation with unions on selection. There is further an indication of the conclusions of the House of Lords in **Polkey v A E Dayton Services Ltd** [1988] 1 ICR 142, and the speech of Lord Bridge:

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

Also, **Freud v Bentalls Ltd** [1982] IRLR 443 was considered in which an individual rather than collective redundancy was involved and which held that good industrial relations practice requires consultation with the employee to consider:

> ***"Whether the needs of the business can be met in some way other than by dismissal and, if not, what other steps the employer can take to ameliorate the blow to the employee."***

The conclusions in that case were that consultation was an essential element of reasonableness in the decision to dismiss in redundancy cases. In addition, it was held that the guidance in **Compair Maxam** was, with appropriate adaptation, applicable to redundancies which did not involve the kind of collective consultation required in large scale redundancies and that consultation should take place at a time when it can make a difference to outcomes.

20. There is some tension between the decision in **Mogane** and that in **Biluan**. It appears in the latter that it was considered that in the absence of trade union or other representatives, consultation would be less likely to impact on avoiding redundancies or the choice of selection criteria. The decision appears to have been made without the tribunal being referred to **Freud** (above). With due respect to a judgment given by such an eminent judge sitting with very experienced members, we consider that this overstates matters. It may be, factually, that in the particular circumstances there would be difficulty in an individual influencing such matters. As a general proposition, however, we prefer the conclusion in **Mogane** that early consultation with the representative or the employee is necessary to fairness, unless it is explained why it would be futile or that, in the particular circumstances, it does not make the process unfair. That, in our judgment, fits in with the tenor of the guidance that arises from the various authorities.

21. What emerges from the above authorities is that the statute is always the keystone to ET decision making. That being the keystone, the guidance provided by various authorities in respect of specific circumstances is just that, guidance; it does not create a stricture on ET decision making. If, despite the guidance, the process adopted by the employer falls within the band of reasonableness an ET must find so. However, the purpose of guidance from the appeal courts is to inform the question of reasonableness and if the guidance does not apply, ETs would be expected to explain why it did not in the particular case.

22. The authorities set out the following guiding principles:

    a. The employer will normally warn and consult either the employees affected or their representative; **Polkey.**

    b. A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious

consideration being given to the response; **British Coal.**

c. Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact; **Freud.**

d. A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable; **Lloyd v Taylor Woodrow.**

e. The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss; **Taylor v OCS.**

f. It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; **Mugford.**

g. Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process; **Camelot.**

h. The use of a scoring system does not make a process fair automatically; **British Aerospace.**

i. The relevance or otherwise of individual scores will relate to the specific complaints raised in the case; **British Aerospace.**

DISCUSSION AND CONCLUSIONS

23. Starting with **Compair Maxam** the theme surrounding reasonableness in redundancy situations is that it reflects what is considered to be good industrial relations practice; that employers acting within the band of reasonableness follow good industrial relations practice. The substance of what amounts to good practice will vary widely depending on the type of employment, workforce and the specific circumstances giving rise to the redundancy situation. However, there are certain key elements which seem to appear. First amongst those is that a reasonable employer will seek to minimise the impact of a redundancy situation by limiting numbers, mitigating the effect on individuals or avoiding dismissal by engaging in

consultation. At one time consultation, certainly in the cases above, tended to relate to methods of selection. However, in more recent years it has been noted that consultation could result in a broader range of outcomes. (During the hearing the JCB workforce taking a pay cut to avoid redundancies was discussed as an example).

24. We have recognised that the nature of employment has changed radically since the 1980's when some of the leading cases were decided. It was worth, in this judgment, considering any impact on what could be considered good industrial relations practice arising out of changes affecting employment. Two matters, we consider, are of particular significance: the first is the reduction of trade union membership (outside the public sector) in the workplace[1] and the second is the growth in employment where there is an international element in the corporate structure.

25. The impact of the first element may be obvious; many more redundancy situations will arise in circumstances where there is no recognised representation for employees than would have been the case in the 1980's. This is catered for, in terms of large-scale redundancies, by the requirements of the Trade Union and Labour Relations (Consolidation) Act 1992. In that Act, where there is no representation, provision is made for the election of representatives. In that way, when large scale redundancy situations arise, the law provides for an equivalence, at least in terms of representation for the purposes of consultation, between unionised and non-unionised workforces. This seems, in statutory terms, to indicate the importance of consultation as it was expressed in **Compair Maxam**.

26. The second element in relation to trade union membership is that it seems clear from the authorities that where there are representatives they should, normally, be consulted at the

[1] In 1979 Trade Union Membership within the UK workforce stood in excess of 50% and in 2022 stood at just over 23% (ONS)

formative stages of any decisions on redundancy selection processes. This appears to apply no matter whether that relates to large scale or smaller redundancy exercises. However, it is less clear that this should apply when there is a workforce that is unrepresented. This is because of the distinction that has been drawn between collective and individual consultation. It seemed to us, particularly to the lay members, that this fails to recognise the reality of good industrial relations in the modern employment environment.

27. This may have arisen because of the use of certain labels. Individual consultation has been seen as considering the particular circumstances of the specific individual. The collective consultation has been viewed as discussions about the overall approach to the workforce at risk of redundancy. Such a division in approach would mean that what would amount to reasonable consultation in the non-unionised workplace could be considered outside the reasonable band in the equivalent unionised workplace. This is a dichotomy that does not exist with large scale redundancies because of the statutory underpinning.

28. We consider that the purpose of collective consultation is actually a reflection of good industrial relations in either type of workplace and that such consultation should generally occur at the formative stages of a process. That might better be described as general workforce consultation rather than "collective", which is a word that has connotations of union representation. The importance, however, is the purpose of consultation at that stage and not the label attached to it. That stage of consultation could take many forms, it is not for this tribunal to be prescriptive. For example, the facts in **Biluan** show that large scale workforce meetings took place; these were considered to be part of the consultation process by the EAT. What is important about that stage of consultation is that the **British Coal** principles are fulfilled; the opportunity to have input from the workforce. That is an opportunity to propose other means by which the employer could minimise the impact of a redundancy situation.

29. The individual stage of consultation is, as we indicate, more personally directed. This stage would, generally, consider such things as alternative employment. However, again, it is not for us to be prescriptive but such consultation would usually be expected to occur in addition to the collective stage.

30. It must be remembered always that the ET is conducting a review of the employer's decisions and not substituting those decisions with its own. An ET could still consider a decision reasonable even in the absence of consultation e.g. where consultation would be futile. However, where there is a decision which is made outside the parameters of what we have described as good industrial relations we would expect the ET to provide the reasons why, in the particular circumstances, the decision was reasonable in the absence of these usual standards.

31. The second change in the working world, international organisations, is also of some relevance. The approach taken to employment law and, perhaps more apposite to this discussion, good industrial relations, will vary significantly between nations. In this particular case, a tool for selection using entirely subjective criteria came, initially, from the USA. If a method has been used in the larger organisation and found to be effective it is unsurprising that it would be thought reasonable to replicate it across the organisation. However, use of a system which reflects good industrial relations in another nation may not reflect the usual practice in the UK as we have outlined it above. It appears to us that, if it is considered to be reasonable for the employer to use American selection criteria solely because the organisation is a global one, this would not reflect a recognition of good industrial relations in the UK. This too is where the question of consultation at the workforce level is of significance. If discussions take place at an early stage those differences of good practice would probably

emerge and it would be possible for an employer to take account of them.

32. Applying these principles we have come to the conclusion that, in this case, there was a clear absence of consultation at the formative stage. There is nothing in the judgment which indicates that there were good reasons not to discuss this at what we have described as the workforce level of consultation. It means that there was never any opportunity to discuss the prospects of a different approach to any aspect of the redundancy process chosen by the employer. The absence of meaningful consultation at a stage when employees have the potential to impact on the decision is indicative of an unfair process. Without an explanation as to why omitting the workforce level of consultation would be reasonable in these particular circumstances, the ET has not provided sufficient reasons to explain its decision. In our judgment, on the facts, there was no good reason for this consultation not to take place. We note, in particular, the fact that the numbers to be dismissed were not settled until a major part of the process of selection had been concluded. That shows that there was no pressure of time.

33. That absence of consultation is sufficient to make the dismissal unfair if the procedure is not fair overall. The Respondent relies on the approach to the appeal in this respect. In our judgment, in order for the process to be considered fair overall, it would generally require something on appeal which would fill any gaps in the earlier stages of a process. In this case, whilst the appeal could correct any missing aspect of the individual consultation process (e.g. the provision of the Claimant's own scores), it could not repair that gap of consultation in the formative stage which we have identified.

34. On that basis it is unnecessary for us to deal with the ground of appeal that relates to the provision of scores.

35. This matter must be remitted to an employment tribunal for a decision on remedy. The parties have referred us to the approach in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The Claimant contends it should be considered by a different tribunal. The Respondent contends that the same Employment Judge should hear this case. There is nothing to indicate that the employment judge could not approach this matter with professionalism. The Employment Judge is familiar with the case and the facts. It would be more inconvenient if the case were to start afresh before a different Judge. In our judgment this case should be remitted to be heard by the same tribunal.