# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs H Bagri

**Respondent:** Oracle Corporation UK Limited

**Heard at:** Reading **On: 28 and 29 March 2019**

**Before:** Employment Judge Gumbiti-Zimuto

**Appearances**
**For the Claimant:** Mr E MacDonald (Counsel)
**For the Respondent:** Ms S Omeri (Counsel)

# RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. There was a 50% chance that the claimant would have continued in employment if she was not unfairly dismissed.

3. The complaint of breach of contract is not well founded and is dismissed.

4. The claimant's complaint that the respondent failed to inform and consult as required by regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations (2006) is dismissed upon with withdrawal by the claimant.

# REASONS

1. In a claim form presented on the 29 August 2017 the claimant made a complaint that she was unfairly dismissed. The respondent denied the claim contending that the claimant was fairly dismissed because of redundancy. The claimant also made a complaint that the respondent failed to inform and consult as required under the Transfer of Undertakings (Protection of Employment) Regulations (2006), that claim has been withdrawn and is dismissed upon withdrawal.

2. The claimant gave evidence in support of her own case. The respondent relied on the evidence of Cathy Temple, Kealey Chapman, Sarah Hopkins

and Claire Bennett. All the witnesses produced written statements as their evidence in chief. I was also provided with an agreed trial bundle.

3. The parties agreed that the issues I must decide can be summarised as: (i) what was the reason for dismissal? (ii) was the claimant's dismissal substantively unfair? (iii) was the claimant's dismissal procedurally unfair? (iv) did the claimant's contract of employment contain an implied term to the effect that she was entitled to an enhanced redundancy payment of one month's salary per year of employment? If so, did the respondent breach such implied term? (v) If the claimant was unfairly dismissed whether this is a case for a ***Polkey*** reduction and or whether there should any reduction for the claimant's contributory conduct. I made the following findings of fact.

4. On 8 November 2010 the claimant commenced employment with NetSuite UK Limited as a HR Administrator. The claimant has a 1st class degree in Business and Human Resource Management and a Level 7 CIPD diploma.

5. NetSuite was a cloud computing company providing software to manage its clients' "financials, operations and customer relations." On 7 November 2016 NetSuite was formally acquired by the respondent and the transfer of the claimant's employment from NetSuite to the respondent took place on the 1 January 2017.

6. The claimant was notified in November 2016 (before NetSuite was merged into Oracle), that she was at risk of redundancy and that potentially her employment would end in May 2017. The claimant was told this by Caroline Martin, her line manager. The claimant and Caroline Martin had worked together for over six years and had a good relationship. At the time this was communicated to the claimant it was not a correct statement of the position. The correct position was explained by Wendy Temple, Vice President Huma Resources, at that time no decision on headcount had been made or communicated regarding NetSuite UK or the Claimant.

7. On 5 December 2016, Wendy Temple was informed that the Claimant and another employee had been told by Caroline Martin that they would be made redundant in May 2017. Wendy Temple contacted Caroline Martin querying who she received this news from. Caroline Martin explained that she had spoken to Timi Baxter (Senior Director of Employment Practices) and had been given the green light to pass this on to her team. Wendy Temple then contacted Timi Baxter. Timi Baxter stated that she did not tell Caroline Martin anyone would be leaving but had explained that their jobs were not changing, and any change or exit would be subject to appropriate consultation at a local level, and this is what Caroline Martin was to communicate to her team.

8. Wendy Temple explained to Caroline Martin that the information she had passed to the Claimant was incorrect: nobody was at risk of redundancy,

and Timi Baxter had never intended to convey the message that any staff would be leaving.

9. In an email sent on 23 November 2016 Cathy Temple referred to the claimant as “loyal and capable” and referenced her view of the claimant’s suitability for a role in HR Central (p111).

10. In September 2016 the respondent had advertised a vacant role of 'HR Consultant'. Wendy Temple considered that on paper this role aligned well with the Claimant's skillset and she arranged for it to be mentioned to the claimant. Wendy Temple emphasises that this was never proposed to the Claimant as suitable alternative employment for redundancy purposes but was flagged up with those employees, including the Claimant, who appeared to have the appropriate skillset and experience for the role.

11. The claimant was presented with the job description for the role by Caroline Martin. The claimant says that she was led to believe the respondent considered this to be a suitable alternative in the context of the supposed redundancy in about December 2016. The claimant was asked to provide an updated CV and was advised to prepare for an interview for the role.

12. The claimant met with Sarah Hopkins, who at the time was UK Central HR Manager, to discuss the role on 6 December 2016. During the meeting the claimant formed the view that the role was very different from her current role, more transactional, there were no opportunities for flexibility or for the claimant to support and partner with the business. The claimant decided that the role was not suitable for her.

13. On 14 December 2016 Cathy Temple met with the claimant. She informed the claimant that her role was not at risk of redundancy and spoke about the HR Consultant role. Subsequently the claimant informed Sarah Hopkins that she was not interested in the HR Consultant role. The claimant was later informed that the role had been offered to another person.

14. The claimant states that the respondent had no intention of retaining her after the transfer. She relies on the false start redundancy and the fact that she was not told of any changes that were to occur after the transfer. In addition, the claimant says that the respondent made no significant attempt to integrate her into the organisation or the HR team. Conversely the respondent says that the claimant did not seem genuinely interested in remaining with the business.

15. I am satisfied that there was some measure of misunderstanding about the possibility of redundancy in around December 2016, that created confusion and also perhaps some distrust on the part of the claimant. The matters that the claimant and the respondent refer to in support of their contrary positions are in my view in the main banal matters that would in other circumstances go unmentioned. I am unable to conclude that the

claimant was at this stage disinterested in continuing in employment with the respondent. On the other hand, I am unable to agree with the claimant's view that even at this time the respondent had no intention of retaining the claimant.

16. Kealey Chapman, Human Resources ('HR') Business Manager worked in the same team as the claimant during her time at the Respondent. She provided input into the claimant's planned work tasks.

17. On joining the respondent, the claimant's role involved assisting in the harmonisation process supporting transferring NetSuite employees, the claimant was based at NetSuite's premises. This was not unusual where there were transferring employees. The fact of the claimant being based at NetSuite premises was not a deliberate attempt to prevent the claimant from integrating into the wider team.

18. Kealey Chapman stated that throughout the claimant's transition the claimant was included in the team-wide emails and kept in regular touch with her.

19. Kealey Chapman states that if the claimant felt isolated from the team, she did not raise any such concerns with her, at the time she was included in the team's activities in the same way as any other new employee Kealey Chapman has seen over the year join the team.

20. In about February 2017 Cathy Temple performed a review of the HR team's resourcing needs and determined that a business reorganisation was required for the HR team and that the Claimant's role would no longer exist. In arriving at this decision Cathy Temple took into account input from Caroline Martin and the tasks the Claimant was assigned to do. The claimant's work involving transitioning NetSuite employees over to the respondent had been completed. Cathy Temple found that the tasks the Claimant was previously undertaking were made unnecessary through automation, self-service processes, or were centralised in other teams. The Claimant's role was unique within the respondent her responsibilities included HR consultancy work, administration work, as well as managing programs such as recruitment, compensation, and benefits. In the Respondent these latter functions are normally undertaken by centres of excellence which are separate from the UK HR team or outsourced to Oracle's shared services centre in Romania. The UK HR team is divided into business partners assigned to particular lines of business and the role profile is significantly different from that of the Claimant.

21. On 1 March 2017, Caroline Martin informed the Claimant that her role was at risk. The claimant considers that it is significant that this occurred *"simultaneous with the harmonizing of terms with Oracle*": "*on the day that employees were getting contracts I was getting redundancy, it was the second time*."

22. The claimant's evidence is that after receiving the letter of 1 March 2017 she had no contact with the HR team or any consultation meetings. The claimant denied that Caroline Martin carried out any consultation meeting with her: "Caroline Martin did not know what was happening … so could not consult with me". Caroline Martin did not encourage the claimant to seek roles on the respondent's web board. The claimant insists that she was interested in a role with the respondent "a large well-resourced organisation".

23. The claimant says that her only point of contact was Caroline Martin and she was no more informed than the claimant. The claimant says that Caroline Martine was also in transition from NetSuite and her own role was at risk of redundancy. (The claimant is wrong about this: Caroline Martin was not at risk of redundancy.) The claimant states that she raised her concerns with Caroline Martin and refers to text messages exchanged between herself and Caroline Martin. I have not been able to draw any general conclusions from the text messages produced.

24. The claimant points out that there are no notes of any consultation meetings that the respondent says took place. The claimant denied that her role was unique within the respondent but did not adduce any evidence in support of the assertion that the respondent has employees who sit between HR Central and HR Business Partners' that matched the nature of her role. The claimant states that she should have been placed in a pool with other employees but does not state which specific employees.

25. Cathy Temple's evidence is that there was no suitable alternative vacancy for the Claimant, no available job's description matched the claimant's skillset and experience which the Claimant was interested in applying or being considered for. The claimant has not referred to any roles that she was interested in or that existed with the respondent. The only specific role referred to was that of HR coordinator role (i.e. which had been available in about November /December 2016).

26. The respondent contends that the claimant, a HR professional, understood that Caroline Martin, as her manager, was the respondent's representative assigned to manage the redundancy consultation process.

27. Cathy Temple says that contrary to the claimant's evidence her understanding is that there were several discussions between the claimant and Caroline Martin. The respondent relies on two emails from Caroline Martin both sent after the claimant's employment ended and in response to the claimant's appeal, where it is stated that at the Claimant's request those meetings focused on the Claimant's external job search.

28. There is no direct evidence to contradict what the claimant says about the consultation meetings except Caroline Martin's email that says that the claimant did not want to work for the respondent.

29. The claimant was told that no selection pool or selection criteria were identified because there was no one else within the respondent carrying out the same or similar role.

30. Cathy Temple considered the Claimant should be in a pool of one because her role was unique.

31. Cathy Temple made the decision to terminate the Claimant's role because of redundancy. The Claimant was dismissed on 31 May 2017 and was paid her statutory and contractual entitlements in the June payroll.

32. The claimant appealed the decision to terminate her employment. The claimant contended that the termination was procedurally and substantively unfair. The claimant stated that she was identified for redundancy because she had transferred from NetSuite to the respondent. The claimant was not invited to an appeal meeting. The appeal process was conducted on paper.

33. The claimant's appeal was dealt with by Claire Bennett, Vice President, EMEA Human Resources. On receiving the claimant's appeal, the respondent informed the claimant that it was considering dealing with the claimant's appeal by way of written correspondence. The claimant did not object to this or ask expressly for the matter to be considered at a meeting. The claimant stated she was "Happy to have a call/meeting if required to talk through the appeal further it required."

34. Claire Bennett describes the procedure she followed in considering the appeal in the following way: "As part of my review of the Appeal, I read each document, often multiple times and also spoke to Cathy Temple (Senior Director at the time) and Sarah Hopkins (UK HR Central Manager at the time) when I felt I needed clarification around certain issues, I did not feel that the points raised within the Appeal required any further direct questions to the Claimant. I spent a number of hours reviewing the material and making notes. In addition, I spent a further few hours writing my reply to the Claimant's appeal to ensure that I was aligning my response with the points raised in the Appeal in a clear and thorough way."

35. Claire Bennett decided not to uphold the claimant's appeal. The claimant made a complaint to the employment tribunal.

36. In the case of redundancy the employer will normally not act reasonably unless he or she warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his or her own organisation.[1] The consultation must be engaged in at a time before the employer has made a decision that dismissals are to be made but after it has determined that there is

[1] Polkey v AE Dayton Services Limited [1988] ICR 142

more than a possibility that they might occur. The employer must consult and consider the employee's views properly and genuinely.

37. Individual consultation should be an opportunity to warn an individual that she or he has been provisionally selected for redundancy; to confirm the basis for selection; provide an opportunity for the employee to comment on her redundancy selection assessment; give consideration as to what, if any, alternative positions of employment may exist, and an opportunity for the employee to address any other matters she or he may wish to raise. The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided, it also helps employees to protect themselves against the consequences of being made redundant.

38. As a general rule, tribunals will expect an employer with sufficient resources to take reasonable steps to ameliorate the effects of redundancy by giving detailed consideration to whether suitable alternative employment is available. The employee placed at risk should be offered an available vacancy even if it is at a lower salary or is of lower status than the post from which he or she is being made redundant. A dismissal may be considered unfair if no consideration is given to finding him or her another job within the respondent company.

39. The determination of the selection pool is a matter for the employer. The employer must demonstrate that it has genuinely applied its mind to the question.

40. The burden is on the claimant to establish a breach of contract. In a case of breach of an implied term based on custom and practice. It is for the claimant to show that the term is able to be implied and that it has been breached. In order for term to be implied on the basis of custom and practice the claimant must show that the term is notorious, certain reasonable, and not contrary to the law; and something more than a mere trade practice.

Conclusions

41. **What was the reason for dismissal?** The claimant says that the reason for the dismissal was the transfer itself and relies on the following matters: the claimant had been told by the respondent that individual consultation would start on 18 April 2017 and run to 31 May 2017; there were no formal consultation meetings; the claimant's role was not unique; there is no documentary evidence underpinning the restricted selection pool.

42. The respondent denies that the reason for the claimant's dismissal was the transfer. The respondent relies on the efforts made to integrate the claimant into the business and contends that the claimant was welcomed into the business in the same way as any other employee. The respondent relies on the email correspondence between the Cathy Temple and Vance Kearney (p111) as showing a desire to retain the claimant as

an employee. It was not until the claimant's work transitioning fellow NetSuite employees was nearly complete that the need for the claimant to carry out work of a particular kind diminished. The respondent contends that contrary to the claimant's account that her role was not unique in the respondent in fact it was unique in its mix of HR consultancy work and administration work.

43. I have concluded that the respondent had no intention of making the claimant redundant in November 2016 and the suggestion of redundancy at that time arose as a result of the mistaken understanding of Caroline Martin. The evidence suggests that the claimant was fully engaged in her role from 1 January 2017 performing the task of transitioning the NetSuite employees to the respondent. I accept the evidence of Cathy Temple that she carried out a review of the respondent's requirements in HR and found that the claimant's role was not streamlined with the respondent's business. This in my view is evident from the fact that Cathy Temple initially considered that the HR Consultant role aligned well with the claimant's skill sets.

44. Any failure in the respondent's consultation with the claimant during the redundancy process arose from Caroline Martin's performance of her role as the claimant's line manager and does not assist me in reaching a conclusion as to the reason for the claimant's dismissal.

45. My conclusion is that the claimant was dismissed because of redundancy Cathy Temple performed a review and determined that the Claimant's role would no longer exist. This was because the tasks the claimant was assigned to do, involving transitioning NetSuite employees over to the respondent had been completed, the tasks the claimant was previously undertaking were unnecessary because of automation or were centralised in other teams.

46. **Was the claimant's dismissal substantively unfair?** The claimant contends that the dismissal was unfair because there was a selection pool of one. The claimant refers to the lack of documentation showing justification for the selection pool being limited in this way e.g. job descriptions compared. The claimant says that there should have been consideration of employees carrying out work of that particular kind in a pool with the claimant. The claimant however does not refer to any specific roles other than the HR Consultant role and the view of Cathy Temple that the role was suitable for the claimant. The claimant says that this role should have been included in the pool for selection with the claimant's role.

47. The respondent states that the size and composition of the selection pool are a matter for the employer. The respondent states that it gave consideration to the composition of the pool and due to the uniqueness of the role no selection pool or criteria was identified. The respondent points to the failure of the claimant to complain about this until the appeal stage

and her failure to identify any role which like her role sat between HR Central and HR Business Partners that matched her own.

48. In considering this part of the claim I have asked myself whether the respondent has genuinely applied its mind to the problem of selecting the pool. The respondent's position on the selection pool was made clear from the letter of the 1 March 2017 in which it was stated that: *"Due to the uniqueness of this role no selection pool or selection criteria was identified when making the decision as there is no one else with Oracle Corporation UK Ltd carrying out same/similar role."* The respondent at the outset had considered the question whether the problem of the selection pool and concluded it was a pool of one.

49. The respondent's position that the claimant's role was unique has not been successfully challenged. While the claimant has insisted that the role was not unique she has not identified a single role that should have been in the pool. The claimant has referenced the HR Consultant role, however even in respect of this role the claimant cannot say that the role was the same or similar to her role, the claimant's position is that it was not. The respondent's position is that while the role was one which was suitable for the claimant's skill set it was not the same or similar role. Therefore, it appears to me that the respondent has shown that the claimant's role was unique.

50. The respondent in my view was entitled to conclude that the claimant's role was unique and treat it accordingly by placing it in a selection pool of one.

51. The claimant argues that there was no consultation after the 1 March 2017. The claimant says that there is no contemporaneous evidence of proper consultation despite the issue having been raised during the appeal. The claimant says that the absence of formal records is evidence of the absence of formal meetings and that at the time that appeal was heard Caroline Martin was an employee of the respondent, so the respondent could have secured whatever evidence there was available from Caroline Martin at that time. The claimant's evidence was that there was no adequate consultation. The claimant says that her evidence should be preferred to the hearsay contained in the emails dated 14 June 2017 (p245) and (p245A) in respect of consultation. The claimant says that consultation in a large organisation with a large number of well-trained HR professionals will come with some contemporaneous record of the consultation process if it took place.

52. The respondent states that there was no duty to consult until mid-February 2017 when it was known that the claimant's role was no longer required. The claimant was then notified by her line manager that she was at risk of redundancy over 6 weeks before the formal consultation process commenced. The claimant's consultation meetings with the Caroline Martin were focussed on Caroline Martin assisting the claimant to find employment outside the respondent. The respondent relies on the

comment made in paragraph 6 of the claimant's witness statement which refers to "negativity and poor reputation" of the respondent. The respondent points out that in her appeal letter the claimant did not spell out what she meant by excepted "follow-up" from the respondent. The respondent contends that the claimant is qualified and experienced HR professional and she did not complain about a deficiency in the redundancy process at the time. The respondent states that there was no reason for Caroline Martin to lie and that to reject the contents of the emails provided by Caroline Martin is to accuse her lying to Cathy Temple.

53. I accept the claimant's evidence about the way that the consultation took place. The claimant said that there were no formal consultation meetings and that any interactions with Caroline Martin were in social gatherings outside the work place. The claimant denied that there were consultation meetings in Caroline Martin's office: "there were no meetings at which colleagues were not present where I could discuss the redundancy." The claimant stated that she did raise the fact that she expected follow up from the respondent after the 1 March 2017 letter. The claimant disagreed with the content of the email of 14 June 2017 (p245A). The claimant accepted that she was attending interviews externally. She denied not looking on the respondent's website for roles or that she said that she had not done so. The claimant expected consultation on why the respondent thought that her job was unique and further explanation on why her role was made redundant. I accept the claimant's evidence on these matters.

54. In my view the absence of any contemporaneous documents dealing with consultation is telling. Where the claimant's supposed attitude is as described by the respondent to show no interest in trying to avoid dismissal, I would expect to see some contemporaneous recording of that even where, as here, the claimant and Caroline Martin enjoyed a good relationship.

55. I reject the respondent's argument that the claimant as a HR profession would complain about inadequate consultation and the fact that the claimant did not do so shows that there was adequate consultation. Firstly, the claimant's evidence in cross examination was that she did complain. Secondly even if the claimant did not complain during the consultation period about the adequacy of the consultation this is not evidence that claimant was "invited to and benefited from consultation with Ms Martin, her line manager and that at such consultation meetings she had the opportunity to focus on any topic she chose and in the event chose to focus on seeking Ms Martin's assistance to apply for external roles."

56. My conclusion is that there was no proper consultation with the claimant about ways to avoid redundancy.

57. In December 2016 when the claimant was offered the opportunity of taking on the role of HR Consultant there was no redundancy. Within the respondent's organisation there was no role like the claimant's role which

was a mix of HR consultancy work and administration work. The role of HR Consultant was raised with the claimant because the claimant had the appropriate skillset and experience, further Cathy Temple considered that there was scope to "shape and grow the role" and maintain the claimant's existing salary. It also allowed the claimant to be integrated into a role in the respondent's HR Structure. In December 2016 the claimant did not consider the role suitable to her.

58. The HR Consultant role was filled by an external applicant so at the point of the claimant's redundancy was being considered this role was no longer vacant. In December the claimant could have been offered a HR consultant role even after the vacant position had been offered to an external candidate because at that time as part of integrating the claimant into the respondent's organisation the respondent was willing to look at creating a role for the claimant and offering her a trial in such a position.

59. By April 2017 the position had changed. Decisions had been made about the reorganisation of the HR team meaning that the claimant's NetSuite role would no longer exist. The claimant did not express an interest in revisiting the HR Consultant role as a way to avoid redundancy dismissal. The respondent did not suggest it. In those circumstances failing to offer the claimant the HR consultant role in April 2017 was not unreasonable.

60. The respondent points out that the claimant never expressed any interest in redeployment by the respondent in any role. The parties did not produce any documentation showing the claimant express an interest in redeployment by the respondent during the consultation period. The evidence shows the claimant's engagement with Caroline Martin aimed at finding employment external to the respondent. The respondent did not put to the claimant any alternative role during the redundancy consultation period. There were several vacancies available at the redundancy, Cathy Temple's evidence, which was not challenged, is that there was no role that was suitable alternative employment for the claimant. There was nothing done to draw the claimant's attention to any role. The claimant did not point to the vacancy list and suggest that she had an interest in any vacant role.

61. The claimant states that the appeal did not alter the decision or rectify any of the procedural failings. The claimant in her appeal stated that there was no meaningful consultation, however, Claire Bennet in her conduct of the appeal did not interview her. I am satisfied that the claimant's criticisms of the appeal are well made. The way that the appeal was conducted could not have cured the deficiencies that arose in the process that had gone before. In particular it could not have addressed any deficiency that there was in the consultation process.

62. I have come to the conclusion that the claimant's dismissal was unfair because there was a failure to carry out meaningful consultation with the claimant. Even if the claimant is to be criticised for her engagement with the consultation process before the appeal the respondent's failure to

engage with her concerns and address them at the appeal stage also makes the claimant's dismissal unfair.

63. **Was the claimant's dismissal procedurally unfair?** For the reasons set out above I am of the view that the claimant's dismissal was procedurally unfair because there was a failure to consult and that the appeal failed to address the claimant's appeal on the grounds that there was a failure to carry out consultation. In the appeal Caroline Martin was faced with the claimant's assertion that after the 1 March there was no consultation and the 14 June email from Caroline Martin. Without speaking to either Caroline Martin or the claimant she rejected the claimant's appeal. In my view the criticism of the Claire Bennet's evidence of her approach to the appeal was justified.

64. **Polkey:** I must assess the loss flowing from the dismissal, that requires me to assess for how long the employee would have been employed but for the dismissal. Where the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for the employer to adduce any relevant evidence on which it wishes to rely. I must have regard to all the evidence when making that assessment, including any evidence from the employee herself.

65. I must have regard to any material and reliable evidence which might assist in fixing just compensation. A degree of uncertainty is an inevitable feature of the exercise.

66. The respondent submits that there is a 100% certainty that the claimant would have been dismissed in any event, given the uniqueness of her role, the respondent's lack of need for it and claimant's disinterest in redeployment within the respondent. The respondent contends that the claimant's compensation should be reduced to nil. The claimant was notified of her dismissal 3 months before the dismissal took effect, any unfairness found did not result in any loss to the claimant.

67. The claimant says that this is not a case where a ***Polkey*** reduction should be made because of the respondent's failure to ask her whether she would be interested in alternative employment and failure to offer her alternative employment before dismissal. It is said that the claimant's reaction to an offer of a job that was at one time unattractive to her may change when the position is that she is threatened with dismissal on the ground of redundancy.

68. In arriving at my conclusion of the ***Polkey*** question the uniqueness of her role, the respondent's lack of need for it are of limited significance. While relevant and important matters in considering the decision on redundancy, having regard to the matters which result in unfairness in the circumstances of this case, when considering ***Polkey*** they are matters of limited significance. In this case the crux of the case arises from

considering the question whether the claimant was disinterested in redeployment within the respondent and so she would have certainly been dismissed.

69. The evidence before me shows that there was no suitable alternative vacancy for the claimant. A list of contemporaneous vacancies was produced, the claimant did not show any interest in any of the roles at the time and did not contend during the case that any of them were suitable alternative employment.

70. The claimant had not expressed any interest in HR Consultant role in December 2016 when she was not at risk of redundancy. The claimant made no attempt to revisit the HR Consultant role in the redundancy process or at the appeal stage where the reference to the HR Consultant role was in terms stating that it was not suitable alternative employment. In this hearing the claimant has sought to rely on the respondent's failure to revisit the HR Consultant role in support of her case suggesting that she might have considered it in redundancy situation where in a non-redundancy situation she would not consider the role.

71. The respondent relies on the emails of 14 June 2017 from Caroline Martin to support its case that the claimant was disinterested in redeployment by the respondent, pointing to the fact that the claimant was seeking support in her search for external roles but not seeking internal roles. This is supported by the claimant's inaction in terms of search for roles within the respondent. However, it appears to me in circumstances where the respondent says that there were no suitable alternative roles for the claimant the absence of evidence of the claimant seeking internal role is less significant.

72. The failure to consult denied the claimant the possibility of exploring with the respondent ways to avoid dismissal. In consultation with the respondent it would have been possible to explore the availability of the HR Consultant role discuss alternative roles (which although not suitable alternative roles) the claimant might have been willing to consider in order to avoid dismissal.

73. In carrying out the ***Polkey*** exercise of assessing how long the employee claimant would have been employed but for the dismissal. I remind myself that the "position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."[2]

[2] Software 2000 v Andrews [2007] ICR 825

74. The object of consultation in redundancy includes looking for ways to avoid dismissal. Had meaningful consultation taken place there is a chance that the claimant would not have been dismissed. The respondent has produced evidence to show that the claimant was disinterested in redeployment: the claimant strongly contests this and insists that she would have would have welcomed the opportunity of continuing her career with the respondent. My conclusion is that the claimant may not have been settled on leaving the respondent's employment, but she did nothing to advance her chances of retaining employment by seeking out roles.

75. I make an assessment that the claimant would have had a 60% chance of continuing in employment if the respondent had entered into meaningful consultation with her. Consultation may have identified a role that the claimant is ordinary circumstances would not be interested in but in redundancy she would have considered.

76. **Contributory Fault**: Section 123(6) provides that: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

77. Section 123 (6) is concerned with causation. The question is whether the action referred to in section 123(6) caused or contributed to the dismissal to any extent. What is the conduct that amounts to contributory fault and is it blameworthy conduct? I am unable to identify any conduct on the part of the claimant that caused or contributed to her dismissal on the grounds of redundancy. The claimant's refusal to move into or trial the HR consultant job in December 2016 did not cause or contribute to the decision which was not made until 1 March 2017. A failure by the claimant to engage in the redundancy process may in appropriate circumstances cause or contribute to a dismissal on the grounds of redundancy but in this case, there is no evidence that it did. This case is not one where the question of contributory fault in fact arises to be determined.

78. **Breach of contract**: Did the claimant's contract of employment contain an implied term to the effect that she was entitled to an enhanced redundancy payment of one month's salary per year of employment?

79. The claimant seeks an award representing an enhanced redundancy payment equivalent to six months' pay. The claimant relies on the email from Caroline Martin to the Cathy Temple dated 20 February 2017. The relevant parts of the email read as follows: "Following out discussion on Friday, I have reviewed our Employee Handbook which is actually silent on redundancy. I can confirm, however that our custom and practise was to pay one month per year of service. Please see below 2 recent cases that needed Oracle approval, pre-LEC. I can provide details of previous payment is if necessary." The two cases referred to did not provide evidence of the custom and practice being followed. The examples showed the custom and practise being asserted. In one case it was not

followed in the other it is not clear whether it was followed or not. The full email chain from which the above email is taken concludes with the position being recorded in an email from Paul Lewis as follows: "NetSuite have no formal policy for their redundancies in the UK. The two cases that Caroline mentions … are the only ones that have occurred in NS, since July, and the amounts requested were intended to represent a worst-case scenario so a negotiation could happen pre-CIC. The intent, from Caroline, was to close James Cronin at the equivalent of 12 months base salary (her had 15 years' service) which is where we ended up."

80. The claimant did not state that she was entitled to an enhanced redundancy payment on receiving her provisional selection for redundancy despite the fact that the letter only set out that she was entitled to a statutory redundancy payment. The claimant did not raise it in her appeal. I note that the claimant did not assert the existence of a right to receive an enhanced redundancy payment until after her employment had been terminated in correspondence from her solicitor.

81. I remind myself that the burden is on the claimant to establish a breach of contract. Where the claimant says there has been a breach of an implied term based on custom and practice the claimant must show that the term is notorious and certain and reasonable, not contrary to the law and something more than a mere trade practice. The evidence before me fails to show this. The evidence shows that it was asserted and acted on in one case. In another it is not known whether it was followed. The claimant's actions fail to show behaviour that suggests that it was in her mind a the time of the dismissal that she was entitled to an enhanced redundancy payment: I attach less weight to this factor as the claimant may simply not have known about the term at the time. However, that in itself bearing in mind the claimant is a highly qualified HR profession is a factor that has some bearing on my conclusion as to whether the custom and practise existed. My conclusion is that I cannot be satisfied on balance of probabilities that the alleged custom and practice formed part of the claimant's contract of employment employment. This part of the claim fails.

**Remedy hearing**

82. The parties are to confirm in writing within 28 days of the date on which this judgment is sent to the parties whether a remedy hearing is required.

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Employment Judge Gumbiti-Zimuto

Date: 23 April 2019

Sent to the parties on:
..1/5/19.....

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For the Tribunals Office