EMPLOYMENT TRIBUNALS

Claimant:	Mr. B. Babarinde
Respondent:	Laing O'Rourke Services Limited
Heard at:	London South Employment Tribunal
On:	22nd, 23rd, 24th, 25th & 26th January 2024
Before:	Employment Judge Sudra
	Sitting with Members, Mrs. J. Cook and Ms. V. Gibbs
Appearances:	
Claimant:	In-Person (unrepresented)
Respondent:	Ms. D. Gilbert of Counsel instructed by Knights

(References in the form [XX] are to page numbers in the Hearing bundle)

WRITTEN REASONS

1. These written reasons are being provided following a request from the Claimant. An oral judgment was delivered at the conclusion of the Final Hearing.

2. This matter was listed for a Final Hearing from 22nd to 26th January 2024 for liability and remedy. The Claimant represented himself and the Respondent was represented by Ms. Gilbert.

3. The Claimant began Acas early conciliation on 23rd October 2020 ('Day A') and was issued with an Acas early conciliation certificate on 23rd November 2020 ('Day B'). On 22nd December 2020 the Claimant presented his ET1 claim form and the Respondent defended the claims by way of an ET3 and Grounds of

Resistance on 24th February 2021 and amended Grounds of Resistance on 9th June 2022.

The Issues

4. The Claimant's claims are for:

(i) Ordinary unfair dismissal; and
(ii) direct race discrimination.

An agreed List of Issues was contained within the Case Management Order of Employment Judge Burge [95] and was supplemented by further information by the Claimant [164] and is as follows:

'The Issues

22. The issues the Tribunal will decide are set out below.

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 24 July 2020 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

2.1 Was the Claimant dismissed?

2.2 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy or some other substantial reason.

2.3 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

2.3.1 The Respondent adequately warned and consulted the Claimant;

2.3.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.3.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

2.3.4 Dismissal was within the range of reasonable responses.

2.4 Alternatively, the Respondent says the dismissal was for Some Other Substantial Reason

2.4.1 What was the reason or principal reason for dismissal? The Respondent says the reason was a substantial reason capable of justifying dismissal, namely a business reorganisation carried out in the interests of economy and efficiency, and the dismissal was in any event fair.

3. **Remedy for unfair dismissal**

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the Claimant?

3.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for

another job?

3.1.3 If not, for what period of loss should the claimant be compensated?

3.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.1.5 If so, should the Claimant's compensation be reduced? By how much?

3.2 What basic award is payable to the Claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. **Direct race discrimination (Equality Act 2010 section 13)**

4.1 The Claimant describes himself as a black person and he compares himself to a white person.

4.2 Did the Respondent do the following things:

4.2.1 Give Victoria Head the IT Services Manager Role [**Respondent to supply information]** with no competition *even though the Claimant had expressed interest when the role became vacant*[1];

4.2.2 Give Michael Wilson the Business Analyst Role [**Respondent to supply information]** with no competition *even though the Claimant had expressed interest when the role became vacant*;

4.2.3 Give Matt Price the IT Service Manager role with no competition, even though the Claimant had expressed an interest in it [**Respondent to supply information]** *when the role became vacant***;**

4.2.4 Select the Claimant for Furlough;

4.2.5 Select the Claimant for the redundancy pool;

4.2.6 Not address the Claimant's grievance;

4.2.7 Not provide suitable alternative employment to the Claimant;

[1] Italicised text is information provided by the Claimant [164].

and

4.2.8 Dismiss the Claimant.

4.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says than he was treated worse than:

a. Michael Wilson (given role)

b. Victoria Head (given role)

c. Matt Price (given role)

d. Kelly (started as a PA and then moved to the security team, made redundant and then given Senior Information Security role).

e. [The Respondent is to provide Further Information (see above) requested by the Claimant to enable him to detail other comparators]

The Claimant also relies on a hypothetical comparator.

4.4 If so, was it because of race?

5. **Remedy for discrimination**

5.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the Claimant?

5.3 Has the Claimant taken reasonable steps to replace lost earnings, for

example by looking for another job?

5.4 If not, for what period of loss should the Claimant be compensated?

5.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.6 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.7 Should interest be awarded? How much?'

Preliminary Matters

5. At the outset of the Hearing the Claimant stated that the Respondent had not made full disclosure of documents he had sought. The Respondent's position was that it had complied with its duty of disclosure and specific disclosure. The Respondent also stated that some, insofar as it was aware, of the documents the Claimant mentioned were indeed contained within the main bundle. Upon the Tribunal's enquiry the Claimant confirmed that he had 'searched' the bundle for documents but had not, read *all* of the bundle. The Claimant was advised to peruse the bundle for documents he thought had not been disclosed and then highlight which documents he believed to be missing. The Claimant was further told that to be disclosable documents had to be relevant and necessary for fairly disposing of the proceedings.

6. It was agreed by the parties that the Respondent's witnesses would give evidence first followed by the Claimant. Due to temporal constraints, the Tribunal decided that the Respondent's evidence must be completed by no later than midday on 24th January 2024 and that the Claimant's evidence will last for one day. Closing submissions, Tribunal deliberations, oral judgment (time permitting) and remedy (if appropriate and again, time permitting) would then follow.

7. The Claimant again raised allegations that the Respondent had not complied with their duty of disclosure and specific disclosure and as a result, documents were missing from the bundle. The Respondent disagreed and confirmed that they had complied with their disclosure duties. The Claimant was informed that the Tribunal would not be re-visiting or altering the orders of Employment Judge Self made on 17th October 2023. The Claimant stated that in closing submissions, he would be mentioning documents which he alleges have been withheld by the Respondent. The Tribunal directed that by the end of the Hearing day on 24th January 2024, the Claimant must supply the Respondent with a list of all documents he says should have been in the bundle but were not supplied. This would allow the Respondent to respond to the Claimant's allegations in respect of disclosure and ascertain if alleged missing documents were in fact contained within the main bundle.

Procedure and Documents

8. The Tribunal had before it:
   (a) An agreed hearing bundle consisting of 1637 pages; and
   (b) A supplemental bundle consisting of 23 pages.

9. The Tribunal also had written witness statements and heard live evidence from:

   <u>For the Claimant</u>
   (i) The Claimant;

   <u>For the Respondent</u>
   (ii) Christoper Bains;
   (iii) Chris Lemon;
   (iv) Matthew Price;
   (v) Paul Petty; and
   (vi) Joanna O'Carroll.

10. The Claimant and Respondent made oral closing submissions at the conclusion of the evidence.

11. The Tribunal notified the parties at the outset of the Hearing that they would only read documents that they were specifically referred to and would only read documents referred to in witness statements insofar as they were relevant.

Findings of Fact

12. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

13. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

14. The Respondent is a subsidiary of the Laing O'Rourke Group, a multinational construction and engineering company. The Claimant began working for the Respondent, as a System Centre Infrastructure Analyst, on 12th April 2012. The Claimant was made purportedly redundant by the Respondent and his employment terminated on 31st October 2020. Upon termination, the Claimant was a Senior Infrastructure Specialist –Systems Management.

15. At the time the Claimant's employment commenced, he was working under a United Kingdom Highly Skilled Migrant Programme ('HSMP') visa. In 2015 the Claimant acquired British citizenship and no longer required a visa to work in the UK.

16. In general, there were no issues with the Claimant's employment at the Respondent except for a disciplinary warning issued to the Claimant in August 2020, for failing to disclose a conflict of interests.

17. Victoria Head (IT Service and Change Manager) was a PMO manager with the Respondent at grade 6 within the IT Leadership Team. Ms. Head was two grades above the Claimant who was a grade 4. On 1st August 2015, Ms. Head moved to the role of IT Service and Change Manager. This was a rotation rather than a promotion as her grade, pay, and terms and conditions remained the same. The IT Service and Change Manager role was not advertised, internally or externally, by the respondent nor was there any competitive process.

18. Prior to being placed in the IT Service and Change Manager role, Ms. Head had held a managerial role, with direct reports, and was part of the IT leadership team. Ms. Head had acquired the Information Technology Infrastructure Library ('ITIL') expert qualification.

19. The Claimant did not express an interest in the IT Service and Change Manager role, not least because there is no evidence of him having done so and it was not advertised. At the time, the Claimant did not complain to the Respondent about Ms. Head's new role or not having had the opportunity to apply for it.

20. Michael Wilson (Applications Manager) began employment with the Respondent in August 2010 as a grade 5 Business Assistant Analyst. In or around June 2014, he was promoted to the role of grade 6 Business Analysis Manager.

21. On 1st August 2015, Mr. Wilson was appointed to the role of Applications Manager which involved extra responsibility. As with Ms. Head, this role was not advertised, internally or externally, by the Respondent nor was there any competitive process. Mr. Wilson also had the ITIL expert qualification.

22. The Claimant did not express an interest in the Applications Manager role and despite claiming that he did, there is no evidence of him doing so. The Claimant, nor any other employee of the Respondent, except Mr. Wilson, could have applied for the role as it was not advertised. At that time, the Claimant did not complain to the Respondent about Mr. Wilson's new role or not having had the opportunity to apply for it.

23. On 21st March 2018, the Claimant emailed Ryan Macnamee (Global Chief Information Officer) enquiring about a UK IT Service Manager role [1403]. The Claimant stated to Mr. Macnamee that if the role was not going to be advertised then he would like to be considered for it. Whilst the Claimant complains that Ms. Head and Mr. Wilson's positions were not advertised and that this was unfair, he did not appear to be concerned about a role *he* was interested in being advertised across the business or a fair competition process being followed. On 10th April 2018 the Claimant also emailed Christopher Sexton (Head of IT Europe) expressing an interest in the IT Service Manager role.

24. On 1st May 2018, Matthew Price (Head of Service Operations G7B) was placed into the role of IT Service and Project Sites manager at grade 6. Just as with the appointments of Ms. Head and Mr Wilson, this role was not advertised, internally or externally, by the Respondent nor was there any competitive process. At the time, again, the Claimant did not complain to the Respondent about Mr. Price's appointment. The Claimant had spoken to Martin Staehr (Head of Human Capital (Europe)) on 14th March 2018. This conversation was not the Claimant complaining about not getting Mr's Price's role - as alleged - but to do with the management of his personal development.

25. It is of importance to note, that whilst the Claimant was a grade 4, Ms. Head, Mr. Wilson, and Mr. Price's roles were all at grade 6 and senior to the Claimant both in terms of experience and qualifications.

26. In March 2020 the UK was gripped by the unprecedented COVID-19 pandemic and the country went into national lockdown. In April 2020 the government

introduced a furlough scheme and in May 2020, the Respondent placed approximately 1,400 staff on furlough; the Claimant being one of those staff. The staff furloughed were a diverse group in terms of race.

27. Members of the Respondent's staff whom were engaged in critical work were not furloughed. This is not uncommon. At the time that staff were furloughed, David Higgs (Senior Infrastructure Specialist – Systems Management grade 4) was engaged on the CMG project. Staff placed on furlough were paid at the same rate as staff not on furlough so there was no financial detriment to furloughed staff and indeed, the Claimant.

28. The Claimant made no objection about being furloughed when he was placed on it. If staff were required to return from furlough, the manager was required to make a robust business case to senior management as to why that staff's presence at work was critical to the business.

29. On or around 10th August 2020, the Respondent made a hub-wide announcement in respect of how it would need to make changes due to uncertainty caused by the pandemic and that this may result in the loss of 150 employees i.e., redundancies.

30. 71 of the staff members affected were based at the Respondent's Dartford site where the Claimant was based. Due to the number of staff affected at the Dartford site, the Respondent were required to engage in collective consultation. As there was no recognised trade union at the Respondent, staff representatives were elected. The staff representative for the Claimant's team was Jordan Lance (Infrastructure Technician grade 3).

31. Collective consultation took place on 25th August 2020 when the Respondent met with the elected employee representatives (who had previously been sent all the relevant information to be discussed at the meeting). During the consultation process the Claimant sent Mr. Lance several emails making enquiries and seeking information. Some of the information requested by the

Claimant would have identified individuals so was therefore, confidential and it would have been inappropriate to furnish the Claimant with it.

32. Nevertheless, the Claimant *was* provided with responses to his queries and requests for information where the information could reasonably be shared without breaching anybody's confidentiality.

33. On 2nd September 2020, Mr. Lance emailed the Claimant and stated there would be one selection pool relevant to the Claimant containing four members of staff; two grade 4 roles and two grade 5 roles. Unfortunately, this information was erroneous. In fact, there was to be two selection pools consisting of two staff members. In the interests of fairness, the Respondent wanted to ensure that staff of differing grades were not placed in the same pool. The Respondent needed to retain both an email and systems management specialist therefore, they had to ensure that the constitution of the selection pools would allow for this.

34. Following scoring of the individuals in the two respective pools, the Claimant scored the lowest of the four staff members. The Claimant was informed that he had scored the lowest in his pool of two at an individual consultation meeting on 5th October 2020 with Paul Petty and Rebecca Hall. At this meeting Claimant was also informed that there were no suitable alternative roles but if there were roles the Claimant was interested in he was able, and encouraged, to apply for them. The Claimant confirmed that he would not consider alternative roles which would result in a change in hours, grade, salary or location outside of London and the South East England area. In doing so, the Claimant had fettered himself from applying for all suitable roles.

35. At the first consultation meeting, the Claimant confirmed that he had seen a role that interested him, it was the role of Senior Information Security Analyst. The Respondent did not consider that that role, which was a grade 5 role, was suitable alternative employment for the Claimant due to him not possessing the requisite experience or knowledge.

36. On 20th October 2020, the Claimant attended a second individual consultation meeting with Mr. Petty and Ms. Hall. At this meeting, the Claimant disputed the composition of the selection pools and the score he had received. Ms. Hall confirmed that the Respondent did not agree that the Senior Information Security Analyst was suitable alternative employment for the Claimant and explained why. The Claimant disagreed and stated that he would not, and should not, have to apply for the role nor attend an interview for a job he (incorrectly) deemed to be suitable alternative employment. The Claimant wanted the Respondent to simply place him in the role without interview or assessment.

37. On 22nd October 2022, the Claimant emailed Tracy Rea (Head of Human Capital) and raised a formal grievance about matters related to the redundancy process. Due to the nature of the Claimant's grievance, the Respondent decided to address it as part of the consultation process.

38. A third individual consultation meeting with Mr. Petty and Rebecca Hall took place on 30th October 2020. The previous matters raised by the Claimant, regarding matters relating to Claimant's selection for redundancy, were discussed. The Claimant stated that he had the skills suitable for the Senior Information Security Analyst role and that contrary to what he had been told by Mr. Lemon, he should not have to undertake a competency assessment in order to be appointed to the role. The Claimant had conducted research on the internet and had a mistaken belief that he was *entitled* to a four-week trial period in a role without completing any assessments or interviews.

39. The matters raised by the Claimant in his grievance of 22nd October 2020 were addressed in the third individual consultation meeting and the Claimant was informed that his employment would terminate on 31st October 2020 and that he would receive eight weeks' pay in lieu of notice as well as any outstanding pay for accrued annual leave.

40. The Claimant appealed his dismissal for redundancy on 4th November 2020. An appeal hearing was held on 20th Novenebr 2020, chaired by Theresa Powell. At the appeal hearing the Claimant was given the opportunity to make any representations and submissions in support of his appeal.

41. On 4th December 2020, Ms. Powell wrote to the Claimant with the appeal outcome. The Claimant was informed that his appeal had been rejected and his dismissal for reason of redundancy remained. There were no further rights of appeal.

Relevant Law

42. The right not to be unfairly dismissed is set out in section 94 Employment Rights Act 1996 ('ERA'). By virtue of section 98 ERA, the employer has first to show a fair reason for the dismissal; in this case redundancy.

43. The question therefore, is whether, the Respondent acted reasonably in dismissing the Claimant, and according to section 98(4) ERA that, '*shall be determined in accordance with equity and the substantial merits of the case*.'

44. We therefore, need to consider whether a fair procedure was followed and, in particular, whether the Claimant should have been offered an alternative role as Senior Information Security Analyst.

45. It is well established that a fair dismissal involves considering whether there are any such alternatives. The duty on the employer is to make reasonable efforts to find alternative employment for a redundant employee, per Kilner Brown J in *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, EAT.

Direct Race Discrimination

46. Section 13 of the Equality Act 2010 ('EqA') provides that (so far as material),

'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

….

47. Under section 23(1) EqA, where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

48. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

49. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e., not trivial) influence and so amount to an effective reason for the cause of the treatment.

50. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was.

51. Section 136 of the EqA sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

52. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

53. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the court of appeal in the well-known case of *Madarassy v. Nomura International plc* [2007] IRLR 246, CA. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the EqA.

54. The Court of Appeal in *Madarassy*, stated:

> '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'* (56)

55. It may be appropriate on occasion, for the Tribunal to take into account the Respondents' explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy*.) It may also be appropriate for the Tribunal to go straight to the second stage, where for example the Respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his favour that

the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

56. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

57. Allegations of discrimination should be looked at as a whole and not purely on the basis of a fragmented approach (*Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. This requires us to "see both the wood and the trees" (*Fraser v University Leicester* UK EAT/1055/13 at paragraph 79).

Conclusions and Analysis

58. The Claimant has advanced his claim under two heads, namely:

    i. That he was unfairly dismissed; and
    ii. that he was directly discriminated on grounds of his race.

59. The Claimant describes his race as black. Therefore, the appropriate comparator is a white person in very similar, if not the same, circumstances as the Claimant with the same qualifications and experience as him.

Credibility of Evidence

60. The Claimant was, and is, an ambitious and intelligent individual committed to furthering and enhancing his career. This is admirable and we make no criticism of the Claimant's determination. However, pursuit of his goals

sometimes skewed the Claimant's perception and his self-estimation of his experience, qualifications and abilities.

61. The Claimant, at times deemed himself to be more qualified and experienced than he actually was; especially when comparing himself to colleagues. The Claimant frequently applied for roles of a seniority for which he had not yet acquired the requisite skills, experience or qualifications. Ms. Gilbert put this to the Claimant in cross-examination and aptly reminded that at one time, he had applied for a role which was at a level of his line-manager's, line-manager's line-manager. This was not a roe to which the Claimant was, then, suited or able to fulfil.

62. The Claimant also was hesitant to accept the level of skills, experience or qualifications of his ex-colleagues even when documentary evidence showed his understanding to be wrong. Curiously, the Claimant did not accept that a role which was graded at two grades higher than his own role, was more senior.

63. Whilst we do not find that the Claimant's evidence to have been dishonest, it was, in aspects, mistaken and at times delusional due to the way the Claimant perceived his own - limited- attributes.

64. We found the Respondent's witnesses evidence to be measured and cogent.

<u>Unfair Dismissal</u>

65. Following the adverse effects upon the UK economy due to the COVID-19 pandemic it was necessary for the Respondent to reduce its workforce. They were entitled to do this, as, unfortunately, many other employers were forced to do so. There was a genuine redundancy situation which is a potentially fair reason.

66. The evidence confirmed that the Claimant was informed that his role was at risk of redundancy and he accepted that he was aware of this. The Respondent

also carried out its obligations of collective and individual consultation incumbent upon it by the statutory provisions.

67. The Respondent's decisions in respect of selection for redundancy and its construction of the redundancy pools was fair and reasonable. It is accepted that the Respondent could not identify suitable alternative employment for the Claimant.

68. The Tribunal has been mindful not to fall into a substitution mindset, which would be an error of law. With this in mind, dismissal on grounds of redundancy was not outside of the range of reasonable responses available to an employer. For these reasons the Claimant's claim of unfair dismissal fails.

Direct Race Discrimination

69. Allegations 4.21, 4.2.2, and 4.2.3 [100] were submitted outside of the primary time limit. We do not believe that it would be just and equitable to extend time in this regard. The Claimant did not advance any coherent reasons as to why these allegations could not have been presented within the statutory time limit when he was able to do so. Even if these allegations had been presented within the relevant time, we do not accept that the Claimant was treated less favourably because of his race.

70. The roles occupied by Ms. Head, and Messer's Wilson and Price were of a level which were, at the relevant time, too senior to be reasonably within the Claimant's grasp. As Ms. Head and Mr. Wilson's roles were not even advertised, the Claimant was not unique in not having had a chance to apply for these roles; nobody else in the workforce, save for Ms. Head and Mr. Wilson would have even been aware of the opportunity.

71. The aforementioned individuals had more experience and skills than the Claimant and were more qualified than him. The fact that they all happened to be white, was not the reason the Claimant was not given those roles. The

Claimant accepted under cross-examination that nobody else in the workforce, be they black, white or any other race could have applied for those roles as they were unadvertised and there was no competition for them. Thus, the Claimant had not been directly discriminated on grounds of his race.

72. The same logic applies to the Claimant's allegation regarding furlough. It was accepted by the Claimant in cross-examination that the 1,400 staff furloughed, were comprised of people of varying characteristics including the diverse characteristic of race. There was simply no evidence before us that the Claimant's race was factor in the decision to place him on furlough alongside the 1,399 other staff members.

73. In respect of the selection for the redundancy pool, the criteria for comprising the selection pools in the way the Respondent did was plainly reasonable. The Respondent did not want staff of differing grades competing for the same role. This would have resulted in obvious inequity. The Respondent also did not require a person with a specialty in emails and security and had to mindful when deciding on pooling that they did not end up with two specialists of one specialism. This desire, not race, determined the Respondent's approach to the selection pools and the number of staff placed within them.

74. The Claimant's grievance of 22nd October 2020 was clearly addressed by the Respondent and this is evident from the notes of the meeting with the Claimant on 30th October 2020. On any reading of that document this cannot be doubted. The Claimant's grievance concerns were discussed and dealt with; albeit it, not to the Claimant's satisfaction. We also find that being unable to find suitable alternative employment for the Claimant was an unfortunate circumstance the Respondent and the Claimant found themselves in and not a deliberate act designed because of the Claimant's race.

75. The dismissal of the Claimant by the Respondent was for the fair reason of redundancy and not influenced by the Claimant being black. There is simply

no evidence that the decision to make the Claimant redundant was for any other reason than commercial expediency.

76. The Possession of a protected characteristic in itself is not enough to find a claim of race discrimination and not in itself evidence of discrimination. What is missing in this matter is the 'something more' or the ingredient from which a prima facie case of discrimination can be raised. The burden of proof did not shift?

77. For these reasons the Claimant's claims are dismissed.

Employment Judge Sudra

Dated: 12 March 2024