

Issues

2. The issues were set out in the Case Management Order dated 21 April 2017 and, after some discussion with the parties, were agreed to be:

Unfair dismissal

- 2.1 What was the reason for dismissal?
- 2.2 Was there a redundancy situation?
- 2.3 If the reason was redundancy or some other substantial reason namely a restructuring of the First Respondent's finance department, was a fair procedure followed, in particular in respect of:-
- 2.3.1 the selection criteria (including the way in which they were applied);
- 2.3.2 the consultation process;
- 2.3.3 the pool (including whether the Treasury department should have been included);
- 2.3.4 the paper assessment of the Claimant?
- 2.4 Did the decision to dismiss fall within the band of responses open to a reasonable employer?

Direct race discrimination

- 2.5 Was the Claimant treated less favourably by the Respondents than Andrew McIntosh and/or a hypothetical comparator when he was dismissed for redundancy?
- 2.6 Was he dismissed because of his race?

Indirect race discrimination

- 2.7 Did the Respondents apply a provision, criterion or practice (PCP) namely that they did not carry out Equality Impact Assessments?
- 2.8 Did they apply the PCP to persons who do not share the Claimant's race?
- 2.9 Would the PCP put persons of the Claimant's race at a particular disadvantage when compared with persons who are not of his race?
- 2.10 Did it put the Claimant at that disadvantage?
- 2.11 If so, can the Respondents show that the PCP was a proportionate means of achieving a legitimate aim.

3. It was agreed with the parties that liability would be decided first and remedy would be dealt with at a separate remedy hearing, if appropriate.

Hearing

4. On behalf of the Respondents the Tribunal heard evidence from:
 - 4.1 Mr Daniel Stevenson (Capital Finance Specialist, formerly Financial Controller and the Claimant's former Line Manager);
 - 4.2 Mr Ray Christopher (Director of Corporate Finance and Development Finance and Second Respondent);
 - 4.3 Ms Deepa Patel (Management Accountant and Claimant's Line Manager);
 - 4.4 Mr Steve Aleppo (Group Director of Corporate Services);
 - 4.5 Ms Sarah Quilter (Director of Finance –Projects)
 - 4.6 Ms Nicola Shoeten-Sack (HR Business Partner). Due to Ms Shoeten-Sack's availability the Tribunal heard her evidence at London South on 21 September 2017.
5. We heard evidence from the Claimant on his own behalf.
6. There was an agreed bundle (633 pages) and a supplementary bundle (SB), totalling 111 pages. With the agreement of the parties additional pages were added during the course of the hearing.
7. Based on the evidence heard and the documents before us the Tribunal found the following facts.

The Facts

8. The Claimant describes himself as black African. He has a BSc Honours in Applied Maths, was ACCA qualified in 1995 and was a Fellow of the Association of Certified Chartered Accountants (FCCA). At the relevant time he had 20 years experience as an accountant.
9. Prior to the commencement of his employment contract the Claimant had worked for the First Respondent via an employment agency. His employment with the First Respondent commenced 1 November 2007, when he commenced working as a Management Accountant.

10. During the course of his employment no formal performance actions were taken and he had an unblemished disciplinary record.
11. During a restructure in 2008 the Claimant was matched against the Management Accountant role grade H with no change in status or salary. As a result of a further restructure in 2009 the Claimant's reporting line changed and he was appointed to the post of Fixed Asset Accountant but with no change in salary. Operationally he was still referred to as Management Accountant and indeed in the later 2011 restructure Ms Quilter referred to the Claimant's role as Management Accountant (SB p1).
12. Daniel Stevenson became the Claimant's line manager in 2011.
13. In 2011 there was a broad review of services, referred to as the Corporate Services Review. The aim was to reduce costs by making significant savings either through reducing the number of senior positions or redundancy (Sarah Quilter's statement, paragraph 4).
14. As part of this the work of the Capital Finance team was reviewed. It was determined that the Claimant was operating at the same level as the other two Capital Accountants and his work was largely transactional. The Claimant did not have line management responsibility for the other two accountants in the team. The decision was taken to delete the Management Accountant role he had been performing and increase the number of Capital Accountants to three.
15. We accept the First Respondent's case that in November 2011 the Claimant was offered a choice between taking redundancy or the additional Capital Accountant role at a lower grade and with a substantial salary reduction. The Claimant disputes that he was offered redundancy arguing that if someone is matched to a post redundancy is not an option.
16. The only reference made to redundancy as an alternative to a pay cut was in an email from the Claimant to an HR Business Partner (SB page 5). He wrote:

“The way things have gone I feel that I have been singled out and treated differently. I am seriously thinking that I have been discriminated against to an option of less pay or redundancy”.

This supports the First Respondent's position. SB page 1 is a contemporaneous email from Sarah Quilter to the same HR Business Partner explaining the rationale for the proposal and querying whether the Claimant could be offered redundancy. She said:

“Adebola Adeyemo – his role is a management accountant paid £48k. However, he does not operate as a management accountant and as a result we think we can cover this post with an Accountant and pay £30k.He is claiming that the Accountant role is the same job as his, but it's a pay cut.

This is correct. Apparently, he cannot have redundancy if it is the same job but at a lower grade. I would not be willing to keep pay as it is as he performs poorly and the Accountants in the team are doing a better job than he is. What can we do here? Can we make him redundant in this situation?"

17. We consider that on the balance of probability the choice was offered to the Claimant. This was in the context of collective consultation in a unionised environment. SB page 5 records that the Claimant attended a 1-2-1 consultation. SB page 1 refers to the Claimant having a union representative. The Claimant's position is also recorded in another contemporaneous email at SB page 6 which heavily references a restructure and redundancy and is consistent with the Claimant being given the choice of the Accountant job or to go into the redundancy pool for consideration for redundancy. He chose to take the role at a lower salary.
18. The Claimant did make reference to differential treatment at this time though he made no mention of a particular characteristic. He did not take the accusation of discrimination further.
19. On the balance of probability the Accountant position was an alternative offered during a redundancy process, which he accepted instead of following the redundancy process or lodging a complaint.
20. The Claimant continued in his new role, which the First Respondent acknowledges was a professional attitude to his changed circumstances.
21. He did not apply for any other Management Accountant roles within the First Respondent.
22. In early 2015, over three years later, Mr Stevenson was pressing for additional resource to his team. In addition in 2015 an external audit by Price Waterhouse Cooper identified deficiencies in the team's processes and that controls needed to be tighter. Mr Christopher's preferred solution was a Management Accountant, to manage the existing three Capital Accountants (including the Claimant). Unlike the Claimant's former role this was to be a line management role in order to tighten up controls and processes (consistent with the issues identified by Price Waterhouse Cooper. Recruitment took place late November 2015.
23. In the meantime, in summer 2015 the government announced changes to its policy on rent setting. These changes required the First Respondent to reduce social housing rents by 1% each year for four years from April 2016. The First Respondent's income for 2016/2017 financial year was predicted to be £6 million lower than originally forecast as a result. The cumulative impact of the reductions would be that its surplus in 2020 would be £32 million lower than previously expected.
24. The response to this was that in September 2015 the Board approved a financial plan to effect costs savings to match the rent reductions. This was to involve saving staffing costs and in the Finance Department led to the proposal in May/June 2016

to reduce head count from 97 to 80 full time equivalent posts. However this did not affect the decision that had already been made to recruit a Management Accountant in late 2015.

25. Maja Jablonska-Bak joined the team as one of the three Capital Accountants in September 2015, which was also unaffected by the financial plan that was approved the same month. She moved from elsewhere within the organisation.
26. It is not the First Respondent's policy to internally recruit. The external advert for the Management Accountant post was placed around 3 November 2015 and closed on 16 November 2015. All of the Claimant's team were informed and told they could apply. However, Mr Christopher did not think the First Respondent had the requisite skill set internally. Mr Stevenson interpreted Mr Christopher as wanting a "new spark". Mr Stevenson did make a joke about needing to back fill a role in the Claimant's team if one of them were successful, as the Claimant alleges, but this was not directed at the Claimant alone, but all three accountants.
27. The Claimant applied for the Management Accountant position, as did his colleague Andrew McIntosh. HR screened the applications and passed them to Mr Stevenson, who did the short listing. Internal candidates were automatically forwarded by HR. The Claimant and Mr McIntosh were therefore forwarded, as were internal candidates from other teams.
28. Mr Stevenson completed the Managers Matrix-Shortlisting Form dated 20 November 2015 (SB 92-94)). The key skills assessed were accounting experience, managing people, reporting skill and problem solving. The Claimant initially scored 7.5, with ten other candidates scoring higher than him, including Andrew McIntosh who scored 9.5. At this stage therefore the Claimant did not score high enough for an interview. Mr Stevenson was particularly disappointed that the Claimant did not appear to have tailored his application to the role, for example there was no covering letter. He also identified that the Claimant's CV included material cut and pasted from the generic role profile for a Capital Accountant which Mr Stevenson himself had produced. The Claimant had therefore claimed that he had done tasks that were actually primarily covered by the others in his team. This was reflected in the comments box on the matrix where Mr Stevenson recorded: "CV updated with copy of current JD including tasks performed by team rather than him".
29. Having reviewed the matrix and heard from Mr Stevenson we are satisfied this was a genuine attempt to score the candidates. The comments in relation to the Claimant were that his performance was satisfactory as Capital Accountant but he was edged out by others for the Management Accountant position.
30. The Claimant was shocked not to be shortlisted and raised this with HR who did raise some criticisms of the scoring based on the applications alone. For example HR could not see a difference between the Claimant and Andrew McIntosh, particularly in relation to the Management skills, and advised Mr Stevenson that he

had to remove personal knowledge beyond the paperwork from his mind when scoring. Mr Stevenson rescored with this in mind. Another candidate's score went down due to a miscalculation previously, whereas others' scores, including both the Claimant's and Andrew McIntosh's scores, went up as a result. Both Andrew McIntosh and the Claimant were given more credit for their accounting experience and the Claimant received more for managing people.

31. The Claimant was still not next in line for interview but was nevertheless invited to interview. The reason was that there was a vacant interview slot. The Claimant was therefore favoured over others scoring the same or more, and was offered an interview with one day's notice. HR suggested giving at least a day to prepare. The Claimant asked for this but his request was refused, despite the HR advice, as Mr Stevenson did not want it to derail his recruitment timetable. He had an assessment day set in the diary on 2 December 2015.
32. The email chain was in the bundle. The Claimant was offered the interview on Wednesday 25 November 2015. The Claimant responded requesting a postponement at 22.22 for more time to prepare. He said if the next day was the only slot he would not be attending (page 85A). He wanted a postponement to the Monday (30 November 2015). At 08.10 Thursday 26 November 2015 Mr Stevenson replied that he could not give the postponement. He said that he had declined postponements to other candidates also. He acknowledged the Claimant would not be attending. Mr Stevenson was not prepared to look into rearranging the interview, which would have had to factor another manager's diary and be before the assessment centre. This left the Claimant with unreasonably short preparation time. The reason for the lack of accommodation of the Claimant was that Mr Stevenson was disappointed with the lack of effort put into the Claimant's application. Although he was able to offer the Claimant the vacant interview he was not prepared for the effort and logistics required to include the Claimant if he could not attend that vacant slot. In any event, the Claimant had been given priority over others and it was he who decided not to attend. Though it is correct that Mr Stevenson did not encourage him to attend in any event.
33. It is also right that throughout Mr Stevenson had felt that the Claimant was not suitable for the Management Accountant role, as he later explained during the internal appeal (bundle, p336):

“[DS asked] to explain why he thinks [the Claimant] was not suitable for the MA role.

DS explained that he feels that [the Claimant] never takes criticism well and that he never really showed much ability to put ...new processes in place. In that sense, when he was recruiting for the MA role, he was looking for a spark.

DS advised that [the Claimant] performed well enough on what he did day to day but did not go well above.

DS also mentioned that [the Claimant] was hostile when he gave him feedback on development”.

34. In the event Deepa Patel was appointed and commenced employment 22 February 2016.
35. The decision in relation to the Claimant and the appointment to the Management Accountant role was in part preconceived based on Mr Stevenson’s existing view of the Claimant’s suitability. The Claimant did not assist his application by not tailoring his application better to the role.
36. Turning now to the events which led up to the Claimant’s dismissal. As said above in May/June 2016 a proposal was announced to reduce head count as a result of the government changes to rent (dealt with below). Prior to that redundancy announcement and selection exercise Mr Stevenson made the comments to Ms Patel about the upcoming redundancy exercise and selection recorded at page 345 (the interview with Ms Patel as part of the Claimant’s appeal investigation). She told the appeal investigation the following:

“A view was expressed to me by Daniel [Stevenson]. I think Ray [Christopher] did not want [the Claimant] and when these conversations had happened.....[Daniel] said he knew it would be [the Claimant] who was going. Because I hot desk he indicated there would be a permanent chair soon. Would Andrew want to be doing another analyst position? Daniel was telling me about the conversations he had with Ray and he was pinpointing. He had an eye for Andrew because he was quite good and [the Claimant] would be the one to go.”

She also mentioned Maja being referred to as an “angel”.

37. At the end of the financial year, 2015 to 2016, all three Capital Accountants had performance reviews, which were relevant in the later selection exercise. They all scored 3, that they were fully achieving their goals. The notes on the performance review form state that a 3 means that the person was doing “a really great job and delivering everything that is expected of you in your role in terms of your objectives and behaviour”. These were conducted by Daniel Stevenson but signed off by Deepa Patel in April 2016 as although she had just become their Line Manager it was Daniel Stevenson who had line managed them for 11 out of the 12 months of the financial year. As Ms Patel was their Line Manager at the time she did sign them off. Within the same performance banding both of the other candidates received more favourable comments with Andrew being encouraged to have the ultimate aim of advancing further within the organisation. Maja, who had only joined the team in September 2015, was recorded as having taken to her new role very well, with her manager using phrases such as “exceptionally pleased” and “especially impressive” in relation to her performance which was recorded as consistently ahead of expectation.

38. Ms Patel had line management responsibility going forwards and in May 2016 asked all three Capital Accountants to prepare work flows reflecting their current work loads (which become relevant below). The Claimant's work flow was used by Ms Patel when she covered his work during his absence (see below). Ms Patel also sat next to the Claimant when he was at work.
39. The First Respondent produced a detailed consultation pack in relation to the proposed restructure and discussed these at meetings with its recognised Trade Union, Unison, and the Joint Staff Council in May 2016. The proposal explained the impact of the policies requiring social landlords to reduce rents over the period 2016-2020 and the resulting cut in the Finance Department budget leading to the proposed restructure which would involve a decrease from 97 to 80 full time equivalent posts (page 381). Overall approximately 29 roles were at risk. These included both Revenue Accountants and Capital Accountants. Some consideration was given to having a pool of generic accountants (as they were all accountants at the same grade) but it was decided that they should be pooled separately in two specialist pools to reflect that they were actually different roles with different skill sets, with little every day interaction (Steve Aleppo, paragraph 11). It was also decided to keep Treasury Accountants separate, with the effect that they were not at risk. There was however an aim of more fluid working between teams. Rather than the teams working discretely it was hoped there would be more fluid cover across broader functionality.
40. On 29 May 2016 the Claimant suffered a close personal bereavement. He had paternity leave, then compassionate leave and then sick leave up to 26 July 2016. He returned to work on 27 July 2016. He was therefore absent when the finance restructure proposal was launched to the Finance Staff on 9 June 2016 (see pages 85 A and 378). The proposed restructure was announced along with timescales for consultation.
41. As part of the overall proposals it was proposed that the Capital Finance team move into the Financial Control team with a reduction of one Capital Accountant. So the team of three was to be reduced to a team of two. We have heard no evidence to suggest that these were not essentially the same roles going forwards but with one role reduced. The Management Accountant position was to be preserved. The existing structure is set out at p388 and the proposed structure was set out at page 391, which were both part of the consultation pack provided to staff. As there was to a reduction of three roles to two a competitive process was established for recruitment to the two remaining roles. Although the Claimant was on leave the First Respondent's HR Operations Manager called the Claimant to inform him of the proposals.
42. On 12 July 2016 Ms Patel wrote to the Claimant to provide him with the consultation pack (pp92-3). The Claimant was offered a number of options:
 - 42.1 to hold a telephone consultation prior to his return to work;

- 42.2 to have a consultation meeting at a location of his choice during his absence;
- 42.3 to elect to withdraw from the process and take a redundancy payment (ie to take voluntary redundancy);
- 42.4 to participate in the selection process by attending an interview, either by telephone prior to his return or face to face upon his return to work.

The option of voluntary redundancy was only offered to the Claimant. The evidence of Ms Shoeten-Sack was that this was in recognition of the Claimant's difficult circumstances.

- 43. The First Respondent had role profiles with expected competencies which were provided to the Claimant. The First Respondent decided to have three selection criteria to choose between the three candidates. The same three criteria, customer focus, delivery focus and leadership were used to select candidates from other selection pools. They are in the expected competencies drafted for the role (amongst others) (SB page 109), reflected the First Respondent's priorities and that Mr Christopher wanted driven and high excelling individuals.
- 44. On 13 July 2016 the Claimant called with some queries which were addressed by the First Respondent in the letter dated 13 July 2016 (p102). He was told that his diary would be cleared for an hour before the selection interview on 27 July 2016, or potentially more if he felt he needed it. He was told he could use a notepad in the interview and he could have extra time to answer questions as compared to the other candidates. If he was unable to attend then he was told that he could be assessed based on Ms Patel and Ms Quilter's knowledge of his competencies. Sarah Quilter was the head of the Financial Control department (the department where the Capital Accountants were to move after the restructure).
- 45. On 14 July 2016 the Claimant indicated that he felt it was not reasonable to launch straight into an interview (p138).
- 46. The Claimant returned to work on 27 July 2016. In the event two further options were offered on his return to work for him to consider which again included a competency based interview with adjustments on 29 July 2016 or a paper based assessment, which would then be applied to his colleagues also (page 140). The adjustments offered included one to one interview skills support.
- 47. On 29 July 2016 the First Respondent held the first consultation meeting with the Claimant (page 141). The consultation was conducted by Ray Christopher. This is the meeting which should have occurred in June if the Claimant had not been absent. It was therefore well outside the consultation timetable. The delay due to the Claimant's absence was a source of frustration to the other two employees affected. The Claimant indicated he did not yet feel ready to discuss the restructure. As a result the first meaningful consultation was on 10 August 2016. The Claimant was able to make his comments on the proposed reduction in posts

and the rationale for the redundancy, although it was so long after the announcement these were unlikely to make any difference by then. It was recorded that the Claimant opted for the paper based assessment (pages 145-148).

48. The Claimant attended an outplacement session on CVs on 5 August 2016 provided by the First Respondent through Working Transitions.
49. On 10 August 2016 after that consultation the three Capital Accountants were formally told by email from Ms Patel (page 149) that the selection interviews would be replaced by a paper based assessment. They were informed of the three competencies – customer focus, delivery focus and leadership – and that examples would be extracted from this years performance review and from the workflow that each of them had provided in May to Ms Patel to assist her to understand what work they were each doing.
50. The Claimant still did not feel ready and on 11 August 2016 expressed to Ms Patel in the context of discussing work priorities generally “please don’t forget I have only just come back and I am not 100% yet” (page 150). However, after meeting his union representative he did confirm to Ms Patel he had no concerns (page 151).
51. The Claimant attended two further consultation meetings on 12 and 22 August 2016. He was off sick again from 15 August but was back at work by 22 August.
52. On 15 August 2016 the Claimant was informed that Deepa Patel, Sarah Cullen (covering for Sarah Quilter) and Ray Christopher would be responsible for conducting the paper based assessment.
53. In the meeting of 22 August 2016 he was still discussing the rationale for the redundancy and the choice of pool. He made no complaint about the fact there would be a paper based selection or who would score.
54. The Claimant took annual leave from 23 August to 2 September but was aware that the paper based assessment would be conducted during his absence.
55. By email (page 161) the Claimant was told that no decisions would be taken about the outcome until the Claimant returned and had had the chance to comment on the scores. He was told that he would have to attend a meeting on his return and that “it [was] possible that, subject to the scoring and any comments [that the Claimant] and the other affected employees [had], the outcome of this meeting [would]be that [the Claimant was] given notice of redundancy”.
56. The paper based assessment was conducted in a meeting facilitated by Ms Shoeten-Sack and attended by Ms Patel, Ms Sarah Cullen (who was covering for Sarah Quilter) and Mr Christopher. Ms Patel was aware of the views of Mr Stevenson and the conversations with Mr Christopher that she had been told about (paragraph 36 above), but she did attempt to do her own scoring based on her view of strengths and weaknesses, based on her knowledge of the three candidates.

57. The three candidates were scored on scoring sheets such as the Claimant's set out at pages 164-170 of the bundle. Andrew McIntosh's is at SB 51-57 and Maja Jablonska-Bak's is at SB 80-86. In addition a list of notes of evidence used was prepared for each candidate (pages 171, SB 89 and SB 90). The scoring sheets were based on a CBI-Smart interview guide (SB18-26). Each three main selection criteria were given a score based on a number of behavioural indicators and the positive and negative evidence for each. The summary of the scores is at page SB 91 and the Claimant with an overall score of 2 scored the lowest. The key to the scores is at page 169. A "2" means that the "evidence raises concerns about competence". There were also summary comments in relation to each candidate. The Claimant's was: **"[the Claimant] is a valued member of the team, he has a lot of knowledge of his area of work but his standards and interactions are often inconsistent. With some more development and guidance this can be easily rectified."**
58. We note the following about the scoring of the Claimant. Item 14 under leadership (p168) has a negative evidence entry for the Claimant and nothing in the positive evidence yet the notes of evidence relied upon for this conclusion (p171) cross references to page 7 of his performance review (p178) which states that the Claimant's leadership is satisfactory and improving with good potential for development.
59. In the list of evidence in relation to the Claimant there are just six references to evidence in the performance review. The remaining evidence came from Deepa Patel's own personal knowledge of the Claimant. There are far more entries of this nature in relation to the Claimant's evidence than in relation to the other two candidates.
60. The Claimant attended a meeting on 5 September 2016 at which he was presented with the scores. He then attended a further meeting on 8 September 2016 where he was able to comment on the scores. His feedback is recorded at pages 252-253 of the bundle. This went into some detail but essentially the Claimant was saying that there were subjective comments included and that not all the positive evidence from his performance review had been included. He pointed out the inconsistency between the score of 3 "fully achieving" in his appraisal and the 2 in the selection exercise. He also made the point that the evidence above in relation to indicator 14 was positive not negative.
61. The Claimant's scores were then reassessed (pp255-261) and he was given an overall score of 3 but the individual scores remained lower than his colleagues and he remained the lowest scoring candidate. The notes of evidence sheet was also revised (p262). There were more references to the performance review but there remained some references to Deepa Patel's personal knowledge. A subjective comment was removed. The negative comment for item 14 was removed but no positive entry added. Other negative comments were removed and positive evidence was added for leadership but his score remained a 2 for leadership. The changes were explained at pages 265-269. This confirms that the assessment in

the selection exercise was based on the performance review and “the standard of work that has been produced since [Ms Patel has] been in post”.

62. Maja meanwhile was given a 3 for leadership based on 2 positive entries. The overall comment for Maja was: Maja is a team player. Her work is to a high standard and always delivered on time. With more experience in other areas of Capital Finance, Maja will be able to build on her leadership skills through working on cross functional projects”.
63. The decision to dismiss the Claimant was communicated on 13 September 2016, with two months notice. During that period he attended other outplacement sessions.
64. The Claimant appealed on 23 September 2016 and included allegations of race discrimination (pages 283-294). The appeal was conducted by Mr Aleppo. The Claimant attended an appeal hearing on 12 October 2016. The appeal officer also interviewed a number of other staff including Ray Christopher, Sarah Cullen, Andrew McIntosh, Maja Jablonska-Bak, Daniel Stevenson, Deepa Patel, and Nicola Shoeten-Sack. The appeal was dismissed on 26 October 2016.
65. Mr Aleppo looked into the circumstances of the Claimants’ demotion in 2011 and concluded at page 361:

“I have checked with the Finance Business Partner who supported the restructure in 2011 and seen evidence of correspondence between you and the company at that time. Management had re-graded your previous role from management accountant to accountant and aligned you to the role at the new level. Based on this, it appears to me that it was your choice to accept the role that you were offered following the restructure and that you could have opted to take redundancy at that time. During the appeal hearing you also said that you had just had a child and needed to maintain an income so you chose to accept the lower grade and did not raise a grievance.”

66. Mr Aleppo also followed up the circumstances of the Claimant’s application for the new Management Accountant role and concluded as follows:

“A new management accountant role was created in the Capital Accounting team in Feb 2016. While this role was called “management accountant”, it was a new role and not a simple reinstatement of the role that had been re-graded to the accountant level in the 2011 restructure. You were not shortlisted for this role at first but you were offered an interview after you raised a concern with HR. You chose not to attend the interview you were offered...ultimately it was your choice not to accept the interview that you were offered. I have followed up on this and found no evidence for your...race being a factoring you not being shortlisted or appointed to the role”.

67. On 10 November 2016 the Claimant was advised that the role of Accountant (Sales Manager) was vacant (p373). He was told that if he was interested he would be invited to interview. The Claimant did not pursue this for the reasons he sets out at page 374.
68. Some statistics were given in the bundle as an Equality Impact assessment was carried out as part of the appeal (pp532 to 533). That shows that 36 members of staff were not affected by the Finance Directorate restructure 2016 and out of those 16 are described as British, 3 as African. Of those 46 that were put at risk 17 are described as British, 6 are described as African and 1 as Black African. Black British is a separate category. 6 of the British people were aligned to roles and the other 11 eventually were off risk after consultation. 1 African person was aligned, 2 African and 1 Black African were off risk and 3 African employees were made redundant. There are a number of other descriptors reflecting staff with other backgrounds.

Relevant law

Unfair Dismissal

69. The law in relation to unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

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

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

(3). . .

(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.

70. The definition of redundancy is found in section 139 of the Employment Rights Act 1996 which states:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to_

....

(b) the fact that the requirements of that business_

(i) for employees to carry out work of a particular kind .

..

have ceased or diminished or are expected to cease or diminish.

71. In applying section 98 (4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

72. The EAT has laid out the broad principles usually to be followed by the reasonable employer when considering a dismissal for redundancy in *Williams & others v Compair Maxam Ltd* 1982 ICR 156 EAT. These are:

72.1 to give sufficient warning and consult the affected employee;

72.2 to establish objective selection criteria and apply these fairly;

72.3 to consider alternative employment.

73. We were referred to *Capita Hartshead Ltd v Byard* [2012] ICR 1256 which set out that the tribunal's role is to consider the employer's choice of pool with care to determine whether the employer genuinely applied its mind to the choice of pool and whether that choice of pool was within the range of conduct the employer could have adopted.

74. We were referred to the case of Mr L Morgan v *The Welsh Rugby Union* UKEAT/0314/10/LA. In that case the EAT observed at paragraphs 28-30 that
- “28. The [selection criteria referred to in Williams] are criteria for selecting those employees who are to be made redundant from within an existing group...**
- 29. There are some redundancy cases...where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. The criteria set out in Williams [cited at paragraph 28 above] did not seek to address the process by which such roles were to be filled...**
- 30. ...Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer’s decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams type selection will involve consultation and meeting, appointment to a new role is likely to involve...something much more like an interview process”.**
75. The Respondents’ Representative also referred us in particular to paragraph 32 which referred to *Ball v Balfour Kilpatrick Ltd* (EAT/823/95) and the principle that there is no rule of law that the selection criteria must be exclusively objective.
76. At paragraphs 35 and 36 the EAT reminded us that a tribunal must apply section 98(4) of the 1996 Act and no further proposition of law is required. In doing so the tribunal is entitled to consider the objectivity of the interview process (bearing in mind that the assessment is likely to involve a substantial element of judgment); whether the employer established and followed through fair recruitment procedures; and whether a decision was made capriciously, out of favouritism or on personal grounds.
77. The employer’s selection and the marks given in that process will not normally be subjected to over-minute scrutiny and the tribunal should not embark upon a reassessment exercise and in general all the employer has to do is show that it set up a reasonably fair system of selection and applied it without overt signs of unfairness (*British Aerospace Plc v Green* [1995] ICR 1006 and *Nicholls v Rockwell Automation Ltd* (UKEAT/0540/11/SM)).

Race Discrimination

78. Section 13 Equality Act 2010 states:

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

others.

79. Race is a protected characteristic. Section 23 provides that there must be no material difference in the circumstances of any comparator.

80. Section 19 Equality Act 2010 states:

1. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

2. For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

81. Section 136 provides that if there are facts from which the tribunal could decide, in the absence of any explanation, that a person A unlawfully discriminated against B, then the court must hold that contravention occurred unless A shows that A did not unlawfully discriminate against B. Section 136 does not put an initial burden on the employee but requires the tribunal to consider all the evidence, from all sources, at the end of the hearing (*Efobi v Royal Mail Group Ltd* UKEAT/0203/16).

Conclusions

What was the reason for dismissal?

82. We accept the reason was redundancy as the decision was made to reduce three Capital Accountants to two following the government changes in relation to rent setting.

Was there a redundancy situation?

83. We accept that there was a genuine redundancy situation, as a result of the decision to reduce the Finance Department head count from 97 to 80 full time equivalent posts, in order to save costs to address the government led rent reduction over the next four years. The decision was initiated by George Osborne's announcement and the response was planned at Senior level, who were looking at the proposals for some time before they were announced to staff. There was full involvement with the union and JSC and we have heard no evidence that they contested the redundancy situation. As part of this wider cost cutting exercise the decision was taken to reduce the number of Capital Accountants by one.

If the reason was redundancy or some other substantial reason namely a restructuring of the First Respondent's finance department, was a fair procedure followed, in particular in respect of:-

the pool (including whether the Treasury department should have been included);

84. The First Respondent employed Treasury Accountants, Revenue Accountants and Capital Accountants and had an aim of more fluid working between teams as part of the re-organisation. We accept, as outlined at paragraph 39 above, that some consideration was given to having a pool of generic accountants instead of two separate pools of Revenue Accountants and Capital Accountants (as they were all accountants at the same grade). However it was decided that they should be pooled separately in two specialist pools to reflect that they were actually different roles with different skill sets, with little every day interaction. It was also decided to keep Treasury Accountants separate, their having a very different specialism, with the effect that they were not at risk.
85. We accept that the First Respondent applied their minds to whether or not there should be a generic pool of accountants or specialist pools of accountants and chose to keep the specialisms separate, notwithstanding the hope of more fluid working in the future. This was a reasonable response. The decision was made in consultation with both trade unions and the JSC. There's no evidence that the pools were chosen with the aim of targeting the Claimant in particular.

the consultation process;

86. There was a consultation process with staff which commenced with the announcement of the proposals on 9 June 2016, during the Claimant's absence from work.
87. The situation was difficult as the Claimant suffered a bereavement and had an extended absence at just the relevant time. The First Respondent wished to be sensitive to that position, whilst progressing with the reorganisation and mindful that delays impacted the other affected employees.
88. The First Respondent kept the Claimant informed and were keen to involve him in consultation and to catch him up to the same position as other colleagues upon his return to work. The First Respondent did not restrict the opportunity for

consultation. The Claimant was invited to participate while he was absent but he requested it wait until he was fit to return. The fact that the Claimant's consultation was delayed during his absence and commenced upon his return, meaning he was behind the process in relation to other staff, was at the Claimant's request. The First Respondent was anxious to press on with the process but did seek to accommodate the Claimant's circumstances and ultimately went at the pace agreed with the Claimant. This was despite their being mindful of the impact of the delay on the other employees affected. The Claimant was given options not open to the other staff such as voluntary redundancy, adjustments in relation to the interview process and the choice as to whether selection should be by competency based interview or a paper based selection exercise. The others were not given this choice and the Claimant's choice was imposed upon them.

89. Once the Claimant did return to work he had three or four consultation meetings. The Claimant was also given two further meetings in relation to his own selection scores. He had the opportunity to comment on his scores and the scores were modified as a result. He was represented by his trade union at at least two consultation meetings.
90. The one criticism we have that relates in part to consultation is that the First Respondent told the Claimant the paper based exercise would be based upon the performance review 2015-2016 and the Claimant's work flow. In fact it was also based on the personal view of Ms Patel and contributions from others such as Mr Christopher in the assessment meeting. The Claimant was not informed of this and his choice of the paper based assessment was based on that incorrect information. We address this further below in relation to the application of the selection criteria.
91. With the exception of this one point, which is better dealt with in the selection criteria below, the consultation process was reasonable. It was in line with what other staff were offered, with adjustments to accommodate the Claimant's bereavement and absence.

the selection criteria (including the way in which they were applied) and the paper assessment of the Claimant?

92. We find the selection criteria of customer focus, delivery focus and leadership were not unreasonable. Although other competencies were also listed with the role profiles, there was consistency between these three criteria and the competencies accompanying the role profile. The indicators used to measure each competency are also reflected in the expected competencies for Accountant (Capital) at page SB109-110. The paper based exercise was a modified version of the competency based interview which was the result of using the cbi-smart tool. They were used for the selection of other pools also. The particular choice of criteria did fit with Mr Christopher's vision for driven and high achieving employees.
93. The Claimant raised no issue with the chosen criteria in his consultation. Again the union and JSC were consulted in relation to the redundancies and we have heard no evidence that any issues were raised about the selection criteria.

94. Although it was originally listed as a separate issue we will turn now to the decision to use a paper based selection exercise. Ms Patel was aware that the Claimant usually performed better in interview than on paper. There was initially pressure on the Claimant to progress to the selection as soon as he returned to work. We accept he felt pushed to select paper based selection because he did not feel ready for a face to face interview process. He had been off for an extended period of two months and was not in the same position as the other candidates. That said in the event he did not make a final decision until 10 August and the process did not take place until the week of 23 August 2016. By this time the Claimant had had Union advice and said he had no concerns. Moreover the decision to move to paper based selection was the Claimant's and the others who were also affected were not consulted. In this sense the Claimant was treated more favourably because of his particular circumstances. On balance we do not find the decision to use a paper based assessment unreasonable.
95. We find the decision to use the performance review of 2015-2016 and the workflow reasonable. The difficulty the First Respondent faced was that Ms Patel had only been in post a few months, the Claimant had been off sick for a substantial part of that time and on the other hand Ms Jablonska-Bak had not been in post long either. The performance review and the work flow predate the bereavement and in the case of the performance review it reflected a full year.
96. We do not consider it unreasonable that Ms Patel was involved in the selection exercise. She had only been the Line Manager for a short period and the Claimant had been absent for a substantial part of that. However she had managed the complete team for three months spanning the busy year end. She had sat next to the Claimant and then covered his workload whilst he was absent. She had signed off on the performance reviews. She did refer back to Mr Stevenson about details that were not within her knowledge. We find that although others were present at the meeting it was essentially Ms Patel who took the lead. Ms Cullen was covering for Ms Quilter and Mr Christopher did not have much first hand experience or contribute much. The decision was essentially Ms Patel's decision based on her views of the three Capital Accountants and her attempt to assess their respective strengths and weaknesses. She did note positives and negatives for each in a selection where the starting point was that each had scored a 3 in their performance review.
97. Where we find the First Respondent did fall outside the range of reasonable responses is in relation to the selection process and the application of the selection criteria in the paper based exercise.
98. Firstly, we find that Mr Stevenson made the comments to Ms Patel about which Capital Accountant would be selected recorded on page 345 and set out at paragraph 36 above. In doing so he was communicating the conversations he had had and views he shared with Mr Christopher. He made it clear they favoured Andrew McIntosh. It was not an instruction but the result they expected. It was made clear that Mr Christopher had "an eye for Andrew" because he was "quite

good". We accept that Ms Patel is an independent thinker and tried not to be influenced by this. However, standing back and looking at whether the First Respondent organisation behaved reasonably we do not find it reasonable for more senior managers to express their personal preferences to a less senior manager who is then the selection manager in the process. As a result Ms Patel was well aware of the senior management's indicated preference when she went into the selection. In our view, whether or not she tried to do the selection process independent of this, she was aware of the senior managers' view and this did taint the process and is an overt sign of unfairness.

99. Secondly, the Claimant chose a paper based selection on the information he was given which was that the selection would be made on his work flow and on his performance appraisal from 2015-2016. In fact Ms Patel also took into account her own views based on the few months she managed the team, including the period after the appraisal and work flow. She added her own evidence beyond what was reflected in the performance reviews and work flows. Looking at the evidence used in relation to the Claimant's scores at page 171 Ms Patel made more such personal comments in relation to the Claimant and these tended towards the negative, whereas the positive comments came from the performance review. Although there were changes made, overall this remained the case after the rescore. In respect of Maja and Andrew nearly all the evidence did indeed come from the performance reviews.
100. It is not our role to reassess the candidates but in terms of the way the Claimant was scored we note that there is inconsistency between the performance review score of 3 and the paper based assessment exercise score of 2. Given the summary comment about the Claimant was fairly positive overall, a score of 2, which meant the evidence raised concerns about competence, was harsh. That was changed to a 3 after the Claimant's input but there remained inconsistency in relation to his score of 3 for leadership and what appears a positive comment in the performance review and the score of 2 for leadership which was maintained in the paper based selection after the rescore, even though the indicators were amended to be solely positive, with no negative entries. Again, a score that means concerns about competence is harsh and we can see nothing in the noted evidence to account for it.
101. This leads us to the conclusion that the selection came down to Ms Patel's view of the three and that she tried to make the evidence fit that view as it was not within the documentation. Again, this was also in the context that she had been told who senior managers favoured.
102. Whilst of course it is not necessarily unreasonable to base a decision on a manager's, it was unreasonable when the employees had been told the decision would be based on the documents and that was the basis on which the Claimant had made his selection of the paper based assessment. This is particularly the case where the Claimant had been on a lengthy absence during her period of management, whereas the paper based evidence predated that and reflected a full year's service.

Did the decision to dismiss fall within the band of responses open to a reasonable employer?

103. Having come to the conclusions above we cannot find the decision to dismiss within the range of reasonable responses. Although the employer set up a potentially fair system of selection there are some overt signs of unfairness in its application. Firstly the senior managers' preferences were made known to the manager responsible for the selection exercise, thereby tainting the process. Secondly, having given the Claimant the choice of a paper based process that would be based on the performance review and the work flow, the selection manager diverted from this. The evidence suggests that this was diverted from in respect of the Claimant in order to get the desired result, and less so in respect of the other two candidates. Thirdly there are inconsistencies in the scoring of the Claimant in the performance review and the selection exercise, and between the indicators given to the Claimant in respect of leadership and the score.

Direct race discrimination

Was the Claimant treated less favourably by the Respondents than Andrew McIntosh and/or a hypothetical comparator when he was dismissed for redundancy?

104. The Claimant was dismissed and Andrew McIntosh and Maja Jablonska-Bak were not. We have found the dismissal unfair on the basis that more of Ms Patel's personal views outside of the performance review and work flow were used in respect of the Claimant and that there was some unfairness in the process and scoring. There was therefore differential treatment.

Was the Claimant dismissed because of his race?

105. The key issue here is whether the Claimant was dismissed because of his race. The Claimant ran this case on the basis that the redundancy process was "bent" and that if the dismissal was not based on capability it must have been based on race. He was the only black African member of his team and he was made redundant. He asks us to take into account what he says is the history of other less favourable treatment when he alleges he was demoted and when he was not shortlisted for a role he had been doing in the past. He did not rely on the statistics for this part of his claim.
106. We have considered the earlier incidents. They did not happen as the Claimant described. Firstly in 2011 the Claimant's Management Accountant post was deleted as part of a wider cost saving review on the basis of the work the Claimant was performing. He was offered the choice of redundancy or the Capital Accountant position at a lower salary and chose the latter.
107. In 2015 there was a new Management Accountant position. Although it had the same title this was not the same role that the Claimant had done until 2011. This

role had line management responsibility unlike the Claimant's previous role. The Claimant was able to apply and did so. As an internal candidate he was short listed for consideration by the Line Manager. He did not score highly by the Line Manager and was not initially invited for interview as other higher scoring candidates were invited for interview. Mr Stevenson was particularly disappointed that the Claimant had cut and paste from a generic document Mr Stevenson had written, rather than focus his application on the particular role. When the Claimant complained to HR however he was offered an interview, even though he still was not the next highest scoring candidate, because there was a vacancy. In this sense he was treated more favourably than other candidates. He wanted longer to prepare than he was given but Mr Stevenson was unprepared to modify his timetable and so refused this request. The Claimant decided not to go to the scheduled interview.

108. There is an explanation for each incident and both were investigated in the Claimant's appeal. We are satisfied that race was not the reason for either.
109. In terms of the dismissal, we have found that the dismissal was unfair. We have found that the employer behaved reasonably and even favoured the Claimant in some respects. However, it was unreasonable for senior management to have tainted the process by expressing a view to the ultimate selection manager outside of the process. It was also unreasonable to divert from the agreed paper based process and add the personal views of Ms Patel. There is some suggestion of inconsistency in relation to the Claimant's scores. However, we are satisfied that the reason for the Respondents' behaviour was a genuine view of differential performance and the view that the other candidates were better, in what was a close selection exercise (all candidates having scored 3 in the performance review). This does not alter our view on the unreasonableness of the First Respondent's approach, but we are satisfied that the reason had nothing to do with the Claimant's race.
110. We do not consider that there is evidence upon which we could conclude that the dismissal was because of race. However even if the burden does shift to the Respondents we are satisfied that none of the above treatment of the Claimant was to do with his race.

Indirect race discrimination

111. The Claimant's Representative did not really cover this aspect of the Claimant's claim in submissions and our starting point is that this case has not been properly defined or articulated for us to consider.

Did the Respondents apply a provision, criterion or practice (PCP) namely that they did not carry out Equality Impact Assessments? Did they apply the PCP to persons who do not share the Claimant's race?

112. It is correct that the First Respondent does not usually carry out Equality Impact Assessments in relation to redundancy exercises and did not initially do one here.

However, they did do an Equality Impact Assessment as part of the Claimant's appeal and prior to upholding the dismissal of the Claimant.

Would the PCP put persons of the Claimant's race at a particular disadvantage when compared with persons who are not of his race? Did it put the Claimant at that disadvantage?

113. The Claimant has not articulated the disadvantage to persons of the Claimant's race or what difference it would have made if the Equality Impact Assessment had been done earlier. The Claimant has also not explained how he was disadvantaged. Whilst the burden of proof is not on the Claimant, he does need to articulate the claim he wishes the Tribunal to consider. It is not clear to the Tribunal in the absence of this explanation what the disadvantage was in the delay in doing the Equality Impact Assessment.

If so, can the Respondents show that the PCP was a proportionate means of achieving a legitimate aim.

114. It is not necessary to consider this issue given the findings above.

Next steps

115. It follows from our decision that the Claimant was unfairly dismissed and a remedy hearing is now required to decide upon the appropriate award.

116. Based on the findings above there must be a significant chance that the Claimant might have been selected even if the First Respondent had followed a fair selection process and applied the criteria fairly.

117. At that hearing the parties should be prepared to address the size of the chance that there would have been a dismissal in any event, and if so, when a dismissal might nevertheless have occurred.

Employment Judge Corrigan
12 February 2018