Case Number: 3400354/2017

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss M Mitchell **v** Travis Perkins Trading Company Ltd

Heard at: Cambridge **On**: 8 & 9 January 2018

Before: Employment Judge Ord
Mr T. Wilshin (Non-Legal Member)
Mr R Ayre (Non-Legal Member)

Appearances

For the Claimant: Mr C. Fray (Equalities Officer)
For the Respondent: Ms. R Dawson (Solicitor)

JUDGMENT

It is the unanimous decision of the Employment Tribunal that;-

1. The claimant's complaints that she was unfairly dismissed and that she was the victim of unlawful discrimination on the protected characteristic of her race are not well found

2. The claimant s claim is dismissed

REASONS

Background

1. The claimant was employed by the respondent from 16 December 2002 until 2 December 2016 when she was dismissed by the respondent. The claimant says that her dismissal was unfair and that she was the victim of unlawful discrimination on the protected characteristic of her race. The respondent denies discrimination and says that the claimant was fairly dismissed on the ground of redundancy.

The issues

2. Following a case management hearing on 7 July 2017 the issues between the parties and to be determined by the tribunal were agreed as follows:

   2.1 Was there a genuine redundancy situation?

   2.2 If so, was the claimant dismissed by reason of redundancy?

   2.3 Alternatively, was the claimant dismissed for some other substantial reason?

   2.4 If the claimant was dismissed for redundancy was she given adequate warning prior to the role being made redundant; was she chosen for redundancy using objective selection criteria which were fairly applied and party to meaningful consultation with the employer. Did the respondent conduct an adequate enquiry into whether alternative work could be offered?

   2.5 Did the respondent follow a fair procedure? (in particular, by requiring the claimant to be interviewed for the post for which she applied during the redundancy process).

   2.6 In the event that the claimant was unfairly dismissed as a result of procedural shortfall would the claimant still have been dismissed if a fair procedure had been followed.

   2.7 Was the claimant subject to acts of discrimination on the protected characteristic of her race? In particular, the claimant relies upon the following matters:

      2.7.1 Her dismissal (the claimant says this was an act of direct discrimination and relies upon a hypothetical comparator)

      2.7.2 The requirement to be interviewed for the role of supplier management specialist whereas others (Darren Gregory Vivian Wilson and Anne Watts) were not required to be interviewed for the posts they had applied for. The claimant relies upon Ms Watts as an actual comparator and upon a hypothetical comparator

      2.7.3 Alterations to the job profile for the supplier management specialist role which the claimant says were made by Mr McHale in order to put the claimant at a disadvantage and ensure she would not be successful in her application (the claimant relying upon a hypothetical comparator) and

      2.7.4 The respondent not acceding to the claimant's request that her role should be regraded subject to salary review. The claimant says that Vivian Wilson's role was regraded and reviewed in December 2015 and relies upon Ms Wilson as a comparator.

2.8 Are any of the claimant claims relating to alleged acts of discrimination out of time? If so are they part of a sequence of events the last of which is in time? If not, is it just and equitable to extend time to allow the claims to proceed?

The hearing

3. Evidence was heard from the claimant and the respondent called three witnesses, Julie Fawcett (facilities manager director) Michael McHale (head of facilities management operations) and Elizabeth Richardson (HR business partner). Reference was made to a bundle of documents and each side made closing submissions through their representatives.

The facts

4. Based on the evidence which has been presented to the tribunal we have made the following findings of fact.

5. The claimant began employment with the respondent in December 2002. The claimant is black British Caribbean.

6. The claimant was employed as a group facilities support manager.

7. At the relevant time the role of group facilities support manager was graded as a C5 role within the respondent. The respondent has three grades of employee, C grade (colleague grade) which runs from grade C1 (the lowest grade) to C6; M grade (management grades) which run from M1 to M3 and finally, director grade.

8. In her written witness statement, the truth of which she was sworn to, the claimant said that in November 2015 both she and Vivian Wilson were told verbally by Chris Sayer (her then line manager) that their roles had been regraded to M1 but that negotiation had to take place regarding salary and benefits. The claimant says that Mr Sayer refused her specific reflect request to confirm this in writing until "all negotiations were complete".

9. The respondent operates an intranet through which each employee has access to their human resources and payroll information. Thus, each employee can see their payslips, their personal information and information such as their employee grade. The claimant's grade on such system at the time of her redundancy was C5.

10. Around the end of 2015 Ms Wilson was given a company car. During the course of the hearing it was suggested that this was an act of more favourable treatment towards Ms Wilson and at this related to the claimant's race. That was not part of the claims which the claimant advanced before the tribunal but in any event, we find as a fact that a company car was provided to Ms Wilson on the basis of the extent of travel which she was undertaking on behalf of the respondent. No analysis of the mileage on a year by year basis was provided to us and whilst it may be the case that Ms

Wilson did not travel more than 10,000 miles per annum on behalf of the respondent every year there was no evidence to suggest that she was provided with a company car for anything other than that legitimate business reason. Ms Wilson's work mileage vastly exceeded that of the claimant

11. Ms Fawcett joined the respondent business in December 2015. She accepted that she was made aware that both the claimant and Ms Wilson had held discussions about possible regrading of their jobs but was told that these had not progressed because at the time the respondent was in "austerity measures" so that the request had been rejected. It had not progressed to the stage of being put to human resources or the respondent's internal reward team for consideration

12. Ms Fawcett also confirmed that Ms Wilson was persistent in her request for re-grade, saying that her job description was out of date for the role she was undertaking. By contrast the claimant did not pursue this matter with Ms Fawcett. Ms Fawcett said that the claimant may have raised this issue briefly in an initial meeting when Ms Fawcett saw, in turn, each member of the facilities management team but she could not specifically recall that. She said the matter had not been raised with her again by the claimant and we accept that evidence. Ms Wilson was persistent and Ms Fawcett reviewed the duties she was actually carrying out which in her words "vastly exceeded what was stated in a job description". A new job description was prepared for Ms Wilson's role to reflect the work she was actually carrying out and this was submitted to the respondent reward team who agreed that the role should be graded M1. As a result, her job title was adjusted to technical compliance and energy procurement manager and she received a £2000 increase in salary. These changes were effected in April 2016.
13. The claimant's evidence was inconsistent on this point. On the one hand in her claim she complained that her request for regrade had not been approved by the respondent but in her oral evidence, she said that the role had been regraded and that she had been told this by Mr Sayer. We find as a fact that the claimant's request for regrading was made in late 2015, before Ms Fawcett joined the business, and was rejected at the time for economic reasons. It was not thereafter pursued by whereas Ms Wilson pursued her request on the basis of the wider role she was actually undertaking. The decision to regrade any role lies with the respondent's reward team (and take no account, when doing so, of the identity of the post holder and they regraded Ms Wilson's role based solely upon the job description prepared by Ms Fawcett). At no stage was the claimant's role regraded nor do we find that she was promised a regrade or told that her role had been regraded.

14. As a fact, we find that Ms Wilson's role was regraded because of the wider tasks which she was carrying out following a request made to Ms Fawcett on more than one occasion. The claimant neither pursued the issue of regrade nor have we heard evidence which would suggest that her role had been sufficiently expanded so as to justify a new job description which would in turn justify regrading.

15. There was something of a "red herring" in relation to the claimant's job description because two versions of it were provided to us. The first was dated December 2008 and referred to the role as grade K (a grade which no longer exists within the respondent) and the second dated 24 November 2010 which did not on the face of it specify a grade. On behalf of the claimant much was made of the fact that there were two separate job descriptions and that Ms Fawcett was apparently working from the 2008 version (this being the version she had been provided by human resources in relation to the claimant's role) whereas the 2010 document was more recent. What no-one sought to establish, however, was that there was any substantial difference in the substance of the documents and indeed no evidence about that was brought before us at all, let alone any indication as to what impact those changes had on the issues before us.

16. On 1 November 2016 Mr McHale made an announcement in which he outlined the respondent's plans to review the structure within the facilities management team. The reorganisation was, in his words, to "evolve, offer better technical expertise and enhance the service we deliver to the group and business divisions through our facilities management roadmap". The claimant, along with a number of other employees within the facilities management team were put at risk of redundancy. The restructure meant that six posts (including the claimant's) were disappearing and nine new posts were being created.

17. Mr McHale had joined the respondent in April 2016. He said that his first major test was to review the provision of helpdesk services (an outsourced service dealing with day-to-day facilities management requests from employees working in various locations). The target (which was reached) was to have a new provider of that service in place by January 2017. Subsequently in September 2016 Ms Fawcett advised that Mr McHale that she had been asked by the respondent's board to restructure the facilities management department and increase the levels of experience and skills. Mr McHale was in agreement with that decision as he did not consider the current team to have the correct level of resource and there were not enough people with the right levels of competence and experience to provide the service the business required for the future.

18. The six roles potentially impacted by the changes which Mr McHale announced on first November were identified by him on that day. They were group fire safety manager, group facility support manager (the claimant's role), two waste management coordinators, a contract and communications coordinator and a customer service administrator. The new roles being created were compliance quality and health and safety lead; technical compliance coordinator; group racking technical support, three roles of supplier management specialist, a supplier coordinator role, FM operations analyst and FM operations manager.

19. The claimant was advised that a first consultation meeting would take place with her on 3 November 2016.

20. At that meeting the claimant was advised that that this was the commencement of a 30-day period of consultation during which there would be a minimum of three consultation meetings designed to enable the claimant to ask questions about the proposed changes and discuss alternative measures which could be put in place to reduce or eliminate the need for redundancies. It was confirmed that the claimant's role was at risk of redundancy. Confirmation of the nine new roles available for the claimant to consider within the team at was given with a copy of the new structure and relevant job descriptions. Mr McHale asked to be advised by 8th November if the claimant wished to be considered for any of the roles and she was told that there would be a formal selection process using competency based interviews. The claimant was advised to look at other internal vacancies which might be available within the respondent. The claimant asked why her role had been "picked up" whereas Ms Wilson's had not (i.e. Ms Wilson was not at risk of redundancy) but it is clear from the structure charts that the role Ms Wilson was then carrying out was not affected by the proposed changes.

21. Mr McHale had previously sent to the whole team a document called supplier relationship management. This was sent to the facilities management team on 14 June 2016 prior to a team meeting the following day. The topic of supplier management was an agenda item for that meeting and Mr McHale's evidence, which we accept, was that at that meeting the document was discussed page by page and it was explained to the team members that this would form the basis of how suppliers were to be managed to put supplier relationships on a more formal and structured footing. He confirmed his intention to implement this fully once the helpdesk issue had been resolved.

22. On 4 November, he re-sent that document to the team. In Mr McHale's words people working within supplier management would be expected to understand the principles of the document and use it for reference as a way of structuring performance management of suppliers.

23. The notes of the first consultation meeting were sent to the claimant on fourth November along with confirmation of a second consultation meeting to take place on 8th November. The claimant said that she had been disappointed that Ms Wilson's role had been looked at but hers was not and said that she had raised this with Ms Fawcett 2016. She said that she wished to apply for two roles within the new structure, the role of FM operations manager and the role of supplier management specialist. She said there were no other roles that she wished to be considered for, either within the restructure or more widely within the respondent. On 9 November, the claimant said that she no longer wished to be considered for the position of FM operations manager.

24. An interview for the role of supplier management specialists had been arranged to take place on 10 November 2016. Mr McHale conducted the interview and was accompanied by Ms Richardson as a notetaker.

25. At the very start of the interview, before it formally commenced, Mr McHale gave the claimant an adjusted job description for the role. It had been the respondent's intention that this role should be management grade but when the job description had been submitted to reward they said it was borderline as to whether the role was genuinely a grade M1 role or whether it was truly a C6 role. On advice from reward Mr McHale and Ms Fawcett had, in their words, "beefed up" the role particularly by reference to what they called "hard" FM. Hard FM relates to the fabric of a building and includes services such as heating, lighting, plumbing, air-conditioning, building maintenance and fire safety systems (as opposed to soft services such as waste management, catering and cleaning). The respondent wished to have three supplier management specialists dealing with both hard and soft FM for different parts of the country (North, Midlands and South). The revised job description had been considered by the reward team who had graded it as an M1 role.

26. Ms Fawcett and Mr McHale both stated that the reason for the change in the job description was to satisfy the reward team that the role justified a management grade. We accept that evidence and are satisfied that that was the sole reason why the job description was altered. In particular, we note that the claimant accepted that it was, in her words, "a given" that the new role would need to cover both hard and soft FM and further that she accepted not only that these changes were an amplification of detail rather than a change of role contact but also, when asked which changes to the job description did she say disadvantaged her, replied "I don't think they did. It's just they weren't there in the first cut".

27. The claimant was given the opportunity to read and consider the amended job role and was asked if she needed further time to consider it but she said she did not. There were written guidelines and questions prepared for the interview by the respondent dealing with commercial acumen, impact and influence and decision making, as well as a series of questions about the respondent’s "cornerstones" which are the principles by which the respondent business operates.

28. Mr McHale's evidence, on which he was not challenged, was that during the interview he found the claimant struggled to give examples to back up her answers and that he considered that demonstrated a lack of experience. There were gaps in the claimant's technical knowledge and she had little experience of hard services. There was an acceptance of a lack of skill although a willingness to learn. Mr McHale was disappointed that the claimant had not taken the opportunity to increase her knowledge of supplier management by reading the document he had sent in both June and November. In summary Mr McHale believed that the claimant did not have "anything like" the experience and knowledge necessary to undertake the role.

29. In relation to this matter Ms Fawcett told us that it would, in her view, take approximately 3 to 4 years for the claimant to learn the technical detail including a building and other regulations for her to deal with the hard FM

side of the role she was applying for. This evidence was not challenged. The claimant was advised that her application had not been successful.

30. The third consultation meeting took place with the claimant on 14 November 2016 with Ms Fawcett and Mr McHale. The claimant said she was disappointed having received the feedback from her interview, said that she thought that she was more suitable for the supplier management role than the FM operations manager role which was why she had not applied for that alternative post and confirmed that she had not applied for any other alternative vacancies.

31. Mr McHale told us that the claimant could have applied for the role of supplier coordinator and had she applied for that role she would have been successful. That was more of a supporting function role which did not require extensive knowledge of hard and soft supplier management and involved lower-level financial aspects which would have been reviewed by a supplier management specialist. His unchallenged evidence was that the claimant had specified that she wanted a managerial role. The supplier coordinator role was a C5 role, the same level as the role the claimant was undertaking. The role would have carried the same salary and benefits as the claimant was already enjoying. The claimant did not apply for that role at any stage. The only person who did apply for the role was Annie Watts and she was appointed into the role. She was also working at C5 grade and because Mr McHale and Ms Fawcett were satisfied that she had the necessary skills and experience to carry out the role based on their knowledge of her and because the role was at the same level as her existing role, it was not considered necessary to interview her for the post.

32. The claimant objects to the fact that she was required to be interviewed when others were not. Initially she put her claim on the basis that others should have been interviewed as well but during the course of the hearing this ground of complaint shifted to being a complaint that she should have been appointed without interview, in the way others were.

33. Mr McHale and Ms Fawcett explained the position as follows. In a situation where there was only one applicant for a post which was at the same grade as the role which the applicant was currently working then provided Mr McHale and Ms Fawcett were satisfied that the applicant had the necessary expertise for the role they would be appointed without the need for formal interview. Where there was more than one applicant or where the role being applied for was at a higher grade than the applicant's current role then interviews would be held to either choose between the applicants or to satisfy the respondent that a single applicant applying for promotion had the necessary skills and expertise to carry out the higher grade role.

34. We note that the changes to the job description which took place in early November 2016 were to determine whether the role was properly graded C6 or M1 and that if the role had been C6 it would still have been a promotion for the claimant. On the unchallenged evidence of Mr McHale, the claimant

would still have been required to pass an interview for that post because it would have amounted to a promotion.

35. Thus we find as facts that the alterations to the job description were made solely for the purpose of ensuring that the appointed post holders would be appointed to grade M1; that in the claimant's own words she was not disadvantaged by the changes and the information set out in the changes were "given" as requirements of the job in any event and that those changes amounted as the claimant herself confirmed to an amplification of detail not a change of role content.

36. We note that the claimant's complaint was not that her performance at interview was such that she should have been appointed to one of the three roles (which were subsequently filled by three external candidates) but rather that the very fact that she was required to be interviewed for the post was both unfair and discriminatory.

37. The claimant identified Darren Gregory as someone who was not interviewed for an alternative role but was "slotted in" to a role. Ms Fawcett's evidence regarding Mr Gregory was unchallenged. She told us that at the time his role was put at risk of redundancy he was group facilities contract manager. He was offered the role of regional maintenance surveyor which had become vacant on the retirement of an employee (Mr Drury). Mr Gregory was a fully qualified building surveyor and had originally been recruited as a regional maintenance surveyor. When he accepted that vacant role it was the same grade as his previous role but resulted in a reduction in salary of £5000 per annum which he accepted as an alternative to leaving the business. Because the two roles were at the same grade and because the respondent was satisfied that Mr Gregory had the skills and expertise to carry out this different role he was not subject to competitive interview.

38. The Claimant’s fourth consultation meeting was held on 25th November 2016. Ms Fawcett chaired the meeting and Mr McHale joined by telephone.

39. At that consultation meeting the claimant raised complaints saying that she did not feel she had been treated fairly and equally throughout the process (without making any specific allegations), referred to differences in the job description from that originally given in relation to the hard/soft services elements of the role and said if she had had the information in relation to supplier relationship management she would have been better prepared for the interview. The claimant said that she received the email from Mr McHale on 4 November when she was on holiday (as she was on the 7th) and the interview was held on 10 November. She was reminded that the document had originally been sent on 14 June.

40. The claimant questioned the scoring she had received for certain aspects of the interview and criticised Mr McHale's management particular in relation to one-to-one meetings, an alleged lack of guidance and objectives and that

she was still waiting for information from him regarding certain projects. She questioned why others had been "placed" into roles rather interviewed which was explained to her in line with the evidence given before us. The claimant repeated that the initial letter she received stated that all roles would be subject to competency based interviews, without any caveats, which chimes with how she originally put this part of her complaint; i.e. effectively saying that others (including sole candidates for jobs at the same grade as those within which they were working) should also have been interviewed. The claimant did not at any stage explain how this would have helped her position.

41. The claimant confirmed she had not applied for any other vacancies and was advised that support would continue to be given to help find an alternative or suitable alternative role but in the absence of any such role the claimant's last day of work would be 2 December 2016. No other vacancy was identified and the claimant's final day of work was 2 December 2016 on which date she was dismissed on the ground of redundancy.

42. The letter confirming the claimant's dismissal was sent on 1 December 2016. The claimant was advised of her right to appeal against the decision. She chose not to do so. The claimant volunteered that she had obtained advice by this stage, and that she did not consider that she had sufficient grounds to warrant an appeal against the decision.

43. One issue which was raised during the course of evidence related to an email sent by Issy Devonald to Martin Meech (group property director) dated 11 November 2016. This email was sent on Ms Devonald's last day of work after working a period of notice. She had been working as group central support manager working in the same team as the claimant and was also a grade C5. In her email, she said that there had been "direct talk from a management team member to colleagues of things such as "X is applying for a job which has had its' JD written so she cannot be successful" and "Martin wants rid of this top manager".

44. She went on to say that whilst top-level management needed to make decisions which sometimes appear contrary to the cornerstone values of the business but which are for the future development of the business "many of us working under the leadership structure would rather these things were kept discreetly within the management circle. Being told of decisions and taken into confidence may at first seem an honour but soon becomes a burden… "

45. It was suggested to Ms Fawcett and Mr McHale that they realised, or ought to have realised, that "X" was the claimant whom "Martin" (I.e. Mr Meech) "wanted rid of".

46. Both Ms Fawcett and Mr McHale said that they did not know who X was and considered the email, when they saw it shortly afterwards, to be nothing more than "tittle tattle". They did not prompt any further investigation, did not conclude that the person referred to in the email was the claimant and in Mr

McHale's case said that he had been told by Ms Fawcett that the matter was being dealt with by Mr Meech.

47. No witness considered that the claimant could have been described as a "top manager" and indeed Ms Devonald was working at the same grade (C5) as the claimant.

48. We accept that neither Mr McHale nor Ms Fawcett came to the conclusion (or should have concluded) that the person referred to in the email was the claimant and on the basis of their evidence find that neither of them considered the contents of the email to raise any matter which gave them particular concern. We have already found as a fact that the job description for the post for which the claimant applied was rewritten to satisfy the concerns of the reward team over the grading of the position (which Ms Fawcett and Mr McHale knew to be the case) and we repeat the claimant's own evidence that the amendments did not give her cause for concern nor in her view cause her disadvantage. They were as the claimant agreed an amplification of detail rather than a change of role content.

49. It is against that factual background that the claimant brings her complaints.

The law

50. Under section 94 of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed by their employer

51. Under section 98 of the same Act it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as the justify the dismissal of an employee holding the position which the employee held

52. Under section 98 (2)(c) redundancy is a potentially fair reason for dismissal

53. Under section 98(4) where an employer has established a potentially fair reason for dismissal the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case

54. Under section 139 (1) (b) an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind of ceased or diminished or are expected to cease or diminish

55. Under section 4 of the Equality Act 2010 race is a protected characteristic

56. Under section 9 of that Act race includes colour nationality ethnic or national origins

57. Under section 13 of that Act a person discriminates against another if because of a protected characteristic, they treat that person less favourably than they treat all treat others ("direct discrimination")

58. Under section 136 of the same Act in any proceedings relating to a contravention of the act, if there are facts from which the court could decide in the absence of any other explanation that a person has contravened the provision concerned the court must hold that the contravention has occurred unless the alleged discriminator shows that they did not contravene the provision

59. Under section123 of the Equality Act 2010 claims relating to breach of the equality act before the employment tribunal may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks is just and equitable. Conduct extending over a period is treated as occurring at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary a person is to be taken to decide on a failure to do something when they do an act inconsistent with doing it or on the expiry of the period within which they might reasonably have been expected to do it.

60. When determining whether or not a dismissal is fair or unfair within the meaning of section 98 (4) a tribunal must ask whether the employer acted reasonably but must not substitute themselves for the employer and form an opinion of what they would have done had they been the employer (Foley v Post Office 1976 ICR 323) and HSBC Bank v Madden 2000 ICR 563.

61. The question of whether an employee is redundant within the meaning of section 139 as set out above requires three questions to be asked. First was the employee dismissed; secondly if so had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished (or were they expected to cease or diminish) and thirdly if so was the dismissal of the employee caused wholly or mainly by the cessation or diminution (Murray v Foyle Meats 1999 ICR 827, confirming the decision in Safeway stores plc v Burrell 1997 ICR 323)

62. In Ayolede v Citilink [2017] EWCA Civ 1913 it was confirmed that it is for a claimant in a discrimination claim to prove facts from which an inference of discrimination could be drawn before the burden of proof shifts to the respondent under section 136 of the equality act

63. In Robertson v Bexley community Centre 2003 IRLR 434 the Court of Appeal stated that when employment tribunals consider exercising discretion under what is now section 123 of the Equality Act (to extend time because it is just and equitable to do so) there is no presumption that they

should do so, but the reverse. The tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time.

Conclusions

64. Applying the facts found to the relevant law we have reached the following conclusions

65. In late 2016 the respondent decided to restructure and reorganise their facilities management team. They wished to improve the quality of facilities management service and advice being given to the business.

66. This meant the proposed removal of six pre-existing roles and the creation of nine new roles. One of the roles which disappeared was the facilities support manager role which the claimant occupied. In the part of the facilities management team (FM operations) which Mr McHale managed, there had previously been four roles at grade C5 and one at grade M1. Going forward there would be five at grade M1 and two at grade C5

67. Tasks were reorganised within the team and between jobs. Previously the claimant had been primarily working in "soft" FM. That role would no longer exist in the structure but there would be three supplier management specialists who would work in both hard and soft FM and would each take responsibility for one part of the country which was to be split between the North, the South and the Midlands. The roles were management grade roles and required significant knowledge of building and other regulations as well as technical knowledge and expertise.

68. The first question for us to determine is whether this amounted to a redundancy situation. In other words, were the requirements of the respondent for employees to carry out work of a particular character cease or diminish (or were they expected to cease or diminish)?

69. We are satisfied that a redundancy situation did exist in these circumstances. There was no need going forward for the roles of facility support manager, waste management coordinator (there had previously been two) or for anyone to fulfil the function of group central support manager. The intention was as Mr McHale said to offer higher levels of technical expertise and enhance the service delivered to the group and business divisions. The new roles required greater technical expertise, greater knowledge of building regulations and health and safety regulations and were more focused on "hard" FM. This was a different role to that previously carried out by the claimant. Her previous role disappeared. In those circumstances, we are satisfied that there was, at the relevant time, a redundancy situation within the respondents undertaking.

70. The next question is whether the claimant was dismissed by reason of redundancy. Has the respondent established that that was the sole or principal reason for her dismissal?

71. The claimant has not advanced any alternative reason for her dismissal. She says that there was no genuine redundancy situation (we have found that there was) and merely asserts that her dismissal was an act of discrimination or was tainted by discrimination but she says no more than that. The claimant had the opportunity to apply for a number of vacancies created by the changes in the FM team. She chose to apply only for one post which was a significant promotion (two grades, from grade C5 to grade M1) with a substantial increase in salary attached. Her old role had ceased and she was unsuccessful in her application for the higher grade role of supplier management specialist. As the claimant did not apply for any other role, did not identify (although she had access to information of all vacancies) any other role within the group of companies operated by the respondent for which she would like to be considered and as her old role was no longer required by the respondent her dismissal was inevitable and was clearly on the ground of redundancy.

72. We should add that if as a matter of law we have erred in finding that the reorganisation and redrawing of responsibilities and roles within the facilities management team amounted to a redundancy situation then we would have found that the claimant was dismissed for some other substantial reason justifying her dismissal. The result of the reorganisation or redrawing of responsibilities was that the claimant was left without a role, but this was in part as a result of her expressing no interest in any role other than that of supplier management specialist, a role for which she was not considered suitable.

73. Was that dismissal fair within the meaning of section 98(4) of the employment rights act 1996? We find that it was. Although in the list of issues the claimant raised the question of whether she had received warning that the role was at risk of being made redundant and whether there was meaningful consultation during the process, her representative in his written submissions withdrew those complaints accepting that the claimant was given adequate warning and that she was consulted with throughout the process.

74. The claimant criticises the "selection criteria" under which she was chosen for redundancy but we do not understand this allegation. It was not suggested to any of the respondent's witnesses that the claimant was unfairly placed at risk of redundancy. It was not challenged that her existing role ceased. The complaint as set out in the list of issues was that she did not believe the selection criteria was applied fairly "as she was required to attend an interview for [a position] which she believes she should have been given without going through an interview like her colleagues had". There was no “selection” process.

75. Thus, we interpret this as not a criticism of any selection process but of a failure to appoint to the new role, in particular a failure to appoint without interview. The respondent's witnesses fully explained the position. Where an employee was at risk of redundancy but was the sole applicant for a role

at the same grade as their previous role then provided Mr McHale and Miss Fawcett were satisfied that the employee in question had the relevant skill and expertise to carry out the role they would be appointed to it as an interview would be unnecessary. Where, however, there was more than one applicant for a role or where an employee was seeking to move to a higher grade role then an interview would be necessary to, in the first instance, decide between the competing applicants and in the second case to establish whether or not the employee had the appropriate skills and expertise to carry out the role in question.

76. We have noted that the claimant was told at the commencement of the process that all applications for all roles would require a competency based interview and this was not in fact the case. We have asked ourselves whether the change from that position to the one set out in the paragraph above and explained by the respondent's witnesses rendered the process unfair. We have decided that it did not. Whilst some fuller explanation of the process adopted, and given in these proceedings, could and possibly should have been given during the course of the process we do not find that the method adopted by the respondent was unreasonable and nor do we find, for that reason, that it tainted the process unfairly. The claimant's approach to this issue was contradictory because on the one hand she objected others not being required to attend interview (as she says they should have been under the process as originally described to her) but the thrust of her complaint in this regard as she set it out before us was that she should have been appointed (to a post two grades higher than the one she occupied and which attracted a much higher salary) without an interview, because others who had applied for posts at the same grade (where they were the sole applicant) had been appointed without an interview.

77. In short, we find the process adopted by the respondent was reasonable. Where an interview would have been an unnecessary process for a sole applicant seeking a job at the same grade as their redundant role, for which the managers were satisfied that he or she had the appropriate skills and experience, the need for an interview was waived. Otherwise interviews were to be held. That is in no way a discriminatory process. We are satisfied that the appointments of those who were appointed without interview took place in materially different circumstances to those which appertained to the claimant and the difference was wholly unconnected to the race of the applicants and the claimant. The difference related to the number of applicants for the role in question and the relative grade of the role applied for against the role they were carrying out.

78. The claimant also complaints about the search for alternative work. The way she puts her claim however is that she considered the building surveyor administrator role and the FM supplier coordinator role were not suitable for her whereas the respondent said that they were and had she applied for them she would have been considered for them. With respect to the claimant, that does not amount to a failure to conduct an investigation into alternative work on the part of the respondent, it merely indicates that the claimant did not wish to be considered for either of those available roles.

The respondent advised the claimant about all roles available both within the team where she had been working and within the wider group of companies operated by the respondent through a list of vacancies. The claimant did not apply for any of and although she criticises the level of "investigation into whether alternative work could be offered "she does not say what steps the respondent failed to take which they ought reasonably to have taken. She merely confirms that she did not wish to be considered for the other remaining posts.

79. In summary, therefore, there was a redundancy situation within the respondent's undertaking, the claimant was dismissed for redundancy (and no other reason) and the respondent has satisfied the requirements of section 98 (4) as to the fairness of the dismissal. The respondent acted reasonably in treating the claimant redundancy a sufficient reason to justify her dismissal in the circumstances of this case.

80. In relation to the allegations of discrimination we have reached the following conclusions.

81. The first act of alleged discriminatory conduct is the claimant's dismissal. It is said that she relies upon a hypothetical comparator. She did not seek to identify or describe that hypothetical comparator as part of her case. The appropriate hypothetical comparator is, we find, a white female who had previously occupied a role at grade C5 who was at risk of redundancy and who had applied for only one role at grade m1, which application had not been successful. We are satisfied that such a person would have been required to be interviewed for the reasons explained by Miss Fawcett and Mr McHale, and would have been treated exactly as the claimant was. We are also satisfied that such a person would, in those circumstances, have been dismissed for the reason of redundancy, her old role having disappeared and no other role being of interest to that person beyond the role for which they were not considered suitable. For that reason, we do not find the claimant's dismissal to have been discriminatory.

82. The second act of alleged discriminatory conduct is that the claimant had to undertake an interview for the role for which she applied whereas others were not interviewed for alternative roles. The claimant specifically relied upon Anne Watts as a comparator. Ms Watts was the sole applicant for the role into which she was placed, it was at the same grade as her previous role and the respondents were satisfied that she had the skills and expertise to carry out that role. She is not an appropriate comparator. The claimant also seeks to rely upon a hypothetical comparator. Using the same hypothetical comparator as in the paragraph above that person would also have been interviewed for the role of supplier management specialist as the role was a promotion by two grades.

83. The third act of alleged discrimination is the change made to the job description for the supplier management specialist role which in the list of agreed issues the claimant said was done by Mr McHale to put her at a disadvantage and ensure she would not be successful in their application.

This allegation fails on the facts because the alterations to the role were made at the behest of the respondent's reward team in order to allow the role to carry a grade M1, i.e. for it to be a management role, rather than a grade C6 which would have been a colleague role. That was the sole reason for the changes to the job description. In any event had those changes not been made the claimant would still have been required to be interviewed for the post, indeed she was attending interview on the basis of their application under the original job description.

84. In her evidence, when asked which of the changes put her at a disadvantage, the claimant said that she did not think they did disadvantage her, it was just that the changes weren't there in the "first cut". She accepted that the changes amounted to an amplification of detail rather than a change of role content. Thus, contrary to the allegation, the changes were made in order to ensure that the role was graded at the appropriate level (grade M1) and on the claimant's own evidence did not put her at a disadvantage. The changes were not made to ensure that the claimant's application would be unsuccessful. The claimant again sought to rely upon an undefined hypothetical comparator in relation to this allegation. We are satisfied that had an employee sharing all of the claimant's characteristics (bar race) applied for the role the changes to the job description would still have been made because they were made in order to clarify the grade of the role and for no other reason.

85. The final act of alleged discrimination is that the respondent did not accede to the claimant's request that a grade and salary be subject to a review. The claimant relies on an actual comparator, Vivian Wilson, and relates this to December 2015. The claimant says he was treated less favourably than that colleague.

86. That allegation fails for a number of reasons. First it relates to matters which occurred in December 2015. The claimant did not contact ACAS to commence early conciliation until 7 February 2017, by which time the claim was already more than 10 months out of time. She has advanced no reason why it would be just and equitable to extend time to allow this claim to proceed and in those circumstances, bearing in mind the decision in Robertson v Bexley heath referred to above, we do not do so. Even if the claim had proceeded, however, it would fail on its merits. Ms Wilson's role was not regraded nor did she receive a salary increase in December 2015. On the evidence of the respondent, which is not challenged, because of the austerity measures which were in place in the respondent company at the end of 2015 it was the “wrong time” to apply for a regrading and the matter did not proceed in respect of either the claimant nor Ms Wilson. Accordingly, at that time they were treated the same.

87. Insofar as the claimant complains (as she did during the hearing but not in the list of issues) that Ms Wilson was treated more favourably because she was given a company car and the claimant was not, we have found as a fact that this was due to the substantial company mileage which Ms Wilson was

undertaking whereas the claimant did not undertake substantial mileage on behalf of the respondent.

88. Even if the claimant intended to raise the issue of Ms Wilson's subsequent regrading, that took place because she established to the satisfaction of Ms Fawcett that she was undertaking tasks well outside and beyond the scope of her existing job description, as a result of which Ms Fawcett agreed to redraw her job description and submit the same to the reward team who agreed to regrade the role. The claimant did not pursue this matter with Ms Fawcett, did not seek a revised job description and thus any difference in treatment about which she complains in relation to Ms Wilson having her role regraded whilst her own was not is attributable to those facts and nothing to do with the claimant's race. Indeed, we note that it was not suggested to Ms Fawcett nor to Mr McHale that the lack of regrading was attributable to the claimant's race. We have found that the sole reason for the regrading of Ms Wilson's role was the redrawn job description, which properly recorded the additional tasks that employee was undertaking, beyond those in her job description..

89. In respect of each of those allegations of discrimination the claimant has not established any facts which could lead us to conclude that discrimination has occurred. The burden of proof therefore does not shift to the respondent under section 136 of the equality act 2010, and the claims fail on their merits. Even if the burden of proof had shifted, the respondent has established on the basis of the facts found and the conclusions we have reached, that the "treatment" was non-discriminatory and/or did not cause any detriment to the claimant and was not on the ground of the claimant's race so that no contravention of the Equality Act has occurred.

90. Accordingly:

    90.1 The claimant was dismissed for redundancy;

    90.2 That dismissal was fair within the meaning of section 98 (4) of the employment rights act 1996, and

    90.3 Her claim to have been unfairly dismissed is not well founded. Further,

    90.4 The claimant's complaints that she was the victim of unlawful discrimination on the protected characteristic of her race are not well founded

91. The claimant's claim is therefore dismissed.

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Employment Judge Ord

Date: 08 February 2018

Sent to the parties on: .....

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For the Tribunal Office