EMPLOYMENT TRIBUNALS

Claimant: **Mrs. G Delaney**

Respondent: **Mears Group PLC**

Heard at: Birmingham

On: 12 and 13 November 2018 and (in Chambers) 6 December 2018

Before: Employment Judge Wynn-Evans

Representation:

Claimant: Mr J Wallace (counsel)

Respondent: Mrs J Fry (solicitor)

JUDGMENT

The judgment of the tribunal is that:-

(1) the claimant's claim of unfair dismissal fails and is dismissed.

(2) the claimant's claim of breach of contract succeeds in respect only of the bonus entitlements she claims in respect of 2016, and not in respect of 2017, subject to determination of quantum at the remedy hearing listed for 4 March 2019.

REASONS

Introduction

1. This is the reserved judgment in the proceedings brought by Ms G Delaney against Mears Group plc in which she brings claims for unfair dismissal and for recovery of bonus payments by way of a breach of contract claim.

2. The claimant's claims were heard at the Midlands (West) Employment Tribunal on 12 and 13 November 2018 before Employment Judge Wynn-Evans (sitting alone). The matter had been listed for two days which was insufficient for full determination of the matter, as should have been apparent to the parties' representatives in advance, given the number of witnesses and volume of documentary material to be put before the tribunal. It was therefore agreed that

the initial fixture would therefore address liability only. The tribunal's decision was reserved and promulgated after deliberation in Chambers on 6 December 2018 with a provisional remedy hearing having been set for 4 March 2018.

3. The Claimant was represented by Mr J Wallace of counsel and the Respondent by Mrs J Fry, solicitor. I am grateful to them for their assistance in, and courteous conduct during, the hearing of this matter and for the written submissions which they both helpfully supplied at the stage of closing arguments as supplements to their oral submissions.

4. I heard evidence from the Claimant and, on behalf of the Respondent, from Mr Lucas Critchley, Group Executive Director, Mr Darren Pace, Executive Director, Mrs Karen Beckley, Regional Director, and Mr Ian Watson, Group Procurement Director.

5. In addition to the parties' written submissions, I had before me an agreed bundle, the statements of the witnesses from whom I heard, the respondent's draft list of issues, the claimant's opening note and statements of two witnesses from whom I did not hear, Mr Tom Gregorek and Mr Richard Brook, both former employees of the Respondent and formerly Commercial Director and Commercial Manager respectively. Their statements were adduced by the Claimant in evidence in support of her claims and to the weight to be attached to which I return in the course of this judgment.

Issues

6. This case concerns the Claimant's dismissal for reason of redundancy and her alleged bonus entitlement in relation to the 2016 and 2017 years. She argues that her dismissal was unfair primarily on the basis of the respondent's excluding a colleague, a Mr Scott Thomson, from the redundancy pool adopted by the Respondent, on the Claimant's case unreasonably, and that she was contractually entitled to bonuses for the financial/calendar years of the Respondent 2016 and 2017.

7. No issues were raised or arose with regard to the timely presentation of the claim or the Respondent's response, compliance with the requisite early conciliation requirements, or with regard to the requisite qualifying period of service for the purposes of the Claimant's unfair dismissal claim. The issues in this case were agreed at the outset of the hearing as being as follows.

8. With regard to the Claimant's unfair dismissal claim the issues to be determined were:-

- Was the reason for the claimant's dismissal redundancy within the meaning of section 139 of the Employment Rights Act 1996 ("ERA 1996")?

- In all the circumstances did the Respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant with particular consideration being given to:

(a) Whether the Claimant was given a fair consultation.

(b) Whether Mr. Lucas Critchley reasonably restricted the redundancy pool to exclude Mr. Scott Thomson.
(c) Whether Mr. Critchley reasonably withheld the post of Commercial Manager (Care Contracts) from the Claimant and reserved it for Mr. Thomson.
(d) Whether Mr. Critchley reasonably restricted deployment to Commercial Manager posts in Enfield.
(d) Whether Mr. Critchley provided the Claimant with the opportunity to find new employment.

- If the Claimant's dismissal is deemed to be unfair, to what level of compensation is the Claimant entitled, having regard to what is just and equitable in all the circumstances; including deductions for *Polkey.*

- If the Claimant's dismissal is deemed unfair what remedy is available having regard to any reduction for *Polkey* and/or failure to mitigate?

9. In relation to the Claimant's breach of contract claim in respect of bonus the issues to be determined were:-

- Was the Claimant contractually entitled to be a member of a bonus scheme.

- What was the status of the discussions for 2016 and 2017.

- Did Mr. Gregorek have the authority to bind the Respondent.

- If so what was the extent and terms of the Claimant's entitlement under the scheme.

- Does the Respondent's failure to pay the bonus claimed amount to a breach of contract.

Applicable law

10. The provisions governing the determination of the fairness of the claimant's dismissal are set out in section 98 of the Employment Rights Act 1996 ("ERA 1996") as follows:-

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
……
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

11. Pursuant to section 98(1)(a) ERA 1996, it is for the Respondent to show a potentially fair reason for dismissal within section 98(1)(b) ERA 1996. If the reason for dismissal falls within section 98(1)(b) ERA 1996, the burden of proving fairness or unfairness within section 98(4) of ERA 1996 is neutral and the tribunal must apply the approach prescribed by section 98(4) ERA 1996.

12. I remind myself that I must avoid the "substitution mindset" and apply the "range of reasonable responses" test. In *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439 EAT it was established that the correct approach for a Tribunal to adopt in answering the questions posed by section 98(4) is as follows:-

- The starting point should always be the words of section 98(4).
- In applying the section, a Tribunal must consider the reasonableness of the employer's conduct not whether the Tribunal consider the dismissal to be fair.
- In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what the right course to adopt should have been.
- In many (although not all) cases there is a band of reasonable responses within which one employer might reasonably take one view whilst another might quite reasonably take another.
- The function of the Tribunal is to determine whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band, it is unfair.

13. In this case the Respondent relies on the potentially fair reason of redundancy. With regard to the definition of redundancy, section 139 of ERA 1996 provides as follows:

(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...
(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.*

14. With regard to redundancy, in *Murray v Foyle Meats* [1999] IRLR 562 HL. Lord Irvine said of section 139 ERA 1996:

> *My Lords, the language of para. (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter.*

15. In *Williams v Compair Maxam* [1982] IRLR 83, the principles applying to consultation in redundancy cases were explained as follows:

> *1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
> *2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
> *3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
> *4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
> *5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

16. In *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72, it was stated that:

> *Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely.*

17. A crucial issue in the case is the selection by the Respondent of the redundancy pool into which the Claimant fell. The band of reasonable responses test applies to the Respondent's decision in identifying the pool from which the redundant employee will be selected, which is to say that a dismissal would only be unfair for this reason if the pool was such that no reasonable employer would have chosen it - see *Capita Hartshead v Byard* [2012] ICR 1256 EAT.

18. An issue central to the determination of the Claimant's claim in respect of her alleged bonus entitlement was the authority or otherwise of Mr. Gregorek to have acted in a way such as to create a binding bonus commitment upon which the Claimant could rely. Mr. Wallace for the Claimant contended that the law in relation to the authority of employees to bind their employer was as follows and this analysis was not challenged by Mrs. Fry for the Respondent.

19. Employees are agents of the employer (see *Harvey,* AI [131]). Accordingly, their authority to act on behalf of a company derives from the issuers of the authority, namely the company board. Case law has established the four contours of authority in employee-agent situations *(see Gore-Browne,* 8[18]):

- an employee's authority will be the usual authority of a person in that position in the circumstances.

- an employee will have authority to act where that authority is either impliedly or expressly delegated, which must be determined with reference to all the circumstances: *Armagas v Mundogas [1986] AC 717***,** 778.

- an employee will not have authority where it is expressly revoked or restrained.

- There is always an implied restraint of authority to not act dishonestly or in breach of a fiduciary duty.

Assessment of witness evidence

20. In relation to the Claimant's unfair dismissal claim, much of the evidence as to the process conducted by the Respondent in proceeding to dismiss the Claimant was uncontroversial as between the parties and was supported both by the oral evidence and the documentary material. The evidence with regard to the nature of the roles of the relevant employees - for the purposes of identifying an appropriate redundancy selection pool - and with regard to the question of whether the bonus scheme for which the Claimant contended had been authorised by Mr. Pace and/or the Respondent's Chief Executive Officer (from whom I did not hear) was far more contentious as to the true facts and their legal consequences. In addressing the Claimant's bonus claim and making my factual findings I have borne in mind in particular the point that it is for the Claimant to make out her claim – she bears the burden of proof – and more generally that my findings of fact must be based on the balance of probabilities test.

21. Mr. Wallace for the Claimant launched a spirited and serious attack on the general credibility of the Respondent's witnesses in relation to both the bonus and unfair dismissal aspects of the Claimant's claims contending that, save for Mrs. Beckley, they were evasive, inconsistent and lacking in credibility. Rather

than make general findings as to credibility and reliability in relation to the Respondent's witnesses, I set out below in detail my findings of fact based on my assessment of the specific evidence before me, both of the witnesses and otherwise.

22. That said, I found the Claimant generally to be a clear and consistent witness whose evidence I had no reason to doubt. Notably her evidence as to the discussions which took place between her and her colleagues and Mr. Gregorek with regard to the bonus entitlement which is in dispute in this case was not challenged by the Respondent. I naturally approached the statements of the witnesses whose statements were submitted but who did not appear to give evidence with care given that those witnesses did not give live evidence. However, Mr. Gregorek's evidence in particular was consistent with the Claimant's. I also note for completeness that in her statement the Claimant raised concerns about the accuracy of the appeal/grievance meeting minutes. In the absence of any specific challenge to the accuracy of those minutes relevant to the issues before me I make no findings in that regard and did not take this point into account in determining the fairness of the Claimant's dismissal.

Findings of fact

23. Having considered the written, documentary and oral evidence before me my findings of fact are as follows. I have not determined all the factual disputes before the parties which were argued before me in these proceedings but rather those which I consider to be germane to the issues which I am to decide.

24. The Respondent provides managed outsourced services to a wide range of public and private sector clients across England, Wales, Scotland and Northern Ireland. The core business of the respondent is the provision of repairs and maintenance services to social housing and a domiciliary care provider.

25. The Claimant commenced employment for the Respondent on 28 October 2013 and at all material times was employed as a Commercial Manager working on the commercial aspects of the Respondent's Bids for work as distinct from the related but separate quality aspect of such Bids. She was based at home but needed to travel for business. The Claimant's contract of employment did not contain any express provisions concerning the payment of bonus. The team in which the Claimant worked dealt with Bids in both the Housing and Care Sectors. Bids are formed of two components - the commercial aspects (financial pricing, as carried out by the team in which the Claimant worked) and the quality aspects, carried out by the Respondent's Bid Writing team.

Redundancy dismissal

26. The Respondent concluded, in my judgment genuinely and for valid business reasons – in part to react to a shrinking repairs and maintenance business - that it wished to reorganise and restructure how it dealt with bidding for new work. I accept that the Respondent decided, in conjunction with a wider cost saving exercise, not to seek to grow its repairs and maintenance business for the future and to make certain organisational changes by way of a restructure. Mr. Critchley led that review with input from his senior colleagues and proceeded on 31 October 2017 to invite the Respondent's Commercial Team, which included the Claimant,

to attend a Group Consultation meeting on 9 November 2017 to discuss the restructure with which it proposed to proceed.

27. As recorded in Mr. Critchley's internal email to Mr. Pace and other senior colleagues of 30 October 2017, there were various aspects to this restructure. In addition to central support function savings, the Respondent planned to change its approach to how it dealt with new opportunities. The Respondent would reduce very significantly the number of repair and maintenance bids it would apply for – from around 200 in 2017 to between 10 and 20 for 2018 onwards – and to increase its focus on what were known as Tier 1 bids - these were larger opportunities. So called Tier 3 opportunities – which were smaller local bidding opportunities - would be absorbed into the Respondent's existing local operational establishments. As recorded in the revised job descriptions circulated in relation to the restructure, Tier 2 opportunities would be those that represented target opportunities and bids, would predominantly comprise housing repairs and maintenance and would realise revenues of in excess of £3.5 million per annum with reasonable longevity - typically a minimum of 5 years. Tier 2 opportunities, on which the Commercial Team would continue to work, would require a reduced team of Bid Writers and Commercial Managers. Importantly, in order to increase communication and team working within the Housing Maintenance Business Development team the Commercial Team would have a central base and need to spend time together as a team every week. This was proposed to be met by the Commercial Team working together at Enfield for 2 days per week.

28. I pause there to note that in the event the Respondent's Commercial Team has not as yet as at the date of the hearing of this matter worked from the Enfield base for subsequent operational reasons. Despite the Claimant's attack on the fact that the change of location has not actually been implemented, I accept that this has been for genuine operational reasons and do not accept that the element of the restructure requiring the team to work two days a week at Enfield was not genuine at the time when it was included as an aspect of the restructure. I accept that the decision to choose Enfield as the location where the team would be based for two days a week was genuine and taken for legitimate business reasons as recorded in Mr. Critchley's email of 28 November 2018 – namely, that it was located in the most established and fastest growing geographical location for the business, had capacity in space terms for the establishment of the business and was well located for travel links and had a long lease compared with the Respondent's typical branch locations.

29. The Commercial Team comprised seven staff, managed by Mr. Gregorek, including the Claimant. The redundancy selection pool adopted by the Respondent excluded one individual, Mr. Scott Thomson. As part of this proposed restructure, the Respondent proposed to reduce the headcount of this redundancy selection pool, within which the Claimant fell, from six to three.

30. The Respondent's proposed restructure was presented to the Commercial Team on 9 November 2017. The detailed PowerPoint presentation which was used was before me in the hearing bundle and confirmed the reasons for the restructure, its impact, the proposed structure and the proposed timetable. Volunteers for redundancy were sought. After the consultation meeting Mr. Critchley sent the presentation and proposed new draft job descriptions to the affected employees. I accept that questions were raised by members of the Commercial Team at the

meeting and further email enquires subsequently none of which demonstrate anything other than an open process of communication and consultation about the proposals.

31. Subsequent to this Group meeting, Mr. Critchley emailed the affected employees on 15 November 2017 to confirm arrangements for the on-to-one meetings which were then to be held with them to address the proposed restructure. In this email he recorded responses to a number of questions raised including details of salaries for the new roles, redundancy payments, whether the Enfield requirement could be negotiable and notice pay. Given the concerns that had been raised about the need to work in Enfield, Mr. Critchley clarified that the requirement was for the team to spend two days per week either at a branch location appropriate to the bid they were working on or at Enfield. He also confirmed that the intention would be that there would be a two day kick off and a 2 day settlement at the relevant operational branch for each bid, that on weeks when those meetings were not taking place the team would be required to spend two days per week at Enfield and that once per month a formal 2 day meeting would be held in Enfield.

32. One-to-one discussions were also held with the affected staff. Mr. Critchley met the Claimant to discuss the situation on 21 November 2017. In this discussion the Claimant raised her concerns about the Enfield location and its impact on her as well as the selection process. It was noted in this discussion that selection would not be required for the restructure if a minimum of three people did not wish to be considered for the revised Commercial Manager role.

33. The Claimant also raised at this meeting the issue of the pool for redundancy which was six staff rather than the seven members of the Commercial Team. Scott Thomson had not been included in the redundancy pool on the basis that he worked on Care bids. The Claimant argued that this was incorrect not least as she and another colleague, Richard Brook, also processed Care bids. At this meeting Mr. Critchley justified this decision on the basis that Mr. Thomson's role was "aligned" to Care bidding for which would not be affected going into 2018. On this basis Mr. Thomson did not fall within the scope of the consultation process that Mr. Critchley was conducting. Mr. Critchley confirmed that he was checking the relevant percentages as to the work performed by the relevant employees, was "digging a bit further" and that he had data back which was "quite compelling to say that Scott [Thomson] does dedicate nearly all of his time to Care bids." The Claimant in effect attributed the relative proportions of Care and Housing work conducted by herself and Mr. Thomson to the way in which "jobs" had come in and how work had been divided up. She also noted that Mr. Thomson had also worked on Housing bids in the past year, although Mr. Critchley's response was that this was very few in number, and that she had also priced Care bids. Her position was to the effect that she and Mr. Thomson had the same line manager, attended the same meetings, had the same weekly catch up conference calls and that he did not work 100% on Care bids at least in the then current year. Mr. Critchley maintained that Mr. Thomson was outside the redundancy process because he was dedicated to Care and confirmed that he would share the relevant data with the Claimant.

34. The Claimant also made clear the issues she had with the Enfield location, not least the significant additional travel that it would entail, indicating that spending

time in local branches would be her preference or with the local operations team when working on a bid. She considered that the team could meet at the Respondent's Welwyn office or Milton Keynes office rather than Enfield with which she had a problem given its distance and the travel time involved. Mr. Critchley confirmed he would give this issue further thought as well as clarifying that there would need to be compromise about how the need for travel would interact with employees' core hours.

35. By email of 28 November 2017 Mr. Critchley addressed a number of issues which had arisen from the various one-to-one sessions which had been conducted with the Commercial Team including an explanation of the selection process that would be applied if one were required, why Enfield had been chosen as the base for the team, whether further consideration could be given to a "North Base and a South base", how the two days a week in Enfield would work in practice, whether salaries would be increased as a result of the requirement to work in Enfield, whether the expectation to be in Enfield each week could be reduced, the Enfield office's location, whether hotel expenses would be covered for the relative travel, and certain other matters.

36. The Claimant raised further queries with Mr. Critchley by email on 30 November 2017 requesting data with regard to the split of Housing and Care bids undertaken by members of the team, whether she could work at local branches other than Enfield, if she would be required to be in Enfield for two days if attending other meetings, if she would be required still to attend settlement meetings, whether her salary would be increased and how the Respondent would determine whether a bid fell within Tier 2 or Tier 3 by reference to its expressed criterion of "win likelihood".

37. By email dated 6 December 2017, Mr. Critchley replied to provide the statistical information to which I return shortly and to clarify the position in relation to the other issues which the Claimant had raised. To summarise, he indicated that working from a local branch did not meet the aim of collective working so was not an option, where a kick off meeting took place this would replace the need to be in Enfield, the Claimant would still need to attend settlement meetings, and that, whilst salary would not be increased, any new expenses would be covered. The possibility of travel in work time and full reimbursement of expenses for trips was raised with the Claimant.

38. I accept, as Mr. Gregorek's email to Mr. Pace of 16 November 2017 records, that the evidence before the Respondent in making its decision as to the appropriate pool for redundancy situation, and which was shared with the Claimant as part of the redundancy process, was that the Claimant worked on 9 of 55 Care tenders during the period from 12 December 2016 to 13 December 2017 – this represented 16.4% of the Respondent's Care tenders. Mr. Scott Thomson, who was excluded from the redundancy pool in which the Claimant was placed had during this period supported 45 i.e. 81.8% of the relevant Care tenders. Given that this evidence was produced by Mr. Gregorek as the manager of the team I consider it to be reliable as demonstrating the volumes of work conducted by the respective Commercial Managers. This evidence I found to be of more assistance to me in testing the reasonableness of the Respondent's decision as to the pool for redundancy than its reliance on the organisational charts before me in the bundle - not least given that one chart labelled as applying to 2016 includes reference to

an individual, Gareth Brown, who it was not disputed did not commence employment with the Respondent until February 2017.

39. Having considered his evidence carefully, I do accept that Mr. Critchley genuinely believed - and had a legitimate basis, by reference to his knowledge of the business and discussions with his colleagues, to believe - that Mr. Thomson had relationships and experience in the Care space and worked to a sufficient degree on Care bids that Mr. Thomson should not be pooled with his Housing colleagues even though there was a degree of crossover in their work. I accept that Mr. Critchley genuinely considered Mr. Thomson to be "aligned" – in effect predominantly dedicated - to Care rather than Housing work and that it was legitimate to exclude Mr. Thomson from the redundancy pool rather than to pool him with colleagues who, whilst they did some Care bid work, predominantly worked on Housing bids.

40. In the event no selection process was necessary in relation to the redundancy pool that the Respondent had adopted as the Respondent received sufficient applications for voluntary redundancy. The Claimant had decided that the requirement to work at Enfield was not appropriate for her and so was made redundant.

41. By a separate email of 6 December 2017 Mr. Critchley recorded the status of the consultation process with the Claimant noting that the Enfield location was "not going to work" for the Claimant. On that basis her last day would be 11 December 2017. This email confirmed other matters relating to the Claimant's final day with the business, return of property and her final payment.

42. The Claimant replied to Mr. Critchley on 7 December 2017 seeking further clarification to which request Mr. Critchley replied by email which was also to be sent by post to the Claimant's home address as well to ensure receipt. In this email he reiterated the position with regard to arrangements and requirements for attendance at Enfield – although by this time the Claimant had already indicated that this would not work for her - and confirmed that, in relation to Care Bids, the statistics were as follows – Mr. Thomson, 46 Care and 4 Housing; the Claimant, 9 Care and 6 Housing; Mr. Brooks, 1 Care and 12 Housing.

43. In her evidence the Claimant contended that she was unable to take time off to seek alternative employment due to having to complete a tender she was working on. At no stage was any request made by her for time off, although I do not accept the Respondent's evidence that the issue of time off was addressed at the initial group consultation meeting given the lack of reference to that point in the otherwise very detailed presentation and subsequent correspondence and documentation concerning the consultation process and timetable.

44. In the meantime, formal notice of termination was issued to the Claimant by letter from the Respondent dated 8 December 2017. This letter recorded the Respondent's position in broad outline and noted that, if the Claimant had any thoughts about her future requirements and how the Respondent could retain her services elsewhere, she should raise them with the Respondent's HR department as soon as possible. The Claimant's employment terminated on 11 December 2017. Details of internal vacancies were sent to the Claimant.

45. The Claimant appealed against her dismissal on 14 December 2017 at the same time as she raised a grievance concerning the non-payment of bonus to which I return below. Both hearings were conducted by telephone conference on 24 January 2018 by Mrs. Karen Beckley, following which the decision to dismiss was upheld and the grievance rejected. The Claimant's appeal against her dismissal centred on her having outstanding queries from her 7 December 2017 email relating to the work split data, the Enfield location and determination of Tier 3 bids.

46. In addressing the Claimant's grounds for her appeal, the appeal decision was in essence to the effect that:-

- It was reasonable to allocate Mr. Thomson to Care bids as this was his role although for transparency this could have been determined as part of the redundancy process rather than for him to be excluded from it.
- The decision to require work at Enfield was a legitimate operational need about which there was lengthy discussion with the Claimant through the process and written responses given to the Claimant's concerns and queries clarifying the business reasons for the change.
- As had been confirmed to the Claimant in the course of the consultation process, any Tier 3 work would be absorbed into local branches and there were and would be no employees conducting that work who therefore should have been included in the consultation process.
- In relation to the Claimant's complaint that she was not allowed to work past 11 December 2017 when a colleague continued to work until 22 December 2017, Mrs. Beckley found that the reason for this was that the individual in question had accepted voluntary redundancy at a late stage and handover of their work necessitated a later termination date. I have no reason to doubt that this was the case and in the event the Claimant's counsel explicitly confirmed during the hearing that this was not a line of attack that the Claimant would be pursuing.
- The team had not as yet worked at Enfield pending recruitment of a new Senior Lead and this was a short term delay, the need for attendance at Enfield remaining a fundamental way the Commercial Team was to work in future.

47. There was some debate before me about the role of the Respondent's Care Director, Bernadette Walsh, in relation to the Claimant's dismissal. Reference was made to an email exchange of 17 May 2018 between Mr. Pace to Bernadette Walsh – sent in the course of this litigation and some several months after the relevant decisions were taken. In this email Mr. Pace asked Ms. Walsh if she recalled her requesting that the Claimant not get involved in Care bids. In this email exchange Ms. Walsh recorded her understanding in essence that Mr. Thomson had ended up working on the majority of Care bids because the Claimant was not the strongest in the Commercial Team. In my view this email was consistent with Mr. Critchley having addressed the issue of the selection pool on the basis of Mr. Thomson's skills, experience and actual work as opposed to any comparison of capability or performance as between him and the Claimant. This email exchange, sent some time after the events in question, did not in my assessment undermine my view of the genuine assessment made by Mr. Critchley of what an appropriate redundancy selection pool should be in these circumstances.

Bonus claim

48. As I have already noted, the Claimant's evidence with regard to her bonus claim, in terms of the discussions which took place with Mr. Gregorek, were not challenged by the Respondent and therefore stand to be accepted not least as there is no direct evidence, whether oral or documentary, casting any cogent doubt on her version of events in relation to the bonus issue. In terms of the evidence of the Respondent's witnesses, what is marked is an absence of positive evidence to rebut the position contended for by the Claimant. My findings on this issue are as follows.

49. Whilst there had been bonus schemes in place for the team which the Claimant joined prior to her commencing employment with the Respondent in 2013, there was no bonus scheme in place for the Commercial Team at the start of her employment. Prior to the events giving rise to this claim the Claimant had received one discretionary bonus payment of £3,000. This was the only bonus payment which the received during her employment

50. On 16 March 2016 Mr. Gregorek circulated an agenda to the Commercial Team ahead of a forthcoming team telephone meeting in which an agenda item was "2016 Bonus Scheme specification", which I note was a very specific description, implying a level of detail as to the operation of a formal or detailed scheme. (I will refer to the bonus arrangements which the Claimant seeks to establish as a contractual entitlement as the "2016 bonus scheme".) On 17 March 2016 Mr. Gregorek sent the Commercial Team, including the Claimant, another email with various attachments including a "Commercial Team Bonus Plan". This document set out by reference to each individual the payment that would be made dependent on the Team's performance – calculated on the basis of "work secured". The bonus allocations described in that document split the potential payments into two performance based elements – "Care Team" and "Social Housing Team". The percentage of salary to be paid to a participant under the 2016 bonus scheme respect of different performance measures varied by reference to whether the individual was Bid Staff or Commercial Team Staff. During the relevant call Mr. Gregorek explained the operation of the 2016 bonus scheme by reference to win rate and that the 2016 bonus scheme applied regardless of who was working on a particular account. Mr. Gregorek stated that the whole team would receive bonus payments under the 2016 bonus scheme in April 2017 and Mr. Gregorek specifically confirmed that he scheme had been signed off by Darren Pace, as Group Commercial Director and Mr. Gregorek's line manager, and by the Respondent's Group Chief Executive Officer, David Miles.

51. Mr. Gregorek had sent Mr. Pace an email on 25 February 2016 with the subject "Bonus Scheme", attaching a document titled "Commercial Team Bonus Plan 2016" and in which he said he would talk to Mr. Pace about it. This was the 2016 bonus scheme which Mr. Gregorek subsequently communicated to the Commercial Team. It is very telling in my view that Mr. Pace did not say in his evidence that at any stage he specifically told Mr. Gregorek that the proposed 2016 bonus scheme was not authorised or approved and that he should not communicate it to his team. Rather, Mr. Pace indicated in his statement that there was "no way the Company would have intended to be bound to make a contractual entitlement" and sought to argue that the team would have known that such a scheme would need approval from David Miles as the Group CEO.

52. Mr. Pace sent an email on 15 March 2017 to Mr. Gregorek - the day before Mr. Gregorek communicated the bonus plan to the Commercial Team. The subject of this email was “Bonus Scheme 2016” and it was clearly part of an ongoing discussion about the proposed 2016 bonus scheme. In this email Mr. Pace used the words “[a]ll agreed by David Miles” which the Claimant argued indicated that the 2016 bonus scheme communicated to the Commercial Team had been approved by Mr. Miles. Mr. Gregorek proceeded on the very next day following that “approval” email to communicate the 2016 bonus scheme to his team as described above. Mr. Pace sought to argue that the approval referred to in his email related to the general principle of incentivising the team. However, Mr. Pace could not recall the detail of the conversation he had with Mr. Miles in this regard to describe in any detail other than the very generic what such an incentive arrangements was intended to be.

53. In his evidence Mr. Pace also indicated that the first he heard of a suggestion by Mr. Gregorek of a bonus payment for calendar year 2016 was on 24 March 2017 (when Mr. Gregorek sent him details of the payments he considered to be due). This statement does not fit easily with the fact that Mr. Pace had seen the proposed 2016 bonus scheme in March 2016 when it was sent to him by email as noted above. In addition, when in March 2017 Mr. Pace did receive details of the bonus payments that Mr. Gregorek considered to be due under the 2016 bonus scheme he did not respond immediately and only did so when chased subsequently. One would have expected an immediate response to a request for payments under a scheme which had not been approved rejecting the claimed payments and clarifying the position. Even when he did reply, as noted below, Mr. Pace did not make any statement to the effect that there was no bonus scheme in place and that none had been approved - which one would have expected if that were or he believed that it were the case. On the balance of probabilities, and taking all the evidence into account, including the additional matters set out below, I find that the email of 15 March 2016 does evidence Mr. Pace confirming to Mr. Gregorek that David Miles had approved the specific 2016 bonus scheme in respect of which the Claimant brings her claim. The email also supports Mr. Gregorek’s contention, as recounted also by the Claimant, that he was told orally by Mr. Pace that the 2016 bonus scheme had been approved.

54. That no emails have been disclosed between Mr. Pace and Mr. Miles with regard to the proposed introduction of the 2016 bonus plan - and the Respondent’s position is that there were no such emails - could be argued to indicate that the proposed 2016 bonus scheme cannot have been approved as such a matter would have been recorded formally under the Respondent’s internal processes. In my view that argument does not affect the validity of the Claimant’s bonus claim given Mr. Pace’s confirmation of the position to Mr. Gregorek of the approval to the scheme from Mr. Miles, In any event, given the Claimant’s evidence as to what she was told by Mr. Gregorek and my findings as to the email of 15 March 2016, the Respondent has not established to my satisfaction that the proposed 2016 bonus scheme was not approved by Mr. Miles.

55. The Respondent also in effect contended that Claimant’s evidence and credibility with regard to her bonus claim was undermined by her delay in bringing a grievance for payment of her bonus until after her dismissal in December 2017, some eight months after she should have received the bonus payment she now

claims if it was genuinely payable and she believed that to be the case. Given the correspondence which was before me in the hearing bundle – demonstrating that Mr. Gregorek chased for bonus payments on behalf of himself and his team and that the Claimant did so herself - and the fact that I have found that the contemporaneous email correspondence and surrounding evidence in 2016 establishes that the 2016 bonus scheme was communicated to the Commercial Team as having been approved, I do not consider this to be a cogent argument.

56. On 24 March 2017 Mr. Gregorek sent an email to Mr. Pace setting out the payments due under the scheme against actual performance. As Mr. Gregorek had not received a response from Mr. Pace he sent a chasing email to Mr. Pace on 11 May 2017. He sent this after the Claimant had sent an email to Mr. Gregorek earlier that day asking what was happening with the bonus payment given, as her email recorded, her understanding that the Commercial Bonus Plan based on achieving set target was agreed and signed off the previous year, that the percentage of achieved target was to be agreed in February 2017 and the bonus was to be paid in April 2017 pay.

57. On 12 May 2017 Mr. Pace emailed Mr. Gregorek staying “I’m nearly there with it” and indicating that Mr. Gregorek should tell anyone enquiring about the issue exactly as he (Mr. Gregorek) had told the Claimant – that the matter had been passed to Mr. Pace to resolve. This is hardly the approach of someone who rejected the existence of the 2016 bonus scheme in question. Mr. Gregorek received similar emails seeking confirmation of when payment was to be made from Mr. Thomson on 30 May 2017 and Richard Brook on 2 June 2017, both of which referenced previous contact seeking clarification of the position, and from Chelsea Hodgson on 21 June 2017. On 29 June 2017 Mr. Pace emailed the Claimant and her colleagues and confirmed that he had been “unable to resolve the bonus issue at the moment”. The Claimant emailed Mr. Pace direct copying various relevant colleagues on 9 August 2017 to follow up as did Scott Thomson on 30 October 2017.

58. On Monday October 30 2017 Mr. Pace emailed Mr. Gregorek not denying that a scheme was in place or saying that the scheme contended for had not been authorised but saying that “the fundamental problem with the bonus scheme for last year has always been the lack of housing wins. The Company cannot pay out on the scheme when the most fundamental part of it has not been achieved”. This email confirmed that the bonus could not be paid. Mr. Pace confirmed the same message to the Claimant direct in an email of 22 November 2017.

59. The Claimant raised a formal grievance with Mr. Gregorek on 7 December 2017 concerning the bonus entitlement she contended that she had for 2016. She made no reference in this grievance or indeed any of the previous correspondence to any bonus arrangements for 2017. In due course the bonus grievance was discussed on a telephone conference immediately following the claimant’s dismissal appeal on 24 January 2018.

60. In relation to the key points relating to the Claimant’s alleged entitlement to a bonus Mrs. Beckley found as follows. The Claimant’s contract contained no bonus entitlement nor had any variation to her contract been found providing for a bonus. There was no contractual entitlement to a bonus and no breach of contract. Mrs. Beckley had established that there had been some dialogue about a one off

discretionary bonus payment in 2015/16 for the preceding performance year but that this was a one off entirely discretionary matter. Mr. Pace's delay in substantive response was attributed to his dealing with the impending restructure which eventually led to the Claimant's redundancy and this preventing him from fuller communication due to commercial sensitivities around lack of bid wins and reduced revenues. Mrs. Beckley responded to the question of whether the non payment of bonus was connected with the Claimant's redundancy with the finding that the two were connected in the sense that the business could not support paying out a non-contractual and/or wholly discretionary bonus to an underperforming team. I did not find the explanation for Mr. Pace's approach to the queries he received about the 2016 bonus plan to be convincing – delay because of an impending restructuring and ongoing commercial issues might have been relevant to a delay in determining a discretionary bonus as distinct from a specific plan with metrics such as the 2016 bonus scheme and whose existence Mr. Pace repeatedly failed to challenge or query.

61. The Claimant appealed against this decision by letter dated 19 February 2018 and the appeal was heard by Ian Watson on 23 March 2018. This appeal was rejected by Mr. Watson after further enquiries by way of discussions with Mr. Pace, Jo Fry, Bernadette Walsh and David Miles. Mr. Watson found that there was no evidence to confirm that the proposal made by Tom Gregorek had ever become a contractual entitlement. He noted that the Claimant accepted that the bonus payment she received in 2015 was discretionary and that the Claimant took, as he put it, no formal steps to claim her perceived entitlement until her grievance on 7 December 2017 despite her belief that the bonus should have been paid in April 2017. Mr. Watson indicated that he considered the trigger for the Claimant's grievance was her redundancy rather than a genuine belief of any entitlement or formal arrangement. A discretionary bonus payment would not be appropriate in Mr. Watson's view given business performance.

62. Mr. Watson addressed the issue of whether there had been any request to formalise the 2016 scheme which the Respondent contends would have entailed the involvement of its HR and legal teams and which never occurred. I have seen no evidence to suggest that the scheme was formalised as the Respondent contends it should have been in the course of the Respondent's usual processes and procedures. Likewise Mr. Watson ascertained from Mr. Miles in a very short telephone conversation that Mr. Miles had not authorised the scheme,
However, in my judgment neither point conflicts with or undermines my findings with regard to the discussions which took place between Mr. Gregorek and Mr. Pace and between Mr. Gregorek and his team.

63. I have seen nothing in the evidence to suggest that the Claimant did not have a genuine belief in her entitlement to the bonus she claims for 2016 in the period prior to the termination of her employment and the lodging of a grievance. The Claimant also now contends that she is entitled to a bonus on the same basis as the 2016 scheme in respect of 2017 subject to pro rating for the period of her employment up to its termination. No evidence has been put forward indicating that there was any discussion of or agreement to the 2016 scheme rolling over into 2017. It was labelled a 2016 scheme. Its terms do refer to successful bids ongoing at the end of the year being carried forward into "the pot" for the "2017 scheme". However, no such 2017 scheme was discussed or introduced. The reference to a 2017 bonus scheme in the 2016 scheme does not in my view indicate that the

scheme would automatically continue. For one thing new financial targets would (presumably) need to be set and there was no evidence before me that this was ever done. Also, the 2011 and 2012 schemes which were in place before the Claimant commenced employment had included similar language but in my judgment this did not connote an automatically rolling over scheme - the 2012 scheme referred to a pot for the 2013 scheme but no such scheme was put in place.

64. I make no further findings about the payments due under the bonus scheme results pending the remedy stage of these proceedings as I have not received detailed evidence or submissions on the amounts claimed under the bonus scheme.

Decision - Unfair Dismissal

65. Applying the facts as I have found them to the Claimant's unfair dismissal claim, I do not find the Claimant's dismissal to have been unfair for the purposes of section 98 ERA 1996.

66. In my judgment, for legitimate commercial reasons, the Respondent had determined that it needed to reduce the number of Commercial Managers and to require those that remained to work two2 days per week at Enfield on the basis addressed in detail in the consultation process. The Claimant decided that she did not wish to be considered for the remaining jobs with the change that was to be introduced of the need to work in Enfield work requirement. The Respondent has therefore established to my satisfaction that the Claimant's dismissal was by reason of redundancy.

67. It was open to the Respondent legitimately to determine - as it did for genuine and rational reasons - that the redundancy selection pool should be the six Commercial Managers whom it treated as the pool and not to include Mr. Thomson in that selection pool. The statistical evidence available to the Respondent at the time supports what I find to have been a genuine belief on the part of the Respondent, particularly in the mind of Mr. Critchley, that Mr. Thomson was sufficiently dedicated to Care bids that he should be excluded from the redundancy selection pool affecting those working on Housing bids. Whilst there was clearly a degree of overlap within the Commercial Team between the handling of Care and Housing Bids, I am satisfied that the Respondent decided to exclude Mr. Thomson from the redundancy selection pool based on his skills, experience and focus on Care Bids which led the Respondent genuinely to conclude – in my view not unreasonably - that he could properly be viewed as aligned to the Care side of the Commercial Team's work even though he did some Housing work and colleagues also worked to some extent on Care bids. This was a decision which in my judgment it was open to a reasonable employer to take and the statistical evidence available at the time supported the Respondent's position as addressed with the Claimant in the consultation process. This was a decision as to the redundancy selection pool, as distinct from the separate and subsequent question of selection for redundancy from that pool, so objective criteria for selection are not relevant at this stage of the analysis. What matters is whether the Respondent took a reasonable and justifiable decision in settling on the redundancy selection pool that it adopted. I am satisfied that it did so having addressed its mind to the question by reference to its direct knowledge of the work of the individuals involved, the work in question and the

statistical information available. Whilst I accept that the relative capabilities of Mr. Thomson and the others in the pool were not tested, that would be a point going to selection from a wider pool rather than the identification of an appropriate redundancy selection pool. I find the decision to exclude Mr. Thomson from the redundancy pool in this case to have been one a reasonable employer could take and not one which took the Claimant's dismissal outside the range of reasonable responses.

68. It was also open to the Respondent not to include in its redundancy selection pool employees in local establishments who would now handle Tier 3 work. These employees would absorb this Tier 3 work into their day to day activities, were not interchangeable in any way with the Commercial Managers who formed the pool for selection which is under challenge in this case and therefore it was legitimate to exclude them from the redundancy selection pool, a decision which I find to have been one that a reasonable employer could take and which did not take the decision to dismiss the Claimant outside the range of reasonable responses.

69. The consultation which the Respondent conducted with the Claimant did not take the Claimant's dismissal outside the range of reasonable response. The consultation process was full and thorough and entailed clear consideration, engagement with and responses to the issues raised by the Claimant and her colleagues. It did not fail to comply with the case law guidance I have referred to above as to the content and nature of a consultation process. Whilst some of the information requested with regard to the relative split of work as between Care and Housing was provided slightly late in the day, I do not accept that there were any defects in the consultation - or appeal – process which take the Claimant's dismissal outside the range of reasonable responses. The Respondent addressed very specifically and in detail in the course of the redundancy consultation process both the Claimant's concerns about the Enfield location and her objection to the exclusion of Mr. Thomson from the redundancy selection pool. Alternative vacancies within the Respondent's organisation were notified to the Claimant.

70. I reject the assertion that the requirement to move to Enfield - argued by the Claimant to have been manifestly unreasonable - or that the proposal and its implementation undermine the fairness of the Claimant's dismissal. The Respondent was entitled to take the commercial decision that the team be required to work in Enfield two days a week subject to the various details as to those arrangements addressed in the consultation process. The reasons for the Enfield location were genuine, rational and business driven and the Respondent was entitled to proceed with its restructuring on the basis that this move was planned and to be implemented. That the Enfield location has not yet been utilised by the Commercial Team does not in my view undermine - in effect retrospectively – the Respondent's decision in that regard given that there is no evidence cogently to challenge the appeal decision – and the evidence before me – that the move to Enfield is still planned to take effect in due course. The decision to terminate the Claimant's employment was by reason of redundancy given the need to reduce the number of staff in the redundancy selection pool by three and the Claimant's decision not to be considered in the selection process because of the Enfield work requirement. I note that to the extent that the changed place of work contributed to the Claimant's redundancy this aspect was in effect an anticipatory place of work redundancy. Section 139 of ERA 1996 confirms that there is a redundancy where the Respondent's requirements for employees cease or diminish "*or are expected*

to cease or diminish". It is not for me to judge whether the Enfield work requirement was reasonable or not once I have accepted, as I do, that it was genuine, rational and business driven.

71. The Claimant's arguments about her not having been informed of her right to time off to seek alternative employment does not in my judgment undermine the fairness of the Claimant's dismissal as there was a full consultation process here and an employer is not legally obliged to bring this right to employees' attention, as the Claimant's counsel readily conceded. Likewise, the undisputed lack of HR accompaniment to assist the Claimant in the various consultation meetings and discussions is not aa legal entitlement failure to honour which can or in this case does undermine the fairness of the Claimant's dismissal.

72. In my judgment therefore the Respondent's decision to treat redundancy as a sufficient reason for dismissing the Claimant was not outside the range of reasonable responses.

73. As I have found that the Claimant's dismissal was not unfair, the issue does not fall to be determined of the chance, if the Respondent did not adopt a fair and reasonable procedure, that the Claimant would have been dismissed in any event with regard to *Polkey v AE Dayton Service Limited*. Likewise, no question of remedy now arises in respect of the Claimant's unfair dismissal claim which fails and is dismissed.

Decision - Breach of Contract

74. On the basis of my findings of fact in relation to the Claimant's bonus claim, I conclude that the Claimant is, subject to proof of quantum, entitled to a bonus in respect of the relevant 2016 period under the 2016 bonus scheme as set out in the document prepared by Mr. Gregorek, sent to Mr. Pace, which Mr. Pace confirmed to Mr. Gregorek was agreed by David Miles, and which Mr. Gregorek proceeded to communicate to his team.

75. In reaching this conclusion I have borne in mind the following points when assessing the facts as I have found them:-

- Mr. Gregorek represented and communicated the existence, approval and precise terms of the 2016 bonus scheme to the Claimant and her colleagues.
- Given the approval which Mr. Pace had given to Mr. Gregorek, I accept that Mr. Gregorek, who was engaged in the role of Commercial Director, had the express or at the very least the implied authority to communicate the approved bonus arrangements to the Claimant and her colleagues thereby to bind the Respondent.
- The facts that the Claimant's contract of employment had no provision for a bonus payment, that there had been no formal variation of contract to provide for a bonus payment, that there had been no HR or legal formal process or sign off and that the Claimant had only previously received one discretionary bonus payment do not in my judgment conflict with or detract from the binding nature of the discussions which took place with regard to the 2016 bonus scheme.
- Likewise, the Claimant's delay in instituting a formal grievance does not in my judgment undermine the factual position as I have found it to have been,

not least as the Claimant was pressing for payment under the 2016 bonus scheme from an early stage following the point by which it had been expected to be paid.

- The Respondent's contention – only put forward with the benefit of hindsight in these proceedings - that it would be illogical for the Care and Housing Bid teams to be remunerated jointly, given that they operate independently of each other, has no bearing on what I have found, by reference to the contemporaneous and other evidence that I have heard, was actually decided and communicated. In any event this argument conflicts with the fact that there was clearly a degree of cross over between the two areas of work as addressed above in more detail in relation to the question of whether it was legitimate to exclude Mr. Thomson from the redundancy pool of which the Claimant formed part.

76. However, in my judgment the Claimant is not entitled to any bonus in respect of 2017 as the 2016 bonus scheme did not automatically roll over into that period and no bonus scheme was devised agreed or communicated in respect of that 2017 period.

Employment Judge Wynn-Evans
13 December 2018