IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

5 **Draft Judgment of the Tribunal in Case No: S/4100778/2017 Heard at Edinburgh on the 23rd, 24th and 25th with Deliberation on 26th October 2017**

Employment Judge: J G d'Inverno, QVRM, TD, VR, WS (Sitting Alone)

10

Mrs L Page	Claimant
Briggs Marine Contractors Limited	Respondent

15

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

25 **(First)** That the claimant was dismissed for reason of redundancy which is a potentially fair reason in terms of section 98(2) of the Employment Rights Act 1996;

(Second) The respondents' decision to dismiss the claimant was one which fell 30 within the band of reasonable responses available to them such that the dismissal falls to be regarded as fair in terms of section 98(4) of the ERA 1996; and

(Third) That the claimant's complaint of unfair dismissal is dismissed.

35

Employment Judge: Joseph d'Inverno
Date of Judgment: 27 November 2017
40 Entered in Register: 28 November 2017
and Copied to Parties

REASONS

5 1. This case, in which the claimant complains of unfair dismissal, called for Final Hearing at Edinburgh on 23rd and 24th with consideration of written submissions on 25th October 2017. Both parties enjoyed the benefit of professional representation, for the claimant, Mrs L Page, Mr L Anderson, Solicitor and for the Respondent Company, Briggs Marine Contractors Limited, Mr D Hughes,
10 Solicitor.

The Issue

2. In the course of Case Management conducted at the outset of the Hearing
15 parties confirmed and the Tribunal recorded as the Issues requiring investigation and determination at Hearing the following:-

(First) What was the reason, or if more than one the principal reason for the respondent's admitted dismissal of the claimant effective by payment
20 of three months in lieu of notice, as at 19th January 2017 and in particular, as is asserted by the claimant,

(a) was the claimant dismissed for an unfair reason, through the respondent's assertion and utilisation of a sham redundancy,
25 connected with or arising out of her work relationship with her then Line Manager, Mr Martin Anderson; in which case it is asserted that her dismissal would fall to be regarded as automatically unfair;

or alternatively, as is asserted by the respondent

30 (b) was the claimant dismissed for the potentially fair reason of redundancy, which failing for some other substantial reason of a type justifying her dismissal, in which latter case does

her dismissal fall to be regarded as fair or unfair in terms of section 98(4) of the Employment Rights Act 1996.

(Second) In the event that the claimant was unfairly dismissed to what remedy, by way of basic and or compensatory award, is she entitled.

Documentary Evidence

3. Parties lodged a Joint Bundle of Documents numbered 1 to 44 and extending to some 209 pages to some of which reference was made in the course of evidence or submission.

Oral Evidence

4. The Tribunal heard evidence on oath from the following witnesses for the respondent:-

- Graham Gray, Marine Assets Director, c/o Briggs Marine Contractors Limited, Seaforth House, Seaforth Place, Burntisland, KY1 1GA
- Martin Anderson, Support Services Manager, as at the effective date of her dismissal, the claimant's Line Manager, c/o Briggs Marine Contractors Limited, Seaforth House, Seaforth Place, Burntisland, KY1 1GA
- Collieson Briggs, Managing Director of the respondent, c/o Briggs Marine Contractors Limited, Seaforth House, Seaforth Place, Burntisland, KY1 1GA

The claimant gave evidence on her own behalf.

Findings in Fact

5. On the basis of the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact.

6. The claimant was employed by the respondent from 18th April 2012 until 19th January 2017.

7. The claimant was initially employed as a “Workshop Coordinator”. The Job description for that role is at Tab 8 in the Joint Bundle.

8. Until in or about January 2015 the claimant reported to Mr John Adam, Yard And Workshop Manager. From January 2015 the claimant reported to Mr Martin Anderson. He was employed to replace Mr Adam who left the respondent’s employ at that time.

9. In January 2015 the claimant’s duties began to change. She had previously required to provide Mr Adam with a large degree of technical computer support. While the claimant initially provided Mr Anderson with similar support, increasingly she required not to do so as, across a number of weeks, Mr Anderson, who was considerably more computer literate than his predecessor Mr Adam, became familiar with the computer systems, software and hardware in use within the respondent’s business.

10. Mr Adam had also worked for periods of time on maintenance tasks. During such periods the claimant substituted for him. Mr Anderson did not require to undertake the maintenance tasks. The claimant did not substitute for Mr Anderson to the same degree or as often.

11. The claimant’s role diminished accordingly.

12. The claimant was dismissed on the 19th of January 2017. By that time her job title changed to that of Support Services Administrator and her job specification, that is the content of her role had been changed, by agreement with her, to that set out at Tab 10 of the Joint Bundle. The claimant agreed to the change in role and responsibilities in writing dated 15th January 2016.

13. The claimant was dismissed for asserted reason of redundancy.

14. The claimant was offered an alternative vacancy as a "Travel Support Administrator". That vacancy was part-time and would have involved a reduction of the claimant's salary of some £18,000 from that of the full-time employment from which she was dismissed and in which she was remunerated in a sum slightly in excess of £30,000 per annum gross. Alternative employment as Travel Support Administrator did not constitute "suitable alternative employment". In offering that post to the claimant the respondents acknowledged that it did not constitute suitable alternative employment. The claimant refused the alternative vacancy offered. Her refusal was a reasonable refusal in the circumstances.

15. Following his appointment as her new Line Manager, the claimant increasingly formed a critical view of Mr Anderson's management skills, styles and ability. She considered that in managing Support Services he was alienating the workforce whose consequent annoyance she required to deal with in her administrative capacity. She considered that Mr Anderson was untruthful in his dealings with both her and the workforce. She considered that he made poor management decisions. She advised him that he should take advice from her before making certain decisions as opposed to acting on his own initiative. She considered that she knew more about the running of Support Services than Mr Anderson did. In the context of proposing that she move her desk into an adjoining room Mr Anderson told the claimant that it was probably a good proposal because "you annoy me and I probably annoy you".

16. On 1st July 2015 the claimant met with the respondent's Marine Assets Director, Graham Gray, to whom her Line Manager, Mr Martin Anderson in his turn reported. The purpose of that meeting, which was requested by the claimant, was to discuss issues relating to the Support Services Team. The claimant stated that she wished to raise issues pertaining to her relationship with her Line Manager, Martin Anderson, the Support Services Manager. The claimant stated at the beginning of the meeting that these issues related to perceived "bullying, harassment and intimidation" of her by Mr Anderson. The claimant described various incidents to Mr Gray. These described by the claimant related to

instances where the claimant perceived that Mr Anderson had not been doing his job properly. The claimant did not describe to Mr Gray any incidents which he considered could reasonably be regarded as instances of bullying, harassment or intimidation.

5

17. During the meeting of 1st July 2015 Mr Gray asked the claimant on a number of occasions if she wished to raise the issues to which she was making reference as a formal grievance under the respondent's grievance policy. She said she did not. She advised that she was simply raising the issues to make the Company
10 aware of what was going on and to protect herself. She said that she did not want to be blamed for things by which Mr Gray understood her to mean for the consequences of what she considered were Mr Anderson's poor management decisions.

15 18. Notwithstanding that asserted purpose, the claimant made clear to Mr Gray that she was not raising the matters to which she was referring formally as complaints nor did she wish to proceed with a grievance. Mr Gray agreed to look into the matters raised. He was already aware of one of them which related to non attendance at a lock opening by the respondent's staff and in respect of which he
20 was already engaging with Mr Anderson. He did not otherwise discuss the matters raised by Mrs Page directly with Mr Anderson. Mr Gray formed the view, based on what he was told during the meeting, that the claimant was not raising complaints against Mr Anderson of bullying, harassment and intimidation, despite her applying that tag in general terms to her comments. He did so because the
25 matters which she specified in response to his several request that she do so were examples only of what she considered to be poor management decisions on the part of Mr Anderson or instances of him not fulfilling his job responsibilities properly.

30 19. Mr Gray prepared a typed minute of the meeting with the claimant, a copy of which was sent to Mrs Page for her review and to which she responded with such modifications as she wished to advise. The minute of the meeting as agreed by the claimant is at Tab 13 of the Joint Bundle.

20. On 8th December 2015, the claimant sent a letter to Norman Briggs, Chairman of the Respondent Company. The letter is copied at Tab 14 of the Joint Bundle. In that letter the claimant complained about Mr Anderson. The complaints which she specified in the letter related in the main to the claimant's assessment of Mr Anderson as a poor Manager albeit that she provided that specification under the general assertion of being bullied, intimated, harassed and lied to by Mr Anderson.

21. In the letter the claimant stated that Mr Anderson disliked her, that he had told her as much to her face and that he excluded the claimant "from necessary information, meetings, toolbox talks etc all in an attempt to demean and discredit her worth in the workplace to both colleagues and to customers". She went on to attribute her several weeks' illness and absence from work, during which she had suffered from head and face shingles, to stress which she was experiencing at work.

22. Mr Briggs took no action in relation to the claimant's letter of 8th December 2015. He did not pass it to Mr Gray, the Director with responsibility for Support Services, nor did he pass it to Mr Anderson nor discuss its content with him.

23. On 12th January 2016 the claimant again met with Mr Gray at her request. Present also was Lisa Jarvis, a member of the respondent's HR Team. At the 12th January 16 meeting the claimant again asserted that she had been subjected to bullying, harassment and intimidation by Mr Anderson. She stated that Mr Anderson also bullied others when he could. Mr Gray advised the claimant that after her last meeting with him he had asked other members of staff if they had witnessed any behaviour of Mr Anderson that could be classed as bullying, harassment or intimidation. He reported that no-one had spoken to any such behaviour nor made any adverse comment about Mr Anderson. No-one had made any complaints. The claimant stated that she had kept records of incidents in her diary. Mr Gray asked if he could be given copies or excerpts of the entries as he indicated if he was to speak to Mr Anderson about the claimant's

assertions he would need some evidence. The claimant said that she would provide excerpts “as and when she felt it was necessary”. In fact the claimant did not provide any excerpts and Mr Gray, for his part, did not thereafter specifically ask to be given the diary in order that he could examine it or take excerpts from it.

24. At the meeting of 12th January 2016, the claimant again offered no specific examples of bullying, harassment or intimidation by Mr Anderson. The claimant complained about the process of change to her job description made by Mr Anderson describing it as unnecessary and ridiculous. Mr Gray pointed out that he had discussed these changes with her at their July meeting and that she had indicated that she was happy with them. The claimant then confirmed that she was happy with the new job description. The claimant complained about matters that were related to her perception that Mr Anderson was not doing his job properly. The claimant went over the matters which had been discussed at the previous meeting in July of 2015. The claimant complained that she was being excluded from toolbox talks.

25. Mr Adam was in practice of holding toolbox talks at 1 pm, that is the time at which all of the 20 strong workforce, other than the claimant, returned from their lunch break. The claimant’s normal lunch break was 1 to 1.30. For several months Mr Anderson advised the workforce of the fact that a toolbox talk was to take place by informing the claimant of the same and asking that she tell the workforce. On those occasions the claimant adjusted her lunch hour in order that she could also be present at the toolbox talks. Mr Anderson then arranged a number of talks directly advising the staff of them but not advising the claimant with the consequence that the claimant was at lunch during those toolbox talks and not present at them. The claimant complained to Mr Anderson about that practice and, after she so complained, he again adopted a practice of informing her of the toolbox talks on the next one or two occasions. Minutes of the toolbox talks attended by the claimant are at Tab 12 of the Joint Bundle.

26. Mr Anderson denied in evidence that he had deliberately or consciously excluded the claimant from toolbox talks. He provided no explanation of why he had

departed from his original practice of advising the workforce via the claimant of the occurrence and timing of toolbox talks.

27. From in or about December 2015 to January 2016, the claimant was absent from work for a period of about six weeks. During this period her duties were partly undertaken by members of the respondent's Central Admin Team and partly by her Line Manager Martin Anderson. The respondent's Managing Director considered that the duties associated with the respondent's role which were so undertaken by the Admin Team and by her Line Manager Martin Anderson were adequately undertaken and performed.

28. During 2016 the division of the respondent's business in which the claimant was employed suffered a decline. Due to an excess of vessels in the North Sea being available for charter, prices for hire of vessels declined as did the amount of business won by the respondent.

29. The Board reviewed the performance of divisions across the Company and over the course of 2016 implemented various cost control measures including making various vessel crew members and other employees redundant at different times. Over the course of 2016 approximately 20 employees were made redundant. As part of that general process the Board considered a review of the Marine Services Division. There was a perception on the part of the Managing Director, that the claimant was not fully utilised in what was a full-time appointment. This arose because she had previously had to provide a large degree of direct support to Mr Adam's performance of his management duties but that the requirement to provide such support to her new Line Manager, Mr Anderson, was diminished. Anna Briggs or MacKenzie, the Director within the respondent's organisation with particular responsibility for administration, was charged, by the Managing Director and in the absence on sick leave of Mr Gray the Support Services Director, with discussing the claimant's role with Mr Anderson and with tasking him, in his term, with assessing whether he considered that the claimant's role, or parts of it, might be amalgamated with other roles or tasks and or be subsumed into the General Administration Department.

30. In or about April of 2016, Anna MacKenzie discussed that matter with Mr Anderson. Mr Anderson was asked if the claimant's role in particular was a full-time role or it could be restructured to assist the Company in making savings. Having considered that proposition Mr Anderson reported back that he was of the view that it would be possible for some of the claimant's duties to be undertaken by the Central Administration Team and others by himself. At that point Mr Anderson was not asked to take any further action. He accordingly took no further action at that time.

31. In or about September 2016, the Board reviewed the Support Services Division again. The Board determined at that point that further cost control measures ought to be considered. The Board identified the claimant's role as one which might be capable of restructuring and accordingly required to be reviewed.

32. Mr Anderson was instructed by the Board, in or about October 2016, to review the claimant's role. Mr Anderson did so. He was aware from the period of the claimant's absence from work some nine or ten months earlier that her role could be covered partly by the reassigning of duties to the Central Administration Team and partly by himself taking on certain duties. He concluded that there was a case for reviewing whether the business required someone to carry out the claimant's role in a discreet appointment or whether, by restructuring and distributing various elements of the role to others, that role could be dispensed with. Mr Anderson analysed the claimant's duties and divided them into daily and non-daily tasks. He formulated a proposal whereby the claimant's non-daily tasks could be undertaken by the Central Administrative Team. He estimated that these would require only a few hours a week to be undertaken and would not add a significant burden to the Administration Team's workload. The remaining daily tasks did not constitute a full-time role. They would require only about two or three hours work per day at most and that not every day. He considered that he would be able to absorb those duties and that thus the requirement for an employee to carry out the tasks in the claimant's job description had reduced.

33. Mr Anderson and the respondents considered at that point in time, that is in or about September 2016 following Mr Anderson's review and consideration, that a potential redundancy situation existed. They further considered that the claimant was employed in a unique role within the Company and that no other employees fell to be included in a pool for redundancy.

34. In or about 30th November 2016 Mr Anderson met with the claimant. Mr Anderson advised the claimant that he was proposing to restructure her duties. He explained that under the proposal some of her duties would be carried out by the Admin Team. Others would be undertaken by himself. There would not be sufficient left to constitute a full-time role and that her position was accordingly at risk of redundancy.

35. By letter dated 30th November, copied at Tab 18, the respondent's HR Department wrote to the claimant on behalf of Mr Anderson advising that the claimant had been informed that the non-daily tasks in her job would be absorbed by others thus diminishing her role and putting her job at risk of redundancy.

36. The letter further advised that Mr Anderson wished to discuss with the claimant the potential possibilities of restructuring the remainder of her job with a current vacancy available within the business for her to consider and invited her to an "initial consultation meeting" on Friday 2nd December 2016 at which she was entitled to be accompanied by a colleague or a fully accredited Trade Union representative.

37. The claimant was absent from work from 30th November 2016. Her medical certificate, at Tab 11, indicates that she was suffering from "stress at work". She was subsequently absent from work from that date until the 12th of January 2017.

38. On 2nd December 2016, Mr Anderson met with the claimant for the purposes of consulting about the risk of redundancy. A minute of that meeting is produced at Tab 19. During the meeting the claimant was advised of a possible alternative

role of “Travel Support Administrator”, a post which had the potential to incorporate those tasks of the claimant which Mr Anderson had classified as daily tasks in addition to those travel related administration tasks. On 2nd December full details of the role including salary and hours, were not available to Mr Anderson and thus to the claimant due to the absence of sick leave of the respondent’s Administration Manager. Mr Anderson suggested to the claimant that if the role proved to be one which was potentially suitable the claimant might like to consider working in it for a trial period to confirm the same, during which he advised the role would not be externally advertised, it being a role which was offered to the claimant on the basis that it would be available to her if she wished to accept it. At the time of making that proposal on the 2nd of December 2016 Mr Anderson was not aware that the role would be a part-time role involving a cut from approximately £30,000 to £12,000 per annum in the claimant’s salary. He was not aware that in the assessment of the respondent’s own HR Department it did not represent suitable alternative employment.

39. On 7th December 2016 Mr Anderson wrote to the claimant summarising the terms of the discussion conducted at the consultation meeting of 2nd December and seeking to outline the reasons for the claimant being at risk of redundancy. That letter is copied at Tab 20 of the Joint Bundle. By the time of writing on 7th December 2016 Mr Anderson had received full details of the Travel Support Administrator alternative role which was being offered to the claimant. He confirmed those details in the letter the same being Monday to Thursday 1200 to 1700 hours (one hour break for lunch), Friday 0800 to 1700 hours, Saturday shift 0800 to 1200 hours required occasionally which would be reciprocated by a half day back of TOIL, located at the claimant’s present workplace, Unit 1, Burntisland and with a salary of £12,113.92 gross per annum. There was also enclosed with the letter a copy of the Company’s open vacancy list showing five other roles, four located in England and one in Aberdeen which were being currently advertised both externally and internally by the respondent. None of those roles were in terms offered to the claimant nor did they represent “suitable alternative employment” for statutory purposes.

40. The claimant wrote to Mr Anderson on 9th December 2016 advising, amongst other matters, that she did not want to be considered for the role of Travel Support Administrator given the substantial drop in salary and, that she was unable to respond more fully because she had not had fully explained to her what was "happening with her job and the reasons for her being made redundant". She stated that she was, (impliedly at the meeting of 2nd December) and remained, "completely confused and bewildered" by Mr Anderson's "poor explanations of how and why my job shall be absorbed by others". In that letter the claimant went on to request that Mr Anderson provide her with "full details of the proposal to reallocate my current roles and an explanation of why this has arisen at this stage".

41. A second consultation meeting was arranged for 12th December 16 but was postponed to 15th December to facilitate the attendance of the claimant's chosen companion. The meeting was further postponed due to illness to the 10th of January 2017 again and ultimately, to 18th January 2017.

42. By email dated 9th January 2017 (Tab 24) the claimant again asked for "precise and detailed information about what the respondents were proposing in respect of her current role and an explanation as to why the matter had arisen at that particular point in time". She went on to assert that in her understanding her existing role still remained and the work done within it continued to require to be done in its entirety and that she therefore did not understand the rationale of splitting and merging some of the duties with travel.

43. By letter dated 13th January Mr Anderson responded to the claimant's email of 9th January by explaining:- "The company constantly reviews its Divisions and during a review of the Support Services Division it was decided that a restructure is required. This decision has resulted in some of your tasks (non-daily tasks) being absorbed within a Travel Support Service Administrator role." In the letter Mr Anderson did not expressly explain that by restructuring and distributing the claimant's roles partly to the Central Administration Team and partly to Mr Anderson himself the resulting cost saving, including Employer's National

Insurance Contribution and pension contributions of around £37,000 per annum would accrue to the respondents. With that letter Mr Anderson enclosed an updated open vacancies list on which some additional posts (three) at the Burntisland premises where the claimant was employed, figured. None of those posts were in fact offered to the claimant although upon her enquiring she was able to identify that they were all full-time posts. Salary details were provided.

44. The claimant was asked to attend a second consultation meeting which ultimately proceeded on 18th January 2017.

45. During the period of the claimant's absence from work, from 30th November 2016 to 12th January 17, the claimant's duties were in part undertaken by the Admin Team and in part by Mr Anderson. The time that was required by the Admin Team to undertake these duties in that period was relatively small, totalling some eleven hours. The balance of the claimant's duties were performed by Mr Anderson.

46. A minute of the second consultation meeting of 18th January 2017 is copied at Tab 27. At the second meeting the claimant again asked for a fuller explanation as to why her job responsibilities were being restructured and re-distributed within the Company. Mr Anderson, in his response, identified that that was happening in furtherance of what he described as "a business decision". He asked the claimant if she understood that it was a business decision to which the claimant responded in the negative. Mr Anderson did not explain that the business decision to which he was referring was one designed to deliver a cost saving to the Company. In the course of that meeting the claimant was confirmed in her pre-held view that the consultation process in which she was being engaged was pointless and was as she put it "a box ticking exercise" with the outcome, namely that she would be made redundant, a matter already determined.

47. In the course of that meeting of 18th January 2017, Mr Anderson explained that the claimant remained employed but that her role had already been diminished

as advised on the 30th of November and 2nd December meetings. He stated "employment is there, but the job of work is not". Mr Anderson referred to the letter sent to the claimant on 13th January 2017. He quoted from that letter in the following terms "The Company constantly reviews its Divisions and during a review of the Support Services Division it was decided that a restructure is required. The decision has resulted in some of your tasks (non-daily tasks) being absolved within a Travel Support Service Administrator role." Mr Anderson asked the claimant if she had any proposals for alternative roles which she wished to suggest by way of avoiding redundancy. The claimant responded by stating that she was unable to make proposals as she did not understand what was happening to her job and the rationale for that. Mr Anderson then adjourned the meeting at approximately 10.30 and reconvened it at 10.55.

48. Mr Anderson further stated at the meeting of 18th January 2017 regarding the purpose of consultation, that the consultation gives the claimant "an opportunity to say why, in her opinion, the business decision was incorrect and to consider other roles/vacancies within the business." At the reconvened meeting Mr Anderson asked the claimant if there was anything else that she would like to add. The claimant had nothing further to add. Mr Anderson then advised the claimant that as there were no alternative roles or suggestions put forward by the claimant the Company had no choice but to advise the claimant that her role was confirmed as redundant. He handed the claimant the severance calculation and figures, which also identified a proposed last date of her employment. He advised the claimant that the outcome of the meeting would be confirmed to her in writing and any questions raised by her today acknowledged. He confirmed that the claimant had the right to appeal the decision. He then asked the claimant if she had any questions. The claimant made a number of statements by way of a response. She stated:-

- She had been forced to be off work for a second time due to work related stress.

- The Company have “compounded” this during the past eighteen months where she has complained about bullying and harassment by Mr Anderson.

- The situation is a “sham” and it is “not a genuine redundancy situation”.

- The Company has failed her duty of care.

- No reasonable person would accept a lower salary.

- She believes this is “constructive dismissal”.

49. In deciding to confirm his earlier expressed belief that the claimant’s role was not a full-time role Mr Anderson, based upon the experience of dealing with matters during the claimant’s two periods of absence, considered that it would be both possible and practicable to have the claimant’s non-daily tasks undertaken by the Admin Team whose members would be able to absorb them using a number of hours per month which would be substantially fewer than those worked by the claimant and would be able to do so without any additional cost to the Company. He was also satisfied, based upon the same experience, that it would be possible and practicable for him to absorb the balance of the tasks associated with the claimant’s role on the basis of two or three hours a day when required, but for which there would not be requirement every day. He was satisfied that the need to employ someone to carry out the claimant’s role had diminished and that a substantial cost saving to the Division and to the Company, in the region of £37,000, would be associated with the redundancy (discontinuance for reason of redundancy) of the claimant’s role and it followed, by the claimant’s dismissal for reason of redundancy.

50. Mr Anderson advised the claimant orally on 18th January 2017 of her redundancy. She was provided with details of the redundancy package that would be made available to her at that time.

51. By letter dated 20th January 2017 (Tab 29) the claimant's redundancy was confirmed in writing. That letter was followed on 26th January 17 with a correction of the redundancy figure. The claimant received three months pay in lieu of notice in the sum of £7,508.12 gross, which sum was passed to her net of PAYE and Employee's National Insurance Contribution. The claimant received a statutory redundancy payment of £2,874 and was advised of her right to appeal against the decision to dismiss her for reason of redundancy.

52. The meetings between the claimant and Mr Gray, at which she criticised her Line Manager's management skills and made the general unsubstantiated statement that she was being subjected to daily bullying, harassment and intimidation (unspecified), occurred in July of 2015 and January of 2016. The claimant's dismissal occurred respectively some twelve and eighteen months after the dates of those meetings. After the 12th January 2016 meeting, despite asserting at it that she was being subjected to daily bullying, harassment and intimidation, the claimant raised no issues with the respondents regarding Mr Anderson's conduct.

53. During 2016 Mr Anderson sent the claimant on training courses.

54. In the period 2015 - 2016 the claimant attended ten out of a possible seventeen toolbox talks.

55. During the consultation process the claimant is recorded as stating that she had not been properly informed about the "business reason" for her position being considered redundant and or that she did not understand what she had been told.

56. In the course of cross examination before the Tribunal the claimant accepted:-

(a) that the proposal which the respondent had communicated to her in the course of consultation was clear and was understood by her, namely that she understood that what was proposed was that her role be split and her duties distributed to others, partly to the Central Administration Team and partly to her Line Manager, Mr Anderson.

(b) She confirmed that she understood that the effect would be that there would be no, or only a few, duties left over, from her then existing role, for her to fulfil and that one possible alternative, should she wish to consider it would be the combination of those residual duties with the duties of the then envisaged new Travel Support Administrator post.

(c) She confirmed that she understood that the Company, by implementing their proposal, were it to do so, would make an annual saving of between £38,000 and £40,000.

(d) She acknowledged that that was a business decision that the respondent was entitled to make in the interests of the business but maintained that what she did not understand or accept was the respondent's reasoning wishing to implement the proposal.

(e) She disagreed with the respondent's assessment that such administrative support duties that required to be provided to the managerial function within the Service Support Team no longer required to be provided from a freestanding appointment based within the Team.

(f) She stated that she considered that that was a bad business decision on the part of the respondents. She did not agree with the respondent's business decision.

57. By letter dated 27th January 2017 the claimant appealed against her redundancy (Tab 30). The grounds of appeal advanced in that letter were:-

- that her role remained in its entirety,

- that there was no genuine redundancy situation and that the respondent had asserted that there was only in an attempt to justify the decision to dismiss her;

- in her letter the claimant also made specific reference to what she described as:- “the contemptuous behaviour of my Manager Martin Anderson by bullying and harassment directed towards me over the past 20 months. Clearly there is an agenda to get rid of me.”, and

- that the apparent redundancy situation had been manufactured by her Line Manager Mr Anderson in retaliation to she having made complaints against him.

58. By letter dated 30th January 2017 (Tab 31) the claimant was invited to attend an Appeal Hearing. The Appeal was heard by Mr Collieson Briggs, Managing Director of the respondent. Mr Briggs was the Director who had first asked Anna MacKenzie, the Director responsible for administration, to consider whether the requirement still existed for a full-time and freestanding post for the carrying out of the duties which comprised the claimant’s role. In advance of the Appeal Hearing, Mr Briggs was provided with some papers relating in part to the issues raised by the claimant in her grounds of appeal namely, the process followed in the consultation and redundancy thus far and the Minutes of the Meetings held with Mr Gray in which the claimant made statements regarding her Line Manager Mr Anderson’s conduct and managerial competency.

59. The Appeal Hearing, chaired by Mr Briggs, proceeded on 8th February 2017. In attendance were the claimant and her work companion, Mr Briggs and a note taker. A Minute of the Meeting, copied at Tabs 34 and 35, was taken.

60. In the course of the redundancy Appeal Hearing the claimant explained that:-

- She had been in the Support Services Division for five years and believed that the tasks performed by her took up at least 80% of her time.

- She indicated that she did not believe that the role could be split as had been proposed by Mr Anderson during the consultation process. She stated that the role required someone (her) to be in the yard that being someone who knew and understood where the jobs onto which staff were to be deployed were.

- She stated that in her view the role which she performed remained a full-time job.

61. At the Appeal Hearing Mr Briggs explained to the claimant that the Support Services Division in which she had been employed had not been performing financially and that it was therefore felt, by the Board, that restructuring if possible, was the right thing to do given the needs of the business and a requirement to save costs. That in turn had prompted a review at Board level of the Support Services Division. Mr Briggs advised that the rationale behind the restructure as far as the claimant's specific role was concerned initially related to a review prompted by the departure of John Adam, her previous Line Manager. Not all of the support provided by the claimant to Mr Adam was required by Mr Anderson. Her tasks had diminished accordingly. Her job had been reviewed and a new job description agreed with her. During a period of her absence late in 2015 it had become apparent that the tasks and duties associated with her role could be partly covered in the Central Administration Team and partly by Mr Anderson at no additional cost to the Company. In her most recent period of absence in December 2016 to January 17 the same situation had pertained. Mr Briggs provided the claimant with a spreadsheet showing that since December 2016 all of what in terms of her most recently agreed job description were described as daily tasks had been covered by the Administration Team by the expenditure of eleven hours in the three working week month of December and of 29.5 hours (or one hour a day) in January 2017. The balance of the tasks associated with her role had been absorbed by and performed directly by Mr Anderson.

62. In response the claimant reiterated that she continued to believe that no genuine redundancy situation existed and that the Company was adopting a sham exercise designed to get rid of her because of her relationship with her Line Manager. The claimant stated, without further specification, that members of the yard staff also had issues with Mr Anderson but none of them would complain because of fear of losing their jobs. The claimant stated that when she had been absent with work related stress no contact had been made with her and that she had received no support from the Company. She stated that while she had no problems with Mr Anderson he had a problem with her and that he had deliberately ostracised her and told people not to talk to her and had excluded her from toolbox talks. She provided no specification of ostracisation or of other persons being told by Mr Anderson not to talk to her.

63. Mr Briggs explained that his understanding was that the claimant had made no formal complaint about Mr Anderson and although asked to proceed by way of the Company's grievance procedure in relation to those matters she had refused to do so stating that she did not wish to make a formal complaint. Mr Briggs explained that, on the basis of the analysis presented by the Central Admin Team for the months of December 16 and January 17, he was satisfied that the post which she had previously occupied was oversubscribed and that her duties could be and had been absorbed partly by the Central Administration Team and partly by Mr Anderson at no additional cost (i.e. that there had been a reduction in the requirement for her duties to be performed by a person wholly employed for that purpose). Mr Briggs advised the claimant that he was satisfied that there was a redundancy situation pertaining.

64. Following the conclusion of the Appeal Hearing, Mr Briggs considered the claimant's Appeal and what she had said during the course of the Hearing.

   (a) He considered the reduction in the claimant's duties, the fact that administration required for the Support Services Team was being provided at an acceptable level while the claimant had been off sick,

that it had been so provided partly by the Admin Team over substantially reduced hours and partly by the claimant's Line Manager at no extra cost producing a substantial saving to the Company in the region of £37,000 per annum.

5

(b) He was separately aware and had advised the claimant, that a review of the requirements for Support Services Administration had come from the Board and had not been suggested by Mr Anderson.

10

(c) He considered, regardless of what may or may not have been healthy or poor state of relations between the claimant and her Line Manager, that there was no evidence that the decision on redundancy had been taken because of any such relationship on the one hand; while

15

(d) on the other hand, he was satisfied as to there having occurred a diminishing of requirement for duties of the type performed by the claimant to be performed in support of the division including in particular a diminishing of the requirement for support to her Line Manager's personal managerial function, as between her present Line Manager Mr Anderson and her previous Line Manager Mr Adam.

20

(e) He was also satisfied that such support as was required did not need to be provided from a freestanding appointment based in the "yard" such as that held by the claimant and, that since such diminished administrative input as continued to be required could be provided partly by the Central Admin Team and be partly undertaken directly by the Line Manager at no additional cost to the Company, there existed a sound business case for restructuring the duties of the role in that way with a resultant cost saving to the Company, in a poorly performing financial period, of some £37,000 per annum.

25

30

65. Following his consideration of matters, Mr Briggs determined to reject the Appeal and to uphold the decision to dismiss the claimant for reason of redundancy.

66. By letter dated 13th March 2017, copied at Tab 36 in the Bundle, the claimant was advised in writing that her Appeal had been rejected together with Mr Briggs' reasons for so deciding. In explaining his reasoning Mr Briggs included in his letter an acknowledgement of the fact that the claimant had met with Mr Gray on two occasions and that at those meetings she had been critical of her Line Manager's managerial skills and the quality of his decision making and that while she had made general allegations of bullying and harassment at the hands of her Line Manager, she had repeatedly declined to provide any specific examples of that behaviour beyond, belatedly her alleged exclusion from toolbox talks; and that she had likewise repeatedly declined to formalise any of her criticisms as complaints using the grievance procedure. He explained that in those circumstances the Company would not have any basis to progress a grievance against Mr Anderson under its Company procedures. Mr Briggs explained separately that there was in any event no evidence presented which went to show that the reason for the claimant's dismissal and or the reason for there appearing to be in existence a redundancy situation, was the fact that she had been critical of the claimant's managerial abilities and practice in her meetings with Mr Gray.

67. The vacant part-time role of Travel Support Administrator, which was offered to the claimant as alternative, albeit accepted by the respondents as not representing suitable (alternative) employment, and with which, in the event that the claimant had accepted the role, it was intended to amalgamate any residual duties of the claimant's role which were not capable of being performed by the Central Administrative Team, was, in the event, not filled by the respondent. The respondent did not require to fill the role and found itself able to absorb all of the claimant's duties within its existing structures. The pre-existing Admin Team were able to carry out all of the claimant's duties which have not been absorbed directly by her Line Manager by spending in the region of 40 hours per month on those duties.

68. Similar schedules lodged in the Joint Bundle for the months of February, March, April, May, June and July 2017 record an average of 48 hours per month expended by the Central Admin Team on tasks associated with the claimant's former role in which the claimant was employed full-time between 36 to 40 hours per week.

69. In addition to offering the claimant part-time alternative employment on a non-competitive basis, the claimant was advised of the vacancies appearing, throughout the consultation period on the respondent's open vacancy list. The claimant considered all of those potential vacancies and confirmed to the respondent that she did not wish to apply for any of them.

70. The respondent's Managing Director, Mr Briggs, was party to the initial Board discussion, which took place in or about March 2016 during which it was determined that Mr Martin Anderson, the Services Support Manager, should be asked to consider whether the claimant's role continued the role which required to be performed by a full-time standalone employee located within the Services Support Team, or was capable of being redistributed to other employees in the Company. Mr Briggs had no involvement in the redundancy consultation process.

71. In the course of the consultation process the respondent offered the claimant one alternative post of employment being the role of Travel Support Administrator into which there had been incorporated such residual duties from the claimant's then existing role as would not have been redistributed, was made available to the claimant on a non-competitive basis. The role was a part-time role which did not detract from the fact that the offer was made. The claimant was not obliged to accept it and declined it. The offer was a reasonable offer to make and was made reasonably and included the offering to the claimant of a trial period.

72. That offer of alternative employment was not an offer of suitable alternative employment for the purposes of section 141 of the ERA from which it falls to be distinguished.

5

Applicable Law

Unfair Dismissal

73. The starting point in all cases of unfair dismissal are the words of section 98 of the Employment Rights Act 1996, which provides:-

10

“***98 General.***

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or nfair, it is for the employer to show—

15

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

20

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

25

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

30

(b) relates to the conduct of the employee,

[F1*(ba) is retirement of the employee,****]***

35

F1*(c) is that the employee was redundant, or*

(c) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[F2*(2A) Subsections (1) and (2) are subject to sections 98ZA to 98ZF.****]***

F2*(3) In subsection (2)(a)—*

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[F3*(3A) In any case where the employer has fulfilled the requirements of subsection (1) by showing that the reason (or the principal reason) for the dismissal is retirement of the employee, the question whether the dismissal is fair or unfair shall be determined in accordance with section 98ZG.****]***

F3*(4)* ***[F4*** *In any other case where****] F4*** *the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

F5*(5). . . . .*

5

(6) ***[F6****Subsection (4)****] [F7****is****] F7*** *subject to—*

(a) *sections* ***[F8****98A****] F8*** *to 107 of this Act, and*

10

(b) *sections 152, 153* ***[F9****, 238 and 238A****] F9*** *of the* ***M1*** *Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).*"

15

Definition of Redundancy

The definition of redundancy is set out in section 139 of the Employment Rights Act 1996, which provides at s.139(1)(b):-

20

"***139 Redundancy.***

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

25

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

(i) to carry on the business for the purposes of which the employee was employed by him, or

30

(ii) to carry on that business in the place where the employee was so employed, or

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

(i) for employees to carry out work of a particular kind, or

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

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

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a [F1 local authority] with respect to the schools maintained by it, and the activities carried on by the [F2 governing bodies] of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly

attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

[F3(7) In subsection (3) " local authority " has the meaning given by section 579(1) of the Education Act 1996.]"

The Ambit of the Definition

74. The statutory definition of redundancy, set out in section 139, is one which extends to embrace not only circumstances in which the amount or quantity of work requiring to be done has been diminished or has ceased, but also the diminution or cessation of the need for the employer to employ persons to undertake that work, even though the amount of work overall may have remained the same. See:-

    1. **Safeway Stores Plc v Burrel [1997] IRLR 200 EAT (at paragraph 32)**
    2. **Sutton v Revlon Overseas Corporation [1973] IRLR 173 EAT** (at paragraph 15)
    3. **McCrea v Cullen and Davidson [1988] IRLR 30** (at paragraph 19)

75. A 'redundancy' within the meaning of Directive 58/59/EC means the declaration by an employer of its intention to terminate the contract of employment rather than the actual cessation of the employment relationship upon the expiry of the period of notice see

Junk v Kühnel: C-188/03 [2005] IRLR 310

Business Reasons

5

76. Section 139(6) of the Employment Rights Act 1996 provides:-

> "*(6) In sub-section (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.*"

10

Accordingly, in circumstances where redundancy within the meaning of the statutory term exists, the Employment Tribunal will not be concerned with enquiry into the employer's business reasons for making the employee redundant (except where there is evidence to show that the redundancy itself was a sham).
15 Likewise the Tribunal will not generally be concerned to enquire as to what caused the redundancy situation. Rather, where the matter is not one of admission, the first question to be asked and answered is "what was the reason, or if more than one the principal reason for the dismissal" and in the case of an asserted reason of redundancy to enquire whether the dismissal was in fact
20 attributable to a cessation of the business or a cessation of, or diminution in, its requirements:- see;-

4. **H Goodwin Limited v Fitzmaurice [1977] IRLR 393, EAT**; (at paragraphs 9 and 10)
25
5. **Moon v Homeworthy Furniture (Northern) Limited [1976] IRLR 298, [1977] ICR 117, EAT** (at paragraphs B, C, and F – of page 119)
6. **Association of University Teachers v University of Newcastle Upon Tyne [1987] ICR 317, EAT** (at paragraph F on page 324 and paragraph D on page 326)
30
7. **James W Cook and Co (Wivenhoe) Limited v Tipper [1990] IRLR 386, [1990] ICR 716, CA**; (at paragraph G on page 729)
8. **Malekout v Ahmed and others (t/a The Medical Centre) UKEAT/0556/12** (at paragraph 7)

77. In general terms it is for the employer to decide whether to restructure one part of its business or another. Although an employee may legitimately and potentially successfully, propose in the course of consultation a reconsideration of the advisability of implementing a proposed business decision, it is ultimately a decision for the employer to take and it is not for the Tribunal to substitute its own view or decision for that of the employer.

Fair Selection

78. An employer must seek to ensure that selection for redundancy is made fairly. That involves consideration first of the pool of potentially affected employees, although failure to consider a pool of employees as being potentially redundant from which one ought to be selected was not an argument given notice of by the claimant in the pleadings nor advanced in evidence in the present case. The claimant, in the instant case, was employed in a standalone role. There was no evidence that went to establish that any other employee in the company perform materially the same role.

Requirements of Consultation

79. Consultation must not be a sham exercise; there must be time for individuals or representatives who are consulted, to consider properly the proposals that are being put to them see

9. **Transport and General Workers' Union v Ledbury Preserves (1928) Limited [1985] IRLR 412**

Fair consultation involves giving the body or individual consulted a fair and proper opportunity to understand fully the matters about which it is or they are being consulted, and to express their views on those subjects, with the consulting employer thereafter considering those views properly and genuinely. The process of consultation, however, is not one in which the employer is obliged to

adopt any or all of the views expressed by the person or bodies whom he is consulting see:-

10. **R v British Coal Corporation and Secretary of State for Trade and Industry, *ex p* Price [1994] IRLR 72**

80. Consultation ought to conform to certain principles set out by Glidewell LJ in the case of **R v British Coal Corporation and Secretary of State for Trade and Industry** (see number 10. above) at paragraph 24:-

> "*24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the test proposed by* ***Hodgson J in R v Gwent County Council*** *ex parte Bryant, reported as far as I know, only at [1988] Crown Office Digest p19, when he said:-*
>
> *'Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information in which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation.'"*

Quoted with approval in the context of consultation with a trade union, by the Inner House of the Court of Session in **King v Eaton Limited [1996] IRLR 199**.

Alternative Employment

81. The duty to attempt to mitigate the effects of a potential redundancy by offering alternative employment is distinct from the statutory question posed in relation to redundancy payments as to whether there has been an "offer of suitable alternative employment" under section 141 of the Employment Rights Act 1996. In resolving the issue of potential unfairness of dismissals for redundancy a factor to be considered is whether the employer made reasonable efforts to look for alternative work. That factor is one which falls to be assessed objectively. There is generally an expectation that the employer will seek to see whether, instead of dismissing the employee, the employer could offer alternative employment. The duty on the employer, however, is only to take reasonable steps in that regard:- see

11. **EAT in Quinton Hazell Limited v Earl [1976] IRLR 296** (at paragraph 7)

82. It is reasonable for an employer to make an offer of alternative employment to the employee. The offer must be made on a reasonable, as opposed to on an unreasonable basis, for example an offer of alternative employment which included an option of working in the post on trial basis may well be considered as made on a reasonable basis, an offer made on the basis of refusing such a trial period is more likely to be considered one unreasonably made. The fact that the offer relates to what is a subordinate job or, for that matter, one which commands a lower salary, does not of itself render the offer unreasonable.

<u>Summary of Submissions</u>

83. Each party exchanged with the other and lodged written submissions including citation of and reference to some of the case authorities set out above and below. The written submissions of parties have been fully considered and remain available, they are accordingly not rehearsed at length but rather are summarised below.

Summary of Submission for the Claimant

84. In the course of his submissions, Mr Anderson for the claimant made reference to the following case authorities:-

5

12. **Williams and others v Compere Maxam Limited [1982] IRLR 83** (no substitution by the Tribunal of its own view)
13. **HSBC Bank Plc v Madden and Post Office v Foley [2000] EWCA Civ 330** (test for unfair dismissal)
14. **Carron Co v Robertson [1967] 2ITR484** (suitable alternative employment exists where on an objective assessment the alternative offer is a match for the employee in terms of the whole of the job)
15. **Jones v Aston Cabinet Co Limited [1973] ICR 292** (respondent has burden of showing that alternative employment offered was "suitable")
16. **Kennedy v Werneth Ring Mills Limited [1977] ICR 206** (a significant drop in pay is likely to render alternative employment unsuitable)
17. **De Grasse v Stockwell Tolls Limited UKEAT/529/89** (employer's size and administrative resources are relevant to the question of reasonableness)
10. **R v British Coal Corporation and Secretary of State for Trade and Industry** *ex parte* **Price [1994] IRLR 72** (consultation meaningful where matters are not *fait accompli*)
18. **Quinton Hazell Limited v W C Earl [1976] IRLR 296** (duty on the employer to make reasonable efforts to look for alternative employment)
19. **Taylor v OCS Group 2006 ICR 1602** (procedural defects can be remedied at appeal)

85. Mr Anderson also made specific reference to the following statutory provisions:-

(a) section 139(1)(b) of the Employment Rights Act 1996 (definition of redundancy)

(b) section 98 of the Employment Rights Act 1996

(c) the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015

(d) section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992

86. Under reference to the above authorities and to the oral and documentary evidence presented, Mr Anderson submitted:-

(a) That the evidence of the claimant, Mrs Page, should be preferred over that of the respondent's witnesses Mr Gray, Mr Anderson and Mr Briggs, on the basis that the evidence of Mr Gray and Mr Anderson was in places vague and in other places internally inconsistent and, in the case of Mr Briggs that he had, by his own admission in cross examination, accepted that he had little knowledge of the detail of the claimant's day to day role.

(b) That, for the purposes of section 98(4) ERA 1996 the respondents should be regarded as having failed to act reasonably in dismissing the claimant for reason of redundancy as evidenced by:-

(i) a failure to give the claimant proper warning and to consult properly with her prior to the 30th of November

(ii) by their failure to adopt a fair basis on which to select for redundancy but rather their simply identifying the claimant's post and therefore the claimant as the ones which and who were respectively at risk of redundancy

(iii) their failure to properly consider suitable alternative employment

Mr Anderson further submitted:-

5

(c) that the respondent had failed to discharge a burden of proof of showing that such alternative employment as they offer to the claimant was "suitable alternative employment and or that the claimant's refusal of that employment was unreasonable"

10

(d) that the alternative employment offered by the respondent was not suitable alternative employment (a point which was conceded by the respondent certainly for the purposes of section 144 of the 1996 Act)

15

(e) that the consultation entered into with the claimant was "wholly inadequate" rendered such by, amongst other things, the fact that it formally commenced only three days after the claimant was given informal warning of the risk of redundancy

20

(f) that the respondents had failed to explain to the claimant adequately and effectively the basis upon which they had formed the view that there had been some diminution in work which required to be carried out through her post

25

(g) that although the respondents had made reference to the decision being a business decision they had, at no point, prior to the internal Appeal Hearing expressly stated or otherwise made it clear to the claimant that the underlying rationale for the "restructuring" and distribution to others of the duties and work previously associated with her role was to achieve a significant reduction in costs

30

(h) that, contrary to the recommendations of their own Redundancy Policy (copied at page 40 of the Bundle) they did not appear to have

considered any other roles for redundancy or other steps that might have been taken to avoid redundancies such as a recruitment freeze, withdrawing job offers, deferring new joiners, redeployment, secondment; temporary stoppages such as layoffs, reducing hours, ceasing pay increments across the board or asking for volunteers for redundancy

(i) in order for an employer to be regarded as having consulted properly the employer must have a truly open mind during the process of consultation and still be capable of being influenced. That in the instant case that was not the position and that both Mr Anderson in his role as Dismissing Officer and Mr Briggs in his role as Appeal Officer had predetermined, before the commencement of the consultation process, that the claimant's role had diminished and that accordingly she would be dismissed.

(j) While accepting that the claimant, for her part, had not made any suggestions throughout the consultation process, that there was nothing which the claimant could have suggested that would have altered matters.

(k) That the situation described in the evidence as that pertaining immediately prior to and at the time of the claimant's dismissal was not one which fell within the statutory definition of redundancy as set out in section 139(1)(b) of the Employment Rights Act 1996 and that therefore there was no genuine redundancy situation and the position of asserted redundancy maintained by the respondent was accordingly a sham.

(l) That the respondents had failed in their duty to make reasonable efforts to look for alternative employment, that the duty was not fulfilled and the respondents by the fact that the respondents had taken what amounted to no more than a cursory look at potential

alternatives identifying only alternatives which were wholly unsuitable and that the respondents should, for example, have actively looked into the possibility of adding tasks to the claimant's job rather than redistributing tasks from it to other employees.

5

(m) That while he accepted on the authority of **Taylor v OCS Group** (number 19 above) that procedural defects could be remedied within an appeal, the appeal in this case was conducted by Mr Briggs, the Managing Director of the respondent, who had instructed in the first 10 instance that consideration be given to reducing costs by examining, amongst other matters, the need to continue having such support services as were required to Mr Anderson's managerial function and were provided from within the claimant's freestanding post located within that department. This, he submitted meant that the appeal 15 was entirely futile and served no purpose other than to create a façade of apparently proper procedure.

(n) That the claimant had made complaints about her Line Manager's behaviour on two occasions and despite the fact that she had 20 specifically declined to make these the subject of a formal process or to invoke the grievance procedure, the respondent's failure to fully investigate those complaints and take subsequent action in consequence constituted a failure on their part to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 to 25 the extent that, in the event of her complaint of unfair dismissal succeeding, the claimant should be awarded an uplift in her compensation of 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

30 (o) That following her dismissal the claimant had taken reasonable steps to find alternative employment and had fully discharged her duty to mitigate her loss.

87. On the basis of the above submissions Mr Anderson invited the Tribunal to hold:-

(a) that "the claimant's role was not redundant";

5 (b) that the assertion by the respondent that there existed a redundancy situation was a sham;

(c) that a full and fair procedure had not been followed in the process of dismissing the claimant;

10

(d) that the claimant's dismissal was a matter which had been predetermined prior to the commencement of the consultation process and was so predetermined by the Dismissing Officer, Mr Anderson substantially because of, or at least in the context of,
15 the existence of mutually poor relations between him and the claimant and the fact that the claimant had made complaints/criticised him to his Director and Manager Mr Gray;

(e) that in the circumstances the respondents had not acted reasonably
20 in determining to dismiss the claimant for reason of redundancy;

(f) that their decision fell outwith the band of reasonable responses available to them in the circumstances, and

25 (g) that the dismissal was accordingly unfair in terms of section 98(4) of the Employment Rights Act 1996

Remedy

30 88. Let it be assumed that the complaint of unfair dismissal were to succeed, Mr Anderson further submitted that the claimant was thereby entitled to a compensatory remedy as per the Schedule of Loss set out at page 209 of the Joint Bundle, all under and in terms of section 123(1) of the Employment Rights

Act 1996; and that no issue of a Polkey deduction and or of deduction for any contributory conduct arose.

Summary of Submissions for the Respondent

89. For the respondent Mr Hughes, under reference to the authorities numbers 1 to 19 above, submitted:-

(a) That there was no evidence before the Tribunal which went to support a Finding in Fact that the reason for the claimant's dismissal was that asserted by her, namely that she had been dismissed for reason of having made complaints against her Line Manager, Mr Anderson. He invited the Tribunal to dismiss that proposition.

(b) That there had pertained at the material times a genuine redundancy situation, that is to say redundancy within the terms of the statutory definition set out in section 139 of the ERA in that there had occurred a diminution in part in the work of the particular kind carried out by the claimant to be carried out by her, including in particular the requirement to provide to her Line Manager, Mr Anderson, the same level of IT and IT systems support which she had provided to her less computer literate previous Line Manager, Mr Adams (that is a diminution in the amount of work) and separately; that there had also occurred a diminution in the need for the respondents to employ persons, including in particular the claimant in a freestanding role located within the Department, to undertake such work as continued to require to be carried out, the same being capable of redistribution to other employees, partly to the central administrative staff and partly to the claimant's Line Manager, at no additional cost to the Company.

(c) That the claimant had been dismissed for reason of redundancy which was a potentially fair reason.

90. Mr Hughes further submitted that redundancy situation arose in the context of a business decision to restructure the manner in which administrative support was provided to the Support Services Division. The same by distributing the majority of the tasks and duties associated with the freestanding role in which the claimant was employed, to other employees and by combining such residual and unre-distributed tasks as remained with those incorporated in the proposed new role and appointment of Travel Support Administrator. That resulted in the appointment and the role in which the claimant was employed being surplus to requirement with a consequent saving in costs of some £37/38,000 per annum. The same in the context of poor financial performance of the Division within which Support Services was located. That saving was one which complemented cost savings associated with the implementing of redundancies of approximately 20 other employees across the Division in the course of 2016.

91. That the above business decision was one which was for the employer to take and that the Tribunal would err in law if it was to seek to substitute its own decision for that of the employer regardless of whether the Tribunal, or as appeared to be the case the claimant, considered that it was or might be a poorly taken business reason or decision.

92. Regarding selection, while accepting that the employer must seek to ensure that selection for redundancy is made fairly and that that would frequently involve consideration first of the pool of potentially affected employees, Mr Hughes submitted that in the present case the claimant was clearly employed in a standalone role, that there was no-one else in the Company who performed materially the same role and that there was, accordingly, no pool from which to select. That separately, and in any event, the claimant gave no notice, in her written pleadings of a claim based on failure on the part of the respondents to consider a pool of employees as being potentially redundant from which one ought to be selected and neither was any such case advanced in evidence. In the circumstances and absent any proof of ulterior motivation for the redundancy, there was no requirement to consider further whether the claimant’s selection for redundancy was fair.

93. Regarding consultation, and while recognising that the claimant's persistent refusal to engage with the consultation process on the grounds that she asserted that it was a sham, had rendered the process, in part at least, sterile, Mr Hughes submitted that on the evidence presented, the Tribunal should hold notwithstanding, the respondents had consulted appropriately with the claimant prior to making her redundant and in particular:-

    (a) They had provided to the claimant an adequate explanation as to why her role was being considered for redundancy;

    (b) that the decision to proceed with redundancy was not predetermined such that consultation was a sham exercise; and,

    (c) that there had been no failure on the part of the respondent to consider any points raised by the claimant regarding alternatives to her dismissal and or any other suggestions

94. In Mr Hughes's assessment of the written and oral evidence presented the claimant's position, in the face of the respondent's attempts to consult with her, could be seen as one of:-

    (a) Insistent attribution of the existence of the whole process entirely to ill will or malintention towards her on the part of her Line Manager Mr Anderson

    (b) Fundamental disagreement with the basis of and the respondent's right to take a business decision in relation to the management of their business;

    (c) a persisted in belief that no-one within the respondent's business including in particular her Line Manager Mr Anderson, her Divisional Director Mr Gray or the Managing Director Mr Briggs, knew enough

about how her role and the duties which comprised it related to the business, to qualify them to make a competent assessment of whether continuation of her role in its entirety was something essential to the business or, alternatively, whether the provision of the support associated with her role could be restructured such as to allow it to be distributed to other employees in circumstances which would render the appointment surplus to requirement and thus result in its discontinuance in order to deliver a substantial cost saving to the Company

(d) Of refusal to accept that any assessment of the impact of maintaining her role and appointment in place or, alternatively, of restructuring it could be worthy of consideration and that therefore the proposal to restructure was, in consequence, unnecessary and, therefore, in consequence was a sham designed to justify a redundancy on that basis,

(e) That the Tribunal should reject the contention that the fact of the claimant's dismissal for reason of redundancy was a matter which had been determined by the respondents, including by Mr Anderson the Dismissing Officer and by Mr Briggs the Internal Appeal Officer before the consultation process was commenced.

(f) That the Tribunal should further reject the contention that there was either no point in engaging with the consultation and seeking to make any suggestions or that the claimant was unable and declined to make any suggestions for consideration by the respondents by way of alternative to redundancy because of any action on the part of the respondent.

95. In Mr Hughes's submission the fact that the claimant's adopted approach and "jaundiced view of the process" meant that consultation quickly became sterile did not result in the consultation falling to be regarded as inadequate or a sham.

(a) In his submission, the consultation took place at a point where the proposal was still at a formative stage and, was a proposal which might have been changed or indeed dropped altogether had the claimant adopted a more proactive part in the consultation and brought forward any material suggestion which, on conscientious consideration by the respondents, might have avoided redundancy.

(b) He submitted that the claimant had had supplied to her in the consultation process adequate information upon which to make such a response had she chosen to apply her mind to doing so.

(c) He further submitted that across the first "heads up" meeting on 30th November and the two subsequent formal consultation meetings extending across a period of six or seven weeks, the claimant had been afforded adequate time in which to respond.

(d) Although the claimant had asserted in the course of the process that she had not had adequately explained to her the business reason for the proposal (or in her perception the already taken decision) to restructure and redistribute the duties of her role, in Mr Hughes's submission that explanation had been provided to her on a number of occasions.

(e) The difficulty which she had in relation to making any constructive response or suggestion was not that she did not understand the proposal, for she had conceded in the course of cross examination that she did indeed understand it and the rationale underpinning it, in circumstances where taking forward the proposal would result in a £38,000 per annum cost saving. Rather, he submitted, the claimant fundamentally disagreed with the business decision which the respondents had taken believing that she, rather than they collectively or individually, was best placed to take such a decision.

96. Regarding the consideration of alternative employment opportunities, Mr Hughes submitted that it was important to bear in mind that in the present case no issue of whether suitable alternative employment for the purposes of section 141 of the Employment Rights Act 1996 was focused. Rather, the issue focused was whether the respondents had adequately considered alternative employment opportunities for the claimant prior to making her redundant. Mr Hughes invited the Tribunal to hold that the respondents had done so, as evidenced by their offer to the claimant on a non-competitive basis of the alternative appointment of Travel Support Administrator and by their making available to the claimant, throughout the process, the latest editions of their current open vacancy list which, ultimately included three positions all which the claimant confirmed were full time positions and which were located within the respondent's Burntisland premises at which the claimant was employed. The fact that the role made available to the claimant on a non-competitive basis was a part-time role and associated with that there would have occurred a substantial reduction in the claimant's salary, had it been accepted, did not detract from the fact that it was reasonable for the respondents to make that offer and further, that the offer was made reasonably including as it did the offer of a trial period. The claimant, Mr Hughes accepted, was not obliged to accept the offer and had, in fact, declined it.

97. In short, Mr Hughes submitted that it was possible for the respondents to satisfy the principal of adequately considering alternative employment opportunities for the claimant prior to making her redundant and in fact should be regarded as having done so, despite the fact that they were unable to offer the claimant "suitable alternative employment" for the purposes of section 141 of the ERA.

98. Mr Hughes invited the Tribunal to reject any contention that the respondent's Managing Director should be seen as having not acted impartially in the appeal process by reason of his being the source, at Board level, of the direction that amongst other cost saving measures/redundancies implemented across the Company, the claimant's Line Manager, in the absence on sick leave of Mr Gray

the Divisional Director, should be asked to examine and consider whether there remained a requirement for the business to have delivered administrative support to Support Services from the claimant's standalone appointment on a full-time basis. In this regard Mr Hughes invited the Tribunal to keep in mind the evidence of Mr Briggs, wholly unchallenged in cross examination, and to the effect that he had taken no part in the redundancy consultation process.

99. In summary, Mr Hughes invited the Tribunal to hold that the claimant had been dismissed for reason of redundancy which is a potentially fair reason.

(a) That there had pertained, at the material time a genuine redundancy situation arising out of a genuine restructuring of the respondent's business driven by a genuine business decision of the respondents

(b) That the procedure adopted by the respondents is one which fell to be regarded as fair and reasonable in the circumstances

(c) That adequate consultation was conducted in a full and fair manner notwithstanding the claimant's reluctance to engage meaningfully with the process

(d) That the claimant's assertion that the redundancy process was a sham designed to hide the ulterior motives of Mr Anderson for dismissing her was one which had not borne scrutiny could be seen to be unsupported by evidence of fact and one which preceded entirely upon the claimant's speculative opinion

100. In the alternative, let it be assumed that the Tribunal were to find that the claimant was unfairly dismissed for reason of procedural defects, Mr Hughes submitted:-

(a) that the subsequent decision by the respondents to not replace the claimant in her role, and the fact that the Support Services function had not suffered as a consequence of its being redistributed and that

the respondents continued to provide those services on that redistributed basis, demonstrated that the redundancy was an inevitable outcome and that no other procedure would have made any difference to the outcome;

5

(b) there were no proposals advanced by the claimant during consultation as to why the respondents' proposal should not be implemented;

10

(c) that there was no evidence placed before the Tribunal that would lead to a conclusion that there was any alternative to redundancy; and,

(d) that in those alternative circumstances any award of compensation should be reduced to nil under reference to **Polkey v A E Dayton Services [1987] IRLR 503 (HL)**.

15

101. Finally, Mr Hughes submitted that no issue arose regarding the applicability or non-applicability of the ACAS Code of Practice on Disciplinary and Grievance Procedures on the facts of this case. That Code of Practice confirms expressly at para 1 that it does not apply to redundancy dismissals. Separately, insofar as a failure to follow internal grievance procedures might be advanced as a breach of the Code, no claim was presented in the present case in relation to an alleged failure to comply with the respondents' grievance procedures and that accordingly and in any event an application for an uplift for failure to follow the Code was inapposite and inept.

20

25

102. Having had the benefit of hearing the claimant's oral evidence regarding her attempts to find further employment following dismissal, Mr Hughes properly confirmed that no issue was taken with the claimant's discharge of her duty to mitigate her loss.

30

103. On the above basis, Mr Hughes invited the Tribunal to dismiss the complaint of unfair dismissal.

5

The Tribunal's Consideration and Determination

104. On the evidence adduced, submissions advanced and upon the Findings in Fact made, I determined that no case of the claimant having been dismissed for the ulterior motive of malintention towards her on the part of her Line Manager Mr Anderson, had been made out.

10

105. In so finding I make clear that I did not dismiss out of hand the claimant's evidence to the effect that following the appointment of her new Line Manager Mr Anderson there increasingly developed between her and Mr Anderson, work related personal relationship issues. I found Mr Anderson to be an unconvincing witness in relation to his assertion that, for his part, he was completely unaware of the existence of any such issues or of any perception on the part of the claimant that he disliked her or was irritated or annoyed by her until after he had communicated his decision to dismiss her. I believed Mrs Page when she said, in the context of offering to move her desk into the adjoining room, that Mr Anderson had said to her that that would probably be a good proposal because "you annoy me and I probably annoy you".

15

20

25

106. On the other hand, I was satisfied that there had pertained, at the material time a genuine redundancy situation and that the claimant had been dismissed for reason of redundancy, both in terms of section 139 of the Employment Rights Act 1996. As is reflected in the Findings in Fact made, I accepted the evidence of the respondents' witnesses which was to the effect that there had occurred in part a diminution in the amount of work required to be performed by the claimant and separately that the requirement on the part of the respondents (the business) to employ someone in the post occupied by the claimant to undertake such work as

30

remained, had substantially diminished, and had ultimately ceased. The same by reason of the fact that it had proved practicable and cost effective to have that work performed to an adequate standard and requirement by other employees to whom it had been redistributed on a temporary basis during the claimant's absence on sick leave, and could be so redistributed on a permanent basis and further, that the claimant's dismissal was wholly or mainly attributable to those facts and that accordingly the principal reason for the claimant's dismissal was by reason of redundancy.

107. While carefully considering, the same, I did not accept the proposition advanced by Mr Anderson, on the claimant's behalf and to the effect that the consultation process was a sham because its ultimate outcome, namely the dismissal of the claimant for reason of redundancy was predetermined. In contra distinction to circumstances in which potentially affected employees are members of a pool of employees from whom only some will ultimately be selected, the claimant, in the instant case, was employed in a freestanding and unique role and was not part of a relevant pool. In such circumstances it is not unusual and, may frequently be the case that at the point of there being formulated in the mind of the employer an intention i.e. for statutory purposes a proposal to dismiss by reason of redundancy, the employer may also form the view that at the end of, and notwithstanding, the consultation process it is likely that the single affected employee may well be dismissed; the same because the employer, for its part having considered matters, has not identified an alternative course of action which would avoid redundancy. That may well have been a view formed and held by Mr Anderson at the point of his initiating the consultation process. Let it be assumed that it was, however, that is not the same as having predetermined the outcome of the consultation process. Nor is the formation or holding of such a view on the threshold of consultation fundamentally incompatible with subsequent consultation being genuine and adequate notwithstanding the fact that the ultimate result may be that which was anticipated. It is of the essence of consultation that it affords to the affected employee an opportunity to bring to bear their perspective on the situation and to bring forward proposals which, if having merit and given conscientious consideration by the employer, might lead

the avoidance of dismissal for reason of redundancy. Although, as indicated above, I found Mr Anderson an unconvincing witness in relation to his assertion that he was sublimely unaware of any relationship issues between himself and the claimant, I did believe him when he asserted, on more than one occasion in the course of his oral evidence, that he was open to giving consideration to any alternative proposal which the claimant brought forward even to the extent of being persuaded that reasons existed for reversing the business decision regarding restructuring and leaving the claimant's appointment in place. He stated in evidence, and was not challenged in this regard in cross examination, that he had the authority ultimately to decide at the end of the consultation process whether the claimant should be dismissed for reason of redundancy or not; and, that had the claimant been able to persuade him that the business decision should be reversed he would not have dismissed her and would have reported that decision and the position back to the Board. For her part, the claimant, on her own assertion and assessment knew more about her role, about the importance of it to the proper performance of the business and about the dangers to that performance which might result from its discontinuance. In that context I did not consider that the claimant was prevented from engaging with the consultation process for want of explanations of business reasons underlying the decision to restructure. I also accepted as credible, Mr Anderson's assertion in evidence that although for his part he did not see a ready alternative, he was quite prepared to accept that the claimant might be in a position to bring one forward.

108. Regarding the adequacy of the explanations/information provided by Mr Anderson in the course of consultation, it is the case that prior to the internal Appeal Hearing/explanation for the Appeal decision, the respondents do not appear to have expressly articulated to the claimant that the business reason driving the business decision to restructure and which ultimately resulted in her post's and ultimately in her, redundancy, was the need to make cost savings and that the cost saving associated with the redundancy of her post was just under £40,000 per annum. I was not persuaded that that failure, in the circumstances, resulted in the consultation being inadequate. The same for a number of

reasons. Firstly, I respectfully agreed with Mr Hughes's submission that the provisons of the Employment Rights Act do not require an employer to justify its business decisions *per se*; Secondly, let it be assumed that restructuring and consequent redistribution of the claimant's duties was a legitimate proposal worthy of consideration, the fact that there was likely to result from redundancy of the post a saving broadly equivalent to the gross salary, plus employer's National Insurance and pension contributions associated with the post was something which, objectively construed, could reasonably be inferred would result if such a proposal were to be implemented. Finally, I considered, on the basis of the claimant's own evidence, that she in fact did understand that such a saving would result and the basis of and reason for the business reason and decision advanced by Mr Anderson but, because she fundamentally disagreed with the decision, was either not able or prepared to identify and or bring forward any alternative proposals, she having also formed the view, on the 30th of November, that she had been expressly told on that day that she would be made redundant at the end of the process and that consequently considered that the consultation was a sham and she was not prepared thereafter to engage meaningfully with it. In the course of giving her evidence Mrs Page appeared to accept that what may, in fact, have been said to her by Mr Anderson at that first meeting was that they, meaning she and the respondents, were in "a redundancy situation" and that she may have inferred from that statement that she would be made redundant at the end of the process, rather than she having being expressly told, at that time, that she would be made redundant.

109. Regarding the respondents' consideration of alternative employment, I preferred the submissions of Mr Hughes to those of Mr Anderson and accepted the proposition that the issue before the Tribunal was not one of whether the claimant had been offered "suitable alternative employment" for the purposes of section 141 of the ERA, indeed I had never understood the respondents to assert that such was the case, their HR Department acknowledging in terms of the Note of Advice which they provided to Mr Anderson, that the Travel Administrator Support post did not constitute "suitable alternative employment". I accepted Mr Hughes's contention that the respondents acted reasonably in making that

offer of employment, on a non-competitive basis, to the claimant, notwithstanding the fact that it was part-time and accordingly would have involved a substantial reduction in the claimant's salary and further, that the offer had been made reasonably in so far as it included an offer of a trial period. I equally accepted Mr Anderson's submission that the claimant was, in the circumstances, reasonably entitled to refuse the offer and that in so declining it she did not do so unreasonably.

110. While, given the respondents' size and resources it may be the case that some further scope for considering/identifying potential alternative employment existed, there was no evidence placed before the Tribunal which would have supported a Finding in Fact to the effect that there was and accordingly that the respondents' efforts, such as they were in this regard, were inadequate or insufficient such as to render the dismissal unfair. Nor did the claimant, in the course of consultation, propose or identify any particular exploration of potential alternative employment. She did confirm, in relation to the alternative employment offered to her, on a non competitive basis, and in relation to all of the appointments identified on the open vacancy lists, that she did not wish to accept the former and did not wish to apply for or be considered for the latter.

Findings in Fact and in Law

111. That, in all the circumstances of the case, in the period from on or about January 2015 up to and including the date of the claimant's dismissal on 18th January 2017 and continuing between that latter date and the determination of the Internal Appeal Hearing in March 2017, there had occurred and continued to subsist a dimunition in the requirement for work of the type previously carried out by the claimant to be carried out from directly within the Support Services Division at the respondent's Burntisland yard premises, such as to constitute "redundancy" within the statutory meaning of that term.

112. That the claimant was dismissed for reason of redundancy which is a potentially fair reason in terms of section 98 of the Employment Rights Act 1996.

113. That in all the circumstances pertaining, (including the size and administrative resources of the employer's undertaking) and as determined in accordance with the equity and substantial merits of the case, the respondents acted reasonably in treating that redundancy as a sufficient reason for dismissing the claimant as at the effective date of her dismissal, 18th January 2017.

114. The respondent's admitted dismissal of the claimant, for the potentially fair reason of redundancy, falls to be regarded, in terms of section 98(4) of the Employment Rights Act 1996 as fair; and the complaint of Unfair Dismissal is dismissed.

Employment Judge: Joseph d'Inverno
Date of Judgment: 27 November 2017
Entered in Register: 28 November 2017
and Copied to Parties