THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Mbakop	**v**	**The Children's Society**

Heard at: London Central

On: 17, 18, 20, 21 September 2018
26 October 2018 (in Chambers)

Before: Employment Judge Glennie
Mr M Ferry
Ms N Foster

Representation:
Claimant: In person
Respondent: Mr G Mahmoud (Counsel)

JUDGMENT

The judgment of the Tribunal is that the complaints of direct discrimination because of race; of constructive dismissal; and for a redundancy payment; are all dismissed

REASONS

1. By his claim to the Tribunal the Claimant, Mr Mbakop, brought complaints of direct discrimination because of race; constructive unfair dismissal; and for a redundancy payment. The Respondent, The Children's Society, disputed those complaints.

2. The Tribunal is unanimous in the following reasons.

The issues

3. The issues were recorded by Employment Judge Tayler at a preliminary hearing in the following terms:

   3.1 The Claimant describes himself as Black African.

   3.2 Was the Claimant subject to the following treatment:

3.2.1 The Finance Director, Chris Knell, giving aspects of the Claimant's role (budgeting and forecasting lead) to Mr A from October 2016.

3.2.2 Mr Knell and Victoria Jones, HR Business Partner, telling the Claimant that he was not permitted to apply for the role of Head of Planning and Analysis at a consultation meeting on 17 November 2016.

3.2.3 Mr Knell and Ms Jones giving a job description for the role of Head of Planning and Analysis to Mr D on or about 17 November 2016 so that he could apply.

3.2.4 Mr Knell and Ms Jones when the Claimant was, after many requests, permitted to apply for the role of Head of Planning and Analysis, on 18 January 2017 giving the Claimant 24 hours in which to apply.

3.2.5 Mr Knell and Ms Jones not appointing the Claimant to the role of Head of Planning and Analysis after the interview on 20 January 2017.

3.3 Was the treatment because of the Claimant's race, in the sense that it was a material factor in the treatment – so as to constitute direct race discrimination?

3.4 Did the Respondent act in fundamental breach of the Claimant's contract of employment by reason of:

3.4.1 The matters set out in paragraph 3.2.

3.4.2 Mr Knell and Ms Jones removing the role of Management Accountant Treasury and Planning from the structure.

3.4.3 The Claimant being asked to undertake the role of Retail Management Accountant by Mr Knell.

3.5 If so, did the Claimant resign in response to the pattern of treatment set out above (or any of it) without having affirmed the contract of employment?

3.6 Was the Claimant dismissed?

3.7 If so, taking into account such treatment as led to the Claimant's resignation, was the constructive dismissal an act of race discrimination?

3.8 If the Claimant was dismissed, did the Respondent have a potentially fair reason for dismissal? The Respondent relies on some other substantial reason, being a business reorganisation.

3.9 Was the dismissal fair?

3.10 [Issues as to time limits, which did not in the event have to be determined].

3.11 Is the Claimant entitled to a redundancy payment?

Evidence and findings of fact

4. The Tribunal heard evidence from:

4.1 The Claimant.

4.2 Mr Chris Knell, formerly the Respondent's Finance Director.

4.3 Ms Victoria Jones, HR Business Partner.

5. There was an agreed bundle of documents and a supplementary bundle of documents provided by the Claimant. References in these reasons to the agreed bundle will be by page number, and to the supplementary bundle by page number preceded by S/.

6. The Respondent is a national charity. The Claimant is a qualified accountant who began employment with the Respondent in November 2008, having previously worked for other charities. His terms and conditions of employment at page 48 gave his job title as Management Accountant – Treasury and Planning, and he was paid according to the Respondent's grade C, being one of several Management Accountants in the Respondent's Finance Team.

7. There was an attempted re-structure of the Finance Team in 2012. The Claimant was critical of this in his witness statement, although it is not necessary for the Tribunal to consider those criticisms in themselves. However, at about this time the Corporate Financial Planning Manager (a grade B post to whom the Claimant reported), left the Respondent and was not replaced. Thereafter the Claimant reported to the Finance Director (a grade A post).

8. The Claimant's case was that following the Corporate Financial Planning Manager's departure, he absorbed most of her role. The Tribunal found that, whether because of this or for other reasons, the Claimant's role developed so that he had a wider remit than the other Management Accountants. Like the others, the Claimant had his own "patch", namely HR, but unlike the others he acquired a co-ordinating role in relation to the information gathered for the purposes of budgeting.

9. The Claimant's case included the complaint that in 2016 his co-ordinating role in budgeting and forecasting was taken away and given to Mr A. The Respondent's case was, that although there had been a change, it would

be wrong to characterise it in this way. Mr Knell's evidence was that a more automated system of collating and presenting information for budgeting was being introduced, and that Mr A was carrying out the technical work that was required for this.

10. The Tribunal found that Mr Knell's evidence was essentially correct on this point. It was not disputed that the new system was being introduced, and there would have been a need of technical input to achieve this. It was possible to see how the Claimant could regard this as involving elements of his job, as it was at that point, being taken away. They were not, however, being given to Mr A, or to anyone else: they were being automated.

11. Meanwhile, in November 2014 the Respondent's Finance Investment Committee had approved a business case for a Finance Project, which was essentially intended to reduce the staffing cost of the finance function. A table at page 138 (in the final version of the business case, dated 11 November 2016) showed that this staffing cost, as a percentage of the Respondent's total expenditure, was considerably higher than in peer organisations. The Respondent's evidence was that it had additionally experienced a reduction in income and expenditure as a result of changes in its activities.

12. Mr Knell joined the Respondent as Finance Director, and so as the Claimant's line manager, in July 2016. He was asked to review the Finance team in the light of changes in the Respondent's activities, including identifying ways of making the staffing structure more efficient. Mr Knell produced a business case for changes to the team on 26 September 2016. The updated version of this, as at 11 November 2016, was at pages 138 to 140.

13. The Respondents relied on an organogram at page 142 as showing the structure of the team as at November 2016. There was a dispute as to how many grade C roles existed in the team under this structure. The Respondent's case was that Ms KG, who was shown as a Management Accountant, had in fact chosen to take a step down to a grade D post. The Claimant disputed this. In the event, however, there was no need for the Tribunal to resolve this issue, as when the restructure proceeded, the Claimant was one of a group of 6 employees considered for 6 posts in the new structure.

14. The proposed new structure was shown in an organogram at page 143. Of relevance to the present case were the role of Head of Financial Planning and Analysis ("the Head role"), which was a grade A role, and 5 grade C roles as Financial Analysts (one of which was said to be interim only). Taken overall, there would be a smaller number of employees in the team than was the case under the existing structure.

15. The process that the Respondent proposed to follow with regard to potential redundancies was set out in a flow chart at page 149. This stated that phase 1 would involve consideration of those on maternity leave.

Phase 2, so far as material to this case, involved selection for grade C posts. Those in the pool for selection were the Management Accountants and the Financial Accountant. The roles ring-fenced for the grade C pool were those of Financial Analyst, Financial Accountant and Interim Financial Analyst.

16. Phase 3 was expressed in the following terms:

"Once the above selection processes have taken place, any remaining posts within the structure become available to apply for. You are able to express interest in any post available in the structure; however, consideration for roles will be in accordance with this process."

Ms Jones' evidence was that this was not intended to mean that individuals could not apply for posts outside of their phase 2 selection pool until after phase 2 had been completed, although she accepted that it could be read in that way. Mr Knell said that the intention was to "go through the pools before phase 3" and that he would have said that "we have to resolve the pools first", which tended to support the notion that wider applications could not be made until phase 2 had been completed.

17. On 10 November 2016 the Claimant was sent a letter inviting him to a first consultation meeting. In cross-examination the Claimant said that he spoke to the union and that they advised him that there was a risk of redundancy and that it would be better for both parties if he actually wanted that (i.e. redundancy). The Claimant then spoke to Mr Knell that morning: he agreed that he asked for redundancy "from the word go".

18. On 17 November 2016 Mr Knell and Ms Jones held the first consultation meeting with the Claimant. There was a standard form used for these meetings at pages 158 to 161, with Ms Jones' notes of what the Claimant said at page 160.

19. The form stated that at this point, there would be a reduction in Management Accountant posts from 5 to 4. It repeated that the pool consisted of Management Accountants and the Financial Accountant, and stated that there were available 4 Financial Analyst posts, one "FTC Financial Analyst" (the interim role) and one Financial Accountant post.

20. There was a dispute about one aspect of this meeting. The Claimant's evidence was that he said that he wanted to apply for the grade A Head role, and was told that he could not. Mr Knell and Ms Jones both stated that the Claimant did not mention this role, and that he was focused on redundancy.

21. The Tribunal recognised that what was said about phase 3 in the flowchart at page 149 might be taken as supporting the Claimant's account, if it was to be understood as meaning that phase 2 had to be completed before an individual could apply for roles outside of the pool. That could provide a reason why the Claimant might be told that he could not apply at that stage,

at least until phase 2 was over. In the event, however, we preferred the account given by Mr Knell and Ms Jones for the following reasons:

21.1 Ms Jones' notes of the discussion made no reference to the Head role.

21.2 It was common ground that the Claimant wanted to be offered redundancy terms and to leave the Respondent: asking to apply for the Head role would not have been consistent with this.

21.3 There was no obvious reason why the Claimant should have been told that he could not apply: Ms Jones believed that he could do so, at any stage, and Mr Knell believed that he could do so, albeit probably in phase 3.

21.4 The Claimant did not mention the Head role in his email of 30 November 2016, discussed below. The Tribunal considered it unlikely that he would have failed to mention asking to apply and being told that he could not do so, if that had happened.

22. Ms Jones sent a follow-up letter after the meeting, on 18 November 2016 (page 163). The letter included the following:

"During our meeting it was explained that your post has been included within a selection pool, where you will be eligible to apply for the remaining roles within the new structure deemed to be suitable to your current role and grade."

There were enclosed with the letter the selection process flowchart, the proposed new structure with roles available to the pool highlighted (although no evidence was given about what roles were in fact highlighted) and an expression of interest form.

23. On 29 November 2016 there took place a collective consultation meeting, which the Claimant did not attend, although he was mentioned. At page 167 the note of the meeting reads: "Cel [the Claimant] SEQ Evaluation compared re the other roles. Some of Cel role into the "Head of role" feeling demotion." The Claimant confirmed in his evidence that he had in fact told the union that he felt that the role of Head of Financial Planning and Analysis ("the Head role") included some of his role.

24. The Claimant sent an email to Mr Knell, copied to Ms Jones, on 30 November 2016 (page 169), in which he wrote the following (without mentioning the Head role):

"Thanks for inviting me for a consultation meeting on the 17th November and sharing your proposals for the Financial Analyst and Financial Accountant roles.

"Unfortunately I cannot apply for these roles for the following reasons:

- Job status: The roles you proposed to me have a lower status/responsibilities compared to my current role.
- Salary: My salary will be decreasing as I am currently earning above the maximum for Grade C.

"I am really distressed by your decision to make my role redundant and not acknowledging that it is the case. Furthermore I am being asked to apply for lower role."

25. Mr Knell replied in an email on 1 December 2016 at page 168. He said that the Claimant's salary would not change as a result of the restructure, and continued:

"I am sorry that you are feeling distressed during this process, I would like to confirm that no decision has been made to make your role redundant, we are still in a period of consultation and it is anticipated that there will be a role available for you within your selection pool as there are 6 people and 6 posts available.

"Based on the information we have, we do not see the Financial Analyst being a "lower" role or a demotion to the Management Accountant post or your current job description. As mentioned, I am more than happy to have a discussion with you if you feel this job description does not accurately reflect your role.

"You have expressed your wish to both me and Victoria to be considered for voluntary redundancy and you have said you do not want to be part of this process. I believe that you understood the reasons why at this stage we could not accept a request for voluntary redundancy and that the consultation process had to take place."

26. A further consultation meeting took place on 15 December 2016. The Claimant attended by telephone as he was unwell. Again Mr Knell and Ms Jones were present and a standard form was used, with Ms Jones adding notes, at pages 177 to 181. Mr Knell noted that the Claimant had not submitted an expression of interest form for a Grade C post. The Claimant said that he felt that this role would be going backwards in his career, and did not meet his aspirations. Mr Knell said that he recognised the Claimant's skills and that the role was suitable. He also said that the Claimant was able to apply for the Head role if he wished. The Claimant asked when this was available and Mr Knell said that it was being advertised at that time. Mr Knell said that the new Grade C role was "80%+" similar to the Claimant's existing role, and the Claimant said that he did not want to take it. Ms Johnson added that if the role was not suitable, and the organisation agreed, redundancy might be an option, but that this was not the position at present.

27. The Respondent's case was that this was the first occasion on which the Head role was raised. The Tribunal has already found that it was not discussed on 17 November. There was no suggestion that it was raised at

any point between the two meetings. We therefore found that this was the first occasion on which the Head role was raised.

28. The Claimant went onto the Respondent's intranet on the same day, and could not find an advertisement of the Head role. He referred to document S/B2, which was a screen shot of the Respondent's internal careers site. It transpired that, unknown to Mr Knell or Ms Jones, the advertisement had in fact been removed from the intranet on 13 or 14 December. The Claimant did not raise with anyone at this stage the fact that he had been unable to locate an advertisement for the Head role.

29. One of the Claimant's colleagues in the team was Mr D, who occupied the Grade B post of Senior Business Partner, Fundraising and MCI, and who the Claimant describes as being of Asian ethnic origin. The Claimant's case was that in the course of his consultation, Mr D was invited to apply for the Head role.

30. The consultation with Mr D was conducted by Mr Knell and Ms Jones. Their evidence, and therefore the Respondent's case about this aspect, was that Mr D's post was to disappear under the terms of the restructure. He was therefore given the job description for the Head role to consider, as there was no phase 2 in his particular case: he would go straight to phase 3. In the event, Mr D did not apply for the Head role.

31. The Tribunal accepted the Respondent's evidence about this. There was no obvious reason to doubt it, and in the circumstances it was logical and plausible that Mr D would be invited to consider applying for the Head role.

32. On 20 December 2016 Mr Knell sent a letter to the Claimant at pages 186-7 in which he stated that it was believed that the Financial Analyst post was suitable for him. He continued:

"You stated that you were not in agreement with this position, however it was explained that we had not received any information to indicate that the roles were materially different, and therefore at the end of the consultation it was confirmed that the change to your job title and job description would take effect from 13th January 2017 and that all other terms would remain unchanged."

33. The Claimant replied by way of an email on 4 January 2017 (pages 188-9) stating that he did not agree with the content of the letter and wished to appeal. Mr Knell replied on 9 January (also page 188) that there was no right of appeal, but that the Claimant could raise a grievance.

34. On 13 January 2017 solicitors instructed by the Claimant sent a letter to Ms Jones (pages 190-1). This asserted that as a result of the restructure, new positions were created and that employees who were made redundant were offered these as suitable alternative employment. The Tribunal noted that the letter omitted any reference to the need for a dismissal to occur for there to be a redundancy within section 139 of the Employment Rights Act.

With reference to the Financial Analyst role, the letter stated that the Claimant was not offered a formal statutory 4 week trial period and was not given a right of appeal. It continued that the Claimant did not accept the role, that it was not suitable alternative employment, and gave the reasons for saying this.

35. Ms Jones replied on 17 January 2017, at pages 192-4. The letter included the following:

"For the avoidance of doubt, there was no redeployment process. Your client was not place at risk of redundancy at any point. The role of Financial Analyst is comparable to the role of Management Accountant and therefore he was slotted into this post. This role was not offered as a suitable alternative to redundancy and therefore there is no appeal process or right to a statutory four week trial period."

36. The solicitors wrote again at page 195 (the letter was received on 3 February 2017 although it is dated, clearly in error, 13 January) stating that the Claimant was "sitting around much of the time with nothing to do" and that "whereas previously he had responsibility for senior accounting functions, he is now undertaking a small amount of junior work on a day-to-day basis."

37. Meanwhile, a one-to-one meeting had taken place on 17 January 2017 between the Claimant and Mr Knell, at which the Claimant had said that he had not had the opportunity to apply for the Head role. Mr Knell sent an email on the same day at page 199 in which he said that all staff had had the opportunity of applying for the role and that it was advertised internally only during the consultation period; and that it was currently open to external applicants. He said that he was currently interviewing, and that the process involved a competency based interview and a situational judgment exercise. He asked the Claimant to let him know by 4pm the next day if he wished to apply.

38. Ms Jones sent an email to the Claimant a few minutes later stating that a short window for the Claimant to apply could be offered. On Wednesday 18 January 2017 the Claimant sent an email stating that he wished to apply (page 198), to which Ms Jones replied (in part) as follows:

"As you will appreciate, this role was open to internal applicants in December; however, with no applications received we have been interviewing external candidates since then. Due to this being a business critical role, there is a requirement to conclude this process as soon as possible; and therefore should you meet the requirements, we are only able to offer an interview this Friday 20th January."

39. The Claimant's evidence was that he asked Mr Knell for time until the following Monday to prepare for the interview, and that he received no response. Mr Knell's evidence was that he did not recall this. The Tribunal found, as a matter of probability, that the Claimant did make this request: it

was likely that he would do so in the circumstances. The Respondent relied on what Ms Jones said in her email of 18 January 2017, quoted above, as justification for any failure to give the Claimant more time. The Tribunal considered this to be a fairly weak reason for not allowing the Claimant at least time over the weekend to prepare: there would be a delay of only one working day in reaching or announcing the outcome.

40. There was no evidence as to how long the other candidates had from the date on which they were notified of their interviews and the interviews themselves, in order to prepare. The Tribunal did not consider that it could conclude that they too might only have had a day or so to prepare: we considered that it was for the Respondent to provide evidence to this effect, if it existed.

41. The Claimant took the situational judgment test and was interviewed by Mr Knell and Ms Jones on 20 January 2018. The evidence of Mr Knell and Ms Jones was that the Claimant achieved the third highest score out of six candidates on the interview, and the lowest of the six on the test, the interview scores being an average of their individual scoring of each candidate. The scores were all set out in a table at page 215. Ms Jones said that the decision was made primarily on the interview (it being the case that the candidate with the highest score at interview was appointed, even though her combined interview and test scores were one point lower than the "second" candidate). On that approach, the Claimant was third placed.

42. When asked in cross-examination whether he disputed the scores he had achieved, the Claimant stated that he did. The Tribunal is not able to determine whether or not the scores were "correct" in any objective sense. However, we found that they were genuine, in that they represented Mr Knell's and Ms Jones' honest assessment of the Claimant's performance. There was no reason to believe that they had in any way deliberately marked him down: indeed his being placed third out of six candidates ran against this. (The Tribunal noted in passing that, had the Claimant applied during the period of internal advertising only, there was a chance that his application might have been successful then, and that the role would never have been advertised externally. Mr Knell said that, on the Claimant's performance at interview it would have been "a judgment call").

43. On 27 January 2017 Mr Knell sent the Claimant an email at pages 218-9 informing him that his application had been unsuccessful and giving feedback on the application, including his scores at interview and in the test.

44. On 3 February 2017 Mr Knell sent an email to members of the team, including the Claimant, setting out his proposals for "lead areas", i.e. areas of work on which each individual might focus. He suggested Retail for the Claimant. (This had been preceded earlier the same day by an email from the Claimant setting out ideas and queries from members of the team). Mr Knell's evidence was that he thought that the Retail area might be suitable for the Claimant because of his previous experience in Treasury: the

Claimant regarded the proposal as being inferior to the level of work that he had previously undertaken.

45. About an hour and a half later, the Claimant sent an email at page 221 to Mr Knell and Ms Jones which read as follows:

"For the reasons set in my solicitor's letter [being the letter received on 3 February], I hereby resign from my job.

"I will speak to you about serving my notice. However, please accept this letter as a formal notice of resignation."

46. Mr Knell and Ms Johnson met the Claimant to discuss his resignation on 13 February 2017. Ms Johnson's notes are at pages 226-236. The Claimant stated that the rationale for his resignation was in his solicitor's letter, and that he felt that the job he was doing was of lower status, with a reduced strategic input. He said that he felt that his role was redundant, and that he taken a step back to where he had been 15 years previously. He mentioned Mr D being given the Grade A job description. Mr Knell reiterated the Respondent's position that the two roles were 80% similar, and asked whether the Claimant was certain that he wanted to resign. There was discussion about whether the new role represented a "trial period".

47. The Claimant continued with his resignation and left the Respondent's employment on 31 March 2017.

48. The Tribunal gave some consideration to the relationship between the job content of the Management Accountant role, the Financial Analyst role, and the Head role. Mr Knell's evidence was that the overlap between Management Accountant and Financial Analyst was "80% plus". He relied on an appendix to his witness statement in which he compared the various elements of the two roles. In submissions, Mr Mahmoud also relied on the job evaluation carried out in connection with the restructure, which found that the two roles were similar. The Claimant's evidence was that the overlap was about 50%.

49. The Tribunal found it impossible on the evidence available to reach a precise comparison: there would have to be a detailed examination of all three posts in order to attempt that, and the constraints of the hearing did not permit this. As a matter of probability, however, we found the position to be approximately as follows:

    49.1 The Claimant's estimate of 50% equivalence includes elements that were lost as a result of the system change and greater automation, so that he was comparing the Financial Analyst role with the Management Accountant role as it had been around a year previously.

49.2 Mr Knell's estimate should be taken as meaning around 80% overlap: had he thought that the "plus" indicated a significantly higher figure, he would have said so. His estimate reflected the position as it was immediately before the re-structure and so after the loss of the elements referred to above.

49.3 The remaining 20% of content that was not common to the two roles was partly accounted for by generic changes that affected all Management Accountants / Financial Analysts and partly by changes that were specific to the Claimant in relation his co-ordinating role, and probably became part of the Head role.

The applicable law and conclusions

50. The Tribunal first considered the complaint of direct discrimination because of race. Section 13(1) of the Equality Act 2010 provides as follows:

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

51. Section 136 makes the following provision about the burden of proof:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

52. In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246,** both of which were decided under the similar provisions of the earlier anti-discrimination legislation, the Court of Appeal identified a two-stage approach to the burden of proof. At the first stage, the Tribunal should consider whether, the facts are such that, in the absence of an explanation from the Respondent, it could properly conclude that discrimination had occurred. For that conclusion to be reached, there would have to be something more in the evidence than a difference of treatment and a difference of protected characteristic (although the "something more" need not be in itself very significant). It the facts were not of that nature, the complaint would fail. If they were, then the burden would be on the Respondent to prove that discrimination had not occurred.

53. The Tribunal reached the following conclusions on the individual issues.

54. Issue 3.2.1. The Tribunal has essentially found against the Claimant on the factual basis of this issue. It was not the case that aspects of his role were given to Mr A: the latter was brought into the organisation in order to set up the automated system that the Respondent had decided to adopt. The

introduction of that system meant that the Claimant had a reduced role with regard to budgeting and forecasting.

55. Issue 3.2.2. The Tribunal has found against the Claimant on the factual basis of the allegation: he was not told that he could not apply for the Head role.

56. Issue 3.2.3. The factual basis of this allegation has been made out, in that Mr D was given the job description for the Head role at his consultation meeting. It was difficult to see how this could, in itself, amount to an act of discrimination against the Claimant, and the Tribunal took it that this issue should be understood as including words along the lines of "and the Claimant was not".

57. Issue 3.2.4. The Tribunal has found that the factual basis of the allegation has been made out to the extent that the Claimant was given 24 hours to prepare for the interview, but not to the extent that he alleged that he had made many requests to be allowed to apply for the role.

58. Issue 3.2.5. It was beyond dispute that the factual basis of the allegation has been made out in the sense that the Claimant was not offered the Head role. The Tribunal has, however, found that the scoring exercise was genuine and resulted in another candidate being offered the position on the grounds that she had achieved the best score.

59. The Tribunal then asked itself whether, to the extent that the Claimant has proved the factual basis of his complaints, the facts are such that, in the absence of an explanation from the Respondent, it could properly conclude in relation to any of those complaints that discrimination had occurred.

60. We concluded that we were unable to find the "something more" in the evidence that could enable us properly to conclude that discrimination had occurred. The Claimant identifies himself as Black African, and identifies Mr A as White, Mr D as Asian, and the successful candidate for the Head role as White. Beyond this, however, the Tribunal could detect nothing else in the evidence that could support a finding that the Respondent's actions or decisions regarding the Claimant were in any way influenced by his race. Mr A was brought in to set up the new system because the Respondent had decided to have a greater degree of automation. That is nothing unusual in present-day organisations. Mr D was given the job description for the Head role because there was no phase 2 post for which he could have been considered, and he might have wished to apply for that role. The successful candidate for the Head role was offered it because, applying the criteria that the Respondent had adopted, she had come first out of the six candidates.

61. The Tribunal has been somewhat critical of the Respondent's stated reason for not allowing the Claimant more than 24 hours to prepare for the selection exercise for the Head role. It was difficult to see what harm would have been done to the process by allowing the Claimant to undertake the

exercise on (say) the following Monday, rather than insisting that he did so on the Friday. The process would only have been delayed by one working day, while the Claimant would have had the two days over the weekend to prepare himself.

62. We could not, however, find anything in the evidence to suggest that the Claimant's race was a factor in the Respondent's decision. At most, it was an exercise of judgment that could be seen as somewhat hard on him.

63. The Tribunal also asked itself whether, looking at the evidence as a whole rather than at the individual allegations, it was possible to discern the "something more", such as a pattern of events, or a course of conduct that would cause us to question whether discrimination might have occurred. We found that it was not possible to do so.

64. With regard to issue 3.7 (dismissal as an act of discrimination), for reasons that will be explained below, the Tribunal has found that there was no dismissal. If, however, we are wrong about that, our findings about the absence of the "something more" necessary to form the basis of a finding of discrimination would apply to this aspect.

65. The Tribunal therefore found that the complaint of direct discrimination failed the first limb of the test under section 136(1).

66. If we are wrong about that, and the evidence with regard to one or more of the allegations is sufficient to satisfy the first limb of the test, the reasons that we have set out above would mean that we have accepted the Respondent's explanations in respect of the allegations that have been made out on the facts, and that the Respondent has proved that in no respect whatever did it discriminate against the Claimant.

67. There was therefore no need for the Tribunal to consider the issues as to time limits in relation to the discrimination complaints.

68. The Tribunal then considered the complaint of constructive dismissal. This complaint necessarily involves a breach of a term of the contract of employment of such a nature that the employee is entitled to treat himself as having been dismissed. The employee's resignation must be in response to the breach, and there must be no waiver of the breach (e.g. by delay in resigning).

69. The Claimant relied on the five elements of issue 2, which were the basis of the discrimination complaint, and the additional two points in issue 4, being the removal of the role of Management Accountant Treasury and Planning from the structure, and his being asked to undertake the role of Retail Management Accountant.

70. To the extent that the Tribunal has found against the Claimant on the factual basis of the allegations in issue 2, those findings are material again here.

71. At various points in his evidence and in his submissions the Claimant asserted that the Respondent had changed the terms and conditions of his employment. Mr Mahmoud accepted that changes to an employee's job content or status could amount to such a breach (a "fundamental breach") but would not necessarily do so.

72. The Tribunal found that the re-structure did not involve any changes to the Claimant's terms and conditions in the sense of matters such as his remuneration or working hours.

73. With regard to job content, the Tribunal has found that, at the point when the Claimant was moved into the role of Financial Analyst, the role was about 80% similar to his previous role. We accepted the proposition that job content is rarely entirely stationary, and often evolves, without this amounting to a fundamental breach of contract. The Tribunal concluded that this was what had happened in the present case. The Respondent was not maintaining that the roles were identical, or that there had been a change of job title only; there was some degree of difference. We found, however, that where around 80% of the previous role appeared in the new one, and in the absence of any single particularly important element changing, there was no fundamental breach.

74. The Claimant also maintained that the status of his role had changed for the worse. The Tribunal did not consider that the change of title from Management Accountant to Financial Analyst necessarily involved any loss of status. We accepted Mr Knell's evidence that the latter title is more prevalent in the sector at present: it is within the Tribunal's general experience that job titles can evolve and change with the passage of time. The Claimant also made the point that, whereas as the previous role was only open to qualified accountants, partly qualified individuals were eligible for the Financial Analyst role. We concluded that this did not reflect any adverse change in job status, but rather a revised view of what level of qualification was necessary for an individual to be able to perform the role.

75. Issues 3.4.2 and 3.4.3 above raised individual matters beyond those relied on in issue 3.2. On the first point, it is the case that the Respondent removed the role of Management Accountant Treasury and Planning from the structure. However, this adds little, if anything, to the complaint already made about the changes in job content and status. Removing the role was an aspect of the restructure.

76. It is also correct that Mr Knell asked the Claimant to undertake the role of Retail Financial Analyst (rather than Management Accountant as recorded in the list of issues). As has been stated above, this was a proposal, not an instruction. Even if (as to which the Tribunal has made no finding) this would not have been a suitable role for the Claimant, it was not a fundamental breach of contract to ask him to consider it.

77. The Tribunal therefore found that there was no fundamental breach of contract by reference to the express provisions about job content or status.

78. The complaint could also be considered by reference to the implied term of trust and confidence, which was defined by the House of Lords in **Mahmud v BCCI SA [1997] ICR 606** in the following terms:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

79. Essentially for the reasons already given in relation to job content and status, the Tribunal did not consider that the Respondent had acted in breach of this implied term. We found that the restructure was not something that was calculated or likely to destroy or severely damage trust and confidence. Occasional restructures are a feature of business life. The Respondent has given an explanation of why the restructure was thought necessary. There was a consultation, following which the Claimant retained a job with the same salary and hours as he had had previously. Equally, we found that the explanation given for the restructure provided a reasonable and proper cause for the Respondent to act as it did.

80. The complaint of constructive unfair dismissal therefore failed. The Tribunal found that it was not necessary or proportionate to continue to decide on a contingent basis the issues about whether the Claimant's resignation was in response to the treatment complained of, or about affirmation of the contract.

81. That said, the Tribunal found that it inevitably followed from what we have decided about the restructure in relation to the issues as to breach of contract, that (if, contrary to our primary finding, there was a dismissal), the Respondent had a potentially fair reason for this, namely the restructure. This would fall within the category of some other substantial reason.

82. On these assumptions, did the Respondent act reasonably in treating this as a reason for dismissing the Claimant (meaning, in the context of this case, treating him in the way that they did)? This involves asking whether the Respondent acted in a way in which no reasonable employer, acting reasonably, could have acted; in other words, outside the range of reasonable responses.

83. The Tribunal would find that the Respondent did act reasonably, for the following reasons, the detail of which has largely been set out already:

    83.1 It was a legitimate business decision to carry out the restructure.

    83.2 The Claimant was consulted about the proposed role within the new structure.

    83.3 He was given that role.

83.4 He was able to apply for the Grade A Head role and was fairly considered for it. (The Tribunal would not find that the criticism it has made of the time allowed for the Claimant to prepare for the interview would take the Respondent outside the range of reasonable responses).

83.5 The role in the Retail sector was a reasonable proposal to the Claimant.

84. Finally, it was not entirely clear to the Tribunal whether there was a live claim for a redundancy payment, as distinct from the complaint of constructive unfair dismissal. To the extent that there was, the Tribunal found that this complaint failed, because the right to a redundancy payment arises only on dismissal, and we have found that the Claimant was not dismissed. In this regard, section 135 of the Employment Rights Act 1996 provides as follows:

(1) An employer shall pay a redundancy payment to any employee of his if the employee –

(a) Is dismissed by the employer by reason of redundancy.

85. It is perhaps understandable that the Claimant felt aggrieved by the way in which events unfolded: when the restructure was announced he stated from the outset that he was willing to accept redundancy, but instead he was placed in a post that he did not want. Often employers in such situations will be relieved when an employee volunteers for redundancy, as this may save them from making difficult choices involving those who wish to remain. There cannot, however, be a claim for a redundancy payment where there has been no dismissal.

86. The Tribunal therefore finds that all of the complaints are unsuccessful.

Employment Judge Glennie

Dated:. 29 November 2018

Judgment sent to the parties on:

30 November 2018

For the Tribunal Office