EMPLOYMENT TRIBUNALS

Claimant: Mr A Gill & Others

Respondent: DO & CO Event & Airline Catering Limited

Heard at: Bury St Edmonds (by CVP) **On:** 1, 2, 3, 4, 5 & 8 July 2024
9, 10, 11 & 12 July 2024 [panel]

Before: Employment Judge Maxwell
Mrs Buck
Mr Moules

Appearances
For the Claimants: Ms Crew, Counsel
For the Respondent: Mr Samson, Counsel

JUDGMENT

1. The claims for a redundancy payment are dismissed on withdrawal.

2. All of the claims of Mr Barry are dismissed on withdrawal, the parties having agreed a settlement.

3. The unfair dismissal claim of Mr Gill is dismissed because he lacked the required 2 years continuous employment.

4. The unfair dismissal claims of the remaining Claimants, Mr Dhanda, Mr Singh, Mrs Didi and Mr Anwar are well-founded and succeed.

5. The claim for a protective award is not well-founded and is dismissed.

6. Pursuant to rule 36, this judgment will be binding upon and apply to the claims of unfair dismissal and for a protective award pursued by the other Claimants whose claims have been case managed as part of this large multiple, subject to the right of the parties to apply within 28 days for an order that it is not binding and shall not apply in their cases.

REASONS

Introduction

1. This final hearing was listed to determine the unfair dismissal claims made by the following lead Claimants:

   1.1 3305400/2021 Mr Arjun Gill;

   1.2 3305419/2021 Mr Muhammad Anwar;

   1.3 3305449/2021 Mr Guy Barry;

   1.4 3305589/2021 Mr Sudarshan Dhanda;

   1.5 3306686/2021 Mr Manjinder Singh;

   1.6 3306687/2021 Mrs Reeta Didi.

2. There was also a protective award claim made by Unite on behalf of its members.

3. Whilst there had been redundancy payment claims, these were no longer pursued as the Claimants accepted what was due had been paid. These claims would be dismissed on withdrawal. Mr Barry's claim was also withdrawn during the hearing, on a settlement being reached.

Procedural Matters

4. The claims of the lead Claimants and many others have been subject to extensive case management at a number of hearings over many days.

5. At the beginning of the hearing, Counsel for Respondent applied to vary the timetable to increase his opportunity for cross-examination. He said that cross-examination would be slower by CVP and he had anticipated an in-person hearing. He also said that one of his witnesses would not be giving live evidence and time saved there could be reallocated. This application was refused. The time allocation and timetable were set following a case management hearing in November 2022 and had never been challenged. A 10-day hearing with two days set aside for the evidence of the Claimants and their witnesses was proportionate to the issues in the case. There was no reason to suppose that CVP should make the exercise of cross-examination slower. Professional representatives are now very familiar with this platform and all previous hearings had been conducted by CVP. The Respondent electing not to call a particular witness was not a good reason to revisit the timetable. Furthermore, there was a history in this case of poor time management by Respondent's Counsel during hearings. Counsel would be required to conduct cross-examination within the existing time allocation. It was a matter for Counsel to ask questions in a proportionate way, taking into account the amount of time available. This might mean asking fewer questions on a particular topic. One of the lead Claimants,

Mr Manerskas, had now withdrawn and not been replaced. There was, therefore, one less witness for Mr Samson to cross-examine.

6. Subsequently, there was some delay, not caused by the use of the CVP platform but rather resulted from a failure by the Claimants' solicitor to ensure that each of those who would be giving evidence had either received a hardcopy of the documents or had downloaded and could view digital copies. This is basic preparation in any case and it was astonishing to discover it had not taken place. At the beginning of day 2 because the first Claimant was not in a position to give evidence we put him back. It was discovered there was a problem with the next Claimant and indeed the one after that. We had to put the case back to 11am, at which point one of the Claimants was in a position to give their evidence. We made up this time by sitting later on both day 2 and day 3. Mr Anwar failed to attend the hearing, further reducing the number of Claimant witnesses to be cross-examined.

7. We noted, on both sides, a tendency to ask witnesses questions in a repetitive manner. The witness having answered a question would be asked to confirm their answer, which was an unnecessary step. Many questions were asked of witnesses about matters outside of the their knowledge. These points were typically based on documents they were not a party to and could more easily have been made by in closing submissions. There is an obligation to challenge witnesses in cross-examination on the material facts to which they speak, where there is a dispute. A party's case does not have to be put to an inappropriate witness simply because someone else, a more relevant witness, has not been called. Indeed, the failure of a party to call a witness who can speak directly to the matters in issue will often be to the advantage of the other party.

Evidence

8. We were provided with an agreed bundle of documents running to page number 3057, although the total page count was somewhat higher.

9. We had witness statements and heard oral evidence [save where indicated otherwise] as set out below:

    9.1 Arjun Gill, Claimant;

    9.2 Guy Barry, Claimant;

    9.3 Manjinder Singh, Claimant;

    9.4 Muhamed Anwar [did not attend to give evidence] Claimant;

    9.5 Reeta Didi, Claimant;

    9.6 Sudarshan Dhanda, Claimant.

    9.7 Shereen Higginson, Regional Officer for Unite;

    9.8 Attila Mark Dogudan, Chief Commercial Officer;

    9.9 Rachel Woolstone [did not attend to give evidence] Global HR Director;

9.10 Natalie Pettitt, Global HR Business Partner.

Submissions

10. Counsel for both parties provided various written submissions, chronologies and summaries of the law. They also made oral closing submissions. We found these very helpful, not just on the evidence before us and applicable law, but also Covid-19 and Government support schemes for employers and employees.

Facts

11. The Respondent is an airline caterer. Prior to the events which give rise to these claims, it had been successful in winning both the long haul and short haul business of BA at Heathrow. As a result of this, employees of the predecessor contractors transferred to the Respondent under the TUPE regulations, from Gate Gourmet on 1 June 2020 and DHL on 1 October 2020. Unfortunately, this increase in the Respondent's workforce coincided with Covid, lockdown and a dramatic reduction in air travel along with ancillary services.

Union Recognition and Employee Representatives

12. Whilst there was no prior recognition agreement between the Respondent and Unite, by the time of dismissing the Claimants we find the Union had been recognised notwithstanding the absence of a formal recognition agreement. The Claimants had expressly pleaded recognition in their claim forms and the Respondent did not dispute the point, until that is at the final hearing when Mr Samson said the Claimants had to prove recognition of Unite and had not done so. Mr Samson put a brief challenge to Ms Higginson on this (she did not agree) and did not raise it at all with the Claimants who were also Unite representatives. None of the Respondent's witnesses had addressed the point. It appeared to be a novel and late addition to the basis upon which the Respondent sought to defend the protective award claim.

13. The Respondent began to deal with Unite in about April 2020. The fact of recognition by the Respondent is reflected in the HR1 it submitted on 23 April 2020. In section 10, Unite was identified as the recognised trade union. Shereen Higginson (a full time official) was named as representative and the description of employees said to be represented was "Gate Gourmet Employees covering a spectrum of roles".

14. In a subsequent HR1 submitted on 28 July 2020, the reference to Gate Gourmet was removed and Unite was simply said to be recognised for "Employees covering a spectrum of roles". A long list of the trade union representatives was included in the HR1, including Ms Higginson and one of the lead Claimants, Mrs Didi. Mrs Didi had been employed by DHL. She was taken off furlough and brought back to work in order to participate in both TUPE and redundancy consultation.

15. Thereafter, there was a great deal of consultation between the Respondent and Unite about Redundancy dismissals. A number of the Union's suggestions for avoiding or reducing the number of redundancies were agreed and adopted by the Respondent, including a 3-month unpaid leave period and a 12-month

career break. These options were offered to the workforce generally, as opposed to simply those coming from Gate Gourmet or DHL. Moreover, it is common ground that efforts were made to secure the agreement of Unite to selection criteria based on discipline, lateness and absence. The documentary evidence demonstrates an intention on the part of the Respondent to negotiate and agree redundancy selection criteria and other elements of the selection method with Unite. Indeed, it is the Respondent's case and our finding that an agreement was reached in that regard, at least with respect to selection criteria and the scoring guide, to the extent that was used. Our conclusion is that Unite was recognised with respect to all roles within the Respondent save for senior management. This is a common delineation and is consistent with the jobs carried out by the Claimants for whom the benefit of a protective award was sought. The relevant jobs would include:

15.1 Ace Allocator;

15.2 Administrator;

15.3 Admin Officer;

15.4 Airside Supervisor;

15.5 Allocator;

15.6 Bond Clerk;

15.7 Catering Assistant;

15.8 Catering Delivery;

15.9 Checker;

15.10 Chef;

15.11 Chef de Partie;

15.12 Customer Service Manager;

15.13 Data Clerk;

15.14 Dispatch;

15.15 Driver;

15.16 Driver/Loader

15.17 Driver Trainer;

15.18 Duty Manager;

15.19 FCO;

15.20 Flight Co-Ordinator;

15.21 Food Technologist;

15.22 General Assistant;

15.23 General Hand;

15.24 HGV Driver;

15.25 Kitchen Assistant;

15.26 Kitchen Supervisor;

15.27 Loader;

15.28 Material Planner;

15.29 Production Manager;

15.30 Purchasing Assistant;

15.31 Section Manager;

15.32 Shift Team Leader;

15.33 Store Assistant;

15.34 Team Leader;

15.35 Team Leader & Checker;

15.36 Team Member;

15.37 Technical Officer;

15.38 Top Up Co-ordinator;

15.39 Top Up Driver

15.40 Transport Planner;

15.41 Trayset Assembler and;

15.42 Warehouse Operative;

15.43 Zone leader.

16. Furthermore and notwithstanding the workforce balance of Gate Gourmet and DHL on the one hand and DO & CO on the other may have differed, the latter placing more emphasis on the catering side rather than logistics, it is likely that most of those transferring in had functional equivalents within the Respondent's existing workforce, even if that role had a different job title.

17. Separately from its recognition of Unite, the 28 July 2020 HR1 also named a number of non-union employee representatives. Whilst there was a lack of

evidence in this regard, it appears likely they had been appointed or elected prior to 28 July 2020 to represent existing the Respondent's employees rather than those transferring in.

Redundancy Proposal

18. As at 28 July 2020, per its HR1, the Respondent proposed to dismiss for redundancy 2,134 of 2,434 employees, the first dismissals to take place on 14 September 2020 and the last on 27 October 2020.

Announcement

19. The Respondent issued two announcements on 28 July 2020. The first was in the form of a letter from Ms Woolstone to employees. It explained the background, indicated the proposed number of dismissals and included:

> **It is proposed to select which employees to make redundant on the basis of an objective selection criteria and scoring process, to be discussed as part of the consultation process.**
>
> **It is proposed to carry out any dismissals of those employees who would be made redundant, within a 90-day period or less and following a fair consultation process and selection process and in line with the redundancy policy. We will consult with you for a minimum of 45 days, before making any dismissal, or giving any notice of dismissal.**
>
> **[…]**
>
> **Voluntary redundancy will be considered (on a case by case basis) where this does not have a detrimental impact on the needs of the business. A copy of a voluntary redundancy application form is attached if this is an option you wish to explore. Submissions can be made from 3 August through to the closing date of 23 August 2020.**
>
> **[…]**
>
> **Lisa Skelton - Head of HR UK and I will meet with all of the employee representatives to discuss the proposed redundancies and to consult over ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. This consultation process will be undertaken by DO & CO with a view to reaching an agreement**
>
> **A series of collective consultation dates shall be booked through your representative in the near future. You are encouraged to put forward, through your employee representative, any suggestions or proposals you may have in relation to any ways you fee! the proposed redundancies may be avoided, reduced or the impacts of mitigated.**

20. Also on 28 July 2020, the Respondent sent a letter to Unite. This began:

> **Dear Employee Representative,**
>
> **Proposed Redundancies - S188**

> **Following our discussion on 28 July 2020, we are writing to confirm that DO & CO is proposing to make a number of redundancies at its UNIT 2 Girling Way, Feltham location and/or DO & CO 200 Great West Road, Hounslow, TW4 5FD locations. As you are aware, under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, DO & CO must consult with appropriate representatives of the affected employees where it is proposing to make 20 or more employees redundant within a period of 90 days.**
>
> **[…]**
>
> **You are a representative of the Unite trade union.**

21. In the absence of any minutes, the Respondent relied on this letter as evidence that a first consultation meeting had taken place on 28 July 2020, along with the witness statement of Ms Woolstone. Later in the hearing, Mr Samson refined his position and said the meeting on that date took place only with employee representatives (i.e. not with the Union). Our conclusion is that there was no such meeting at all on 28 July 2020. The letter is likely to have been drafted in advance anticipating what would happen on the 28th, rather than being written after the event describing what did. A meeting had been envisaged but did not take place. Ms Higginson was clear in her denial of a meeting on this date and we accepted her evidence. She was a good witness on the whole. She demonstrated a detailed memory of events, including with respect to the Covid chronology put to her by Mr Samson. She made appropriate concessions at times and was clear with respect to what she could and could not recall. Whilst it might be said Ms Higginson adopted an optimistic position on some issues, including whether or not the Union had agreed the proposed redundancy selection criteria (she said it had not but her email correspondence suggested otherwise) we did not gain the impression she was trying to mislead.

22. Ms Woolstone did not attend the final hearing. Her evidence could not be tested. We decided to attach little weight to it on controversial matters, save unless this was corroborated by other evidence. We note that Mr Samson's refined position, there being a meeting with non-union representatives only on the 28th, was inconsistent with the account of Ms Woolstone, given she says the first meeting on that date was with former Gate Gourmet employees who had the benefit of collective bargaining. Although the absence of minutes is far from conclusive (so much relevant document appeared to be missing) it is consistent with a meeting not having taken place. Finally, we think it unlikely the Respondent would have commenced consultation with employee representatives first. The Union took the lead in consultation on the employee side and it would be odd for them to have been excluded from the first consultation meeting.

Consultation

23. Before looking in more detail at the consultation process, we pause to note the Respondent, according to the statement of Ms Woolstone, had no prior experience of such a large scale redundancy exercise in the UK. Whilst the announcement of 28 July 2020 spoke of a redundancy policy, we were not referred to any such policy during the hearing and there is no other evidence of a previous policy or practice in this regard. Ms Woolstone says that Ms Skelton "had the requisite skills and experience to oversee the HR requirements of the

project." We did not hear from Ms Skelton. She had not made a witness statement. We have little information about her prior training, experience and knowledge.

24. The hearing bundle included a framework document, with various steps to be taken at different points between July and October 2020, with final decisions about dismissal on 19 October and an employment end date of 27 October 2020. Ms Higginson said she did not receive a copy of this document and had not seen it before it was disclosed during these proceedings. In the course of cross-examining Ms Higginson, Mr Samson put the Respondent's case on this point in general terms, namely that she had been given a copy at the time. In closing submissions, Mr Samson took a more specific point, namely that on the last page of an annotated version of this document, there was a table with ticks to confirm that steps have been taken and Ms Skelton's signature. One of the rows related to the framework document and there were ticks in the relevant boxes for Unite representatives. Mr Samson told us this was evidence that a copy had indeed been provided. This point had not been put to Ms Higginson, who would have been the relevant witness. We accepted the evidence or Ms Higginson. The document was not shared with the Union. Ms Higginson was clear about what she did and did not receive. She agrees the receipt of various other relevant documents the Respondent produced. There is no evidence to show the transmission of the framework and it does not appear to have been discussed at any of the consultation meetings, which would be surprising if it had been passed on. Our conclusion is this was a document used internally within the Respondent rather than being distributed more widely.

25. A first consultation meeting took place on 17 August 2020. Whilst minutes were taken of this, they were not provided to the Union and the Respondent has not produced them.

26. We pause to note that there are many documents we might have expected to see in a case of this sort, which we have not. In this regard, the Respondent refers to a cyber-attack said to have taken place in November 2020. Ms Pettitt's statement included:

> **The appeal process was also affected by the cyber-attack the Respondent suffered in November 2020. During this time the Respondent could not access its systems and had lost most of the data/e-mails we should have received when the attack occurred. Data/e-mails that the Respondent received prior to the attack was also lost. It was not until the system was rebuilt and accessible that the Respondent realised the loss of data/e-mails, meaning we had no trace of who had tried to be in contact.**

27. We were somewhat surprised by the brevity of the witness evidence on this point and lack of any supporting documentation. The Respondent is a large international undertaking. Mr Dogudan confirmed in his oral evidence that the Respondent made backups of its IT system. He said these had also been compromised. We would have expected a cyber-attack of this scale to have been the subject of a careful investigation by the Respondent, with a view to understanding how the attack had occurred, what needed to be done to eliminate any vulnerabilities found, what had been lost and the exercise in restoring data from backups. Yet we have no report explaining any of these

matters. We do not know why apparently relevant evidence cannot be restored from backups or how these too came to be affected. Where documents relating to the material events in this case that we might expect to have seen have not been produced, that might be because they were lost to the attack or it might be they were never created in the first place.

28. There were regular collective consultation meetings in most weeks between the Respondent and the employee side. Ms Higginson and Ms Skelton also had a number of separate discussions.

29. At the consultation meeting on 24 August 2020 there was much discussion about the number of flights taking off and level of demand for the Respondent's services. Unsurprisingly given the effect of the pandemic on air travel, the position was a poor one. The Respondent agreed to put back the date for voluntary redundancy applications to 31 August 2020. At that time, the Respondent had some 260 staff at work, out of a workforce of 1,594 (the DHL employees had yet to transfer). Even allowing for the state of the aviation business, the employee side expressed surprise and concern at the number of redundancies proposed by the Respondent in its HR1. In response to this, management said the HR1 figures were a worst-case scenario:

> **DHL Rep: so you have 260 employees working and that is the number you are looking to operate**
>
> **Lisa: Let me reiterate our business position. It is worst case scenario and not final figure which has been set within our HR1. If we announced a reduction of 50% redundancies and the actual figure at the end of the process had to be higher we would have to start the process again - HR1 form, consultation and redundancy process. In this current climate anything is possible and its ever changing day by day so we have been cautious with our approach.**

30. The Respondent's August 2020 newsletter told employees that the move of the business to a new site was now complete. It also included:

> **Consultation**
>
> **Whilst we have some great opportunities ahead with the transition of short-haul services from BA, we also are continuing to consult with all of our teams collectively and via 1-2-1 meetings. This is due to the reduction in services and the impact that COVID-19 has had on aviation, hospitality and the service industries.**
>
> **We shall ensure that we continue to evaluate our position as a business in terms of services and look at ways in which we can mitigate the risk of redundancies. We would also like to encourage you to speak to your representatives about ideas that you may have to support the business and reduce this risk. […]**

31. Some of the Respondent's employees had individual 1-1 meetings. None received a letter or email inviting them to attend, rather the Respondent made the Union and employee representatives aware that such meetings could be arranged for those employees who asked. The Respondent adopted a passive

approach, relying to a large extent on others to convey its message and arranging such meetings only if requested to do so.

32. On various dates in August and early September 2020, there were individual 1–1s with DHL employees who were due to transfer to the Respondent. The meetings appear to have been arranged with the assistance of DHL HR and Unite representatives. Mrs Didi, one such representative, was brought back from furlough to accompany employees. Mrs Didi gave evidence to the effect that each of the meetings she attended lasted for about 15 to 20 minutes and they were held consecutively to make best use of time. Had every employee taken up this opportunity, it seems likely the Respondent would have needed to acquire additional HR support. Indeed, given the size and financial resources of the Respondent, we are surprised they attempted to conduct these very large TUPE and redundancy exercises running in parallel, with a relatively small HR team.

33. The content of the 1-1 meetings with the DHL cohort is reflected in template documents, in effect a script for the Respondent to deliver information. The template began with Ms Skelton introducing herself as Head of HR from DO & CO before explaining that she was managing the process of TUPE and redundancy consultation. Whilst the claim before the Tribunal concerns only redundancy consultation, Ms Skelton was endeavouring to deal with both matters at the same time. Having briefly referred to a huge decline in the Respondent's business, the template goes on to say that: applications for voluntary redundancy were being sought by 31 August 2020; the Respondent was currently scoring employees against criteria of disciplinary, absence and lateness; low scoring employees would be selected for the first dismissals via redundancy; once this exercise had been completed with all DHL employees, the Respondent would evaluate the number of employees it needed and if further redundancies were necessary, conduct an objective selection process:

> **As an example we shall review our employees based on role and function, and conduct assessment centres to score Individuals against skills and behavioural criteria.**

34. The script included suggestions of ways to avoid redundancy, alternative vacancies and space for a brief note of anything the employee said in response. The sheet also said that no redundancy scores were available and employer liability information was awaited.

35. DHL employees were very well aware of the difficulties faced in the aviation sector and many feared they would be dismissed as soon as they entered the Respondent's employ. Being told that would not happen and a fair process would be followed before any redundancy dismissals was reassuring for those who attended.

36. Also in September 2020, Ms Skelton had 1-1 meetings with some non-DHL employees, (i.e. pre-exiting employees of DO & Co or recent transferees from Gate Gourmet). Given the size of the relevant cohort of employees, it would appear that a relatively small proportion had such a meeting. Again, the Respondent did not send out any individual invitations, it relied upon the newsletter and trade union representatives to spread the word. Where employees did proactively request such a meeting, one was arranged. Had the

entire workforce been invited to such meetings these would have taken far longer to carry out.

37. A similar template was used for the non-DHL 1-1 meetings, this iteration referring only to redundancy consultation. Some employees were given their score at the meeting, albeit this was done without any information that would make the figure meaningful, such as the pool for redundancy selection into which they had been placed, the number of employees in the pool, the number to be retained and whether or not their score would mean they were safe.

38. In a very small number of the non-DHL meetings, additional information was given that was potentially relevant to their individual redundancy risk. We were referred to 4 sheets which included:

> **Your current score against the criteria based on the evidence available in your personnel file is […]**
>
> **Therefore, we have now moved you on through to the next phase of criteria which given your current role - Recruitment Co-ordinator is no longer within the structure, you will be required to make the business aware formally your wish to apply any of the available positions within structure. Once we have consulted with all members of the team, we shall then return to a 1-2-1 to discuss the outcomes and the business position.**

There were no follow-up 1-1s.

39. A letter was sent to employees on 25 September 2020 inviting them to apply for voluntary redundancy, unpaid leave for 3 months or a 12-month career break. The end of the letter included a form the employee might complete to express their interest.

40. On 21 September 2020, the collective consultation meeting started with a discussion of agency workers. The employee side was concerned about the use of agency workers and temporary positions being advertised. Ms Skelton said that an agency had used its "brand" in error. She went on to say that given three groups of employees were coming to work together at the same site, there was scope for people to be unfamiliar with their new colleagues (i.e. mistake them for agency staff staff). Ms Skelton said there were no current vacancies and:

> **LS: Our recruitment coordinator was placed on furlough when the pandemic began and all roles to our knowledge were placed on hold.**

41. Ms Skelton also discussed some measures to reduce the number of dismissals:

> **LS: Shereen kindly extended some time to me last week to temperature check some ideas in what we can do to mitigate and reduce the risk of redundancies. There are two schemes I can talk to you about today. The first is a 3 month scheme from 1st November called Voluntary Unpaid Leave Scheme. You can apply to have a voluntary period of unpaid leave for up to 3 months. After that we can assess with those individuals the next steps, whether there is work or a redundancy offer. The second is a career break scheme. This is also unpaid and will be for a period of 12 months. Since COVID-19 and the furlough scheme has come in place, and since the transition of short haul and induction programme, we are now**

> **introducing more people into the business. During furlough a lot of people went back to their home country, and people are still looking to go home due to the uncertainty. We want to extend this opportunity for a career break of 12 months. The package of redundancy would not be in place at the end of this option but the hope is that at the end of the 12 months then we would have seen improvement in aviation and catering. If at the end of the 12 months, things still have not picked up then we may consult with those individuals who took the career break. Both schemes will be on an application basis similar to voluntary redundancy. So the business can still accept and decline these. This could be an opportunity to save jobs in the business, and there may still be a need to make redundancies but we hope these schemes would reduce this.**

42. A further consultation meeting took place on 28 September 2020. Some improvement in airline traffic was reported. On this occasion, there was a discussion of redundancy selection methods, Mr Kitchen, the General Manager proposing it being done randomly:

> **Paul: just to be really clear, it is fair and consistent approach, we are doing random selection from the pool of candidates we have currently for respective departments and we ensure that they are fit to work, it has nothing to do with GG specific or DHL.**
>
> **Shereen: you can't just take random selector to pick staff I just do not like to support the idea of computer selecting random people and not at all fair system and you are the only company only takes computer system and we want to make sure to submit the fairly and not activity and hearing that's we have not taken, we don't like it we need to blanket that now. DHL goes over - we would like to see DHL reps and we want to get your mixes of the DHL and voices are heard, DO& CO member not heard - Lisa said that we use computer selector that is not good enough.**
>
> **Paul: I am little bit anti-personal discretion selection and it is not fair and consistent I am not a fan of selecting people and I feel it is more of a fair approach not to use managers discretion, I don't believe that it is fair for the people. Can you please suggest something we can take back and look in to it?**
>
> **Shereen: code system better for instance you have pool of all the 3 groups of staff from the individual category and picking up 3 of each category will be fair and equal and not biased at all**

43. Ms Skelton said that approximately 80 employees had expressed an interest in voluntary redundancy, unpaid leave or a career break in response to its recent letter.

44. Ms Higginson asked whether the Respondent would seek to take advantage of the next Government Covid support scheme for employers. The history and evolution of the various schemes was addressed in some detail during the hearing before us. In summary, at the beginning of this process it was possible for the Respondent to recover some 80% of its employees' wage costs where individuals were placed on furlough. With the passage of time, the financial contribution required of the employer increased. Government announcements on this topic were prone to change at short notice and there was a degree of uncertainty. The CJRS scheme was due to close at the end of October 2020. Ms

Higginson wished to know whether the Respondent would apply for support under the new scheme then being spoken of by Government:

> **Shereen: establish and understand benefit and going down that route winter scheme part time jobs? Talk about the scheme kick in and no other information is shared - are you guys establish and would like to go for the same.**
>
> **Lisa: you are right there are not all the scheme rules out and not noted the fine detail of the scheme. As a larger business we need to review whether we are eligible. Once area could be revenue review based. We have of course seen a positive in our revenue year on year due to the transfer of BA irrelevant of the manner in which it is flying. So we need to review if we are eligible for the scheme.**
>
> **Shereen: I guess you are eligible and as soon as you get any information we can find out about the same. It is pain not knowing where we are and utilising other individual, can we chat about it more, we know we are not going to avoid redundancies can I see the matrix (selection criteria) ideas and come to some conclusion what you pay them - past they had criteria which was not competitive and has categories like average, outstanding and poor and scoring and 4 or 5 tier system**
>
> **Lisa: we have already put something together and we have number areas-Discipline, absences and lateness and then this shall evolve to a second stage assessment centre with individual, group setting whereby we would asses - situation handling, personal attributes and different departmental skills.**

45. The discussion about selection criteria at this meeting is somewhat odd, or at least inconsistent with other documentary evidence we have seen. The discussion suggests selection criteria had yet to be settled on or provided to the Union, let alone agreed, despite that being the Respondent's declared intention. Yet it is apparent from documents we have seen that in August 2020, the Respondent had already chosen to use such criteria (disciplinary record, sickness absence record and lateness) together with a scoring guide (with a maximum of 10 for each criterion) and was undertaking a large scoring exercise. There were also some 1-1 meetings in September during which individual employees were told of their scores, albeit without any information as to whether and if so the extent to which this put them at risk of dismissal for redundancy.

46. There was also a discussion about the number of applications that had been received for voluntary redundancy or one of the other recent options. Mr Kitchen said it was difficult to predict but noted that less than 50% of employees were in work at that time.

47. A further consultation meeting took place on 5 October 2020. Some good news was reported with respect to the number of flights. There was again a discussion about the numbers of likely redundancies. The notes of this meeting are of poor quality and not easy to follow. Also on that date Ms Skelton sent a copy of the selection criteria and scoring guide to Ms Higginson by email:

> **Please see our intended first phase of scoring for your review and feedback.**

> **The selection criteria used shall be across all individuals within the business and therefore shall be fair in approach.**

48. Ms Higginson replied the following day offering constructive comments. Unbeknownst to Ms Higginson, the Respondent had been using these criteria and the scoring guide since August. In those circumstances, Ms Skelton referring to this as the Respondent's “intended first phase of scoring” appears somewhat disingenuous. Notwithstanding Ms Higginson’s oral evidence that Unite did not agree the proposed selection criteria, we find this was implied by her response.

49. The next consultation meeting took place on 12 October 2020. As far as the level of demand was concerned, there had been improvement in flights but seat occupancy and the number of premium customers was still low. Once again, Ms Higginson sought to ascertain whether the Respondent would be using the new Government support scheme from the beginning of November, as a means of avoiding making redundancies:

> **LS - Job Support Scheme - November scheme still no direction from the Treasury**
>
> **SH - Have you applied and up in the air, company apply through the route. Backwards but need to apply. If they give the green light will you be using the process**
>
> **RW - we are keen to use that**
>
> **SH - just wanted to gain reassurance**
>
> **RW - positives and negatives, Government funded support and the grey areas and instability. But if we can come out of it with a better result then we will.**

50. In the course of cross-examination and submissions, Mr Samson suggested that Unite and Ms Higginson had their ‘head in the sand’ about large-scale redundancy dismissals at the end of October 2020. He said the Respondent’s intention had been clear since July, referring back to the HR1. This proposition is not consistent with the position conveyed by Ms Skelton and other managers during the various consultation meetings to which we have referred. At an early stage the Respondent had said the figures were worst case scenario. Thereafter there was discussion about agreeing selection criteria and additional processes to be followed for later stages of the process. As late as 12 October 2020, Ms Skelton expressed the Respondent’s keenness to use the next iteration of the government support scheme due to commence in November. The Union side could, reasonably, understand the point at which large scale compulsory redundancy dismissals would be made had not yet been reached.

51. During a discussion about the treatment of those on furlough and those actually at work, the meeting note includes:

> **Those on furlough will be treated in the same manner to those within the workplace. Apply for the job and go through the selection process.**
>
> **Why would they have to apply for their job?**

52. From the context, it would appear the first statement was made by a member of the Respondent's management and the question in response asked by the employee side, most likely Ms Higginson. The Respondent appeared to be proposing a different method of redundancy selection, by way of a competitive process of job applications, although no detail was given.

53. The Respondent's explanation for not applying the selection criteria to DHL employees was an alleged failure in the provision of employee liability information ("ELI") by DHL. This was conveyed to Ms Higginson and she took the matter up herself, writing to Mr Cookman of DHL on 22 October 2020 (21 days after the transfer):

> **Have tried ringing, I was wondering if you could give me an update in regards to the records being transferred over to DO&CO;**
>
> **Disciplinary/lateness/sickness**
>
> **IFR training/ADP/CPC**
>
> **Reason I asked is, we are in current consultation over the matrix criteria for redundancy and have been informed this information is still pending. Considering DHL were keen on the pre-consultation of redundancy and authorising such process. We currently cannot continue pending this data being transferred over.**

54. Mr Cookman replied the same day:

> **Apologies for missing your call. The central team were going to send the files via a secured drop box to Do&Co this week but I have not seen it yet. When the team are back in the office tomorrow I will chase this and get it sent over ASAP.**
>
> **As part of the ELI information we did provide the disciplinary information and have previously provided absence occasions. So the only thing is the skill / training that Do&Co are waiting for - I'll get it sent as soon as.**

55. We note that whilst Mr Cookman offered to provide more, he said DHL had already supplied disciplinary and absence information. This would appear to have allowed for scoring as against the first two selection criteria chosen by the Respondent. As to lateness, this is not part of statutory ELI. Not all employers capture data around lateness and even if they do, TUPE regulation 11 does not require the transferor to provide this to the transferee. Given the Respondent said it was waiting for the opportunity to score DHL employees, it is difficult to understand why it would choose a criterion which it could have no certainty of receiving data on.

56. Furthermore, we have considerable doubts about the use to which the Respondent put the scores obtained from the exercise it carried out in August and September 2020. The usual purpose for such scoring in a redundancy situation is for making a selection from a pool of employees doing the same or similar jobs. In circumstances where fewer such employees are required, those with the highest scores will be retained. There is, however, no evidence of a pooling exercise. We would have expected to see a schedule or job structure chart, with the current number and required number of employees in each role.

In his closing submissions, Mr Samson suggested there was a single pool of all employees. There is, however, no evidence to support that proposition and it seems inherently unlikely. In a redundancy exercise, the employer will be anxious to retain the correct number of people for all of the jobs which remain. An exercise in which many hundreds of employees were all pooled together, scored and those falling below a particular score dismissed, would result in an entirely random distribution of employees and skills. This would scarcely assist the Respondent's business going forward. Ms Woolstone's statement does not address this point and we have nothing from Ms Skelton. Nor is an answer to be found in the documentary evidence.

57. Our finding is the Respondent chose to engage in a very large scoring exercise, without much thought for whether it would be able to carry this out with respect to the entire cohort of employees it would have by October 2020 or indeed whether such scores would allow it to make the huge number of dismissals necessary for its proposed business structure going forward. Whilst much time may have been spent on the endeavour, scoring against these criteria in isolation appears to have been an exercise with little or no value. Furthermore, the Respondent does not appear to have looked, in any serious way, at what it might need to do if the scoring exercise could not be completed or did not allow it to make the number of dismissals required. There is no evidence of a Plan B if Plan A did not work. The references to an assessment centre appear to lack realism. Given the Respondent's need to dismiss many hundreds of employees, carrying out assessment centres for each of them would likely take several months. This method could not realistically achieve proposed dismissals in 2020. In reality, talk of assessment centres was speculative and a distraction.

58. The final consultation meeting took place on 28 October 2020. This was an acrimonious affair. We accept the evidence of Ms Higginson to the effect that the minutes give an impression of order and sequential speakers that is not representative of what actually happened. There was a great deal of over talking and much heat. That said, we accept these minutes as with earlier meetings, as a fair reflection of the content, if not of the tone and in all respects, the precise sequence.

59. Ms Skelton made a long statement in which she summarised events from the Respondent's perspective and this included:

> **In order to look to reduce the employee resourcing in a fair and consistent manner, we had consulted and agreed upon with all parties, the use of a selection criteria consisting of a review of discipline, absence and lateness. After further review and with a lack of data from DHL (no information regarding absence, lateness and disciplinary), we proposed to Shereen last week that this information was not what we believed to be complete. We therefore proposed to utilise assessment centres as a way in which we could review all employees fairly**
>
> **Shereen noted that she would prefer the use of selection criteria and that she would support with the gaining of the data required from DHL -this has still not been shared**
>
> **Shereen also rejected the use of assessment centres as a way to move the process forward**

[…]

Next Steps

After review with three separate employment lawyers, we can confirm that at present DO & CO shall not be eligible to utilise the new Job Support Scheme which comes into effect from 1 November

[…]

we are not eligible for the Government Job Support Scheme. There are further Government updates to come this Friday, but we do not feel it is suitable for us to await this update and action has to be taken now.

We have explored different options but as a company still need to move to compulsory redundancy as a business. For the future of our business we need to reduce our headcount in line with the flight reduction of 60%.

We shall be looking at our structure, reviewing roles which do not fit in to this, rather than just using the select criteria agreed.

As from the last phase, head count, including the unit and lounges 1884 employees, an extra 309+ from the voluntary options of voluntary redundancy, voluntary unpaid leave and career break.

We can, using the agreed selection criteria, release a further 292 employees through compulsory redundancy. We can then conduct the same exercise once the data has been received from DHL.

These exercises will leave us with 1283 employees and the further reduction of 60% is required from this figure. Totalling around 776 further redundancies. We shall continue our endeavours to retain further employees f and where this is financially viable.

Currently in the unit we have 620 employees.

Looking at the deduction of flights hitting us next month for an ongoing period, our final figure of head count is 507 employees, required going forward after 60% reduction have been made.

[…]

We shall be moving forward with the removal of roles, removing any roles which are not within our structure

For positions whereby there is a larger workforce, we shall conduct a fair assessment based on the role e.g. Transport - Drivers, a review of incidents and categorise with a scoring system

This shall take place over the coming days with a view to reducing the workforce by approximately 60% in line with the reduction of flights

60. Ms Higginson was dismayed. She had been given no prior indication of the decision not to seek to take advantage of the next Government support scheme and proceed instead with immediate large-scale redundancies. She asked for a short adjournment. Following this, Mr Kitchen summarised the numbers:

> **Paul - Just before we invite you to ask questions we would just like to ensure everyone's understanding of the numbers. We will welcome any question afterwards.**
>
> **Current staff 1884**
>
> **Uptake for the three voluntary options currently 309**
>
> **292 via CR selection criteria**
>
> **Would leave us with total head count of 1283, based on flights being reduce in Nov, 507 is the number that us as a company need to be at for our total direct labour operational support.**
>
> **Therefore, there is an estimated 776 compulsory redundancies that we shall look to make.**

61. Ms Skelton went on to say that the collective consultation had now ended, without agreement and the Respondent would move forward as it wished in order to protect the business. Ms Higginson complained that the Respondent had not provided information about what the process would look like. Ms Skelton responded to this:

> **Lisa - We did discuss this on the phone last week (Shereen) if you remember. I confirmed we would prefer to have the data from DHL to ensure that this is relevant and protects those which may have protected conditions. I explained that we will take the necessary precautions to make sure this process is fair. As we could not agree upon an alternative of assessment centres, we shall look to something simple in terms of role removal.**
>
> **It will be a staged process, so if there is movement with JSS we can adjust this process.**
>
> **Shereen - The 292 first?**
>
> **Lisa - VR shall be confirmed first, then we shall move through the selected CR from the scored criteria from both DO & CO and GG. This is the selection criteria which has been previously agreed upon through the consultation. Should we find ourselves in a position requiring further reduction to achieve the required staffing figure, we shall then look to role removal. Removal of roles whereby we can support with alternative skilled roles across the business.**
>
> **Shereen - So GG and DOCO will have the upper hand and DHL will be at a disadvantage?**
>
> **Lisa - No we are scoring no data against DHL until we have this information. Any updates to the JSS shall be delivered by Shereen by Monday**
>
> **Shereen - When will the first likely CR be?**
>
> **Lisa - End of this week, I know it's a difficult situation but this is where we are currently.**

> **Shereen - Can / suggest until the Monday 1st November**
>
> **Lisa - It will be sent on the 31st redundancy effective from the 1st of November,**

62. The meeting ended following an exchange in which Ms Higginson observed that once notice of dismissal had been sent, then eligibility under the new Government support scheme would be lost.

<u>Government Support</u>

63. As at 28 October 2020, the most recent Government announcement about the successor to the existing support scheme was that made on 22 October 2020. It had then been proposed that a new Job Support Scheme (“JSS”) would start in November 2020 and run for 6 months. A press report included the following terms:

> **Employees must work 20pc of their hours (down from an originally stated one-third) to qualify**
>
> **Staff will receive a 27pc pay cut**
>
> **Treasury will pay 62pc of unworked hours, capped at £1, 541.75 per month**
>
> **Employer will pay just 5pc of unworked hours - down from 33pc**
>
> **All SMEs are eligible for the scheme**
>
> **Larger businesses must demonstrate a slump in turnover**
>
> **Firms on scheme cannot make staff redundant**
>
> **Cash grants of up to £2,100 a month are available for businesses in Tier 2 areas – mostly targeting hospitality and leisure firms**
>
> **These are available retrospectively for firms in areas already subject to tighter Tier 2**

64. On 30 October 2020, a further Government announcement was made, this time withdrawing the proposed JSS. On 31 October 2020 an extension of the former CJRS to December was announced. On 2 November 2020 the Prime Minister set out his new plans to Parliament. On 5 November 2020, Parliament voted to extend the CJRS scheme to 2 December 2020. It is fair to say, there was a uncertainty and frequent change at this time, in what was proposed to support the employment of those absent from work (in whole or part) on furlough.

<u>Decision to Dismiss</u>

65. Dismissal letters began to be sent on 29 October 2020. In general terms, it is obvious that the reason for dismissal in each of the cases before us was redundancy. Because of a decline in the aviation industry and associated support services, the Respondent required fewer employees to do work of many particular kinds. Sensibly, the Claimants conceded this point.

66. The detail, however, of who made the decision, when and on what basis is far from clear. Most surprisingly, we did not hear evidence from a relevant decision-maker.

67. Ms Woolstone's witness statement included:

> **78. Despite representations made by UNITE following the Prime Minister's announcement on 31 October 2020, the Respondent had made the decision to commence a programme of redundancies of over 2000 on 29 October 2020 based on the information available to it at the time i.e., that these roles were not viable under the JSS Open scheme. Notwithstanding UNITE's position, the announcement on 31 October 2020 required ratification by parliament on 5th November 2020, which was not guaranteed to happen, nor was there any guidance as to what grant was available between l-5th November 2020. Further, extension of the furlough scheme would have required the Respondent to write to all employees whose notice of redundancy had been sent via Royal Mail 'drop and send' on 29 October 2020, withdrawing notice and seeking agreement to re-furlough. The extension was only to be for a further three weeks and therefore did not provide significant or long-term relief for the Respondent's tenuous trading position and a further tranche of letters were therefore released on 9 November 2020.**
>
> **[…]**
>
> **81. At the time the decision was taken the Respondent took account of the government guidance, employee representative submissions and legal advice concluding that it would have been logistically impossible with the resources available to share out work to accommodate 20% (one fifth) of each employees hours to maintain employees on JSS Open, particularly since March 2020 we had been unable to bring furloughed employees back to temporary work on many occasions when work was available because they had gone overseas to their country of origin, were self-isolating or simply not responding to contact. In addition, Covid safety measures for those coming to work would have been severely compromised, and hugely costly, in attempting to provide 20% hours weekly for over 2000 furloughed workers on the JSS Open scheme.**
>
> **82. Combined with the cost of reducing the workforce by making redundancies, being reduced to a fraction of its former revenue and with continuing uncertainty, the Respondent had to rely on financial support from the parent company, otherwise the Respondent's business would not have been viable. As an alternative to winding up the Company which would have placed a further burden on public funding for redundancy payments, the Respondent consulted with employee representatives as to how selection of roles for redundancy would be carried out. The representatives understood the dire situation and a method of selection was agreed, until the talks on 28 October 2020 broke down in respect of how to select DHL employees for whom the Respondent had no reliable data.**

68. According to Ms Woolstone, therefore, on 29 October 2020 the Respondent decided to dismiss many hundreds of employees because a view had been reached that Government support for their continued employment would not be available / it was logistically impossible to achieve the qualifying conditions and

the Company was in tenuous trading position / faced a risk of winding up. She does not, however, say it was her decision and nor does she provide any detail with respect to the Respondent's trading position or solvency.

69. The relevant part of Mr Dogudan's statement was in very similar terms:

> **30. Despite representations made by UNITE following the Prime Minister's announcement on 31 October 2020, the Respondent had made the decision to commence a programme of redundancies (including voluntary and compulsory) in line with the HR1 form we had submitted […] and shared with the employee representatives. on 29 October 2020 [check date] based on the information available to it at the time i.e. that these roles were not viable under the JSS Open scheme. Notwithstanding UNITE's position, the announcement on 31 October 2020 required ratification by parliament on 5th November 2020, which was not guaranteed to happen, nor was there any guidance as to what grant was available between 1-5th November 2020. Further, extension of the furlough scheme would have required the Respondent to write to all employees whose notice of redundancy had been sent via Royal Mail 'drop and send' on 29 October 2020, withdrawing notice and seeking agreement to re-furlough. The extension was only to be for a further three weeks and therefore did not provide significant or long-term relief for the Respondent's tenuous trading position.**

70. Neither Ms Woolstone or Mr Dogudan put themselves forward as having taken the relevant decision. We did not hear from Ms Woolstone. In the course of Mr Dogudan's oral evidence, it became apparent the final decision maker was Gottfried Neumeister of the Respondent's board. Mr Neumeister did not give any evidence in these proceedings and there is no documentary evidence recording his decision or the basis for it.

71. Whilst Mr Dogudan could speak to his understanding of why the Respondent sought to make such a large number of dismissals, he could not explain the detail of this exercise, which roles were removed and for what reason. He did not add to our understanding of the redundancy selection process, whether by reference to selection criteria, scoring or role removal. Mr Dogudan was rather more certain about the Respondent's difficult financial position. This included a €300m loan, sourced from 4 banks, 3 of which were "on board" (i.e. willing to be flexible) and 1 that was not, in circumstances where the loan had to be repaid in full immediately if a particular financial threshold was surpassed. We were very surprised that documentary evidence in this regard had not been provided but nonetheless inclined to accept what we were told on this. Mr Dogudan was a relatively straight forward witness. He gave a number of clear, specific and credible answers to questions, albeit he did occasionally strive to maintain an unrealistic position. An example of the latter was when asked whether the words in the HR1 "Intend to use objective criteria discussed with employee representatives - score-based criteria based on role" would tend to convey an intention to made redundancies by deleting roles entirely without any scoring. Initially he appeared to say they did before, sensibly, conceding they did not.

72. In the course of being cross-examined, Mr Dogudan was unable to tell us the cost of this redundancy exercise, he said he had not expected to be asked that. He was, however, clear in his view that there was no case for delaying the

redundancy dismissals, even if the Respondent had been eligible for government support until March 2021, because the company would find itself in the same position then, having incurred substantial additional costs during the intervening months. Whilst government support would reduce the employer's costs, it would not cover them entirely. He said it was important to consider the affordability perspective and this meant the decision to dismiss had to be taken when it was. Mr Dogudan said he expected that work had been done leading up to the decision to dismiss (i.e. about which jobs and on what basis) but agreed there was no evidence in the bundle to show this.

73. Mr Dogudan was then re-examined at considerable length. In the course of this, he said Ms Skelton and Ms Woolstone "would have" taken various steps, such as preparing organisational charts and role comparison. Our conclusion is this is evidence of Mr Dogudan's expectation of what should have happened, rather than knowledge of what did. If he had been a party to this work and received it at the time, no doubt he would have said so. We were reinforced in this view, when later Mr Dogudan said the material had been provided to Mr Neumeister who assessed it, along with financial information and legal advice before making a decision. We would have expected a report or written proposal to have been prepared by Ms Skelton or Ms Woolstone setting out how they would achieve the required number of dismissals by the end of October, which was then sent to Mr Neumeister to approve or not. There was, however, nothing of the sort in the documentary evidence before us.

74. In response to a suggestion made by Ms Crew that evidence showed the business was improving at this time, Mr Dogudan had replied "on the contrary". Asked in re-examination to explain what he meant by this, Mr Dogudan said "we were burning money, €1.5 to €2 million per month".

75. Our conclusion is that Mr Neumeister made the decision to dismiss in October 2020, taking into account various matters, including: uncertainty over eligibility for Government support; the additional costs to the business even if it were eligible for support; the prospect of incurring those additional costs and then finding themselves in the same position a few months down the line; and the Respondent's difficult financial position, in particular the outstanding loan and risk of immediate repayment. Whilst the Respondent's case before the Tribunal was predicated, primarily, on the Respondent receiving legal advice that it was not eligible for the successor to CJRS, our conclusion is this was merely one of many factors and not the principal one. Having heard from Mr Dogudan and notwithstanding he was not the actual decision-maker, it is highly likely and our finding that the main driver of the decision to dismiss was the Respondent's financial position and its need to dramatically reduce costs. Its workforce had increased enormously at a most inopportune moment. The business was leaching money.

76. Furthermore, and given the main driver of the decision was the need for a dramatic reduction in costs, it is likely that large scale dismissals by the end of October 2020 had been expected by the Respondent for a considerable period, notwithstanding the reassurance given by management to Unite at consultation meetings. This is the date in the July 2020 HR1. It occurs to us there may have been something of a disconnect between London and Vienna, with local management and the controlling mind of the parent proceeding on a different

basis as to how firm the October date was. Whilst the consultation meetings would, reasonably, have given the employee side the impression there was scope to put off large-scale compulsory redundancies beyond the end of October 2020, given what we now know about the Respondent's financial position that seems unlikely. Much more likely, is an expectation on the part of Mr Neumeister that local 'experts' would achieve the required number of dismissals in a legally compliant way, by no later than the end of October 2020, such that the Respondent could then crystallise its losses and retain financial viability. At some point in October 2020, it must have become apparent to Mr Neumeister that the exercises actually being conducted in the UK by the local team were getting nowhere near achieving the number of dismissals required. In these circumstances, a huge number of additional dismissals would need to be made almost immediately. The mechanism alighted upon appears to have been "role removal", dismissing those whose role or job title was said not exist in the Respondent's structure. Unfortunately, we cannot make detailed findings about what this comprised in practice. We heard from no witness who carried out the "role removal" exercise, nor is there documentary evidence to show what was done.

77. We are at something of a loss to understand how this new mechanism enabled the Respondent to make the number of dismissals required. According to what Mr Kitchen said, as at 28 October 2020, the Respondent had a total workforce of 1,884 and needed to reduce that to 507. This would necessitate the loss of 1,377 jobs. The voluntary options accounted for 309. 292 were said to be dismissed by application of the selection criteria. This left the Respondent to find another 776 employees to be dismissed for redundancy. The proposed method was role removal. No new structure or list of jobs to be retained was provided to the Union or disclosed in these proceedings. But even if such had been created and used for internal purposes, we do not understand how this would enable the Respondent to make the number of redundancies needed. Whilst there may have been some jobs maintained by the predecessor contractors that the Respondent did not require at all, it would be surprising if that just happened to be the 776 further reduction in headcount required. More likely, in many jobs the Respondent simply had too many people.

<u>Lead Claimants</u>

78. We will now address the individual circumstances of the Lead Claimants.

<u>Barry</u>

79. Mr Barry was scored using the selection criteria and awarded 20 points on 10 August 2020. This might tend to suggest he was dismissed by the application of those criteria, albeit if that were the case we have no idea what pool he was placed in, how many were retained and what score was required to achieve that.

80. A dismissal letter dated 29 October 2020 was sent to Mr Barry by email and received the same day. This provided that his employment would terminate on 24 January 2021 and included:

> **We used a selection criteria as agreed with the employee representatives, to make the first selections for redundancy. After using this selection**

> **criteria, and for those employees whose skills fell outside of the criteria, we conducted an assessment process, which focused on roles which are not required for our future structure and assessing the skills necessary for the remaining roles moving forward. After a review of the selection data available to us, and after consideration of all of the options, this was deemed by the business to be the most fair and reasonable way to select.**
>
> **We also considered whether there was any other alternative employment available within the business. We carried out a thorough search, however unfortunately there are no such roles available.**
>
> **I write to confirm that after application of the above process, your role Is one that has unfortunately been selected for redundancy.**

81. The first paragraph in this part of the letter is not easy to follow. Whilst it begins with the first selections for redundancy being made using selection criteria, what is said to have happened thereafter is far from clear. The reference to "those employees whose skills fell outside the criteria" is difficult to understand, as the Respondent did not use any skill-based criteria. There is then said to have been an assessment process of roles required in the new structure and assessing skills. Whilst looking at the structure would tend to fit with role removal, there is no evidence of Mr Barry or any other Claimant having their skills assessed. Mr Barry was told his role had been selected for redundancy "after application of the above process". This begs the question which process? It is unclear whether he is said to have been dismissed because:

    81.1 his score against the selection criteria were too low;

    81.2 his skills fell outside the criteria;

    81.3 his role was not required in the new structure;

    81.4 his skills had been assessed as unnecessary for the remaining roles.

82. Mr Barry appealed against his dismissal. He raised several grounds, including:

    82.1 he was one of 8 ex-Gate Gourmet transport allocators and the only one to be compulsorily dismissed;

    82.2 he wanted to know the "exact criteria" for his redundancy;

    82.3 whilst the dismissal letter said he had been given the opportunity for individual consultation, he had not.

83. Ms Pettitt dealt with all (circa 300) appeals, including that of Mr Barry. This took several months. She was at the time an HR Officer, having obtained that role in June 2020 and junior to Ms Woolstone.

84. Mr Barry's appeal hearing took place on 21 January 2021. The way Ms Pettitt approached this and every appeal hearing we have seen, was primarily as an exercise in gathering information. Not having been given a proper explanation about how he had been selected for redundancy prior to or at the point of his dismissal, Mr Barry sought this during the appeal hearing. Ms Pettitt provided no specific information, giving only a general explanation:

Throughout the redundancy processed we used 2 criteria options. Firstly in instances where possible we used a selection criteria, reviewing employment records looking at lateness, absence and disciplinary.

Secondly, we use role removal, this is where we look at the business structure and the job titles if the job titles no long fit into the structure they can be removed.

85. Ms Pettitt did not tell Mr Barry which of these two routes had resulted in his dismissal.

86. At a later point, Mr Barry received an undated appeal outcome letter, which included:

You said that you were not given the opportunity to attend an individual consultation meeting. On investigation I have determined that you were given the opportunity to attend an individual consultation meeting to discuss the company's proposals in further details, to include how redundancies may be reduced, mitigated or avoided and how we propose to select those for redundancy, in the event they could not be avoided.

Individual consultation meetings could be booked via your representatives. Details regarding this, including how to book your meeting, was shared with your employee representatives on 28th July. The process of holding individual consultation meetings in this was agreed with your employee representatives at the start of the consultation process and was used due to the high volume of employees affected by the proposals. In addition, and throughout the consultation process, you were invited to give your views on the proposals put forward by the company.

87. Many of the Respondent's employees became aware of the possibility of asking for a 1-1 consultation meeting to discuss redundancy. Where this took place, it was a largely generic exercise, save in some cases for the provision of a score devoid of context. In no case was an individual told they had been selected for redundancy dismissal and offered a meeting at which they could discuss or contest the basis for their selection before a final decision was made. Indeed, even their dismissal letters failed to explain the basis of their individual selection.

88. In connection with redundancy selection, Ms Pettitt wrote:

After investigation, into the eight ex-GG transport allocators you have referenced, in your appeal – I can confirm that six of those employees have a different job title to yourself and are therefore for the purpose of your appeal - the role does not sit within the same framework of review for redundancy. However, I can confirm that those positions equal to that of your own -Team Coordinator role, have been affected by this process and have been made redundant. Your job title of Team Coordinator does not fit in to the business structure and has therefore been removed.

[…]

For some, a selection criteria was agreed upon which took in to account evidentiary data which could in turn support the decision and outcome.

> **For yourself, as we had not at the time have data shared by your previous employer, we took the step to make 'role redundancies'. These redundancies were based solely upon the 'job title' held by an employee and not the role and function carried out by the employee (as we have become aware some of our people were working an alternative role to their contract). As we did not reach agreement upon this point for alternatives such as, individual assessment, we believed that this was the most fair and consistent approach to apply.**

89. The first paragraph above suggests that the Claimant's was dismissed by way of role removal. This appears to be somewhat undermined, however, by the paragraph addressing selection criteria, as it suggests that the role removal approach was adopted in his case because of a failure by the transferor to provide ELI. This last point is plainly wrong. Whilst the Respondent has said information was lacking from DHL it did not say that was so with respect to Gate Gourmet. Furthermore, we know that information was received because Mr Barry was scored by reference to it.

90. The Claimant in his appeal said he was one of the "transport allocators". In her oral evidence, Ms Pettitt agreed the Claimant was doing the same job as those he had sought to compare himself with. The basis for her appeal decision was, therefore, job title rather than substantive role. Mr Barry received this information for the first time in his appeal outcome and, therefore, had no opportunity to contest the position.

91. Ms Pettitt said she would have made enquiries of the transport department as part of her investigation into the Claimant's appeal. We were told that notes had been made of what she was told but they were no longer available.

92. In order for the Respondent to have dismissed by role removal, there must have been a documented business structure and list of roles to be retained. Without this, it is difficult to see how such an exercise could have been carried out at all. When she was giving evidence, Ms Pettitt said she believed these documents had existed but she did not have them. When asked if she had requested the documents, she said she had from both Ms Skelton and Ms Woolstone but they were not provided. She could not remember what response had been given to her request. If there were such documents its seem very odd that they were not provided to Ms Pettitt, either at the start of the appeal process with her initial instructions or if that had been overlooked, in response to her specific request.

93. What appears to be entirely absent from Ms Pettitt's consideration of this appeal and the others we have seen, is an approach by her to Ms Skelton, Ms Woollstone or Mr Neumeister, to seek their explanation for how any specific individual came to be selected. Given the dismissal letters are vague and generic, allowing for redundancy selection by various methods but not saying which was applied in the instant case, clarification with the decision-maker would seem an obvious first step. Rather than interrogating the original decision to dismiss, Ms Pettitt appears to have constructed a rationale for the selection of the individual after the event.

94. The appeal outcomes comprised mostly generic responses. We are not satisfied Ms Pettitt conducted a thorough investigation in the case of Mr Barry or any other to which we were referred, with respect to their appeals against dismissal.

Our conclusion is that whilst Ms Pettitt undertook a very large exercise in determining all of these appeals, with respect to the dismissal aspect (as opposed to money claims) her approach was superficial and flawed.

95. We do not know how Mr Barry was selected.

96. Mr Barry's claim was withdrawn following a settlement being agreed during the hearing.

Dhanda

97. As a trade union representative at DHL, it likely Mr Dhanda would have been aware of the possibility of asking for a 1-1 meeting and did not do so. He was not, however, told of his own selection and proposed dismissal, given an explanation of how he had been chosen, invited to a meeting to discuss this or otherwise given the chance to contest the position before a final decision. Even his dismissal letter was devoid of meaningful content with respect to the rationale for his selection.

98. Mr Dhanda received his dismissal letter on or about 17 November 2020, notwithstanding the letter itself was dated 9 November 2020. Whilst we have not seen a copy of the letter, Mr Dhanda refers both to its date and receipt at the beginning of his appeal letter. Our finding is the material part of Mr Dhanda's letter, at least with respect to dismissal as opposed to monies owed, will have been the same as that sent to Mr Barry. His grounds of appeal included complaints about the lack of a fair selection process or consultation.

99. His appeal hearing took place on 22 January 2021. As with other appeal meetings, the focus was on gathering information from the appellant rather than engaging with or responding his points at the time.

100. Mr Dhanda's appeal outcome letter was not sent until 9 April 2021. The response in connection with the complaints about redundancy selection and consultation was the same as that given to Mr Barry. No specific explanation was given for his particular selection.

101. We know that Mr Dhanda was not scored because he was a former DHL employee and it does not appear that any scoring was undertaken for this cohort. That would tend to suggest he was selected by role removal. What this exercise comprised, we do not know. Mr Dhanda's job title was Top-Up Driver. His role involved driving a large van. We do not know what if any driving roles the Respondent retained as no evidence of the structure has been put forward. It would be surprising if the Respondent had no need for driving whatsoever.

Singh

102. As a trade union representative at DHL, it is likely that Mr Singh would have been aware of the possibility of asking for a 1-1 meeting and did not do so. He was not, however, told of his own selection, given an explanation of how he had been selected and invited to a meeting to discuss or contest this prior to a final decision being made. The dismissal letter was devoid of meaningful content with respect to the rationale for his own selection.

103. In January 2021, the Claimant made a phone call to the Respondent about coming back to work. He was then told of his redundancy and that he should have received a letter about this and it would be resent. He subsequently received a letter dated 29 October 2020, the part dealing with redundancy selection being in the same terms as other letters we have referred to.

104. In the course of cross-examination, it was suggested to Mr Singh that he was not paid in December and was, therefore, given notice by conduct. Mr Singh said he had been paid. When referred in cross-examination to payslips for November and January, it was put to him that the absence of a December payslip demonstrated he was not paid. It quickly became apparent the payslips did not represent an interrupted sequence, as the first was from November 2019 and the second from January 2021. It was then put to Mr Singh that he had failed to disclose payslips or bank statements to prove his case. A dismissal by conduct had not been pleaded by the Respondent and the Claimant had no case in this regard prove. It was for the Respondent to establish the facts necessary to make out its defence. We note the letter to Mr Singh gave him notice of dismissal with an effective date of termination of 31 January 2021. This letter was received by Mr Singh in January and will, therefore, still have been effective to secure that end date.

105. Mr Singh did not appeal against his dismissal.

106. We know that Mr Singh was not scored because he was a former DHL employee and it does not appear that any scoring was undertaken for this cohort. That would tend to suggest he was selected by role removal. What this exercise comprised, we do not know. Mr Singh's job title was loader. We do not know what if any loading roles the Respondent retained as no evidence of the structure was put forward. It would be surprising if the Respondent had no need for loading whatsoever.

<u>Didi</u>

107. Mrs Didi was aware of the possibility of asking for a 1-1 meeting, indeed she attended many of them. She was not, however, told of her own selection, given an explanation of how she had been selected and invited to a meeting to discuss or contest this prior to a final decision being made.

108. On 26 January 2021, Mrs Didi checked her payslip and discovered she had received far more than expected. She wrote to her employer immediately. We pause to note that given this was the day after the Respondent's payroll run, it suggests Mrs Didi was attentive to such matters. Had she not been paid in December 2020, no doubt she would have raised this with her employer. The fact she did not, suggests she was paid in the usual way, which reinforces us in our view about Mr Singh being paid in the same month.

109. Mrs Didi wrote:

> **I looked my payslip app yesterday and noticed that there was a considerable sum of money recorded, way above my monthly salary, I am confused.**

> **I am conscious and aware that the organisation is undertaking a redundancy exercise, being a trade union rep for Unite, I have been involved in some of the consultation process as well as representing individuals at appeal; to date I have had no knowledge or been made aware by Do&Co that I, also, am subject to being made redundant, If this is the means of notification I am shocked beyond words that I am being treated in this manner.**
>
> **If indeed that is the case that I have been made redundant, I am bewildered that, I have not received any notification from Do&Co advising me that my employment is being terminated through redundancy; during this period of time I have acted as Rep for people undertaking their appeals and have been oblivious that I myself was also subject to redundancy.**
>
> **Can I please ask, that you respond to me on the status of my employment, hoping that the figure appearing in the payslip app is a clerical error**

110. Having received no response, Mrs Didi chased for one on 1 February 2021. Only following further chasing, on 8 March 2021 was an email sent by the Respondent in the following terms:

> **Kindly note the letter was posted to your postal address as below from your employee file, on 29th October 2020.**
>
> **Please see below break down of you payslip.**
>
> **[…]**
>
> **• Statutory Redundancy payment****
>
> **Redundancy pay weekly= 20 years for service and 22.5 weeks of redundancy**
>
> **Total payments = £6472.44**
>
> **[…]**

111. The Respondent’s email was sufficient to give the Claimant summary notice of dismissal (the email treated termination as a past event). In circumstances where she had been actively chasing for confirmation of her status and could reasonably expect a response, we do not find a prior dismissal by the Respondent's conduct.

112. Despite Mrs Didi making it perfectly plain that she had not received a copy of the dismissal letter, this was not resent and there was no copy in the hearing bundle.

113. Mrs Didi appealed against her dismissal. A hearing took place on 16 April 2021. The appeal outcome, insofar is this dealt with redundancy selection, was in similar terms to other such letters.

114. We know that Mrs Didi was not scored because she was a former DHL employee and it does not appear that any scoring was undertaken for this cohort. That would tend to suggest she was selected by role removal. What this exercise comprised, we do not know. Mrs Didi’s role involved working in the

bond department loading alcohol. We do not know what if any bond / loading roles the Respondent retained as no evidence of the structure was put forward. Again, it would be surprising if there was no such work whatsoever.

Gill

115. We think it likely that Mr Gill would have been aware of the possibility of asking for a 1-1 meeting and did not do so. He was not, however, told of his own selection, given an explanation of how he had been selected and invited to a meeting to discuss or contest this prior to a final decision being made. The dismissal letter was devoid of meaningful content with respect to the rationale for his own selection.

116. At the beginning of November 2020, Mr Gill received a letter dated 29 October 2020 giving him notice of dismissal to expire on 30 November 2020. The part dealing with redundancy selection was in the same terms as the other letters to which we have referred.

117. Mr Gill appealed by letter of 10 November 2020. His appeal hearing took place on 18 March 2021. The outcome letter was dated 30 April 2021. His grounds had not included complaints about individual selection consultation and so the outcome letter did not comment on these matters.

118. We know that Mr Gill was scored because the relevant sheet with 27 points (3 shy of the maximum) was included. What use was made of this score, we do not know. There is no evidence to show him being placed in a pool and selected from that by virtue of this score. He may have selected by role removal and if so, we do not know what that exercise comprised. Mr Gill's job title was Airside Loader. We do not know what if any loading roles the Respondent retained as no evidence of the structure was put forward.

119. Mr Gill lacks sufficient employment to bring an unfair dismissal claim.

Anwar

120. We think it likely that Mr Anwar would have been aware of the possibility of asking for a 1-1 meeting and did not do so. He was not, however, told of his own selection, given an explanation of how he had been selected and invited to a meeting to discuss or contest this prior to a final decision being made.

121. At the beginning of November 2020, Mr Gill received a letter dated 29 October 2020 giving him notice of dismissal. We have not seen a copy of this letter but he refers to it in an appeal email of 7 November 2020. The appeal hearing took place on 28 January 2021. The outcome letter was sent on 17 March 2021. His grounds had not included complaints about individual selection consultation and so the outcome letter did not comment on these matters. This

122. We know that Mr Anwar was scored because the relevant sheet with 30 points (the maximum) was included. What use was made of this score, we do not know. There is no evidence to show him being placed in a pool and selected from that by virtue of this score and given he achieved the maximum, it is difficult to see how this could have occurred. He may have selected by role removal and

if so, we do not know what that exercise comprised. Mr Anwar had a role in the purchasing department, ordering products and ensuring delivery. We do not know what if any roles of this sort the Respondent retained as no evidence of the structure was put forward but it would be surprising if there were none at all.

Law

Unfair Dismissal

123. So far as material, section 98 of the **Employment Rights Act 1996** ("ERA") provides:

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

124. As can be seen, redundancy is a potentially fair reason for dismissal. ERA section 139 provides:

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to...**
>
> **(b) the fact that the requirements of that business--**
>
> **(i) for employees to carry out work of a particular kind, or**

> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
>
> **have ceased or diminished or are expected to cease or diminish.**

125. The leading authority on the definition of redundancy is **Murray v Foyle Meats [1999] IRLR 562 HL**. Lord Irvine said of section 139:

> **"My Lords, the language of para. (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."**

126. Where the reason for dismissal is found to be redundancy, the Tribunal must go on to consider whether this was fair within ERA section 98(4). Guidance in this regard was provided by the EAT in **Williams v Compair Maxam [1982] IRLR 83**, Browne-Wilkinson J:

> **"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."**

127. The band of reasonable responses test applies to the respondent's decision in identifying the pool from which the redundant employee will be selected, which is to say that a dismissal would only be unfair for this reason if the pool was such

that no reasonable employer would have chosen it; see **Capita Hartshead v Byard [2012] ICR 1256 EAT**.

128. The question of whether an employer must always engage in individual consultation or whether consultation with the union may release it from such an obligation was considered in **Mugford v Midland Bank Plc [1997] IRLR 208 EAT**, per HHJ Clark.

> **41. Having considered the authorities, we would summarise the position as follows.**
>
> > **(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.**
> >
> > **(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.**
> >
> > **(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.**

129. In **Freud v Bentalls Ltd [1982] IRLR 443** the EAT confirmed that a fair dismissal will not always require consultation, per Browne-Wilkinson J:

> **We must emphasise that we are not saying that good industrial relations practice invariably requires such consultation. There may well be circumstances (for example a catastrophic cash flow problem making it essential to take immediate steps to reduce the wages bill) which render consultation impracticable. We are only saying that we would expect a reasonable employer, if he has not consulted the employee prior to dismissal for redundancy in any given case, to be able to show some special reason why he had not done so.**

<u>Union Recognition</u>

130. TULRA section 178 provides:

> **178.— Collective agreements and collective bargaining.**
>
> **(1) In this Act “collective agreement” means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and “collective bargaining” means negotiations relating to or connected with one or more of those matters.**
>
> **(2) The matters referred to above are—**

> **(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;**
>
> **(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;**
>
> **(c) allocation of work or the duties of employment between workers or groups of workers;**
>
> **(d) matters of discipline;**
>
> **(e) a worker's membership or non-membership of a trade union;**
>
> **(f) facilities for officials of trade unions; and**
>
> **(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.**

> **(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly.**

<u>Protective Award</u>

131. Insofar as material, sections 188 and 189 of **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") provide:

> **188.— Duty of employer to consult representatives.**
>
> **(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.**
>
> **(1A) The consultation shall begin in good time and in any event—**
>
> > **(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and**
> >
> > **[…]**
>
> **(1B) For the purposes of this section the appropriate representatives of any affected employees are–**
>
> > **(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or**

(b) in any other case, whichever of the following employee representatives the employer chooses:–

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

(2) The consultation shall include consultation about ways of—

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

[…]

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a) the reasons for his proposals,

(b) the numbers and description of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed,

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect,

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed,

(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer's undertaking in which those agency workers are working, and

> **(i) the type of work those agency workers are carrying out.**
>
> **[…]**
>
> **(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection [(1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly, a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.**
>
> **[…]**
>
> **189.— Complaint and protective award.**
>
> **(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground–**
>
> > **[…]**
> >
> > **(c) in the case of failure relating to representatives of a trade union, by the trade union, and**
>
> **[…]**
>
> **(6) If on a complaint under this section a question arises—**
>
> > **(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or**
> >
> > **(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,**
>
> **it is for the employer to show that there were and that he did.**

132. Under section 188 an employer is required to consult “appropriate representatives” of employees who may be affected by dismissals, or measures taken in connection with them. If the employer recognises a trade union for purposes of collective bargaining in respect of employees affected by the dismissals, they are obliged to consult the appropriate trade union official. If there is no recognised trade union, the employer is obliged to consult either an existing body of employees’ representatives who have been appointed or elected for other consultation purposes but who have authority to be consulted about the proposed dismissals, or representatives who have been elected specifically for the purpose of the redundancy consultation.

Conclusion

Unfair Dismissal

133. The reason for dismissal was redundancy, as set out above. Whilst the point was conceded, we would have made the same finding in any event. The Respondent required fewer employees to do work of many particular kinds.

134. The next question is whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants.

135. The workforce was warned of the Respondent's proposal to make large scale redundancy dismissals on 28 June 2020. An announcement was sent to all employees and specific information sent to Unite and the elected or appointed employee representatives. There was ongoing consultation with Unite and the employee representatives, the reasonable expectation being that information would be passed on in that way. There were references to redundancy in newsletters. We are satisfied there was adequate warning of the general risk of redundancy dismissals.

136. As set out above, some employees did have 1-1 meetings. Those transferring from DHL had meetings which were intended to cover both TUPE and redundancy. A small proportion of those who came from Gate Gourmet or were existing employees of DO & CO had redundancy meetings. The Respondent adopted a reactive or passive approach in this regard, putting the word out via Unite or employee representatives that meetings could be arranged if wished for. When requests were made, meetings were arranged.

137. We are not satisfied this amounted to meaningful consultation for the purposes of redundancy dismissal, even for those employees who did have a meeting. Some of the matters that would be relevant in this regard were discussed. Employees were asked whether they had any ideas about how redundancies might be avoided. Whilst some employees were told of their score against the Respondent’s redundancy criteria, this was prior to any individual selection being made. In the 1-1 sheets to which we were referred, no employee was told about the pool into which they would be placed, the number of jobs to be retained or the score required to achieve retention.

138. The most significant deficiency in the Respondent’s consultation process is that all of the consultation meetings took place before the individual employees had been selected for redundancy. There was no consultation with any employee after they had been selected for a redundancy dismissal and before a final decision was made. Employees were not told, either orally or in writing, why they have been selected. Individual consultation should take place in circumstances where the employee can understand the basis of their individual selection and have an opportunity to challenge this, before a final decision is made. This is part of a fair process. Employees may seek to challenge the data upon which their score is based, if the result of that may make a difference. They may say they have been put in the wrong pool and should be put in another. They may say their job title on the Respondent’s systems or in an old contract document, does not reflect their current role. In the case of role removal, they may say they are doing the same job as others the Respondent proposes to retain. This is a

very important aspect of redundancy consultation and it did not happen. Whilst there is a band in which different reasonable employers might choose to proceed, what the Respondent did here falls well outside of that.

139. Even when employees were dismissed, the letter sent advising them of this (which was not delivered or received in all cases) did not explain the basis of their individual selection. The relevant paragraphs described in general and vague terms processes the Respondent said it had followed when deciding to dismiss, without telling the employee which process had been applied to them or giving any detail of how that resulted in their selection. Employees would not know from this letter whether they had been selected for dismissal by reason of their score against selection criteria or role removal. If the former, they did not know how they had been pooled, how many jobs were lost and retained or what score was necessary to avoid dismissal. If the latter, they were not told what the Respondent considered their role to be and why this was no longer required. It follows, therefore, even at the point of raising an appeal, employees could do no better than challenge matters generally. They could not engage, or at least were severely hampered in doing so, with the specific reasons for their own dismissal. Again, the falls outwith the reasonable band.

140. None of these deficiencies were in any way remedied by the collective consultation process. Somewhat bizarrely, having expressed an intention to seek agreement with Unite on the selection criteria, the Respondent commenced a scoring exercise in August and September, before sharing the basis for this with Unite. Only in October, shortly before the dismissals took place, did Ms Skelton send to Ms Higginson the precise criteria and scoring guide. Even then, the Respondent failed to provide any information to the Union about how the various employees undertaking different roles would be pooled and the number of jobs to be retained in each. As far as role removal is concerned, this was something disclosed to Unite at the last moment, the day before the dismissal decisions, without any detail of what it would mean in practice and which jobs would go. Unite were in no better position to understand why any particular person had been selected for redundancy dismissal than the individual employee. It follows, the Union could not explain this to its members, nor could the appointed or elected representatives assist those they represented.

141. Whilst the selection criteria were clear and objective, as opposed to being discretionary factors, we do not know whether and if so how their application in an individual case caused their selection for redundancy. We can make no finding about the pool for redundancy selection, if any, to which the criteria were applied. There is no evidence to support a single pool of all the employees, as had been suggested by Mr Samson. Such an approach would seem to be inherently unlikely and an unhelpful way for the Respondent to proceed, since it would tend to produce a random distribution, rather than allowing the business to retain the required number in relevant roles. We know the Respondent could not place the entire workforce in a single pool for scoring because it did not score all employees. Furthermore, it would appear that a relatively small proportion of those dismissed lost their job by reason of their score against selection criteria. The greater number were said to have been dispensed with by role removal. We are somewhat at a loss to understand how role removal operated in practice or to whom it was applied. A reasonable approach to such matters (i.e. within the band) does not emerge from the evidence.

142. We are satisfied there were no there were no vacant positions at the material time, which the Respondent could have offered to potentially redundant employees. This does not, however, relieve the Respondent of the duty to carry out a fair selection process and consult when deciding who would keep their employment.

143. Some of the Claimants received notice in advance of the date on which the Respondent had decided their employment should end. Some did not. We do not criticise the Respondent in this latter regard, it appears likely to have been a default on the part of Royal Mail.

144. The Claimants were afforded the right to appeal against their dismissal. With respect to dismissal, however, as set out in our fact find this was a superficial and flawed exercise. It certainly did not remedy the deficiencies in what had gone before.

145. For the reasons set out above, our finding is that each of the Lead Claimants (save for Mr Barry whose claim was settled and Mr Gill who lacks the qualifying employment to bring such a claim) was unfairly dismissed. Whilst redundancy is a potentially fair reason for dismissal, we are not satisfied in any case that the Respondent followed a fair selection process or properly consulted with affected employees. We are mindful that in this regard there is a reasonable band, in which different reasonable employers might proceed. Nonetheless, in this case the substance of the selection process has simply not been shown. The little we have been able to ascertain is most unsatisfactory. As far as consultation is concerned, whilst 1-1 meetings were held with some employees, these were not meaningful consultations as the individuals had not then been selected for redundancy and had no opportunity to understand or challenge their selection. The dismissal letters were vague and generic. The appeal process did not remedy the substantial unfairness.

146. Furthermore, this is not a case in which it can be said that fair redundancy selection or consultation would have been futile. Whilst the Respondent made very many redundancy dismissals, a substantial number of jobs were retained. The way in which the Respondent approached the selection and engaging in meaningful consultation would determine which 507 members of its workforce kept their employment.

<u>Polkey</u>

147. We will address most remedy issues at a separate hearing. It is, however, appropriate to deal with the question of a Polkey reduction at this stage. Both Counsel made submissions. Ms Crew said that given the defects in the Respondent's procedure, the correct approach was to award all the Claimants their losses for the period of time it would take to carry out a fair procedure from the point of dismissal. She said this was 5 months. Mr Samson took a different line. He said that if there was unfairness then a very substantial percentage reduction ought to have been made to reflect the prospect of a fair dismissal in any event. He contended for a 90% reduction

148. In light of our findings about the Respondent's finances and acceptance of Mr Dogudan's evidence in that regard, it seems most unlikely that the employment

of all of those dismissed could have been sustained until March 2021. We think the percentage reduction approach is more appropriate in this case. However the matter was dealt with, many hundreds of employees were going to be dismissed for redundancy at the end of October 2020. The question was which of them.

149. This is in many ways an unusual case. More commonly, where a redundancy unfair dismissal claim has been successful, the basis upon which the Claimant was selected will be clear but found to have been unfair (outwith the reasonable band) in one or more respects. In such a case, it may possible to construct a hypothetical fair scenario, retaining elements of the original decision and selection method but amending this to remove the unfairness found. In such a way, the prospects of a potentially fair dismissal can be assessed. We cannot adopt that approach in this case because we have so little information about how any of the Claimants were selected.

150. Given, however, the inevitability of so many dismissals, it would not be appropriate and in the interests of justice simply to say there will be no reduction at all because we cannot reconstruct what would have happened in each individual case. Rather, it is proper to look at the workforce as a whole as at 28 October 2020 and the number of dismissals the Respondent required.

151. The Respondent had a total workforce of 1,884. Voluntary options reduced this by 309 to 1,575. Given the Respondent had decided it needed a workforce of 507, 1,068 compulsory redundancies were necessary.

152. The Respondent says these redundancies were achieved by 292 criteria dismissals and 776 role removal dismissals. Whilst we can be certain that some employees must have been dismissed by role removal because they were not scored, in the case of those employees who were scored we do not know whether they were dismissed for that reason or they too, were subject to role removal. Mr Barry is an example of an employee who was scored and yet may have been dismissed on the basis of his role.

153. Given 507 jobs to be retained and 1,575 employees who might have secured one in a fair redundancy process, the best we can say about the chances of any individual employee keeping their job was 507 in 1,575. This can also be expressed as 32%. Accordingly, the compensation otherwise due to the successful Claimants will be reduced by 68% to reflect the prospect they would have been dismissed in any event had a fair procedure been followed.

Redundancy

154. The Claimants accept they were correctly paid for their redundancy and this claim was withdrawn.

Collective Consultation

155. The parties agree:

155.1 the Respondent proposed to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less.

155.2 consultation began at least 45 days before the first of the dismissals took effect.

156. As far as the Claimants are concerned, Unite was the recognised trade union and appropriate representative. The Respondent identified the Union as appropriate representative in the HR1, which it could not be without recognition. With respect to the selection criteria, the Respondent sought to and did indeed agree these with the union in the consultation process. This is a matter relating to the termination of employment within TULRA section 178(2)(b).

157. The various consultation meetings between Unite and the Respondent are set out in our fact find. There was consultation about the state of the aviation industry and the Respondent's business at various points during the discussions, to ascertain whether this had improved sufficiently to avoid or reduce making dismissals. Whilst Unite is very critical of the Respondent's failure to put off a decision about making redundancy dismissals and apply for Government support in the period from November 2020, the possibility of it doing so was discussed at more than one of the meetings held. Unite made suggestions about voluntary redundancy, unpaid leave and career breaks. The Respondent took this up and an options package was put to employees. The Respondent also agreed to put back the date for voluntary redundancy applications. We are satisfied the Respondent did consult about the matters required by TULCRA section 188(2) of the TULCRA, namely ways of:

157.1 avoiding the dismissals;

157.2 reducing the number of employees to be dismissed;

157.3 mitigating the consequences of the dismissals.

158. The Respondent can be criticised for various matters in the consultation, including: late provision of the selection criteria and scoring guide; failure to provide information about pools and the application of scores in practice; announcing its intention to use a new redundancy selection method, role removal, only the day before it was used and without any detail of what that meant or how it would be applied. These are not, however, matters the Respondent was obliged to consult pursuant to TULCRA section 188(2).

159. As far as the provision of information in writing is concerned, the Respondent did supply the matters specified by TULCRA section 188(4). Most of these matters were not in dispute. The principle challenge was with respect to the information provided about the method of redundancy selection. The method specified in the HR1 selection by criteria, is not that which was used to select the vast majority of employees who were compulsorily dismissed for redundancy. Rather, they were selected by role removal. The statutory obligation is, however, for the Respondent to set out its proposals in various respects specified in section 188(4). As at 28 July 2020, we are satisfied the Respondent did intend to make its selection by way of scoring against objective criteria.

160. It was only toward the end of that process, when it became apparent to the Respondent it lacked the data to score employees who had recently transferred from DHL and in any event that the number of dismissals likely to obtained in

this way fell well short of the numbers required, did it change tack. The Respondent can be roundly criticised for this. Its approach to the exercise was a poor one. It embarked upon scoring, without having agreed those criteria and seemingly without much notion of how that data would be used or whether it would enable the Respondent to achieve the number of dismissals required. This does not mean, however, that it did not provide written information about the selection method it proposed to adopt, in July 2020. At that time, we are satisfied the Respondent genuinely intended to make the selection by way of scoring against criteria. This subsequently changed but the original proposal was not a sham.

161. Although the special circumstances point no longer arises, if it had we would not have been persuaded. For the reasons set out above, uncertainty around the Respondent's eligibility for continuing government support was a relatively small component of the decision to dismiss many hundreds of employees for redundancy when it did. The real driver, was the Respondent's precarious financial position and the affordability of continuing to employ so many more staff than it needed, even if it were eligible under the new scheme. Whilst the pandemic, lockdown, frequently changing restrictions and pronouncements with respect to CJRS or JSS might constitute special circumstances, they did not make it not reasonably practicable for the Respondent to consult with Unite in a proper way about alternative selection methods. The fact this was not done, stems from inept management of the consultation and redundancy selection exercise on the part of the Respondent. The Respondent appears to have chosen criteria and gone about scoring without any or much consideration of whether this would enable them to dismiss the required number. It would be unsurprising if very many employees obtained the maximum score. A more varied scoring regime or criteria likely to produce greater variation (e.g. service) might have been chosen. Moreover, the Respondent needed to ascertain how many jobs would be reattained in various different roles and consider how to pool those at risk. Instead the Respondent proceeded with a scheme that was not fit for its purpose and then changed this, without any meaningful consultation, at the last moment. Uncertainty over the next Covid scheme did not cause this state of affairs or mean it was not reasonably practicable to do more.

EJ Maxwell

Date: 28 August 2024

Sent to the parties on:

…29 August 2024.
For the Tribunal Office:

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3305378/2021	Mr Richard Gonsalves
3305379/2021	Ms Anita Lopes
3305384/2021	Mrs Aruna Lobo
3305386/2021	Mrs Velhi Fernandes
3305388/2021	Mr Rami Siqueira
3305390/2021	Mr Miguel Souza
3305391/2021	Mr Leo Fernandes
3305392/2021	Mrs Marzena Rosowska
3305393/2021	Mr Jose Rebello
3305399/2021	Mr Nazareth Diniz
3305402/2021	Mr Charith Walgampalage
3305406/2021	Ms Luiza Furtado
3305411/2021	Mr Dharminder Kahlon
3305413/2021	Mr Navneet Bajaj
3305417/2021	Mr Jeyam Sobasrikaran
3305419/2021	Mr Muhammad Anwar
3305423/2021	Mr Gordon Kam
3305424/2021	Mr Abdul Khan
3305428/2021	Mr Hardeep Bains
3305430/2021	Mr Rafal Drag
3305433/2021	Mr Tajinder Singh
3305435/2021	Mr Shiv Sandhu
3305437/2021	Mrs Permjit Noorpuri
3305442/2021	Mr Caitan D'Souza
3305446/2021	Mr Satbir Bajwa
3305447/2021	Mrs Sukhjit Wassi
3305452/2021	Mr Jatinder Khera
3305453/2021	Mr Jatinder Singh
3305458/2021	Mrs Jasvir Chaggar
3305459/2021	Mr Davinder Johal
3305461/2021	Mr Hassan El-Husseini
3305464/2021	Mrs Charnjeet Sidhu
3305465/2021	Mr Mukesh Bhangu
3305468/2021	Mr Adam Warsame
3305471/2021	Mrs Gursharanjit Chahil
3305472/2021	Mr Paramjit Chahil
3305475/2021	Mr Hermick Soman
3305476/2021	Mr Bhagawan Damania
3305477/2021	Mr Subash Dharmarajan
3305478/2021	Mr Paramjit Sidhu
3305479/2021	Mr Dalbir Bhullar
3305485/2021	Mr Tariq Mehmood
3305488/2021	Mr Abid Hussain
3305489/2021	Mrs Gulshan Dhugha
3305490/2021	Mr Husan Lal
3305491/2021	Mrs Violet Lopez
3305494/2021	Mrs Dharmini Jayprakash
3305501/2021	Mrs Gurdeep Kaur

3305504/2021	Mr Jatinder Singh
3305507/2021	Miss Velina Dias
3305509/2021	Mr Richen Thomas
3305510/2021	Mrs Reeta Dhaul
3305512/2021	Mr Riaz Sheikh
3305514/2021	Ms Gurcharan Sahota
3305515/2021	Mr Balamurali Benoit
3305516/2021	Mr Verghese Chackappan
3305519/2021	Mr Kulwinder Randhawa
3305520/2021	Mr Anilkumar Mruthyunjayan
3305521/2021	Mr Dhanesh Rughoo
3305522/2021	Mr Peter Betts
3305523/2021	Mr Hardeep Ghai
3305525/2021	Ms Christine Nsubuga
3305527/2021	Mrs Jasbir Hayer
3305528/2021	Mr Inderpal Dharni
3305529/2021	Mr Radhakrishnan Surendran
3305537/2021	Mrs Linda Yu
3305540/2021	Mrs Angelique Radcliffe
3305541/2021	Mrs Kiranjit Singh
3305543/2021	Mrs Jaswinder Benning
3305545/2021	Mrs Balvinder Birk
3305546/2021	Mr Dalbir Tut
3305552/2021	Mrs Davinder Sambhi
3305554/2021	Mr Sebastian Rejnisz
3305556/2021	Mr Dedar Singh
3305557/2021	Mr Ranjit Singh
3305558/2021	Mr Jasvinder Singh
3305559/2021	Mrs Sharandeep Grewal
3305561/2021	Mr Mohammed Choudhry
3305563/2021	Mrs Kulwant Chattu
3305565/2021	Mrs Harwinder Kaur
3305566/2021	Mr Tony Bullock
3305567/2021	Mr Kuljit Chauhan
3305570/2021	Mr Popinder Riyal
3305571/2021	Mr Vanravan Badiani
3305572/2021	Mr Som Siris
3305574/2021	Mr Ajmer Sidhu
3305575/2021	Mrs Sukhwinder Monjal
3305576/2021	Mrs Satya Rai
3305577/2021	Mrs Amarjit Bhinder
3305579/2021	Mr Parminder Sidhu
3305582/2021	Mr Rashpal Singh
3305583/2021	Mrs Neelam Khullar
3305584/2021	Mrs Neelam Saroyia
3305585/2021	Mr Hasmukh Patel
3305586/2021	Mr Ranjit Singh
3305587/2021	Mr Hermick Somal
3305588/2021	Ms Querubin Dala

3305589/2021	Mr Sudarshan Dhanda
3305590/2021	Ms Alka Delvi
3305591/2021	Mrs Manjeet Kaur
3305592/2021	Mr Jaspal Sidhu

3300871/2021	Miss Virginija Pakalnyte
3306519/2021	Mr Carl Fernandes
3306532/2021	Mr Aleksejs Brengulis
3302792/2021	Mr Emile Kubwimana
3315398/2020	Mr PL Rotaru
3315420/2020	Mr I Ganchev