EMPLOYMENT TRIBUNALS

Claimant: **Mr P Baniasadi**

Respondent: **Unipart Group**

Heard at: **CVP** **On:** **9 and 10 March 2023**

Before: **Employment Judge Eeley**

Representation
Claimant: In person
Respondent: Mr P Nainthy, solicitor

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is well founded and succeeds.

2. The appropriate remedy for the unfair dismissal is to be determined at a separate remedy hearing, if not agreed between the parties.

3. By consent, the respondent shall pay the claimant the agreed sum of £1054.13 in respect of accrued untaken holiday pay.

REASONS

Background

1. By a claim form presented on 6 April 2022 the claimant presented claims of unfair dismissal and for unpaid accrued annual leave.

2. For the purposes of the final hearing I received written witness statements and heard oral evidence from the claimant and from Dr David McGorman (Managing Director of Unipart Technology Group) who heard the claimant's appeal against his dismissal. I also had regard to documents contained within a main hearing bundle consisting of 162 pages and a further supplemental bundle consisting of 82 pages. I read the documents to which

I was referred by the parties. I also received closing submissions on behalf of the claimant and the respondent.

3. Unless otherwise stated, numbers appearing in square brackets are references to pages within the main bundle of documents.

4. On the first morning of the hearing the claimant made an application to strike out the respondent's response to the claim. Upon hearing the parties' representations I dismissed that application. I gave oral reasons for my decision and have issued a separate judgment dismissing that application and so I do not propose to set out the reasons for that decision here.

Findings of fact

5. The claimant was employed by the respondent between 14 October 2019 and 31 December 2021. He was employed as an Optimisation Engineer at the respondent's site in Cambridge. The respondent group of companies provide strategic, technical, operational and communications support. The respondent is a technology company and it develops and introduces digital products, services and new ways of working. The claimant was employed in the "Data Science" team within the larger "Digital Team."

6. A decision to restructure the company was taken in 2021 due to the difficult trading situation that the respondent found itself in, compounded by the ongoing impact of the Covid 19 pandemic. Many of the divisions within the organisation made significant cuts to the number of people they employed. The respondent took the view that redundancies were required within the Digital Team. The claimant was part of that Digital Team. I am also told that, subsequent to this round of redundancies, a further 28 people were made redundant from the team in 2022. However, I have seen no documentary evidence confirming the exact scope and implications of that subsequent redundancy exercise.

7. At the hearing I heard evidence from Dr McGorman. He heard the claimant's appeal against dismissal. Prior to the dismissal the respondent conducted a redundancy consultation exercise. The one-to-one consultation meetings with the claimant were conducted by Debra Syme who was, in substance, an HR manager, although her job title was "Head of Digital Talent." During the redundancy consultation process the post of Data Science Lead was occupied by Anya Dulnik, on an interim basis. She was, in effect, the claimant's ultimate line manager and she chaired some of the consultation meetings which formed part of the process. Both Ms Dulnik and Ms Syme have left the respondent's business since the events which form the subject matter of this case and they were not available to give evidence to the Tribunal. This means that there was limited direct evidence available to the Tribunal concerning what Ms Syme and Ms Dulnik said, did, thought and decided during the course of the process. Any findings of fact which I make about the stages of the redundancy consultation procedure prior to the appeal are derived from the contemporaneous documentation, the claimant's evidence to the Tribunal and Dr McGorman's evidence to the Tribunal (insofar as it is based upon his own direct knowledge or recollection of events).

8. The Director in charge of the business area affected by the redundancies was the Chief Digital Officer (Richard Neill) who was the son of the respondent's then CEO and Chairman (John Neill).

9. The respondent announced the decision to make redundancies in a briefing to the Digital Team on 6 December 2021. This announcement was made via remote online meeting. Unfortunately, 6 December 2021 was a Monday (one of the claimant's non-working days) and so he was not present at the initial announcement in relation to the redundancy.

10. The respondent drafted a briefing pack to which I was directed [68]. That briefing pack was subsequently disseminated to the relevant employees, including the claimant. The briefing pack set out the proposed changes to the Digital Team resulting from the 6 December announcement. It purported to provide the background to the proposed changes, details of the proposed consultation, information about alternative roles and the selection process, details of an appeal procedure, details of redundancy payments and notice periods, further information about holidays and other miscellaneous information (including references to the support available for affected employees.)

11. Within the briefing document the respondent explained that the business faced various challenges. These included: the semiconductor shortages; cuts to spending by one of the respondent's biggest customers (Network Rail); and the Covid 19 pandemic and its wider effect on business and the wider economy. The respondent explained that this had significantly reduced the respondent's profitability (albeit the respondent remained a strong and profitable company.) The decision had been taken to make changes in order to reduce costs. As a result, some employees would be made redundant in order to effect the cost savings. The briefing document confirmed that there would be a consultation process which was intended to give employees the chance to understand the proposals, put forward alternatives that may lead to amendments to the proposals and allow employees to raise any other matters which may minimise the effects of the redundancy upon them. The consultation was likely to last for ten days. The document explained that those "at risk" would have individual consultation discussions with a line manager and a human resources representative. Any follow-up actions would be noted and it was anticipated that consultation would close by 17 December 2021.

12. The briefing document confirmed that consultation would include a discussion of alternative employment and redundancy payments, where appropriate. Employees were informed of their right to choose a companion to attend consultation meetings with them. The respondent made clear that any vacancies within the group would be communicated to employees during the consultation process and employees would be advised when a vacancy was open to applications and would be provided with a copy of the advert and/or job description. Anyone selected as redundant would have the opportunity to appeal against the decision within five working days of notification of the decision. The respondent undertook to provide an estimate of any redundancy payments as part of the consultation process. Where redundancy was confirmed, a final, updated calculation would be provided, as necessary. Those made redundant would be given formal notice of the end of their employment in line with their contracts of

employment. The respondent indicated that in some circumstances employees would be required to serve their notice and some employees would receive pay in lieu of notice instead. Outstanding holidays at the effective date of termination would be paid in line with the normal rules for outstanding holiday payments. The impact of an employee refusing suitable alternative employment was explained under the heading "additional information". Employees were signposted to seek support from line managers or HR. Employees were also advised that they did not have to wait for formal consultation meetings if they had immediate concerns. They could contact the respondent accordingly.

13. The claimant received the briefing note and had the opportunity to read it. He was also provided with a copy of the respondent's generic "FAQs" document [72] and had the opportunity to consider its contents. Of note, within the document it was confirmed that the proposal was to make fewer than twenty employees redundant. In those circumstances the wider requirements for collective consultation were not triggered. The document did not confirm exactly what number of employees would be lost as a result of the redundancy process. The document also made clear that individuals at risk of redundancy were at risk because their roles were not in the proposed future structure which had been designed to meet the customer and business needs for the future business strategy.

14. The respondent gave evidence that a lot of the documentation concerning the redundancy situation was uploaded to a 'Google drive' to which the claimant (and others) had access. The respondent's position was that some documentation was uploaded to that drive for employees to access for themselves. Other documentation may have been sent direct to the individual employee concerned. There was no documentary evidence of this Google drive within the hearing bundle. I am prepared to accept that such a shared drive existed and that it contained some documentation concerning the redundancy process. However, there is nothing to indicate the precise contents of the shared drive. Insofar as it is necessary to do so I will have to decide, on a case-by-case basis, whether the document in question was in fact provided to employees (including the claimant) via the drive and whether the claimant actually saw the particular document during the course of the consultation process. Furthermore, where documentation is said to have been disseminated via the Google drive rather than by being sent direct to the claimant, I will have to determine what impact (if any) this has on the fairness of the overall procedure in the claimant's case.

15. The respondent directed me to consider the organisation charts for Data Science [67]. The diagram at the top of the page set out the structure of the department when the claimant was employed there and the diagram at the bottom of the page set out the proposed new structure.

16. Prior to the redundancy process the claimant was part of a team who reported to Nuno Goncalves. Mr Goncalves was the "Machine Learning Technical Lead." One of his direct line reports was Alvise Pellegrini ("Simulation and Optimisation Lead"). The claimant ("Optimisation Engineer") and his colleague Maryam Kamali ("Data Scientist") reported directly to Mr Pellegrini. Mr Goncalves' other direct line report was Alex Walther ("Machine Learning Lead"). Mr Walther had only one person

reporting directly to him: Zahari Kassabov ("Machine Learning Engineer.") Thus, prior to the redundancy process there were five people in the organisation in the team which reported to Mr Goncalves.

17. Alongside Nuno Goncalves (at the same level of the organisation) there were three other individuals who also reported to Ms Dulnik (in addition to Mr Goncalves). These individuals were Etienne Boisseau-Sierra ("UBIS Lead"), Richard Whitefoot ("DS S/W Engineering Lead") and Ksenia Shchegolkova ("Project Manager"). Mr Boisseau-Sierra's team of direct reports consisted of two people: Ines Moskal ("Data Scientist") and Ivan Krsnik ("Software Engineer"). Richard Whitefoot had a team of five Software Engineers reporting to him (Le Suer, Timson, Acosta, Hunter and Salazar.) Ms Shchegolkova had no direct line reports.

18. The proposed organisation chart after the redundancy process consisted of the same four job roles reporting to the Data Science Lead (Ms Dulnik). The Machine Learning Technical Lead (Goncalves) would have three direct reports: a Machine Learning Lead, a Simulation and Optimisation Lead; and a Software Engineer. This suggests that Messrs Walther and Pellegrini's jobs would remain where they were within the structure and a Software Engineer would move across to sit in Goncalves' team. The Machine Learning Lead (Walther) would retain the Machine Learning Engineer as his direct line report. The Simulation and Optimisation Lead (Pellegrini) would lose the Optimisation Engineer (the claimant) and would retain a Data Scientist as his direct line report. In parallel, the UBIS Lead would lose both of his direct line reports. The DS S/W Engineering Lead would lose all five of his direct line reports (the team of Software Engineers). The Project Manager would remain without any direct line reports. Overall the head count in the new structure (bearing in mind that there was only one Data Science Lead working at any given time as Ms Massabuau was on leave) reduced from 17 to 10. The job titles which were lost from the structure were the Optimisation Engineer (one post- the claimant), Data Scientist (one out of two posts) and Software Engineer (five out of six posts).

19. The evidence contained in the organisation charts was elaborated upon by Dr McGorman in his evidence to the Tribunal. He indicated that the pool for selection for redundancy which was originally considered was the claimant, Maryam Kamali, Ines Moskal, Ivan Krsnik and Zahari Kassabov (i.e. Optimisation Engineer, two Data Scientists, a Machine Learning Engineer and a Software Engineer). He indicated that Mr Acosta was originally in the pool (another software engineer) but Dr McGorman's evidence was that he was then removed from the pool as his role was "clarified as sitting elsewhere within the team." He did not elaborate on what this meant. (In any event he was made redundant in August 2022.) This indicates that the claimant was in a pool for selection for redundancy with four other people.

20. Dr McGorman's evidence was that Ines Moskal had the lowest score and was made redundant during this selection exercise. This meant that the respondent had lost one of the two Data Scientists as per its proposed new structure. Ivan Krsnik was also selected for redundancy at this time (losing one of the software engineers). Maryam Kamali (Data Scientist) remained in her role but subsequently resigned on 12 April 2022 and left the business

on 13 May 2022. Zahari Kassabov also remained in post as Machine Learning Engineer.

21. Dr McGorman went on to explain (paragraph 14 of his witness statement) that Richard Whitefoot had resigned and that Messrs Le Suer and Hunter were made redundant (Software Engineers), Mr Salazar transferred to a different role (so another Software Engineer was lost) leaving two people in that team: Timson and Acosta (although Acosta was subsequently made redundant in August 2022.) Dr Gorman clarified that the people referred to in paragraph 14 of his statement were not part of the pool for selection with the claimant. The claimant was, apparently, not competing against these individuals to avoid selection for redundancy.

22. None of this was actually explained to the claimant during the course of the redundancy consultation process. He was not told precisely how many people were at risk of redundancy. He was not told who was in the pool for selection alongside him. The respondent's evidence about the pool for selection was vague and difficult to follow. It gave no explanation as to how it had decided which roles should be pooled together. There was no indication as to which posts might be broadly interchangeable so that individuals could be transferred from one role to another. The respondent's evidence indicating who resigned and who was dismissed raised as many questions as answers. Why was one of the Software Engineers (Mr Krsnik) in the pool alongside the claimant when the others were not? When Mr Krsnik was selected for redundancy did his role come up as an alternative post for the claimant to move into, given that it sat within the same team as the claimant's original job?

23. In reality, the claimant heard the respondent's explanation of the pool for selection for the first time as part of these Tribunal proceedings. He was not furnished with this information during the consultation process and so could not meaningfully consult upon it. He could not actually see how he was being selected for redundancy so he was precluded from making any suggestions which would avoid his dismissal. Nor could he understand which roles were being grouped together and whether he could, therefore, suggest a transfer to another role within the pool once the scoring had been completed.

24. The respondent's oral evidence to the Tribunal was that the Team Leaders carried out the scoring process to determine which employees within the pool should be selected for redundancy. None of those individuals gave evidence to the Tribunal to explain how they applied the scoring criteria to the employees to arrive at the scores which were given to the claimant and his colleagues. In order to examine the fairness of the process I was therefore required to look at the available contemporaneous documentation for guidance.

25. The respondent disclosed the scoring criteria and the employees' scores during the course of these Tribunal proceedings [74-75]. This document had been the source of some controversy during the Tribunal process. It was not disclosed to the claimant until 28 February 2023. At the time that it was disclosed, the respondent's solicitor indicated that the respondent accepted that the claimant had *not* been given this document during the redundancy process itself and that this was the first time he would be able to examine

it. The respondent's position in relation to this changed during the course of the two-day final hearing. The respondent's solicitor indicated that he was instructed that, although this document had not been sent *directly* to the claimant during the course of the redundancy procedure, it had been uploaded to the Google drive (referred to above) during the redundancy process and was therefore available for the claimant to examine during the relevant period of time. It is fair to say that the claimant found this change of position outrageous and called into question the honesty of the respondent as a result.

26. Having reviewed all of the contemporaneous consultation meeting notes, I have to conclude that the claimant had *not* seen this document prior to its disclosure on 28 February 2023. I accept his evidence on this point. There are repeated questions asked by the claimant during the course of the meetings which should have made it obvious that he had not seen the scoring criteria and did not know his own scores. His comments during the appeal are certainly consistent with the claimant not having seen the document at [74-75] during the redundancy procedure. For example, he made the following comments:

"I am not a legal expert but the one ran lacked transparency. No-one said to me we would select on x criteria and how we would select." [101]

"… the one that concerned me the most the selection process and criteria and how it was made and lack of response to my email regarding selection." [101]

PB: "Before we get to that what is the selection criteria. How was the score made?" [102]
…

PB: "The things we both do in optimisation, a lot of the tasks were overlapping, the role overlapped and it is my understanding that there needs to be clarity on how the selection is being made and I don't have clarity. If it is skills I would have enough evidence this can't be the case. Doesn't make a lot of sense to me. Now you are saying there was some scoring that was done, if this was, I don't know if Ania had a lot of knowledge of what was going on with projects due to length of time she has been involved in the projects, there wasn't any in detail knowledge of who is doing what. I asked the difference between data science and optimisation, this is what I asked. What is it about them that made the optimisation role redundant and not data science? One thing, originally when my title was changed to optimisation engineer this was due to understanding that there was expertise in the team. In addition to data science and machine learning. Julia left so not sure if common knowledge the criteria is." [102]

…

PB: "What is the criteria? I should know this to understand if the process was fair or not. Based on what I do have, isn't it a requirement?
DMcG: "I don't have it in front of me"

PB: "I understand employees have a right to know the selection. So you don't have the information and aren't aware of it? If you have it please send it to me. Happy to review and see if I am wrong."
DMcG: "I understand. What was said to you about selection?"
PB: "It was generic and meaningless, we review talent and certain things that make sense but not particular enough. Review talents and selected people more suited to keep things that were most relevant (digital products). I asked the specific question and it was a repeated, to be honest not getting anything." [102]

…
"additional information was not provided. Specific criteria not provided." [103]

27. In addition, at the appeal hearing the claimant stated, *"… there was no information on the selection pool, or who was to be selected. I assumed all the data science team was included. The pool I was in should have been provided."* [100]

There was an exchange as follows:

PB: "*During the 2nd consultation meeting I asked, mentioned concerns about transparency issues, one included proposal for redundancies to be made, I asked about alternative proposals but didn't understand the proposal. At the 2nd meeting, they showed me the new structure, it was at the end the 2nd meeting the structure was provided to me. I did not have this information."*
DMcG: *"It does say that on the 14th Dec, you asked how many people are being made redundant?"*
PB: *"I also asked about the new structure"*
DMcG: *"Debra confirmed it was less than 20 people."*
PB: *"She said probably going to be, not saying there was no number detailed. I asked for exact number of the pool I was in."*
DMcG: *"Debra shared on her screen the new structure?"*
PB: *"Yes, at the end of the second meeting in response to my question."* [103]

These comments show that it took until the end of the second consultation meeting for the respondent to show the claimant the proposed new structure. Even then, there is nothing to indicate that he was told how the people within the existing structure were to be pooled for selection. There is nothing to indicate who else was within the claimant's scoring pool.

28. In those circumstances, whatever the respondent's assumption about the document's availability to the claimant on the Google drive, it could have given him a copy of the document directly so that the respondent knew for a fact that he had seen it and could comment upon it during the consultation process. At best, the respondent managers assumed the claimant had seen the document but had no substantive representations to make about it, or, at worst, they realised that he had not seen the document and therefore could not comment on it. I have considered whether the document in question was actually available to the claimant on the Google drive as alleged. I am not satisfied, on balance of probabilities, that it was present

and available on the Google drive. There was no screenshot or print out to indicate the existence of the Google drive and the presence of this particular document in the list of available documents in the drive during the relevant period of time. One might expect such documentary evidence to be provided, if available, to resolve the issue one way or another, particularly given that the respondent knew that the claimant was asserting that he had not seen this document before February 2023. It was in the respondent's power to prove the presence and availability of the document (as they still have access to the relevant computer systems) but the respondent has not done so. Furthermore, the contemporaneous notes and letters do not indicate that it is one of the documents available in the drive for the claimant to consider. It is reasonable to expect the respondent's managers to have referred to the document containing the selection criteria by title or description at some point during the consultation process if it was in fact available for the claimant and his colleagues to look at given its central relevance to the redundancy selection exercise. On balance, I am not satisfied that the document was made available to the claimant and his colleagues at the relevant time. The respondent's position during the Tribunal hearing (that it was available for him to access for himself) is inconsistent with its earlier instructions to its representative and appears to be something of an afterthought. It lacks credibility.

29. In any event, this document sets out the selection criteria which the respondent says it applied to the claimant. The four criteria were:

    (A) Must be technically exceptional and highly proficient in the languages, tools and libraries (notably python.)
    (B) Must have very detailed experience and familiarity with the key platform that we've identified as our highest need to support in the future, namely Dragonfly (UFOS).
    (C) Must be "self-sufficient", i.e. able to work technically without a large amount of management and technical guidance. This is also another measure of experience.
    (D) Must be a "team player" and able to get on well with and support the other team members, and look out for them and their interests and needs.

30. There was a key for the scoring range. Scores awarded ran from 0 (no knowledge) to 5 (excels and goes above).The four criteria were weighted: 5 for (A); 10 for (B); 5 for (C) and 5 for (D). The raw score would be multiplied by the weighting factor. There was nothing within the documentation to indicate how the raw scores would be arrived at and what evidence would be taken into account to get to the raw score. For example, there was no suggestion that the scorer would look at previous appraisals or other pre-existing KPIs for the individuals concerned. Nor was there any indication that the scores would be based on an examination of the individual's previous work. Overall, it appears that the scorer would apply a score based on their personal opinion or experience of the individual in question. The respondent did not confirm whether the same person scored all of the candidates and whether the scorer would have the same degree of knowledge and experience of each of the candidates in the pool and their performance at work. This is problematic. It leaves the Tribunal unable to assess whether the criteria were in fact sufficiently objective or at least based on objective evidence. How is the Tribunal to determine the fairness

of a scoring process where there are so many unknowns? Furthermore, even if the claimant had been aware of this document, how could he have consulted on it in any meaningful sense given that he would be none the wiser as to how his own score had been obtained and whether it was arrived fairly?

31. The scores for the claimant's pool are apparently in the document at [75]. The names of the people in pool have been removed, save for the claimant's. The claimant scored 75. The scores of the other employees were 60, 125, 85, 95 and 110. The claimant's is therefore the second lowest score. The respondent's witness confirmed that the lowest score belonged to Ines Moskal, although this is not apparent from the face of the document. Reading this document together with Dr McGorman's witness statement it appears that only two people out of the five in the pool were retained in post. The claimant came in the middle of the bottom three scores. Thus, there was one employee who scored more highly than the claimant who would have been 'next in line' for a redeployment post if one had become available.

32. The claimant received a letter from the respondent dated 7 December 2021 [76] which confirmed that he was at risk of redundancy. He was notified that his first individual consultation meeting would take place on 10 December. He was invited to that meeting by letter dated 8 December [77] which indicated the issues which might be discussed at the meeting and confirmed the practical arrangements. The claimant was notified that he was entitled to be accompanied by a fellow worker or trade union official. He was notified that, if no alternatives were established, his employment might be terminated.

33. The notes of the first consultation meeting were provided [78]. They were set out on a pro forma and did not purport to be verbatim. The claimant met with Ms Dulnik and Ms Syme. In the course of the meeting the claimant is recorded as having raised concerns about his visa for the UK. He pointed out that his visa was dependent upon his employment with the respondent. He notified the respondent that if his employment was terminated he would only have 60 days to find another sponsor. He also made a proposal about reducing hours to facilitate a longer period of employment at the same financial cost to the respondent. He confirmed that he wanted to work his notice rather than be paid in lieu. Ms Syme confirmed that these options could be considered should the need arise.

34. On the second page of the notes it is recorded that Ms Syme was "to share group vacancies." This was a reference to alternative employment which might be available within the respondent's group of companies. The wording suggests that no document was provided to the claimant during the meeting with those vacancies on it. Ms Syme is recorded as having explained the one-to-one process. The claimant asked whether the new structure was 'set in stone.' He was told that the leadership team would like to hear any other ideas and proposals during the consultation period.

35. There is no reference in the document to the claimant's selection scores, his relative placing within the pool or any discussion of how his scores were arrived at.

36. By letter dated 10 December 2021 the claimant was invited to his second individual consultation meeting, which was due to take place on 14 December [80]. The letter was substantially the same as the invitation to the first consultation meeting.

37. The notes of the consultation were amended and updated to reflect the additional discussions on 14 December [82]. Ms Dulnik informed the claimant that there were potentially a couple of options for employment within the wider UTG businesses. The claimant agreed to share his CV with Ms Dulnik so that she could forward it on to them for consideration. The claimant asked whether the decisions were job title driven and was told that the decisions were based on the strategic business needs for 2022 and the skill sets required to perform the tasks necessary to achieve the business strategic goals for the next year, in line with the reduced budget. The claimant asked how many people were being laid off. He was not given an exact number but was told it was less than 20. The proposed structure was shared on the screen by Ms Syme. The claimant asked how the proposed structure was arrived at. Ms Dulnik indicated that the decisions were made higher up the chain but that the products were taken into consideration. The claimant queried why Optimisation had been chosen to be deleted but not Data Science in UFOS/dragonfly. He indicated that it seemed to be 'title only' and so a misunderstanding of his skill set. Ms Dulnik indicated that she would see what further information she could find. The claimant raised visa timelines again and Ms Syme indicated that there would be a further consultation meeting.

38. By letter dated 16 December, the claimant was invited to a further consultation meeting on 17 December at 4pm. The terms of the invitation were as before [85].

39. At 3.54pm on 17 December the claimant sent an email to Ms Dulnik and Ms Syme [86]. In it the claimant summarised his thoughts after the previous consultation meetings. He again asked for any termination to take place at the end of the notice period, for visa purposes. The claimant queried the selection of a Data Science role in the proposed structure in preference to the Optimisation Engineer role. He asserted that, despite the difference in title, the two roles were highly related. The optimisation element of his job title had been added to show an additional area of expertise (additional to data science and machine learning abilities). The optimisation expertise was in addition to the other skills, not instead of them. The claimant argued that he could demonstrate his data science abilities and gave examples from his CV to back this up. He argued that the two roles had significantly overlapped within the respondent over time. He could not understand why the Data Science role had been retained in preference to the Optimisation role if the decision was based on skills required given the overlaps and examples he had identified. He reiterated that he was unclear about the selection criteria and the consideration behind the decision. He asked directly for further clarification of the reasons behind the decision.

40. Within the document the claimant went on to query why he had not been given the numbers of people being made redundant when he understood that other people had been given that information as part of their consultation packs. He asked for the numbers. He also asked for

clarification of the wider group that he was being considered as part of. Was he being considered as part of Unipart Digital or Unipart Cambridge?

41. The claimant sent this document to the respondent's managers a matter of minutes before the meeting was due to start. Other than providing a paper trail of the issues he intended to raise with the respondent, the timing meant that the respondent could not really do a great deal during the meeting to respond to the points actually raised. In order to be able to address the document meaningfully the respondent would have needed to receive it well in advance of the meeting. That said, the document is useful in that it clearly sets out the limitations on the information that the claimant had received about the selection process up until that point.

42. The record of the 17 December meeting followed a similar format to the previous notes. The additional discussions were added onto the record for earlier meetings [90]. During the meeting the claimant apparently raised the issue of the choice of the Optimisation role for redundancy in preference to the Data Science role. He asked the respondent managers to reconsider that choice. In response, Ms Dulnik confirmed that the decisions were not a reflection on people's work ethic or the value they brought to the respondent. She just confirmed that they were making difficult decisions based on the revised budget. She does not seem to have directly addressed the argument about the overlap between the two roles, either in terms of which post should be retained within the structure, or any argument that the claimant would be capable of filling the retained Data Science post. Ms Syme also confirmed that the claimant would not be required to work his notice and that the termination date would be 31 December 2021. The claimant's request to work his notice period so as to avoid visa problems does not seem to have been addressed.

43. The letter of termination was dated 20 December 2021 [96]. It confirmed 31 December 2021 as the date of termination and set out the arrangements for paying him his notice pay, redundancy pay and other sums owed.

44. The claimant indicated his intention to appeal against the dismissal in an email sent on 22 December [98]. The reasons for his appeal were stated to be: lack of transparency about the selection process; absence of a fair selection process; and lack of transparency with respect to the mandatory set of information about redundancy and consultation that should legally be provided in a redundancy process.

45. Dr McGorman met with the claimant to hear his appeal on 10 January 2022. The meeting notes [99] indicate that the meeting lasted in the region of fifty minutes. Siobhan Shields also attended as an HR representative/notetaker. Prior to the appeal Dr McGorman read the claimant's appeal letter and the notes of the three one-to-one consultation meetings. He indicated during cross examination that he had some conversations with Ms Syme and Ms Dulnik and Richard Neill but these were not documented. As far as he understood the position, Ms Dulnik had come up with the selection criteria in consultation with Mr Goncalves and Ms Syme checked it with Richard Neill. Mr Neill had the final 'sign off' on the criteria.

46. During the course of the appeal hearing the claimant confirmed that he did not feel that he had received a response to his assertion that there may

have been a misunderstanding of the background to the role. He did not feel he had received a response to his earlier points (presumably as set out in the email of 17 December). He made it clear that he had not been told the selection pool that he was in. Dr McGorman responded by saying that the respondent would not discuss other people with the claimant. The claimant made clear that he had asked for information to understand why one role was being made redundant versus another role but did not get it. The claimant also outlined the difficulties with his visa which were caused by the short notice period.

47. The claimant confirmed that he had not been present at the meeting where the initial announcement had been made but that Ms Syme had called him individually the next day to explain the situation. The claimant was asked whether had received the FAQs document and the claimant confirmed that this was in the shared folder and he had that information. Dr McGorman then asked whether the claimant had all the information and the claimant confirmed that he had. The respondent seems to rely on this as the claimant confirming that he had seen all the documents that he needed to. However, I consider that this would be to misinterpret the exchange. The claimant is asked about a particular document. He is then asked whether he had all the information. At most, the claimant can only be confirming that he had all the information that he had been told about and that was present in the shared folder. If a document was missing from the pack, the claimant would not know this. It would be an unknown. The respondent therefore had a duty to listen carefully to what the claimant was saying about missing information and what he had/had not been told.

48. This conclusion is supported by the fact that the claimant made it clear that the information he received was helpful in some ways and not in others. He made it clear that he had asked how many people were in the pool and he did not get an answer. He made it clear that he had not been told whether the pool in question stretched across Digital or across Unipart. Dr McGorman confirmed that it was across Digital only.

49. At the Tribunal hearing there was significant cross examination about the issue of the selection criteria. However, I note that during the appeal hearing the claimant is recorded as saying “No-one said to me we would select on x criteria and how we would select.” [101] This is a fairly clear statement that he had not been told what the selection criteria were. This flags up that he has not been provided with the document at [74] or anything similar to it. The conversation then apparently moves on to address other matters. There still seems to be a reluctance (on the respondent’s part) to confirm the precise numbers who have been made redundant as part of the process. The respondent just confirms that it is under 20. Dr McGorman asserts that the consultation meetings made clear which teams were affected and where the selection pools fell within the organisation. It is not clear on what basis he felt able to give this assurance. The documents do not indicate on the face of them which pool for selection the claimant was placed in.

50. The claimant again asks: “..what is the selection criteria. How was the score made?” [102] The response to the question was, “The criteria was decided by the team leaders and Richard Neill, the criteria was set by each team.” Dr McGorman seems to focus on the process which was adopted. He does not specify what actual, substantive criteria the claimant was scored

against. Dr McGorman confirmed that for the claimant's team it would have been Ms Dulnik and Richard Neill who came up with the criteria. It would not have been Ms Syme as she is essentially from HR.

51. The claimant reiterated his point that the Optimisation and Data Science roles overlapped. He also queried whether the scorer would have enough information about the work he had done/was doing to be able to give appropriate scores. He asked again what it was about the roles which made Optimisation redundant and not Data Science. The claimant again asked, "What is the criteria? I should know this to understand if the process was fair or not. Based on what I do have, isn't it a requirement?" Dr McGorman confirmed that he did not have the criteria in front of him. The claimant reiterated, "I understand employees have a right to know the selection. So you don't have the information and aren't aware of it? If you have it please send it to me…" The claimant was asked what he had been told about selection and he responded that it had been generic and meaningless. He had been told that there was a review of talent but there was nothing particular.

52. In relation to the pool for selection there was an exchange [103] where the claimant accepted that Ms Syme had shared the new structure on the screen with the claimant. It seems to be assumed that the pool for selection in which the claimant was scored and the proposed new structure are one and the same thing. This does not appear to have been the case. The claimant was not being scored in a pool with all the people on the old or new structures but just against a subset of them. It was not apparent from the face of the documentation how that subset had been determined. Again the claimant confirms that the specific criteria were not provided.

53. After the appeal hearing it appears that Dr McGorman spoke to some people about the issues raised: Ms Syme, Ms Dulnik and Richard Neill. Those conversations were not documented. There is no contemporaneous record of what Dr McGorman discussed with them and what their responses to the queries were. Dr McGorman was asked how he had made sure that the selection criteria were correctly applied to the claimant and he indicated that he had discussed it with Richard Neill who indicated that there were no 'surprises' in the scoring/results. Mr Neill was content with the scores. I was not told on what basis he reached this view. Dr McGorman's evidence in cross examination was that he was told by Ms Syme and Ms Dulnik that the selection criteria had been discussed with the claimant. He did not say that he received confirmation from them that the claimant had been given a copy of the selection criteria, the weighting for the raw scores or a copy of his own individual scores. Dr McGorman confirmed that neither he nor the claimant had a copy of the selection criteria in front of them during the course of the appeal hearing.

54. Dr McGorman made his decision on the claimant's appeal and sent it to him in writing, attached to an email of 24 January 2022. The outcome letter [108] confirmed that Dr McGorman had explained during the hearing that the selection was based on digital products and their long-term profitability and the reliance on these products across the wider business. He confirmed that throughout the process all legal obligations were followed and that the claimant was informed of the timeline, rationale and the proposed structure. A briefing pack was shared with him and he was given the opportunity to

attend one-to-one consultation meetings. Dr McGorman decided that the redundancy was fair and all legal obligations were met. The decision to dismiss the claimant was upheld.

55. I was referred to page 6 in the supplemental bundle. This was a printout from a Linked In page relating to a Software Engineer apparently employed by the respondent ("JB"). His name is not mentioned in any of the organisation charts in the main hearing bundle. He states that he is employed as a full-stack software developer on the Unipart Digital Enterprise (UDES) team. When asked about this document Dr McGorman confirmed that this role had been advertised, recruited and accepted prior to the start of the relevant redundancy process. He explained that UDES is a warehouse management system which is core to the logistics business and the ongoing business of the respondent. Consequently, the UDES team were ringfenced during the process and were not put at risk of redundancy.

56. In terms of alternative employment to avoid redundancy, Dr McGorman indicated that he looked for alternative roles within two separate businesses within the respondent's group: Instrumental Ltd (in Leeds), and Parks Signaling (Manchester). Individuals within the consultation process were offered the opportunity to apply for roles within these businesses. Some of them took those roles. It appears that the claimant did not apply for these jobs. The individuals under consultation for redundancy apparently had access to the respondent's internal vacancies list. There was no printout of the available vacancies within the bundle to demonstrate what alternative roles were actually available during the redundancy selection process.

57. Dr McGorman maintained in evidence to the Tribunal that he thought the claimant had seen the applicable selection criteria during the consultation process. This was apparently based on what Debra Syme had told him (presumably after the appeal hearing). It does seem to contradict what the claimant said repeatedly during the appeal hearing. I conclude, as set out above, that the weight of the evidence suggests that the claimant never saw pages 74 or 75 or the selection criteria until 28 February 2023. Dr McGorman's belief to the contrary was mistaken.

58. Looking at the transcript of the appeal Dr McGorman often does not answer the claimant's questions directly. He often answers a different (albeit related) question or changes the subject matter. That said, I can appreciate that meetings have a dynamic which is not always apparent from the written notes. It may well have been difficult to stay on track with the claimant and ensure that all his questions had been answered. However, he could have reviewed the hearing notes after the event to ensure that all relevant points were addressed in the outcome letter. I am not satisfied that this was done.

59. The claimant also asked Dr McGorman why he was not pooled with the Robotics team given his CV. Dr McGorman's position was that UDES and Robotics teams were both critical teams going forwards and were therefore ringfenced from the redundancy process. Dr McGorman pointed out that the main product which the claimant worked on was UFOS and this was no longer used by the respondent. However, in looking at the scoring criteria the claimant pointed out that UFOS was specifically referred to and given a higher weighting (B). This should have led to the claimant achieving a higher rather than a lower score. To the lay person with no background inside the

business the claimant's argument makes a lot of sense. Dr McGorman maintained that the claimant was part of the UFOS team, as were others. UFOS stood for Unipart Forecasting Optimisation Simulation. Dr McGorman accepted that the head of the team was Mr Pellegrini. The claimant maintained that Mr Walther was also part of the team. Dr McGorman was not sure as a matter of fact who would be said to be part of the UFOS team. Dr McGorman's position was that there was no team which was purely concerned with UFOS. All those employees who worked on UFOS worked on other things as well. The team was not structured around a pure 'UFOS team.' That was not how the respondent operated. In that sense there was no 'UFOS Team' as such. Looking at the organisation structures at [67] this seems to be correct. There is no explicitly titled or structured 'UFOS Team' identified in the documents. A number of employees within the organisation may have worked on UFOS as part of their duties at various points in time rather than being assigned to a 'UFOS team.'

60. Dr McGorman confirmed that the Team Leaders did the scoring and then had it double checked and signed off by Richard Neill. He was unable to say what evidence the scores were based on as he was not involved in the scoring process.

61. In answering questions from the Tribunal, Dr McGorman confirmed that he did not explain to the claimant which other roles were in the selection pool with the claimant's. He also could not confirm whether the claimant saw pages 74-75 on the Google Drive.

62. In terms of internal vacancies within the respondent, Dr McGorman's evidence was that, in reality the claimant would only be applying for jobs with an IT basis. His recollection was that the internal vacancies list at the time of the claimant's dismissal contained only warehouse and manufacturing roles, which would not have interested the claimant. Hence he did not think that the claimant had expressed any interest in seeking an alternative role within the respondent so as to avoid dismissal.

63. One of the claimant's arguments before this Tribunal is that redundancy was not the real reason for dismissal. He asserts that his relationship with Ms Syme had deteriorated to the extent that the process was used as a pretext for dismissing him. The real reason for the dismissal was, he says, the breakdown in his relationship with Ms Syme. There is nothing in the consultation documentation to suggest that there was such a breakdown in the relationship. Dr McGorman confirmed that the claimant did raise the fact that the relationship had deteriorated at the appeal. However, he made the valid point that Ms Syme did not carry out the selection procedure. She did not design the criteria or do the scoring. So, irrespective of any poor personal relationship, this could not have had a material influence on the decision to dismiss the claimant as far as Dr McGorman was concerned.

64. I looked to see if there was any contemporaneous evidence of the breakdown in the working relationship between the claimant and Ms Syme. Page 41 of the bundle indicates that the claimant's working hours were increased following his flexible working request. I also note that the claim form does not allege that redundancy was not the real reason for dismissal or that a relationship breakdown was the reason for dismissal. If this were

the claimant's genuine belief one would expect to see it set out clearly as part of the claim. Instead, it really makes its first appearance in the claimant's witness statement which was exchanged with the respondent the day before the Tribunal hearing. He maintained at the hearing that by asserting a lack of transparency it meant that he was saying he could not determine the real reason for the dismissal. I do not consider this to be a good argument. It is rather convenient. If the argument that he was dismissed for a reason other than redundancy was always part of his Tribunal case, one would expect to see it clearly set out in the ET1.

65. The disagreement which may form the basis for the claimant's allegation surrounds the fact that there were two versions of the claimant's contract of employment. One version had a flex point provision and the other did not. The claimant had raised this and alleged that the respondent was trying to change his contract without proper notification and agreement. The correspondence in the bundle suggests [56-61] that this dispute arose in March-May 2021 and was concluded several months before the redundancy situation arose.

66. I am inclined to accept that the claimant raised an issue which took some time to resolve. However, there is nothing in the documentation to suggest that this was acrimonious or that Ms Syme held it against the claimant in any way. I do not accept that this was the real reason for the dismissal. It predates the dismissal process by a considerable number of months and involved Ms Syme from HR. She did not make the decision that redundancies were required and did not carry out the selection process. Therefore, even if she had wanted to select the claimant for redundancy to further a personal agenda, there is no evidence to suggest that she would have been able to do this. I do not find the claimant's assertion that her demeanor changed to be credible in all the circumstances and taking into account the contemporaneous documentary evidence.

The law

67. Section 98 of the Employment Rights Act 1996 states, so far as relevant in this case:

(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. …

b. …

c. is that the employee was redundant, or

d. …

…

(4) 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.*

68. Redundancy is defined at section 139 Employment Rights Act 1996:

(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-
   a. *the fact that his employer has ceased or intends to cease-*
      i. *to carry on the business for the purposes of which the employee was employed by him, or*
      ii. *to carry on that business in the place where the employee was so employed, or*
   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.*

69. In line with the Employment Rights Act it is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' *(Abernethy v Mott, Hay and Anderson 1974 ICR 323)*.Thereafter the burden of proof is neutral as to the fairness of the dismissal (*Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT).*

'Redundancy'

70. A respondent does not have to be in financial difficulties in order for a redundancy situation to arise within the meaning of section 139 ERA 1996. In *Kingwell and ors v Elizabeth Bradley Designs Ltd EAT 0661/02* Mr Justice Burton stated that, *"It can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is overstaffed. Thus, even with the same amount of work and the same amount of income, the decision is taken that [a] lesser number of employees are required to perform the same functions. That too is a redundancy situation."* A particular reorganisation may involve making redundancies if the statutory definition of redundancy is met; or it may not (for example, where work is redistributed more efficiently without

the need for a reduction in the number of employees doing a particular kind of work.) What is crucial is whether the restructuring entails a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees whose numbers nonetheless remain the same.

71. Section 139 states that there is a redundancy situation where the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they are employed, have ceased or diminished. This can cover three separate scenarios:

- where work of a particular kind has diminished, so that employees have become surplus to requirements;

- where work has not diminished, but fewer employees are needed to do it because the employees have been replaced by, for example, independent contractors or technology; or

- where work has not diminished, but fewer employees are needed to do it because of a reorganisation that results in a more efficient use of labour.

It is the requirement for employees to do work of a particular kind which is important. The fact that the amount of work is constant is irrelevant. If fewer employees are needed to do work of a particular kind, there is a redundancy situation (McCrea v Cullen and Davison Ltd [1988] IRLR 30) In cases of reorganisation where the overall number of employees remains the same or even increases, there may still be a redundancy situation where the requirements of the business for employees to carry out a particular kind of work have ceased or diminished, or are expected to do so.

72. There is no need under section 139(1)(b) for an employer to show an economic justification (or business case) for the decision to make redundancies (although the employer's motives may become relevant if it is alleged that the redundancy is a sham and that there is another, possibly discriminatory, reason for dismissal.)

73. In Safeway Stores plc v Burrell [1997] ICR 523 HHJ Peter Clark set out a three-stage test. A tribunal must decide:

(i) was the employee dismissed?
(ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
(iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

According to HHJ Peter Clark there are no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question to be asked when determining stage (ii) of the three-stage test

is whether there was a diminution in the employer's requirement for *employees* (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant's contract. The terms of the contract are only relevant at stage (iii) when determining, as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal. The test set out in Burrell was subsequently endorsed by the House of Lords in Murray and anor v Foyle Meats Ltd [1999] ICR 827 .

74. A reorganisation creating a substantial change in the kind of work required by the employer can result in redundancies even though the employer's overall requirements for work or employees remain the same Murphy v Epsom College [1985] ICR 80. A reallocation of duties may entail a fundamental change in the duties of employees so that the work to be done after the reallocation is quite different from that done before. This may create a redundancy situation. The Court of Appeal has held that work, and the requirement for employees to do it, do not change simply because the work is carried out under different terms and conditions. Changes in terms and conditions are relevant to the fairness of a dismissal but they do not create a redundancy situation. In Chapman and ors v Goonvean and Rostowrack China Clay Co Ltd [1973] ICR 310 the employer withdrew free transport to work because it was uneconomic and some employees lost their jobs because they could no longer get to work. The Court of Appeal held that there was no redundancy situation. The fact that the terms of employment had changed did not mean that the requirements for work and for employees to carry it out had changed, so that the statutory definition of redundancy was not satisfied. However, a change in the terms and conditions of employment can lead to redundancy where the nature of the changes means that the work could be described as being of a different kind.

75. There is no reduction in 'work of a particular kind' merely because there is a change in the kind of employee required to do it. In Pillinger v Manchester Area Health Authority [1979] IRLR 430 a scientific research officer was dismissed because the work on which he was engaged would be done in future by a scientist of a lower grade. The EAT held that this was not redundancy: there was no change in the work to be done simply because it would be done by an employee of lower status. While status or qualifications per se cannot mark the work out as being of a particular kind, the experience or greater competence of an employee may do so. There is no redundancy situation if the new work is of the same kind as the old work. However, if the new work is of a different kind, there is a redundancy situation.

76. Where the overall amount of work that needs to be done has not diminished, a redundancy situation may still arise where fewer employees are needed to do the work, for example where the employer has introduced technological changes to working practices that have the effect of requiring fewer employees to do the same amount of work. The situation may also arise where the employer uses independent contractors to perform part or

all of the work needed to be done; or where the employer reorganises the work so that it can be done by fewer employees.

77. In considering a claim of unfair dismissal in a redundancy context it is not for the Tribunal to investigate the commercial and economic reasons behind the decision to create a redundancy situation. The Tribunal has no jurisdiction to question the reasonableness of the decision to create a redundancy situation. The Tribunal is entitled to examine whether there is a genuine redundancy situation within the meaning of the statutory definition and whether this was really the reason for dismissal.

78. Even where the Tribunal is satisfied that there was a genuine redundancy situation this does not automatically mean that redundancy was the reason for the dismissal of the particular employee.

‘Some other substantial reason.’

79. The question of redundancy may arise in the context of a business reorganisation. Such a reorganisation may meet the statutory definition of a redundancy dismissal or it may not. If not, the dismissal of an employee within the context of the reorganisation may still be for a potentially fair reason within the meaning of section 98(1)(b), ‘some other substantial reason’ (SOSR). To establish SOSR as the reason for dismissal where there has been a business reorganisation, the employer does not have to show that a reorganisation or rearrangement of working patterns was essential. A ‘sound, good business reason’ for reorganisation is sufficient to establish SOSR for dismissing an employee. This reason is not one which the Tribunal considers sound but one ‘which management thinks on reasonable grounds is sound’ (Scott and Co v Richardson EAT 0074/04 and Hollister v National Farmers’ Union [1979] IRLR 542) It is not for the Tribunal to make its own assessment of the advantages of the employer’s business decision to reorganise or to change employees’ working patterns. However, the employer must do more than simply assert that there was a ‘good business reason’ for a reorganisation involving dismissals. A Tribunal must be satisfied that changes in terms and conditions were not imposed for arbitrary reasons. Employers will be expected to prove the reason for dismissal and, as a result, to submit evidence showing what the business reasons were and that they were substantial. A business reason behind a SOSR dismissal does not need to be particularly sophisticated or strategic so long as it is genuine and rational.

Section 98(4) fairness in redundancy or SOSR context

80. Under section 98(4) the Tribunal must consider the reasonableness of the dismissal in an SOSR case just as in a redundancy case. This involves considering whether, in all the circumstances, including the employer’s size

and administrative resources, the employer acted reasonably in treating the SOSR business reason as a sufficient reason to dismiss. The Tribunal must not substitute its own view of whether or not the employer acted reasonably in the circumstances rather than properly applying the range of reasonable responses test.

81. In relation to redundancy dismissals Williams and ors v Compair Maxam Ltd [1982] ICR 156 lays down the guidelines that a reasonable employer will normally be expected to apply when making redundancy dismissals. It is not for the Tribunal to impose its own standards of reasonableness and decide whether the employer should have behaved differently. It must ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (similar to the 'range of reasonable responses test' applicable in other types of unfair dismissal claim.)

82. The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:
    (a) whether the selection criteria were objectively chosen and fairly applied;
    (b) whether employees were warned and consulted about the redundancy;
    (c) whether, if there was a union, the union's view was sought; and
    (d) whether any alternative work was available.

    These guidelines are not principles of law but are standards of behaviour that can inform the reasonableness test in section 98(4). There may be reasons to depart from these guidelines in the circumstances of a particular case. Norms of acceptable industrial practice may change over time. The overriding test is still whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

83. Procedural fairness is an integral part of the section 98(4) test. In line with the decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 failure to follow correct procedures is likely to make the ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably conclude that that doing so would be utterly useless or futile. A procedural failure renders a redundancy dismissal unfair under section 98(4), and the question of whether the employee would have been dismissed even if a fair procedure had been followed will be relevant only to the amount of compensation payable.

84. The ACAS 'Code of Practice on Disciplinary and Grievance Procedures' does not apply to redundancy dismissal cases. The disciplinary parts of the Code therefore do not have any relevance to the award of compensation if the reason for dismissal is redundancy. However, the grievance parts of the Code are not limited in the same way. If a relevant grievance is raised so as to engage the Code, then an unreasonable breach of the Code can be taken into account in determining whether an uplift (or reduction) to the compensation should be made.

85. If an employee is selected for redundancy in breach of a customary arrangement or agreed procedure, a Tribunal must determine whether that selection was fair or otherwise under the general reasonableness test set out in section 98(4). The Tribunal must be satisfied that it was reasonable for the employer to have departed from the relevant agreement or procedure. There is no legislative provision that gives agreed procedures and customary arrangements a special protected status, but an employer cannot simply ignore them. If there is a collective agreement in relation to such procedures the tribunal must determine whether it was in fact incorporated into the individual's contract of employment.

86. The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of the dismissal. *(*J Sainsbury plc v Hitt [2003] ICR 111, CA*;* Whitbread plc (t/a Whitbread Medway Inns) v Hall [2001] ICR 699, CA*.)*

Pool

87. An employer should identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the selection criteria to determine who will be made redundant. The application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair. There is no legal requirement that a pool should be limited to employees doing the same or similar work . The question of how the pools should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem (Taymech Ltd v Ryan EAT 663/94.) There will be some redundancy situations where, because of the complete closure of the workplace, business or unit, selection as such will not be necessary. Where there is a customary arrangement or agreed procedure that specifies a particular selection pool, the employer will normally be expected to adhere to it unless the employer can show that it was reasonable to depart from it. Where there is no customary arrangement or agreed procedure to be considered, employers have significant flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, the Tribunal must be satisfied that the employer acted reasonably and, in considering whether this was so, the following factors may be relevant:

- whether other groups of employees are doing similar work to the group from which selections were made;
- whether employees' jobs are interchangeable;
- whether the employee's inclusion in the unit is consistent with his or her previous position; and
- whether the selection unit was agreed with any union.

88. The pool is usually composed of employees doing the same or similar work. The choice of pool will be assessed by considering whether it fell within the range of reasonable responses available to an employer in the circumstances. The Tribunal must not substitute its own view for that of a reasonable employer in identifying an appropriate pool for selection. An employer will need to have justifiable reasons for excluding a particular group of employees from the selection pool where those in the excluded category do the same, or similar, work to those who are up for selection. It may be unreasonable to exclude a group of employees doing similar work from the selection pool even where the employees in the pool would have to undertake some training before carrying out the work done by the excluded employees. A fair pool for selection is not necessarily limited to those employees doing the same or similar work. Employers may be expected to include in the pool those employees whose work is interchangeable.

89. In Murray and anor v Foyle Meats Ltd 1999 ICR 827, it was confirmed that there is no reason why a dismissal of an employee cannot be regarded as being 'attributable' to a diminution in the employer's need for employees to do work of a particular kind within the meaning of section 139 ERA irrespective of the terms of the particular employee's contract or the function that he or she performs. 'Bumping' dismissals may be allowed, whereby an employee whose job is redundant, is redeployed to another job and the employee in that job is the one who is actually dismissed. Although the dismissed individual's job may not be redundant, his or her dismissal is attributable to redundancy in that it has been brought about by the diminished need for work of a particular kind namely the work previously done by the employee who 'bumped' them out of their job.

90. Lionel Leventhal Ltd v North EAT 0265/04 gives guidance on the circumstances in which an employer should consider bumping. Where an employer fails to consider offering alternative employment to a potentially redundant employee, even in the absence of a vacancy this may be unfair. Whether it is unfair is a question of fact for the tribunal, which should consider matters such as:

    whether or not there is a vacancy;
    how different the two jobs are;
    the difference in remuneration between them;
    the relative length of service of the two employees; and
    the qualifications of the employee in danger of redundancy.

91. It is not the case that an employer must consider bumping to avoid a finding of unfair dismissal. In Byrne v Arvin Meritor LVS (UK) Ltd EAT 239/02 the EAT noted that the duty to act reasonably does not impose an absolute obligation to consider bumping as an option but in particular circumstances, the failure to do so may fall outside the band of reasonable responses. Where an employer has considered the possibility of bumping, and decided against it, the question for the Tribunal is whether that decision fell within the range of reasonable responses.

92. In Capita Hartshead Ltd v Byard 2012 ICR 1256*,* the EAT rejected an argument that the statement in Taymech Ltd v Ryan EAT 663/94 that 'how the pool should be defined is primarily a matter for the employer to determine' necessarily meant that Tribunals are precluded from holding that the choice of pool for selection by the employer is so flawed that the employee selected has been unfairly dismissed. That statement only applies where the employer has 'genuinely applied his mind to the problem' of selecting the pool. Even then, an employer's decision will be difficult, but not impossible, to challenge.

93. An employer that *has* applied its mind to the question of a pool may still be challenged on its decision if the Employment Tribunal considers that it defined the pool in a particular way in order to ensure the dismissal of a particular individual. However, the decision in Wrexham Golf Co Ltd v Ingham EAT 0190/12 noted that the word 'pool' is not found in section 98(4) ERA and 'there is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy'. 'There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool.' The question in that case was whether, given the nature of the job, it was reasonable for the employer not to consider developing a wider pool of employees.

Selection criteria

94. If the selection pool is reasonable, the Tribunal will then consider the selection criteria applied by the employer to the employees in the pool. The criteria should not be unduly vague or ambiguous. In order to ensure fairness, the selection criteria must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service. The fact that certain selection criteria may require a degree of judgement on the employer's part does not necessarily mean that they cannot be assessed objectively or dispassionately. Just because the criteria used were 'matters of judgement', it did not mean that they could not be assessed in an objective or dispassionate way (Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT 0605/11.) The chosen criteria would inevitably involve a degree of judgement, but that was true of almost all selection criteria other than the simplest criterion, such as length of service or absenteeism. The EAT concluded: 'The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises.'

95. Provided an employer's selection criteria are objective, a Tribunal should not subject them or their application to over-minute scrutiny (*British Aerospace plc v Green and ors 1995 ICR 1006, CA*.) The Tribunal should satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. Employers are given a wide discretion in their choice of selection criteria and the manner in which they apply them, and Tribunals will only be entitled to interfere in those cases which fall at the extreme edges of the reasonableness band.

96. It is common for employers to select employees for redundancy on the basis of their performance at work. The potential problem relates to how performance is measured. An organisation that sets employees targets and regularly reviews staff performance against those targets should have objective and verifiable documentation available on which to rank employees' performance. An employer that does not regularly monitor performance, and instead relies on the subjective opinion of the employee's manager at the time redundancy is considered, may be open to the allegation that the criterion is either not objective or is not being applied in a fair manner. It is reasonable for an employer to try to retain a workforce that is balanced in terms of skills and abilities. Hence an individual's skill and knowledge are reasonable considerations, provided they are assessed objectively. The precise choice of factors and their relative weighting will be determined according to the current and future needs of the business. Employers using performance as a selection criterion also need to ensure that employees are compared fairly. Employers may wish to retain employees who are willing and able to be flexible in their approach to their job but they should ensure that the criterion is necessary, can be applied in an objective manner, and does not impact unfairly on particular employees.

97. The application of the selection criteria must be reasonable. While Tribunals are entitled to consider whether selection criteria were applied fairly, they should not examine the actual scoring unless there has been bad faith or an obvious error (Dabson v David Cover and Sons Ltd EAT 0374/10.) A Tribunal may examine an employee's complaint that his or her selection for redundancy is unfair because of his or her relationship or prior interactions with the person or persons responsible for applying the employer's selection criteria.

98. When selecting employees for redundancy, it is common practice for employers to decide upon a number of different criteria against which the employees in the pool for selection should be assessed and then to allocate marks for each employee under each of those criteria. Once the selection has been made, those selected might feel that the marking or grading was not carried out accurately and complain that the resulting dismissal was unfair. The question which then arises is whether, and to what extent, an Employment tribunal can lawfully scrutinise the employer's assessments of all those in the pool in order to discover any evidence that would substantiate the employees' claims. An employer need only demonstrate that it had established a good system of selection which had been administered fairly (British Aerospace plc v Green and ors 1995 ICR 1006, Eaton Ltd v King and ors 1995 IRLR 75) In the EAT's view in King, there was no reason why the managers who took the decision to dismiss should not have relied on the information supplied to them by the supervisors who carried out the assessments, and the managers could not be expected to be able to explain each marking. Furthermore, there was nothing in the Tribunal's findings to suggest that the assessments were not carried out honestly and reasonably. The EAT considered that, while there may be cases where an inference could be drawn from the markings that there was something unfair about the application of the selection process, this was not such a case. Lord Justice Waite in British Aerospace plc v Green and ors had observed: 'So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the

law requires of him.' The principle that Tribunals should not subject redundancy selection criteria or the employer's application of them to undue scrutiny applies even where two groups of employees are scored separately and no system of moderation is used. However, where there is clear evidence of unfair and inconsistent scoring, any subsequent dismissals are likely to be unfair. There may be cases where the absence of documentary evidence indicates a lack of objectivity. In E-Zec Medical Transport Service Ltd v Gregory EAT 0192/08 G worked for a private ambulance service. An important part of the firm's business was transporting injured and sick holidaymakers who had been repatriated to the UK. During 2006 the company faced a downturn in this aspect of its work. It decided to restructure the site where G worked and to make four employees redundant out of a pool of 14. The selection process was supervised by the senior HR manager, W, who allocated marks for service, absence, sickness days, sickness occasions and discipline. This was done by reference to employees' personnel files. The remaining selection criteria (performance, commitment and attitudes, skill base, and team working) were assessed by the regional manager, D. The company adopted a scoring matrix with definitions for the various criteria. However, D did not use any records or objective evidence in arriving at his scores but relied on his personal judgement as a line manager and his experience of working with the employees in the pool. G obtained one of the lowest scores and was made redundant. The Employment Tribunal accepted that it was not its task to subject the marking system to microscopic analysis or to check that the system had been properly operated. While the choice of criteria fell within the range of reasonable responses, key aspects of the marking had been left to D's personal judgement, some of the criteria were not capable of measurement by reference to personnel records, and there was no evidence as to how the scoring had been arrived at. According to the tribunal: 'The absence of evidence before us as to how the scoring had been arrived at made it impossible for us to decide that the selection criteria had been fairly applied and accordingly the claimant had been unfairly selected.' The EAT upheld the Tribunal's decision. The EAT said, "Unlike the Eaton case there was no attempt to consult with the unions or the employees as to the method of selection, the criteria to be adopted and the marking process. We agree with the Tribunal's views that it was an unfair process that fell outside the band of reasonable decisions for the key criteria to be left to one individual who was not able to support his marking by reference to any company documents such as performance appraisals, who had not spoken to any other manager concerning those marks and who had made no notes or given any indication as to how he had made this individual choice. The Tribunal were careful in making it clear that their task was not to subject the marking system to microscopic analysis or to check that the system had been properly operated but they did have to satisfy themselves that a fair system was in operation. In our view were entitled to come to the conclusions that this was not a fair system and that the appeal process did not cure it."

99. A failure to disclose to an employee selected for redundancy the details of his or her individual assessments may give rise to a finding that the employer failed in its duty to consult with the employee. In John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, the EAT held that the employer's refusal, as a matter of policy, to disclose the marks of those selected for redundancy rendered its internal appeal process a sham. The

employees' subsequent dismissals were accordingly unfair for lack of proper consultation. The EAT pointed out that a fair redundancy selection process requires that employees have the opportunity to contest their selection. The Brown case does not hold that employees should be entitled to compare their own scores with those of employees who have been retained. Nor does the Brown case entitle employees to see interview notes and other documentation in the employer's possession.

Consultation

100. A procedural flaw in carrying out a dismissal would generally render the dismissal unfair. The only escape available to an employer is where it could reasonably have concluded that a proper procedure would be 'utterly useless' or 'futile'. Individual consultation should normally include:

> an indication/warning that the individual has been provisionally selected for redundancy;
>
> confirmation of the basis for selection;
>
> an opportunity for the employee to comment on his or her redundancy selection assessment;
>
> consideration as to what, if any, alternative positions of employment may exist; and
>
> an opportunity for the employee to address any other matters he or she may wish to raise.

101. In John Brown Engineering Ltd v Brown and ors 1997 IRLR 90 the EAT stated that what is required in each case is a fair process which gives each individual employee the opportunity to contest his or her selection, either directly or through consultation with employee representatives. It suggested that this involved allowing employees selected for redundancy to see the details of their individual redundancy selection assessments.

102. In Pinewood Repro Ltd t/a County Print v Page 2011 ICR 508, the employee was told that he was at risk of redundancy. He was placed in a pool with two other employees and they each received a copy of the scoring matrix together with the standards and qualities that each level represented. However, the employee did not receive his actual scores. He scored the lowest and was invited to a consultation meeting at which he was given his scores. He raised a number of queries in relation to these but was not provided with an explanation as to how they had been calculated. He brought an unfair dismissal claim. The EAT upheld the Tribunal's finding that his redundancy dismissal was unfair on the basis that he did not have an opportunity during the consultation process to challenge his scoring since the respondent had not explained how the scores had been arrived at. The EAT stressed that fair consultation involves the provision of adequate information on which an employee can respond and argue his or her case. The claimant should have been given the opportunity to challenge his scoring in relation to flexibility, particularly since this was an entirely subjective area. Further explanation of scoring may not be necessary in

every case, especially where the scores relate to issues such as attendance, timekeeping, conduct and productivity. It is for the Tribunal to decide whether an employee has been given sufficient information to challenge the scores given in a redundancy selection exercise.

103. In Camelot Group plc v Hogg EATS 0019/10 the EAT observed that "*the case of John Brown Engineering Ltd v Brown and others [1997] IRLR 90 , contrary to what the Tribunal suggest, is not authority for the proposition that if an employee intimates a broad unspecific challenge to the application to him of redundancy assessment criteria, then he must be afforded the opportunity to see his interview notes (or any other documents) prior to any decision to dismiss. The decision in Brown related to its particular circumstances which were that the employees had been given no information at all about their individual assessments, not even their individual scores."* The EAT continued, *"We would also observe that the Tribunal were wrong to suggest as, at paragraph 99 they seem to do, that whenever an employee who is at risk of redundancy makes any request for information, an ensuing dismissal will be unfair if that request has not been acceded to. Whilst an employer who has received a specific request for specific relevant information would be well advised to provide it, that is far from saying that he requires to do so in respect of every unspecific request for documentation unaccompanied by reasoned justification. In any event, the Claimant here did not ask for 'information' of the sort that might be expected in a redundancy exercise e.g. "why did I score only 'x' for my performance rating when I was told that I was an outstanding performer at my last appraisal?" Or, as was the issue which arose in the case of Pinewood Repro Ltd v Page [2011] ICR 508 : "why did I receive a low score for flexibility when I have always been as willing as the next person to tackle any task that was asked of me?". She asked to see a document which, of its nature, was bound to contain a wide range of information. Her request was plainly, at best, a fishing exercise and, given that once she had the notes she raised no complaint at all by reference to them, it can only be concluded that she did not catch so much as a minnow."*

104. Choosing, without prior consultation, selection criteria that immediately determined which employee was to be dismissed rendered a redundancy dismissal unfair in Mogane v Bradford Teaching Hospitals NHS Foundation Trust and anor 2022 EAT 139. M, who worked for the Trust on a series of fixed-term contracts, was invited to a meeting and told that the Trust faced financial difficulties. The Trust decided that M should be made redundant as her contract was due to be renewed soonest. The remainder of the redundancy process related to an attempt to find alternative employment for M but, when that was unsuccessful, her contract was terminated. The EAT overturned the decision of an Employment Tribunal that M's dismissal was fair. For consultation to be genuine and meaningful, a fair procedure requires it to take place at a stage when an employee can still potentially influence the outcome. Where the choice of criteria adopted to select individuals for redundancy has the practical result that the selection is made by that decision itself, consultation should take place prior to that decision being made. It is not within the band of reasonable responses for the purposes of section 98(4) ERA, in the absence of consultation, to adopt one criterion which simultaneously decides the pool of employees and which employee is to be dismissed. The implied term of trust and confidence requires that employers do not act arbitrarily towards employees in the

methods of selection for redundancy. In this case, the Trust's decision to dismiss the employee whose contract was up for renewal immediately identified M as a pool of one and as the person to be dismissed, before any level of consultation took place with her. In the absence of any explanation as to why it was reasonable to make that decision without consultation, M's dismissal was unfair.

Alternative employment

105. When a question of alternative employment arises in the context of an unfair dismissal claim, the reasonableness test under section 98(4) requires a tribunal to consider whether the employer's actions lay within the range of responses of a reasonable employer. An employer should do what it can so far as is reasonable to seek alternative work. This does not mean that an employer is obliged by law to enquire about job opportunities elsewhere and a failure to do so will not necessarily render a dismissal unfair as a general rule. An employer with sufficient resources will be expected to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available. This may include allowing an at-risk employee the opportunity to demonstrate his or her suitability for a vacant position, even if the employer is doubtful about this because the employee lacks prior relevant experience. When informing an employee of an available alternative position, the employer should be clear about any eligibility criteria for the role, and the terms on which the role might be offered. Even if an employer considers that an employee would not accept an alternative post, it may be unreasonable to exclude him or her from consideration for it without consulting him or her first. It will not necessarily be unreasonable for an employer to assume that an employee would not wish to accept an inferior position. In Barratt Construction Ltd v Dalrymple 1984 IRLR 385 the EAT stated that 'without laying down any hard and fast rule' a senior manager who was prepared to accept a subordinate post rather than being dismissed should make this known to his or her employer as soon as possible. Whether an employer's failure to offer an at-risk employee an inferior position will render a dismissal unfair will depend on the circumstances of the case. The appearance of an alternative job after the employee has been dismissed cannot make the dismissal unfair.

106. The reasonableness test is based on the facts or beliefs known to the employer *at the time of the dismissal*. A dismissal will not be made reasonable by events which occur after the dismissal has taken place (W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.)

107. In relation to considering a so called 'Polkey reduction' to take account of the chances of a fair dismissal if procedural flaws had not been present in Software 2000 Ltd v Andrews [2007] IRLR 568 it was said that, "there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must

recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence….".

Conclusions

Unfair dismissal

108. What was the reason for the dismissal? The claimant says that it was because his relationship with Ms Syme had deteriorated. I do not accept this. It is clear that, whatever the rights and wrongs of the claimant's individual dismissal, the dismissal took place as part of a wider business restructure. There is no real evidence of any animosity between the claimant and Ms Syme to suggest that she would have a reason to target him for dismissal. Furthermore, the contractual dispute on which the claimant relies was resolved to his satisfaction several months prior to the commencement of the redundancy process. There is nothing to suggest that this dispute would even have been considered in the run up to the redundancy process. It was water that was well under the bridge by then.

109. Furthermore, even if Ms Syme was motivated to target the claimant for dismissal (which I do not accept), the reality is that she did not have the means to do so. She was not involved in the selection process, she did not design the scoring criteria and was not involved in marking the claimant against those criteria. That was apparently carried out by others and there is no evidence to suggest that she had any influence over those people who did the selection. Ms Syme's involvement was basically as head of HR. She was involved as a guardian of the process during the one-to-one consultations. She did not make the dismissal decision.

110. In light of the above I reject the claimant's contention that this was a sham redundancy/restructuring dismissal. The changes within the business were the real reason that the claimant was dismissed.

111. Was the reason for dismissal a potentially fair reason? In short, yes. The available evidence demonstrates that the respondent underwent a significant business restructuring which culminated in the claimant's dismissal. Significant changes were made to the Data Science department. The overall headcount reduced from seventeen to ten and the team was reorganized. The claimant's job title of Optimisation Engineer was deleted from the business structure. The number of Software Engineers within the team as a whole were reduced from six to one and the position within the team of the remaining Software Engineer also changed. The number of Data Scientists was also halved from two to one.

112. On any reasonable reading of the evidence the respondent's requirement for employees to do work of a particular kind had ceased or diminished, whether the claimant's case was examined within the Data Science Department as a whole, as an Optimisation Engineer (the post was

deleted), or as part of some subset of employees within the Data Science Department. I am satisfied that there was a genuine redundancy situation within the meaning of section 139 and that this was the real reason for the claimant's dismissal. Even if I were wrong about that and the restructure did not meet the strict definition of redundancy, it was certainly a business restructure which would constitute 'some other substantial reason' (SOSR) for dismissal within the meaning of section 98(1) and was therefore a dismissal for a potentially fair reason.

113. Having concluded that the dismissal was for a potentially fair reason I have to consider whether the dismissal was fair within the meaning of section 98(4) of the Act.

114. I have first considered the overall farness of the procedure which led to the dismissal. Given my findings of fact, I have concluded that there were significant procedural flaws in the dismissal process. Whilst the claimant was invited to (and participated in) consultation meetings, they did not constitute consultation in any meaningful sense.

115. The claimant had not been provided with adequate information to be able to make proper use of the consultation period. Whilst he was told that there were likely to be fewer than 20 redundancies (so that collective consultation was not triggered) there was a marked reluctance on the respondent's part to make clear precisely how many redundancies were anticipated. Clarifying the actual number would not have necessitated the respondent disclosing confidential information concerning other members of staff. Without more information the claimant could not suggest alternatives to redundancy or get a clear picture of the proposed changes.

116. Importantly, the respondent never clarified to the claimant which job roles were being pooled together for selection and scoring purposes. He did not know the group from which the redundancies would come. He did not know how many redundancies were going to be made from the pool of employees either. Even more importantly, nobody told him what the scoring criteria were, how the scores were obtained and how he, as an individual, had been scored. As a result, he had no real means of challenging his selection for redundancy during the course of consultation process. He could not really make suggestions about alternatives to redundancy in these circumstances. He did not know what his own personal scores were or his actual position within the scoring group. He could not see whether rescoring him against the criteria would realistically have meant that he avoided dismissal. Whilst he was not entitled to know the basis of the other employees' scores, he was entitled to examine whether his own scoring had been carried out fairly and to challenge it with appropriate evidence, if not. He would not be able to put forward evidence to suggest that his scores for any particular criteria should be increased in the absence of adequate information from the respondent.

117. The respondent says that the selection criteria were available to the claimant in a shared Google Drive. As set out in the findings of fact above, I have not been able to accept this. Even if I did accept that the selection criteria were left in the Google Drive, it is questionable whether it was appropriate for the respondent to leave the information there rather than deliberately send it directly to all the affected employees as part of the

invitation to consultation. This should not have been left to chance. Given the centrality of such a document to the redundancy process, the respondent could reasonably have been expected to send that document to the claimant directly and individually (e.g. by email.) In that way it would know that the claimant had seen it and had the opportunity to consult properly upon it. It should not have been left to chance as to whether the claimant checked the Google Drive, located the document for himself and took time to read and understand it. To put this onus on the claimant would be unreasonable.

118. Given the evidence and all the circumstances of the case, it is hard to know what meaningful use the claimant could have made of the consultation meetings. He was not in a position to challenge his selection for redundancy or put forward alternatives to redundancy. The procedural flaws were not minor. The procedure deployed fell outside the range of reasonable responses meaning that the claimant's dismissal must be found to be unfair on a procedural basis.

119. I have also examined the substantive fairness of the dismissal. The claimant challenges the fairness of the decision to delete his post and challenges the fairness of the selection pool. I remind myself that it is important for the Tribunal not to fall into the 'substitution mindset' when considering selection pools. What did the range of reasonable responses require of the respondent in these circumstances? The claimant may well make cogent arguments about the way that the respondent chose to organize the team. It may or may not have been an ill-advised business decision but that is not the assessment that the Tribunal is called upon to make.

120. As set out above, the claimant was placed in a pool with four other individuals: two Data Scientists a Machine Learning Engineer and a Software Engineer. Given the prior organisation of the team and the proposed changes, together with the potential elements of overlap in the skill sets of the employees concerned, it is potentially a reasonable pool. That said, no real rationale for the selection pool was provided to the Tribunal other than comparing the organisation charts before and after the redundancies. No explicit explanation was given as to why the whole Data Science Team was not put together in one pool rather than taking a subset of different job titles within the team and pooling them together. No real explanation was given, for example, as to why the Software Engineers were not all in a pool together. It is possible, from a lay person's perspective, to make assumptions that the respondent applied its mind to the suitability of the claimant's selection pool but there is little evidence from which to draw a conclusion as to whether the respondent genuinely applied its mind to this issue.

121. No real explanation was put forward as to why the pool for selection was set out as it was. On the other hand, there was little evidence available to the Tribunal to suggest that another proposed pool would have been within the range of reasonable responses whereas the actual pool used fell outside the range of reasonable responses. Whilst the claimant's job title was to be deleted he was not automatically selected for redundancy. He was not 'in a pool of one'. (This was an option which the respondent did not take.) He had the opportunity to survive the selection process if he scored highly enough against the selection criteria. Whilst I have concerns about

the selection pool, the pool which the respondent chose would not, on its own take the dismissal outside the range of reasonable responses.

122. I have considered the fairness of the selection criteria. They are rational criteria for the respondent to apply to this group of employees. They are geared towards ensuring that the most appropriately skilled and able employees were retained within the organisation given the respondent's future plans for the business. The criteria themselves are not capable of being entirely objectively applied to the employees insofar as they require the exercise of a judgment by the respondent in order to obtain scores for the employees in the pool. Unlike reference to attendance records, length of service etc. there can be rational disagreement about the scores a given individual could obtain. However, the case law shows that this, of itself, would not necessarily render the selection criteria unfair or outside the range of reasonable responses. The respondent is not precluded from relying on criteria which import an element of 'judgment' into the scoring process. The case law shows that it is not always possible or desirable to eliminate all subjectivity from selection criteria if the criteria are to be meaningfully associated with skills and aptitude.

123. A reasonable employer may not be required to utilize solely objective criteria depending on the circumstances of the case. However, if less objective criteria are deployed it is even more important that the fair application of the criteria to the individuals in the pool can be assessed. That is where the respondent in this case falls into difficulty. Just as the claimant struggled to use the consultation process in a meaningful way because of a lack of information about how he his scores had been chosen, so too the Tribunal struggles to apply any meaningful scrutiny to the fairness of the scoring process in this case. Whilst the Tribunal is not entitled to carry out a re-scoring exercise or to challenge why the claimant got a particular score and another employee scored differently, there does have to be some basis for the Tribunal to assess whether the scoring criteria were fairly applied in this case. This is particularly important if the chosen criteria are more subjective than objective. Whilst the range of reasonable responses may be wide, it does have some boundaries. The Tribunal needs, as a minimum, to be able to assess whether the scoring process has been genuinely and conscientiously undertaken by the respondent and to be satisfied that scores are not the result of the whim of a particular manager or a capricious or unjustifiable assessment of an employee's abilities and experience etc. Thus, the evidence surrounding the scoring process goes not just to the procedural fairness of the dismissal but also to its substantive fairness.

124. In some cases it is possible for a respondent not to call the individuals who designed and implemented the scoring system as witnesses. If there is other evidence available (including in the documents) from which the Tribunal can understand how the scores were arrived at then it may be possible not to call the scorers themselves. Indeed the senior manager may be able to rely on the scores given by his subordinates in such cases without being able to explain and justify the scores for himself. In such cases the evidence will explain the process used and the sources relied on for giving the scores (e.g. personnel files, appraisals, a review of the employees' CVs, a review of samples of the employees' work etc). The respondent does need to explain how the scores were arrived at and how fairness was maintained, however, whether that be by oral witness evidence or contemporaneous

documentary evidence. The difficulty in this case is that the Tribunal did not have either of these sources of information. Dr McGorman did his best to explain how the scoring had been done but had no direct knowledge of it. Nor had he been involved in coming up with the selection criteria. He was only able to relay to the Tribunal what he had been told by third parties about who had devised the scheme. The scoring was apparently carried out by Team Leaders and was reviewed by Richard Neill to ratify and check it. It was not clear on what basis Mr Neill would be able to challenge or amend the scores already given. What knowledge did he have of the individuals concerned? Although I was presented with the employees' scores, the criteria descriptors (A-D) and the weighting to be applied to the categories, I was given no information about how the scores had been arrived at. What were the sources of evidence which the scorers relied upon to apply the scores to the individuals? How did the respondent decide that the claimant would be scored 3 for all categories whereas Team member 2 got 5s in all categories? Was this just a matter of impression or was it derived from appraisal documents or an assessment of particular work done by the employees? Who actually graded them? Were the scores moderated? Did the scorers know all the employees and their work equally well (i.e. were they qualified to assess the employees in question)? Was there a scoring sheet for each individual which would explain the data on which the numbers were based (as one often sees in similar cases)?

125. The reality is that the Tribunal only knows the descriptors and the scores given to the employees. There are none of the usual evidential safeguards which can be used to check that the scoring system has been fairly applied to the claimant and the others in the group. Where an employer chooses less objective criteria for assessment which depend on an evaluation of performance it is even more vital that the employer has a properly documented procedure for arriving at the scores and evidencing its conclusions. Otherwise there is no meaningful safeguard for fairness. The scores applied can appear arbitrary whereas, with evidence and an explanation, they may be justifiable.

126. In this case there was no real evidence by which the Tribunal could meaningfully assess the fairness of the selection criteria or ensure that they were applied in a fair way. When the issue was raised on appeal, Dr McGorman apparently spoke to others who had been involved at the scoring stage but did not document what they said in a meeting note, or similar. Had this been done, the Tribunal would have had at least some opportunity to test the fairness of the criteria and their application to the employees.

127. In light of my conclusions above, I conclude that the unfairness in the dismissal goes beyond procedural unfairness. The decision to dismiss fails the section 98(4) test on more substantive grounds too.

128. The problems in the case become particularly evident when I attempt to consider whether a 'Polkey reduction' could be applied in this case. If the procedure flaws were removed what would be the chance that the claimant would be fairly dismissed in any event? I am not in a position to say whether the scoring was fairly carried out and whether the claimant was fairly selected for redundancy. It is not possible to assess whether following a fair procedure, the claimant's scores would have been different so that he could

have avoided selection. This is partially because the Tribunal cannot see how the scores should have been arrived at. It is not possible to see whether the selection criteria were capable of objective application or verification. It was within the respondent's power to provide this information either as part of the system as it was applied at the time, or in the form of documentary or witness evidence to the Tribunal. Its failure to do so means that the selection of this claimant for redundancy was outside the range of reasonable responses.

129. I have considered whether the respondent made adequate attempts to find the claimant alternative employment in order to avoid the dismissal. The respondent did inform the claimant that there were potential job opportunities at two other companies within the group. The claimant did not apply for them. The claimant said that he sent in his CV for consideration by the respondent (i.e. for internal vacancies) but was told there were no other Optimisation Engineer roles within the respondent.

130. There is no evidence that there was any suitable alternative employment available within the respondent's own business. I accept the evidence of Dr McGorman that the only job opportunities at the time were within manufacturing or warehousing and that the claimant showed no interest in these jobs. I therefore conclude that the respondent did take reasonable steps to look for alternative employment for the respondent in the circumstances which obtained at that time. The claimant did not show any interest in the jobs which were available.

131. I have considered whether I can assess the percentage chance that, had a fair procedure and selection process been followed, the claimant would have retained his employment. The evidence shows that only 2 out of the 5 employees in the pool retained employment. Taken at its highest the claimant had a 2/5 chance of avoiding dismissal. The respondent says that the claimant was the 4th highest score out of the five and therefore, even if he had moved one place up the rankings he would still not have avoided dismissal and that dismissal was, therefore, still inevitable. The difficulty with this argument is that it presupposes that all five scores were fairly obtained or that the claimant would only have moved one place up the rankings using a fair procedure. Given the absence of data and evidence highlighted in the previous paragraphs, this is not a safe assumption to make on the facts of this case. Doing the best that I can on the available evidence, I therefore conclude that, if an award of compensation is made in the claimant's case for loss of earnings then he can only be entitled to two fifths (40%) of his full losses to reflect the prospect of him avoiding dismissal as part of a fair redundancy process.

Holiday pay and the ACAS Code

132. By the conclusion of the hearing the parties had agreed the sum of accrued untaken holiday which remained payable to the claimant in the sum of £1054.13. The claimant accepted that the amount of accrued holiday which was outstanding had now been agreed between the parties. I have therefore been able to make an order that the respondent should pay the agreed outstanding amount.

133. The remaining issue for determination was whether the claimant had raised a grievance about holiday pay, whether the respondent had unreasonably failed to comply with the requirements of the ACAS grievance procedures and whether this should result in a 25% uplift to the claimant's compensation.

134. In the claimant's claim form he made a claim for holiday pay and asserted that the respondent had never responded to his enquiries about this at the time. The correspondence at [113-116] indicates that the respondent did respond to the enquiry but did not provide a substantive response in writing. Hence, the claimant was required to chase them for the answer to the query. The claimant's assertion in the ET1 that he received no response was therefore incorrect. He was just not satisfied with the response he received. Eventually the claimant was paid the equivalent of a further 19 hours holiday pay [134]. However, the claimant says that he was not told that the payment had been made and was not told how the sum had been calculated. He was not, therefore, able to say that his complaint had been resolved. He maintains that despite being out of work at the time he did not notice the payment into his bank account.

135. The respondent asserts that the claimant did not raise a grievance to which the ACAS procedure could be said to apply. I accept that there is no indication in the claim form that the claimant had raised a grievance or that the respondent was in breach of the ACAS Code. I accept that an objective reading of the ET1 would not indicate that this formed part of the claimant's claims and was one of the allegations the respondent would have to meet at the Tribunal.

136. Having reviewed the relevant correspondence I am of the view that the claimant did not raise anything which can reasonably be identified as a 'grievance' regarding unpaid holiday pay. He pointed out an error and sought to have it resolved. There was nothing to indicate that he was raising a grievance which he wanted to have resolved by use of a 'grievance procedure.' He was not indicating that he wanted to attend a grievance meeting or have a grievance manager make a decision following a hearing in relation to all of the evidence. He was not invoking a formal grievance procedure. Rather, he just wanted the correct payment to be made with the minimum of fuss. I am, therefore, not satisfied that there was a grievance in this case which would trigger the application of the ACAS Code in relation to grievance procedures.

137. Even if I am wrong on this point, the question to consider would be whether the respondent unreasonably failed to comply with the ACAS Code. Clearly, the respondent attempted to recalculate the holiday pay and pay the claimant what he was owed. It got the calculation wrong so that even when it made a further payment, the claimant was still owed further monies. However, getting the calculation wrong is not itself an unreasonable failure to comply with the ACAS Code. Clearly, the respondent did not hold a grievance meeting as envisaged by the Code but was that unreasonable? In my view it was <u>not</u> unreasonable in circumstances where the respondent was completely unaware that a grievance had been raised by the claimant. The claimant had queried the monies owed and the respondent sought to resolve this via email correspondence. Given the nature of the issue and the lack of any obvious or formal grievance that was an entirely reasonable

way to approach matters and was not an unreasonable failure to comply with the Code. The claimant was not denied a grievance hearing. Nor did the claimant request one. The real issue here was the error in calculation and not the failure to conduct a formal grievance procedure. I therefore decline to apply an uplift to the compensation in this case.

Remedy Case Management Orders

138. I have determined the issue of liability in relation to the complaint of unfair dismissal. I have yet to hear any evidence in relation to remedy. It appears that the claimant is still seeking reinstatement or re-engagement. It will be necessary to have a separate remedy hearing if the parties are unable to resolve the issue of remedy by agreement. I therefore make the following case management orders:

    i. The claimant shall confirm in writing to the respondent and the Tribunal within 28 days of this judgment being sent to the parties whether he still seeks reinstatement or re-engagement with the respondent or whether the remedy sought is compensation.
    ii. The claimant shall send the respondent any updated schedule of loss, documentary evidence or witness statement dealing with issues of remedy by no later than 42 days from the date that judgment is sent to the parties.
    iii. The respondent will send the claimant any witness or documentary evidence it seeks to rely upon for the remedy hearing by no later than 56 days after the judgment is sent to the parties.
    iv. The respondent shall compile a remedy hearing bundle and send a copy to the claimant and the Tribunal to arrive no later than 14 days prior to the remedy hearing.
    v. The Tribunal will list the case for a remedy hearing for one day to be heard by CVP on the next available date no sooner than 84 days after the liability judgment is sent to the parties.

Employment Judge Eeley

Date: 1 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5 May 2023

FOR EMPLOYMENT TRIBUNALS