EMPLOYMENT TRIBUNALS

Claimant: Mr M Ostendorf

Respondent: Barclays Capital Services Limited

Heard at: East London Hearing Centre **ON**: 14,15 & 16 October 2015

BEFORE: Employment Judge McMahon

For the Claimant: In person
For the Respondent: Ms D Sen Gupta of Counsel

DECISION

The application for reconsideration is refused. The original Judgment issued to the parties on 6 February 2013 is confirmed.

REASONS

Introduction

1. Mr Ostendorf was employed by Barclays Capital Services Ltd ("the Bank") in the position of Global Head of Funding Structuring. His employment ran from 1 August 2003 until 5 November 2010. Following the ending of his employment he made a claim of unfair dismissal. I heard the claim in December 2012.

2. The Bank asserted that Mr Ostendorf had been fairly dismissed on the ground of redundancy. A part of Mr Ostendorf's claim was his view that redundancy was not the true reason for dismissal. In short, he maintained that he had devised a particular financial transaction which had considerable financial potential for the Bank. He claimed that his line manager, Mr Smailes, saw potential in the proposed transaction and made a decision to dismiss Mr Ostendorf so that he, Mr Smailes, and others, could take benefit from the proposed transaction.

3. Having heard all the evidence in December 2012 I reached the conclusion that Mr Smailes had not acted in the way asserted by Mr Ostendorf and that the

decision by Mr Smailes to end the employment of Mr Ostendorf was taken fairly and on the genuine ground of redundancy. Therefore the claim was dismissed.

4. In a letter dated 7 October 2013 Mr Ostendorf applied for the original decision to be reviewed/reconsidered on the ground that new evidence had become available since the conclusion of the hearing. An important feature of Mr Ostendorf's application for reconsideration was his belief that in 2012 the Bank did in fact enter into a transaction which was, in effect, the proposal he had put forward in 2010. Mr Ostendorf's position is that if it can be shown that the 2012 transaction was in fact the proposal he made in 2010 then that must throw considerable doubt on my judgment that he had been fairly dismissed. The Bank's position in that respect was to accept that the Bank had entered into a 2012 Transaction but that that transaction was not connected in any way with the proposal put by Mr Ostendorf in 2010. I made an order that the original decision should be reconsidered.

5. Following application by Mr Ostendorf I determined that an expert witness should be appointed to examine Mr Ostendorf's 2010 proposed transaction and the 2012 transaction that was entered into by the Bank in order to give an opinion as to the degree of similarity between the two transactions and whether the two transactions effectively were the same. There was considerable discussion/dispute between the parties as to the detail of instruction to be provided to the expert which led to the need for the Tribunal to make a number of Orders in that respect. In a particular Decision/Order the Tribunal set out what should be the extent of the reconsideration. The detail of that Order is set out below.

Background financial transactions

6. I believe it properly sets the context if I record what I see to be the significant background transactions and events.

7. In doing so I make the point that in the history of this case, particular definitions have been applied to certain background financial transactions. In my view there has been a little inconsistency in the use of those definitions. I give definitions below to certain transactions. They may not be the same as previous definitions used on some occasions in the past but I hope they will be consistent throughout these Reasons.

7.1 In 2007 the Bank entered into a transaction ("the First Transaction") with an Italian financial institution which in these proceedings has been referred to as the Italian Bank. In that transaction the Bank lent €750,000,000 to the Italian Bank. By way of security for the loan the Italian Bank provided Italy CMS bonds of the same value to the Bank.

7.2 In 2008 the parties agreed changes to the first transaction by extending the maturity date of the loan and introducing an additional bond ("the Second Transaction").

7.3 There was a further transaction entered into between the Bank and the Italian Bank ("the Credit Hedge Transaction"). A dispute arose between the Bank

and the Italian Bank in respect of the Credit Hedge Transaction. That dispute eventually led to litigation. But before that litigation took place the Bank made considerable efforts to try to find a solution which would remedy the differences between the Bank and the Italian Bank.

7.4 Mr Ostendorf became involved in trying to identify such a solution. A first attempt by him led to nothing. It was his second attempt which has become known in these proceedings as the "Second Solution". That Second Solution was set out in writing in an email dated Thursday 1 July 2010 sent by Mr Ostendorf to various persons within the Bank. Those persons did not include Mr Smailes. But, as is highlighted by Mr Ostendorf, one of the recipients was an employee (Mr Ali) who reported to Mr Smailes. The email was also copied to a Mr Norfolk-Thompson.

7.5 On 5 July 2010 Mr Smailes told Mr Ostendorf that his then current role was to be made redundant and that he was at risk of redundancy unless an alternative role could be found. An alternative role could not be found and on 6 August 2010 the Bank wrote to Mr Ostendorf to give notice that his employment would end on 5 November 2010.

7.6 In September 2010 the Bank carried out a review of a specific proposed financial transaction ("Screening Transaction Review – September 2010").

7.7 In June 2012 the Bank entered into a number of connected transactions ("the 2012 Transaction") with the Italian Bank which had the effect of "unwinding" the first transaction and the second transaction and of creating a revised financial arrangement/transaction between the two parties.

8. At the core of this Reconsideration application is Mr Ostendorf's assertion that, in truth, the 2012 Transaction was the implementation of his Second Solution.

The extent of the Reconsideration Hearing

9. On 1 December 2014 I conducted a Preliminary Hearing. One of the subjects for discussion was "the proper extent of the application for Reconsideration" - see paragraph 13 of the order issued by the Tribunal on 13 January 2015. During that Preliminary Hearing the parties reached agreement as to the proper extent of the application. Paragraph 28 of the Tribunal Order records that the parties agreed that the following paragraphs of the original decision were to be the subject of reconsideration: 67, 71, 73, 74, 80, 81 and 83.

10. I think it is helpful, by way of background context, to set out the wording of those paragraphs from my original decision which, on the agreement of the parties, set out the previous findings/ conclusions which I am to reconsider.

"67. The position of the Bank, through the evidence of Mr Smailes, is that the emails relied upon do not show it was Mr Ostendorf's second solution that was being taken forward by the Bank. Mr Smailes maintains that at the time in question a number of solutions were being suggested and that the emails relied upon may well refer to other solutions. His position is that the second solution

suggested by Mr Ostendorf was never in fact taken forward and that the dispute between the Bank and the Italian Bank still remains outstanding.

71 I have not accepted that the email trail from the beginning of July and thereafter shows that it was Mr Ostendorf's second solution that was being taken forward by the Bank. I have to, of course, make such an assessment on the balance of probabilities. I appreciate that the initial email responses that came from Mr Norfolk-Thompson and others were specifically supportive of the second solution. But I take into account and accept the evidence that persons such as Mr Norfolk-Thompson worked in a sales capacity within the Bank. They might well be supportive about a proposal but not be sufficiently qualified (for example in terms of risk assessment) to be able to judge whether, in overall terms, a proposal is viable. In other words the fact that such persons might been enthusiastic at the outset is not of itself a clear indicator that a particular proposal continued to be given consideration.

73 It is not clear to me, on the balance of probabilities, that what was being examined by various persons within the Bank in the period up to 9 July 2010 was the second solution alone. I am satisfied that a number of possible solutions were in play. I do not accept that all of the email traffic referred to concerned only Mr Ostendorf's second solution. In this respect I have accepted the evidence of Mr Smailes that he did not become aware of the second solution until 9 July 2010.

74 If I put together my above conclusions I am satisfied that it was not the case that Mr Smailes decided to dismiss Mr Ostendorf in order to secure for himself the benefit of the second solution. I therefore dismiss this aspect of the claim.

Was Mr Ostendorf given opportunity to comment and respond before the final decision was made?

80. I am satisfied he was. He had access to very senior people within the Bank. He was actively engaged with those other senior people in detailed examination of alternative proposals for continued employment.

Was the consultation a sham?

81 I find it was not. I am satisfied that the examination of possible alternative employment, in particular by Mr Smailes, was genuine and supportive. Mr Smailes put off issuing the formal at risk status to give Mr Ostendorf further time to pursue his proposals for alternative roles.

The redundancy decision must be kept under review right up until dismissal

82 I find that it was. In my assessment it was not argued on behalf of Mr Ostendorf that there were in fact alternative positions that he could have been moved into. I am satisfied that during the time in question there was no reasonably alternative employment available. I appreciate that Mr Ostendorf has made the criticism, whilst giving his evidence, that it was unfair that he was formally placed at risk on 5 July 2010. That was the beginning of the holiday season and he was bound to be hampered in his attempts to get senior people to

buy into his proposals if they were on leave. But I am satisfied that Mr Ostendorf had already, by that time, had opportunities to put those proposals to the necessary people.

The Reconsideration Hearing

11. The application for Reconsideration was heard on 14, 15 and 16 October 2015 and I had the benefit of a private reading day on 13 October 2015.

12. In support of his application for Reconsideration, Mr Ostendorf relied upon oral and written evidence from the expert witness, Mr Rule, and his own oral and written evidence. The Bank relied upon oral and written evidence from Mr Ahlberg, Mr Colavito and Mr Smailes. The parties were in agreement that they each would make closing submissions only in writing, to be provided by 30 October 2015.

13. I set out below a summary of the written submissions and some features of the evidence.

14. The instructions to the expert witness, Mr Rule, were set out in a letter dated 21 April 2015. The content of that letter reflects considerable input by both parties and by the Tribunal. It summarised the respective positions of each party on the subject matter of the Reconsideration and it put to Mr Rule specific questions he should answer.

The expert opinion of Mr Rule

15. In my view Mr Rule's report contains a very helpful portion under the heading "Technical Background" which provides useful background context. Mr Rule's sub-paragraphs were not numbered but I have inserted numbering below to assist subsequent referencing.

"TECHNICAL BACKGROUND

15.1 The Eurobond market began some 50 years ago but it was not until the 1980s post Big Bang that it began to expand rapidly and it was only in 1994 that the first Credit Default Swap (Buying/selling credit protection in exchange for payment/receipt of a premium) was entered into. The concept of "hedging" risk, whether of credit, interest rate or currencies grew with the demand from corporates, funds and financial institutions. Most investment Banks set up departments to structure, price and trade these risks using various financial instruments that were developed to meet these demands. At the same time managing risk portfolios and higher capital costs meant that Banks needed to develop innovative structures to "transfer" risk off-balance sheet and reduce the Bank's capital requirements.

*15.2 In the unfolding credit crisis of 2007/2008 the fixed income markets were primarily concerned with liquidity and credit risk so any proposal that addressed these concerns could be beneficial to the parties involved. One of the financial instruments most frequently used to achieve this is a repurchase agreement (**Repo/Reverse Repo**) (Appendix B (i)) which allows one party to lend the*

underlying security to another party in exchange for a cash payment for a pre-agreed period from overnight to the maturity date of the underlying security (Appendix B (ii)). The legal title to the securities passes from the seller to the buyer and the seller effectively receives a reduced cost of funding as the cash borrowed is on a secured basis. In addition, it is possible to enhance the return on a Repo by adding additional structuring (Appendix B (iii)).

15.3 The First Transaction between the Respondent and the Italian Bank used the Repo market to enable the Italian Bank to sell EUR750m of illiquid Republic of Italy bonds with a coupon linked to 30 year CMS (Appendix C (i)). Following the "rescue" of Bear Stems in March 2008 the financial markets witnessed deterioration in the pricing of risk (credit) and a lack of liquidity in the interim interbank market and incorporated in the First Transaction was a coupon (interest payment) that was dependent upon interest rates remaining within a predefined range. As a result of the changes in market conditions, the Italian Bank was concerned that it would not receive the expected coupon and in order to ensure receipt of a coupon they agreed with the Respondent to amend the First Transaction by extending the maturity date from 2019 to 2023 and to include an additional bond (Appendix C (ii)). This extension to the maturity date and the use of an additional bond is the Second Transaction (Appendix D).

15.4 In addition, because the Respondent had sold the Republic of Italy CMS bond, they effectively owned credit protection on the Republic of Italy i.e. if as a result of a deterioration in the credit quality of the Republic of Italy due to the financial crisis the cost of buying back those bonds decreased, then the Respondent would profit from the change in price. However in order for this scenario to occur then either the Republic of Italy would have to default (without the Italian Bank also defaulting) or the Italian Bank would need to unwind the First and Second Transactions, which was unlikely to be in its commercial interest.

15.5 When Lehmans filed for bankruptcy in September 2008 the financial markets reeled as national governments bailed out banks and stock markets dropped worldwide. The resultant fall out caused a downturn in economic activity and led to the European sovereign debt crisis where several Eurozone member states were unable to repay or refinance their government debt or to bail out over indebted banks. The impact on European sovereign credit spreads, including those of the Republic of Italy, was dramatic (Appendix E).

15.6 In order to monetise the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions the Claimant proposed the Second Solution (Appendix F) - By entering into the Repo in the opposite direction with the Italian Bank (a Repo for the Respondent, a Reverse-Repo for the Italian Bank), the Respondent was able to purchase bonds issued by the Republic of Italy (which it would use as collateral with tho Italian Bank under the Repo) to give the Respondent credit exposure to the Republic of Italy at the wider credit spread. Now, if the Republic of Italy were to default, the Respondent would be able to offset the repayments due to the Italian Bank under the Reverse-Repo against the payments due from the Italian Bank under the Repo which will would allow it to benefit from the price movement.

16. I set out below the written questions put to Mr Rule and his answers, using the paragraph numbering from Mr Rule's report. In doing so (and, again, to assist future referencing) I have maintained my own paragraph numbering (shown in square brackets).

"QUESTIONS FOR THE EXPERT".:

[17] 43. ***The Second Solution: July 2010***

(a) Based on what the Respondent knew of the Second Solution, (i.e. what was set out in the 1 July 2010 Email), was the Second Solution theoretically viable?

(b) Was, in the opinion of the expert, the Second Solution a viable transaction in July 2010?

(c) Was there an outstanding or unusual feature in the Second Solution which contributed to the 83.3M EUR added value and if so what was the value of this contribution?

(d) Does the expert agree with the EUR 83.3M added value as calculated by Toby Norfolk-Thompson and explain why or why not?

[18] 44 ***Screening Transaction Review - September 2010***

(a) Can it be concluded that the transaction which was the subject of the Screening Transaction Review in September 2010, was suggested by or inspired by the Second Solution?

(b) Can it be concluded that the transaction which was the subject of the Screening Transaction Review in September 2010, was suggested by or inspired by any of the trade proposals disclosed by the Respondent and in existence at or before 1 July 2010?

(c) For the avoidance of doubt and to be complete, can it be concluded that it is not possible to determine if the Screening Transaction Review in September 2010 was suggested by or inspired by specifically one trade proposal or by any of them at all?

[19] 45 ***A comparison of the Second Solution and the 2012 Transaction***

(a) From a comparison of the Second Solution, as set out in the 1 July 2010 Email, and the 2012 Transaction, could the 2012 Transaction have been originated without knowledge of the Second Solution (as set out in the 1 July 2010 email)?

(b) With reference to the points set out in the Respondent's letter of 15 November 2013 at (b)-(e), does the Expert agree that such differences are evidenced between the Second Solution and the 2012 Transaction?

(c) How economically different are the 2012 Transactions from a combination of (i) a restructuring of the 2008 Transaction and (ii) a Reverse Repo until the maturity date of the Restructured date (the 2012 Equivalent Transactions)?

(d) Can the Expert estimate the added value of the 2012 Transaction for both parties combined and how much of this added value can be contributed to each of the parties using the Confidential Pricing Information?

(e) Can the Expert break down the combined added value into distinguishable features and how much each feature contributes to the combined added value and is any of these features among the ones in 41 [should read 43](c) above?".

20. Mr Rule set out his opinion as follows.

"Opinion

[21] ***Question 43***

(a) From the evidence provided in the email traffic between structuring, trading, sales and management (1-5 July 2010) it is clear that the Second Solution was theoretically viable.

In my experience, the indicative pricing of the proposed trades by the trading desk, the escalation to senior management ("I think it works in principle") and the time spent off-desk in a meeting to discuss the potential trades are all symptomatic of a theoretically viable transaction.

In practice the willingness of a trader to price any potential transaction is driven by the perceived viability and profitability of the transaction. The traders are focused on generating profit for the trading desk (and themselves) so the transaction has to be structurally sound for a trader to invest time in pricing it up.

Any potential trade would only be escalated to senior management if it was viable as the traders would want to retain their credibility in the eyes of their managers.

The fact that an off-desk meeting was held indicates those individuals were willing to allocate further resources to investigate the proposal which further demonstrates that the opportunity was under serious consideration.

It should be noted that all trading in structuring departments exist to maximise the profits for their institution and that the sales departments are there to distribute the products or provide a solution for their clients and are allocated a "sales credit" on which their performance and overall remuneration is based.

(b) In my opinion the Second Solution was a viable transaction in July 2010.

This would have been subject to the agreement of the Italian Bank, obtaining the necessary internal approvals and completing the appropriate legal documentation. The underlying products utilised to achieve the Second Solution are established financial instruments and subject to market conditions at the time

such as liquidity, size and maturity being favourable then this was a viable transaction.

(c) Yes, the unique element of the Second Solution was the monetisation of the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions.

I have undertaken a pricing of the Second Solution (Appendix G) which sets out my calculations of the value of this contribution incorporating the cost of purchasing the Republic of Italy 4.75 Aug 2023 bonds and the assumed internal credit charge, which demonstrates added value of EUR84.5 m.

(d) Broadly speaking yes, the difference between our figures is EUR1.2m which is less than 1.5% of the total added value or less than 1.5 basis points on the underlying Asset Swap.

[22] ***Question 44***

(a) Both the Screening Transaction and the Second Solution seek to monetise the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions, utilising the same combination of underlying financial instruments. Structurally both solutions consist of a Repo, an Asset Swap (which swaps fixed rate coupons for a floating rate payment) and a credit charge for credit protection against the Italian Bank.

It should also be noted that both solutions utilised the same Republic of Italy bond, 4.75%, 1 Aug 2023 (ISIN IT0004356843).

My conclusion is that these transactions are the same in both form and substance.

The Screening Transaction Review sought to monetise the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions utilising a Repo and Asset Swap structure. All of the trade proposals disclosed by the Respondent which were in existence at or prior to 1 July 2010 (Appendix H) were standalone new transactions and all of them are seeking to offer bond financing for the Italian Bank i.e. none of them involved the Respondent entering into a Repo or an Asset Swap structure (in all the Respondent entered into Reverse Repos). From the email dated 27 June 2015 (EW 172-173) suggestion 5 refers to a European Sovereign CDS monetisation, but there are no other details of the trade structure and the viability is questioned due to the illiquid nature of the EUR CDS and the fact that the Respondent had not executed any CDS monetisation trades to date.

Based on the information provided, it cannot therefore be concluded that the Screening Transaction Review in September 2010 was suggested by or inspired by any of the trade proposals disclosed by the Respondent which were in existence at or before 1 July 2010.

(c) No. Based on the information provided and the examination of the two structures, it can be concluded the Screening Transaction Review was suggested or inspired by the Second Solution.

[23] ***Question 45***

(a) In principal it is possible to originate the idea independently, absent the knowledge of the Second Solution. However, in order for the 2012 Transaction to be contemplated, the proposer would need to recognize that the unique element of the structure (the monetisation of the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions) would have to be incorporated in any viable solution.

That said, in order for this to occur, the proposer would have to have had knowledge of the historical relationship with the Italian Bank including previous transactions and proposals and have a detailed understanding of complex structuring and repackaging (including product, pricing, regulatory, jurisdictional, tax and legal knowledge) in order to formulate an original bespoke idea or solution. In addition, the proposer would need to go through an internal approval process to obtain new structure sign off.

The appointment of Mr Colavito in October 2010 was a senior level appointment designed to rebuild the relationship between the Respondent and the Italian Bank. In my experience I would expect someone tasked with such a role to have extensive discussions with all relevant departments who were involved in past and could assist in future opportunities. As a Managing Director and Global Head of a Repackaging desk I interacted with senior sales/distribution and based on this experience I find it highly unlikely that Mr Colavito would not have been informed of either the Screening Transaction Review (which took place just one month prior to his appointment) or the previous proposals including the Second Solution, especially given the substantial profit that could have been realised.

If, as detailed in the Respondent's letter of 15 November 2103 [should be 2013] (EW 32) (a), Mr Colavito had not been made aware of the Second Solution and the 2012 Transaction was wholly his original idea then the Respondent's internal documentation should be able to evidence this fact through the discussion of ideas with structuring and trading, including an indication of pricing/profitability, as well as the appropriate paperwork for the approval process.

(b) Repackaging transactions can take many forms but in general they utilise existing financial instruments, often with different features, to achieve an agreed solution between the parties to the transaction. Ultimately it is the net effect of the structure that is important and that the substance of the executed transaction takes priority over the form, i.e. it is important to look at the overall financial outcome of a transaction rather than its legal form.

In order to assess whether or not any such differences as detailed in the Respondent's letter of 15 November 2013 points (b) - (e) are evidenced between the Second Solution and the 2012 Transaction, I have provided a flow diagram of the 2012 Transaction (Appendix I, (i)) and a theoretical repacking of trade 2008 in the same form as the Second Solution (Appendix I, (ii)). In addition, diagrams (iii)

and (iv) in Appendix I show that the net effect of these methodologies produces the same end result.

The new "clean" trade(s) (transactions A & C) were done as a replacement for the Second Transaction and were done contemporaneously with the other constituent transactions to provide a Repackaged solution, they therefore cannot be considered as separate.

The difference in the maturity date just reflects the removal of the Second Transaction which had extended the original maturity date from 2019 to 2023 (at the behest of the Italian Bank in order to widen the range accrual conditions) but did not make it entirely different because it retained the same underlying reference bond and an amended term repurchase confirmation being issued.

With regard to the financial effects of the 2012 Transaction and the 2010 Second Solution, we have seen already in Appendix E that the financial outcome of any transaction changes over time as the price of the underlying risk changes. It is clear to me that the commercial driver of the 2012 Transaction and the 2010 Second Solution, based on my assessment of the structure of each and the pricing of the underlying financial instruments, has been to monetise the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions. In any event, it is extremely unlikely that the Italian Bank would have entered into any transaction proposed unless they also received a commercial benefit.

(c) With reference to the transaction flow diagrams at Appendix I, it is possible to create the same economic effects of the 2012 Transaction (Diagram (iii)) by a restructuring of the Second Transaction (Diagram (ii)) and entering into a reverse of the 2008 Repo (Transactions B & D Repo trades) (Diagram (iv)). By matching the additional legal changes to the structure executed in the 2012 Transaction it is possible to make the economics identical.

(d) & (e) Appendix J sets out the estimated added value of the 2012 Transaction for each of the parties and by distinguishable feature. The combination of the Bonds/Repo flows and Asset Swap Proceeds (excluding the Swap Unwind) monetise the change in the price of the Republic of Italy credit protection, this is the same feature detailed in 43(c)".

Evidence at the hearing

24. I do not attempt to summarise the evidence given within the hearing but I do record what I see to be some of the significant features.

From Mr Ostendorf

25. In his witness statement Mr Ostendorf said that he thought the report of Mr Rule was "clear, thorough, unbiased and of a very high quality" and further that he was in agreement with its opinions and conclusions. He observed that Mr Rule concluded (i) that the Second Solution was viable from the very moment it was created, (ii) it was the Second Solution which was discussed at the Screening

Transaction Review meeting in September 2010 and (iii) that the Second Solution was executed in June 2012 by executing the 2012 Transactions.

26. Mr Ostendorf maintained that the Bank's previous position was that the Second Solution was "simply never viable". He went on to maintain that it was "simply inconceivable" that the Bank was ever of the opinion that the Second Solution and [he meant] the 2012 Transactions were not connected. He asserted that the fact that the 2012 Transactions were not disclosed in the course of the original hearing meant that the Bank had deliberately misled the Tribunal during the first hearing. He maintained that, in that way and others, "the credibility of the Respondent must be considered irreparably tarnished". He asserted "I believe that it cannot be stressed enough how pivotal the viability of the Second Solution is to my case".

27. Mr Ostendorf's position is that right up until 30 June 2010 Mr Smailes was being supportive of his (Mr Ostendorf's) suggestions as to alternative employment. He describes the behaviour of Mr Smailes up until that point as "both rational and supportive". Mr Ostendorf goes on to make the point that the very next day, on 1 July 2010, Mr Smailes did not discuss the "trading platform" idea that Mr Ostendorf had been pursuing but "out of the blue" and without prior discussion he (Mr Smailes) maintained he was considering putting Mr Ostendorf at risk of redundancy. Mr Ostendorf makes the point that he was put at risk of redundancy on Monday, 5 July 2010 and Mr Smailes did not mention to him the very negative comment made by Mr Azzolini regarding the trading platform idea: "Over my dead body he will have anything to do with me". Mr Ostendorf asserts that Mr Azzolini should have been reported to HR and possibly fired for gross misconduct. Mr Ostendorf puts the case that the only explanation for these events, including the change in behaviour on the part of Mr Smailes, to what Mr Ostendorf describes as "irrational, unsupportive and effectively ending my career with the Respondent" was his invention of the Second Solution on the evening of 30 June 2010. In his witness statement he says "With the establishment of the viability of the Second Solution, there is now a clear motive and incentive for Mr Smailes to act the way that he did. Almost every part of the judgement has been influenced by the statement of fact from the Tribunal that the Second Solution was considered not viable and these parts of the judgement cannot stand".

Mr Ahlberg

28. In his supplemental witness statement Mr Ahlberg maintains (paragraph 4) "*the Expert Report fails to consider several key factors in its analysis of the Second Solution and the 2012 trade. It presents a simplistic and narrow view of the lengthy process that took Barclays from the Second Transaction (this is Mr Ahlberg's reference to what I am now calling the first transaction), its 2008 restructure and the dispute between Barclays and the Italian Bank (the Italian Bank Dispute), through to the conception and execution of the 2012 Trade. It falls short of fully grasping the importance of looking at the Second Solution and the 2012 Trade against the wider context of the contemporaneous market conditions, the ongoing Italian Bank Dispute and the wider relationship between Barclays and the Italian Bank. The result is a simplistic and rather naive assessment of the issues in question*".

29. Mr Ahlberg then went on to identify certain issues that he thought the expert had failed to deal with adequately or where he thought the expert's conclusions were incorrect. One of those is under the heading "Ongoing review of the Second Transaction" where Mr Ahlberg puts his view that the Second Solution would have been just one of many ideas being evaluated as a potential remedy for the problems between the Bank and the Italian Bank. He accepts that Mr Colavito "would have had some insight into many of the ideas that had been discussed" but the fact was that none of them went forward in 2010.

30. Under his heading "Market Conditions" he refers to the comment made by Mr Rule that the Second Solution was a viable transaction "*subject to market conditions at the time*". Mr Ahlberg comments that the key issue was not whether any particular idea was "theoretically viable" but was whether it was "a commercially viable and acceptable transaction that both parties wished to undertake".

31. Under the heading "Italian Bank Relationship", Mr Ahlberg put the view that Mr Rule did not appreciate the unique role that Mr Colavito had in the 2012 Trade or his previous history with the Italian Bank.

32. Mr Ahlberg made further comment under the heading "Structure" and made the point, in his view, that the Second Solution was essentially an overlay of the existing Second Transaction and that Mr Rule "*fails to realise that the Second Solution structure was not accepted by Barclays in part because it did not afford Barclays the opportunity to revisit the Second Transaction, which it was keen to do for a variety of reasons, particularly with regard to the underlying complex documentation. Furthermore, Barclays was the only party who stood to obtain significant financial profit from the Second Solution overlay proposal. The Italian Bank would never have agreed to enter into a trade that did not benefit them financially*".

33. Mr Ahlberg went on to say that, in contrast, the 2012 Trade had a clear financial profit for both Barclays and the Italian Bank. The 2012 Trade allowed a total unwind of the Second Transaction, coupled with a new transaction. He put the view that an unwind, even if proposed, would not have been a feasible solution until 2012 because of market conditions.

34. I should register the point that the question of any benefit to the Italian Bank was put to both Mr Rule and to Mr Ostendorf. They said that it went without saying, that Mr Ostendorf's Second Solution would obviously lead to benefits to the Italian Bank. They made the point that this was a resolution being put forward by Mr Ostendorf and it was obvious that out of the potential profit of 80+ million euros that the Bank would enter into some kind of sharing arrangement of that money with the Italian Bank. It was so obvious or implicit that it did not need to be mentioned within the Second Solution proposal.

Mr Colavito

35. The most recent witness statement from Mr Colavito is dated 27 March 2014. My understanding is that he no longer works for the Bank. His evidence was that he joined the Bank in October 2010 as "Head of Solutions for Italy". One

task for him was to rebuild relationships between the Bank and the Italian Bank by finding new transactions to remedy continuing problems arising from the previous transactions. He maintained he put various proposals to senior management which were rejected.

36. He said "*Following the sovereign crisis in Italy that had peaked in December 2011 with the resignation of the Italian Prime Minister, at the beginning of 2012 I started again to revisit my search for a potential trade between the Respondent and the Italian Bank. I recognised that there could be an opportunity to leverage on these market conditions and the resulting market "dislocation" which meant that, in particular, the CMS Bonds that underlined the Second Transaction, were trading at approximately 70% of their par value*".

37. The particular bonds which were used as security in the first transaction were "illiquid" which I take to mean were not readily available on the open market. Upon receiving those original bonds by way of security, the Bank had sold them to a third party. Any attempt to put the Bank and the Italian Bank back into their original positions with a view to then putting in place a replacement transaction would require the Bank to return to the Italian Bank the original bonds which, of course, had by then been sold. The evidence from Mr Colavito was that he came up with the idea of a way in which the Bank could borrow the original bonds back from the third party so as to return them to the Italian Bank for a temporary period. On the basis of one of the transactions within the 2012 Transaction the Italian Bank would then quickly return those bonds to the Bank (on the basis of further agreement to the advantage of both parties) which would allow the Bank to return the bonds to the third party.

38. This scheme, although in practice more complex than described above, became part of the basis of the 2012 Transaction. The thrust of the evidence of Mr Colavito was that "his" 2012 Transaction was in no way motivated by the Second Solution".

39. Within his witness statement, at paragraph 17 and onwards, Mr Colavito set out what he saw as distinctions between the Second Solution and the 2012 Transaction.

Mr Smailes

40. Mr Smailes made a witness statement dated 3 September 2015. He maintained his previous position that the 2012 transaction was not a progression or execution of the Second Solution. He said further "However I was not in any way involved in the origination of nor did I have a detailed involvement in the execution of the 2012 Trade".

The closing submissions

41. I thank both parties for their very careful written submissions. The submission from Mr Ostendorf runs to 22 pages. The submission from Ms Sen Gupta runs to 33.

42. Any summary will not do full justice to the detail within the submissions but I set out below the main points.

From Mr Ostendorf:

43. The witnesses for the Bank, tellingly, make little criticism of the conclusions of the expert witness, Mr Rule.

44. Mr Rule concluded that the second solution was a viable transaction as at July 2010 (with some provisos).

45. That he, Mr Ostendorf, and Mr Norfolk-Thompson were the two leading experts on transactions of the nature of the Second Solution and the evidence from them was that the Second Solution was viable

46. Mr Rule had concluded:

(i) that the second solution and the transaction which was subject to the September 2010 screening transaction review were the same in both form and substance

(ii) that it could be concluded that the Screening Transaction Review was suggested or inspired by the Second Solution.

47. Mr Rule put the opinion that the elements within the 2012 Transaction were not in fact separate transactions and that the form of the 2012 Transaction was merely a restructuring of the Second Transaction.

48. The fact that the maturity date had been changed in the 2012 Transaction was not significant and merely reflected the same change contained in the Second Transaction which was now being removed.

49. Mr Rule identified that there was a "very same outstanding or unusual feature" in both the Second Solution and the 2012 Transaction. That was "the monetisation of the change in the price of Republic of Italy credit protection embedded in the First and Second Transactions".

50. When the above points were taken into account that had to create severe doubt as to the reliability of the respondent's evidence at the original hearing. The respondent "can no longer be considered credible nor honest".

51. That the Second Solution was within the scope of Mr Ostendorf's job duty and thus the fact he had invented the Second Solution (and the concomitant profit for the Bank) was a factor validly to be taken into account when considering whether his post should be made redundant.

52. The evidence of the Bank's witnesses Mr Ahlberg and Mr Colavito should be discounted as, partisan, not credible and implausible.

From Ms Sen Gupta

53. The 2012 Transaction impugned by Mr Ostendorf was entered into some two years after he had proposed the Second Solution. It was a highly unlikely proposition to argue that:

(i) the Second Solution would have been recognised by Mr Smailes / the Bank as a viable proposition in July 2010 and

(ii) that Mr Ostendorf would have been dismissed to avoid giving him credit for the Second Solution but

(iii) the Bank would then wait two years before (as was claimed by Mr Ostendorf) implementing what was really the Second Solution.

54. There were distinguishing features between the Second Solution and the 2012 Transaction:

(i) the 2012 Transaction was in fact originated by a new employee, Mr Colavito

(ii) they were different in both structure and substance

(iii) the Second Solution may (in the opinion of Mr Rule) have been viable in a theoretical sense but the 2012 Transaction was viable both in a theoretical sense and in a commercial sense

(iv) the 2012 Transaction did not resolve the dispute between the Bank and the Italian Bank.

55. Mr Rule's suitability as an expert witness was questionable. Parts of his evidence appeared to be based on dated past experience. He was speculative in some instances and appeared to interpret circumstances in favour of Mr Ostendorf.

56. There were inconsistencies within the evidence given by Mr Ostendorf on important parts of the evidence. Whereas the witnesses on behalf of the Bank were independent and detailed (Mr Ahlberg), very knowledgeable and highly experienced (Mr Colavito) and extremely composed and credible (Mr Smailes).

57. The Second Solution was intended (at least in part) as a remedy for the then current dispute between the Bank and the Italian Bank but the evidence of the continuing litigation between those parties confirmed that that dispute had in fact continued into 2014.

58. The Second Solution was not in fact commercially viable and was not executed

59. The documentation supporting the 2012 Transaction was very different from the documentation (created by Mr Ostendorf) which supported the 2008 transaction which the Second Solution was intended to amend

60. The financial climate between 2010 and 2012 had changed significantly particularly taking into account the Italian sovereign debt crisis of 2011.

61. The 2012 Transaction dealt with a problem not faced up to in the Second Solution which was the need to return the exact Italian government bonds that had underpinned the original transaction when those bonds were now in the hands of another person.

62. The 2012 Transaction incorporated a number of profit generating elements which were not present in the Second Solution.

63. The Bonds used to support the 2012 Transaction had a different maturity date than the bonds in the Second Solution.

Evaluation of the evidence, findings of fact and conclusions

64. I take into account the email dated 1 July 2010 in which Mr Ostendorf set out the basis and detail of his Second Solution. The copy provided in these proceedings was redacted and I set out the wording below showing the redactions as "xxx".

"Size EUR 1bln
Maturity 1-Aug-2013

Standard Repo under GMRA however without CSA
- *Client lends Barclays EUR 1bln, Barclays pays 3M Euribor flat*
- *Barclays transfers BTPs with a market value of 1bln to xxx. xxx pays all the BTP income to Barclays if and when it occurs*

Although there is no market for long dated repo trades, BTPs have always repo'd under euribor, so this trade can be viewed as on market and has close to zero PV.

Barclays hedge
- *Barclays will buy the BTP 4.75% 1-Aug- 2013 with a notional equal to EUR 750MM and transfer this to xxx. The remaining BTPs to be transferred will be repo'd in by Barclays.*
- *Barclays will book the BTP flows it receives against the existing BTP flows, it is currently paying out, discounting both flows with either the swap curve or the BTP curve, whatever is most conservative.*
- *The loan flows will be booked against the loan flows of the existing trade*
- *The net (4) flows will be credit charged against xxx.*

Variation
xxx can give us 1bln and we only give them 900MM of BTPs back i.e. EUR100 MM is unsecured lending to Barclays. This amount would (partially) offset the fees we have to repay xxx or equivalently will not be receiving.

The firm is able to do this trade today.
Trading and GFRM need to sign off on risk and booking before trading.

Estimated P&L EUR 90 or EUR 102 for the variation".

65. The opinion of Mr Rule amounts to significant support for Mr Ostendorf's position. In particular his view that:

(i) the Second Solution was theoretically viable

(ii) there was a common "unique" element in both the Second Solution and the 2012 Transaction

(iii) the Screening Transaction Review was suggested or inspired by the Second Solution

(iv) it is likely that upon appointment in October 2010, Mr Colavito would have been advised of either the Screening Transaction Review (based itself, it is said, on the Second Solution) or directly of the Second Solution. At page 9 of his report Mr Rule makes the comment that given the purpose of Mr Colavito's appointment (to identify and develop solutions for the Bank's Italian financial institution clients) it is likely he would have had extensive discussions with those working in the Bank to find out the history of the problem between the Bank and the Italian Bank.

(v) if Mr Colavito had not been so informed then it would be reasonable to expect him to have produced working papers to demonstrate his activities in generating what he claims to be his originally created 2012 Transaction.

(vi) the substance of a transaction "takes priority over the form". In other words two transactions of apparently different form that achieve the same outcome by using the same underpinning financial instruments are likely to be, effectively, the same transaction. The financial effect of the Second Solution and the 2012 Transaction is effectively the same.

66. But there are other factors I have to take into account. I am satisfied:

(i) there was concern within the Bank as to the nature of the Second Transaction. It was seen as founded on complex, and not fully reliable, documentation. It was also seen as creating a risk for the Bank in that the Bank's exposure to the Italian Bank (by lending money to the Italian Bank creating an exposure that was not covered by collateral). If the Bank had a remedy for those concerns as early as July 2010 (in the form of the Second Solution) why was the remedy not applied earlier than June 2012? Unless, from Mr Ostendorf's perspective, the Bank was applying a very cunning delay to create distance between the Second Solution and the 2012 Transaction?

(ii) the relevant financial circumstances pertaining at July 2010 to November 2010 were very different to those at about June 2012. The Italian sovereign debt crisis had taken place. I accept the evidence of Mr Colavito that that peaked in December 2011.

(iii) whilst I take into account Mr Rule's comments about substance and form I accept:

(a) there were very substantial differences in the documentation that supported, respectively, the Second Transaction and the 2012 Transaction.

(b) the Second Solution intended to leave in place the Second Transaction and to overlay it. However the 2012 Transaction was a complete unwind or removal of the Second Transaction and, in addition, it had significant features not present in the Second Solution. Those were the use of the original bonds which were the security in the First Transaction and the profit generating features referred to in Ms Sen Gupta's submission.

(iv) at the outset Mr Norfolk-Thompson thought, on 1 July 2010, that the Second Solution "works in principle". On 5 July 2010, in an email to other persons in the Bank (not including Mr Smailes), he identified what he saw as "the two most difficult aspects". Those were the need to buy EUR 750mm of a single issue [bond] and that the documentation "exactly mirrors the language on the existing repo and be 100% sure that the GMRA netting will work – probably with an external opinion".

(v) I recognise that in my original judgment I described Mr Norfolk-Thompson as working in a sales capacity in the Bank. Within the Reconsideration Hearing Mr Ostendorf maintained that he and Mr Norfolk-Thompson were leading authorities on the type of transaction contained in the Second Solution. In my view the "difficult aspects" identified by Mr Norfolk-Thompson were very significant cautions to the Second Solution being commercially effective. Those comments from Mr Norfolk-Thompson appear to me to be saying that the form of a transaction is, in fact, very important which is different, in my view, to Mr Rule's opinion (page 10 of his report) that "*Ultimately it is the net effect of the structure that is important and that the substance of the executed transaction takes priority over the form, i.e. it is important to look at the overall financial outcome of a transaction rather than its legal form*". With respect to Mr Rule I have some difficulty with that comment because, surely, the wording and content of the underpinning documentation (ie its form) is likely to have considerable effect on what the transaction achieves overall (ie its financial outcome)?

(vi) there is no evidence that, as at July to November 2010, the Italian Bank agreed, or would have been likely to agree, that the Second Solution was commercially acceptable from the Italian Bank's point of view. In the absence of such agreement, it seems to me, the Second Solution would not have come into being. Clearly, as at June 2012, the Italian Bank was prepared to enter into the 2012 Transaction.

(vii) Mr Rule himself accepted the viability of the Second Solution was subject to the agreement of the Italian Bank, the obtaining of necessary internal approvals and the completing of appropriate legal documentation. Further that it depended on "market conditions at the time such as liquidity, size and maturity being favourable". There is little, if any, evidence that there were such favourable factors in place between July 2010 and November 2010 (i.e. the consultation period leading up to Mr Ostendorf's dismissal).

(viii) Mr Rule has said, in effect, that it would require a particular type of person to have the experience/ability to identify and propose a transaction in the nature of the Second Solution or 2012 Transaction. The proposer would have to have had knowledge of the historical relationship with the Italian Bank including previous transactions and proposals and have a detailed understanding of complex structuring and repackaging (including product, pricing, regulatory, jurisdictional, tax and legal knowledge) in order to formulate an original bespoke idea or solution. In addition the proposer would need to go through an internal approval process to obtain new structure sign off. I am satisfied on the evidence that Mr Colavito would have had knowledge of the historical relationship and the type of understanding referred to by Mr Rule.

(ix) the evidence shows that persons in the industry would have been generally aware of the underlying factors which, in a theoretical sense, would make the Second Solution and the 2012 Transaction attractive for the Bank. For example, the widening "spread", that is the decrease in the market value of the Italian Government Bonds during the period in question and, further, that "monetisation" was an important factor to be taken into account when trying to structure a revised transaction between the Bank and the Italian Bank. .

(x) it also seems to me that the evidence of Mr Colavito to the effect that it took him a long time to persuade senior managers to allow the 2012 Transaction to move forward is consistent more with the fact of increased caution within the banking industry (following the debt crisis 2008/2009) as to the nature and type of proposed financial transactions than with a strategy of deliberately creating a distance in time between the Second Solution and the 2012 Transaction.

67. I have to bring all factors together in reaching conclusions on the balance of probabilities. I do accord significant weight to the opinion of Mr Rule. But I have had the benefit (through sitting on the original hearing in December 2012 and the Reconsideration Hearing in October 2015) of receiving a more extensive body of evidence than the material available to Mr Rule.

68. It seems to me there are particular propositions that I have to determine:

(i) was the Second Solution viable?
(ii) was the transaction examined within the Screening Transaction Review suggested or inspired by the Second Solution?
(iii) was the 2012 Transaction effectively the implementation of the Second Solution?
(iv) at the time of the "redundancy" process in 2010 was Mr Smailes, in fact, motivated by a belief or view that the Second Solution was viable and, further, that Mr Ostendorf should be dismissed so that he and others could take the benefit from it? Or at least (knowing or believing the Second Solution to be viable) Mr Smailes should have continued the employment of Mr Ostendorf so that Mr Ostendorf could continue to develop, and implement, the solution?

Was the Second Solution viable?

69. I am satisfied on the evidence that the Second Solution was theoretically viable. But, at the same time, I have concluded that the Second Solution was not seen as ***commercially*** viable in the view of the Bank at the time of the Screening Transaction Review 2010. The Second Solution contained, in my view, the basic structure of a possible transaction. But it did not face up to, and identify, remedies for the "two most difficult aspects" identified by Mr Norfolk-Thompson. It did not deal with the provisos identified by Mr Rule: the agreement of the Italian Bank, internal approvals, appropriate legal documentation and market conditions. There is no, or little, reliable evidence that those "difficult aspects" or "provisos" were capable of resolution at the time of the redundancy process.

Was the transaction examined within the Screening Transaction Review suggested or inspired by the Second Solution?

70. Mr Rule's clear opinion is that it was and I agree with him. As at July 2010 Mr Norfolk-Thompson believed the Second Solution would work "in principle". The underlying transaction was of substantial value. It is clear that the difficulty between the Bank and the Italian Bank was of considerable concern within the Bank. Against that background I very much doubt that awareness of the basic structure of the Second Solution would simply have evaporated upon Mr Ostendorf's departure. But on the evidence before me I find that the Screening Transaction Review did not lead to or authorise the Second Solution being taken forward.

Was the 2012 Transaction effectively the implementation of the Second Solution

71. Mr Colavito has maintained that the Second Solution was never discussed with him "*and therefore I had no knowledge of the Second Solution and/or what it may have comprised*". Alongside that assertion I put two factors. First, Mr Rule's comments about the structural similarities between the Second Solution and the 2012 Transaction. Second, Mr Rule's view, and my conclusion, that it was likely that an awareness of the principle of the Second Solution would have remained within the knowledge of certain employees within the Bank with whom Mr Colavito would undoubtedly have had discussions as part of his role to understand the history of dealings between the Bank and the Italian Bank.

72. I accept Mr Colavito's evidence to the effect that from the end of 2010 to early 2012 he was putting proposals to senior management intended to resolve the dispute between the Bank and the Italian Bank. He could not identify acceptable proposals. His evidence, which I accept, has been that he reached the conclusion that a solution was not possible.

73. He then identified a way forward which, unlike the Second Solution, did not depend on an overlay of the Second Transaction but relied upon an unwinding of that transaction and a replacement of it by a new transaction. At the same time he faced up to an issue that had not been covered by the Second Solution which was the need to return the original bonds to the Italian Bank. By early 2012 he had become aware that the Italian Bank wanted to "upgrade" its current collateral by changing its form from CMS bonds to BTP bonds. He

describes in paragraphs 12 and 13 of his witness statement the basis of his proposal.

74. I have concluded that in the course of his discussions with other Bank employees (so as to understand the history of the relationship between the Bank and the Italian Bank), Mr Colavito became aware of the outline of the Second Solution as well as becoming aware of other suggested transactions on the same subject which were being evaluated in the Bank. I do not find that he was told the outline of the Second Solution had been originated by Mr Ostendorf. But even with knowledge of the outline of the Second Solution he was not able to create a transaction (which had the necessary underpinning mechanisms to deal with the difficulties identified by Mr Norfolk-Taylor and the provisos of Mr Rule) that would be seen by the Bank as commercially viable. There is no evidence that, at that time, the Italian Bank was agreeable to any solution.

75. But by 2012 Mr Colavito identified (in the manner set out in paragraphs 12 and 13 of his witness statement) a package of arrangements which effectively dealt with the "difficult aspects" and provisos. It was on that basis that the 2012 Transaction was seen by the Bank and the Italian Bank as then being commercially viable.

76. So my conclusion on this question is that the 2012 Transaction was not, effectively, the implementation of the Second Solution. I very much bear in mind all that Mr Rule has said but I have concluded that the Second Solution put forward by Mr Ostendorf was what I would describe as an initial premise. There were a number of substantial practical issues that had to be confronted and remedied before that initial premise would be seen as commercially viable. In making that assessment I have of course taken into account all of the points made by Mr Rule which indicate, in his view, that the 2012 Transaction was effectively the implementation of the Second Solution. But I have also taken into account all of the factors set out in paragraph 66 above together with the points made by Ms Sen Gupta (recorded at paragraphs 54 to 62 above) which I accept. Taking into account all of the evidence, I have concluded that the 2012 Transaction was in fact different in both form and substance such that it was not, in effect, an implementation of the Second Solution.

77. My assessment is that the premise of the Second Solution may well have been mentioned to Mr Colavito when he was gathering relevant information at about the end of 2010. But he did not see it as then forming a commercially viable transaction. The Screening Transaction Review of September 2010 did not lead on to identifying/recommending the Second Solution as a viable way forward. I am satisfied that during the period of consultation relating to Mr Ostendorf's redundancy decision (July to November) neither the Bank as an institution, or Mr Smailes as an individual, saw the Second Solution as a viable transaction. It follows that the Second Solution was not in any way a motivating factor in the redundancy decision made by Mr Smailes.

78. On the basis of that conclusion I am satisfied there is no need to revoke or in any way vary my original decision that the dismissal was fair.

At the time of the "redundancy" process in 2010 was Mr Smailes, in fact, motivated by a belief or view that the Second Solution was viable and, further, that Mr Ostendorf should be dismissed so that he and others could take the benefit from it? Or at least (knowing or believing the Second Solution to be viable) Mr Smailes should have continued the employment of Mr Ostendorf so that Mr Ostendorf could continue to develop, and implement, the solution?

79. Even if I had found that the 2012 Transaction was, in effect, the implementation of the Second Solution I would have had to go on to determine whether, in fact, Mr Smailes had in mind the Second Solution when he made the decision to place Mr Ostendorf at risk of redundancy. Given my conclusion above it is not strictly necessary to deal with that point but I do so because I think it is sensible to deal with all of the issues that have been examined in this Reconsideration process.

80. I have fully taken into account the evidence from Mr Ostendorf about his perception there was a clear change in behaviour on the part of Mr Smailes once Mr Ostendorf had disclosed the Second Solution to colleagues within the Bank. That, as is recorded above, Mr Smailes moved from being "both rational and supportive" to "irrational, unsupportive and effectively ending my career with the respondent".

81. In that context I have again considered my judgment following the original hearing. On 5 July 2010 Mr Smailes told Mr Ostendorf he was at risk of redundancy. A week later, on 12 July 2010, Mr Smailes and Mr Ostendorf had a meeting with Mr Azzolini to discuss certain proposals which might lead to alternative employment for Mr Ostendorf (paragraph 59). There was a further meeting on 14 July 2010 with Mr Bull to discuss proposals. But the proposals were not being supported by senior management.

82. At paragraph 69 of my original judgment I concluded "It does not seem to me to be at all likely that Mr Smailes would assist him to attend meetings with senior Bank staff if Mr Smailes was truly proposing to make Mr Ostendorf redundant simply to prevent Mr Ostendorf from gaining benefit from the second solution. If Mr Smailes was proposing to dismiss Mr Ostendorf in such circumstances I am satisfied that Mr Smailes would not have been so relaxed or cooperative about Mr Ostendorf meeting with Bank senior staff because of the risk that Mr Ostendorf would complain about his actions".

83. I have again had the benefit of hearing evidence from Mr Smailes. I agree with the submission from Ms Sen Gupta that Mr Smailes was composed and credible in giving his evidence. I am satisfied, and I find, that at the time of putting Mr Ostendorf at risk of redundancy Mr Smailes was not aware of the Second Solution. Even if he had known of the proposal it was, in my view, at that time simply at initial premise stage. Even at that early stage Mr Norfolk-Thompson could see difficulties with it.

84. In my view, and even if Mr Smailes had had some knowlecge of the Second Solution (which I do not accept), that solution was not in sufficient detail (when considering the surrounding practical issues that had to be overcome) so as to persuade Mr Smailes to see it as viable such that he would dismiss Mr

Ostendorf on a pretext. As is recognised by Mr Rule the Second Solution had to be subject to the agreement of the Italian Bank, obtaining the necessary internal approvals and completing the appropriate legal documentation. In addition market conditions had to be favourable. There is no evidence before me which shows that those conditions were likely to be met.

85. It is also highly relevant to take into account that the prospect of Mr Ostendorf being made redundant was under consideration by Mr Smailes from as early as the beginning of 2010 (see paragraphs 20 to 40 of my original Judgment/Reasons). So a number of months before Mr Ostendorf created his Second Solution. In addition, I can see nothing in the evidence which explains why (if the Second Solution presented a commercially viable transaction) the Bank (even if it were operating in an underhand manner towards Mr Ostendorf) would have waited more than eighteen months before implementing it.

86. I am satisfied that the Second Solution was not a factor which acted on the mind of Mr Smailes when he made the decision that Mr Ostendorf's employment should be ended. I maintain my conclusion that the true reason for dismissal was redundancy and that the decision was fair.

87. Within the Respondent's written submission it was argued that my original Reasons should be varied so as to replace the phrase "in fact viable" at paragraph 83 of the Reasons with the phrase "commercially viable or executable". With respect, I do not see a need to make such a variation. I think it is implicit that any business that considers the viability of an action will, as part of the assessment, take into account commercial as well as theoretical viability.

Costs

88. During the course of these proceedings both parties have indicated a wish to make an application for costs. The Bank made a costs application within correspondence relating to one of the Preliminary Hearings. At the end of the Reconsideration Hearing Mr Ostendorf indicated a wish to apply for costs. I indicated I thought the appropriate course was for me first to issue judgment and reasons on the reconsideration application and then the parties could assess their positions on costs in the light of those reasons. At the Reconsideration Hearing both parties sensibly accepted that any future applications for costs could be dealt with on the basis of written submissions.

89. Having now made my decision regarding reconsideration it is open to the parties to make such costs applications as they think fit. But I take into account the long history of this litigation in the Employment Tribunal and also the overriding objective within paragraph 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Regulations"). Particularly, avoiding delay and saving expense. I want to try to avoid any future unnecessary expenditure of time and money on the part of the parties. With that in mind I hope it would be helpful if I indicate to the parties my view on costs ***as it is at present*** on what I emphasise is a very provisional basis.

90. My starting point is to consider the power to make a costs order or a preparation time order as set out in paragraph 76 of Schedule 1 to the Regulations. The power to make such orders arises where I am satisfied:

(i) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(ii) any claim or response had no reasonable prospect of success.

91. I am satisfied that the word "claim" referred to above can reasonably be interpreted as any part of the process of claiming including making an application for reconsideration.

92. In considering an application for costs or a preparation time order a tribunal must , first, determine whether either of the statutory grounds for making an order exists and, second (if it does), exercise discretion in deciding whether or not to make such an order and, if so, in what amount. So there are two distinct parts to the decision making process.

93. I believe that in previously making an application for costs the Bank was relying on what it perceived to be unreasonable actions on the part of Mr Ostendorf, particularly in his stance taken regarding the form and manner of the instructions to Mr Rule. There was also the previous Reconsideration Hearing which I adjourned because of a lack of readiness on the part of Mr Ostendorf.

94. For his part, Mr Ostendorf, I believe, thinks the Bank has been unreasonably resistant in providing disclosure of documentation and was unreasonable obstructive in the settling of instructions to Mr Rule.

95. In respect of Mr Ostendorf's actions I am satisfied that it cannot reasonably be said that the application for Reconsideration had no reasonable prospect of success. That is because I previously applied a reasonable prospect test (under paragraph 72 of Schedule 1) when I allowed the Reconsideration application to move forward. In the event, the opinion of Mr Rule provided a significant basis for supporting the application.

96. I have considered whether Mr Ostendorf has acted in any way unreasonably such that a costs order should be considered. In this respect I anticipate that the Bank would point to (i) the difficulties experienced in fixing the wording of the letter of instruction to Mr Rule and (ii) the previous Reconsideration Hearing that was adjourned.

97. I acknowledge there were such difficulties which did lead to delay and expense incurred by the Bank. But I am satisfied that Mr Ostendorf was raising genuinely held points even though, in some respects, I did not always agree with him.

98. I have considered the adjournment of the previous Reconsideration Hearing which had been fixed for 10 and 11 April 2014. In particular, all that I said at paragraphs 25 to 28 of my note of the hearing. Mr Ostendorf had not

complied with certain tribunal orders but I took the view that he was not ignoring them. He had taken a position that he did not think certain aspects of the orders were appropriate. He had not properly prepared for that hearing. He had interpreted what had been said in correspondence from the Tribunal as meaning the hearing would not be taking place. I did not agree with his interpretation but I accepted he held his view on a genuine basis.

99. I do not accept that I can classify the manner in which Mr Ostendorf has conducted these proceedings as unreasonable.

100. During the October 2015 hearing (and before) Mr Ostendorf indicated a wish to make a costs application against the Bank. That was, at least in part, because of his view that the Bank had acted unreasonably in delaying disclosure of documents and has still not provided full disclosure. In my assessment the Bank had valid points to raise concerning disclosure particularly regarding the need to maintain client confidentiality notwithstanding that I did not accept all of the points made. I do not accept that I can classify any of the actions of the Bank as unreasonable.

101. In summary, my provisional position on costs is:

(i) neither of the statutory tests for making a costs order/preparation time order is met so there is no proper basis to make such an order against either party

(ii) even if it were the case that one of the statutory tests was satisfied the appropriate exercise of my discretion would be to make no costs/ preparation time order. I would take that view because, in my opinion, and despite the time taken (and expense incurred) in dealing with this Reconsideration application it has had, at its core, arguable points on both sides.

J. McMahon 9.12.15

Employment Judge

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14.12.2015

S. Kurmallee

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
at the end of the Reconsideration Hearing