EMPLOYMENT TRIBUNALS

Claimant: Mr R Warwick
Respondent: Npower Limited

HELD AT: Leeds **ON:** 14, 15, 16, 17 August, 21 August 2017 (in chambers)

BEFORE: Employment Judge D N Jones
Mrs J Goodson-Moore
Ms G M Fleming

REPRESENTATION:

Claimant: Mr D Flood, counsel
Respondent: Mr M Winthorpe, solicitor

JUDGMENT

The Tribunal holds, unanimously:

1. The claimant was unfairly dismissed by the respondent.

2. The dismissal was not unfair contrary to section 103A of the Employment Rights Act 1996 (ERA).

3. Had the respondent adopted fair and reasonable procedures, there was a 35% chance the claimant would have been dismissed by reason of redundancy in any event. The compensatory award shall be reduced commensurately.

4. The complaint that the claimant was subjected to the detriment of being excluded from discussions concerning the restructure of the department after 23 December 2015 on the ground of having made a protected disclosure is dismissed upon withdrawal.

5. The complaint the claimant was subjected to the detriment of being excluded from further involvement with the task force charged with considering defective IHD equipment on the ground of having made a protected disclosure is dismissed as it was presented out of time and the claimant has not established that it was not reasonable practicable to present the complaint in time.

REASONS

Introduction

1. By a claim form presented to the Tribunal on 17 February 2017 the claimant complained that he had been unfairly dismissed by his former employers, the respondent, that he had been the subject of age discrimination and detriments for having made a protected interest disclosure.

2. At a preliminary hearing before Employment Judge Lancaster on 13 August 2017, the claimant withdrew his complaint of age discrimination and clarified that there were two complaints of detriment by reason of having made a protected disclosure and a complaint of unfair dismissal under general principles or alternatively unfair dismissal for having made a protected disclosure.

3. The respondent accepted that the claimant had made a protected disclosure in an email he had sent to Sue Rhodes, copying in his manager Chris Wall, on 23 December 2015.

Issues

4. The issues to be determined were:

> [i] What was the reason for the claimant's dismissal? Was the claimant dismissed by reason of redundancy? Or was the reason for the claimant's dismissal because he had made a protected disclosure?
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> [ii] If the reason for the claimant's dismissal was redundancy, was he selected for redundancy because he had made a protected disclosure?
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> [iii] If the respondent establishes that the reason for the dismissal was redundancy and if the tribunal is satisfied that the claimant was not selected for redundancy because he had made a protected disclosure, was dismissal for redundancy fair and reasonable in all the circumstances?
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> [iv] If the dismissal was unfair for procedural reasons would or might the claimant have been dismissed in any event such that any compensatory award should be reduced?
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> [v] Was the claimant excluded from the task force which dealt with the defective IHD component?
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> [vi] If so, was that because the claimant had made a protected disclosure?

[vii] Was the act of exclusion, if established, part of a series of similar acts and if so, when was the last such act?
[viii] Was the act of exclusion, or the last of a series of such acts, more than three months and, if relevant the period of early conciliation, before the presentation of the claim? If so, was it not reasonable practicable for the claimant to have presented the claim within that period?

The law

6. The relevant statutory provisions are contained within Part IVA of the ERA, sections 43B, 47B and 48, and in Part X of the ERA, sections 94, 98, 103A, 105(6A), 123 and139.

7. In **Kuzel v Roche Products Ltd [2008] ICR 450**, the Court of Appeal held that the burden of establishing the reason for the dismissal lay upon the respondent under section 98(1) and (2) of the ERA. Whilst there is an evidential burden upon the claimant to identify an issue which warrants investigation relating to the causative effect of the protected disclosure that does not shift the legal burden. If the tribunal rejects the reason advanced by the employer, it is not bound to accept the alternative advanced by the claimant. It may find a reason advanced by neither party.

8. In **Fecitt v NHS Manchester [2012] ICR 372**, the Court of Appeal held that the words 'on the ground that' in section 47B of the ERA should be construed as meaning 'significantly influenced by'. That was to be contrasted with the language of section 103A of the ERA. For a dismissal to be unfair the protected disclosure must be the sole or principal reason, under that provision.

Evidence

9. The Tribunal heard evidence from the claimant and from Mr Christopher Wall formerly head of metering, Mrs Louise Williams, human resources business partner for energy services, and Andrew Powell head of risk control and Ms Angela Reid, head of transformation and change.

10. A bundle of documents of 849 pages was submitted. This was augmented during the hearing as further disclosure was requested and obtained.

Background/findings of fact

11. The respondent sells and supplies energy in the United Kingdom. The claimant was employed by the respondent from 14 November 2011 to 30 September 2016 as head of metering development. His employment was terminated on notice, by letter of 20 June 2016. Initially the notice was to expire on 19 September 2016, but this was later extended by Mrs Williams to 30 September 2016. This was to enable the claimant to attend an interview with a view to him avoiding the

redundancy. A term of the contract relating to the receipt of the redundancy payment was that the redundant employee would be precluded from obtaining re-employment with the respondent for a defined period.

12. The claimant was one of six managers in the metering leadership team who reported to Mr Wall. Government policy in respect of introducing smart metering led to a number of innovations within the respondent. In 2015 consultants were commissioned, Ernst & Young LLP, to report on the delivery of smart metering. By September 2015, organisational change within the metering management team was proposed. This would lead to the abolition of the head of metering development post. There was to be a new role of head of change and continuous improvement. The claimant's role reflected 95% of the new post. He expected to be appointed into the new role upon the implementation of the restructure. The claimant and the other managers in the metering leadership team had provided input to the proposals for reorganisation. It had not been envisaged that there would be any redundancies at that level. On 2 December 2015 Mr Wall wrote to his management team. He announced appointments to the majority of posts. The head of change and continuous improvement role was not to be filled immediately and the claimant was to continue for the time being as head of metering development.

13. This came about as a consequence of concerns Mr David Titterton, director of energy services, had about the work Ernst & Young had undertaken. He held a meeting with Ms Reid and Mrs Williams on 7 December 2015. At that time Ms Reid held the role of head of change and transformation in the home team. She reported to Mr Yeoman, the head of home team and he, like Mr Wall, reported to Mr Titterton. Mr Titterton required Ms Reid to compile a report with a view to the reorganisation of 'change and transformation' within energy services, to take it outside both the home team and metering team. A further meeting took place on 21 December 2015. Only Mrs Williams and Ms Reid were present.

14. In early December 2015 two reports were received from separate customers who had suffered a problem following the installation of their smart meters. The power supply units to the display meter (which demonstrated the use of energy) had 'exploded'. A task force was set up to consider and address this problem, which became known as the defective IHD issue. It was chaired by Sue Rhodes the head of smart operations in the metering department. The claimant was part of that committee in the early stages. He had a background of professional electronics expertise. He liaised with the supplier of the power supply unit, Green Energy Options (Geo). The task force believed, in the early stages, that the problem was one of early life failure which could be isolated to a particular batch of units. However upon further investigation, and discovery that another energy supplier had experienced a similar failure, it was the view of the claimant that the problem could not be so confined. He believed that the failure could arise at any stage. In his view there was a safety risk to all customers who had had such devices installed. On 23 December 2015 he attended a meeting with the task force and relayed his findings. He recommended that there should be a recall of all 14,000 installed devices, immediately. Ms Rhodes did not agree. She said no total recall would be initiated.

15. Following that meeting the claimant reduced his findings and opinion to writing and sent an email to Ms Rhodes and copied Mr Wall in. An email sent by Ms Rhodes to Mr Fowkes of the legal department, and copied into Mr Wall, reflected her view. It was sent within an hour of receipt of the claimant's email on 23 December 2015. She stated that if Geo were to fund the replacement parts then they would commence a recall in the New Year. Mr Flood submitted that this reflected the attitude of mind of the task force including Mr Wall, that such an extensive recall should await agreement as to who would cover the cost.

16. The claimant telephoned Mr Wall. He was annoyed with the claimant. In his witness statement he described his reaction as "terse". In cross examination he said that this was because it had not been the appropriate route for the claimant to convey this concern and he should have convened a meeting of the task force to discuss his opinion. In his witness statement he gave a different explanation for his reaction. He said this was not a helpful contribution especially being sent just before the Christmas holiday period. We did not consider this to be a likely explanation of his displeasure. The claimant had taken his concern to the task force without success. Following that up with a written communication to the chair of that subcommittee, and copying that to his manager was the appropriate course of action. It would have been irresponsible for the claimant not to have expressed this opinion at that time or to have deferred it beyond the festive period. Mr Wall's irritation betrayed a frustration he had with the claimant's manner more generally. He described this a number of times in his witness statement. The impression given was that he believed the claimant lacked a diplomatic approach in his dealings with others and created unnecessary conflict.

17. On 24 December 2015 Mr Wall delegated his authority to the claimant to deal with the defective IHD issue in his absence. He informed the members of the task force that the claimant would have to route any questions or changes with Geo through the commercial team. Mr Wall felt that the claimant's blunt approach with Geo might limit the prospect for an early indemnity for the cost of the recall. The claimant had no further involvement with the taskforce.

18. On 4 January 2016 Ms Reid presented a report to Mr Titterton. It proposed a new organisational structure for transformation and change. That was to be a new department operating outside the metering and home teams. The change and transformation function within the smart and metering teams would be moved and a number of the staff who had reported to Ms Reid and the claimant respectively would move to the new department. The roles of Ms Reid and the claimant, which had reported to Mr Yeoman and Mr Wall respectively, were to be deleted. The head of transformation would report directly to Mr Titterton. A new role of head of development and change management (later to be renamed head of change delivery) was created which was to report to the head of transformation.

19. The proposal for the reorganisation of change and transformation, and how it came about, in December 2015 and January 2016 was vouchsafed for the first time

in the course of the hearing. The witness statements served by the respondent made no reference to it. Mr Wall, when challenged in cross examination, said he had first become aware of the proposals when they had been presented to him to implement in early February. Further disclosure, after his evidence, revealed that Mr Wall had been informed of the new proposals by 11 January and he had expressed a number of concerns. These included who would be responsible for implementation of change and to be clear that nothing had been overlooked with regard to the complexity of smart metering within the framework of change management. This would appear to have particular significance to the claimant's area of expertise. Ms Reid said that a number of iterations of the structure were prepared in January, but none of these were produced, nor seen by anyone it seems, than Ms Reid, Mrs Williams and Mr Titterton. Six roles were to be casualties of the restructuring, including those of the claimant and Ms Reid.

20. On 11 February 2016 Mr Titterton wrote to all employees in energy services to announce a significant restructure. That was to involve the potential for a loss of 380 full-time equivalent jobs. This arose as a consequence of serious losses which had been suffered in the previous year. He announced the commencement of a consultation process under the heading "energy services recovery plan".

21. When the claimant received that letter he learned of the proposal to create a separate change and transformation department and suspected that this may put his own future at risk. He raised his concerns with Mr Wall who was unable to allay them.

22. Ms Reid was appointed to the role of head of transformation and change in early February 2016. That was announced in an email from Mr Titterton on 18th February 2016. The claimant learned of the appointment at a meeting with Mr Wall and Miss Barrett, human resources adviser, on the morning of 18 February 2016. They informed the claimant his role was redundant. The claimant complained that there had been no selection process for the new post Ms Reid had been appointed to and he believed his selection for redundancy to be unfair. Mr Wall emailed the claimant later that day to inform him he would commence a consultation process the following week and that Ms Reid would not be involved. This was to be separate and apart from the consultation the claimant had to initiate with his own team about the broader reorganisation arising from the recovery plan.

23. On 7 March 2016 a meeting was held with the claimant's department. Ms Reid presented a PowerPoint explaining the process and reorganisation. The claimant announced that the teams were to be combined and he was to be made redundant. Having seen that there was to be a role entitled "head of change delivery", the claimant asked Ms Reid whether he was being considered for the role. She informed him it was not suitable for him. Although Ms Reid disputed having made any such remark in her evidence (and in response to a subsequent grievance raised by the claimant) we were satisfied that she had. It had significance for the claimant and was one he was likely to register. Subsequently Ms Reid let it be known to her human resources advisors that she did not think the claimant was

suitable to be mapped against the new head of change delivery role, given his previous area of responsibility. She was ultimately persuaded he should be pooled for interview. This is compelling support for the claimant's contention that she made the remark at the meeting, when he queried if he were to be considered for the role.

24. On 18 March 2016 the claimant attended a stage I consultation meeting with Mr Wall and Ms Barrett, HR adviser. The claimant said he was not happy that there had been no formal process for the appointment of the head of transformation, that that was unfair and against company policy. Ms Barrett told him that the scope of that role was different as was its grade. The claimant was informed that he had been placed in a closed pool for interview with one another for the head of change delivery post.

25. On 4 April 2016 the claimant was seconded to the customer services division to work in the complaints task force.

26. He was due to be interviewed for the head of change delivery post on 18 April 2016 but was unable to attend because of illness. Ms Reid sent him a text the following day. She asked if he would be content for her to evaluate his suitability for the post purely on the content of his CV. The claimant did not reply. The interview was rearranged the following day. It took place on 20 April 2016. It was conducted via web cam. Ms Reid and a member of the human resources department conducted a scoring exercise against a list of competencies. The other interviewee, Mr Simon Keight, scored higher than the claimant and was appointed to the post. The claimant learned of this on 5 May 2016 whilst working on secondment in Durham, not from Ms Reid but from a member of his former department. This led the claimant to suspect that Mr Keight had been pre-selected by Ms Reid.

27. On 27 May 2016 Mr Titteron issued a briefing note announcing a further restructure of senior management. Mr Wall's role was to be divided.

28. On 14 June 2016 the claimant attended the stage II consultation meeting. He was informed that he had been unsuccessful in his application for the post of head of change delivery. He was told he was therefore to be dismissed on the grounds of redundancy. The claimant appealed the decision. He also lodged a grievance in respect of the process.

29. Mr Powell undertook an investigation of the claimant's grievance. He spoke to Ms Reid, Mrs Williams and Mr Titterton. In cross examination Mr Powell acknowledged that he had not challenged any of these individuals as to the view of the claimant that he had been adversely treated because he had raised health and safety concerns at the end of 2015. In reality, Mr Powell simply satisfied himself that a process had been followed which had led to the claimant's role becoming redundant. He did not investigate in any detail the possibility that this process could have been unfairly influenced.

30. The appeal and grievance hearings took place on 18 July 2016 with Mr Powell. He wrote to the claimant on 29 July 2016 and dismissed the appeal and rejected the grievance. He informed the claimant that he had been assessed for the head of transformation role. He said that he had reviewed the mapping process which had successfully measured the similarities in role between Ms Reid's earlier, redundant post and the new one. The claimant's former role, in contrast, had not been considered to share sufficient similarities to pass the 70% requirement. In his evidence Mr Powell explained that he had seen a document mapping the claimant's role but he had not seen a comparable document relating to Ms Reid. The respondent disclosed to the Tribunal, during the hearing, the documentation mapping Ms Reid to this post. It left a lot to be desired. For each category a significant match and a marking of 100% match had been allocated. This could not have been correct, as was acknowledged. The previous and future roles were not at the same level, nor of similar status with regard to reporting lines. Ms Reid had previously had to report to a further tier of management below Mr Titterton. 100% was not an appropriate match in respect of other categories of comparison. It was not clear why this had not been seen by Mr Powell, nor why it had only been produced to the Tribunal at a late stage. Both this document and the mapping record concerning the claimant had appended a name of the reviewer which was incorrect and neither documents were dated.

31. On 8 August 2016 Mr Wall resigned. He had a chance meeting with the claimant two days later over a coffee. The claimant relies upon their discussion, but the respective recollections of what was said differ. We are not satisfied as to precisely what might have been said about safety issues and its context, in this brief unrecorded exchange.

32. The claimant applied for the post of head of infrastructure during his notice period. The interview took place on 26 September 2016. Mrs Williams and another manager conducted the interview. There were two other candidates, one internal and one external. The claimant came third and was not appointed. He asked for feedback. It was given verbally on 29 September 2016. Mrs Williams informed the claimant that he had gone into a level of detail which was not required, he was not succinct and "talked at" people rather than engaging them. She referred to his work in metering. She said it had been well known within the company and that the way he engaged with stakeholders was a key concern. She was also critical of his leadership, based upon her knowledge of his history with the respondent. In cross examination Mrs Williams said she had held this opinion from when he had joined the organisation. She said she would have readily shared it if asked with others, including Ms Reid and Mr Titterton.

33. The claimant applied for three other post but was unsuccessful.

Discussion, analysis and conclusions

Unfair dismissal
Section 103A of the ERA

34. What was the reason for the dismissal, redundancy or because the claimant had made a protected disclosure? If it was redundancy, had the claimant been selected for redundancy because he had made a protected disclosure?

35. Mr Flood submitted that the tribunal could infer that there was an agenda; one that allowed of the conclusion that the principal or sole reason for the loss of the claimant's employment was the fact he had made the protected disclosure relating to safety issues concerning the IHD components. The meetings between Mr Titterton, Ms Reid and Mrs Williams to reorganise the function of transformation and change took place in secret. The processes which led to Ms Reid being appointed to the head of that new department were highly unsatisfactory. The policy of the respondent was to advertise new posts whether internally or externally. There was no such open selection process for the head of transformation and change. If that were not bad enough, he contended, the disclosure concerning the mapping exercise which was undertaken was highly questionable. The allocation of the maximum similarity of Ms Reid's previous and future roles together with a number of other inaccuracies in that record led to doubt about when and how the document had been created and for what purpose. The mapping exercise for the claimant and the new role was based upon his out of date role profile and was undertaken without any input from anyone other than Mrs Williams and Mr Titterton. The mapping guidance recommended that the exercise be undertaken by the manager of the candidate for the job. Mr Wall and Mr Yeoman had no input, but would be the best informed to have discharged the mapping exercise.

36. Mr Flood commented upon the convenience with which Ms Reid created a job, in her own image, and a role reporting to her, head of change delivery, which best matched that of one of her team, Mr Keight. None of this aspect of the restructure was opened up for comment or representation, but was presented as a fait accompli. To add to those deeply unsatisfactory features, Mr Titterton, the director who initiated the restructure which led to the claimant's loss of employment, did not give evidence. Only he, submits Mr Flood, could dispel the aspersion that he had been motivated by an antipathy to the claimant, regarded him as a troublesome influence who had exposed the respondent to the potential of significant expense, by issuing the unqualified recommendation that there be an immediate recall of the IHD device. He adds that it is inexplicable that Ms Reid and Mrs Williams had made no reference whatsoever to the restructure and discussions of December 2015 and January 2016 in their witness statements, because the case was, from first to last, about redundancy and the disappearance of the claimant's post. He contends any respondent to such a claim would commence their response and witness statements with the process which eliminated the job of the redundant employee. The picture of

what happened in regards to the claimant's role only emerged piecemeal, during the course of the proceedings as further disclosure was ordered and witnesses gave evidence in cross examination about the secret meetings with Mr Titterton.

37. Mr Flood draws attention to unfair treatment of the claimant by Ms Reid in respect of consideration of him for the new job of head of change and delivery: expressing the view that he was not suitable, not considering his role to match by reference to an outmoded role profile, suggestion that a face-to-face interview be avoided and his learning about the outcome from a third party. He said Mrs Williams betrayed a negative and unfair attitude of the claimant, which was summarised in the feedback she gave to him. The final and fatal piece of the picture, submitted Mr Flood, was Mr Wall's illogical explanation for becoming testy with the claimant on receipt of his email. The subsequent disclosure demonstrated he and others were concerned that no recall should be implemented before Geo agreed to fund it. This was, he argues, the obvious reason for his frustration.

38. There is force in some of these points and criticisms, but they do not lead to the inference that the sole or principal reason for the claimant's dismissal was that he had made the protected disclosure of 23 December 2015. We shall address those criticisms which are well founded below when we address section 98 of the ERA relating to unfairness under general principles.

39. On the critical question as to the reason for the dismissal, we are not satisfied that it can be attributed solely or principally to the protected disclosure of 23 December 2015. There was already to be a change to the claimant's role under the reformulation proposed in September 2015. Albeit the claimant's security of employment at that time was not under threat, further analysis of the requirements for change and transformation had been identified. Mr Titterton expressed his dissatisfaction with the Ernst and Young reorganisation and his proposal for a new, separate transformation and change department on 4 December 2015 and later on 21 December 2015; all this was before the claimant had concluded that the IHD defect was not merely early life failure but would necessitate, on safety grounds, a total recall. This sequence of events led the claimant to withdraw his first detriment complaint; it was apparent his alienation from the discussions about reorganisation could not be attributed to his protected disclosure on 23 December. Similar difficulties arose about his complaint that the dismissal was unfair because the reason was that he had made this protected disclosure. Mr Titterton had already said he wished the function of change and capability to be extracted from the home and metering teams to become a new department reporting directly to him, before the protected disclosure had been made, exposing the claimant and Ms Reid's post to redundancy.

40. This led Mr Flood to advance a more nuanced argument that whilst the reorganisation affecting the claimant's role may not have been because of his protected disclosure, the subsequent shape of the structure to eliminate the claimant's post and any likely redeployment post was as a consequence of his intervention on the IHD issue.

41. We recognise that there are circumstances in which employers will, opportunistically, manipulate a redundancy programme or business reorganisation to eliminate a particular employee for improper reasons and to use it to mask the real motive. We are not satisfied the evidence justifies such a conclusion in this case.

42. The absence of Mr Titterton, as a witness, was of concern, but we are satisfied it was not he, but Ms Reid who, principally, had been responsible for the decisions which impacted upon the claimant's employment, once the strategic decision had been initiated by Mr Titterton prior to the making of the protected disclosure. Neither Mrs Williams nor Ms Reid knew of the email of the claimant of 23 December 2015 or its content. Whilst the problem relating to the IHD was likely to have been known, the claimant's view, discussions with the task force and the frosty altercation with his manager Mr Wall were not matters which went beyond that group. It follows that they did not influence the selection of the claimant's post for redundancy nor his selection for redundancy.

43. We reject the suggestion that Ms Reid had been innocently manipulated by Mr Titterton to create a framework in which the claimant had no place. She had extensive authority in creating the new structure. The claimant's role profile which describes three principal parts did not suggest that change and transformation dominated his managerial post. It was this that led her to conclude that he would not even have been considered for the head of the new department and would not be mapped into the head of change delivery post.

44. The unsatisfactory disclosure of evidence by the respondent was not out of a desire to conceal a motive based upon a protected disclosure. When the documents finally were produced, they undermined rather than supported this aspect of the claimant's case. A good example is that relating to Mr Wall. He had been consulted, but far from manipulating the work of Ms Reid to exclude the claimant, he was anxious to emphasise the need to include the very expertise the claimant had in change delivery of smart metering.

45. The aspect of the case in which Mr Titterton had been directly involved after the protected disclosure was the mapping exercise concerning the new post of head of change and transformation. For reasons we set out below, this was far below the standards one would expect of an employer of this size. That said, the role of Ms Reid was more suitably matched to the new post than the claimant's former post, even giving due account for his actual role profile. We do not consider, in those circumstances, that this exercise was influenced by the claimant's protected disclosure. The other person involved in that exercise was Mrs Williams. She formed a negative view of the claimant as a consequence of what she had come to know of him over four years and not because of any knowledge of the protected disclosure.

46. The reorganisation eliminated a role formerly held by the claimant in which the requirements for employees to undertake work of a particular kind had reduced or

diminished. The role of the claimant in undertaking change/development in the metering department ceased to exist. There were similar abolitions within the home team, including the roles of Ms Reid and Mr Keight.

47. We find that the reason for the dismissal of the claimant was that he was redundant. We are not satisfied that he was selected for redundancy because of the protected disclosure. The complaint under section 103 a of the ERA, accordingly, fails.

Unfair dismissal (general principles)

48. A dismissal will be unfair if it was unreasonable in all the circumstances of the case having regard to the reason for the dismissal, taking into account the size and administrative resources of the employer and having regard to equity and the substantial merits of the case. There is no burden on either party in respect of this consideration.

49. It is well established that in any redundancy situation an employer will need to undertake a suitable consultation exercise. The extent and breadth of it will depend on the particular circumstances. We must measure it as against the reasonable band of responses of a reasonable employer.

50. The consultation in this case fell outside that range. The responsibility of the employer is to announce the potential for redundancies at the earliest stage possible and to consult with any recognised union or representatives, or alternatively the employees themselves, to invite discussion/representation about how any loss of jobs might be avoided and, if not, what process will be adopted to select employees for redundancy, see **Williams v Compair Maxam Ltd [1982] ICR 156**.5145. It was known that the claimant's role was one of six which was to be eliminated by 4 January 2016. There were some discussions with Mr Wall over the next few days but not with any person affected, or at risk, nor their union or representatives. The general restructure of the recovery plan was announced the following month, in a letter from Mr Titterton of 11 February 2016. It announced that there would be a single energy services change and transformation capability but it contained no detail, nor expressly stated that the claimant's role had become redundant.

52. On 18 February 2016 the claimant was formally notified that his role had become redundant and that Ms Reid had been appointed as head of the new department, but no detail as to the new structure was provided. This first became available at the briefing on 7 March 2016, nearly two months after the restructure had been completed.

53. The claimant was never given the opportunity to make representations in respect of the new framework or how it might have been possible to avoid making any redundancies. At his one-to-one meeting on 18 March discussion concentrated solely upon one option for redeployment, the head of change delivery post. When the claimant raised his concern about unfairness in the appointment of Ms Reid to the head of the new department, he was simply informed that scope of the role and grade was different. He was not told that there had been a mapping exercise in which he and Ms Reid had been considered. That was concealed until the outcome of the claimant's grievance. The very fact this exercise had been undertaken at all,

demonstrated that the claimant's role warranted consideration in the new structure. That should have been the clearest of signals to Mr Titterton and Mrs Williams that transparency and consultation was required at that early stage. A fair process would have involved the opportunity for representations before any individual was appointed into the new structure.

54. It is worthy of note that in January 2017 a need has been identified for a programme manager to manage change in the Leeds office. It is to be accountable for leading change in metering capability through delivery and assurance of transformational projects and activities. The claimant suggests this mirrors his previous work and establishes how it had been overlooked. A vacancy which is advertised a year later must be treated with some caution. Many changes, restructures and personnel movement must be factored in before drawing the inference the claimant invites and the Tribunal does not have the evidence required satisfactorily to interpret what has happened in the interim. That said, the claimant did have a level of expertise, experience and specialism of a technical nature in metering which he could have argued, in a fair and open consultation process, was an invaluable part of a new department. This had been touched upon by Mr Wall in his email of 11 January 2016.

55. In addition to the shortcomings concerning consultation, we accept the submission that there was other unfairness within this process. Ms Reid had formed a premature view as to the unsuitability of the claimant for the new post of head of change delivery. It had been based upon an out of date role profile of the claimant. It infected her approach to the recruitment to the new role. She told the claimant in terms that he was not suitable for the post on 7 March 2016. She had to be persuaded to pool him for interview. Her suggestion of a desk-based analysis, an interview by webcam and not formally writing to the claimant to inform him of the outcome gave the impression to the claimant that Ms Reid had never really taken him seriously for the role and wanted it to be filled by Mr Keight, who had reported to her within the former structure. Not only did this approach give the appearance of unfairness, we accept the claimant's submission it was unfair.

56. In October of the previous year, Ms Reid had made changes which gave Mr Keight additional staff and responsibilities, the effect of which made his role comparable to that of the claimant, in direct reports. Notwithstanding the claimant held a more senior role to Mr Keight in the reporting structure, this had carried no weight in the mapping exercise Ms Reid undertook, in contrast to the similarity Ms Reid saw in Mr Keight's recently acquired post.

57. The appointment of Ms Reid by Mr Titterton and Mrs Williams to the head of transformation was not compatible with the respondent's normal practice to advertise newly created posts, which could be restricted to internal candidates in appropriate circumstances. The mapping exercise for the post was amateurish and gave every impression of being a window-dressing exercise. It should have involved Mr Wall and Mr Yeoman, with the best knowledge of the candidates' roles. They were not even consulted. An out of date profile was used for the claimant. The allocation of similarities to Ms Reid were manifestly incorrect in a number of respects. The investigation of that matter by Mr Powell was shallow, he not requesting the full documentation such as the mapping record in respect of Ms Reid. Rather, Mr Powell accepted at face value an explanation advanced by Mr Titterton for why the claimant

had not been considered for the post. Fairness and transparency justified this post being advertised as a vacancy at the commencement of the exercise, not embarking upon a restructure which involved redundancies within which the posts available were restricted from the outset. The claimant had good cause to complain about the way in which Ms Reid had been appointed to this post in private.

58. The claimant's feeling that he had undergone an unfair interview for the head of infrastructure post also has merit. The negative view Mrs Williams had of the claimant, based upon events over the previous four years in respect of which he had not been given the opportunity to comment, could not have been fair. Mrs Williams measured the claimant against an external candidate of whom she had no previous knowledge. Mrs Williams should have asked herself whether she could have impartially discharged the role of assessor in the circumstances. The claimant was entitled to be treated with fairness and not written down for impressions reached in respect of which he had no opportunity to defend himself.

59. For all of these reasons, the respondent acted outside any reasonable range, and the selection of the claim for redundancy was unfair.

Polkey

60. Had a fair procedure taken place there was a real possibility the claimant could have influenced the make-up of the new department. There was a real prospect that would have led to the provision of a role with greater emphasis on metering and technical expertise. That might have been within the role profile of the head of the new department, or at a different level. Ms Reid designed the new structure from her own perspective, without the benefit of the claimant's experience in metering. Cost saving did not drive the redesign of change and transformation unlike the broader recovery programme.

61. The claimant should have had the opportunity to persuade impartial and fair managers that he was a suitable candidate for the head of transformation and change, or if not another role within the Department, possibly one of head of change delivery with a different role profile, had he had the chance to make representations at an earlier stage. We note that in one iteration of the restructure that post had previously been called head of development and change management, more comparable to that job title held by the claimant of head of metering development. Had such opportunities been given, we are satisfied there was a good prospect of the claimant having been redeployed. The respondent relied upon the scoring process which had taken place, with two assessors, to suggest the claimant would not have been redeployed anyway. We do not accept that submission. The preconceptions about the claimant's previous work and negative views of him, held by Ms Reid and Mrs Williams respectively, had a significant impact on the interviews and how they were approached.

62. There was, of course, no guarantee that the claimant would have been successful following a fair process. His post was already under scrutiny by September 2015. As with any Polkey exercise, it is necessary to weigh up all the factors to evaluate the lost chance, but we reject the submission of Mr Winthorpe that it is far too speculative. We agree with his contention that the claimant may have still been a casualty of the restructure, in a differently conducted process.

63. We find the claimant had a 65% chance of remaining in employment had the procedure been fair and reasonable and compatible with the respondent's own policies. That reflects the compelling case he could have put forward, had he been given the opportunity and the greater prospects he would have had of obtaining one of the alternative posts. We shall therefore reduce the compensatory award by 35%.

Detriment on the ground of having made a protected disclosure

64. There is limited information available as to what occurred with the task force after Christmas 2015. It is common ground that the claimant no longer had any involvement. The respondent carries the burden under section 48(2) of the ERA to explain why an act, or failure to act which constitutes the alleged detriment was done. We are satisfied it would be a detriment to be excluded from a subcommittee of this type. That said it was not a claim foreshadowed in the grievance and the claimant did not appear to raise this concern with Ms Rhodes in early 2016.

65. The respondent has not called evidence from Ms Rhodes or anyone else on the task force to explain why the claimant ceased to have any further involvement. There was unquestionably a difference of opinion about the recall when the matter was raised by the claimant. We have found it annoyed Mr Wall and we have rejected his explanation for his irritation. But for the issue of time limits we would have found that the respondent has failed to discharge the burden upon it, that is to say to explain that the claimant's exclusion from the task force was not significantly influenced by the protected disclosure of the 23 December 2015.

66. There is not a great deal of information as to the work of the task force after the claimant ceased to have any involvement with it at the end of December 2015. In the bundle of documents a PowerPoint update of 19 August 2016 records work which was undertaken in respect of the defective IHD parts. It reports 13,933 customers had had replacement units provided and that an invoice for the costs had been sent to Geo. It gives every impression of the process having come to an end.

67. Until closing submissions the Tribunal had understood that the detriment complained of was the decision taken to remove the claimant from the task force, a decision which must have taken place within a period of days, or at most a matter of weeks, after 24 December 2015 when Mr Wall had delegated his functions to the claimant in his absence. In that event the detriment complained of would have been an act which took place within the first two months of 2016. The claim form was issued on 17 February 2017. The period of early conciliation ran from 6 December 2016 until 18 January 2017. Such an act to exclude the claimant from the task force would be well outside the period of three months, within section 48(3) of the ERA and has not been suggested that it was not reasonably practicable to have presented the claim within that period.

68. Mr Flood put the case somewhat differently, on the time limit point, in his closing argument. He contended that the exclusion constituted part of a series of similar acts. By section 48(3)(a) of the ERA the last of such acts activates the commencement of the time limit. It was not possible for the claimant to establish that there had been any work undertaken by the task force beyond 19 August 2016. If

that was the last date of exclusion, that series of detriments would also be outside the time limit allowed. In the circumstances that claim is dismissed.

Employment Judge D N Jones

Date: 31 August 2017