Neutral Citation Number: [2024] EWCA Civ 1291

Case No: CA-2023-002524

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(HIS HONOUR JUDGE BEARD,
MR CHARLES LORD OBE AND MRS ELIZABETH WILLIAMS)
EA-2021-000794-NLD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE SINGH
and
LORD JUSTICE BAKER

- -

Between :

JOSEPH DE BANK HAYCOCKS	**Appellant/ Respondent**
- and –	
ADP RPO UK LIMITED	**Respondent /Claimant**

- -
- -

Charlene Ashiru and **Kieran Wilson** (instructed by **Bingham Mansfield Solicitors**) for the **Appellant**
Tristan Jones KC and **Hollie Higgins** (instructed through **Advocate**) for the **Respondent**

Hearing date: 5 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill :

INTRODUCTION

1. The Respondent in these proceedings (the Appellant before us), ADP RPO UK Ltd, runs a recruitment process outsourcing ("RPO") business. At the time material to the claim its only significant client was the London office of Goldman Sachs. It had between fifty and sixty employees in London, and a smaller number in Warsaw (employed through a Polish subsidiary). It is a subsidiary of a US company called ADP Inc. ADP Inc had a separate UK subsidiary, ADP Ltd, which provided the HR function for the Respondent. Save where it is necessary to distinguish I will refer to the various ADP entities simply as "ADP".

2. The Claimant was first employed by ADP in London as a "sourcer" for Goldman Sachs on 16 October 2017. As a result of a diminution in vacancies resulting from the Covid-19 pandemic, ADP decided in May 2020 that it would have to make redundancies in the team in which the Claimant worked, which numbered sixteen employees in London and four in Warsaw. Following a process of which I give more detail below, the Claimant was dismissed for redundancy on 14 July 2020. He appealed, but the dismissal was maintained.

3. On 16 October 2020 the Claimant commenced proceedings against ADP in the Employment Tribunal ("the ET") for unfair dismissal. The claim was heard (remotely) at the London Central tribunal by Employment Judge Goodman, sitting alone, on 5 and 6 July 2021. The Claimant was represented by his father, who is a former solicitor (though not a specialist advocate, and with no expertise in employment law). ADP was represented by Ms Charlene Ashiru of counsel. By a decision sent to the parties on 7 July the Judge dismissed the claim.

4. The Claimant appealed to the Employment Appeal Tribunal ("the EAT"). On the sift HH Judge Beard allowed the appeal to proceed on two grounds, designated grounds J and L. At a hearing under rule 3 (10) of the Employment Appeal Tribunal Rules 1993 (as amended) HH Judge Auerbach gave him permission to pursue a further ground, designated O.

5. The Claimant's appeal was heard before Judge Beard and two lay members, Mr Charles Lord OBE and Mrs Elizabeth Williams, on 20 September 2023. The Claimant was represented by Mr John Horan of counsel; Ms Ashiru again represented ADP. In his skeleton argument Mr Horan abandoned ground L, and at the start of the hearing he also abandoned ground O. By a judgment promulgated on 28 November the appeal was allowed and a finding of unfair dismissal made: the case was remitted to the ET to determine remedy. I will have to consider the EAT's reasons in more detail in due course; at this stage I need only say that they were based on what it found to be the absence of proper consultation.

6. This is an appeal against the EAT's decision, brought with the permission of Bean LJ. The Claimant has been represented by Mr Tristan Jones KC, leading Ms Hollie Higgins, (both acting *pro bono*). ADP has been represented by Ms Ashiru, leading Mr Kieran Wilson. The case was well argued on both sides.

THE CONSULTATION PROCESS

7. I start by summarising the facts relating to ADP's consultation with the Claimant. At some points I supplement the Employment Judge's findings by reference to contemporary documents to which both parties' counsel referred us without objection.

8. The decision that redundancies would be needed in the Claimant's team was made at the end of May 2020, though no decision was taken about numbers. ADP's HR department asked the team manager, Evie Hancock, to assess the employees in question in accordance with a "redundancy selection criteria matrix", comprising seventeen criteria. Ms Hancock performed that exercise on 10 or 11 June. The Claimant had the lowest overall score.

9. On 18 June 2020 it was determined that the number of redundancies required in the team was two (with a third from a different ADP team). A consultation timetable was then set under which all staff in the pool would be informed (individually) on 30 June that they were at risk of redundancy, to be followed by a 14-day consultation period at the end of which decisions would be communicated.

10. In accordance with that timetable the Claimant was called to a meeting on 30 June. We have the script prepared by the HR department for the meeting. This informs the employee that they are at risk of redundancy. It gives a very summary account of the business rationale – essentially "changing workloads along with our reduction in client needs" as a result of the pandemic. It says that there will be a two-week consultation period during which "we intend to discuss the selection criteria and process we will use to determine which role or roles will be redundant". It is also said that during the period the employee will have an opportunity to ask any questions and to "suggest an alternative approach to the situation which we may not have thought of". There would be a further meeting the following week once the employee had had the chance to digest the information and consider what questions they might wish to ask. It is common ground that that script was followed at the meeting.

11. At or shortly after the end of the meeting the Claimant was given a letter signed by a member of ADP's HR team, Delia Greetham, conveying much of the same information as the script, but also making one or two other points. In particular, it referred to the possibility of alternative employment within ADP; stated that "no formal decision can be made until the consultation process is complete"; and said that "a selection matrix scoring process will be used to determine who is selected for redundancy". The phrase "will be used" clearly implied, contrary to the fact, that the "scoring process" had not yet taken place. The Claimant was also given a copy of the script and various other materials. These included a "selection criteria matrix example"; thus he knew from that point what selection criteria were being used.

12. On 3 July the Claimant obtained details of other vacancies in ADP: there were only two, neither of which was suitable for him.

13. The further meeting promised in the letter of 30 June took place on 8 July. Ms Hancock and Ms Greetham attended for ADP. In advance of it the Claimant sought some further documents, including his performance review for the previous year. He was supplied with these (or told where to find them), with the exception of one request which Ms Greetham did not understand and suggested be raised at the meeting. The only finding

that the Judge makes about what happened at the meeting is that the Claimant asked when, if he was redundant, he would be paid. It is clear that that was not the totality of what was said because the Claimant's own evidence was that he was told that the number of redundancies proposed was two; but there was no evidence of what else, if anything, was discussed.

14. On 14 July the Claimant was called to a meeting with Ms Hancock, accompanied by Lucy O'Donovan, the HR manager with ultimate responsibility for the exercise. He was told that he would be dismissed and handed a dismissal letter. He expressed surprise on the basis of the number of placements he had made and his length of service. Ms Hancock explained why length of service was not used as a criterion.

15. It is important from the point of view of the issues before us to note that the Claimant was not told during the consultation process what his scores had been, or indeed about who had done the scoring or on the basis of what information; nor was he told that a scoring exercise had been carried out before the consultation started. It transpires from an internal email dated 15 July that Ms O'Donovan's understanding was that "the impacted associates were being sent their scores ahead of the final meetings", and that when she realised that this had not occurred she sent them to the Claimant (either that day or possibly the day before). She says in the email that she "didn't realise that [he] hadn't seen them when we had the meeting with him yesterday, as he didn't mention anything about his scores". Even at that stage he was not told that the scoring exercise had been done before the consultation started: he only learnt that when Ms Hancock was cross-examined in the ET proceedings.

16. As already mentioned, the Claimant exercised his right of appeal and provided written grounds. The grounds are under two headings. Under the first, "Redundancy", he begins by asserting that his position was not redundant, but the substance of his complaint is that he was scored too low, either as a result of a serious mistake or because his score had been manipulated for a "reason about which I can only speculate". The second, "Procedural Fairness", challenged the selection criteria on various bases and complained of the absence of consultation about the scores. In a letter in advance of the appeal hearing he asked for information on various aspects of the selection process. Most of it was supplied, though he was not given the scores of the other members of the team.

17. The appeal hearing took place on 10 August before Annabel Jones, an HR Director, and Allen Hoke, Recruiting Operations Manager. The hearing lasted 45 minutes. There is a full transcript, but all that I need say is that each of the matters contained in the grounds of appeal was discussed.

18. By letter from Ms Jones dated 17 August the Claimant's appeal was dismissed. The letter contained summary findings rejecting his complaints: among other things it concluded that "the selection process was thorough and fairly applied". More detailed reasons for those headline conclusions were given in an Appendix.

THE PROCEEDINGS IN THE EMPLOYMENT TRIBUNAL

THE CLAIMANT'S CASE

19. The Details of Claim accompanying the original Claim Form are full and carefully structured. There are four headings – (1) "Brief Work History"; (2) "Position not Redundant"; (3) "Failings in Redundancy Process"; and (4) "Real Reason for Dismissal". I will summarise what appears under each heading so far as relevant to this appeal.

20. *"(1) Brief work history".* This section contains some uncontentious background about the Claimant's work, but it also sets out in detail a falling-out which had occurred the previous year between himself and Goldman Sachs' Head of Securities Recruitment, Piers Bramhall (referred to by the ET as "PB"). At that stage he was working for an area of Goldman Sachs' business referred to as "Revenue". The problem with PB led to the Claimant being moved to a different section of ADP working for an area of the Goldman Sachs business referred to as "Federation": the recruiter there was a Ms Sarah Moore (referred to by the ET as "SM"), with whom the Claimant got on well.

21. *"(2) Position not redundant".* This section disputes statements made by ADP during the redundancy process about the extent of the Claimant's workload and the score that he was given in the exercise. The conclusion that he draws from what he says was his unjustifiably low score is that it was "contrived and manipulated to achieve the end desired – my dismissal".

22. *"(3) Failings in redundancy process".* The introductory averment under this section is that "the company has not carried out the redundancy process following and applying fair and proper procedures". After noting that ADP had no formal redundancy procedure, it sets out a number of specific criticisms. Paras. (c) and (d) criticise the selection criteria adopted: the broad criticism is that they were "nebulous, subjective and inadequate", but some other points are made which I need not summarise. Para. (e) makes a particular criticism of the factual basis for one of the Claimant's scores. Para. (f) is more relevant to the issues before us, and I should set it out in full. It reads:

> "During the consultation period the Company did not involve me properly in the redundancy process and did not give me the opportunity to challenge the scores and express my views on the matter. In particular, the Company did not:
>
> (i) inform me of the number in the pool for selection;
>
> (ii) inform me of my scores until after I had been told that I was to be dismissed and had received my dismissal letter;
>
> (iii) provide me with details of the positions, lengths of service and scores of those in the pool for selection;
>
> (iv) provide me with the Critical Roles Report which they said they received from Goldman Sachs and by which they were guided."

It will be seen that the primary complaint in para. (f), identified in the introductory words and repeated at (ii), is that the Claimant was not given "the opportunity to

challenge the scores", though the "particulars" at (i), (iii) and (iv) raise some other complaints about information which he was not given. Paras. (g)-(k) make various other criticisms of the process – for example, about ADP's attempts to find the Claimant alternative employment – but these are not material for our purposes.

23. *"(4) Real reason for decision".* This section reads:

> "My dismissal was as a result not of the redundancy of my position but of the difficulties which arose, through no fault of mine, between Piers and me set out in some detail above. Although after moving to Federation I directly or knowingly experienced no problems emanating from him, I consider that the lasting damage caused by the affair constituted a potential threat to ADP's continued tenure as RPO to Goldman Sachs. Piers' status within Goldman Sachs is such that I submit that he would continue to exert influence in that respect and, accordingly, ADP arrived at the decision to dismiss me using the consequences of the pandemic as a pretext, a decision which, therefore, was not based on any redundancy of my position."

24. It will be seen that there were two broad strands to the Claimant's case – (a) that his dismissal was caused or influenced by his falling-out with PB, which is said to show that the true reason for his dismissal was not redundancy at all and/or that the episode unfairly influenced his selection; and (b) that there were other unfairnesses in the selection process, including (para. (f)) a failure to "give me the opportunity to challenge the scores and express my views on the matter".

25. I need not for present purposes summarise ADP's grounds of resistance. It is enough to say that it disputed the Claimant's case.

26. There was a case management hearing in April 2020 at which the issues were defined. The statement of the issues was subject to some agreed changes at the start of the hearing in the ET and the amended version was set out by EJ Goodman at para. 3 of her Reasons as follows:

> "(1) Was redundancy the real reason, or was it a pretext, relating to earlier conflict with PB, an influential client?
>
> (2) If redundancy was the reason, did the respondent follow fair procedure? The claimant says: the pool of employees was kept artificially small by not including the Warsaw team; next, the evaluation criteria were not reasonable, and not applied reasonably to the claimant; was there adverse and material influence by PB on the claimant's scoring?
>
> (3) Did the respondent act fairly or unfairly and in particular consult the claimant, make a reasonable selection decision, take reasonable steps to find suitable alternative employment?
>
> (4) If redundancy was not the reason, was this a business reorganisation carried out in the interests of economy and

efficiency, and did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss?

(5) If the process made the dismissal unfair, what difference would fair process have made to the outcome?

(6) If unfairly dismissed, remedy. The respondent argued a failure to mitigate the loss."

(I have silently made some small corrections to the wording and punctuation.)

THE HEARING

27. As already noted, the hearing lasted two days. ADP called three witnesses, including Ms Hancock, and the Claimant gave evidence himself. There was a substantial bundle of documents. These included a number of documents produced by ADP on disclosure, including the names and detailed scores of the other fifteen employees in the pool. ADP had lodged a skeleton argument at the start of the hearing; and Mr Haycocks senior and Ms Ashiru made oral closing submissions.

THE ET's REASONS

28. The Reasons, which run to some nine pages, follow the conventional format. After dealing with various introductory matters the Judge gives her primary findings of fact at paras. 11-41, focusing particularly on the redundancy consultation and selection process and on the Claimant's internal appeal. At paras. 42-47 she summarises the applicable law. Her reasons for dismissing the claim appear at paras. 48-58. Most of them are not directly relevant to the issue in the appeal, and it is sufficient that I summarise these, which I can do as follows:

(1) At para. 48 the Judge records that in the course of his closing submissions Mr Haycocks senior had conceded that there was a redundancy situation – that is, that the need for employees of a particular kind had diminished. (She also records, at para. 55, that the Claimant accepted that there were no suitable alternative vacancies for him.)

(2) Paras. 49-50 address and reject respectively the Claimant's arguments that ADP could have furloughed staff rather than dismissing them and that the Warsaw team should have been included in the pool.

(3) Para. 51 notes that since the choice of criteria came from a standard package they were evidently not tailored so as to disadvantage the Claimant. In the course of making this point the Judge mentions that the package was supplied by the HR Department of ADP Inc in the US: it now appears that this was a misunderstanding – see para. 31 below.

(4) In para. 52 the Judge acknowledges that the selection criteria relied heavily on the judgment of the team manager rather than on more objective criteria, which left scope for bias. But she noted that there had been no challenge to Ms Hancock's good faith. Rather, the Claimant's case was that others, who had been influenced by the PB episode, had interfered with the selection process: in particular, he sought to implicate a Mr Henry Melbourn. The Judge rejected that

case on the evidence. At para. 54 she addressed and rejected a further particular development of that argument.

(5) At para. 53 the Judge considers the specific argument that the Claimant had been unfairly marked down on his scores. She did not believe that that had been established. His scores on various criteria were "good but not outstanding" and consistent with comments about his performance which Ms Hancock had made in an earlier review. He now had the scores of the others in the pool but he had not been able to demonstrate that he should have scored higher than others. The Judge also in this paragraph finds that it was reasonable for ADP not to use length of service as a criterion.

29. I should set out para. 56 of the Reasons in full. It reads:

> "It is right that the claimant knew nothing about his scores, until the appeal stage, but the appeal process was a conscientious investigation of what he said about Ms Hancock's knowledge and ability to assess his performance (the claimant having suggested GS [Goldman Sachs] were better people to ask), and there was also enquiry into his mention of PB. In any case, now that he has the scores, and knows the identity of the others on the list, he has not demonstrated that his own score should be higher up the list, and others should have been lower."

30. The Judge summarised her conclusion at paras. 57-58 as follows:

> "57. To conclude, the claimant has not shown anything more than a possibility that knowledge of the previous run-in with PB 15 months earlier influenced his managers to reduce his score to make sure he went. In particular, he has not shown that he ought to have scored higher than needed. It remains speculation. Ms Hancock did not know about it. As far as she was concerned, GS, in the person of SM, were very happy with the claimant. It is not shown Henry Melbourn was involved. It often happens in redundancy situations that those dismissed by reason of redundancy experience it as rejection, and as criticism of their capability or conduct. This is understandable, but redundancy, when there is not enough work to go around, often involves difficult choices about people who do their jobs well, and are satisfactory employees.
>
> 58. In the judgement of the tribunal, this was a fair redundancy process. There is no reason to hold that any apprehension about the views of GS on particular individuals skewed the selection decisions of the respondent's managers. The unfair dismissal claim does not succeed."

31. Before leaving the ET's Reasons, I should explain my reference to an error in para. 51. What the Judge says there is that "the choice of criteria looks from the emails to have been a standard package *from the US parent* [my italics]". However, that is not what appears from the emails in question. Rather, they show that Ms O'Donovan sent Dana Crockett of the HR department of ADP Inc in the US two different selection matrices which she had obtained from her UK colleagues, explaining that "the manager would determine the key skills which are critical to the roles in question"; Ms Crockett reviewed them and apparently had some input into the final version, but it is clear that

she was working on the UK-generated draft which she had been sent[1]. The picture which emerges from the e-mails is consistent with what Ms Hancock says in her witness statement about how the selection criteria were produced; and before us Mr Jones did not seek to defend the Judge's statement. This error was not raised by ADP in the EAT, but no formal point arises about that since, as will appear, it is not relevant to the dispositive issue in the appeal. I have only felt obliged to mention it because it bears on a secondary point made in the EAT's judgment: see para. 62 below.

THE PROCEEDINGS IN THE EMPLOYMENT APPEAL TRIBUNAL

THE GROUND OF APPEAL

32. As already noted, although the Claimant initially raised a large number of grounds of appeal, the only one which was pursued was ground J. As pleaded in his Notice of Appeal to the EAT, this read:

> "The Judge completely failed to deal with the Claimant's contentions that
>
> (a) the constitution of the redundancy process was fundamentally flawed and
>
> (b) its implementation was equally flawed, inter alia, because the scoring was completed and, therefore, the decision to dismiss the Claimant was effectively made, 3 weeks **before** the commencement of the consultation period, (i.e. when his job was put at risk), as demonstrated by the oral evidence of Evie Hancock, thus proving the Claimant's point that he was pre-selected."

33. That pleading complains about both (a) the "constitution" of the redundancy process and (b) its implementation. The allegation under contention (b) is specific, namely that the decision to dismiss the Claimant was "effectively made" when Ms Hancock carried out the scoring exercise, and that since that was done before the consultation process had even started the dismissal was inevitably unfair. (It may be that the description of that as "pre-selection" is a reference to the separate point that the process was manipulated in order to ensure the Claimant's dismissal because of the PB episode, but I do not think it would be fair to read it as limiting the ground to that point.) By contrast, what specific complaint is made under (a) is wholly unclear; but, as will appear, the nature of the Claimant's case was clarified later. Read strictly, the allegation in ground J is only that the Judge "failed to address" contentions (a) and (b); however, I think it is fair to read it as including an allegation that, if and to the extent that she did address them, she was wrong to reject them.

34. When he gave his reasons for allowing ground J to proceed at the sift stage Judge Beard said this:

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[1] The Judge may have had in mind an earlier email from Ms Crockett sending Ms O'Donovan "an example of what we use in the US"; but that was said to be "just for your knowledge", and it is clear from the chain as a whole that what she sent was not what was used. It is also clear from the e-mails that, as one would expect, Ms Crockett was aware that the process would have to follow domestic employment law and practice.

> "It appears to me arguable that the EJ erred in not considering whether deciding upon and marking the criteria for selection before consultation has taken place and that the Claimant was not informed of scores until the appeal. *De Grasse v Stockwell Tools Ltd* [1992] IRLR 269 indicates consultation is essential in every redundancy process and *Crown v British Coal Corporation Secretary of State for Industry ex parte Price & Others* [1994] IRLR 72 per Glidewell LJ: that a fair consultation means: (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; (d) conscientious consideration by an authority of the response to consultation."

35. The gist of those reasons is in the first sentence (something has gone wrong with the English, but the broad meaning is clear): the second sentence simply summarises some propositions of law. It is clear that Judge Beard understood the issues raised by ground J to be:

(1) whether "deciding upon and marking the criteria for selection before consultation has taken place" meant that the consultation process was unfair – i.e. "contention (b)";

(2) whether the consultation was vitiated by the fact that "the Claimant was not informed of scores until the appeal" – this was presumably regarded as falling within the scope of "contention (a)".

36. In his skeleton argument for the full hearing in the EAT Mr Horan formulated ground J as follows:

> "2.1 The consultation exercise was not a fair consultation exercise.
>
> 2.2 The Appellant made that a central plank of his case - see the grounds of unfair dismissal as part of the ET1 … (3)(f) [i.e. the passage quoted at para. 22 above];
>
> 2.3 The decision to dismiss the Appellant was effectively made three weeks before the commencement of the consultation period, i.e. when the Appellant's job was put at risk. And therefore, the Appellant was right in that he was pre-selected;
>
> 2.4 In fact, the tribunal did not consider this question at all, or in the alternative, inadequately;
>
> 2.5 Based on their findings of fact it was, no doubt, not a fair consultation exercise."

The only specific point explicitly made in those paragraphs is the complaint at para. 2.3 that the decision to dismiss the Appellant was "effectively made" – that is, because the scoring exercise had been done – before consultation commenced; but para. 2.2 also refers to para. (f) under head (3) of the Details of Claim.

37. At the start of the hearing in the EAT Mr Horan summarised ground J, being the only remaining ground, as follows (see para. 3 of the judgment):

> "… the consultation exercise was not a fair consultation exercise; the Claimant had raised consultation as a central issue before the ET; there was, effectively, a decision to dismiss three weeks before commencement of consultation; and the ET had not considered the consultation issue adequately or at all."

38. It will be seen that although the various formulations of ground J aver that the consultation process was not fair, the only specific criticisms made of it are (a) that the decision to dismiss the Claimant was taken before the consultation started – that is, when he was scored; and (b) that he was not informed of his scores until the appeal.

THE JUDGMENT OF THE EAT

39. Paras. 1-12 of the EAT's judgment are essentially introductory, containing summaries of the ground of appeal, as quoted at para. 37 above, of the facts found by the ET and its conclusion, and of counsel's submissions. I would only note that all that the EAT says about the reasoning of the ET is as follows (para. 10):

> "The ET accepted that the Claimant knew nothing about his scores until after dismissal but concluded that the appeal process was carried out conscientiously. This involved an investigation of the issue the Claimant had raised about his manager's knowledge and ability to carry out the scoring. The ET found that, despite knowing the identity of the others on the list, the Claimant had not demonstrated to the ET that his score should have resulted in a higher ranking. In terms of the issue of consultation, the ET does not deal with this directly. However, it is fair to say that as part of the conclusions that the ET considers, its findings are that the Claimant's criticisms of both the selection criteria and the pool chosen by the Respondent have not been borne out."

I quote that summary in full because it is the only point in the judgment in which the EAT says anything about the ET's Reasons.

40. At paras. 13-22 the EAT addresses the applicable law. It sets out section 98 (4) of the Employment Rights Act 1996 and then conducts a review of the authorities relating to the requirements of a fair consultation procedure. Its conclusion appears at paras. 21-22 and is in the following terms:

> "21. What emerges from the above authorities is that the statute is always the keystone to ET decision making. That being the keystone, the guidance provided by various authorities in respect of specific circumstances is just that, guidance; it does not create a stricture on ET decision making. If, despite the guidance, the process adopted by the employer falls within the band of reasonableness an ET must find so. However, the purpose of guidance from the appeal courts is to inform the question of reasonableness and if the guidance does not apply, ETs would be expected to explain why it did not in the particular case.
>
> 22. The authorities set out the following guiding principles:

a. The employer will normally warn and consult either the employees affected or their representative; *Polkey v A.E. Dayton Services Ltd* [1988] AC 344**.**

b. A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration being given to the response; *R v British Coal Corporation ex p Price* [1994] IRLR 72.

c. Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact; *Freud v Bentalls Ltd* [1983 ICR 77.

d. A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable; *Lloyd v Taylor Woodrow Construction* [1999] IRLR 782.

e. The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss; *Taylor v OCS Group Ltd* [2006] ICR 1602.

f. It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; *Mugford v Midland Bank plc* [1997] ICR 399.

g. Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process; *Camelot Group plc v Hogg* UKEATS/0019/10.

h. The use of a scoring system does not make a process fair automatically; *British Aerospace plc v Green* [1995] ICR 1006.

i. The relevance or otherwise of individual scores will relate to the specific complaints raised in the case; *British Aerospace v Green*."[2]

41. I broadly agree with what the EAT says in para. 21, save that the final sentence should not be treated as stating a rule of law. I also agree that the various propositions in para. 22 reflect the effect of the authorities cited so far as relevant to this case, though they are of course in very summary form.

42. I should comment on one point made by the EAT in the course of its review of the authorities. In para. 20 it refers to paras. 33-35 of the judgment of the EAT (myself sitting with lay members) in *Mental Health Care (UK) Ltd v Biluan* UKEAT/0248/12. In that case the ET had found the claimant's dismissal for redundancy to be unfair for a variety of reasons. We upheld the finding of unfair dismissal but we did not agree

[2] I should say that the EAT had already cited the various authorities referred to and accordingly referred to them here only in shorthand; I have added the full citations.

with what the ET had said about the fairness of the consultation process. The statutory consultation procedures did not apply. The consultation process which was in fact followed was summarised at para. 5 of the judgment, but for present purposes I need only note that there had been two meetings of the entire affected workforce, at which they were informed of the proposed redundancies, and aspects of the procedures to be followed, and were given the opportunity to ask questions; but the subsequent individual consultation had been limited to the issue of alternative employment. I recorded at para. 34 of the judgment various submissions made by counsel for the employer to the effect that the consultation was adequate and continued, at para. 35:

> "[Counsel's] points are well-founded. It is inevitable that the character of the consultation that is reasonable and appropriate may differ to some extent in cases where there is collective consultation with a trade union or other representatives and in cases where there is not. The scope for useful consultation on such issues as avoiding the redundancy situation altogether or the choice of selection criteria may well be less in the latter case; the focus for individual consultation will normally be on the circumstances involving the individual's particular case, and in particular – though not necessarily only – the chances of alternative employment. It seems to us that the Tribunal took no real account of this. The process described by the Tribunal as summarised at para. 5 above seems to us to reflect very much the sort of consultation exercise that we would expect an employer to carry out."

The EAT suggests that our approach in that case "overstates matters" and is inconsistent with *Freud v Bentalls*, which emphasises the importance of consultation, including on ways of avoiding redundancy, in a case where there was no obligation to conduct collective consultation. It also refers to a "tension" between *Biluan* and the more recent decision of the EAT (Judge Beard sitting with a lay member) in *Mogane v Bradford Teaching Hospitals NHS Foundation Trust* [2022] UKEAT 139, [2023] IRLR 44. I apprehend that the EAT referred to *Mogane* because it contains a discussion of the requirement that consultation take place at a formative stage: I consider it in that context at para. 61 below.

43. On re-reading the passage in question in *Biluan*, I am happy to accept that my description of counsel's submissions as "well-founded" was poorly worded: the intention was to approve their general trend, as stated in the rest of para. 35, rather than to adopt each of them as a statement of general principle. It should also be appreciated that the essential point being made in para. 35 is that the ET's criticisms of the inadequacy of the individual consultation failed to take account of the fact that there had already been two workplace meetings. We did not say that, in cases where collective consultation is not required by statute, no opportunity need be given at the individual consultation stage for affected employees to express views on issues of a "collective" nature: I say more about that point at para. 52 below. We said only that consultation on such issues at the individual level might well be less useful: that is a common sense proposition from which I would not resile. Thus understood, I see no inconsistency with *Freud* or tension with *Mogane.*

44. I return to the EAT's judgment. The substance of it appears in paras. 23-33, which are headed "Discussion and Conclusions". These fall into two quite distinct parts. The first, comprising paras. 23-31, contains a general discussion of what constitutes good

industrial relations practice as regards redundancy consultation in the light of changes in the world of employment since the early case-law and concludes by giving some further guidance. The second, comprising paras. 32-35, gives its reasons, "applying these principles", for deciding that the appeal in the present case should be allowed. I consider the two parts separately.

Paras. 23-31: "Good Industrial Relations Practice"

45. I start by noting that in para. 1 of the judgment the EAT says:

> "We should … make it clear that the lay members of this panel have been of particular assistance to the judicial member. Their experience of modern good industrial relations practice has particularly informed the conclusions reached. The guidance as to the approach to be taken to redundancy situations set out below reflects that experience."

This Court too recognises the importance of the views of the lay members on matters of good industrial relations practice.

46. The basis of the EAT's discussion is, as I have said, that although the case-law contains several statements of good industrial relations practice, the authorities mostly date from the early days of the legislation and reflect the conditions prevailing then. The Tribunal identifies two principal changes since that time – (1) "the reduction of trade union membership in the workplace" (which leads to a recommendation of "general workforce consultation" at "the formative stage of the process") and (2) "the growth in employment where there is an international element in the corporate structure" (see para. 24 of the judgment). I take them in turn.

The decline in trade union membership: need for "general workforce consultation"

47. Paras. 26 and 27 of the judgment can be summarised as follows. The EAT notes that where an employer proposes to dismiss twenty or more employees for redundancy it is obliged by Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 to consult with the recognised trade union – or, where there is no recognised union, with other representatives appointed or elected in one of the ways prescribed by the statute – about a range of specified issues; and also that in cases falling outside the statutory scheme ("smaller-scale redundancies") the authorities establish that where there is a recognised trade union consultation with it is normally required as a matter of good industrial relations practice (the leading case being *Williams v Compair Maxam Ltd* [1982] ICR 156). It notes that the decline in trade union membership has meant that there is an increasing number of workplaces where there is no recognised trade union (for short, "non-unionised" workplaces). It believes that it is increasingly the practice that in such workplaces consultation in the case of smaller-scale redundancies does not cover any collective issues and is limited to discussion with individual affected employees of issues peculiar to them. It believes that it is undesirable that there should be such a "dichotomy" between what is good practice in a unionised and a non-unionised workplace.

48. Against that background, the EAT says, at para. 28:

> "We consider that the purpose of collective consultation is actually a reflection of good industrial relations in either type of workplace [sc. both where a trade union is recognised and where it is not] and that such consultation should generally occur at the formative stages of a process. That might better be described as general workforce consultation rather than 'collective', which is a word that has connotations of union representation. The importance, however, is the purpose of consultation at that stage and not the label attached to it. That stage of consultation could take many forms, it is not for this tribunal to be prescriptive. For example, the facts in *Biluan* show that large scale workforce meetings took place; these were considered to be part of the consultation process by the EAT. What is important about that stage of consultation is that the *British Coal* principles are fulfilled; the opportunity to have input from the workforce. That is an opportunity to propose other means by which the employer could minimise the impact of a redundancy situation."

At para. 29 it confirms that even where there is general workforce consultation there should usually also be individual consultation, to consider "such things as alternative employment".

49. Para. 30 of the judgment says that although a departure from good industrial relations practice in this regard will not necessarily be unreasonable (e.g. where consultation would be futile)

> "… we would expect the ET to provide the reasons why, in the particular circumstances, the decision was reasonable in the absence of these usual standards".

That reflects the case-law following *Williams v Compair Maxam*, the effect of which is that, although there are no absolute rules, an unexplained departure from good industrial relations practice as regards redundancy consultation is likely to render a dismissal unfair. (And, as will appear, that is how the EAT proceeded in its decision in this case: see para. 64 below.) In that sense, the designation of "good industrial relations practice" imposes a requirement, albeit a qualified one; and I will sometimes refer to it as such below.

50. As will appear, the EAT relied on what it described as the "principles" in paras. 28-30 of its judgment as the basis of its decision in this case. I accordingly need to consider whether what it says in those paragraphs is correct. There are two elements in those principles – the requirement for general workforce consultation and the requirement that it occur at the formative stage of the process. Although the EAT clearly regards them as going together, I need to consider them separately.

51. I start with the "general workforce consultation". I should observe by way of preliminary that smaller-scale redundancy exercises in non-unionised workplaces are not a new phenomenon of a kind which might by itself call for the guidance in the case-law to be revisited: although there has indeed been a substantial decline in trade union membership over the decades, there are whole sectors of employment in which non-unionisation has always been the norm. Nevertheless, I accept that if, as the EAT

believes, misunderstandings about the requirements of fair redundancy consultation in such cases are widespread they need to be addressed, whatever their cause.

52. I agree with the EAT that there are dangers in the unthinking application of labels "individual" and "collective" consultation. Collective consultation in ordinary usage refers to consultation between the employer and representatives of the affected workforce (that is, those who are at risk of dismissal) as a whole. Typically it is the appropriate forum to discuss issues that are common to the group. The most obvious such issue is whether there are ways in which redundancies can be avoided, or at least the numbers reduced, but there will also be procedural issues relevant to the group as a whole, such as the choice of selection criteria. Where collective consultation occurs, it may be sufficient for individuals to be consulted about issues peculiar to them. The most obvious such issue is alternative employment, to which the EAT specifically refers; but it may not be the only issue on which fairness requires that there be individual consultation (not least because the distinction between "common" and "individual" issues may not always be clear-cut). But where there is no collective consultation the situation is different. In such a case it is good practice for employees to be given, in the course of individual consultation, the opportunity to express their views on any issue that may affect the risk of their dismissal or its consequences, whether it is peculiar to them as an individual or common to the affected workforce as a whole. It should certainly not be assumed that they will have nothing useful to contribute on common issues: it depends on the particular case. For the avoidance of doubt, I am not to be taken as saying that a failure to afford that opportunity will necessarily render any subsequent dismissal unfair: again, that will depend on the circumstances (see points (f) and (g) in the EAT's summary of the case-law above). But if there is a widespread view among employers that individual consultation need only ever address individual matters the sooner they are disabused of it the better.

53. So far so good, but I fear that I cannot agree with the EAT that, in order to ensure that the opportunity for consultation on common issues is given in the case of smaller-scale redundancies in non-unionised workplaces, it should be treated as a requirement of good industrial relations practice – or "the usual standard" – that the employer should in such cases conduct what it calls "general workforce consultation", so that there is in effect a rebuttable presumption that a dismissal where there has been no such consultation will be unfair (see para. 49 above). My reasons are as follows.

54. An initial difficulty is establishing what the EAT means by "general workforce consultation". I understand its wish not to be too prescriptive, but it is still necessary to have a clear idea of the essential concept. A possible reading is that it means no more than that the employer should (at the formative stage) consult all employees on the kinds of common issue that would otherwise be the subject of collective consultation, particularly the possibility of taking steps that would avoid or reduce the need for redundancies. If that were the right reading, the matters in question could be dealt with as part of individual consultation, and the EAT would not be saying anything substantially different from what I have said in para. 52 above. However, I do not think that that is what the EAT meant. As I read it, the word "general" is intended to connote that the workforce, or the affected part of it, should be consulted in some way at a group level in order to fill the gap left by the absence of collective consultation. That reading is reinforced by the EAT's use of the paraphrase "workforce level of consultation" later in the judgment (see paras. 63-64 below). I note also that the only example which it

gives of general workforce consultation is the workplace meetings that are referred to in *Biluan.* The EAT says that this is only an example, and that general workforce consultation could take other forms: it is not in fact easy to think of other forms that such group consultation could take, but one obvious possibility is an online meeting or forum.

55. If, as I think, that is what the EAT meant, I cannot agree that consultation of that kind should be regarded as "the usual standard". It appears from the discussion in the EAT's judgment that the justification for its proposal is that it would remove the "dichotomy" between the treatment of redundancy situations where collective consultation is required (either under the statutory procedures or, where those do not apply, because a trade union is recognised) and where it is not: in other words, general workplace consultation would be a proxy for the kind of collective consultation that would occur in those cases. However, the two situations are fundamentally different. Where there is a recognised trade union, or representatives appointed or elected as prescribed by the statute, there will be someone who can be treated as expressing the views of the affected workforce and with whom those views can be discussed. That purpose is not replicated, even approximately, by holding a general workforce meeting, or meetings (whether in real life or online): no one at such a meeting has a mandate to represent the individual employees, who will simply express their own views (or not). That being so, I can see no justification for creating a presumption which would depart from the repeated message of the authorities that redundancy situations arise in an extraordinarily wide variety of circumstances and that the adequacy of consultation has to be considered on a case-by-case basis. Indeed the range of circumstances might be thought to be particularly wide in the case of smaller-scale redundancy situations in non-unionised workplaces. Group meetings may indeed be a useful way of ascertaining the views of employees, but their appropriateness will depend on the circumstances.

56. A further difficulty with what the EAT says in para. 28 of its judgment is that it does not give the sort of detailed guidance that employers would reasonably require if they were seeking to comply with a recognised standard – not previously identified in the case-law or in any ACAS or other published guidance – governing how to conduct consultation at a group level in the absence of any representative machinery.[3]

57. In reaching this conclusion, I am conscious that I am disagreeing with the view of a Tribunal including two lay members. But I feel less uncomfortable about doing so because, as noted above, the EAT does not appear to have been stating some currently recognised norm of good industrial relations practice. Rather, it was seeking to fill what it perceived as an undesirable gap created by the fact that the statutory requirements do not apply to smaller-scale redundancies. If such a gap does exist, it is more properly addressed by legislation or, perhaps, by ACAS guidance.

58. The upshot of the foregoing paragraphs is that I see no reason to or depart from, or add to, the well-established case-law as regards the requirements of fair redundancy

[3] We asked at the hearing whether there was any ACAS guidance specific to this kind of situation and were told that there is none. I have since checked the published ACAS advice on redundancy. The section on "Managing Staff Redundancies" includes a section on consultation which reflects the existing case-law and a separate section on "Collective Redundancies". Nothing is said in the former about any kind of group consultation.

consultation. The authorities – seminally *Williams v Compair Maxam* but developed in several other cases, including those identified by the EAT – state certain broad principles, but they recognise the wide range of situations in which those principles will fall to be applied and, as Ms Ashiru reminded us, contain repeated warnings against elevating them into rules of law that displace the very broad language of section 98 (4) of the Employment Rights Act 1996: see, for example, the observations of Browne-Wilkinson J in *Williams v Compair Maxam* itself at p. 160 C-D.

59. I turn to what the EAT says about the stage at which consultation should take place, which arises even if there is no requirement of general workforce consultation.

60. In the well-known case of *R v British Coal Corporation ex p Price* [1994] IRLR 72 Glidewell LJ said, at para. 24 of his judgment, that fair consultation means "consultation when the proposals are at a formative stage". Although that decision was concerned with consultation in a rather different context, his observation has been adopted in the context of the non-statutory obligation on an employer to consult about proposed redundancies, and I have no difficulty with it. However, it is important to appreciate what is meant by "formative". Ms Ashiru submitted that what it means is "at a stage where it can make a difference to outcomes" and that it does not necessarily equate to "early consultation" in a temporal sense (which she said was how the EAT appeared to have understood it): what matters is that the employer still has an open mind and not, as such, how soon after the proposal was first formulated the consultation occurs. Mr Jones's submission was to essentially the same effect – that it meant that consultation should occur "at a point at which the employee can realistically still influence the decision". I agree with those submissions. No doubt the later in the process the consultation occurs the greater the risk that the decision-maker will have closed their mind; but whether that is so in a particular case is a matter for the factual assessment of the tribunal. And of course in an appropriate case an employer may not be held to have made a final decision until after the conclusion of an internal appeal: see para. 74 below.

61. I have noted above that the EAT in this case attached importance to the decision in *Mogane*. At paras. 22-24 of its judgment there is a discussion of the stage at which consultation should take place where there is no requirement of collective consultation. It points out at para. 22 that in "collective redundancy cases" the case-law following *Williams* has established that consultation should take place at a formative stage, and at para. 24 it says that that should be the case in all redundancy situations, not just those involving collective redundancies". It continues:

> "It seems to us that the formative stage of a redundancy process is where consultation ought to take place according to the principles in *Williams* and the cases developed from it. The reason for consultation to take place at a formative stage is because that means that a consultation can be meaningful and genuine. That must mean that consultation, for a process to be fair, should occur at a stage when what an employee advances at that consultation can be considered and has the potential to affect the outcome."

That seems to me entirely consistent with the position as I have stated it. On the facts of *Mogane* itself the EAT held that consultation had commenced only after a crucial

element in the selection process had been definitively decided; but the situation was very different from that in the present case, and no useful comparisons can be drawn.

Employment by an international corporation

62. I can deal with this supposed change much more shortly. Again, I am not wholly persuaded that there has been a significant change in recent years in the numbers employed in businesses which form part of international corporations: such employment has been very common for decades. However, what matters is the point of substance made by the EAT, which is that different standards of redundancy consultation may apply in different countries, and that employers should follow good industrial practice in Britain rather than any less demanding standard that may apply in the jurisdiction of the parent company. It observes that the present case is an example of "a tool for selection using entirely subjective criteria [coming], initially, from the USA". As noted above, that does not appear to be an accurate summary of what in fact occurred; but I nevertheless agree entirely with the general proposition that redundancy processes which are regarded as fair in another country may not meet British standards.[4]

Paras. 32-35: the EAT's Reasons for Allowing the Appeal

63. I need to set out paras. 32-34 in full. They read:

> "32. Applying these principles we have come to the conclusion that, in this case, there was a clear absence of consultation at the formative stage. There is nothing in the judgment which indicates that there were good reasons not to discuss this at what we have described as the workforce level of consultation. It means that there was never any opportunity to discuss the prospects of a different approach to any aspect of the redundancy process chosen by the employer. The absence of meaningful consultation at a stage when employees have the potential to impact on the decision is indicative of an unfair process. Without an explanation as to why omitting the workforce level of consultation would be reasonable in these particular circumstances, the ET has not provided sufficient reasons to explain its decision. In our judgment, on the facts, there was no good reason for this consultation not to take place. We note, in particular, the fact that the numbers to be dismissed were not settled until a major part of the process of selection had been concluded. That shows that there was no pressure of time.
>
> 33. That absence of consultation is sufficient to make the dismissal unfair if the procedure is not fair overall. The Respondent relies on the approach to the appeal in this respect. In our judgment, in order for the process to be considered fair overall, it would generally require something on appeal which would fill any gaps in the earlier stages of a process. In this case, whilst the appeal could correct any missing aspect of the individual consultation process (e.g. the provision of the

[4] Having said that, I am bound to say that my own experience in this field is that the HR departments of overseas parent companies generally understand the need to be guided by their British colleagues on matters of local law and practice – not least because they appreciate that it may be expensive for them if they do not.

> Claimant's own scores), it could not repair that gap of consultation in the formative stage which we have identified.
>
> 34. On that basis it is unnecessary for us to deal with the ground of appeal that relates to the provision of scores."

(I need not set out para. 35, which deals only with consequential matters.)

64. It is clear from para. 32 that the EAT's conclusion that there was no consultation at the formative stage of the process was based squarely and only, as it says in the opening words, on the "principles" identified in paras. 28-30 – that is, (a) that there was no "workforce level of consultation" (evidently a paraphrase of "general workforce consultation"); and (b) that no reason had been shown for that departure from good industrial relations practice. It did not conduct any analysis of the actual sequence of events in the Claimant's case or the particular criticisms advanced by him in the ET or of the Judge's reasoning.

65. I should note at this stage that the EAT's reasoning as I have identified it does not fall within the scope of the only ground of appeal which was before the EAT (see paras. 32-38 above). Although it was indeed a central part of the Claimant's case that consultation had not occurred at the formative stage of the process, that contention was based on the specific point that ADP had effectively made the decision to dismiss him at the point at which it conducted the scoring exercise. It had nothing to do with the need for consultation "at the workforce level", which was in truth a new argument, put forward by the EAT itself.

THE APPEAL

66. Ground 1 of ADP's Grounds of Appeal challenges the EAT's proposition that there is a requirement of general workforce consultation. Ground 5 contends that the EAT was not entitled to decide the appeal before it on the basis of a point not raised in the ET or in the grounds of appeal to the EAT. It will be apparent from what I have said above that in my view both grounds are correct. (ADP advances some other grounds but I need not address them.)

67. Mr Jones made some short submissions rebutting particular criticisms of the EAT's reasoning made by ADP in its grounds of appeal and to that extent seeking to uphold it; but they were not the centre of his argument and he did not raise any points that I have not considered above. Instead, realistically he concentrated his submissions on an Amended Respondent's Notice, filed at a late stage, which contended that the appeal should be allowed on other grounds, namely that:

> "The ET's judgment was erroneous because it failed to consider whether the consultation process was fairly conducted at all and/or in accordance with the guidance in *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others* [1994] IRLR 72 at [24] and [25]."

Ms Ashiru did not object to the amendment as such, but she made it clear that she did not accept that Mr Jones was entitled to rely on points not taken in the ET or the EAT.

68. The contention in the Respondent's Notice is expressed in very general terms: the reference to the *British Coal* case is simply as a convenient statement of the elements of a fair consultation process. Mr Jones's broad point was that the Employment Judge had simply addressed the question of whether there was, as she put it at para. 58, "a fair redundancy process", without giving specific consideration to the issue of consultation. He referred to the decision of the EAT in *Langston v Cranfield University* [1998] IRLR 172 as establishing that in any claim of unfair dismissal by reason of redundancy it would be necessary for an employment tribunal to consider the main elements of a fair redundancy process, one of which is whether there has been proper consultation, even if they had not been expressly raised.

69. I do not think it can be said that the Employment Judge did not consider at all whether ADP had properly consulted with the Claimant about his dismissal. She identified that question as point (3) in the list of issues: see para. 26 above. She found the facts about the consultation process. At para. 46, as part of her self-direction on the law, she referred to *Williams v Compair Maxam*. Although most of the "Discussion and Conclusions" section of the Reasons is, understandably, directed to the Claimant's case based on the PB incident (which I have the clear impression was the main focus of his case), para. 56 is directed at the central (though admittedly not the only) pleaded criticism of the consultation process – that is, that ADP did "not give me the opportunity to challenge the scores" (see para. 26 above). The Claimant's real criticism has to be that the way that she dealt with the issue of his scores was wrong in law and/or that he had made other criticisms of the consultation process with which she was obliged to, but did not, deal. In other words, the criticism has to be of specific errors or omissions in her reasoning.

70. In his careful and persuasive oral submissions Mr Jones recognised the need to condescend to specifics. He took us through each stage of the consultation process advancing various criticisms as he proceeded. However, there is an issue about whether all the criticisms advanced were within the scope of the appeal. That is defined by ground J, subject perhaps to any clarification or amplification in the subsequent documents noted at paras. 32-38 above. I will start with ground J itself.

71. The only specific criticism made in ground J is that the decision to dismiss the Claimant was effectively made at the point that the scoring exercise was carried out and he was given the lowest score, which was before the consultation period had even started. If that was indeed when the decision was made, the consultation was self-evidently not undertaken at a formative stage. It was only in the course of the cross-examination of Ms Hancock in the ET that it became clear that the scoring exercise was carried out when it was, so this point was not made in the Details of Claim. However, Mr Haycocks senior's note of the points to be made in the closing submissions reads:

> "Not only made decision before end of 2 weeks referred to in letter but decision effectively made not around 6/7 July as I had worked out, but as early as 10/11 June. Also that decision would be final as Annabel Jones said [sc. at the appeal hearing] that Evie [i.e. Ms Hancock] was the one who made decision and she did scoring."

It is not disputed that he did indeed make that point to the Judge.

72. The Judge does not in her Reasons expressly address the argument that the decision to dismiss was "effectively made" when the scoring exercise was carried out. It would clearly have been better if she had done so. I do not, however, believe that that omission amounted to a material error of law, for the following reasons.

73. I start by saying that I agree that it was bad practice for Ms Hancock to carry out the scoring exercise before the consultation started; but it is important to understand why. The reason is that it was good practice to give the employees at risk the opportunity to comment on the selection criteria to be used (and perhaps also on ancillary questions about their application, such as who was to do the exercise and on the basis of what information) before the exercise was done. But the failure to give the Claimant that opportunity does not mean that the die was irrevocably cast when it transpired that his score was the lowest. If in the course of the consultation he, or anyone else, had persuaded Ms Hancock or her HR advisers that the criteria were flawed (or that she should not be the sole decision-maker and/or should have had access to more information) it was not too late for the exercise to be re-done. No doubt that would have been inconvenient and caused a little delay, but it would certainly not have been impossible. The scoring decision only constituted an "effective" decision to dismiss if ADP would not in practice have been prepared to reconsider. (In fact, it would not have been a final decision even then, because the Claimant might in principle have persuaded ADP that there was no need for any redundancies, or have accepted a different job in the business; but that qualification is irrelevant for present purposes.)

74. The Judge does not expressly address the question whether Ms Hancock would have re-done the scoring exercise if the Claimant had persuaded her that the choice of criteria was unfair (or that the exercise was done by the wrong person and/or on the basis of inadequate information): instead, her focus was on the Claimant's primary case that his score was unfairly low because of the PB incident. However, the question is academic unless the Claimant did in fact challenge the selection criteria (or the ancillary points about their application) once he received them and, to the extent that he did, whether the challenge had any substance: the dismissal decision would only be potentially unfair if he had been deprived of a real opportunity to ask ADP to re-do the exercise.

75. As to that, the Claimant was notified of the selection criteria in advance of the meeting on 8th July. There is no evidence that he challenged them in the meeting, or that he asked about who would be doing the exercise or on what information. (Mr Jones suggested that he might have done so if he had known that the exercise had already been done and that he had scored lowest, but I am not persuaded that fairness required that he be told that: the selection criteria should be important to an at risk employee whether or not the exercise has been done.) He did of course challenge them in the appeal meeting, when he not only knew the criteria but also knew how he had been scored on them and that Ms Hancock had done the exercise and the information that she had used. However, as we have seen, at para. 56 of the Reasons the Employment Judge made an express finding that the appeal process involved a conscientious investigation of those complaints (for which purpose it was irrelevant at what stage the scoring had occurred) and, by necessary inference, that they had been reasonably rejected. There is authority from this Court that in principle a procedural unfairness in a decision to dismiss can be cured by a fair internal appeal – see the case of *Taylor v OCS* cited in support of point (e) in the EAT's summary of the law (see para. 40 above); and that principle had already been stated by the EAT in the specific context of a

redundancy dismissal in *Lloyd v Taylor Woodrow* (point (d) in the summary). I note also that, while at para. 33 of its judgment the EAT rejected the argument that a failure to conduct general workplace consultation could be cured by an appeal, it expressly acknowledged that the position might be different if the complaint were of a particular defect in the consultation process "e.g. the provision of the Claimant's own scores".

76. The Claimant's case in the EAT did not involve any challenge to the finding at para. 56 of the Reasons that the appeal hearing had conscientiously addressed the Claimant's complaints about the scoring process. It would be too late to mount such a challenge before us, and indeed Mr Jones did not attempt to do so. It follows that, if the entirety of the dismissal process is taken into account, including the appeal, the question of the scoring exercise having to be re-done would never have arisen; and thus also that the Judge's failure to address the complaint about its timing did not constitute a material error of law.

77. As we have seen, although that is the only specific complaint pleaded in ground J, Judge Beard in his decision on the sift treated it as raising also the separate point that the Claimant was not informed of his scores until after the dismissal decision. That was confessedly an error on ADP's part (see para. 15 above). It may be debatable whether it was sufficient potentially to vitiate the fairness of his dismissal; but it is unnecessary to decide that question because, again, the ET found at para. 56 that the Claimant had the opportunity to challenge his scores at the appeal hearing and that his complaints about them were rejected after a conscientious investigation.

78. In his oral submissions Mr Jones pointed out that, although those were the only specific points made (or arguably made) under ground J, Mr Horan had at para. 2.2 of his skeleton argument (see para. 36 above) referred to para. (f) under head (3) of the original Details of Claim; and he submitted that all the points made in the paragraph should be treated as falling within the scope of the appeal to the EAT and thus were available to be advanced under his Respondent's Notice. I do not accept that. In my view the natural reading of para. 2 as a whole is that the only specific point being relied on in that paragraph was the one at para. 2.3 – that is, that the scoring had preceded the start of the consultation; and that is consistent with the pleading of ground J itself and with Judge Beard's reasons for allowing the point to proceed (save only for his introduction of the separate point about the Claimant not having been provided with his scores). But in any event the inclusion of a point in a skeleton argument is not a substitute for its inclusion in the ground.

79. However, I would not want the Claimant to think that his appeal had failed only because of a deficiency in his pleading. I am therefore prepared to say that I do not believe that the Judge erred in law either in the way that she dealt with the points raised in para. (f) or by failing to deal with them. In fact, only two of the four points – (i) and (iv) – are potentially live, because point (ii) is that the Claimant had not been provided with his scores until after his dismissal, which I have already considered, and Mr Jones said that he did not feel able to pursue point (iii) as a matter of law.

80. Point (i) is that ADP failed to inform the Claimant of the number in the pool for selection. This point was not raised in Mr Jones's skeleton argument, but we established at the hearing that the gist of the complaint was that the Claimant was not told that the pool comprised only the sixteen London employees working on the relevant part of the Goldman Sachs business and not the four Warsaw employees. At

para. 50 of her Reasons the Judge held in terms that in the context of the exercise in this particular case, where only three redundancies were proposed (in fact it is arguable that the relevant number is only two), the size of the pool was not a matter of significance. It follows that it cannot have been information which the Claimant should as a matter of fairness have been given for the purpose of consultation even though he did not (initially) ask for it. In any event, it is clear that he was given the numbers in the pool by the time of the appeal hearing.[5]

81. Point (iv) is that ADP did not provide the Claimant with Goldman Sachs' "Critical Roles Report". Again, this point was not advanced in Mr Jones's skeleton argument (or indeed in Mr Horan's skeleton argument in the EAT), and it was not developed by him in any detail. We were not shown the Report (it is not clear whether it was before the ET or, if not, whether its disclosure was sought); but, so far as I can see, its absence is relied on because it was mentioned by Mr Hoke at the appeal hearing in the course of an explanation of how the redundancy situation arose. Mr Jones submitted that if the Claimant had had this report it might have enabled him to make submissions about how redundancies could be avoided, e.g. by changing the hours worked; but he was not in a position to develop that submission further. On the information before us, there is no basis on which, even if the point had been within the scope of the appeal, we could properly have held that it was a material error of law for the Judge not to address it specifically in her Reasons.

82. That disposes of the points which are even arguably within the scope of this appeal. As will appear, the only points of real substance are those relating to the scoring process considered at paras. 69-75 above. I strongly suspect that the reason why they are the only points specifically identified under ground J is that they are the points on which Mr Haycocks senior focused in the ET (apart, that is, from his reliance on the PB incident). That would be entirely understandable, since in both respects ADP clearly departed from good practice and were only saved by what the ET found to have been the careful consideration given to the scoring on appeal. I have the impression, though I need not decide, that to the extent that other criticisms of ADP's consultation were pursued by Mr Haycocks at the hearing they were distinctly secondary (which may explain why the Judge does not directly address them). It is not surprising, and no criticism of him, that Mr Jones was not in a position to develop them fully before us.

83. On this basis, Mr Jones's reference to *Langston* does not advance the argument. This is not a case where a claimant has failed to rely on deficiencies in the consultation process but the tribunal should have considered them nevertheless. The issue here, within the ambit of the ground of appeal, is whether the Judge dealt properly with complaints that the Claimant did make and, to the extent that she did not, whether her omission to do so vitiated her decision.

84. In short, I can find no error of law in the Employment Judge's conclusion that, viewed overall, ADP conducted a fair redundancy process. I would accordingly allow its appeal and restore the decision of the ET.

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[5] The transcript shows that he referred to being "in the bottom of 23 people", when the pool so far as his team was concerned was 16. The discrepancy is not material, but I suspect that it is because the scoring exercise covered also the other team from which a redundancy was made.

Singh LJ:

85. I agree.

Baker LJ:

86. I also agree.