



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Ms. W Jacob**

v **Corporate Document Services Limited**

## PRELIMINARY HEARING

**Heard at: Leeds**

**On: 9 & 10 November 2017**

**Before:**

**Employment Judge Wedderspoon (sitting alone)**

**Appearance:**

**For the Claimant:**

**In Person**

**For the Respondent:**

**Miss S Gould, Solicitor**

## JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well founded and is dismissed.
2. The remedy hearing listed for 14<sup>th</sup> March 2018 is thereby vacated.

## REASONS

### **Claim and Issues**

1. The Claimant brought a claim of unfair dismissal. It was agreed by the parties at the commencement of the hearing that the relevant issues to be determined by the Tribunal were as follows :-
  - 1.1 What was the reason or if more than one the principal reason for the Claimant's dismissal;

- 1.2 Did the Respondent have a redundancy situation within the meaning of section 139 (1) ERA, in particular;
  - 1.3 Did the Respondent cease or intend to cease to carry on the business for the purposes of which the Claimant was employed by him, or
  - 1.4 Did the Respondent's need for the Claimant to carry out work as a Journalist for the Codex publication under job title Deputy Editor MOD Defence Science, cease or diminish or was expected to cease or diminish.
  - 1.5 Did the Respondent follow a fair dismissal procedure in compliance with the Claimant's contract of employment and ACAS guidelines,
  - 1.6 Did the Respondent consult with the Claimant
  - 1.7 Did the Respondent use a fair selection criteria
  - 1.8 Did the Respondent take steps to avoid compulsory redundancy
  - 1.9 Was the sole or principal reason for dismissal redundancy
  - 1.10 Having regard to the reason shown by the Respondent and taking into account the circumstances of the case including the Respondent's size administrative resources did they act reasonably or unreasonably in treating redundancy as sufficient reason for dismissing her, if not
  - 1.11 Would the Respondent still have dismissed following a fair procedure (Polkey reduction)
  - 1.12 Was the Claimant's dismissal fair and lawful within the meaning of section 98(2)(c) of the Employment Rights Act 1996.
2. The Tribunal heard evidence from the Respondent's witnesses Mr. A. Carey, Operations Manager; Miss. K. Riddell, H.R. Manager and Mr. F. Bailie, Chief Executive Officer and from the Claimant and her witness, Lee Probert who acted as her companion at a meeting on 4<sup>th</sup> January 2017. The Tribunal also read the agreed witness statement of Dr. John Perry.
3. The Tribunal was provided with an agreed document bundle consisting of 319 pages. The Tribunal provided the Claimant on the morning of the first day the opportunity to check whether the bundle was agreed and the Claimant confirmed in the afternoon that the document bundle was agreed. At the end of the hearing the Claimant suggested that she would have preferred other

documents to have been included in the bundle. The Respondent argued that the Claimant wished to embark on a fishing expedition and the relevant documents were included in the hearing bundle. On the basis that the trial bundle was agreed at the commencement of the hearing having given the Claimant time to consider it (whilst the Tribunal read the witness statements and papers), the Tribunal considered that this issue was raised too late in the proceedings to be re-opened.

## **FACTS**

4. From 28<sup>th</sup> January 2008, the Claimant was employed by the Respondent as a journalist. From 23<sup>rd</sup> January 2009, the Claimant's employment was assigned to Williams Lea to carry out work as a journalist on behalf of the end client, the Ministry of Justice, to produce a CODEX magazine and a blog. As a result the Claimant received a significant increase in salary to reflect her increased hours and additional responsibility.
5. By email dated 23<sup>rd</sup> August 2012, Steve Anderson of the Respondent sought to attach a marketing role to the Claimant's CODEX work. The Claimant resisted this in her response by email the same day stating  
*"..I am employed solely on Defence Codex and this was the role I was recruited for and have been working on for four years plus, you are proposing some radical changes to my role, customary ways of working and where I work.."*
6. The Claimant sought an increase in her salary in 2014 which was rejected by David Burton, Director of Print and Creative Services by letter dated 16<sup>th</sup> September 2014. He stated  
*"Since joining the company you have been exclusively creating content for Codex. your role remains exclusively creating content to Codex and the decline in the number of issues of the magazine has been replaced with the blog and online periodicals."*
7. By 2012, the Tribunal finds that the Claimant was employed by the Respondent to exclusively work on CODEX. The Tribunal finds the Claimant to be an

intelligent, competent individual who enjoyed working at a high level on the CODEX project. The Claimant's assigned work was monitored by the M.O.D. editor for the CODEX magazine Dr. John Perry who signed off her work prior to publication. The very last CODEX magazine was published in August 2016 and the Claimant's last published blog was produced on 16<sup>th</sup> August 2016. In November 2016, the M.O.D. refused to pay the Respondent's invoices for CODEX.

8. On 6<sup>th</sup> December 2016 the Respondent was informed to cease work pending investigations by the M.O.D. and on 15<sup>th</sup> December 2016 the CODEX contract was terminated with 3 months.
9. On 22<sup>nd</sup> December 2016, the Claimant's line manager Mr. Aidan Carey informed the Claimant that the CODEX contract had been terminated and arranged a redundancy consultation meeting on 4<sup>th</sup> January 2017.
10. At a meeting on 4<sup>th</sup> January 2017 between the Claimant and Mr. Carey (the Claimant was accompanied by a family friend, Mr. Lee Probert) the Claimant was informed that she would cease work on 13<sup>th</sup> March 2017. He stated that the Claimant was at risk of redundancy and over the next two weeks he would seek alternatives with the consultation period commencing from 4<sup>th</sup> January 2017. The Claimant stated that she believed that Giles was keen for her blog to continue. Mr. Carey told the Claimant that she should cease work on the project in line with the instruction from Williams Lea. The Claimant stated that although CDS had instructed her to cease work on the project she continued to receive emails from the M.O.D. staff regarding the Blog/magazine. Mr. Carey requested the Claimant to share the emails with him so to assist him to make a case that the situation was ongoing. The Claimant stated that the contract had been a lucrative one for the Respondent which Mr. Carey agreed.
11. The Claimant was placed in a pool of one person. The Respondent took this decision because the Claimant was the sole person, in the Respondent's business, who worked on the CODEX contract. The Tribunal finds this was a reasonable decision to make.

12. The Tribunal finds that at the time of the meeting on 4<sup>th</sup> January 2017 the Respondent had not received advice from its H.R. advisor about the process to be adopted and Mr. Carey was poorly equipped to deal with the relevant questions about the process raised by Mr. Probert. It was Mr. Probert who raised the following issues including that TUPE may apply; the pre-determined timeline and where the two weeks of consultation period had come from. Mr. Carey stated he felt the two week period was reasonable and gave CDS an opportunity to look for other roles for the Claimant. Mr. Probert also raised whether the Claimant was going to be employed and paid by CDS until 13<sup>th</sup> March when the project actually terminates. Mr. Carey declined to comment. It is unsurprising that the Claimant felt unclear about the process to be adopted. The Tribunal finds that Mr. Carey was out of this depth and lacked the appropriate knowledge to properly advise the Claimant as to the procedure to be adopted by the Respondent in this process. Mr. Carey also placed the Claimant on garden leave at this stage and she was not required to attend the office at this time.
13. Mr. Probert indicated on behalf of the Claimant that at the next meeting in two weeks a number of matters should be clarified including the contractual situation between Williams Lea and the MOD and whether a termination notice has in fact been issued by the MOD to Williams Lea; whether two weeks was the appropriate period for consultation in the circumstances; whether there were any other opportunities for the Claimant in the Respondent's business and what training would be available to the Claimant. In response to Mr. Carey's enquiry whether the Claimant would be prepared to travel, the Claimant replied that she would not role out options at this time. The Claimant requested that she be permitted to speak to Justin MacKenzie at Williams Lea. Mr. Carey confirmed he would make the offer to Justin when he spoke to him. The Tribunal finds it was reasonable for the Respondent to make this offer and it would have been extremely unusual for an employee to make direct contact with a third party. Notes were made of the meeting on 4<sup>th</sup> January 2017 which were sent and agreed by the Claimant and her companion Mr. Probert.

14. Following the meeting, on 5<sup>th</sup> January 2017 the Claimant emailed Mr. Carey. The Claimant stated in this email that she would not rule out any role in any location and her preference that the Respondent share any vacancies with her. She restated her concern that a two week period was an insufficient time period for her to be considered for redeployment. The Claimant raised a valid point here; two weeks was too short for proper consultation to take place. She also sought confirmation about her understanding of garden leave namely that she was not permitted to carry out work for the MOD/Williams Lea; she was required to monitor her emails and forward any to the Respondent concerning this contract. She noted she may be contacted by Mr. Carey and offered for other duties on temporary contracts.
  
15. Mr. Carey did follow up the Claimant's queries about whether TUPE applied. In response to three questions put by Mr. Carey to Justin MacKenzie, on 6<sup>th</sup> January 2017 Mr. Mackenzie replied that

*“the MOD instructed Williams Lea to give notice to terminate the arrangement for Codex, not because the requirement was ending but because the requirement isn't in scope for the new contract. ..We only asked Wendy to stop all work until Aidan was happy to accept invoices again there is no reason why Wendy cant carry on during the notice period-after all, you are invoicing MOD £8k per month for her services.”*
  
16. Further Mr. MacKenzie expressly stated that he did not believe a meeting was planned or necessary with the Claimant. By email dated 9<sup>th</sup> January 2017 Mr. MacKenzie confirmed that the requirement for the Claimant's services can not carry on under the new contract after March and doesn't under scope for the next contract. On receipt of this email Mr. Carey emailed the Claimant and informed her that Williams Lea wanted the Respondent to continue working on the blog/magazine with immediate effect and attached a letter of the same date. The letter confirmed that the Claimant was at risk of redundancy.
  
17. Following the departure of Dr. John Perry no-one was appointed to manage the blog/magazine which subsequently resulted in Williams Lea refusing to sign off

invoices until some clear structure had been arranged. He raised the fact that the Respondent had been given 90 days notice of the termination of the contract and stated that there would in effect be a 90 day period of consultation. In his letter dated 9<sup>th</sup> January 2017, he set out a detailed chronology of events from 30<sup>th</sup> November 2016 when Mr. MacKenzie raised the fact Aidan O'Mara was concerned that nobody within the MOD had given financial authority for the work to continue and that he could not sign off any more invoices. He also set out his responses to the questions raised by the Claimant and Mr. Probert and in particular stated that he would send details of any vacancies that arise directly to the Claimant. All vacancies should be posted on the CDS website and he provided a web link. He stated that to ensure all vacancies have been included he had emailed managers in other locations seeking up to date vacancies. He stated that the vacancies would be discussed at their next meeting to establish suitability and provide the Claimant with an opportunity to ask questions about them. He also stated should training be identified the Company would support the Claimant. This letter contained the clarity that the Claimant and Mr. Probert sought at the meeting on 4<sup>th</sup> January 2017 as to the process to be adopted save for the TUPE issue. However at this time the Respondent had insufficient information themselves about TUPE to fully inform the Claimant.

18. By letter dated 16<sup>th</sup> January 2017 from Phil Quinlan, Operations Director provided further information to the Claimant. He confirmed that the service provided by the Respondent to Williams Lea would definitely cease; Williams Lea was the client and not the MOD. He went onto state that the Claimant remained at risk because of the current uncertainty of what the MOD propose for the future of the blog/magazine. He stated once we are clear about this position then we will be able to look at TUPE and whether it applies and if it does what measures may be proposed. He sought to meet with the Claimant on 25<sup>th</sup> January 2017.
19. The proposed date was inconvenient to Mr. Probert and the Claimant requested another meeting date. Mr. Quinlan refused to move the meeting on the basis that the attendance of Mr. Probert was outside normal process (namely a

companion was normally a trade union representative or work colleague and he was neither). He also stressed the need to meet at regular intervals to keep the Claimant updated and wanted to discuss suitable vacancies with the Claimant. Mr. Probert was critical in his evidence about the Respondent's refusal to move the meeting to permit his attendance in the context that the Claimant was a homeworker but the Tribunal finds it was reasonable for the Claimant to meet on 25<sup>th</sup> January because this was the only date the managers of the Respondent would be in Leeds together and to continue the consultation with the Claimant.

20. It was also confirmed to the Claimant that Kirsten Riddell would be present to answer any questions she may have about the consultation process, risk of redundancy, alternative employment and TUPE. The Claimant expressed her disappointment that her companion would be unable to attend the arranged meeting but agreed to attend the meeting herself.
21. On 20<sup>th</sup> January 2017 Mr. Carey spoke to Justin MacKenzie and advised that Giles Deacon, Defence Science and Technology, (contact at CODEX), did not see the need to spend £8k per month on maintaining a blog. Mr. Carey was given permission by Justin to speak to Giles directly. In an email of the same date to Mr. Carey, Justin Mackenzie stated Giles had confirmed that they have no intention to procure journalism services through the PVP contract with Williams Lea and they have no intention to procure journalism or publishing services under any future CCS contract. He said  
*"The service will finish on 13<sup>th</sup> March 2017 as per the cancellation notice on 13<sup>th</sup> December 2016."*
22. Mr. Carey followed this email up on 21<sup>st</sup> January 2017 requesting Mr. MacKenzie to confirm whether the CODEX/blog will cease in any form be that under other contract or internally. Mr. Mackenzie stated on 23<sup>rd</sup> January 2016  
*"as far as Giles is concerned the entire requirement is ending on 13<sup>th</sup> March- he actually wanted to end the requirement immediately as he can't see that any activity as taken place over recent months.."*



23. The meeting took place as arranged on 25<sup>th</sup> January 2017. The Claimant, Mr. Carey, Mr. Quinlan and Kirsten Riddell, a HR professional were present. At this meeting Kirsten Riddell had printed off job vacancies in the Respondent's organisation for the Claimant to consider. The Claimant also mentioned that there were blogs on the administration site which she and Giles have access to. The Claimant expressed her concern that a meeting with the MOD was cancelled which she proposed to attend and speak to Giles. Kirsten informed the Claimant that there was no choice because the Respondent had instructions from the client (which is not the MOD) to stop it. The Tribunal accepts that this was the case; it would be highly unusual for an employee to meet with a third party and it was not unreasonable for the Respondent employer not to insist on such a meeting.
24. Mr. Carey contacted Giles at the MOD on 26<sup>th</sup> January 2017 to obtain further information about the future of the blog. He sought clarification as to whether the blog/CODEX would cease from 13<sup>th</sup> March 2017 and whether it would continue in any form. He said a member of staff whose sole role within CDS is to work on the projects and that the Respondent had a legal obligation to seek assurance that the work had ceased so there is no TUPE implication to consider. He also sought guidance as to what the Claimant should produce until 13<sup>th</sup> March 2017.
25. On 26<sup>th</sup> January 2017 the Claimant wrote to Mr. Carey requesting further information on two vacancies; media content manager and Business Development Manager at Defence Support. The Claimant stated that she may require retraining and enquired if she relocated whether she would retain her present salary and other benefits plus adequate relocation expenses. Mr. Carey followed up the Claimant's enquiry about the orange county job with Tim Barfoot but unfortunately this post had been filled.
26. On 1<sup>st</sup> February 2017 Aidan O'Mara from the MOD emailed Justin MacKenzie stating that

*“..it has been decided that from immediate effect for no further journalism services for CODEX including the blog will be required. Can you please inform CDS of this decision and that all activities should now cease. Please also inform CDS that the Defence Science (formerly CODEX) magazine ceased publication in August 2015 and there is no intention for it to be produced in future. The continuing use of the blog is under consideration. However should it continue it would involve significantly reduced support, for example it will not involve any submissions from industry nor the use of professional journalists or photographer. It is MOD’s view that as the magazine has ceased publication and the potential blog activities will not be fundamentally the same as the activities currently carried out by the Deputy Editor TUPE is not applicable..”*

27. Mr. Carey on receipt of this email forwarded it to Ms. Riddell for consideration.
28. By email dated 2<sup>nd</sup> February 2017 the Claimant asked Mr. Carey about his request to her to work as “normal”. She stated that as the magazine and blog would cease in March it was unprofessional and misleading to encourage people to undertake a considerable amount of work when she knows it will not be used. Mr. Carey responded to the Claimant on the same date explaining the delay in responding to the Claimant had been due to a failure of Williams Lea/MOD to respond to a request to clarify their expectations of CDS between now and 13<sup>th</sup> March 2017. He told the Claimant that it had been decided that with immediate effect no further journalism services for CODEX including the blog would be required. He therefore requested the Claimant not to contact anyone at Defence Science or commission any more work. He stated Ms. Riddell would be in contact. He told the Claimant the Californian post had been filled and the other post which was based in Cheltenham had no relocation package; the salary depended upon the experience relating to the personal specification detailed on the job description.
29. By email dated 3<sup>rd</sup> February 2017 the Claimant requested further details of the Defence Support role and enquired whether she would need further training. Mr. Carey confirmed Ms. Riddell would deal with the Claimant’s queries.

30. By letter dated 5<sup>th</sup> February 2017 Ms. Riddell informed the Claimant that  
*“If you wish to apply for the Business Development Manager Training Services role within CDS Defence then we will inform Richard Bradley of your interest. I am aware that Aidan has already explained that the role is based in Cheltenham and that there is no relocation package. CDS Defence provided a job description detailing the expectations of the role together with a personal specification detailing the necessary skills and experience required to fulfill such a role. Your salary will not remain the same but should you be successful in any application then your salary will change to reflect the position. With this particular position there is no set salary. Salary agreed will depend on relevant skills and experience.”*
32. She proposed a further meeting to take place on 14<sup>th</sup> February 2017. The Claimant accepts that she did not express any interest in the CDS Defence role in response to this letter.
33. By letter dated 9<sup>th</sup> February 2017 the Claimant wrote to Ms. Riddell and complained she was being treated disrespectfully. She stated she did not consider she was in a consultation process but rather a process that seeks to terminate her employment as expeditiously as possible. She raised the fact that TUPE may well apply and sought a negotiated settlement.
34. Ms. Riddell responded to the Claimant on 10<sup>th</sup> February 2017 and confirmed that the Claimant was still under consultation; had not been served with notice and the client had terminated the contract the Claimant had been working on for the past 8 years with immediate effect. She stated that the MOD have stated TUPE does not apply. She stated that the Respondent was not in a position to consider settlement because there was no confirmation about TUPE. She stated that the Claimant had been given all the vacancies within the Group and she had showed an interest in a position in Cheltenham. Ms. Riddell contacted Justin MacKenzie on 15<sup>th</sup> February 2017 detailing reasons why the Respondent believed TUPE applied and requesting him to contact Aidan O'Mara. In the

absence of a response, Ms. Riddell chased Mr. MacKenzie for an answer on 20<sup>th</sup> February. He replied on 21<sup>st</sup> February stating that it was with the MOD for consideration. Ms. Riddell also contacted Aidan O'Mara on 27<sup>th</sup> February 2017 for a response on his view about the application of TUPE. The Tribunal finds that the Respondent was making genuine and reasonable attempts to clarify the potential TUPE situation. The Tribunal accepts that it was in the best interests of both the Claimant and the Respondent to do so. Mr. Carey contacted the Claimant on 27<sup>th</sup> February 2017 to confirm enquires were being made about this issue.

35. By email dated 2<sup>nd</sup> March 2017 Aidan O'Mara stated that as all journalist services were ceasing TUPE was not applicable. Ms. Riddell made the Claimant aware of this by email dated 7<sup>th</sup> March 2017 and that the assurance of Aidan O'Mara's legal team was being sought. On 9<sup>th</sup> March 2017 Ms. Riddell again contacted the Claimant and stated that she did not consider that Aidan O'Mara had provided enough information as to whether the new proposed activities were going to be fundamentally similar as those currently being carried out. She warned the Claimant again that she may be redundant. She proposed a further meeting on 14<sup>th</sup> March 2017. The Tribunal accepts that Ms. Riddell was making genuine attempts to clarify the TUPE situation for the benefit of the Claimant and the Respondent.

36. On 10<sup>th</sup> March 2017 Ms. Riddell sought further information from Mr. O'Mara as a matter of urgency about the new proposed blog. Aidan O'Mara replied on 13<sup>th</sup> March 2017 and stated

*'I can now inform you that it has been decided to cease publication of the blog which has been dormant for some time..'*

37. At the meeting on 14<sup>th</sup> March 2017 the Claimant, Mr. Carey and Ms. Riddell were present. In the course of the meeting Ms. Riddell stated

*"The position now is there are no other positions within the organisation at the moment however have to put out another request for vacancies like I gave you before a number of weeks ago. There are no other consultation*

*going on at the moment so I have to put out vacancies now or potential. People cannot recruit as of the end of last week until they have given them to me and I have offered them to other people whether they are suitable or not. It has to be within their capability or there is an element of training that person could undertake within reason and providing it is not going to take months to train then I will show them those.”*

38. Ms. Riddell went on to say

*“we haven’t any work for you. Yes you are being paid but there is nothing for you to do. It is an awful position to be in but there isn’t even any work for you to do in the office at the moment so until I get back to you when I hear back about positions..I will try my hardest to find a position for you.”*

39. By letter dated 24<sup>th</sup> March 2017 Aidan Carey confirmed that the Claimant’s present role was redundant and that the Claimant was entitled to appeal against this decision within 5 working days.

40. The Claimant appealed the decision to dismiss her in a detailed letter dated 29<sup>th</sup> March 2017. The Claimant was critical of the consultation in the process and her concern that the process was to prove she was redundant and to expedite the process. The Claimant also raised her concerns that there was no obvious and meaningful attempt to mitigate the redundancy or to identify alternatives; insufficient regard as to the potential implications of TUPE and that she believed she had been discriminated by reason of her age (this cause of action is no longer pursued by the Claimant). She raised that she may pursue an Employment Tribunal claim.

41. An appeal hearing was fixed for 7<sup>th</sup> April 2017 and Chaired by Fergus Bailie. The Claimant was afforded an opportunity to put her concerns to Mr. Bailie. She stated that she did not believe there was a genuine redundancy situation; she was concerned that Mr. Carey thought she would be retiring; the meeting on 4<sup>th</sup> January 2017 was poor with no agenda or detail given to the Claimant; it took her companion rather than the Respondent to raise the issue of TUPE; she should have been given an opportunity to have met with Giles Deacon (instead

she was barred by Williams Lea); had she met Giles Deacon she believes that she would have been able persuade him to keep the contract with CDS. The Claimant also stated that she could do alternative work such as social media, blogging and website publishing. She was also concerned that she felt that the Respondent deliberately arranged meetings on dates her companion could not attend ensuring she came alone. The Claimant also stated that Aidan claimed he told the Claimant to speak to Richard Bradley about a role which was untrue. In respect of the Defence Support role the Claimant was asked that when she was told by the Respondent that there was no relocation package with this job, did she express she was still interested in the job. The Claimant stated she believed that it was ongoing and there was no continued effort from anyone at CDS to give her updates about vacancies.

42. At the end of the meeting the Claimant enquired whether Employment Tribunal papers should be served direct to Mr. Bailie. He confirmed they should be.
43. Mr. Bailie adjourned the appeal hearing and interviewed Kirsten Riddell, Phil Quinlan and Aidan Carey. Their interviews appear in the trial bundle at pages 262 to 264. Kirsten Riddell stated that she made attempts to investigate whether TUPE applied and the Claimant failed to apply for any of the vacant roles. Mr. Quinlan stated that the client Williams Lea instructed him to cancel the Claimant's meeting with Giles Deacon. Mr. Carey stated that the Claimant's companion's availability did not fall on convenient dates for meetings for the Respondent. The Claimant was given an opportunity to bring someone else but she declined to do so. He stated he tried to push the TUPE issue because it was in both the Respondent's and Claimant's interests to do so. The Claimant was given details of vacancies.
44. By letter dated 28<sup>th</sup> April 2017 Mr. Brailie informed the Claimant that he dismissed her appeal. He stated the consultation was reasonable. He confirmed that all vacancies across the company and the wide group were notified to the Claimant during the consultation process. At the appeal hearing the Claimant had confirmed that she did not apply for any positions which were presented. He stated that the Respondent was not under an obligation to create a new role

for the Claimant. He also set out a chronology of events setting out attempts by the Respondent to clarify whether TUPE was applicable.

## THE LAW

45. Redundancy can be a potentially fair reason for dismissal pursuant to section 98 (2)(c) of the Employment Rights Act 1996.
46. Redundancy is defined in section 139 of the Employment Rights Act 1996. It states
- “(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
- (a) the fact that his employer has ceased or intends to cease –*
- (i) to carry on the business for the purposes of which the employee was employed by him or*
- (ii) to carry on that business in the place where the employee was so employed or*
- (b) the fact that the requirements of that business –*
- (i) for employees to carry out work of a particular kind, or*
- (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.*
47. Section 139 of the Employment Rights Act 1996 is a broad definition that covers a myriad of situations including closure of a business, closure of an employee’s workplace and a diminishing need for employees to do the available work. The burden of proving the reason for dismissal lies with the Respondent.
48. In respect of the fairness of a dismissal for the reason of redundancy guidelines were laid down in the case of **Williams and ors v Compair Maxam Limited (1982) ICR 156 EAT** that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed that in determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it

had to ask whether the “dismissal lay within the range of conduct which a reasonable employer could have adopted.” The factors suggested by the EAT in the **Compair Maxam** case that a reasonable employer might be expected to consider were

- (a) whether employees were warned and consulted about the redundancy;
- (b) whether any alternative work was available.

49. The House of Lords held in the case of **Polkey v AE Dayton Services Limited (1988) ICR 142** where an employer failed to follow correct procedures it was open to an employer to argue that a fair procedure would have been utterly useless or futile and would have made no difference to the outcome of dismissal.

50. The extent of the obligation to consider alternative employment for a redundant employee was considered by the Court of Appeal in the case of **Thomas and Betts Manufacturing Limited v Harding (1980) IRLR 255**. The Court held that an employer should do what it can so far as is reasonable to seek alternative work.

51. In the case of **Polkey v A.E. Dayton Services Limited (1987) UKHL 8** it was held that

*“..the employer will normally not act reasonably unless he warns and consults any employees affected or their representative adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation..It is quite a different matter if the tribunal is able to conclude that the employer himself at the time of dismissal acted reasonably in taking the view that in the exceptional circumstances of the particular case the procedural steps normally appropriate would have been futile could not have altered the decision to dismiss and therefore could be dispensed with..”*



**SUBMISSIONS**

52. The Respondent provided a written submission. The Respondent relied upon the fact that on 22<sup>nd</sup> December 2016 that the Claimant's line manager Mr. Carey informed her that the CODEX contract had been terminated and arranged a consultation meeting for 4<sup>th</sup> January 2017. She was placed at risk of redundancy and thereafter consultation meetings took place on 25<sup>th</sup> January 2017; 14<sup>th</sup> February 2017 and 14<sup>th</sup> March 2017. It was submitted that the Respondent made reasonable attempts to clarify whether TUPE applied. The Claimant was provided with vacancies but she failed to apply for any.
53. The Respondent submitted that there was a genuine redundancy situation within the meaning of section 139 of the Employment Rights Act 1996 by reason of the CODEX contract ending on 13<sup>th</sup> December 2016 so that the Respondent's need for the Claimant to carry out work as a journalist for the CODEX publication under job title Deputy Editor MOD Defence Science, ceased.
54. It was submitted that there was procedural fairness in the process and the Claimant was kept informed and consulted with. The Respondent submitted that they followed up the Claimant's enquiries about the application of TUPE; informed her about vacancies and taking account of the three limb Polkey test the dismissal was fair.
55. The Claimant also provided a written submission. She submitted that the Respondent failed to analyse her skills; had no up to date knowledge of her skills and failed to provide training to her. She stated she was placed on garden leave and prevented from meeting with Giles Deacon. She queried whether the Respondent had foreseen the affect changes in budget and government policy could have affected her employment.
56. She submitted there was a failure to consider objective, fair and consistent selection for redundancy and she was simply placed in a pool of one and a failure to consider a lower skill level elsewhere in the business. She submitted

that she should have been alerted to vacancies earlier and it was untrue that she was told to apply via a weblink for jobs; she understood Ms. Riddell and Mr. Carey were dealing with this. The Claimant submitted that there was a lack of transparency in the process.

57. She raised that she had not been given a fair opportunity to put her case. On my enquiry the Claimant confirmed this criticism was aimed at the Respondent's process and was not aimed at the Tribunal process. She submitted that the Respondent have not acted fairly.

## **CONCLUSIONS**

58. The burden rests on the Respondent to establish the reason or if more than one the principal reason for the Claimant's dismissal and whether this was for an admissible reason namely redundancy within the meaning of section 139 of the Employment Rights Act 1996.
59. In December 2016 when Mr. Carey had been notified that the CODEX contract had been terminated, the Claimant had been engaged on work for the client Williams Lea for the Ministry of Justice to produce a magazine and blog. She was the only person in the Respondent's business carrying out this specialist work. By August 2012 the Claimant was informing the Respondent that her contract was to work solely for the MOD and she was resistant to carry out any other work on behalf of the Respondent. The last CODEX magazine was published in August 2016 and the last blog was produced by the Claimant on 16<sup>th</sup> August 2016.
60. The Tribunal finds on these facts that on receipt of the termination of the CODEX contract in December 2016 the Claimant's role was potentially redundant because (within the meaning of section 139 (1) of the Employment Rights Act 1996) the Respondent's need for the Claimant to carry out work as a Journalist for the Codex publication under job title Deputy Editor MOD Defence

Science, ceased or diminished. In the circumstances I am satisfied that there was a potential redundancy situation for the Claimant.

61. In respect of the procedure followed in this process, the Tribunal shares the concerns of Mr. Probert that the meeting on 4<sup>th</sup> January 2017 was wholly inadequate in informing this Claimant what procedure would be followed. I find that Mr. Carey was completely out of his depth and was unable to answer the relevant questions raised by Mr. Probert as to the consultation period and potential implications of TUPE. It is unsurprising that both the Claimant and Mr. Probert left the meeting being unclear as to the status of the Claimant going forward in the business. Mr. Carey did place the Claimant on garden leave and state that only two weeks would be used for the consultation period. I regret to say that this was rather more to do with Mr. Carey's lack of knowledge of appropriate employment relations process than of any pre-determined decision to dispense with the Claimant. His enquiries to the HR professional in December 2016 as to the procedure to be applied had not been answered by Ms. Riddell by the time of the meeting on 4<sup>th</sup> January 2017 and he was uncertain about what to do.
62. However, the Tribunal finds that by the letter dated 9<sup>th</sup> January 2017 detailed information was provided to the Claimant about the factual context of her potential redundancy; confirmation of the meaning of garden leave and the Claimant's obligations; the process to be followed going forward. She was also provided with a link of current vacancies and that training for a new a vacant post may be possible.
63. I also accept that the Respondent did take reasonable steps to clarify whether TUPE applied. This would be to the benefit of the Claimant and the Respondent. By his letter dated 16<sup>th</sup> January 2017 Mr. Quinlan informed the steps being taken to clarify the TUPE position and this was followed up by Ms. Riddell in her communications with Williams Lea and the legal advisers.
64. I reject the submission that the Claimant should have been permitted to meet with Giles Deacon as a means of securing the future contract with the

Respondent. The Claimant has the status of an employee with the Respondent; the Respondent contracts with the client Williams Lea who in turn contracts with the MOD. The client, Williams Lea had told the Respondent it did not want the Claimant to meet with Giles Deacon and it was therefore reasonable of the Respondent to inform the Claimant of this fact and would have been most unusual for an employee in the Claimant's position to conduct negotiations with Giles Deacon. This part of the process cannot be criticised.

65. From the letter dated 9<sup>th</sup> January 2017 I am satisfied that the Claimant was provided with full information as and when the Respondent obtained updates in respect of TUPE. Despite the procedural deficiencies of the meeting dated 4<sup>th</sup> January 2017 the Tribunal's judgment is that the process going forward provided to the Claimant reasonable consultation about the process. This also included details about vacancies.
66. I find the Claimant to be an intelligent, competent and articulate professional. She understood available posts could be sought via the weblink detailed in the letter dated 9<sup>th</sup> January 2017. She did not directly apply for any. At the meeting on 25<sup>th</sup> January 2017 in fact Ms. Riddell gave her copies of the job vacancies. The Californian post which the Claimant expressed an interest in had sadly been filled. In respect of the other post of Business Development Manager at Defence Support her enquiry about relocation cost dated 26<sup>th</sup> January 2017; it was clarified that there was no relocation package. The Claimant made a further enquiry about the need for training for the role in her email dated 3<sup>rd</sup> February 2017. This pre-dated the letter from the Respondent dated 5<sup>th</sup> February 2017 which invited the Claimant to contact Richard Bradley about her interest. She did not do so. In fact her response dated 9<sup>th</sup> February 2017 was critical of the Respondent's disrespectful treatment and sought a negotiated settlement. Ms. Riddell's response dated 10<sup>th</sup> February 2017 made clear to the Claimant that training may be available. The Claimant did not apply for the role nevertheless. The Tribunal is satisfied that the Claimant had been made aware of job vacancies; where she could find them via a web link and provided with hard copies. She did not take the step of applying for the Business Development Manager post.

67. By 24<sup>th</sup> March 2017 three months following notice being given to the Respondent on the CODEX contract, there were no other available posts and the Claimant had not applied for any vacancies. The Respondent is not under any duty to create a role for an employee. The Tribunal reaches the conclusion that the consultation and search for alternative work for the Claimant was reasonable.
68. The Tribunal's role is not to substitute its view for the Respondent's but to consider taking into account the circumstances of the case including the Respondent's size administrative resources did the Respondent act reasonably or unreasonably in treating redundancy as sufficient reason for dismissing the Claimant. The Tribunal concludes that the Claimant was carrying out highly specialised work for the MOD via the client Williams Lea. It was reasonable for the Respondent to place the Claimant into a pool of one when the CODEX contract was terminated. The Respondent did take steps to inform and consult with the Claimant via email correspondence and meetings. I do consider it to have been reasonable to keep continuity in the consultation process which meant unfortunately that the Claimant's companion was unable to make other consultation meetings. The Claimant was given the opportunity to bring another companion but she declined. I do not consider the refusal to move meetings to have been a sinister motive by the Respondent.
69. Despite the deficiencies identified at the start of the process on 4<sup>th</sup> January 2017 identified by Mr. Probert, these were remedied by letter dated 9<sup>th</sup> January 2017 and the involvement of Ms. Riddell. Conscious efforts were made by the Respondent to keep the Claimant informed; meet with her; and clarify the TUPE position.
70. The Claimant was made aware of potential vacancies but did not apply for them which she confirmed at the appeal hearing on 7th April 2017.
71. The Tribunal concludes in all the circumstances that the Respondent's decision to dismiss the Claimant was a fair one and lawful within the meaning of section 98(2)(c) of the Employment Rights Act 1996.

72. Further it has been submitted the Respondent's procedures were in breach of the ACAS code. Redundancies are specifically excluded from the application of the ACAS code : Discipline and Grievances at Work . This submission is therefore rejected.
  
73. The remedy hearing listed for 14<sup>th</sup> March 2018 is hereby vacated.

Employment Judge Wedderspoon

Dated: 7 December 2017