EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100124/2024

Held in Glasgow on 11-12 April and 20-21 May 2024

Employment Judge Murphy

Mr C Rennie	**Claimant** **Represented by:** **Mr R Clarke - Solicitor**
P&O European Ferries (Irish Sea) Ltd	**Respondent** **Represented by:** **Ms L Finlayson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal declares that the claimant was unfairly dismissed.

2. It is not practicable for the respondent to comply with an order for reinstatement.

3. It is practicable for the respondent to comply with an order for re-engagement. The Tribunal intends making such an order. In anticipation of doing so, a case management order has been issued of even date, appointing further procedure.

REASONS

Introduction

4. The claimant (C) brings a claim of unfair dismissal. The respondent (R) resists the claim on the merits. R also resists the remedies sought by C.

5. A final hearing took place in the Glasgow Tribunal on 11-12 April and 20 to 21 May 2024. R led evidence from Jack Steer, Operations Director (JS), Laura Gilmour, former Route Director (Irish Seas) (LG), and Phil Hills, People

Director for P& O Ferries (PH). C gave evidence on his own behalf. Evidence in chief was taken orally from the witnesses. I was referred to a joint set of productions running to 253 pages, though not all documents were introduced into evidence. I am grateful to both representatives for their able assistance with the case.

6. The parties agreed a list of issues. There was some further refinement as it was agreed that certain aspects of remedy would be dealt with but others would be held over for a future hearing, if necessary. The issues to be decided following this hearing are as follows:

Redundancy

7. C, having accepted the reason for dismissal was that his role as a Port Manager was redundant, did R act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss C in accordance with equity and the substantial merits of the case?

    a. In particular, did R and carry out reasonable consultation with C about the redundancy?

    b. Did R respond reasonably to queries and questions from C and his union representatives during the period of consultation?

    c. In particular, did R provide C with sufficient and relevant information relating to the difference between the redundant role of Port Manager and the role of Senior Port Duty Manager (SPDM) which C applied for i.e. which tasks and responsibilities were being removed from the role of SPDM?

8. Did R act reasonably in looking for alternative employment for C?

9. Was dismissal within the range of reasonable responses open to R?

Remedy (Reduced set of issues agreed to be decided at the present hearing)

10. During closing submissions, Mr Clarke clarified that C does not seek reinstatement but seeks an order for re-engagement, which failing compensation.

11. Is it practicable for R to comply with an order for re-engagement? (R does not assert that C caused or contributed to the dismissal).

12. If the Tribunal decides it is not practicable for R to comply with a reengagement order, a further hearing on remedy will be listed. However, it was agreed that, at this stage, the Tribunal will (in those circumstances) decide:

    a. whether there is a chance that C would have been dismissed anyway if a fair procedure had been followed, or for some other reason?

    b. if so, should any compensation awarded in due course at a remedy hearing be reduced? By what percentage?

Findings in Fact

13. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities The facts found are those relevant and necessary to my determination of the issues. They are not intended to be a full chronology of events.

Background

14. C was employed by R (or a predecessor employer within R's group) from 1 January 1996 until he was dismissed by reason of redundancy on 2 August 2023. He was latterly employed as Port Manager Cairnryan and Larne with effect from 1 November 2020.

15. Before November 2020, C had held the role of Port Manager (Cairnryan) (only). His colleague, Laura Gilmour (LG) at that time held the role of Port Manager (Larne). Pursuant to a restructure around this time, LG was made redundant and R asked C to take on responsibility for the Larne Port as well

as Cairnryan Port. C agreed to do so and, in recognition of the extra responsibilities, he received a relatively modest increase of 4% which lifted his basic salary at that time to £61,675.

16. At the time, C had sought to negotiate for himself a higher pay increase. R operated a policy whereby the maximum pay increase they would award for taking on additional responsibilities was 10% of existing salary. In the discussions then had, R took the position that the addition of the responsibility for Larne Port was not a material change or was suitable alternative employment for C such that a higher increase was not warranted. R's position was that, if C were to decline the changes to his responsibilities, he would leave R without receiving a redundancy payment because the combined role with responsibility for both ports was said to be either the same employment as his existing role as Port Manager for Cairnryan or suitable alternative employment.

17. C was aware that, during the period of his career, when his colleagues were made redundant (that is, specifically, his Irish Sea colleagues as opposed to those employed in other parts of the UK or by other group companies) they received enhanced redundancy payments. C understood that in the 20+ years his employment spanned, whenever anyone was made redundant in the Irish sea locations, they received an enhancement calculated on the basis of 3 weeks' pay per year of service for every year under the age of 40 and 4 weeks' pay per year over 40. He was aware this had been subject to a cap of 2 years' pay.

18. C knew that LG, then employed in the disappearing role of Port Manager for Larne, had been paid a redundancy payment based on this calculation when she left R in the 2020 restructuring. C was aware that some Irish Sea employees were employed in a bargaining unit in respect of which Unite was recognised and were covered by a collective bargaining agreement negotiated between R and Unite. He believed, however, that all Irish Sea employees, regardless of whether they were within Unite's bargaining unit, had been paid enhanced redundancy according to these multipliers throughout the time C was employed.

19. After her redundancy in 2020, LG returned to work for R in or around 2021. She was latterly appointed to the role of Route Director (Irish Seas). Three Port Managers and an HSSE Manager for Larne Harbour Ltd reported to her before a further restructuring in 2023 (Project Fleet). One of the Port Managers was C who, as mentioned, managed Larne and Cairnryan. The others were the Dublin Port Manager and the Liverpool Port Manager.

20. There were material differences between R's ports in the Irish Sea from a management perspective. In some cases, R (or a company in R's group) owned the port and in other cases R was the tenant of a third party port authority. The functions for which the relevant Port Manager was responsible at each port varied depending on whether they were the tenant of a port authority and depending on the contractual relationship with that authority. Larne, for example, was owned by Larne Harbour Ltd. Liverpool and Dublin likewise had port authorities whereas Cairnryan did not. A practical implication of that for C's role in the period from November 2020 to summer of 2023 was that in Cairnryan, C required to manage the port, including assets and infrastructure, oil spill preparedness, security, garbage and fuel whereas in Larne, these aspects were managed by Larne Harbour Ltd.

21. In his Port Manager role after 2020 when he had assumed responsibility for Larne as well as Cairnyan, C managed a budget of approximately £8M per annum and around 110 employees. In May 2023, R opened consultation on a large-scale restructuring project which it named Project Fleet. Just before the consultation on Project Fleet started, C was on a salary of approximately £68,212 per annum in addition to which he was entitled to a First Aid Allowance of approximately £161.40 p.a. and a car allowance of approximately £5,850 per annum.

Events in May – June 2023: Project Fleet

22. R's business struggled as a result of the impacts of both Covid and Brexit, among other matters, and a decision was taken to restructure the business and centralize functions where possible. The objective was to reduce costs by implementing a new operating model.

23. On or about 4 May 2023, Jack Steer, Port Operations Director, held a remote meeting with the team, including C, to brief them on the project. He showed them an organizational structure chart for the structure as it then existed. So far as relevant, it showed the European Port Operations Director (J Steer's post) at the top of the chart with 6 roles reporting into his post. These included the Route Director (North Sea) and the Route Director (Irish Seas) occupied by LG. The chart showed that, under the proposal, it was intended to eliminate, among others, the post of Route Director (Irish Seas) and all 4 of the roles reporting to that position, including C's role of Port Manager Larne and Cairnryan.

24. Mr Steer also showed a separate chart with the proposed new structure. It showed 4 new roles reporting into the Director of Port Operations. These included three Cluster Port Director roles (CPDs); one for Dover/ Calais ("DOCA"), one for the Irish Sea and one for the North Sea. There was also a new role reporting into the Director of Port Operations which was a Director of Efficiencies and Operational Excellence. The proposed structure in the new chart also envisaged 6 new Senior Port Duty Manager roles (SPDMs). Four of these would report into the new CPD Irish Seas (i.e. one for each of Larne, Cairnryan, Liverpool and Dublin ports). The other two were proposed to respectively report into the CPDs for DOCA and for North Sea.

25. It was possible to access job descriptions for the proposed new vacancies on R's intranet. A generic job description (JD) was prepared for each of the new SPDM roles, irrespective of the port to which the SPDM was allocated. The advertised salary for each of the new SPDM roles was also advertised on the same basis and words along the lines "£48,000 p.a. negotiable dependent on experience) were used. The SPDM JD was in much shorter form that the JD with which C had been issued for his existing Port Manager role. He had a 4-page JD for his existing role which was densely populated with text and which set out at some length a list of key tasks and responsibilities, accounted for almost two of its pages. The new SPDM JD extended to little over a page and contained much less information about the key duties and responsibilities of the role (less than half a page).

26. In his presentation, JS advised that the designs were proposed designs which were subject to consultation which would include the opportunity to submit counter proposals. He explained that R would initially undertake a collective consultation process with its recognised trade union partners and that the individual consultation phase would not start until after that.

27. On 5 May, J Steer forwarded an email to individuals in the team, including C. Embedded within that email were links to R's online platform Connexions which hosted pages with the proposed operational designs and a full list of all proposed new job roles. That email explained that employees would have the opportunity between then and 17 May 2023 to reflect on the proposals and submit initial counter proposals to be considered by the business. A link was embedded by which counter proposals could be submitted. The email also said there would be an opportunity to submit further counter proposals during the individual consultations.

28. C did not submit any counter proposals in the period to 17 May 2023. LG invited him on 31 May 2023 to attend his first individual consultation meeting on 1 June 2023. Her letter said: "You will be given the opportunity to ask any questions that you have, and we will endeavour to answer what we can at that meeting".

First Consultation Meeting – 1 June 2023

29. The meeting took place on 1 June 2023. LG attended with Gemma Whitnall of HR and C attended without a companion. The meeting was brief (17 minutes). LG told C that there were no counter proposals from the ports and no changes to the structure design. C asked for a redundancy calculation and what salary he could expect if appointed to the role of CPD Irish Seas or the role of SPDM Cairnryan. He pointed out for each of the SPDM in the 4 Irish Seas ports, the duties would be different, yet the salaries were stated to be the same but said to be 'dependant on experience'. He gave some detail about what the differences would be for a SPDM in Cairnryan compared to other ports.

30. He said he was keen to have the salaries with his experience for the roles. With respect to the SPDM role, he asked: "£46,000 or £56,000? I'd like these to compare my options". He said salary would be a key influencer in being able to make an informed choice. LG asked if he wanted the scales and he said yes and asked for the upper limit for the role. C said he was considering applying for two roles but could not make an informed decision. He was told the closing date for applications was 9 June 2023.

31. LG wrote to C on 2 June with reference to the meeting the previous day and enclosed brief notes. On 4 June, she wrote to him again to invite him to a second consultation meeting on 6 June.

32. On 5 June, C sent an email to LG and Gemma Whitnall. He observed there were many omissions from the notes and provided an amended version of the notes with his additions. On the same date, C emailed LG. He declined the invite to a consultation meeting the following day on the basis, among other matters, that it was short notice, and he expected his questions to be answered before the next meeting as well as time to reflect on the answers. He said he needed the information to be able to make an informed decision. He had in mind, with respect to the duties of the SPDM role, that he wanted to be able to negotiate the best salary he could for the vacancy and to do that he felt he needed to be supplied with the information about the duties and tasks the new SPDM role would entail.

33. LG replied that day. She said she had proposed a meeting before she went on annual leave to provide C with answers to his questions. She proposed a further meeting after her return from leave to take place on 20 June 2023.

34. In the meantime, in response to C's queries, LG set out some information in her email of 6 June. She did not provide a redundancy calculation. She said redundancy would be discussed at the point when no suitable alternative employment was found. With respect to the salary for the new roles, she said this would be *'discussed during the recruitment process and negotiated with the successful candidate, as is normal practice.'* With respect to C's point about the different duties associated with the SPDM roles at the four different

Irish Sea ports, she said: *"the job description is on Connexions, this is not an exhaustive task list but details the key responsibilities for the role. Each Port may have a different operating model and as advised salary can be discussed during the recruitment process."*

35. C replied to LG's email the same day (6 June) and complained that no informed decisions could be made without answers to the questions he had asked. He queried whether the new SPDM role was just the same job he was currently doing with a different title and, therefore, whether there was even a redundancy situation. He asked for answers to his previous questions to be furnished as soon as possible.

36. On 7 June 2023, C sent a further email to LG and Gemma Whitnall to ask again for his redundancy calculation. He said *"redundancy calculations are critical … it is only once affected persons have the option of considering what alternative employment is available and making that comparison with the potential new job description and salary can affected persons make an informed choice. Withholding any known information that has been requested would be viewed as intentionally making it harder … to make an informed choice …"*

37. On 9 June 2023, Jozefine Cox, People Business Partner, responded to C in the absence of LG and G Whitnall. With respect to the redundancy enhancement, she told C: *"I can confirm the calculation will be two weeks pay for every year of service up to a maximum of 26 years, unless there is a written agreement otherwise".*

38. C replied the same day to query the multipliers for the calculation. He said *"All P&O European Ferries (Irish Sea) Ltd employees have always benefited from 3 weeks and 4 weeks pay for every year of service up to 40, over 40 years."* He also pointed out he awaited answers to his other questions.

39. Prior to the deadline of 9 June, C applied for the roles of SPDM (Cairnryan) and CPD (Irish Seas). On 16 June 2023, he withdrew his application for the CPD (Irish Seas) role on the basis that he was deterred by the travel commitment that would be required to support all four locations.

40. C and LG (whose Route Director role was also at risk) had been the only two applicants for the CPD (Irish Seas) post. When C withdrew his application, LG became the sole applicant and the role was offered to her without an interview. She accepted and soon after was appointed as CPD (Irish Seas).

41. C was the only applicant to the SPDM (Cairnryan) role at the time. If C's application for the role was progressed, R would have offered him the SPDM Cairnryan role and would have appointed him if he accepted it. He was the only applicant and R knew he had the skills and experience required to perform the role. He had performed the duties of that SPDM role which would amount to a demotion for C. Had an interview been conducted for the post, it would have been conducted by LG as Cluster Port Director and line manager of the SPDM Irish Seas role. LG knew C's skills and experience, being his line manager in the old structure. She knew that his appointment was certain if his application were to be progressed.

Second Consultation Meeting – 28 June 2023

42. On 28 June 2023, a second individual consultation meeting took place. LG attended with Jozefine Cox on the management side and C attended with his Unite representative, Alex Mills.

43. With respect to enhanced redundancy, C challenged the formula set out in JC's email of 9 June. He queried how they had arrived at a multiplier of 2 weeks. He said he believed his contract issued in 2014 would contain a Clause 19 to the effect that he would get the same, whether covered by the collective bargaining agreement or not. JC said it was a business decision to offer an enhanced multiplier of 2 weeks' pay per year of service to those not covered by the more generous terms of the collective bargaining agreement.

44. With respect to the SPDM role, C raised the issue of the salary and of the responsibilities associated with this role. He said if the role was the same as his current role, there would be no redundancy situation. (The role was plainly not the same as responsibility for Larne port had been removed but C had in mind from his experience in 2020 that R did not regard the addition of that port as a material difference). JC said, *"when you go into the interview process*

then you have the more detailed discussion about what the role entails, and if you were offered the role would have the discussion then around salary details etc.."

45. JC said, however, that they could give C an overview of the differences between the SPDM role (Cairnryan) and his present role as Port Manager (Cairnryan and Larne). LG said that the SPDM role was a grade below C's current role. She then read aloud from the job description for the new SPDM role and told C that was what the job entailed according to the JD which C had already seen. JC confirmed they would provide a list of the differences between that role and C's role.

46. Mr Mills asked if R would ringfence C's present salary if appointed to the SPDM role and JC said they would take that away. She advised that the SPDM role would not attract a car allowance.

47. Later on 28 June, JC emailed C to provide minutes of the meeting. With regard to C's point about his contract of 2014, she advised him that the only contract R had on file for C was the one signed in 2020. She said the team had located other letters and forms confirming amendments but nothing referred to the Clause 19 he had mentioned. She asked for a copy of C's contract to check the clause he was alluding to. C replied to say he did not have a copy. He asked for copies of whatever HR held so he could advise what was missing. JC replied that they had his original contract (which was dated 2000) and amendments but no newly issued contract. She didn't provide C with the documents at that time.

48. Additionally, on 28 June, C emailed JC and requested written answers to the following questions before their next consultation meeting:

- *Confirmation that business is fully aware of redundancy provisions for employees of P&O Ferries (Irish Sea) Ltd*
- *Confirmation of inclusion in minutes of question asked … that redundancy provision made for persons affected by Fleet in Dover is the same as their colleagues at that location but that the business is*

proposing not doing the same at Irish Sea locations re offering affected persons same as their location colleagues.

- *JC/LG would identify roles / responsibilities currently undertaken which will no longer be required as Senior Port Duty Manager.*
- *JC would revert re …whether it would be normal practice to ring fence salary if moving to a lesser role and whether this would be considered on this occasion.*
- *Requests to be furnished with a copy of most recent contracts 2021 and / or 2014 contract.*
- *…*

49. Later on 28 June, C sent a further email on the issue of his contractual documentation and his enhanced redundancy entitlement. He repeated his request for HR to send what they held on file for him. He also asserted his position that *"the redundancy calculation is a result of being an employee of P&O European Ferries (Irish Sea) Ltd as opposed to P&O North Sea Ltd or P&O Ferries Ltd. This is where the entitlement comes from. The same is simply now expressed in our Irish Sea contracts, CBA etc."*

50. On 29 June 2023, Paul Bennett, Regional Officer of Unite, emailed JC on C's behalf. He pointed out that he had supported employees including C at the previous restructuring in 2020 and that LG (who was not covered by the collective bargaining agreement) had received the enhanced redundancy rates then. Mr Bennett said these applied to all employees of P & O European Ferries (Irish Sea) Ltd. JC replied by letter dated 7 July 2023. She distinguished the position in 2020 on the basis that she said R was not offering voluntary redundancy as it had in that restructuring. She said that the packages offered then did not set a precedent. She refuted that any new contract was issued in 2013 or 2020 or that C's existing terms were varied to incorporate a Clause 19 along the lines C had asserted. She confirmed that R's position remained that the enhanced redundancy multiplier would be 2 weeks.

Third Consultation meeting – 21 July 2023

51. On 18 July, JC sent C an invite to a third consultation meeting on 21 July 2023. C was accompanied by A Mills and LG attended with JC on the management side.

52. In anticipation of the meeting, LG prepared a two-page comparison document which compared the Job Descriptions issued for C's existing role and that of the new SPDM role. There was nothing new in the document, in the sense that it simply lifted wording from each of the two JDs C had already seen and pasted the text in a table with the wording on one role shown adjacent to the wording for the other.

53. At the meeting, the question of the difference between C's current role and the SPDM (Cairnryan) role was discussed. LG referred to her comparison document. She said there was a significant reduction in responsibility as the SPDM role would be responsible for one port instead of two. She said headcount would be halved as well as other areas of responsibility. C pointed out that when his responsibilities increased from one to two ports, he was told this was only a small change and it was basically the same job.

54. LG gave the example that C currently set the budget for both Cairnryan and Larne and said that in the future the budget would be set by her as CPD. The SPDM would assist, she said, but would not set it. C disputed that he currently set the budget which he argued he merely proposed but was ultimately approved by LG under the existing job structures. He argued essentially that his role in respect of budget setting would not really change were he to be appointed SPDM.

55. With respect to the possible ringfencing of C's existing salary, JC confirmed R would not do this *"due to it being a significant reduction in responsibilities leading to it being a different role".*

56. C asked if anyone else had applied to the SPDM (Cairnryan) role. JC replied, *"My understanding is that you indicated that until you had clarification on the*

differences between the role and understood it better that you could not make a decision on whether you wanted to be considered for the role or not."

57. C responded: *"No, I didn't. I applied for the role and I'm still waiting on an interview."* JC refuted that. She quoted from the minute of the previous consultation meeting where C had said he could not make a decision about what he wanted to do without understanding how much of the role was similar and without understanding what his redundancy package would be. C answered*: "I was told to apply. Apologies if you were holding the process for me, but I don't understand why. Has anyone applied for the Cairnryan site?"* JC then confirmed no one else had.

58. C raised the contractual documentation he'd requested, and JC told him she would send it as part of the outcome of the meeting.

59. There was further discussion about the enhanced redundancy multiplier and JC held firm that the decision was to pay 2 weeks per year of service for those outside the collective bargaining agreement, regardless of whether management had chosen in 2020 to extend the better terms beyond those covered by the collective bargaining agreement. C and A Mills repeated their assertion that the higher enhancement had always been paid to all Irish Sea employees. C suggested that JC look at the contract of one of his managerial colleagues, which he suggested would contain the Clause 19 he had talked about to the effect that collectively bargained redundancy terms would apply. This, he said, was contained in management contracts and suggested it would also be in his (missing) contract if they were all issued in the same terms. He said that alternatively this was an implied term of his contract through custom and practice.

60. JC then asked C if he wished to be considered for the SPDM role and C replied, "I can't say until I've seen the document".

Correspondence following third Consultation meeting (25 to 31 July 23)

61. On 25 July 2023, JC emailed C a letter purporting to be dated 24 July. She summarised the meeting from her perspective. She enclosed her minutes

from the latest meeting and a copy of C's contract from October 2020 and amendment to that contract paperwork. She asked C to confirm by close of play on 31 July 2023 whether he would like to continue with his application for the SPDM role.

62. R was aware that C was on annual leave and out of the country from 26 to 28 July.

63. On 26 July 2023, he emailed LG and JC. He set out numerous additions to the minutes of the last consultation meeting minutes which he said had been omitted. He asked again for the information previously requested, namely, a list of roles and responsibilities no longer to be undertaken by the SPDM role. He asked about the revisiting of his ringfencing request and his redundancy calculation. With regard to the salary for the SPDM role, he said:

"I was earlier told that both job description and salary would only be discussed at interview and would and not beforehand. Why is it now that you are saying this has delayed my interview. I have always said I would need the information requested before deciding if I wanted to progressed interview, but never has this been suggested that this should be the company's reason for delaying any interviews it. If so the solution is simple. Provide the information requested promptly."

64. On 31 July 2023, C emailed LG and JC, copying both A Mills and P Bennett of Unite. His email included the following text, so far as relevant:

"I am mindful of your pressure on me to respond by the close of play today whether or not I would like to continue with my application to interview for the role of senior port duty manager in the absence of being able to make a fully informed decision because of the company's failure to furnish requested information, which has been repeatedly asked for re job role and salary. To require this question to be answered in the absence of providing the agreed information attempts and continues to frustrate my position to remain with the business… "

A list was requested of roles and responsibilities no longer being required to be undertaken has repeatedly been requested and remains outstanding.

Ring fencing was to be revisited.

[C repeats same paragraph reproduced above at para **[63]** from his email of 26 July regarding the delay to an interview for the SPDM role]

65. C went on to talk about new information he had gleaned over recent weeks which he suggested affected the overall restructuring picture. Among other points, he raised the following:

- *…*
- *Knowing the company's longer term strategy and set up as we are told our Directors, including Jack Steer, yourself and likely HR business partners like Jozefine know, if you no longer have anything to do with Larne Harbour Limited and P&O close Liverpool in Dublin, effectively leaving yourself being director for a cluster which consists of only the Larne and Cairnryan route, and having told me that I currently set the budgets for Larne and Cairnryan but going forward it will be yourself as Cluster Director that is setting them, are you not in effect simply doing my job role or even a lesser role? What is the difference between my current role and yours going forward?*
- *Is it not the Ports Cluster Director - Irish Sea that is truly redundant having no LHL or LIDU to concern your role?*
- *…*

So could either please tell me, how am I meant to progress towards an interview when nobody has answered job role, variations to what currently do, but don't need to do going forward and salary. Nobody is telling me the structure, job role or salary. It is coming out in drips.

66. On 31 July, LG replied by email. Her response was in the following terms so far as relevant:

… All of the concerns raised have been addressed in your last consultation meeting with the outcome confirmed in writing …

We feel that this is sufficient information for you to make the decision on whether or not to progress your application for the SPDM role.

As per … your outcome letter on 24th July, we discussed the variation in the roles however we will not be providing a task list as we feel this information is enough for you to make a decision. We also confirmed that we do not propose to ringfence salary for the SPDM role and finally it has been confirmed that your role is excluded from the CBA and [we] will mirror the approach … which is 2 weeks of pay per year of service up to a maximum of 26 years.

Based on this, we need a decision from you by 1pm tomorrow on whether you would like to progress your application for the SPDM role. Should you not make this clear to us by this time we will consider your application withdrawn.

…

67. On 31 July 2023 at 16: 56, C replied as follows:

Thank you Laura

You have now responded fully on the company's position regarding the points I have raised throughout consultation and the conflict re what is in the minutes.

With the likelihood that I have suggested it is instead the role of Cluster Director that is redundant or whether my questions have been answered with sufficient information to make the decision on whether or not to progress with my application for the SPDM role will now be for persons more learned than myself to determine.

...

In the absence of receiving anything I will await further advice from my representatives re proceeding with a job that has neither been fully explained in a structure that has not been fully explained or is being made-up ad-hoc. The company's failure to be open with my union and your telling me that there

are more 'stages' of change or redundancy's [sic] to come as part of Project Fleet... causes me significant concern and will also be for others to consider…

68. Later that day, P Bennett of Unite sent a further email to LG and JC, copying in C. It included the following text so far as material:

Dear Laura

I feel the need to intervene once again... I cannot understand why you and your business partners insist on withholding information which is crucial to anyone being able to make an informed decision. …

...

I am not convinced there is actually a genuine case for redundancy as a new role looks to be much the same as the current role …

Once again, I strongly urge that you

1. *identify all tasks removed or varied from current to new role and to what extent (words like significant and substantial will not suffice to explain this)?*
2. *How the new structure will operate?*
3. *The salary which Craig can expect for the new role given his wealth of experience of which you are all fully aware?*

Dismissal – 2 August 2023

69. LG had authority to dismiss C. She decided to do so in close consultation with JC. Either LG or JC or both also consulted with more senior managers (JS and /or PH) and had the knowing approval of senior management (whether explicit or implicit) to go ahead and dismiss C at this point.

70. On 2 August 2023 at 11:25 am, LG emailed C a letter terminating his employment with effect from 2 August 2023 by reason of redundancy. C read the letter that day. The letter confirmed C would be paid 12 weeks in lieu of notice and confirmed he would be paid an enhanced redundancy payment of

£68,212.14. This was based on the maximum entitlement of 52 weeks' pay. C received these funds, subject to deductions for tax and NI on or about 25 August 2023.

71. LG also emailed P Bennett at 11:25 am that day. She told him she did not feel that continuing the dialogue would result in the solution that either seeks and confirmed that R had taken the decision to make C redundant with effect from that date.

Appeal

72. C intimidated an appeal on 6 August 2023. PH was appointed as the Appeal Manager. On 11 August 2023, C set out in further correspondence to PH his grounds of appeal. He began by saying *"…I do not intend to repeat what has already been written during consultation, either via meeting minutes or subsequent emails. You will clearly have all this documentation already provided by Jozefine Cox or Laura Gilmour for your reference…"* C attached the outcome letter following the third consultation meeting and P Bennett's email exchange with LG dated 31 July and 2 August 2023. C did not attach other email correspondence generated between the parties during the consultation. This was not supplied to PH by either LG or JC at this time, and PH did not request it.

73. In his email of 11 August, C asserted there were insufficient differences between his Port Manager role and the new SPDM job to warrant a redundancy situation. He asserted he was entitled to a more generous enhanced redundancy package and set out his reasons for this view. He asserted the selection for redundancy and redundancy payments was discriminatory. He asserted LG ought to have been selected for redundancy and said that the two most recently redundant female managers had received more generous enhancements.

74. The appeal meeting took place on 12 September 2023. It was conducted by Phil Hills, People Director, and JC attended as a notetaker. C was accompanied by TU rep, Paul Bennettt. During the meeting, C put forward his arguments in relation to these points.

75. PH asked him if he wanted to be reinstated and he replied he didn't think he could be reinstated. PH then asked C about offering him the SPDM role, to which C replied. *"But I don't know if I would take the role".* PH asked C what outcome he sought from the appeal process and P Bennett said there were two scenarios: if R accepted C's role was not redundant, he should be returned to his substantive position on the salary he was on. If there was a redundancy, then P Bennett stated the calculation should be based on a 4-week multiplier. PH asked what the preferred solution was, and C said, *"I don't know if there is too much bad blood in the business to allow me to return. When you have directors referring to me as "him who thinks he's entitled up there"".*

76. At the conclusion of the hearing, PH advised he would investigate.

77. PH did not read, either as preparation for the appeal meeting nor as part of his post meeting investigations the following documents:

    a. the emails sent between C and LG and between C and JC between 5 and 9 June 2023;

    b. the emails between C and JC dated 28 June 2023;

    c. C's email of 26 July 2023 to LG and JC with various amendments to the minutes of the meeting on 21 July 2023;

    d. any of the emails dated 31 July from C to LG and JC nor LG's email to C of that date.

78. PH did read the consultation meeting minutes prepared by management (as unamended by C) and the invite and outcome letters of each of the consultation meetings. He also read the email from P Bennett to LG dated 31 July and her emailed reply dated 2 August which C had attached to his email to him dated 11 August.

79. Following the appeal hearing, PH declined to uphold C's appeal. He concluded (i) that C's role was redundant; (ii) that C voluntarily withdrew from the process of applying for the SPDM role; and (iii) there was no discrimination

either in C's selection for redundancy or the redundancy payment terms and no right to a more generous enhancement.

R's vacancies in period post dismissal

80. After C was dismissed, the SPDM (Cairnryan) post remained vacant until an appointment was made to the post at the end of December 2023. In the intervening period, LG "double hatted" as she put it, keeping the responsibilities of the SPDM post and of her own post restructure post of Cluster Ports Director. The SPDM Cairnryan post was the second last of the 6 SPDM posts created in the Project Fleet restructure to be filled. The last post (SPDM (Hull)) was filled in January 2024.

81. At the time of the hearing dates in April 2024, none of the posts in R's restructured ports structure as shown on the organisation chart prepared for Project Fleet was vacant. C had the qualification and skill to do all of the roles at least from the SPDM tier of management and below. He was also qualified also to take on the Cluster Ports Director posts in the tier of management above with some mentoring and support, though appointment to such a post would represent a promotion. None of the incumbents in post in R's ports management team was under notice or had indicated to R an intention to leave or retire in the short or medium term as of 12 April 2024.

82. Project Fleet was implemented with a view to achieving costs savings. If C was to be returned to a role which did not exist or was not vacant in the new structure, J Steer's view is that would be unaffordable and would undermine the cost-saving aims of the project.

83. As at 20 May 2024 (the second and final diet of the hearing), R had a vacancy for Port Technical and Assets Manager for the Irish Sea and North Sea (PTAM). The post was advertised as based in Woking though the role would require travel to R's Irish and North Sea Ports. C would be willing to travel to the ports and indeed willing, if necessary, to be based in Woking though he queried why the job should be based there given the geographical locations of the ports the role would be concerned with. C's preference would be to be appointed to the CPD (Irish Seas) post or to the SPDM (Cairnryan post) but

he would be willing to take up the role of Port Technical and Assets Manager for the Irish Sea and North Sea.

84. Although C felt embittered at how he felt he was treatment at the time of his dismissal and his appeal hearing in August / September 2023, by the time he gave evidence to the Tribunal on 20 May 2024, his attitude towards the prospect of working for R again had much mellowed. He was aware that some individuals in the business 'had moved on' and felt the R group 'was somewhere he could work'.

85. By the time of the hearing on 20 May 2024, when C gave evidence, he was in a position to undertake employment entailing a higher degree of travel than he had been willing to entertain at the time of his dismissal on 2 August 2024. C has indicated he is available to begin a new position with R immediately.

86. From R's perspective, there were no concerns about competency or ill health that could militate against a return by C to R's employment. There was no loss of trust and confidence in C on R's part which would impede his return. C had a clean disciplinary record.

Observations on the evidence

87. There was relatively little that was materially in dispute between the parties. Much of the evidence was contained in contemporaneous correspondence and the minutes of meetings together with any amendments to those minutes all of which were before the Tribunal. Although there were occasional differences of recollection between the parties about whether some particular words were said at meetings, these were not of any materiality.

88. During the cross examination of Ms Gilmour, LG gave evidence on the issue of whether she decided to dismiss C and whether she had the authority to do so which was, perhaps, rather unexpected. Although she signed off the dismissal letter, she initially suggested she didn't make the decision but latterly said she did. At one point she said she lacked authority to make the decision. She was equivocal in identifying who was consulted, other than Jozephine Cox, about the decision to dismiss C. PH gave evidence that she

indeed had delegated authority to do so, which evidence I accepted. Ultimately, I found that LG had the authority to dismiss (whether or not she was certain of that at the time). My impression of this odd passage of evidence was that it stemmed from LG's preference to distance herself from individual accountability for the dismissal decision in circumstances where she knew the decision had been the subject of discussion with, and approved by, managers more senior than she.

89. With respect to the evidence about advertised vacancies within R's group, the PTAM role was not mentioned during the April diet when PH and JS gave some evidence about the vacancies then advertised within the group. They said, essentially, that there was no suitable managerial vacancy for C in the Ports section (or at all). Mr Clarke didn't put the PTAM vacancy in the Ports team to those witnesses at that time. C brought up the vacancy when he was giving his evidence during the May diet. I infer the anomaly arises because the vacancy was advertised in the intervening period between the hearing diets. The fact of the vacancy was uncontroversial; no challenge was made to C's evidence about it. Ms Finlayson was instructed at both diets by JC of R's HR team and no doubt kept abreast of R's vacancies situation in preparation for the continued hearing, given its subject matter.

Relevant Law

90. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (s98(2)(c) ERA). An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the employer has ceased or intends to cease to carry on that business in the place where the employee was employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to do so (s139(1) ERA).

91. In general, it is not open to an employee to argue that their dismissal was unfair because their employer should not have reorganised its business in the way that it did, or should not have decided to make employees redundant following that reorganisation (**Moon v Homeworthy Furniture** [1976] IRLR 298).

92. If satisfied of the reason for the dismissal, it is for the Tribunal then to determine (applying a neutral burden of proof) whether in all the circumstances, having regard to the size and the administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA, the Tribunal must not substitute its own view of the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

93. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, the House of Lords held that:

"in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within its own organisation."

94. It will be a question of fact and degree for the Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy (**Mugford v Midland Bank [**1997] IRLR 208).

95. In order to effect a fair dismissal in a redundancy situation, an employer must look for alternative work and satisfy itself that it is not available before

dismissing for redundancy. The duty on the employer is to take reasonable steps, not to take every conceivable step to find the employee alternative employment (**Quinton Hazel Ltd v Earl** [1976] IRLR 296).

96. In discharging the obligations, so far as is reasonably possible, to find suitable alternative employment for a redundant employee, it is the responsibility of the employer, when making an offer of alternative employment, to give the employee sufficient information upon which he can make a realistic decision whether to take the job and stay or whether to reject it and leave. While it will depend on the circumstances of every case how much information is to be given, normally it is necessary for the employer to inform the employee of the financial prospects of the new job (**Modern Injection Moulds Ltd v Price** [1976] IRLR 172).

97. If a Tribunal declares a dismissal to have been unfair, it has the power to make an order for reinstatement or re-engagement. The relevant provisions are as follows:

112. - The remedies: orders and compensation.

(1) This section applies where, on a complaint under section 111 , an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—

(a) …

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113 the tribunal shall make an award of compensation for unfair dismissal …

113 The orders.

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

114 Order for reinstatement.

…

115 Order for re-engagement.

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to

reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

116. - Choice of order and its terms.

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

98. In **King v Royal Bank of Canada Europe Ltd** [2012] IRLR 280, the first instance tribunal found that dismissal was inevitable because the claimant's job no longer existed and there was no suitable alternative vacancy at the time of dismissal. It held that neither reinstatement nor re-engagement were practicable. However, the EAT disagreed. When considering an order for re-engagement, a Tribunal will err if it confines itself to considering vacancies available as at the date of the dismissal. The Tribunal ought to consider the chance of a vacancy over the whole period of consultation which any reasonable employer would have afforded. The practicability of reinstatement or re-engagement, taking into account statutorily required considerations, is to be assessed as at the date the Tribunal has received all the material to be placed before it (**Rembiszewski v Atkins Ltd** EAT 2012 WL 4808648).

99. The issue of practicability is a question of fact for the Tribunal to decide. The issue is practicability, not possibility. A Tribunal should scrutinise the reasons put forward by an employer as to why reinstatement or re-engagement is said to be impracticable and should give due weight to the commercial judgment of management unless the witnesses are to be disbelieved. The employer does not have to explore every possible avenue which ingenuity might suggest (**Port of London Authority v Payne & Ors** [1994] IRLR 9).

Submissions

100. Both Mr Clarke and Ms Finlayson spoke to written submissions. The terms of the written submissions are incorporated by reference in the interests of brievity. The entire content of both submissions (written and oral in each case) has been carefully considered and taken into account in making the decisions in this judgment. Failure to mention any part of these submissions in this judgment does not reflect their lack of consideration. The submissions are addressed in the ‘Discussion and Decision’ section below, which sets out where the submissions were accepted, where they are not, and the reasons for this.

Discussion and Decision

101. It is conceded that R dismissed C for the potentially fair reason that his post of Port Manager was redundant. The case therefore turns on whether R acted reasonably, having regard to its size and administrative resources, and in accordance with equity and the substantial merits of the case, in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA).

102. There is no dispute that R warned the employees, including C of the risk of redundancy. R's Jack Steer informed C of this risk on 4 May 2023. There was some individual consultation with C following a collective consultation phase and LG had three meetings with him on 1 June, 28 June and 21 July 2023. C's case is that this consultation was not adequate. His case is that R did not respond reasonably to queries and requests for information from him and his TU representatives throughout the consultation. He also says that R did not act reasonably in looking for alternative employment for C.

103. I remind myself that it is not for me to substitute my view of how I would have conducted the for the approach taken by R, but rather to assess whether R's approach fell within the range of reasonable approaches open to them to take. In doing so, it is important to assess the overall picture up to the date of termination.

104. Mr Clarke has identified a number of individual strands to the claim where it is said by C that the information sought was not provided or was not provided timeously. It is helpful to contextualise C's situation more holistically before addressing the detail of these and R's responses to them. C was a long serving and senior employee on a comfortable annual income. He was facing an uncertain future under the proposals R had published in May 2023. If implemented, his job role would be deleted and he would soon face a big decision with substantial financial and other implications.

105. At the time he entered the 'individual' consultation period, no counter proposals had yet been made collectively or otherwise to R's proposed structure. In terms of that structure, C's job would be deleted. C and LG, who conducted the consultation, knew well that, if he wasn't redeployed, he faced

redundancy and the prospect of seeking new work outside R's organisation. Both parties knew that, alternatively, the potential internal redeployment opportunities on the table also carried significant implications for C. If redeployed to the SPDM post, on the information published at that time, it appeared this could entail a significant reduction in pay for C (a pay cut of up to £20k).

106. LG line managed C and knew his experience and skills. Having both weathered restructures in the past they knew the enhancement formula which had been offered in previous restructures. LG was aware of C's employment history in recent years. She knew that he had taken on responsibility for managing Larne in 2020 (a job she had done herself up to her departure at that point) and that before that restructure C had been the Port Manager for the Cairnryan (only).

107. It is against this backdrop that the individual consultation process comprising three meetings and various exchanges of email correspondence commenced. In assessing the reasonableness of that process in this Judgment, I consider with the questions of whether R carried out reasonable consultation and whether R acted reasonably in looking for alternative employment for C within the same section. From a factual perspective, these issues were not separated out along neat lines in the consultation. Nor are the complaints made by C about asserted omissions exclusive to one or the other. Therefore, to avoid repetition and the risk of assessing the reasonableness of R's approach in an overly fragmented a way, I have not addressed these sequentially under separate headings. Ultimately, of course, both questions require to be, and are, answered.

108. Mr Clarke says R failed to give C precise information relating to the calculation of the enhanced sum he would receive if he were not redeployed but instead was made redundant. Ms Finlayson denies this. She said the method was given to C and was subsequently discussed with him on a number of occasions. She submitted C had adequate information in order to make an informed decision. Mr Clarke accepted that R was eventually clear about the multiplier for the redundancy payments but says that this was not confirmed

until after 4pm on 31 July 2023. He says C was not given sufficient time to consider this but was told to confirm by 1pm the next day whether he wished to proceed with his application.

109. R was initially unforthcoming about how C's redundancy payment would be calculated were he to be dismissed. It was first requested at the first consultation meeting on 1 June and R declined to confirm the position. LG said redundancy would be discussed at the point when no suitable alternative employment was found. Given the impact of R's proposals on C, that stance appeared premised on the unrealistic view that C could decide how to go forward without understanding the respective financial implications of his options. Depending on the level of the redundancy package and that of the salary of any role offered to C, there was real scope that he could be financially prejudiced by withholding information about the redundancy enhancement until after decisions had been taken about redeployment.

110. LG, at that moment, must have been aware of a real risk that C might harbour incorrect expectations of the enhanced redundancy multiplier based on his knowledge of higher historical pay outs. A lack of candour in explaining that the formula would not echo previous restructures risked C making ill informed decisions about whether or not to apply for other vacancies, believing he would receive a higher package than was the case.

111. R led evidence that the multiplier was already published on R's intranet. That may have been so, but C was unaware of it or he would not have asked LG the question at the time. LG omitted to signpost the relevant intranet page when asked.

112. However, it is important to acknowledge the information was subsequently provided. The process is to be assessed in its totality by the time of dismissal. Information about the new multiplier was first provided to C by JC on 9 June (which was the closing date for applications for the deployment vacancies) after some to-ing and fro-ing by email. She said the multiplier would be 2 weeks' pay per year of service *'unless there is a written agreement otherwise'.*

113. That opened up a new topic of discussion in the ensuing correspondence as C contested this was the correct approach for employees of R. He had lost his written contract of employment, but he said he believed it contained an express term (Clause 19) which confirmed his entitlement to be in line with employees of R covered by a collective bargaining agreement (CBA) with higher multipliers. He asked for copies of the documentation held by R for him while alternatively challenging R's approach on the basis of an asserted implied term entitling him to the higher payout.

114. There was, once again, a strange reticence when it came to disclosing the contractual documentation R held on file for C. C first requested this on 28 June and did so more than once. JC did not provide the contractual documentation R held until 25 July. R knew that C was due to be on holiday on 26-28 July. Having done so, JC asked that C confirm by 31 July whether he wished to progress his application for the SPDM role. No reason was put forward by R's witnesses for the delay in JC's provision of the contractual documents either to C at the time or in evidence to the Tribunal. JC had located the documentation herself as early as 28th June.

115. Irrespective of the correct legal position as to whether C did or did not have a contractual entitlement to an improved redundancy package, it cannot have been surprising to LG that C and his union representatives would seek to push back against the lower figure and would wish to scrutinise the written documentation held for C to satisfy themselves on his express written entitlements.

116. With all of that said, by the time of the dismissal, it is true that LG had stated unequivocally R's position regarding the redundancy enhancement formula on offer. On 21 July, JC had set out the company's position that he would be paid on a multiplier of x 2 weeks. C had then asked her to look at a contract of a particular colleague who was also a manager not covered by the CBA. JC appeared to agree to do so or – at least - did not advise that she was unwilling to do so or contest the relevance of the contents' of C's colleague's contract. JC did not follow up on this, however, and in her subsequent letter sent on 25 July she repeated the company's position on the 2 week multiplier

as did LG in her email of 31 July. By that time, R had left C with little room for doubt that it intended to pay C under the lower enhancement formula in the event of his redundancy.

117. It was also clear by 31 July 2024 that R would not ringfence C's existing salary if he were to be redeployed to the SPDM role. That had been intimated on 21st July and, though C had pushed back on the reasoning communicated by JC for that stance, that position was also repeated on 25 and 31 July. As at 31July, C was therefore aware that the salary for the SPDM role would not be as high as his existing salary.

118. 118. However, as at that date, there was still a lack of clarity about the exact salary C could expect if redeployed to the SPDM (Cairnryan) role. He knew with certainty it would not match his existing salary of approximately £68,000 plus allowances which would not be ringfenced. However, R had been steadfast in its refusal to provide any range (after initially appearing to agree to do so on 1 June). R latterly insisted from and after 6 June salary for the role would be 'negotiated with the successful candidate' at interview.

119. Ms Finlayson submitted that this was a perfectly reasonable approach for R to take. There was no requirement, said Ms Finlayson, for roles to have salary ranges.

120. It is correct, of course, that there is no specific legal rule requiring ranges to be published for advertised roles. It is within the judicial notice that advertising vacancies with an indicative salary and words like 'negotiable dependent on experience' is a common practice.

121. However, the circumstances here, as they stood on 31 July 2023, were rather specific. C was at risk of redundancy. R had a duty to make reasonable efforts to find C alternative employment. He had applied for the vacancy before the 9 June deadline and been told he would be given priority over any other applicants who were not at risk. R knew C was, in fact, the only applicant. R also knew, beyond a shadow of a doubt, that he had the skills and experience to perform the job. He was already performing many of the duties or had done so in the course of his career. LG, who was conducting the consultation and

would also be his interviewer, knew with complete certainty that he would be offered the job following interview. She knew well what skills and experience C would bring to the role.

122. It was not spelled out in the evidence of R's witnesses what purpose the intermediate step of holding an interview was intended to serve. The question was not specifically addressed. LG herself had been appointed to the CPD (Irish Seas) role in the same restructure without interview when she was the only applicant for that post, following C's withdrawal of his application. I do not suggest that it necessarily fell outside the range of reasonable approaches for R to hold an interview (and that is not an argument asserted by Mr Clarke) but it is relevant to acknowledge the particular circumstances in which this interview was proposed.

123. One purpose which R anticipated the interview would serve would be to negotiate with C the salary for the role. LG had said on 6 June that salary would be discussed during the 'recruitment process' and had told him this was normal practice. In and of itself, it was not objectively unreasonable to defer the negotiation to take place in that context. C would, after all, be under no obligation to accept the post if the salary could not be negotiated to a level he considered satisfactory, in circumstances where he would be weighing this against the alternative enhanced redundancy option.

124. What then occurred was in effect a standoff between the parties. R insisted that C confirm his interest in the SPDM role in a tight time frame. C declined to give that confirmation in circumstances where he awaited information requested from R. Most importantly, for present purposes, he awaited a list of tasks and responsibilities no longer required to be undertaken by C. He had requested this from early June. Although JC had suggested on 28 June 2023 that they would provide an overview of the differences with C's current role, this was not provided. Latterly, C asked for this on 31 July 2023 at around 1pm and his representative repeated that request at 5.25pm on the same date. LG refused to provide further information on the matter. She had previously discussed her two-page JD comparison document with C during the third consultation meeting on 21 July 2023 but this did not identify, as C

had requested, which of the tasks listed in C's existing job description would be removed from the SPDM role.

125. C's complaint about the failure to provide information about the tasks and responsibilities being removed from his existing role to form the SPDM role straddles both the question of the reasonableness of the consultation and of reasonableness of the efforts to look for alternative employment for C. C says this information was needed to enable him to identify if there was a genuine redundancy situation and formulate possible counterproposals. It was also his position that he needed this information to enter a meaningful negotiation in relation to salary at any interview for the SPDM post, to adequately prepare for the interview, and to understand the role he would be doing if appointed.

126. Ms Finlayson said it was a reasonable approach for R to take. R denies that it hadn't provided the necessary clarification. In Ms Finlayson's submission, R had answered C's questions and given C the JDs. It was, she said, reasonable for R to decline to make a list of tasks being removed. C had ample information to allow him to assess the differences. Ms Finlayson also relied upon C's comment in his email of 31 July 2023 where he said: "you have now responded fully…" She argued LG was entitled to take this at face value.

127. I consider first the point about C's email where the first sentence purported to accept the company had responded fully to his queries. That sentence was indeed strange. Though C didn't characterise it as such when giving evidence, I concluded it was a petulant and sarcastic remark. I find that this was evident in light of the remainder of C's email that day and in light of the email sent on his behalf shortly after by Mr Bennett, I do not accept that LG either did or was reasonably entitled to hold the belief that C was satisfied that all his queries had been adequately answered given the terms of those communications.

128. I consider next whether the information R had already provided about the nature of the SPDM role was reasonable and sufficient in all of the circumstances as R contends. If the sole purpose of providing the information were to allow C to assess whether there was a genuine redundancy situation

for the purpose of the statutory definition, the information provided in the brief JD for the SPDM role probably sufficed to enable him to assess or take advice on that question.

129. However, that was not the only relevance for C of the information sought. C wished to understand what he would be doing if he took the SPDM role. He was particularly keen to understand if he would be performing largely the same duties in relation to the Cairnryan Port as he was then undertaking in his existing role (or in his pre-2020 role) but potentially for substantially less money.

130. When C was being pressed to confirm he wished to progress his application, he didn't have the information about how the day-to-day tasks differed, other than on the question of budget setting in relation to which he disputed the substance of the difference. One purpose of the interview was to negotiate the salary for the role. I am not persuaded it fell within the range of reasonable responses to expect C to agree to proceed to enter such a negotiation without the information relating to job duties. The wider the overlap between the duties of the roles, the stronger C's position might be in the negotiation that his current salary, or in any event his pre-2020 salary, ought to inform the salary the SPDM role would attract.

131. To go through the page and three quarters of C's key tasks and responsibilities in his existing job description to identify those he would not longer be required to carry out would not have been a be a particularly arduous task for LG as CPD and line manager to the new SPDM. On the particular facts and circumstances of this case, the refusal to do so while insisting C confirm his commitment to progress his application did not fall within the range of reasonable approaches. R had a responsibility to give C sufficient information upon which to make a realistic decision on whether to take the job and stay or to reject it and leave. R was not willing to be definitive about either the salary or the duties which, in this particular case, left C in a problematic position when making his decision. There was a lack of clarity in LG's evidence as to why she could not have explained with relative ease which of C's duties would no longer apply in the lesser role.

132. Mr Clarke submitted that PH did not obtain all the relevant documents during the appeal and thus fell into error in concluding C had withdrawn from the process of applying for the SPDM role voluntarily. Ms Finlayson said PH held a lengthy meeting with C when C had a full opportunity of discussing his appeal points. She said failing to review all the emails which formed part of the consultation was a reasonable approach for PH to take in circumstances where he believed he had enough evidence to decide the issues raised.

133. It is relevant to bear in mind the substance of the appeal advanced. The internal appeal did not proceed on the same grounds as the unfair dismissal claim before this Tribunal. Broadly, C argued (i) his role was not redundant;(ii) he was entitled to a better redundancy package; and (iii) his selection for redundancy and the level of redundancy payment on offer was discriminatory on grounds of sex. Whether the consultation had been inadequate was not a principal issue for determination by PH, as it is in the present forum. In those circumstances, it was not outside the range of reasonable responses for PH to omit to seek out copies of all correspondence connected to the consultation process where C had not signposted him to particular documents claimed to be relevant to the appeal advanced.

134. A concerning omission, however, in his approach was that PH read the consultation minutes prepared by R but was not provided with C's amendments to these and did not, it seems, enquire whether the minutes were agreed. There were some detailed amendments put forward by C to the minutes of the first and third consultation meetings in his emails of 5 June and 26 July 2023, neither of which were reviewed by PH. Had this been the only flaw in the procedure in the case, it is unlikely that I would have found it sufficiently serious to render the dismissal unfair in and of itself. By far the more significant defects related to the failures discussed above to provide C with the information he needed to assess whether to pursue the alternative employment available.

135. Looking at the picture holistically, I am satisfied that R's approach fell outside the range of reasonable responses in this case. R knew that for C to make an informed decision about his options, he had to understand fully the

implications of each of them. R knew the financial consequences of C's choices could be considerable. There was an unreasonable reticence and delay in confirming the redundancy package on offer then in providing copies of C's contractual documentation when he challenged this. These were forthcoming in the course of the consultation and, again, would not of themselves have been fatal to the fairness of the dismissal. However, these combined with the more fundamental defect which was R's insistence on a tight timescale for C to confirm his interest in a role following its persistent refusal to provide exact salary information for that role or to provide more detailed information about the duties of the job. That refusal had the scope to disadvantage C in preparing for the salary negotiation R insisted upon having, and also more generally deprived him of a sufficient understanding of the nature of the redeployment option on the table.

136. R was a large employer with significant access to HR support. The unfairness lay not its substantive decisions to restructure its operation or to decline to ringfence C's salary or to use a lower multiplier than had used previously when calculating redundancy enhancement. Nor did it lie in R's election to attach a much lower salary to the SPDM post (if indeed R did so). What I conclude fell outside the range of reasonable responses for an employer of R's scale and administrative resources was the level of information communicated to C and the timing of that information.

Remedy

137. Mr Clarke in his submission accepted that a reinstatement order was not practicable for R in circumstances where C accepted that his previous role was redundant. He therefore sought instead a re-engagement order. He said it would be practicable to make such an order because there was no evidence that C would not be competent. Mr Clarke also asserted there was no evidence from R of the financial effects on the business. Nor, said Mr Clarke, was there a lack of trust and confidence or relationship difficulties between C and his colleagues. C's health or capability posed no obstacle. He observed that R is a large and well-resourced employer. Mr Clarke did not make submissions on the specific role to which he asserts C should be re-engaged.

138. Ms Finlayson referred to evidence given by JS that there was no vacancy currently for senior managers in the ports team and that no one was expected to retire soon. She referred to evidence that finances would not permit C to be brought in to assist with a role which was already filled. She pointed out PH's evidence which had been that there were no vacancies in the area other than low paid dockers and a Route Ship Manager role (which she said required significant technical expertise).

139. Ms Finalyson also referred to C's comments at the appeal stage that he couldn't return to his role. She also noted he had previously withdrawn his application for the CPD role in June 2023 because of the travel commitments. She pointed out too that the SPDM role was now occupied.

140. Neither Ms Finlayson nor Mr Clarke addressed me specifically on the evidence I heard from the claimant during the May diet about the advertised vacancy for the Ports Technical and Assets Manager for the Irish and North Seas (PTAM). Ms Finlayson did not cross examine C on this evidence. She did not dispute the vacancy existed or put to him that he was in any way unsuitable for it. She did not put to him that it would not be practicable to appoint him to the role for any reason. C said he would be willing, if necessary, to travel to Woking where the role was advertised as based, though he could not see why the role should require to be based there given the locations of the ports with which it is concerned. There was no evidence before me that the PTAM role was not suitable employment for C for the purposes of section 115(1) of ERA.

141. The point at which I require to assess the practicability of a re-engagement order is not at the time at dismissal but as at the date the Tribunal has received all the material to be placed before it (**Rembiszewski**). In this case, that date was 21 May 2024. I had no reason to disbelieve C when he said he would be interested in being re-engaged by R as at that date and that he would be open to the required travel associated with the PTAM role (North and Irish Seas) (PTAM). His attitude may have differed or mellowed from that suggested by his comments in June and September 2023. Ultimately, I have found as a fact

that this was his attitude at the relevant time when his evidence was taken in May 2024.

142. As Mr Clarke pointed out, there is no evidence of a breakdown of trust and confidence in this case or of unworkable personal relationships or of health or competency concerns which might render a re-engagement order to the PTAM position. Nothing of the sort was put to C in cross examination. Nor is this a case where R claims that C has caused or contributed to the dismissal.

143. My reading of the provisions of sections 115 and 116 is that I do not have an unfettered discretion to decide whether re-engagement is 'just' based on all matters about which I have heard evidence during the hearing. I must take into account C's expressed wish as to the nature of the order to be made and whether it is practicable for R to comply with a re-engagement order. Beyond that, I could only decide whether it is just to order re-engagement in a case where C had caused or contributed to the dismissal. This is not argued here.

144. My understanding of the provisions and the authorities is that the fact that C's was a redundancy dismissal that has been found to have been procedurally unfair is not of itself a barrier to ordering re-engagement. Indeed, that is not a relevant matter for me to take into account save insofar as it might have a bearing on practicability of compliance. Likewise, the **Polkey** question of whether C would have been fairly dismissed in due course had a fair procedure been adopted is not a factor for consideration in deciding whether to make an order for re-engagement (again unless it might be said to bear upon practicability).

145. In the circumstances, I find that it is practicable for R to comply with an order for to re-engage C to the PTAM post.

146. Given parties have not addressed the precise terms of the re-engagement order in any detail in their respective submissions, I have issued a Case Management Order of even date to explore whether those terms may be capable of being agreed between the parties or alternatively to invite further submissions on the terms contended for by the respective parties. Any such submissions shall, of course, be based on the facts as found in this Judgment

and premised on the finding now made that re-engagement to the PTAM role is practicable.

147. Having found that it is practicable for R to comply with an order for re-engagement, it is unnecessary to go on to consider the **Polkey** question relating to a prospective compensatory award.

Employment Judge: **L Murphy**
Date of Judgment: **19 June 2024**
Entered in register: **20 June 2024**
and copied to parties