Case No: 2501174/2016

EMPLOYMENT TRIBUNALS

Claimant: Mrs MA Gibson

Respondent: Thirteen Group (1)
Thirteen Housing Group Limited (2)

Heard at: **Middlesbrough** **On:** **27, 28 February and 2 March 2017**

Before:
Employment Judge JM Wade

Representation
Claimant: Mr Hargreaves (solicitor)
Respondent: Ms E Hodgetts (counsel)

RESERVED JUDGMENT

1 The first respondent is removed from these proceedings pursuant to Rule 34.

2 The claimant's complaint of unfair dismissal against the second respondent is not well founded and does not succeed.

REASONS

Introduction, complaints and issues

1 This was a single complaint of unfair dismissal, but concerning a widespread collective redundancy and appointment exercise carried out by the respondent in the early part of 2016, as a result of which there were some twenty three compulsory redundancies. The dismissal was a personal tragedy for the claimant, coming at a time when she had recently adopted two children, with a previously stable, rewarding and advancing career. Oral evidence was heard over three full days, with no time for an extempore decision. The parties were desirous of an expedient decision.

2 The issues covered well trodden ground with a particular focus: what was the reason for dismissal? Was it, as the respondent asserted, redundancy: its need for employees to carry out work of a particular kind had ceased or diminished? The claimant accepted that the respondent's need for employees carrying out the work of Neighbourhood Managers ("NMs"), the post she held, had diminished (from five to three); she did not, implicitly in the case put on her

behalf, accept that it had diminished from five to zero, such that appointment to a new post of Area Manager ("AM") was required. She asserted theArea Managerrole, was a development of theNeighbourhood Managerrole, but was substantially the same.

3 The claimant did not pursue a case (suggested by her witness Mr Trodden) that the respondent's exercise had been in bad faith, or manipulated or targeted to produce the result of her dismissal: they would have been impermissible reasons. Had she done so, the findings of fact I would have needed to make would have been more extensive. The height of allegations made by the claimant against Mrs Glew, her manager were of a failure to act, being flippant, and through the evidence of Mr Trodden, seeking to advantage NMs who reported to her, (including the claimant) over colleagues who reported to a different manager. There was a potential tension in the allegations of Mr Trodden and those of the claimant.

4 Also in this hearing the claimant did not put to the respondent's witnesses or seek any inference concerning her interview scores or the way they were translated or transcribed. I inferred that was because either those acting for her or the claimant herself had established nothing turned on it.

5 The second issue in the case, if the respondent establishes a Section 98(1)(b) or (2) reason, is whether it acted reasonably or unreasonably in treating it as sufficient reason for dismissing the claimant, having regard to the reason established.

6 It was common ground that the Section 98(4) test requires the application of the "range of reasonable responses" principle. That is, some employers would dismiss in particular circumstances and some would not or would take different steps, all of which may be reasonable: a dismissal is unfair if it is outside a range of reasonable (albeit different) responses to given circumstances.

7 The claimant advanced a large number of reasons why her dismissal should be found to be outside the range, including that the respondent carried out a particular selection process, and appointed an external candidate. The respondent said its actions were within the band.

8 There were also some factual matters in dispute, but I have resolved them only to the extent relevant to the issues.

Evidence

9 The Tribunal heard oral evidence out of order for practical reasons but with no impact on the fair hearing of the case: Mr Trodden, on behalf of the claimant and a former Neighbourhood Manager also dismissed; Mrs Lowther, head of HR, much involved in the collective consultation process; Mrs Joynes, Organisational Development Manager, responsible for the Area Manager (and other) appointment exercise; Mrs Glew, Head of Housing, and the claimant's manager; Mrs Smith, a Director who heard the claimant's appeal; the claimant.

10 The respondent's oral evidence was properly divided up between the relevant witnesses; the strain of giving evidence in the claimant's case fell on her alone (in the large part), and all matters had to be put to her. She needed clarification and was hesitant at times, and changed her responses at times.

Notwithstanding that, I consider all the witnesses were doing their best to give a truthful account to the Tribunal; whether that account was reliable on certain matters is a different question and I explain below, where I have needed to make factual findings adverse to one or other party.

11 The Tribunal also had before it a bundle of some five hundred pages of documents, to which there were agreed additions, at times at the request of the Tribunal. For the sake of clarity, Mrs Joynes (a witness in these proceedings) is married to Mr Joynes, who appears in the findings of fact below as the other head of housing and colleague of Mrs Glew.

Findings of Fact

Background and the 2014 appointment process

12 The respondent provides housing to those on low incomes. It is a large employer (around fourteen hundred employees). It has a large "People" ("HR") function (over fifty staff). Its present form arose through merger with similar providers in 2014. Its housing stock spans thirty two thousand homes in the north east.

13 The claimant had continuity of employment with the respondent from 3 August 2009. In 2004 she had been awarded higher education qualifications in housing with distinction.

14 In 2014, as a result of merger, the claimant competed with colleagues for the post of Neighbourhood Manager and was appointed; others were not, but secured lesser posts (for example a Mr Horrocks was appointed to a Neighbourhood Team Leader post. The claimant's manager became Mrs Glew and they became friends. The claimant received good performance reviews: she was well regarded by Mrs Glew and vice versa.

15 In the 2014 exercise, the respondent had been bringing organisations and staff together. Staff were allowed to apply for many roles, with the expectation that those who achieved the greatest scores (against the number of posts to fill) in any exercise, would be appointed. The claimant had not previously held the Neighbourhood Manager position. Other applicants had. The appointment exercise involved an interview, presentation and "in tray" exercise. Mrs Glew and other heads of service were free to decide from a menu of appointment tools, the process for appointment to those posts.

16 As to junior posts in the 2014 exercise, Mrs Glew, applied a "threshold" score to a neighbourhood officer post, of which Mr Trodden, also involved in the appointment had been unaware prior to the interviews taking place. The application of that threshold resulted in the posts being advertised externally because at least one internal applicant, albeit in the top internal performers, did not meet the threshold and the posts could not be filled from exclusively internal candidates.

17 I make this finding for a number of reasons. Mr Trodden was unwavering when questioned about when the threshold was applied, and had maintained a sense of unfairness about matters. His evidence as to the particular scores between the margin for appointment and the impact on individuals, was detailed and considerably less than the threshold put to him as the true threshold. There

were no rebuttal documents presented, although given the passage of time, this may not have been possible. Many if not all of the respondent's documents in this case have been electronically generated, but data protection principles may have resulted in disposal of 2014 papers. In the 2016 process, the Unions raised concerns about the 2014 Tier 4 process.

18 In short, I am faced with little more than recollections: the clear recollection of Mr Trodden, albeit he felt disgruntled about his own dismissal, and that of Mrs Glew.

19 Mrs Glew's recollection was not detailed. She was clear from her own experience that her expectation had been that every team would have a benchmark. She did not assert in her oral evidence (and nor did any of the other respondent witnesses) the particular higher benchmark put to Mr Trodden (71.42 percent). She recalled discussion about lowering the benchmark to enable internal candidates to be appointed, which she had not endorsed. That is not so dissimilar from her maintaining a benchmark in a meeting with Mr Trodden, albeit he had previously been unaware of it. Mrs Glew's maintenance of a benchmark for appointment is also a principle born out by the later events in this case.

20 Mrs Glew denied Mr Trodden's very particular allegation of **introducing** a benchmark specifically to exclude one candidate. In the findings above I do not resolve this particular conflict. It is a very serious allegation of bad faith (and not one made by the claimant). It is unnecessary to make that finding, given the claimant's case; and it is not just to do so, when, as I have explained, the relevant documentation about that exercise is not available to me.

Development of the Neighbourhood Manager role

21 From the summer of 2015 the respondent's housing sector was under financial pressure: welfare reform affecting tenants' means and a requirement from the regulator that the respondent save £55m over four years. Changes were inevitable. Mrs Glew anticipated that there would be redundancies as a result and shared this view with a colleague, Mr Hanif that same summer, when the claimant was on adoption leave.

22 Mrs Glew had three Neighbourhood Managers reporting to her (Mr Hanif, the claimant, and Ms Iveson for Hartlepool). She directed them to work with wider colleagues to focus on core activities, the "three Rs": rent, renewals and repairs. The financial strain on the respondent meant less emphasis on the "nice to have" elements of their jobs: the creation and support of thriving neighbourhoods. Around this time the respondent had established that about 70% of the work of neighbourhood officers was spent on core activities, and around 30% on the "nice to have" elements to create thriving neighbourhoods.

23 There were other operational managers with specific targets and accountability for the three R items (such as the repairs manager and department), but the Neighbourhood Managers were asked to work more effectively with those managers to increase rent collection, minimise debt, and reduce empty properties.

24 By November 2015 meetings were arranged by the claimant and others to more effectively address the three Rs, and they were discussed in performance management meetings or one to one meetings with Mrs Glew. Targets were set.

25 Mr Joynes, who managed the Middlesbrough housing team via two Neighbourhood Managers including Mr Trodden, did not embark on such an initiative.

26 At around the same time Mrs Glew (but not Mr Joynes) arranged team building and Myers Briggs activity for her team to address the way they worked together. It is clear Mrs Glew was anticipating an organisation under strain, with a review and cuts imminent, and that her team would have to be resilient and focused on core activities.

The 2016 review

27 By 10 February Mrs Glew and Mr Joynes had finalised a review of their service and how their departments would contribute to organisational savings. They proposed the deletion of the five Neighbourhood Manager and seven Neighbourhood Team Leader posts, and the creation of three Area Manager and five different Neighbourhood Team Leader posts in their place. Other department heads produced reviews with a similar purpose. The Glew/Joynes review document was not shared with the affected staff. It did not envisage any redundancies at the Tier 4 level (that is over fifty front line housing officers in the department), but only amongst management.

Collective and individual consultation about redundancies

28 On 11 February 2016, in possession of the various service reviews proposing reductions and changes to posts, the respondent informed its recognised trade unions that redundancies were a possibility and formal consultation would start on 24 February.

29 On 24 February the unions were provided with a comprehensive consultation pack which included details of posts to be deleted or reduced, new posts and the process and timetable. The timetable reflected feedback from staff that the 2014 exercise had gone on too long. It was also clear from the documents that selection for redundancy and appointment to new posts was not to be undertaken by a conventional redundancy matrix scored by managers, but in the main by interviews, and for some, by the use of additional appointment tools.

30 The reason for the respondent abandoning historic appraisal or other data as a means of selection was the inconsistency across departments and locations in that data, and approaches to appraisals, (the respondent having developed from the coming together of different organisations).

31 From the outset the unions secured early changes to the proposals: those whose posts were simply being reduced in number would not have to complete an application form, and only when they did not attend an interview or indicate voluntary redundancy would they be discounted; the time line for notices of dismissal (and dismissals taking effect) was pushed back; the time line for applications for new posts was extended.

32 The claimant was not a union member. She did not understand that the respondent could lawfully consult and agree changes concerning a redundancy process with the recognised trade union, which might affect her.

33 The claimant attended a "mandatory" meeting with Mrs Glew and Mr Joynes the same day with her fellow Neighbourhood Managers and Neighbourhood Team Leaders. When a company announcement was read out and slides shown indicating the reduction and changes to posts, there was a degree of "shell shock". All attendees then knew there were to be fewer posts and that there would be a competitive process for the new posts.

34 I do not accept that prior to this meeting Mrs Glew had told her team of the review proposals to advantage them. This was an allegation levelled by Mr Trodden; it was inconsistent with the claimant's evidence of "shell shock", which I accepted. It may well be that Ms Iveson said to Mr Trodden and Mr French "I can't believe he didn't tell you" referring to Mr Joynes; it may well be that Mrs Glew told Ms Iveson why she had to travel to a meeting or there was some other relevant context to the conversation; I accept Mr Trodden's evidence of what he heard by way of one line comment, but it is not the basis for a finding that Mrs Glew told her full team of the detailed proposals which were announced to all at the same time on 24 February, or in any other way sought to advantage them.

35 The full information provided to the Unions was not available to the claimant and her colleagues at the time of the announcement or subsequently. The claimant did not understand that she could have approached the unions, not being a union member.

36 The claimant and her colleagues had access to the new post job descriptions and the application forms, and were made aware of the timetable; they had the organisation charts, information on how to apply for voluntary redundancy, and appointment principles. They did not have the detail of all the proposals (pages 454 to 479), nor a document called "recruitment process" (98-99), which set out how appointments were to be made.

37 In a section headed "who are we proposing to dismiss?" the umbrella document said this: "Overall this equates to 117 staff being placed at risk of redundancy. However, there are also a number of newly established posts being created as a result of these reviews, which, with the exception of the YEI posts, will be ring-fenced for those at risk of redundancy, thereby reducing our total redundancies further. We therefore anticipate that there will be approximately 69 redundancy dismissals".

38 That indication of unrestricted access to new posts was modified later in the document: where posts involved significant change or there is a new role, "the full recruitment process will apply" such that a member of a ring fenced group was not guaranteed to secure the post if they did not meet the requirements of the role.

39 The recruitment process document set out a marking scheme for the interviews and was clear that all candidates had to reach the benchmark score at interview. It was not clear that where other recruitment tools were used, there was a combined or other benchmark for the additional tool used.

40 The document also provided that for posts where numbers were reducing or there was minor change, if posts were unfilled due to a failure to reach the benchmark, consideration would be given to appointing the highest scoring incumbents supported by training or a development plan.

41 In collective consultation meetings, of which there were many, the unions notified that the appointment/recruitment principles and processes were acceptable, but that they could not be treated as agreed in case the unions were later called upon to challenge them.

The Area Manager post compared with the previous Neighbourhood Team Leader post

42 The job descriptions for the two posts were very similar. The knowledge, skills and qualifications were identical. The summary of the post and accountabilities were subtly different. To an uninformed observer, there was barely a difference; but for a housing specialist it was apparent that Area Managers, unlike Neighbourhood Managers, were to have joint accountability for key performance on rent, repairs and relettings, measured by empty property and other key data. They were to chair the staff panels of specialists regularly reviewing that data to make sure that performance was achieved. The focus on meetings with the local authority and others to create thriving neighbourhoods was removed. These changes were mirrored in similar new team leader posts.

43 The salary was the same for the two posts; and when the new post had been entered into the respondent's job evaluation matrix the values from the old post had simply been transcribed across.

44 For two out of the three posts (Stockton and Middlesbrough) the geographical area, housing stock and underlying tier 4 staff numbers would expand by virtue of the reduction in posts. For the Hartlepool post held by Ms Iveson the size of the housing stock and underlying staff would remain the same.

The Area Manager appointment process

45 The claimant knew from discussions with Mrs Glew and information provided by Mrs Joynes to all candidates, that the appointment process was: a written application, which if passed led to the next stage; a competitive interview contributing 80%; a verbal reasoning test contributing 20%.

46 The claimant believed, consistently with the written information provided to the unions, that there was a benchmark for the interview and that failure to meet it would result failure to secure the post. She did not know that the minimum requirement for appointment was 66.6% measured over both interview and verbal reasoning elements. That information was nowhere documented or available to candidates, but it meant that a lower score in one element could be mitigated by a higher score in the other.

47 The written information to the unions was clear that an average of 4 out of 6, or 66.6% was required at interview, but it was not clear that if an additional appointment tool was used, the threshold or benchmark applied to the combined appointment tools.

48 Mrs Joynes had attended and presented generic information to the unions, but for two reasons this particular issue was not covered. Firstly there were no questions about the Area Manager or Neighbourhood Team Leader posts (union membership was not high in those groups); secondly Mrs Glew/Mr Joynes were the only managers to choose a verbal reasoning test as the other appointment

tool and they set the weighting in consultation with HR.

The choice of a verbal reasoning test

49 Mrs Glew and Mr Joynes discussed the menu of appointment tools with Mrs Joynes; they had used an "in tray" and "presentation" exercise as part of the 2014 process; they were shown verbal and numerical reasoning tests which they had not used before; they considered verbal reasoning would test something new that was relevant. They considered the new posts would need to assimilate performance information and other complex housing issues quickly, and provide analysis and recommendations. There was no agenda to advantage or disadvantage any particular candidate. The tests were objective with correct or incorrect answers and the capacity to compare the marks to relevant external groups to produce a percentile comparison.

50 That objectivity was an advantage over interviews, desktop exercises and presentations which had to be scored or marked by Mrs Glew and Mr Joynes. They knew all their managers could perform in their then roles (they had only been competitively selected two years before).They also knew that they had to appoint to new roles, which were likely to be more challenging. They needed to appoint the best of those managers using a fair process. The decision was taken to use the verbal reasoning test across both the Neighbourhood Manager and Neighbourhood Team Leader groups.

The process as it impacted the claimant

51 Between 24 February and 11 March, the closing date for applications, the respondent provided workshops for interview skills. The claimant downloaded the information but did not attend a workshop. She was focused on reassuring her team of Tier 4 staff that they would not be affected and on carrying out her "day job", whilst competing for a new job.

52 The claimant had two catch ups with Mrs Glew on 3 March and 8 March. On 3 March Mrs Glew recommended the claimant apply also for a team leader post, to which the claimant took offence. She said the same thing to Mr Hanif, the claimant's colleague in the same position.

53 There were discussions of the reasons for the review and the claimant made the point that with housing operations going through this process first (of the various departments) there was less likelihood of being able to apply for other posts if neighbourhood managers were not successful. That was also context for recommending applications for the lesser post. Mrs Glew did say she wanted to get the process over with.

54 On 4 March Mr Hanif vented his frustration about the respondent and its leadership with Mrs Glew and indicated he would not be applying for an Area Manager post. He intended to apply for a different post. He was angry and a few days later diaried an exit interview lunch with Mrs Glew to apologise for his outburst. From that point, I accept the claimant's evidence that he "disengaged" or took bat and ball home in terms of work output and the claimant took up some of that strain. That is entirely consistent with Mrs Glew's later request for the claimant to cover the role until an appointment was made and that she had shown all the right behaviours.

55 At the 8 March catch up, the claimant questioned the use of verbal reasoning and was told by Mrs Glew, well we all know you can do presentations, and not to worry, or words to that effect. The claimant considered this flippant to her expression of concern. Privately on this occasion she expressed that concern about testing. Earlier, when discussing verbal reasoning with her team leaders, who were also going to be subject to the same test, she had said words to the effect, " it would be worrying if I could not do it" and had been light hearted.

56 Mrs Glew did not pick up on the difference in the claimant's private and public position about testing - she had no reason to think the claimant would not perform well. The claimant did not emphasise or explain in any detail "exam" stress or a particular difficulty with testing such that Mrs Glew realised there was any issue. On this I reject Mrs Glew's evidence that the claimant did not express concern at all, because had she done so, Mrs Glew would have taken further steps. I consider the claimant did not make much of her worries, but she did express them; Mrs Glew does not recall it because perhaps she believed no doubt the claimant would be fine; sadly, her judgment on that could not have been more wrong, notwithstanding the very high regard she had for the claimant.

57 By 11 March all the applications were in and were then marked, with everyone passing through to the next stage. By email on 16 march the claimant was told of the interview and verbal reasoning schedule and was provided with a verbal reasoning test example. She was also told that that if she had any concerns or questions, she should raise them with HR. Her colleague Mr Trodden researched the tests and practiced them before his assessment date. The assessments took place on 16 and 18 March; there were five applicants: a team leader who had previously been a manager, the claimant, Mr Trodden, Ms Iveson, and Mr French.

58 The interviews took place before the verbal reasoning. The interview panel was Mrs Glew, Mr Joynes, and a Mr Till, who had no specialist knowledge of the posts or department, operating as a balance or moderator without knowledge of the candidates. The claimant was told by Mrs Glew she passed the interview. She had scored third out of the five candidates and more then 66.6%.

59 After the verbal reasoning tests Ms Iveson complained to HR because of having suffered a migraine during the test and Mrs Joynes, after taking advice and discussing matters with Mr Joynes and Mrs Glew decided that all candidates (including team leader post applicants) could take the same test again and the best score would count.

60 The human resources business partner who supported Mrs Glew and Mr Joynes' department knew of the scores and was involved in the marking. She liased with Mrs Glew and Mr Joynes concerning the re-test.

61 As a friend, rather than as a colleague, Mrs Glew told the claimant that Ms Iveson had complained about the first test, that there was to be a second one, and strongly advised the claimant to take the test again. The claimant took from this (correctly) that she had failed or not been successful in the verbal reasoning.

62 The claimant then asked Mrs Joynes whether there was a pass mark for the verbal reasoning; Mrs Joynes said she did not know, which was an honest answer, because the selection was based on the overall mark for verbal reasoning plus interview: a failure to meet the benchmark on one, could be

addressed by a high score on the other. Mrs Joynes did not explain that to the claimant, and nor did Mrs Glew. The claimant however knew the process was competitive and her interests were best served by performing at her best.

63 All candidates took the test again and were then given formal feedback in one to one meetings. The claimant had scored the lowest raw mark in verbal reasoning amongst both the team leaders and the area manager candidates. This meant that although she remained ranked third as a potential area manager, her combined score was less than the 66.6% threshold. Mr Trodden and Mr Horrocks who were in fourth and fifth place were in the same position and were not appointed. Mr Trodden was later made compulsorily redundant.

64 At the end of March following discussions with the claimant, Mrs Glew sought HR approval for the claimant to continue with the Neighbourhood Manager post until an external candidate (or different internal candidate) could be appointed to the Area manager post. HR confirmed that the new Area Manager structure would not come into place until all those at risk of redundancy had either been found other posts or made compulsorily redundant.

65 Mrs Glew's department had made a commitment to deliver savings from 1 April and therefore her preference was to advertise again internally and externally at the same time to be able to move forward with savings as soon as possible. HR reigned in that wish: the internal advert went out first and Mr Hanif applied, having failed to secure the other post for which he had applied.

66 Mr Hanif then went through the process, did not meet the benchmark by virtue of his interview performance, but scored more highly overall than the claimant through better performance in the verbal reasoning. He was then subject to compulsory redundancy also. His partner had recently had a child.

67 On 31 March the claimant had a formal consultation meeting concerning her likely redundancy as a result of failing to secure the Area Manager post; she applied for an alternative vacancy but was not successful. She had a further consultation meeting on 11 April.

68 The claimant then raised questions about the process and had a meeting with Mrs Joynes towards the end of April. At that meeting she asked for her scores and she asked why candidates who had not met the benchmark were not appointed with training. Mrs Joynes explained that it was decided before the process commenced that candidates for new posts (as opposed to simple reductions in posts or minor changes) needed to meet the benchmark to be appointable. She said that she would provide the documentation to reflect that and make enquires about the provision of scores. Mrs Joynes also mentioned the concept of reasonable adjustments in relation to verbal reasoning, for example extra time for those with learning difficulties. The claimant did not suggest she fell into that category. The documentation Mrs Joynes had mentioned was not provided, nor was it provided for the claimant's subsequent appeal. It was made available for these proceedings. I infer nothing from that, save that there was no documentation covering expressly the need to meet a combined benchmark for the Area Manager (and Neighbourhood Team Leader) posts.

69 The claimant was given formal notice of dismissal on 29 April after her meeting with Mrs Joynes. She indicated her intention to appeal in a subsequent letter and Mrs Glew asked her not to, or used words to that effect. Mrs Glew was

weary and felt the upset of a friend losing her job would only be made worse by extending uncertainty through an appeal.

70 From 24 February the claimant had been aware through discussions with colleagues that there were complaints about the process, and it was unclear whether there was to be an investigation for a time. Mr Trodden and Mr French considered that the other candidates were at an advantage believing Mrs Glew had shared more information with them than Mr Joynes had with his team. There was no formal investigation but there was a search of emails undertaken to see if there had been information leak by email. That produced no results.

71 On 3 June the claimant's appeal meeting took place and subsequent enquiries were made of various witnesses including Mrs Joynes and Mrs Glew and Mr Joynes. On 10 June the claimant's employment came to an end and she was sent the outcome of her appeal which was unsuccessful. The respondent did not consider, either before giving the claimant notice of dismissal, or confirming her appeal outcome, revisiting its application of the benchmark. Its policy decision had been considered in the fixing of the benchmark across the board, prior to the process commencing, and it did not re-consider that policy.

72 On 13 June 2016 an external candidate was appointed to fill the combined Stockton Area Manager post left unfilled by the dismissal of the claimant and Mr Hanif. Ms Iveson secured the Area Manager post for Hartlepool with the same housing stock; Mr French secured the combined Middlesbrough post with an increased area and housing stock.

The Law

73 The relevant sections of the Employment Rights Act 1996 ("the 1996 Act") are set out below:

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)

Section 98 General

(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.

(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.

Section 139 - Redundancy

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

(a) the fact that his employer has ceased or intends to cease--

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business--

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

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

74 I have further directed myself as follows. It is for the respondent to establish the reason for dismissal but thereafter the burden of proof is neutral as to whether the respondent acted reasonably in dismissing for that reason: the latter is a matter for the Tribunal to determine as a matter of fact.

75 A reason for dismissal is a set of facts known to the respondent or beliefs held which cause him to dismiss (Abernethy v Mott, Hay and Anderson [1974] IRLR 213 CA); in a redundancy case, both elements must be established: the fact of redundancy within Section 139; and that it caused dismissal (see Murray v Foyle Meats Ltd [1999] ICR 827; when determining a reason for dismissal one must go to the thought processes of the employer (Amicus v Dynamex Friction Ltd [2009] ICR 511).

76 I take into account well established principles in the application of Section 98(4) to dismissals for redundancy: R v British Coal Corporation, ex parte Price

[1994] IRLR 72 (Admin Ct) (fair consultation means when the proposals are at a formative stage, the consultee has a fair and proper opportunity to understand fully what is being consulted about, to express his views, and thereafter for those views to be considered); Vokes Limited v DC Bear [1973] IRLR 363 (it will not normally be reasonable to dismiss for redundancy unless efforts are made to redeploy that individual); "*It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted*" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]; an employment tribunal is bound to have regard to events between notice of dismissal and the date when that dismissal took effect in determining whether the employers acted reasonably (Alboni v Ind Coope Retail Limited [1998] IRLR 131 CA).

77 Where there is no trade union or employee representative structure, the following principles hold good for consultation with individuals (see Williams):

> "1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
>
> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
>
> 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

78 When considering the position where dismissal is to be avoided through appointments to new posts, His Honour Judge Richardson in Morgan v Welsh Rugby Union [2011] IRLR 376 said this:

"30 We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. 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, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion"….

"36 To our mind a Tribunal considering this question must apply section 98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4)."…

"39 When making an internal appointment, we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind the employer was entitled to interview internal candidates even if they did not precisely meet the job description; and it was entitled to appoint a candidate who did not precisely meet the person specification. It was, in other words, entitled at the end of the process, including the interview, to appoint a candidate which it considered able to fulfil the role. We do not, therefore, see any error of law in the approach of the Tribunal to this matter; and we do not consider the approach of the majority to be perverse."

79 I include the paragraphs above because they illustrate, when contrasted with the circumstances in this case, the range of approaches employers can take in circumstances of appointments to new posts.

80 The same principles have been examined in Samsung Electronics (UK) Limited v Monte-D'Cruz UKEAT/0039/11/DM, and in Cumbria Partership NHS Foundation Trust v Steel UKEAT/0635/11. The latter illustrates that the Tribunal's task in applying section 98(4) is to ask whether the respondent acted within the band of reasonable responses of a reasonable employer in the circumstances, rather than to substitute its own view. In Cumbria the Tribunal found it was outwith the band to adopt a minimum competency benchmark, when that was not part of its publicised redundancy policy, nor had been adopted before. That was held by the Employment Appeal Tribunal to be a permissible conclusion displaying no error of law.

Discussions and Conclusions

81 Both parties representatives provided written submissions which are a

matter of record; for expediency I do not repeat them here but express thanks for the clarity of those submissions.

82 What was the reason for the claimant's dismissal? Has the respondent established that its requirements for employees to carry out work of a particular kind, had ceased or diminished?

83 In this case the respondent asserts that the work of a neighbourhood manager is "work of a particular kind" and that its requirements for such work had ceased or diminished. Even on the claimant's case that definition is made out: if the post of Area Manager was simply a renaming exercise to reflect subtle changes and developments in her role, there was a reduction in the respondent's need for employees (from five to three) to carry out that work.

84 The reason for a dismissal comprises the facts known and beliefs held which cause the respondent to dismiss. The focus is the respondent. The relevant beliefs of Mrs Glew (when she sent the redundancy notice on 29 April), and of Mrs Smith when she rejected the appeal before the claimant's employment ended, included that the Neighbourhood Mangager posts had been eliminated, that the Area Manager (and other posts) were potential posts for which the claimant had applied, but not succeeded. As a result of those matters the respondent dismissed her.

85 There was no conspiracy here or other impermissible reason for the dismissal; the diminution in the respondent's requirements for employees to carry out housing operations management work, the work of a particular kind, "the glue" which stuck the other departments together, as Mrs Glew called it, caused the dismissal. The belief of Mrs Glew and HR that the Area Manager post was a new post was genuinely held; it was not a sham or a rouse. The claimant and others may disagree, and consider the changes to the post were minor changes, but the respondent has proven its reason for dismissal.

86 It is unnecessary for the Section 98(2) question, to decide whether the requirement for work of a particular kind in fact ceased altogether (such that no employees were required to carry out that work - the logic of the respondent's case) or only diminished such that three rather than five managers were required (the claimant's case). That is all the more so when the respondent knew, by the time the notice was sent, that of the five original post holders, the two that would have been selected for dismissal, applying the respondent's criteria, were the claimant and Mr Trodden.

87 However the similarities (and the differences) between the old post and the new post are matters to be taken into account when considering the Section 98(4) question.

Did the respondent act reasonably in treating redundancy as a sufficient reason for dismissing the claimant, having regard to equity and the substantial merits of the case?

88 This question is multi-faceted. At its heart is whether the respondent acted reasonably in deploying a recruitment process rather than a traditional redundancy selection process, resulting in the dismissal of the claimant when there was a role which she may have been able to do.

89 The respondent consulted fully with its unions over many meetings. There were real discussions and changes, and particular cases were raised. At the close of the process there had been some 23 compulsory redundancies, many of which arose due to a failure to meet the benchmark; voluntary redundancy and redeployment were used to avoid that figure being higher and the consequent unnecessary hardship.

90 The respondent observed Williams principles in its approach to collective consultation. There was no union challenge to the principle that applicants for changed posts needed to demonstrate they met the requirements of the post, be that interview benchmark, or otherwise. There was assistance for interview technique. That was the picture at large and collectively.

91 At the individual level and for the claimant, it is right that the process content and timescales were imposed on her and her colleagues. Those who reported to her were also subject to the same process: the team leaders. As a manager, the claimant did not challenge or undermine the respondent's decisions about how it wanted to run its process, albeit she was subject to those decisions herself. She did not, for example like Mr Hanif, engage in an outburst. She had a good and open friendship with Mrs Glew, and was able to discuss matters with her. What the claimant perceived as flippant, the Tribunal considers was Mrs Glew having no concerns (given the claimant's past performance) that she could not succeed on a level playing field.

92 Communications were also clear that concerns or questions could be raised with HR, and in Ms Iveson's case, that resulted in change. Had the claimant raised with HR a very particular issue with verbal reasoning testing, or exam conditions as a whole, and explained the detail of that, there is no reason to think that the respondent would not have sought advice as to how to address matters. The claimant did raise questions with HR about verbal reasoning, and some were answered, although the benchmark/pass mark question was not; the respondent cannot be criticised if its HR team were not approached about the particular issue of exam stress or verbal reasoning test anxiety.

93 My findings of fact are also clear that there was no conspiracy or bad faith here; the reasons for Mrs Glew and Mr Joynes choosing verbal reasoning were cogent and understandable (see findings above). There had been no prior "priming" of Mrs Glew's team. There was no "edge" in Mrs Glew suggesting the claimant apply also for Team Leader positions: that was sensible advice (and again, indicative of the fact that she had no idea in advance of the difficulty the claimant would come to experience with the verbal reasoning test). There was a level playing field for the claimant and her colleagues.

94 The Area Manager post was also likely, for all the contextual reasons above, to present new challenges, even in Hartlepool where the area had not expanded. The removal of the "nice to have" job content meant that the sole focus was to be rent, repairs, renewals, and having joint accountability and leadership on that. Nevertheless the broad skills required were the same as for the old post. Applying Morgan, Samsung and Cumbria, it cannot be said to be outwith the band of reasonable responses in all the circumstances of this case that the respondent:1) treated the post as a new post with greater challenge, even if paid or valued the same and with considerable similarity to the previous post; 2) deployed interview and verbal reasoning as the recruitment tools to assess capacity to meet that challenge; and 3) imposed a recruitment process on

managers in these circumstances, whilst engaging also in collective consultation and providing safeguards for questions to be raised.

95 The caveat to this conclusion is the lack of precise information when questions were raised, including about the application of the benchmark. This was the first use of verbal reasoning by the respondent, and was only applied to the claimant and her Neighbourhood Manager and Neighbourhood Team Leader colleagues, rather than all those at risk. The invitations with sample test were only sent out two days in advance, albeit the use of verbal reasoning and the weighting was known by early March. Mr Trodden certainly had time to research matters and was able to practice similar tests. The "unknown" and undocumented position, for the claimant, was that the benchmark was combined.

96 Had the respondent wished to avoid allegations of bad faith, or that the combined benchmark was set after the exercise to exclude certain staff, Mrs Joynes' department could have sent out a very clear briefing note in advance to all candidates on the combined benchmark and its operation for this particular group.

97 Mrs Joynes did explain matters for the unions in their meetings in the context of different additional recruitment tools, but this particular combined benchmark was not explained (either to the claimant, her colleagues or the unions), feeding suspicion.

98 Compounding that suspicion, Mrs Joynes did not give the "combined benchmark" explanation when asked by the claimant, and the claimant was told she had "passed" the interview, which was misleading, unhelpful, and inconsistent, with a combined benchmark.

99 The respondent said that such matters were effectively requiring perfection in a process, which went far beyond the band of reasonable responses test. That may be fair comment, particularly in as large an exercise as this across many departments, but these matters remain relevant to the Section 98(4) question as a whole.

100 The central argument of the claimant's case, was that the decision to dismiss was out with the band of reasonable responses, when on her case, the claimant could reasonably have been appointed to the vacant Area Manager role, given her strong performance in the similar and previous role.

101 It is conceivable, that when the combined results of five applicants were received, and the claimant was third, but slightly short of the benchmark, a reasonable employer might have, exceptionally, offered appointment with particular training or on a trial basis. Reasons which might underlie such a decision could include: the candidates did not know of the combined benchmark with clarity - had this been explained the claimant may have realised that for her, even stronger interview performance was required to make up for likely poor verbal reasoning results, and she may have been able to address that; verbal reasoning was uniquely used in this department and was going to result in the hardship of compulsory redundancies; the overarching obligation to minimise redundancies; the claimant's record up to that point; the similarities, albeit greater challenges, in the new post compared with the old; whether the benchmark was too high given that three out of the initial five failed to meet it, and of all eventual candidates (six internal and four external) only three met that benchmark.

102 Against these arguments, there are equally compelling counterarguments. The position financial faced by the respondent; its need to have confidence its objectives could be delivered; fairness to all those involved in the process; others were to be dismissed for a failure to meet a benchmark; the benchmark was fixed as a minimum standard for appointment and growth into a new role.

103 It was clear that the respondent used many different measures to mitigate against compulsory redundancies across the work force at large, including, for example insisting on further internal advert for this post, and giving Mr Hanif a second chance to secure appointment. It is also clear that its "red line", or firm position, fixed from the outset, was the need for new post appointees to meet the requirements fixed for the role, including a benchmark.

104 Given the challenges faced by the respondent, and the potential for hardship faced by many of its staff at large, and taking into account equity and the substantial merits of this case, whilst the Tribunal is dismayed at the position in which the claimant found herself through no fault of her own, it cannot be said that the respondent acted outside the band of reasonable responses in dismissing her for redundancy, the reason it has proven. It may well be right that the claimant would have performed well on the ground in the Area Manager role, and it undoubtedly very sad for her and her family that she was not provided with that opportunity.

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Employment Judge Wade

Date 10 March 2017

JUDGMENT SENT TO THE PARTIES ON

16 March 2017

G Palmer
FOR THE TRIBUNAL OFFICE