



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Mr H Lewis

Network Rail Infrastructure Limited

Heard at: London Central Employment Tribunal

On: 3, 4, 5 October 2023

Before: Employment Judge Adkin (sitting alone)

Representations

For the Claimant: in person

For the Respondent: Mr B Randle, Counsel

JUDGMENT

- (1) The claim for unfair dismissal pursuant to sections 94 and 98 of Employment Rights Act 1996 (“**ERA**”) is well founded.
- (2) Any compensatory award may be subject to a deduction under section 123 ERA following the principle established by the House of Lords in the case of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, [1988] AC 344 to be determined at a remedy hearing.

REASONS

The Claim

1. The Claimant presented his claim of unfair dismissal on 27 February 2023.

Evidence

2. I had the benefit of an agreed bundle of 852 pages. References in this format [123] are to pages in that bundle.
3. I heard oral evidence from the Claimant himself and from the Respondent following witnesses:
 - 3.1. Michael Bridgeland, dismissing manager and the Claimant's sometime line manager;
 - 3.2. Toufic Machnouk, Director, Industry Partnership for Digital Railway, who planned the reorganisation which led to the Claimant's dismissal, and who heard the appeal from the decision to dismiss;
 - 3.3. Maria Dravnieks, who was a Redeployment Coordinator, subsequently Promoted to Team Leader who dealt with the redeployment process;
 - 3.4. Sarah Hewlett, who heard the Claimant's grievance;
 - 3.5. Eric Larocque, who heard the grievance appeal.

Findings of fact

The parties

4. The Respondent operates and maintains Britain's rail network and infrastructure.
5. On 3 June 2019 the Claimant's employment with the Respondent commenced as Executive Reporting Manager.

Claimant's role

6. In the second half of 2020 as part of an earlier restructure, the Claimant's role of Executive Reporting Manager was deleted. He was offered the role of Business Improvement Manager, without need for interview. In the Respondent's structure this was a Band 2 role. On the job description it is described as band 2B. He assumed responsibility for five teams, a total of 20 staff.
7. I should note that the Claimant suggested in the Tribunal hearing that the key accountabilities set out in the job description last amended in November 2015 reflected the reality of the role that he was doing.

Performance

8. The Claimant's performance appraisal for 2020/21 was undertaken by his new line manager, Chris Hanshaw. He assessed and recorded the Claimant's performance as Partially Met. The Claimant did not accept that this and raised a grievance. The grievance investigator upheld his claim that the grading was not justified on the basis that for 18 months, including the first 13 months under

the management of Michael Bridgeland, no formal objectives had been set. On the recommendation of the grievance investigator, the Claimant's performance for that period was changed from Partially Met to Good.

9. Notwithstanding that change in the Claimant's performance grading, the evidence of Mr Bridgeland in the Tribunal hearing was that he felt that Claimant needed significant support in relation to day-to-day responsibilities. I have not needed in the course of this hearing to determine how fair an assessment that was, although I did not have a reason to doubt that this was Mr Bridgeland's opinion.

Background to the restructure

10. The genesis for the restructure material to the present claim was a plan devised by Mr Machnoug to form a new "Industry Partnership for Digital Railway" (abbreviated to IPDR).
11. Mr Machnoug identified particular problems that needed to be addressed: first, there was an over-population of band 1 and band 2 roles (senior but not the most senior roles); second, the same bands reported to each other and there were no clear accountabilities; third, job descriptions and bandings did not correspond with the objectives or the needs of the organisation, nor the right opportunities for people; and fourth, there were work streams coming to an end with the need to redeploy those teams.
12. Mr Machnoug explained that he considered what types of roles were necessary for the success of the proposed new structure. He spent a lot of time working on the proposed new structure and considering job descriptions which had been adopted in other regions, functions and programmes, and what roles could make the IDPR more efficient and effective.
13. Mr Machnoug's resulting proposal affected 91 roles, although only 63 employees were proposed to be affected as not every role was filled at that time. There were quite a number of roles within the organisation that were not filled. These figures suggest nearly 30 roles were vacant.
14. Mr Machnoug concluded that 49 roles were needed in the proposed new structure, as detailed in the memo to the union, including the proposed new organisation chart at pages 174 – 181 and 188 - 192 and the people impact document at pages 193 – 197 of the Bundle.
15. The Claimant does not challenge that there was a real genuine organisational reason for the restructure. An Employment Tribunal would not generally go behind the commercial or organisational reason for a restructure.

"Use" of vacancies

16. The Claimant gave unchallenged evidence, which I accepted, that the Respondent's practice when a task arose, was to find a vacant role that was closest to the task that needed doing, and then expect the recruit into that position to complete the task that needed doing, without changing their job

description to properly reflect the task, since a change would require trade union approval.

17. The Claimant described the vacant roles and the way that the organisation used these vacant roles as a “peculiar practice”. While this does not form part of my necessary deliberations, I understand why the Claimant had that view. The number of vacancies in the structure is surprising.

Proposed restructure

18. On August 2021 Dave Gallagher of the TSSA union emailed consultation documents. It is not possible to see from this email all of the recipients, but the Claimant does not dispute that he received the documents attached to it. The attached documents were as follows:
 - 18.1. Memo for consultation;
 - 18.2. Current and proposed organisation charts;
 - 18.3. Current and new job descriptions;
 - 18.4. Disposition statement and people impact.
19. What these documents showed was that the role being performed by the Claimant (Business Improvement Manager) did not map to a post in the proposed new organisation. That is clear from a chart headed “people impact” [195], which contains minimal detail on various roles and another document described in the tribunal hearing as the “Disposition statement”, which provided more detail at page 199. That contained the wording “All accountabilities for the post removed and not transferred” in three different columns.

Claimant’s comments to union

20. By an email dated 24 August 2021, Mr Lewis wrote to Mr Gallagher, his trade union representative with some comments.
21. The Claimant made comments on the “Programme Reporting Specialist” role, querying whether this was more of a “reporting” function or a “change” function. He suggested that the job description was “very outdated”.
22. In relation to a different role the Business Manager role, the Claimant suggested that this role might be unmanageable based on the description. He offered some other comments on Information Controller role, which did not feature significantly in the subsequent history.

Consultation

23. A union consultation meeting took place involving four trade union members from the TSSA and one from the RMT on 7 September 2021.
24. An email was sent out to the team generally on 14 September 2021 encouraging the affected employees to speak to their trade union

representatives, enclosing email contact details for the relevant trade union representatives.

25. A further consultation meeting with trade union representatives took place on 20 September 2022, at which job descriptions and the identification process discussed. Part of the actions at the conclusion of that meeting included Mr Machnouk working with HR to look for alternative opportunities for individuals and for Mr Gallagher to provide details of individuals who believe that they “**identified**” into particular roles.
26. Mr Machnouk explained that the consultation with trade unions was useful and that this influenced his proposal.
27. Part of the proposal was the phasing out “contingent” staff i.e. contractors who were not on permanent employment contracts.
28. The new structure contained 49 new positions. There were 28 different roles/job descriptions, of which 17 were newly proposed roles and 11 were the same as existing job descriptions.
29. By 27 September 2021 the proposal had been agreed with trade unions.

Briefing to team

30. On 28 September 2021 there was a briefing about the restructure by Microsoft Teams to those affected, including the Claimant.
31. On 8 October 2021 the Claimant engaged with a consultation through an IPDComms email address. The Claimant raised a concern about job descriptions being in very dated language.
32. The anonymous response from IPDComms was that “we have used existing job descriptions versus new job descriptions (processed and approved through project ACE), as the basis for selection/identification.” This was said to be a consistent and fair approach, which the trade unions had been informed about through consultation.
33. On 12 October 2021 the window for voluntary redundancy closed.

Identification

34. The Respondent’s has a policy “Managing our People Through Change / Information for employees Bands in a 1 – 4 and equivalent” (v.9, last updated April 2016), which according to its front page was approved by Tim Craddock, HR Dir Network Operations. The TSSA band 1 to 4 union representatives were apparently consulted.
35. This policy provides for Band 1 and 2 roles was that where 75% of the role was unchanged, as shown by a comparison of the old and new job descriptions, where there is a single individual who can be matched to a particular role, that person would be identified as going into the new role.

36. In the event that more than one individual identified into a role, this would be a need for a competitive interview process.

Closed list

37. On 18 October 2021 the Claimant was told he was at risk of redundancy and provided with closed list of vacancies. The email explained the process as follows:

“What is a Closed List and who does it apply to?

Closed Listing is used to help those displaced by change (i.e. their position is consulted out) seek an alternative job. We do this by listing all the current vacancies and share this list exclusively with those people who are displaced. Affected employees are invited to select up to two preferences from the list of positions at the same band as their previous role by filling in a preference form and CV (in standard formats). You can only apply for closed list posts at your substantive grade, or one grade below (with the protection of earnings for 2 years at your substantive grade).

How will the Closed Listing work?

The Closed List will run for two weeks from Monday, 18th October 2021 through to midnight on Friday, 29th October during which impacted people have exclusive access to the list of vacant positions in their substantive band. You will be able to select up to two positions you wish to be considered for, using a standard preference exercise form (Appendix A), attached for ease. You may apply for any role listed at your current substantive band, or one grade below (with the protection of earnings for 2 years at your substantive grade). The job descriptions for every vacancy will be made available to you.

38. That closed list contained a Programme Reporting Specialist role, grade 3A (below the Claimant’s existing role), based in York.

Drop in session/guidance

39. On 21 October 2021 the Claimant attended a “drop in” session for those involved in closed list process. A “Questions and Answers” Sheet was produced to support that session which included the following:

“1) If an applicant feels they can only justify making one preference, not two, what happens then?

They can do so; it is up to the individual. If an applicant feels they can only justify making one preference, then they are guaranteed an informal discussion and/or interview with the panel for that preference.

2) If an applicant would like to identify to more than two preferences, can they do so?

Yes, it is up to the individual. If the applicant feels they can identify to more than two posts they can include these on the preference form.

3) If two or more people make the same role their first preference, would this then involve an interview for the applicants. If not, what is the process?

If more than one person preferences a role as “first preference” then an interview/selection process is the fairest way to settle the matter. They will be invited to an interview with the panel (late November date as per timeline).

Application for Business Manager role

40. In relation to the closed list the Claimant took the view that the Business Manager role was the closest to his existing role. He discussed this with colleagues. He says that several people remarked “do you know Debbie Edwards is doing that role?”
41. Ms Edwards was a Senior Project Manager who was transition lead and led control transition activities which covered the transfer towards the IPDR implementation phase. The Claimant formed the impression that she was expected by colleagues to be the successful candidate for that role. In his witness statement he insinuated that this might not be based on merit, but did not when asked to elaborate on this beyond suggesting that she did not have a CV or background that ought to have made her the best applicant for this role. That suggestion is not accepted by the Respondent.
42. The Claimant decided to only apply for the Business Manager role to avoid the Respondent having the option to offer him his second preference. That decision was characterised by the Respondent in submissions something of a gamble. What this meant was that he did not apply for the role of Performance Reporting Specialist, a Band 3 (i.e. lower) role, which he then asked about later in the process, after the closed list phase of the process was completed.
43. The deadline to select role from closed list of vacancies was 29 October 2021.

Interview for Business Manager role

44. On 2 November 2021 the Claimant received an invitation to an interview for the role of Business Manager (Business and Governance) from Joanna Parkes, Human Resources Business Partner Support, Central Functions, Eastern Region. This was to be a one hour interview by Microsoft Teams held by Mr Toufic Machnouk, Director Industry Partnership Digital and Ms Samantha Baker, Financial Controller, Eastern region.

45. On 12 November 2021 the Claimant attended an interview for the Business Manager role.
46. The interviewers were Toufic Machnouk, Director Industry Partnership Digital who had devised the restructure and Ms Samantha Barker, a Finance controller.
47. Of relevance to the Respondent's policy in relation to aiming for diversity of interview panels (and the Claimant's concern that this had not been adhered to), Mr Machnouk describes his ethnicity as Middle Eastern (Syrian and Lebanese heritage). Ms Barker identified herself as a woman who was part of the LGBTQ+ community and has a financial background (as opposed to being part of the Digital Team).
48. The Claimant was scored 20/50 whereas the successful candidate Debbie Edwards was scored 48/50. It does not fall within the remit of this Tribunal to go behind this assessment or decide whether the disparity in score at this level was justified. I find on the balance of probabilities that the two members of the panel did consider Ms Evans was a strong.
49. The Claimant contends in his witness statement that the "lead" recruiter (i.e. Mr Machnouk) had a relationship with one of the candidates which should have been declared. Mr Machnouk absolutely denies this in witness evidence. He says that he had not worked with her in any capacity within the Respondent or outside of the organisation, that there is no personal relationship and that the only connection was that she reported to Dan Holder who reported to him. There is no evidence from which I can conclude that there was a relationship that needed to be declared as part of a redeployment process.
50. The Claimant contends that the notes taken in his interview are exceptionally brief by contrast with the notes taken in the interview of the successful candidate Debbie Edwards. The Respondent's position is that the successful candidate gave fuller, "richer" answers.
51. The notes in both interviews are in truncated note form rather than being verbatim. The answers recorded in Ms Edwards' interviews are somewhat fuller.
52. As explored by the Respondent in the Claimant's evidence to the Tribunal, his answers tended to focus on *what* he did in a given situation rather than *how* he did it.
53. A summary of the Claimant's performance in the interview was recorded as follows:

"PMO, strong experience in PMO functions, personable, empathetic, comes across warm and good natured...Answers not strategic enough for band, lacked example depth, in some cases lacked understanding of the question depth, didn't understand vision and goals of role. Candidate didn't understand BM role in essence"

54. Mr Machnouk felt that the Claimant's experience and interest was in a "PMO" role. He gave an explanation of the distinction between PMO and business manager role in his oral evidence. He drew a distinction between the PMO roles which related to the programme management office, involving governance and reporting, managing information, documents and plans. By contrast, he explained, that the business manager role was more of a "corporate" role, the nature of which was to support senior staff in a complex or diverse organisation, helping them with organisational challenges and managing multiple stakeholders.
55. The Claimant was notified that he was unsuccessful in this job application on 29 November 2021.

Feedback

56. On 17 December 2021 the Claimant met with Samantha Barker for feedback on his unsuccessful application for the Business Manager role. The documented candidate feedback contained the following:

Describe the top 3, role relevant, strengths the candidate demonstrated during the interview:

1. PMO, strong experience in PMO functions, personable, empathetic, comes across warm and good natured

In order to help the candidate improve, describe 3 development areas observed during the interview:

1. Answers not strategic enough for band, lacked example depth, in some cases lacked understanding of the question depth, didn't understand vision and goals of role
2. Candidate didn't understand BM role in essence

57. The Claimant says that he recapped evidence he had given in the interview and Ms Barker remarked that if he had offered that answer in the interview he would have scored much higher. It seems from her reaction that she did not believe that precisely that answer had been given during the interview.

UBA – change of line management

58. On 6 December 2021 the Claimant began reporting to Michael Bridgeland again. The role was UBA (Used to Best Advantage), which was a temporary position doing temporary assignments. This role was not intended to be permanent and this period was designed to allow him time to apply for permanent roles.
59. Mr Bridgeland himself had lost his original role as part of this restructure and was in a new role.

60. On 20 December 2021 the Claimant attended a meeting to discuss potential redundancy.
61. A catch up meeting took place between the Claimant and Mr Bridgeland on 31 January 2022.

Grievance

62. On 28 January 2022 the Claimant submitted a Grievance [347]. This grievance was presented in the form of a table over 6 pages in landscape format, in which the Claimant identified 10 separate criticisms of the redundancy process in all cases by specific reference to paragraphs of the Respondent's change policy.
63. The criticisms include:
 - 63.1. "identification" should have taken place between the Claimant's existing role and the new role of Business Manager, and if it was not a case of identification should have received confirmation of this;
 - 63.2. that there was no "selection panel" containing to appropriate managers and an HR representative as provided for by the policy;
 - 63.3. that he should have been deemed suitable for the Business Manager role without the need for interview;
 - 63.4. that the "diversity" of the selection panel for the Business Manager role did not assist him as a Black Caribbean male;
 - 63.5. alleged conflict of interest;
 - 63.6. that additional questions were asked in relation to the Claimant's motivation which was inconsistent with the interview carried out with the successful candidate;
 - 63.7. lack of regular contact with his line manager or an appropriate person during the process.

Catch up

64. A further catch up meeting took place between the Claimant and Mr Bridgeland on 12 February 2022.
65. In an email sent four days later Mr Bridgeland encouraged the Claimant to continue to engage with redeployment in parallel to the grievance.

Redeployment process

66. On 22 February 2022 the Claimant supplied an updated CV to Maria Dravnieks, a Redeployment Co-ordinator.
67. In March 2022 the Claimant applied for the role of Internal Audit Manager, which was a band 2.C role, which would represent a promotion.

68. On both 10 and 11 March 2022 Mr Bridgeland made notes relating to the Claimant suggesting that the two had discussions on those days. There are references to the grievance and to the audit manager role.

Grievance

69. The grievance was heard by Sarah Hewitt, a Programme Manager.
70. In 25 May 2022 there was a meeting relating to the grievance. The Respondent's employee relations department had substantially cut down the scope of the grievance on the basis that much of the grievance related to matters that fell into the category of collective consultation rather than the individual implementation of the process in the Claimant's case.
71. While Mr Lewis understood the distinction being drawn between consultation on the restructure and its "execution", he did not agree where the dividing line had been drawn in this case.
72. "Selection and appointment process was biased, unfair and lacked quality and consideration", "conflict of interests of panel members", "diversity of panel", "feedback and paperwork not provided or of poor quality", sufficient support in finding an alternative role was not provided", "lack of communication by line manager" was all identified as a collective matters. Mr Lewis did not accept that these were collective matters, and considered rather that these were matters relating to the execution of the process which was individual to him. I understand why he had that view.

Meeting

73. On 4 May 2022 there was a further catch up meeting between the Claimant and Mr Bridgeland.
74. In May 2022 the Claimant applied for the role of Head of Programme Capability which was a Band 1.C role, which would represent a promotion.
75. The Claimant was notified that his application for Internal Audit Manager Role was unsuccessful.
76. On 30 May 2022 the Claimant requested feedback from the Redeployment Team who told him to speak to the resource or hiring manager.

Post-implementation review

77. On 7 June 2022 there was a post-implementation review meeting held at 3pm by Microsoft Teams in which the successful candidate for the Business Manager role. Debbie Edwards took a leading role in this meeting. There was a discussion of vacancies. The minute of that meeting contains the following:

"there were 26 people at the point of change – 9 people have found alternative roles with 4 people in secondments. DE [*Debbie Edwards*] confirming numbers of those who have left under VSS and VR and that there are 2 people flagged as redeployees, both

Band 2. Dave Gallagher [*TSSA trade union representative*] querying the number of Band 2 roles that are vacant and why those roles are not suitable for the individuals. **DE confirming that they are sponsor roles and the individuals concerned are not suitable for these roles** and not engaging re the alternative Band 3 roles or any ongoing training.

DG advising this needs to be raised at the “at risk” meeting to give them a list of the Band 2 and Band 3 roles and see what they would need to be able to maintain the Band 2 role or accept a Band 3 with protection of earnings for 2 years.

[*insertions in italics above added*] [**emphasis added**]

78. Mr Machnoux in his witness statement explained that “sponsor roles” would “champion and communicate the IPDR benefits to clients, funders and industry partners, while making sure the benefits are realised and managing the flow of investments, providing value for money assurance to the funder”.
79. The Tribunal did not receive evidence on how Debbie Edwards concluded that these roles were unsuitable for the two redeployees.

Meeting

80. On 27 June 2022 there was a further catch up meeting between the Claimant and Mr Bridgeland, in which the former updated the latter on a recent application and explained his reasons for not wanting to attend wellbeing seminars.
81. On 13 October 2022 the Claimant applied for Head of Analysis and Report. He did not progress this application later on by mutual agreement once he discovered that this was a role only suitable for a qualified accountant. This requirement had not been made clear in the material originally considered by the Claimant.

Grievance outcome

82. On 18 July 2022 there was an outcome to the grievance outcome in which Ms Hewitt partially upheld one element, specifically:

“Grievance Point 2.2: The feedback given from the interview was that the answers given were not in detail enough, but HL feels the interview lasted around 70 minutes. He states this would not have taken this long if his answers were not in detail.

Partially, completed panel selection decision form and/or interview notes to be shared with HL for use at future interviews. Whilst this is partially upheld, I note Herman was given guidance on where to obtain the written feedback and there is no evidence that he followed the this up.” (*sic*)

83. As to the Claimant's argument that there should have been an HR representative on the selection panel Ms Hewlett's conclusion was the policy does not state that HR should be in the interview.

Meeting 18 July 2022

84. On 18 July 2022 the Claimant was invited to a meeting to discuss the redundancy of his role.
85. On 27 July 2022 the Claimant met with Mr Bridgeland. Jo Parkes of HR attended as a notetaker.
86. The Claimant mentioned to Mr Bridgeland that he had seen a role of Reporting Specialist in the Network Rail organisational chart that was produced as part of the consultation process. He had not applied for this role as part of the closed list process.
87. Mr Bridgeland explained that this was not a vacant role that he could apply for, and following the conclusion of the close list process it had not been advertised. He said that it had been considered as a temporary construct when the new organisational chart had been proposed, but it had since been considered that there was no need for a dedicated reporting role at that time and instead, reporting was picked up by the managers as part of their roles.
88. The Claimant mentioned another role, new role in the business, a programme reporting lead. Mr Bridgeland explained that this was a programme role which was not permanent and was with in East Coast Digital Programme which was a different employer. Ms Parkes explained that this was tendered for and led by Atkins, a separate organisation to the Respondent.
89. The Claimant was told that his role was going to be made redundant and was given 6 months notice of a termination date **27 January 2023**, and his redundancy settlement figure was confirmed.

Grievance appeal

90. On 29 July 2022 the Claimant submitted an appeal against the outcome of the grievance.
91. This grievance appeal was dealt with by Eric Larocque, Head of Network Delivery.
92. On 23 August 2022 the Claimant met with Mr Bridgeland, who apologised for late notes from meetings. There was a discussion of ECDP performance reporting.

Meeting with Mr Bridgeland

93. Two days later, on 25 August 2022, the Claimant met with Michael Bridgeland.

94. Mr Bridgeland informed the Claimant that the vacant post he had enquired about previously, Programme Reporting Specialist, was 'not required at this time, but would be reviewed early in the new calendar year'.
95. The Claimant asked why it was not removed from the structure and made the point that it was surprising given this was not mentioned at the June 2022 Post Implementation Review. (It is possible that Mr Gallager of the TSSA may have been referring to this role among others in his exchange with Ms Edwards).
96. Mr Bridgeland answered that he was not present at this review, but agreed to ask Toufic Machnouk if the Programme Reporting Specialist could be considered as alternative employment for the Claimant.
97. Mr Machnouk's explanation is as follows:

"86 With regard to the Performance Reporting Specialist role, Herman advised that he had raised this as a potential role to avoid his redundancy. Michael had discussed that with me and I had advised him that there was no potential to fill the role at that time. I explained that when the organisation was first designed in 2021, I had tried to create something that supported the need for executive reporting in the Region. That need had evolved and changed since that time and as such there was no longer the need for the level of reporting that was initially proposed. The finance team picked those things up and in the East Coast it was picked up in the delivery setting. The need to fill that role therefore had not arisen.

87 In terms of the PIR, things had evolved and adjustments had been made to the structure following challenge from the unions. However, the Performance Reporting Specialist role did not go through the PIR as it was not a priority to make that change due to timing.

98. Mr Bridgeland's unchallenged evidence was that this Programme Reporting Specialist in fact was never filled, as there was never deemed to be a business need for it and even at the time of this Tribunal hearing that role was still unfilled.
99. Also in the meeting on 25 August 2022, Mr Bridgeland highlighted to the Claimant that there were some portfolio management roles not filled during interviews, which were lower grades. He reminded him that there would be salary protection for two years.

Appeal

100. On 25 August 2022 the Claimant appealed against the decision to dismiss him. He also asked whether he could be considered for the post of Reporting Specialist (IPD Structure) or Alternatively Programme Reporting Lead Function.

101. His grounds of appeal were:
- 101.1. not being considered for the Reporting Specialist role;
 - 101.2. not being considered for the Program Reporting Lead role;
 - 101.3. lack of support during reorganisation.

Appeal hearing

102. On 13 September 2022 there was a hearing of the appeal against decision to dismiss heard by Toufic Machnouk.
103. The Claimant argued that he should have been considered for roles of Reporting Specialist or Programme Reporting Lead in ECDP, a role which was at that point covered by contingency staff. Contingency staff were due to be phased out as part of the reorganisation. Mr Machnouk explained that this Programme Reporting Lead role was “embedded” within an external supplier and the Claimant should approach the organisation directly.
104. The Claimant confirmed during the course of the appeal that he had not applied for these roles at an earlier stage. Mr Machnouk that he would review the position with regard to these roles
105. It seems from this meeting that the Claimant did not feel supported by line management but acknowledged that the redeployment team had been supportive and he had received the list they sent every Friday afternoon.

Appeal outcome

106. By a letter dated 21 September 2022 Mr Machnouk dismissed the Claimant’s internal appeal against his dismissal.
107. The grounds of appeal, he found as follows:
- 107.1. Not being considered for the Reporting Specialist role - that was role available at the closed list stage but no longer since matters had “moved on”;
 - 107.2. Not being considered for the Program Reporting Lead role - this was an external role;
 - 107.3. Lack of support during reorganisation in essence Mr Machnouk took the view that there was an onus on the Claimant to look for roles himself. He took account of the fact that had been substantial delay in the process which was to the Claimant’s benefit.

Claimant’s comments in response to appeal outcome

108. On 23 September 2022 the Claimant wrote back to say he did not consider meetings with Michael Bridgeland were a discussion; he had himself had to draw vacancies to the attention of his line manager; there was a lack of

managerial support; the Managing People through Change policy placed an active responsibility on his manager and the Respondent to secure him suitable alternative employment.

Grievance appeal hearing

109. On 12 October 2022 there was a hearing of the appeal against the grievance with Mr Larocque.

Redeployment (continued)

110. Also on 12 October 2022 the Claimant had a discussion with Mr Bridgeland. This meeting was to discuss the outcome of the appeal against dismissal and for a general catch up. The Claimant questioned the finality of the outcome of his appeal and Mr Bridgeland responded that, to the best of his knowledge, it had been conducted in accordance with the Managing our People Through Change process. The Claimant discussed with Mr Bridgeland that he had also applied for a role in Network Rail Southern Region, as Head of Analysis and Reporting. Mr Bridgeland offered help with his interview preparation for which the Claimant thanked him but did not take this up. As to the Claimant's application for the role in the Southern Region on 24 October 2022, he explained that the role required a qualified accountant and he and the hiring manager had agreed that his skillsets did not meet the necessary requirements.
111. On 29 November 2022 and 10 January 2023 the Claimant did not attend scheduled catch up calls with redeployment team.

Grievance appeal outcome

112. On 8 December 2022 there was an outcome to the grievance appeal in which none of the Claimant's grounds of appeal which substantially criticised the grievance were upheld.
113. The following month, on 12 January 2023 the Claimant made comments on the grievance appeal outcome.

Termination of employment

114. The Claimant's employment came to an end with effect from 27 January 2023.

Outcome of reorganisation

115. Overall, of the individuals affected, 11 colleagues took voluntary redundancy or voluntary severance and only six were issued a notice of redundancy.

ACAS

116. The ACAS early conciliation period took place for 2 days between 6 and 8 February 2023.

Claim

117. On 27 February 2023 the Claimant presented a claim to the Tribunal.
118. On 2 June 2023 at a case management hearing before Employment Judge JS Burns the claim of race discrimination was dismissed upon withdrawal

Respondent's policies

Recruitment and Selection Policy

119. This policy issued in May 2019 contains the following:

4.12 Interview panels will be a minimum of two people and the panel will include employees from different backgrounds(5) to provide diversity of thought and opinion in decision-making”

Footnote (5) For example, people of different genders and/or ethnicities

Redeployment Policy and Procedure

120. The agreed bundle contains a policy under this title issued 17 December 2023.
121. The respondent highlights that redeployment need to provide details of the suitability.

Managing our People Through Change

122. Extracts from Managing our People Through Change (created June 2014 and last updated April 2016), which the parties agree was a policy document, agreed with the relevant trade union, which applied when there was an organisation change.
123. This policy contains the following:

“7 Identification

Identification is the process by which we compare current posts to new posts, to establish how similar they are by seeing how many of the existing accountabilities move across into a new Job Description. **Identification is the subject of challenge during formal consultation and can only occur where there equal or more posts to employees.**

7.1 Following the conclusion of Area Consultation, employees will be invited to a meeting and advised of one of the following outcomes:

7.1.1 Affected employees in Role Clarity Band 1 and Band 2 or equivalent will be identified into role where they are the sole occupant of a role which is at least 75% unchanged

...

7.3 Employees who have not been identified to a role will be advised of the reason(s) for this and the Closed Listing process will be explained by their line manager.

10 Selection and appointment process

10.1 Appointments to posts on the closed list will be decided by a selection panel, **made up of a minimum of 2 appropriate managers plus an HR representative**. Employees will be selected for positions at their existing band.

...

10.3 The selection panel will use the information provided on CVs and preference forms to select the most suitable candidate. The panel will take account of the order of an individual's preferences and **decisions will be recorded in writing using the selection form**.

10.4 The selection panels will be facilitated by HR who will record the reasons for selection or non-selection and keep details of the employees considered and not selected for the job. If a selection panel believes there is insufficient information to appoint on the basis of suitability, the individuals concerned may be called to an interview.

10.5 Employees will be able to seek feedback. To do so they should contact their Line Manager in the first instance. In cases of non-selection a copy of the completed selection panel decision form will be provided to the employee during their one to ones along with feedback.

...

27 Appeals

27.1 In the event that an employee is advised of a dismissal by reason of redundancy, they may appeal against this decision in writing.

27.2 Details regarding who an appeal should be addressed to will be contained in the 'Dismissal by Reason of Redundancy' letter.

27.3 The appeal will be heard as quickly as possible by an appropriate more senior manager, who has the authority to hear the appeal. The manager hearing the appeal will invite the

employee to attend a hearing to discuss the matter and inform the employee of their right to be represented.

[**Emphasis in bold** added]

124. A glossary [page 88] provides the following assistance on the Identification process under a heading "Explanation":

Identification is the process by which we compare current posts to new posts, to establish how similar they are by seeing how many of the existing accountabilities move across into a new Job Description

For bands 3 to 8, if 60% of the new role is made up of accountabilities from the old job description then identification occurs, **it is 75% for Bands 1&2.**

This will only occur where there is one candidate to one or more roles. I.e. if there are two candidates to one role identification cannot take place More than one individual can claim identification to a post, provided that the number of posts available is greater than the number of individuals who can claim identification. Once this process has been completed and if identification is agreed, the individuals will be appointed to the new roles subject to go live of the new organisation.

A table which tracks the accountabilities that have moved from a role to another or many roles. The purpose of this exercise is to meet our requirements under safety validation. It also demonstrates whether a role identifies or not.

[**Emphasis** added]

Submissions

125. I received written submissions and oral submissions from both parties.
126. I was grateful to both the Claimant and Mr Randle for their succinct submissions.

Law

UNFAIR DISMISSAL

127. **Section 98 of the Employment Rights Act 1996** provides
98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(c) is that the employee was redundant, or

The band (or range) of reasonable responses

128. In **Iceland v Jones** [1983] ICR 17 the EAT confirmed that (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many (though not all) cases there is a band of reasonable responses to the employee conduct within which one employer might reasonably take one view, another quite reasonably take another, it would only be if the decision to dismiss is outside of this band that it would be unfair.
129. In **Sainsbury's v Hitt** [2002] EWCA Civ 158 the Court of Appeal held that band of reasonable responses test applies to the procedure followed by an employer as well as the substantive decision to dismiss.

Redundancy

130. A useful 'overview' of a fair process was provided by Lord Bridge in **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, [1988] AC 344:

'In the case of redundancy the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, 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.'

131. In **Williams v Compair Maxam Ltd** [1982] ICR 156 the EAT gave the following guidance on a fair redundancy process:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if

necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

132. It is a question of fact and degree for the Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render a dismissal unfair. Ultimately, the overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether, in all the circumstances the employer has acted fairly in dismissing the employee: see **Mugford v Midland Bank Plc** [1997] ICR 399 at 406 - 407.

Suitable alternative employment

133. There is no legal obligation on employers to search for suitable alternative employment for employees whose roles have become redundant, however failure to offer a redundant employee an available alternative role may have the effect of turning a fair dismissal arising from redundancy into an unfair dismissal.
134. The role of a respondent is not to make every possible effort to look for alternative employment, but to make reasonable efforts: **British United Shoe Machinery Co Ltd v Clarke** [1978] ICR 70 at 72
135. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR 255, CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work. In that case the Court of Appeal upheld

the ET's decision that the employer had unfairly failed to offer Mrs Harding a role as a packer. Although Mrs Harding was a fittings maker she had started work as a packer and the employer had recently employed some new packers who might have been made redundant.

CONCLUSIONS

UNFAIR DISMISSAL

Redundancy

136. **[Issue 1]** Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(c) of the Employment Rights Act 1996 (ERA), namely redundancy?
137. Redundancy is a potentially fair reason for dismissal and not disputed that the Claimant's role was made redundant.

SOSR

138. **[Issue 2]** If the Respondent cannot show that the Claimant was dismissed for redundancy, can the Respondent show that the Claimant was dismissed for some other substantial reason, pursuant to section 98(1)(b) ERA?
139. This is only relevant in the alternative to the issue above. It is not in dispute that there was a reorganisation in which roles were deleted. This might amount to some a substantial reason, which is a potentially fair reason.

Reasonable dismissal?

140. **[Issue 3]** Was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant?
141. I have dealt with this issue under the headings below. For given below (in particular at paragraphs 174-190), I found that the procedure followed fell outside of the range of reasonable responses.

Warning

142. **[Issue 4]** Was the Claimant given sufficient warning of the redundancy situation?
143. In view of the lengthy period of delay between the initial announcement of the redundancy situation in August 2021 and the eventual notice of termination which took effect in January 2023, and the period of consultation in this case my conclusion is that there was sufficient warning of the redundancy situation.

Consultation

144. **[Issue 5]** Did the Respondent carry out reasonable consultation with the Claimant?
145. I shall deal with the Claimant's arguments.
146. *Group consultation* – there were elements that in the grievance were taken out of the scope of the grievance. I accept the Claimant's argument that it is difficult to see why so many elements were said to be "group" consultation and taken out of the scope of the grievance. This may have been a deliberate attempt to cut down the scope of what the grievance had to consider. I have to bear in mind however that the grievance and grievance appeal processes were not part of the redundancy and redundancy appeal processes. I accept the Respondent's submission that the relevance of the content of grievance process is only insofar as it casts a light on the redundancy and redundancy appeal processes. It is not for the Tribunal to make its separate assessment of the grievance and grievance appeal processes.
147. *Role not filled* - was it reasonable to consult with the unions on the basis of a role (Reporting Specialist) that was not actually filled? The Claimant argues that this was "not an accurate" reflection of the reality. He argues that the situation was "peculiar", which I entirely understand. It would be an odd situation to have roles defined in this way for a new structure when apparently there was no business need for them. It might be thought that in devising a new structure as a matter of common sense roles for which there was no business need might be simply deleted.
148. The picture is slightly more complex however. It seems at the time of the closed list in October 2021, that this role was open for applications. By the time of the discussion of the decision to make the Claimant's role redundant in July 2022, some 8 months later there was apparently no longer a business need.
149. This is not a situation in which another redeployee was allowed to apply for this role but the Claimant was not. The uncontested evidence is that no one filled this role in 2022 nor has it been filled since.
150. Considering the background, it is not disputed that the Respondent's practice was to have roles which were in the structure but unfilled. In other words this was business as usual, and not something by implication that would have taken the trade union by surprise. I have not received evidence that the trade union was unaware of the fact that there were roles unfilled before and after the restructure. There was some discussion in the review meeting. I do not form the conclusion that this was the situation in which the trade union was in some way hoodwinked or that the consultation was not full or meaningful.
151. The test the Tribunal must consider is whether the process followed fell outside of the range of reasonable responses. The practice of having roles unfilled within the structure, appears to have been no more than business as usual, albeit I acknowledge Mr Lewis' view that this was peculiar.

152. As to the level of consultation, I am satisfied that that the number of discussions or offers of discussions, enumerated at 9(e) of Mr Randle's written submissions, was adequate.

"Identification" process

153. **[Issue 6]** Did the Respondent apply a fair identification process for the role of Business Improvement Manager held by the Claimant?
154. The Claimant argues that the Respondent has not followed its own process under the Managing our People Through Change policy. Specifically he argues it has not provided any "certified records" that identification took place against the Claimant's Business Improvement Manager role. He says that although Toufic Machnouk claimed he was a panel member for identification, no evidence that this panel reviewed this post was provided. The consequence he argues is that he was not able to challenge the identification process. His contention is that with a "recognised marketable CV" he stood a good chance of being appointed to the Business Manager role.
155. The Respondent's position is that where there were more than two individuals vying for the same post this would lead to a competitive interview process rather than an automatic identification.
156. Paragraph 7 of Section 1 the Managing our People Through Change policy indicates there should process of comparing current posts to new posts to see how similar they are, which suggests an exercise by reference to job descriptions without particular reference of the individuals in those roles or their preferences. I can see how this has given the Claimant the expectation that there should be essentially a paper exercise to be carried out objectively by reference to how close new job posts are to the roles in the existing structure
157. The Glossary of Terms at Section 4 of the same policy [88] on the other hand refers to "candidates" and states "more than one individuals can claim identification to a post" which gives a slightly different impression. This suggests a more dynamic process whereby individuals' preferences influence whether or not identification applies. To the extent that they might be seen to be a conflict, ultimately I have come to the conclusion that the Respondent was entitled to follow the more detailed narrative in the Glossary of Terms under the heading "Explanation".
158. In practice, Debbie Edwards as well as the Claimant expressed a preference for the Business Manager. Given that there were two candidates for one role, based on the policy, as interpreted by reference to the Glossary of Terms set out above, identification could not take place and instead this went to a competitive interview. I find that fell within the policy.

Opportunity to challenge lack of identification

159. The respondent identifies several documents that were provided to the Claimant by Dave Gallagher in an email dated 18 August 2021 [173]. Attached to that email were: a consultation document dated 9 August 2021 which

described the “disposition statement” which was used to explain key changes e.g. responsibilities of new roles being introduced and key changes to responsibility of current roles. That “disposition statement” is described in a glossary to Managing Our People through Change policy as “a table which tracks the accountabilities that have moved from a role to another or many roles. The purpose of this exercise is to meet our requirements under safety validation. It also demonstrates whether a role identifies or not.” [88].

160. In the detail of that “disposition statement”, which was a chart containing quite some detail of the various roles the Claimant’s role of Business Improvement Manager was described to be discontinued “all accountabilities for the post removed and not transferred”. A further comment is “This role is no longer required within the team”.
161. There was a document entitled “People impact” which showed in a chart for the current organisation and the proposed organisation. On that chart the Claimant’s role of business improvement manager did not map to a new role but instead contain the comment “post not currently proposed in new organisation”.
162. There was a document which contained organisation chart including the Program Reporting Specialist role which the Claimant would have been suitable for him.
163. It might be said that this suite of documents is quite heavy on detail and not especially easy to access. On the other hand the Claimant was a manager of some seniority. He did not state that he was unable to comprehend the content of the document. He described in his evidence the feeling of disappointment when he understood that his role was to be discontinued as a result of the re-organisation.
164. The Claimant had seen these documents in advance of the union consultation which took place on 20 September 2021. I find therefore that the Claimant had the opportunity to challenge the lack of identification.

Notes of interviews

165. The Claimant criticises the stark contrast between the sparse notes taken in his interview for the Business Manager role and the fuller notes and generous “exceeding” score for nearly every question in the interview with Debbie Edwards.
166. The Respondent’s case is that the successful candidate Ms Edwards fuller answers leading to fuller notes being taken. That is supported by the concluding comments on the “candidate feedback” sheet on [323] which contain the words “lacked example depth, in some cases lacked understanding of the question depth”.
167. On the balance of probabilities I do not form the conclusion that the two interviewers deliberately wrote more elaborate or longer notes in the case of

Ms Edwards when that did not reflect the reality of what was said in that interview.

Fair selection/appointment

168. **[Issue 7]** Did the Respondent apply a fair selection and appointment process for the post of Business Manager?

Feedback

169. The Claimant contended during cross examination that he should have been provided with individual feedback from Mr Machnouk. He did receive feedback from Samantha Barker, the other interview panel member. The Claimant's preference would have been to receive feedback from the hiring manager rather than the other member of the selection panel.
170. In my assessment the identity of the person giving feedback on an unsuccessful interview for redeployment as part of a redundancy/restructure is tangential to the question of the fairness of the dismissal and appeal process.
171. Nevertheless, giving the Claimant's argument the benefit of the doubt and looking at this as part of the process overall, I do not find that allowing one of two members of a selection panel within a redeployment process took the process leading to dismissal overall outside of the range of reasonable procedural responses. He might have had a ground for complaint had the feedback been given by someone not present, but this is not what happened.

Composition of panel (diversity)

172. The Claimant argued that there was no one who "looked like him" on the panel.
173. It was not outside of the Respondent's policy nor in my judgment outside of the range of reasonable responses for the Respondent to convene a two person panel, which contained some diversity as this panel did but which did not match the Claimant's sex and ethnicity. Trying to convene a panel to match the sex and ethnicity of every person involved in a large restructure would be impractical.

HR absent from panel

174. The Claimant argues that the interview panel for the list Business Manager role did not have an HR representative as required and agreed by unions. He argues that this was a breach of the Managing our People Through Change policy at paragraph 10.
175. I shall first consider what the policy requires.
176. The conclusion in the grievance process that the policy does not state that HR should be in the interview and that neither of the panel members were told that HR needed to be in the interview.

177. It is true that the policy does not explicitly state that a representative of HR should be in an interview.
178. Paragraph 10.1 of the policy states that the selection panel “**will be** made up of a minimum of two appropriate managers **plus an HR representative**”. The inclusion of an HR representative is a requirement under this policy. Under paragraph 10.3 the selection panel selected candidates based on information provided on CVs and preference forms.
179. The policy provides that the selection panel will contain an HR representative and that appointments to the closed list will be decided by a selection panel. It follows therefore that an HR representative should at least be party to that selection process. It is not explicit in the policy what the role of the HR representative is, whether they are a decision-maker, or simply present to ensure a fair process.
180. Under paragraph 10.4 the HR representative facilitates the panel and records the reasons for selection or non-selection. If there is insufficient information only then individuals might be called to an interview. The Claimant’s case is that he was suitable candidate on paper and by implication of his comments on the other candidate, he was the better candidate. If he is right about that he should have been appointed without the need for an interview.
181. As to what actually happened, Mr Machnouk in his witness statement states:
- “51 Unfortunately, given the number of interviews that would be required as part of this restructure, and the number of other change programmes and initiatives which required HR input, it was not possible for HR to be involved in the interview panels. I am not aware of any policy that says that HR must be involved in an interview panel. In any event, I did not consider that it was necessary. I have conducted hundreds of interviews and would be joined by another senior manager to bring discussion and fairness to the process.
182. What appears to have happened is that the Claimant and Ms Edwards were selected as applicants purely as an administrative process within HR. The Claimant and Ms Edwards were then invited to competitive interviews to be heard by a panel of two.
183. If there had not been agreed process, in my assessment this would have been an entirely reasonable approach. However there was an agreed process and what occurred does not match the terms of that process.
184. Did it fall outside of the range of reasonable responses to fail to follow the process in this way?
185. As to identification (i.e. automatic slotting in to a role), I have considered this by reference to the Glossary of Terms. Given that there was more than one candidate because of Ms Edwards, I do not see that the Claimant has lost out here. He was not entitled to identify to the new role given that another candidate also sought the Business Manager role.

186. Turning to the selection and appointment process under paragraph 10, the procedure [57] seems to envisage a paper-based selection process at 10.3, to be carried out by a selection panel including an HR representative. This did not happen. Instead what seems to have happened is that the Respondent has passed directly to the final sentence of 10.4 [58] i.e. being called to an interview.
187. The Respondent argues that if there is ambiguity in a policy it is HR which should determine how the policy should operate and, it is said, the Claimant agreed with this point under cross examination. That would be a reasonable argument if the policy is ambiguous, but I do not consider this policy is ambiguous in respect of the basic two stage process which is paper selection first, possible interview if necessary second.
188. The Respondent has chosen not to follow their own process because HR was too busy. I am paraphrasing in broad terms the explanation given at paragraph 51 of Mr Machnouk's statement.
189. It does not always follow that a failure to follow a employer's procedure takes a process outside of the range of reasonable responses in every single case. However in this case **there was an agreed process and I am not satisfied that it did fall within the range of reasonable responses simply to disregard the agreed policy.**
190. For these reasons **I find that this was an unfair dismissal.**

Alternative employment

191. **[Issue 8]** Did the Respondent act reasonably in looking for alternative employment for the Claimant?
192. The requirement on the Respondent is to make reasonable efforts to find alternative employment.
193. The Claimant is critical of the level of support offered to him. The contemporaneous evidence is that he was offered support at various stages. On more than one occasion he declined the support that was being offered to him. The Claimant acknowledged that the redeployment team had communicated with him. I understand his criticism to be that his manager Mr Bridgeland did not carry out a consultation with him to identify suitable alternative roles.
194. Considering the Reporting Specialist role, the Respondent argues that the Claimant had the opportunity to apply for this as part of the "closed list" period between 18 and 29 October 2021. This role was below the Claimant's existing job band, it was based in York and (at least in part for tactical reasons) he choose only to apply for the Business Manager role.
195. Subsequently, the Respondent argues that once the restructure began to take shape it was apparent to Mr Machnouk that the role was not required and that there was no business need for it. In particular, the internal reporting functions

of the role were picked up by the finance team as Mr Machnouk confirmed at paragraph 86 of his witness statement. The Claimant did not challenge Mr Machnouk's evidence on this. To be clear that is not a criticism of Mr Lewis, these matters are very likely outside of his knowledge and it would be difficult to challenge it.

196. Had the Claimant been unaware of the Reporting Specialist role during the closed list process, that would have been of particular concern to the Tribunal, as it would suggest a failure on the part of management to draw it to his attention. He was aware of it and chose not to apply for it at the time. The subsequent non-availability of that role has troubled me somewhat, but while ultimately I accept the Claimant's criticism that this is peculiar, it does seem to be the way that this organisation works that certain roles within the structure are not filled. In other words it is no more than business as usual. The uncontested evidence is the reporting element of this role was performed elsewhere and a decision was taken not to recruit to this role which still stood at time of the liability hearing in September 2023.
197. I understand why the Claimant feels that this is unfair, but I have not found that this takes the process outside of the range of reasonable responses.

“Polkey”

198. **[Issue 9]** If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss?
199. A reduction in the compensatory award may be made where was a possibility or likelihood that the Claimant would have been dismissed in any event a fair process been followed (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503, [1988] AC 344). Such award may be in the range 0%-100%.
200. A 0% reduction would be appropriate if there is no chance that a fair process could have resulted in a fair dismissal.
201. A 100% reduction would be appropriate if it is certain that a fair process would have resulted in a fair dismissal.
202. A percentage reduction to a compensatory award between 0%-100% may be appropriate to reflect a possibility or likelihood that claimant who was unfairly dismissed nevertheless might fairly have been dismissed.
203. (It is open to a Tribunal as an alternative to conclude that the successful claimant would have been fairly dismissed but at a later stage and therefore compensate them for that period only.)
204. It seems to me at this stage that there is likely to be a reduction, but I feel that I would be assisted by further submissions (and possibly evidence).
205. The questions in this case in the application of the potential Polkey reduction are:

- 205.1. What is the likelihood that the Claimant would have been selected for the Business Manager role on a paper assessment of a selection panel with the safeguard of HR involvement without the need for competitive interview?
- 205.2. If there had been a competitive interview, what is the likelihood that panel containing an HR representative would have selected the Claimant as the stronger candidate?

Remedy Hearing

206. A one day remedy hearing has been listed **in person** on **Friday 15 December 2023**.
207. Provided that the Claimant has received statutory redundancy pay, he will not be entitled to a basic award. The only issue therefore is compensatory award, subject to a "Polkey" deduction (see paragraphs 198-205 above).
208. The Tribunal will retain the bundle of documents from the liability hearing.
209. By **30 November 2023** the Claimant shall either provide to the Tribunal and Respondent an updating Schedule of Loss or confirm that the schedule on 4 July 2023 still stands, and **confirm whether he is seeking re-engagement or financial compensation only**.
210. The parties are ordered to exchange and send to the Tribunal any updating evidence on which they rely by **7 December 2023**.
211. The parties are ordered to exchange and send to the Tribunal any written submissions on which they rely by **12 December 2023**.

Employment Judge Adkin

Date 22 November 2023

WRITTEN REASONS SENT TO THE PARTIES ON

22/11/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

ANNEX

LIST OF ISSUES

TIME LIMIT (DISCRIMINATION)

1. Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.
2. Were the race discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - a) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates? The Respondent denies this and relies upon the following:
 - i. The Claimant made an early conciliation notification on 6 February 2023.
 - ii. Acas issued the early conciliation certificate on 8 February 2023.
 - iii. The Claimant presented his Claim Form to the Tribunal on 27 February 2023.
 - iv. any allegations which arose three months less one day prior to 6 February 2023 (the date of the Acas EC notification), namely 7 November 2022, would be out of time and, therefore, the Tribunal has no jurisdiction to consider them.
 - b) If not, was there conduct extending over a period?
 - c) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - i. Why were the complaints not made to the Tribunal in time?
 - ii. In any event, is it just and equitable in all the circumstances to extend time?

UNFAIR DISMISSAL

Redundancy

3. Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(c) of the Employment Rights Act 1996 (**ERA**), namely redundancy?
4. If the Respondent cannot show that the Claimant was dismissed for redundancy, can the Respondent show that the Claimant was dismissed for some other substantial reason, pursuant to section 98(1)(b) ERA?

5. Was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant?
6. Was the Claimant given sufficient warning of the redundancy situation?
7. Did the Respondent carry out reasonable consultation with the Claimant?
8. Did the Respondent apply a fair identification process for the role of Business Improvement Manager held by the Claimant?
9. Did the Respondent apply a fair selection and appointment process for the post of Business Manager?
10. Did the Respondent act reasonably in looking for alternative employment for the Claimant?
11. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss?

Remedy – unfair dismissal

12. If the Claimant's claims are upheld, the Claimant seeks: compensation only.
13. What financial loss, if any, has the Claimant suffered as a result of any unfair dismissal?
14. If the Claimant has suffered financial loss, what financial compensation is appropriate in all of the circumstances? In assessing this:
 - a) Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?
 - b) Has the Claimant mitigated his loss? Should any compensation awarded be reduced on the grounds that the Claimant has failed to act reasonably in seeking to mitigate his losses and, if so, what reduction is appropriate?