



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs R Emrys-Roberts

v

Hertfordshire County Council

Heard at: Bury St Edmunds

On: 22, 23, 24, 25 and 26 July 2019
19 & 20 August 2019 (Discussion days – no parties in attendance)

Before: Employment Judge Laidler

Members: Ms L Daniels and Mr B Smith

Appearances

For the Claimant: Ms S Bewley, Counsel.

For the Respondent: Mr N Clarke, Counsel.

RESERVED JUDGMENT

1. The respondent has failed to satisfy the tribunal that it had a potentially fair reason for dismissal within section 98 Employment Rights Act 1996 and it follows that the tribunal must find the dismissal unfair.
2. If the respondent had satisfied the tribunal that it had a potentially fair reason for dismissal of the claimant namely redundancy or some other substantial reason, the tribunal would still have found that the respondent acted unfairly in treating that reason as a sufficient reason for dismissing the claimant within the meaning of section 98(4) Employment Rights Act 1996
3. The respondent has failed to establish that had it followed a fair procedure dismissal of the claimant would still have occurred and there will be no deduction from any compensatory award under the principles in Polkey v A E Dayton Services Limited [1988] ICR 142
4. The claimant has not established facts from which the tribunal could conclude that she was subjected to direct and/or indirect sex discrimination and such claims fail and are dismissed.

5. Case management orders in respect of a remedy hearing will be set out in a separate document.

RESERVED REASONS

1. The claim in this matter was received on 19 June 2018 when the claimant brought claims of unfair dismissal, age and sex discrimination arising out of her dismissal by the respondent on grounds of redundancy. The respondent defended the claims in its response of 3 August 2018. It asserted that the claimant was made redundant, (or had been dismissed for some other substantial reason) potentially fair reasons for dismissal and that it had acted fairly in all the circumstances of the case. The claims of discrimination were denied.
2. There was a case management discussion before Employment Judge Cassel on 31 January 2019. The issues were clarified at that hearing but there were some issues raised about them by the claimant's representative and the tribunal had before it in the bundle an amended and now agreed document setting out the issues to be determined by this tribunal. These were as follows: -

“Unfair Dismissal

1. What was the reason for the Claimant's dismissal?
2. Was the Claimant dismissed for a potentially fair reason under s.98 Employment Rights Act 1996, namely redundancy or SOSR?
3. Did the Respondent act reasonably in treating that reason as the reason for dismissing the Claimant? Did the Respondent follow a fair process in carrying out the Claimant's dismissal and was the process rendered unfair in particular by the following?
 - (a) the Respondent failing to provide the Claimant with information setting out the business case for redundancy, including provision of information about any approval of a business case at departmental board level as required by the Respondent's redundancy procedure together with the information about who had the authority to make this decision;
 - (b) the successful candidates being informed of their appointments before the Claimant's appeal was heard
 - (c) the Respondent failing to follow its own Organisational Change Policy, including failing to:
 - i. provide information on slotting and ring-fencing roles to the Claimant in line with the Respondent's Workforce Design Guide and Selection Criteria Guidance and Matrix, including identifying whether slotting or ring-fencing, as set out in the JKK/010463/02361188/Version: Page 2 Respondent's

Organisational Change Policy, applied to the roles of Team Leader Definitive Map & Enforcement and Team Leader Countryside Management; or

- ii. follow the relevant slotting or ring-fencing process (as appropriate) set out in the Organisational Change Policy, e.g. by not completing a redundancy selection criteria matrix for the candidates applying for those roles and arranging for this to be reviewed independently by Human Resources prior to arranging the competitive interview process which led to the Claimant's redundancy
 - (d) the Respondent failing to provide an independent panel for interview;
 - (e) because the Claimant's manager did not meet with the Claimant to advise on the proposed method of implementing the selection for redundancy as suggested in the Respondent's organisational change policy; or
 - (f) because there was no meaningful consultation with the Claimant prior to her selection for redundancy.
4. Was the decision to dismiss within the reasonable range of responses open to the Respondent?

Sex Discrimination

Direct Discrimination

5. The Claimant relies upon Richard Cuthbert and Lee Tyson as her comparators.
6. Was the Claimant treated less favourably? The less favourable treatment the Claimant relies upon is:
- (a) Tony Bradford (the manager in charge of the selection process) cutting across her during meetings.
 - (b) the Respondent and/or Tony Bradford:
 - i. failing to inform the Claimant of, or giving her any guidance relating to, the proposed selection criteria for the interview process for the new team leader posts in a meeting on 22 January 2018 and/or by email following this meeting and/or by means of any further information or clarification relating to the new roles and selection process (paragraph 7 ET1).
 - ii. asking questions that solely related to management experience and competence in the interview of the Claimant on 6 February 2018.
 - iii. failing to ask any technical questions during the interview of the Claimant on 6 February 2018.
 - iv. Failing to give the Claimant a fair and equal opportunity to demonstrate her suitability and competence for the posts available (paragraph 12 ET1).

- (c) The Respondent failing to offer the Claimant a Team Leader Role.
 - (d) The Respondent dismissing the Claimant.
7. If the above treatment amounts to less favourable treatment, was the reason for the Claimant's treatment the Claimant's sex?

Indirect Discrimination

8. Did the Respondent apply a provision, criteria or practice (a "PCP")? The Claimant relies upon the following PCP:

The provision of higher marks to interview candidates who supply answers to questions about managing change which are not based on a collaborative approach.

The Respondent denies that the above amounts to a PCP.

9. If the above does amount to a PCP:
- (a) Did the PCP put women at a particular disadvantage in comparison to men?
 - (b) Was the Claimant disadvantaged by the PCP?
 - (c) What was the reason for applying the PCP?
 - (d) Was the aim of the PCP legitimate? The Respondent avers that if a PCP is found the legitimate aim relied upon is to ensure the most suitable candidate was offered the role.
 - (e) Was the PCP a proportionate means of achieving that aim?

Remedy

10. If the Claimant's claims are upheld the Claimant seeks compensation for unfair dismissal and discrimination:
- (i) What financial compensation is appropriate in all of the circumstances?
 - (ii) Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate?
 - (iii) Has the Claimant mitigated her loss?"
3. The tribunal read the witness statements and relevant documents on the first day of the hearing and then heard the oral evidence of the witnesses. It concluded with the submissions of the representatives on the last day of the listed hearing but there was insufficient time to complete its

deliberations which were adjourned to 19 and 20 August 2019 hence these reserved reasons.

4. The tribunal heard from the claimant and the following on her behalf: -
 - 4.1 Robert John Fenton.
 - 4.2 Andrea Corine Trendler.
 - 4.3 Helen Denton
5. From the respondent the tribunal heard from: -
 - 5.1 Tony Bradford.
 - 5.2 Simon Brown.
 - 5.3 Martha Goodhill.
 - 5.4 Melanie West.
 - 5.5 Lindsay Edwards.
6. The tribunal also had a bundle of documents running to 835 pages. It was not necessary to go to a significant number of those documents. In view of time constraints, it was agreed the tribunal would focus on matters of liability although any issues about whether there should be a Polkey deduction in the event of the tribunal finding the dismissal to be unfair would also be dealt with within the ambit of this hearing.
7. Prior to this hearing by email of 9 April 2019 the claimant withdrew her age discrimination claim leaving the claims of sex discrimination as the only Equality Act claims.
8. From the evidence heard the tribunal finds the following facts.

The Facts

9. The claimant joined Hertfordshire County Council on 6 June 1994 and was appointed as one of four Definitive Map Officers in a new team that was set up. In 2002 she was appointed as Definitive Map Team Leader. The tribunal saw the job description for that role. It was an H9 grade and the claimant was responsible for seven Definitive Map Officers. She reported to the Head of Rights of Way and one of her duties and responsibilities was to assist that individual in the management of the unit and deputise for him or her when appropriate.
10. There has been no dispute at this hearing that the claimant had a high level of expertise. She has a degree in Geography and a Diploma in Countryside Management. In the June 2018 Journal of the Ramblers

Hertfordshire and North Middlesex area (STILE) there was published a thank you to the claimant on her leaving the respondent. It was stated that “her positive influence on the Rights of Way network at both national and county levels has been immense”. It described how at national level the claimant had been a key member of the working party which had proposed legislative changes simplifying the processes so that historic routes can be recorded before the cut-off date at the end of 2025. Her detailed knowledge of Rights of Way law and her unfailing courtesy and objectivity were described as having helped resolve countless difficult problems. Under her leadership the team had produced exemplary reports and clear legal orders. What was described as a complex and long-standing problem on the Tyttenhanger Estate “would not have been resolved without her competence, knowledge and experience”. The journal stated that it was “astonished” that the council was dispensing with the claimant’s services at a time when it was failing to make real progress with the very large back log of modification applications. On behalf of the Ramblers they thanked the claimant for all that she had done for the users of the Rights of Way network.

11. The claimant has lectured at Wolfson College in Oxford for the Rights of Way Law Review (a group set up by lawyers to promote learning and understanding about Rights of Way). She sat on the Rights of Way Committee at the House of Lords (representing the Local Government Association) from 2006 until her dismissal. The claimant was also on the Stakeholder Working Group that was set up by Natural England on 1 October 2006 looking at how to change and improve the Rights of Way legislation. The respondent is one of seven pioneer authorities in the country for implementation of the Commons Act 2006 as a result of which the claimant has lectured other authorities when the implementation of the Commons Act was rolled out to the remaining registration authorities in England in 2014. The claimant has also given lectures to the Institute of Public Rights of Way Officers at their annual conference and has given training courses for them.
12. Whilst with the respondent the claimant represented it on many occasions in Rights of Way matters including the Houses of Parliament, public enquiries and at Crown Court such as in enforcement cases. In 2014 she was appointed as the respondent’s expert witness for a High Court case on behalf of the Hertfordshire Highways in a highways matter.
13. The respondent must make decisions about Rights of Way and Village Greens, and the claimant had delegated authority to make decisions on behalf of the council. Until 2015 she made decisions with the support of solicitors in the council’s legal team who provided advice. At that time the solicitor who dealt with Rights of Way matters retired. Due to the claimant’s knowledge and experience the manager of the Environmental Law team which dealt with Rights of Way agreed that he was happy for the claimant to make decisions without the support of a solicitor in every decision meeting. The claimant has provided a training course for this team of solicitors in Rights of Way.

14. The above findings have been taken from the claimant's witness statement for this hearing on which aspect she was not challenged.
15. When the claimant was appointed as a Team Leader in 2002 Richard Cuthbert was her manager and he reported to Head of the Environmental Management Group Simon Airies. This was last time the claimant was involved in a competitive interview process. In April 2008 the claimant's application under the Career Grade Scheme to be re-graded to M2 was successful.
16. Prior to the restructure the Access and Rights of Way Service (ARoW) was formed from two very different teams, the Access Team and the Definitive Map Team. The Access Team included the Enforcement Officer. The Definitive Map Team included an officer who dealt with Common Land issues and the team had statutory duties regarding the legalities of recording and changing the records of Rights of Way and Registers for Village Greens and Common Land. All officers deal with applications made, draft orders for sealing by legal services and where necessary appear as the Council's expert witness at public enquiries. The claimant was not involved in the Countryside Management Service (CMS) and accepts in her witness statement she is not clear about the work provided by it.

Proposed re-structure

17. The first indication of proposed budget reductions to the Countryside Management Service & Access and Rights of Way Service was a document dated 8 July 2014 (page 75a). The report set out the details of proposed budget reductions over the next two years to the Countryside Management Service (CMS) & Access and Rights of Way Service. It acknowledged in paragraph 2.3 that whilst every effort would be taken to minimise the impact on frontline service delivery the proposals if agreed would lead to 'an increased risk of legal challenge to the authority'. At paragraph 5.2.6 dealing with the impact of a reduction in funding it was acknowledged that this:

 '...may increase the risk of successful legal challenge if the authority is found not to be complying with its statutory duties. It is anticipated that the Definitive Map Team will remain at current revenue levels, in order to reduce a historic backlog of applications and to deal with and expected increase in workload ahead of proposed changes to rights of way legislation in 2026.'
18. The proposal was to reduce the CMS net original budget by £125,000 from 2015/2016 and in addition to reduce the funding for the Access and Rights of Way Service by £100,000 from 2015/2016. The claimant acknowledges that she was aware that proposals for restructure were being discussed but not until the summer of 2017. She became involved in re-structure meetings in or about early September 2017. These were attended by herself, Richard Cuthbert, Tony Bradford and Lee Tyson from CMS. At the time Tom Hennessy the then Head of Transport, Access and Road

Safety was responsible for implementing the re-structure. The tribunal accepts the claimant's evidence (paragraph 17) that Tom Hennessy stated at this time that all four managers would keep their jobs following the re-structure. He gave no explanation to them as to why.

Phase 1 – 13 November 2017

19. The objective for this proposal was stated as being to: -
 - 19.1 Achieve efficiency savings of at least £150,000 from the revenue costs over the next two years.
 - 19.2 That necessary efficiency savings be secured from a mix of grants and cost reductions, income generation and “only where necessary staff cost reductions”.
 - 19.3 That they secure a structure that reflected the need to align skills, capacity and resources as effectively as possible.
 - 19.4 That the combined teams be co-located within the existing floor space at County Hall.
 - 19.5 That the quality of service outcomes and reputation of the respondent be maintained or enhanced.
20. The proposal was that CMS & Access and Rights of Way Service be merged into one unit under shared leadership. More could be achieved to improve performance, establish consistency of approach and develop efficiency by bring together the two teams and thus ‘widen the knowledge capital available’. This also presented an opportunity to rename it to better reflect its purpose and rationale, and it would become known as the Countryside and Rights of Way Service. The proposed new structure was set out in section 7 supported by two charts, one showing the current structure and one the new structure. It was proposed that the saving would be delivered by a combination of reducing spend on grants, increasing income and pay cost reductions.
21. A new post of Head of the combined service had been created which would require significant leadership and capability to bring together two separate units with different operating environments and cultures. That new post would be recruited to as an open competition role which meant that applications would be invited from anyone in the Access and Rights of Way & CMS teams. The aim was to have that person in post by 1 December 2017 and that post holder would then take forward the

remainder of the review and implement Phase 2 of the consultation process.

22. The new structure (page 175) had the new Head of Countryside and Rights of Way with responsibility for Countryside Management and Rights of Way. The claimant's role of Definitive Map Team Leader was still present as an M2 role under the Team Leader Rights of Way. Reporting to her would be two senior Definitive Map Officers (grade H9) who each would have two Definitive Map Officers reporting to them (grades H6-H8). It was expressly stated in the Phase 1 document that it might result in some staff redundancies, however where possible they would aim to reduce the staffing establishment through the uptake of voluntary redundancy and early retirement. Full consultation on any proposed redundancies would take place at the Phase 2 stage.
23. An implementation timetable was given with dates provided in November for further discussion and feedback and for requests for voluntary redundancy and early retirement closing on 27 November 2017.
24. The way in which staff were to provide their feedback on the proposals in phase 1 was to email a designated email address AskKAREN@hertfordshire.gov.uk. The tribunal's attention was drawn to various emails from different staff during November 2017. A number of these raised issues with the number of managerial/team leader positions suggesting that it was top heavy with managers

Organisational Change Policy

25. This policy seen at page 751 states that it applies to all the respondent's employees and sets out how the respondent will manage organisational change which is stated to include:

'Changes to terms and conditions

Reduction in number of employees to achieve cost savings and/or improve efficiencies which may result in redeployment or redundancy'.

It must be followed in conjunction with the relevant guides and toolkits. HR must be informed of any organisational proposals as soon as possible.

26. Proposals for organisational change which will affect employees' terms and conditions and/or where re-deployment and/or redundancies may be required must be approved at departmental board level. A business case must be written which includes the following: -

- "Proposed changes including rationale, role profiles and person specifications for any new or revised posts in the new structure.
- Timescales and methods of consultation.

- How employees will be affected by the change including the number and description of those roles at risk of redundancy and the total number of employees of that description employed at the establishment.
- Proposals for implementing the change including the selection criteria for posts and timescales.
- Proposals for avoiding or minimising the effect of redundancies.
- Financial implications including potential redundancy costs, methods of calculation and savings that will be achieved.

If the organisational change process is approved, a manager will be nominated to oversee the change with the support of Human Resources.”

27. The policy specifically states that when creating or amending a structure consideration must be given to ways of minimising compulsory redundancy and appointing employees into posts. Reference is made to the toolkit.
28. There is reference throughout to the involvement of HR. On the front page of the Phase 2 document Rachael Hide is named as ‘HR lead’. The tribunal did not hear evidence from Rachael Hide and no witness statement was produced. It saw minimal emails in the bundle evidencing her involvement. The tribunal was told by Melanie West from HR who did give evidence of a generic nature that Rachael Hide still worked for the respondent but was on annual leave whilst confirming that it was Rachael who had been involved in the restructure. It was not until cross examination of Mr Bradford on the fourth day of the hearing that it came to light that Rachael Hide had been in tribunal on the first day of the hearing. Counsel for the respondent stated that he had believed she was on annual leave for the whole period of the hearing. The tribunal has heard no direct evidence from the HR lead as to any advice or guidance given. Tony Bradford stated throughout his evidence that he was working with HR but the tribunal had no evidence of the detail of HR involvement and certainly no minutes of any meetings or other notes where they could see that.
29. The claimant raises as an issue before this tribunal and raised at her appeal that the respondent failed to provide her with information about the approval of the business case at departmental level as required by the respondent’s policy. The tribunal accepts the evidence of the appeals officer Lindsay Edwards (as noted in the minutes of the appeal) that Simon Airies confirmed that the proposed restructure had initially been set out in the Integrated Plan and was signed off by the full County Council. This was then handed to Tom Hennessey to implement. The appeal officer was satisfied, as is the tribunal, that all the relevant required information with regard to the business case was included in the Phase 1 and 2 consultation documents.

Selection Criteria Guidance and Matrix

30. This document seen at page 757 of the bundle provides that when a new structure is created there are a number of methods available when appointing employees to available posts. Each of those criteria are outlined. All decisions made when appointing employees to post must be fair and consistent. When a new structure is created and there are new roles or significant changes, these will be graded or re-graded in line with Hay Job Evaluation.

Selection criteria

31. The following specific areas covered: -
- 31.1 Slotting;
 - 31.2 Open competition;
 - 31.3 Ring fencing;
 - 31.4 Compulsory redundancy.

Slotting

32. The policy specifically provides as follows: -

“Slotting must be used wherever possible with individuals being slotted to posts (with predominantly the same job role) within the revised structure without going through a selection process.

Slotting must occur when the duties and responsibilities of a post are predominantly the same as those of an individual’s existing post and the salary is normally not more than one grade higher or lower and there is no other employee who has a comparable claim ...

Process

- Identify the substantive post occupied by the employee.
- Identify the relevant post in the new structure.
- Assess whether the duties and responsibilities of this new post are “predominantly the same” as the employee’s current post. This can be done by comparing the old job description to the job description of the new post.
- Assess whether the salary for the post in the new structure is not more than one grade higher or lower than their current salary.

- Establish whether there are any other employees with a comparable claim for the post.”

Ring fencing (Selection pool)

33. The policy provides that ring fencing will occur in situations where a role in the new structure is the same as one in the existing structure but there are more employees than the number of posts available. Such posts are those considered as potential suitable alternative employment and therefore must be similar to the employee’s existing post. The ring fence to roles within the new structure will be determined by the manager leading the change process having sought advice from Human Resources and undertaken consultation with the recognised unions. These employees will then be given the opportunity to apply for identified ring fenced positions in the new structure by completing an expressions of interest form.

34. The process is described as follows: -

“Identify the group of employees who will be placed in the selection pool (categorised either by each role or group of roles). In its widest context an entire team could form a selection pool.

Ring fencing will be informed by a number of factors including: -

The grading level – based on a specific grade.

The service area – usually a re-structure or reduction will be undertaken within a defined service area that will form a natural selection pool.

The function – each either tasks or main purpose of the role should be the same within the selection pool.

Specialisms within a function – there may be consideration to limit the selection pool to specific specialisms.

The line manager will complete a redundancy selection criteria matrix for each employee which will then be reviewed independently by Human Resources who will challenge where required.

Following the completion of the selection criteria matrix if more than one employee has the same number of points a further selection process will be adopted for example a competitive interview process conducted by an independent panel.”

35. The Selection Criteria Guidance and Matrix was seen at page 761. This was in tabular form but with a Guide on a second page. The table contained the following headings: -

35.1 Measure;

- 35.2 Method of assessment;
 - 35.3 Suggested scoring guidelines;
 - 35.4 Points available;
 - 35.5 Score;
 - 35.6 Evidence.
36. The various measures to be marked were: -
- 36.1 Qualifications, skills and experience;
 - 36.2 Performance;
 - 36.3 Disciplinary warnings;
 - 36.4 Attendance.
37. In relation to the first measure of Qualification, Skills and Experience the suggested scoring guidelines were that the manager was to assess this by reviewing the persons job description, person specification and any other supporting documentation for example PDP. There were other options given which could be tests, assessments or interview.
38. For the measure of Performance, the last PMDS or appraisal rating including values and behaviours, and any warnings issued for performance were the method of assessment.
39. The disciplinary warnings section was to be measured by the disciplinary record.
40. Attendance was measured by the sickness absence record over the past year including warnings and total number of days sickness absence (over any number of occasions).
41. The points available were 100 in total with 40 being available for qualifications, skills and experience; 40 being the maximum for performance; 10 for disciplinary warnings and 10 for attendance.

Head of Countryside and Rights of Way post

42. Both Richard Cuthbert and Tony Bradford were interviewed for this post and Tony Bradford appointed to the role leaving Richard Cuthbert as Access and Rights of Way Team Leader. From then on Tony Bradford managed the re-structure.

43. By email of 12 December 2017 Lee Tyson wrote to Tony Bradford about interview training. He had been booked onto a course on 24 January 2018. He queried whether he needed still to attend. Tony Bradford replied on the same day and stated: -

“Once the phase 2 is launched there is a cascade process and you will be re-engaged then I would suggest. This is likely to include interviewing for the SPO [Senior Project Officer] and PO [Project Officer] positions if you are successful with your application – the former likely to be open competition. You might want to shift to a later date but if you can do it in Jan then it would make sense to keep the date.”

44. In cross examination on this point Mr Bradford stated the first line where he said, ‘you will be re-engaged’ had to be read with the next line where he stated ‘if you are successful’. The tribunal finds even with that next sentence he was giving Lee Tyson an indication he would be appointed to one of the managerial roles otherwise why would he have stated that in the first line of the email.

45. By letter of 20 December 2017 Tony Bradford wrote to Kevin O’Daly of Unison. He set out how the service was required to save £150,000 from the 1 April 2018 and that it would be achieved through “some grant reductions, income generation as well as inevitably a small reduction in staff”. He explained how he had been appointed to the Head of Countryside and Rights of Way and that he was now responsible for taking forward the re-organisation process. He had set a date for the launch of Phase 2 being the 10 January 2018 and a meeting was planned for that day. He advised that there would be 29 staff in scope with one full time equivalent reduction required. He went on to explain: -

“It is proposed to use selection criteria of open competition, ring fences and slotting. Interviews will be used as a selection method. The selection criteria matrix was considered and did not provide the differentiation between individuals required to make selections and therefore interviews will be used. As post are confirmed in the structure it may ease pressure on the ring fences and where possible slotting will occur.”

No evidence was produced as to how, at that point in time the selection criteria matrix was ‘considered’ and how the conclusion had been reached that it did not ‘provide the differentiation between individuals required’.

Phase 2 Consultation

46. There was a subsequent email to Mr O’Daly on 10 January 2018 which referred to their meeting on 3 January 2018. No further information has been given to this tribunal about that meeting or the views of the trade union.
47. In the email of 10 January 2018 Mr Bradford stated that 25 posts would fall into the selection pool for redundancy. This included that of the claimant.

He could provide more details if required. He went on “the proposed method of selecting employees who may be dismissed for redundancy will be using the agreed selection criteria including interviews in accordance with the Organisational Change Policy”. He attached a copy of the consultation for redundancy Phase 2.

48. This was launched on Wednesday 10 January 2018. The claimant was unable to attend as she needed to take her 87 year old father to a medical appointment that had been arranged a long time in advance.
49. On 10 January 2018 at 16:54 the claimant received along with others Tony Bradford's email about Phase 2. Attached to this were the following:
 - 49.1 Phase 2 consultation document;
 - 49.2 Phase 2 FAQs;
 - 49.3 Application form;
 - 49.4 Working pattern and flexible working form;
 - 49.5 Job outlines (link provided).
50. This email made it clear that for ring fenced and open competition posts the selection method would be by way of interview. The selection criteria matrices may be used to slot to grades. Application forms should be submitted by 29 January 2018.
51. The consultation document explained that in the responses received to the Phase 1 consultation document there were several themes running through that feedback. The main one was that there had been an imbalance of management positions in the proposed structure between the Countryside Management Team & Access and Rights of Way Team. The response to this was that the levels of management in the Rights of Way part of the proposed structure would be reduced through the deletion of the Definitive Map Team Leader position, the claimant's role. The Team Leader Rights of Way and Team Leader Definitive Map roles would now be replaced by a Team Leader Definitive Map and Enforcement post.
52. Other than stating that this was the response to the consultation there is no rationale provided as to why it was the claimant's role that was to be deleted as opposed to others and no explanation as to why it had been retained at Phase 1 but was now to be deleted, other than the staff view that Phase 1 was top heavy with managers.
53. As before structure charts of the teams as they had been, and as now proposed were produced and annexed to the consultation document.
54. Under a heading 'Final Outcomes/Changes' it was noted that 'following feedback from Phase 1 one of the changes was that the selection criteria

matrix would not be used as a selection method but may be used to support the process of slotting grades if applicable. Interviews would be used as the selection method and to appoint employees to roles in the new structure.

55. It is not clear to the tribunal how this emerged from the Phase 1 consultation. In Tony Bradford's witness statement at paragraph 20 he gave a different explanation. He stated that he needed to decide whether or not to use the selection criteria matrix. His recollection is that he explored, in conjunction with HR how the matrix would be employed. An example of the matrix was a p785. He concluded that 'the matrix would not provide sufficient distinction between candidates for each role' and therefore chose to use interviews only. There was no evidence from HR about this discussion and no notes or other record of when or how it was discussed and this conclusion reached.
56. The Frequently Asked Questions document included with the Phase 2 Consultation stated that the Selection Criteria Matrix 'may' be completed where slotting to grades is required. If the matrix process was not conclusive alternative assessment maybe used. The policy does not use the word 'may' but states that the redundancy selection criteria matrix 'will' be used. It then states that if having done so more than one employee has the same number of points a further selection process will be adopted which may be interview. That presupposes that the matrix has been completed for all affected employees.
57. Lee Tyson raised an issue with Tony Bradford by email of the 23 January 2018. In it he quoted from the Frequently Asked Questions as set out above. He did not consider that the ring fencing for the Countryside Management Team Leader M3 post had been undertaken consistently. He did not consider that the Definitive Map Team Leader areas of responsibility could be considered to be 'predominantly the same' as those in the Countryside Management Team Leader role. He questioned whether the claimant's job outline or Job Evaluation Questionnaire had been updated more recently to explain this decision. He mentioned in his email he had raised this issue at his 1-1 and in an email of 19 January but did not feel he had received an acceptable response.
58. Tony Bradford forwarded this to Rachael Hide. In one of the few emails the tribunal saw from Rachael Hide she responded to Tony Bradford reminding him of the process and in fact cut and paste the section from the Organisational Change Policy dealing with Ring Fencing (as set out at paragraph 34 above). What she did not do was answer Lee Tyson's question which he said in his email he had raised previously and not received an answer to.
59. There was a reply from Tony Bradford on the 25 January 2018 when he noted that Lee Tyson was challenging the inclusion of the claimant in the ring-fence for the Team Leader Countryside Management in the new structure. All that he said was that he had sought HR advice and that 'having reviewed the proposed restructure I can confirm that it remains my

intention to proceed with the current ring-fencing' but gave no explanation or justification for this. He stated that the quotation Lee Tyson had used from the FAQ contained an error in that it related to slotting in and not ring-fencing.

60. Helen Denton, who gave evidence on behalf of the claimant, had also raised the issue of ring fencing to the AskKaren email address. To start with in an email of 11 January she queried why the Team Leader Definitive Map and Enforcement role had been ring fenced.

61. in her email response of 12 January 2018 @ 17:10 Rachael Hide stated that the Team Leader Definitive Map and Enforcement Role:

'is deemed not to be a new role as it incorporates the Job Outlines that currently exist in roles within the current structure, where employees have a claim on the role; therefore the ring fence pool is in place'.

62. Helen Denton queried this in a response on 15 January stating that this was not what the Phase 2 Consultation Document said. She questioned how 'does this sit with your response...' if in that document it was referring to a post (Team Leader Definitive Map) being deleted and a new one created.

63. Rachael Hide replied as follows:

'...The Job Outline for this post incorporates Job Outlines that currently exist with the structure. Therefore there are employees with a claim on the role based on their current Job Outlines and therefore the ring-fence selection pool applies. There are employees in more than one selection pool where their Job Outline means there is a claim on more than one role in the structure. The process of identifying the selection pools has been applied in a fair and consistent method.'

64. Helen Denton persisted with her enquiry stating in an email of 17 January that she still did not understand. She queried how it was said that the current Access Rights of Way Team Leader had the skills of a Senior Definitive Map Officer and said even Richard Cuthbert would not suggest that he was skilled enough to 'research the most complicated cases, apply the facts of 400 year old documents to case law, interview witnesses and act as HCC's expert witness at public inquiry'. She questioned also how the claimant was said to have the skills of an Access Officer. The reply to that email has not been seen.

65. The timetable confirmed that the 29 January 2018 was the closing date for applications for roles and interviews for the ring fenced posts would be between the 29 January and 23 February 2018.

66. By letter of the same date, 10 January 2018 the claimant was written to individually. Tony Bradford wrote to advise her that due to her post being deleted she was being put in a ring fence and was at risk of redundancy. The letter confirmed that the process for selection for redundancy was

based on the council's Organisational Change Policy which could be found on the Intranet. The claimant's post had been selected for deletion due to the requirement of the work having 'diminished or ended'.

67. The letter went on to make it clear that those in the ring fence would be selected for redundancy by way of an interview. Those who scored the lowest would be selected for redundancy and that would be confirmed in writing on 5 March 2018 following consultation.
68. The formal consultation process would end on 28 February 2018. Staff at risk of redundancy would have a 1-1 meeting with a manager. Those would take place between 10 January and 23 February 2018 and the claimant would shortly be notified of an appointment.
69. The claimant had a meeting in Birmingham on 11 January 2018 and did not meet with Tony Bradford until 12 January 2018 upon her return. She had no recollection of the meeting and no notes were taken. As she had only just read the email sent to her she had little time to formulate questions.

Job outline – Team Leader Definitive Map and Enforcement (page 345)

70. When the claimant read the job outline for the new role, she believed it described the role that she was already performing. The only part of the role which she was not experienced in was the council's contract and financial regulations & EU procurement legislation, although she was aware of those. No evidence was given by the respondent to suggest that this was a large area of the new team leader role. The tribunal saw the job evaluation questionnaire for the role (page 298a) and it is not mentioned.
71. Under the heading of main areas of responsibility was the requirement to manage and provide leadership, support and guidance to the definitive map and common/TVG [Town and Village Green] functions. Additionally, line management for senior Definitive Map Officers, technical and enforcement officers, establishing and maintaining effective and appropriate staffing levels in accordance with the respondent's policies. Counsel for the claimant took Mr Bradford through the seven specific areas of responsibility listed and in relation to the first six he accepted that they were what the claimant did. It was only in relation to the last "secure commitment from other organisations to deliver service objectives and achieve income" the he answered he was not sure if the claimant did that. Mr Bradford was quite evasive when it was put to him that this set out the main areas of responsibility that the claimant was already doing. He answered twice that it was constructed using two job descriptions. Only when the Judge put the question to him again did he then accept it was what the claimant was doing.
72. In the person specification it was stated that it was essential that the successful candidate was able to demonstrate "all round managerial ability

and a keen sense of enterprise". The post holder would also lead on appropriate technical specialisms having extensive experience in the delivery of duties, policy, procedures and best practice in respect of "ARoW definitive map common/TVG and enforcement".

73. What could be seen from an analysis of pages 283 and 284 (the before and after structure charts) was that the claimant's line management responsibilities remained within the new Definitive Map and Enforcement Team Leader role with the addition only of line management responsibility for an Enforcement Officer and a Technical Officer.

74. There were nine bullet points of the necessary attributes of the person to be appointed and Mr Bradford accepted that save for the last two they were generic management and leadership skills. The last two were much more specific to the job role: -

"Extensive knowledge and experience of documents, legislation and processes for management of the definitive map and commons and village green registers.

Experience of dealing with complex enquiries and complaints, public enquiries in a high degree of conflict resolution skills."

75. As stated at the outset of these findings there is no dispute that the claimant had extensive knowledge of all the technical requirements of her originally defined role as were then set out in the new Team Leader role. This was a point also being raised by Helen Denton. She gave evidence which was not challenged of public enquiries she had been involved in.

76. The claimant recalls being sent an email on Tuesday 16 January 2018 from Tony Bradford, for herself, Richard Cuthbert and Lee Tyson to attend a meeting with him later that day. No copy of that email is now in the bundle but the claimant kept copies of the guidance and pro-formas that were attached to it. These were seen at page 787 and 791 respectively. Page 787 was guidance for 1-1 meetings during the consultation process and Page 791 was consultation feedback form.

77. The 1-1 with Tony Bradford was arranged for the claimant on Friday 19 January 2018 but she had to cancel as she was feeling unwell. It was re-arranged for Monday 22 January 2018. It became apparent to the claimant at that meeting that the proposal was final and that Tony Bradford would not be making any changes to what was being proposed.

78. The claimant prepared some questions in advance of the meeting seen at page 309.

79. One of the claimant's questions was "what the balance was between managerial and technical expertise" and she has jotted down: -

"Leadership 25%
Legal 20%
Commitment 10%

Client 20%
Senior projects 15%
? 10%”

80. The claimant followed this up with an email on 25 January 2018 (page 331) and Tony Bradford confirmed in reply that the final category was “outcome performance recording and reporting/agency management”. He said to her that the percentages were only approximate and likely to shift as the workload requirements altered. They were just key areas and there would inevitably be other activities. From the evidence heard it appeared that those categorisations came from the job evaluation questionnaire seen in the bundle at page 298b. The categories and percentages appear to replicate the main areas of responsibility listed in that document and the percentages are the same although the candidates did not see the job evaluation questionnaire at that time.
81. The next question the claimant had noted was in her words in her witness statement “I understand the principles of the selection process, but not the process please could you explain and who would be interviewing at each stage”. The claimant the tribunal accepts was clearly voicing concerns as to how it would work in practice. Tony Bradford’s notes at page 313 just circle the box saying that the claimant had understood the selection process was by interview but provided no further information. The claimant followed this up in an email on 25 January 2018 (page 329) when she queried the level of detail that was expected in the application form of herself and the two other candidates and asked whether the application form would be an important part of the decision-making process. The reply was “It would not be appropriate for me to provide guidance on quantity or quality of your application”.
82. Mr Bradford accepted in evidence that there was nothing stopping him replying to all three of the candidates. The tribunal accepts that would have been fair and equitable between them. His position was that all the candidates had the job outline. He felt that was adequate and did not consider forwarding the claimant’s request to HR or seeking advice on it, although he acknowledged that he could have done that with the claimant’s email. This would have been a role that the tribunal would have expected the HR lead to take in responding to such an enquiry.
83. Counsel for the claimant took Mr Bradford to the role that the claimant applied for in 2002, the job description for which was seen in the bundle at page 53. Page 56-57 contained the person specification and set out in detail the skills and abilities, experience, knowledge, education, training and qualifications required with cross referencing to the job description number and setting out in columns on the right-hand side how each aptitude would be assessed, whether by application form, interview or test. Mr Bradford acknowledged when taken to this document that it would indeed have been fair and helpful to let the claimant know what they were looking for at the interview. That was the last and only experience the claimant had of an interview process since being appointed. The tribunal

can therefore appreciate why she sought further information as this detail was not being provided during this restructure.

84. As already referred to, Lee Tyson was due to attend interview training with Mr Bradford and in his email of 12 December 2017 confirmed he had booked the course for the 24 January 2018 (page 243). This is around the same time as the claimant was raising queries about the interview process. Mr Bradford acknowledged that the attendance at the interview training would have meant that Mr Tyson was up to date on interviewing. He acknowledged he would have understood the policies that were being applied. Mr Bradford denied that he socialised with Mr Tyson outside work but did see him at work. There was no evidence of a social relationship and if they did occasionally have lunch in the staff canteen that is just part of normal working life.
85. It also relevant that both Richard Cuthbert and Tony Bradford had applied for the Head of Countryside and Rights of Way role (which Tony Bradford got) so Richard Cuthbert also had very recent interview experience which the claimant did not.
86. The meeting with Tony Bradford overran and the claimant was not able to ask all the questions she had written down for herself on page 309.
87. The claimant's evidence is that the issue of slotting was never properly addressed at this time. The claimant raised points about this at her appeal which will be set out below.
88. Other colleagues had questions that they posed on the "AskKaren" email address about the application form. Ellie Beach, Projects Officer raised on 24 January 2018 that in the relevant skills and abilities section it stated, "Please limit this section to the box below", but when you wrote in the box it expanded. She asked for clarification as to how much could be written. Karen Hendry replied that it was suggested you complete up to an A4 page but if you found you went over by one or two paragraphs that would be okay. Lee Tyson then contributed to the email correspondence on 25 January 2018 saying he had discussed the issue "and can confirm that there is no limit to the size of the box". The key message he said was to be concise and that there were no extra marks for extra volume.
89. The claimant attended a free half day Pathways workshop on preparing for interview and CV writing on 25 January 2018.
90. The claimant submitted her application form on 27 January 2018 (page 351). Her narrative ran to one and a half pages. The application was primarily targeted at the Team Leader Definitive Map & Enforcement role although she stated in the conclusion that she believed she had the necessary skills, knowledge, experience and sense of enterprise to fulfil either that role or the Countryside Management role. Richard Cuthbert's application was dated 29 January 2018 and spanned just over four pages. He also applied for both roles. Lee Tyson applied only for the Team

Leader Countryside Management and a Senior Project Officer Land Management role and his application ran to just over two pages.

Evaluation matrix

91. Mr Bradford used an evaluation matrix to assess the expression of interest forms submitted for the team leader posts (page 371). He had asked Simon Brown and Martha Goodhill to be on the panel with him. He asked them to meet with him to do the evaluation matrix, but Martha Goodhill was not available. This exercise was therefore carried out by him and Simon Brown. The only document in existence about this is page 371 and the joint scores are included in the table. Original documents showing how the scores had been arrived at by each of the interviewers were Mr Bradford told the tribunal lost in scanning. There were comments on those original documents. Another document was prepared but after the event (page 427) for the appeal. The tribunal therefore had no evidence as to how these scores were arrived at and on what basis.
92. Having carried out the assessment of the expression of interest form Richard Cuthbert scored a total of 54, Lee Tyson 52 and the claimant 37.
93. It was not clear to the tribunal why the application forms were marked in this way and what it added to the process as the respondent's case is this did not form part of the selection process which was by interview only. Martha Goodhill did not participate in it. Even if Simon Brown did not see the matrix in this format until recently, he had had the discussion with Tony Bradford when marking the application forms and would have been aware already that the claimant had been marked the lowest.
94. It is also relevant that on this matrix the two team leader roles are distinguished between even though there was only one application form and the competencies were said to be generic across the two roles.
95. The Countryside Management role was highlighted in green. For technical leadership in relation to that role the claimant only scored 1 meaning that one of the assessors gave her no marks. For collaborative working/service development she scored 4.
96. For the Definitive Map and Enforcement role the claimant scored 8 for technical leadership with Richard Cuthbert scoring 7. The claimant scored 8 for statutory activity and Richard Cuthbert scored 9. The remaining categories and marks were:

Line management and staff leadership – the claimant was awarded 6, Lee Tyson 10 and Richard Cuthbert 6;

Project delivery – the claimant was awarded 3, Lee Tyson 8 and Richard Cuthbert 5;

Change management – the claimant was awarded 3, Lee Tyson 9 and Richard Cuthbert 8 and

Communication the claimant was awarded 5, Lee Tyson 8 and Richard Cuthbert 7.

97. Mr Bradford told the tribunal that he created the matrix by drawing things out of the job outlines.
98. It was not clear from the evidence heard why Martha Goodhill could not have been sent this matrix and have completed it on her own, and then the scores amalgamated.
99. Further, it is not clear what the point of this marking was. What Tony Bradford said in his witness statement was that the scoring was shared with Martha Goodhill prior to the interview and that he did this to “set the context for the forthcoming interviews. The evaluation matrix was also designed to help the panel draw out from the applications the experience, competence and knowledge of the applicants”. Martha Goodhill’s evidence was that she did not see this document until a conference with counsel a few months before this hearing. It was not discussed at the end of the interview process. This therefore makes it difficult to understand what the point of it was and whether it did in fact influence certainly Tony Bradford and Simon Brown even before they had seen the candidates at interview.
100. Tony Bradford presented the Management Statement of Case for the claimant’s appeal (page 573) He made specific reference to the scoring of the Expression of Interest Forms at page 597. He stated they were scored to evaluate the candidates against the criteria for the particular roles as in the Job Outlines, ‘including the technical and managerial requirements of each post’. He went on that:

‘EOI and interview questions enabled both the technical expertise for the roles and competencies for leadership, management, change management and values to be assessed. Selection was based on the interview and the EOI score taken into account where the total scores at interview were close between candidates and therefore required an additional assessment score, provided by the EOI’

He acknowledged that only he and Simon Brown undertook that scoring on 31 January 2018

Interviews

101. The interviews were held on 6 February 2018 and the panel was Tony Bradford, Simon Brown and Martha Goodhill. The candidates were not interviewed for the individual roles but it was a generic interview for the two available posts of Team Leader Definitive Map and Enforcement, and Team Leader Countryside Management.

102. The tribunal saw in the bundle the various sheets completed by each of the members of the panel. There were only six questions. These were:-
 - 102.1 Why the candidate thought they were suitable for the role, their key attributes and what they would contribute.
 - 102.2 How did they see the combined services operating going forward to ensure successful delivery of projects and statutory functions.
 - 102.3 Immediate actions and priorities, and how they would change over the coming months.
 - 102.4 How the candidate planned to manage parts of the business with which they were less familiar.
 - 102.5 What needed to be introduced to ensure the service was resilient to change over the next 3-5 years and how the candidate would help lead this.
 - 102.6 To give an example that the candidate had demonstrated the value "Every penny counts" in their current role.
103. These questions were drafted by Tony Bradford and sent to the other members of the panel on 1 February 2018 for comments. Simon Brown was happy with the questions and made no changes to them. Martha Goodhill recalled sending back a set of questions she had used recently but did not recall any changes being made to those that had been proposed. She was however happy with them. Again, there was no evidence of any HR involvement in the drafting of the questions.
104. The marking sheets used by the panel members gave suggested areas that the candidates might focus upon. For example, in relation to question 3 about immediate actions the first suggested answer was acknowledge the disappointment of the other candidates and agree a way forward to get their support. Where candidates did give suggested answers a tick has been placed beside these. Other answers have been written on the right-hand side of the form.
105. The claimant's total scores were; 8 from Simon Brown, 15 Martha Goodhill and 9 from Tony Bradford.
106. Richard Cuthbert's scores were; 23 from Simon Brown, 24 from Martha Goodhill and 19 from Tony Bradford.
107. Lee Tyson's scores were; 22 from Simon Brown, 20 from Martha Goodhill and 25 from Tony Bradford.
108. The claimant therefore scored the lowest of the three candidates. In relation to some of her answers she was only given a "1" by Simon Brown and Tony Bradford.

109. A lot was made in cross examination that some scores were changed by interviewers and others were not. The tribunal accepts the evidence of Martha Goodhill that she would change her scores as the interview progressed and more was said. Whereas Simon Brown would wait until the end of a particular question to allocate his score. The tribunal is satisfied that different people have different techniques for scoring at interview.
110. The tribunal accepts that all the panel found the claimant to be unimpressive at interview. They went so far as to state that she was unappointable to the role. Martha Goodhill stated in her witness statement at paragraph 5 that it appeared that the claimant had not prepared for the interview very much at all and acted as if she was “entitled to the job”. She expanded upon this in cross examination that she was surprised by the brevity of her responses and that there was not enough depth and remembered thinking that the claimant was either not prepared, was shy or could not get the words out. She kept trying to come up with an explanation as to why the answers were not as good as they should be for someone of that grade and experience.
111. Simon Brown also found that the claimant came across as unprepared and that it was difficult to draw out information from her.
112. In her appeal and to this tribunal the claimant raised concerns about question 5 which required the candidate to illustrate their example of ensuring the service is resilient to change over the next 3-5 years, by telling the panel about a significant change they had managed. It is this that the claimant relies upon as a ‘provision, criterion or practice’ that was indirectly discriminatory. The claimant referred to a previous 25% cut which had been made to the Rights of Way Service. Rather than that cut being carried out over 4 years it was achieved by agreement with the team in 1 year. The details the claimant gave to the interview were that she had persuaded 4 officers to agree to work 4 days thereby “retaining business resilience rather than making one person redundant”. Martha Goodhill found that to be a satisfactory example but felt it would have been better if there had been more examples and depth, and more explanation of the claimant’s role in making it happen and what the results were; the panel needed to have more. Simon Brown stated in relation to this question that it appeared that the claimant had offered the problem out to staff and it was the staff who had provided the answer. He did not feel this example evidenced leading change and how she dealt with delivering a message of change and difficult conversations which were the leadership skills required for the new roles.
113. The claimant was told on the evening of the interview by Tony Bradford that she had not been successful, and that Richard Cuthbert and Lee Tyson were to be appointed to the roles.

114. The claimant met with Tony Bradford the next day, 7 February 2018 and received some feedback from the interview. His notes of this meeting were seen in the bundle at page 429 but were not seen by the claimant until she received the tribunal bundle. This note states he offered feedback on the interview focusing on some of the positives namely her strengths in technical areas and attention to detail, but that other candidates were stronger in change management, leadership and management of budgets. Other interviewees gave stronger responses on how they were going to make the new structure work.
115. Tony Bradford emailed the claimant on 9 February 2018 stating he had provided her as part of their conversation on 7 February with some feedback but that the organisations policy was not to provide verbal feedback. He would reiterate the feedback given if she wished him to do so. The purpose of the email really was that the claimant had on her expression of interest form indicated the priorities were the two team leader posts available within the structure, however she had not indicated any other positions in which she was ring fenced on the form. He was going to commence interviews for those in the coming week and would need to consider the claimant for those posts unless she informed him otherwise. The claimant confirmed that she did not consider the two H9 officer roles as suitable alternative employment.
116. The claimant attended a meeting with Tony Bradford and Jack Byford on 1 March and took a member of her team, Carole Young who made notes. These were seen in the bundle at page 465. The claimant did not recall much about this meeting and it was adjourned as she had become distressed. At the end of Carole Young's notes she noted "feedback in writing". The claimant never received any such feedback.
117. On 28 February the claimant met with Simon Aries to discuss the timing of her redundancy and a proposal she had for the council employing her for an extra 4 months until the end of September, which would have taken her past her 55 birthday. Her notes were at page 457.
118. At a meeting 8 March with Tony Bradford he gave the claimant feedback that her example of managing change using a collaborative approach was in his view an easy option and not as strong as others who had given answers that illustrated more challenging of change.

Appeal

119. By letter of 18 March 2018 the claimant submitted her appeal with a six page supporting statement and attached documents.
120. In her grounds of appeal, the claimant submitted that Tony Bradford had talked across her at meetings including consultation meetings and she felt that her input was not valued. She was concerned that when he interviewed her he would have been biased against her as he had demonstrated by his behaviour in previous meetings. She was concerned

the decision had already been made at the beginning of stage 2 to get rid of her post.

121. With regard to the interview, no questions were asked with regard to the legal aspects of the role even though in the percentage terms it had been stated to form 20% of it. The claimant felt it possible that the weighting for each aspect of the roles were not properly considered under the interview process and that all her skills and abilities were not properly evaluated.
122. The claimant also argued that when she was given feedback she was told that her answer to one of the questions showed a more collaborative approach. It had been suggested this was a “easy option”. The claimant had noted that using the collaborative approach is what is suggested for dealing with change through redundancy given on the Government website. It is a typical female approach of managing change and potential conflict and therefore marking her down for her response could potentially be seen as a form of discrimination. The appeal was heard by Lindsay Edwards on 6 June 2018. Her handwritten notes were seen in the bundle at page 605.
123. Richard Cuthbert was called by the claimant to the appeal. He gave evidence of the claimant being talked over at meetings by Tony Bradford and how they came up with a device whereby he would assist her to ensure that she had her voice heard and was not cut off. In answer to a question as to whether the claimant was singled out, he answered that he would not use that word but felt it happened to her more. It happened to men too.
124. Tony Bradford presented the management case. Simon Aries was called as a witness.
125. The claimant put questions to Tony Bradford. She asked why she had not been slotted (page 610). She stated that the questions did not allow her to highlight her qualifications and experience (page 611).
126. Following consideration of the evidence Miss Edwards found no evidence to support the claimant’s allegations and dismissed her appeal.
127. The tribunal was referred to a letter in the bundle from Tony Bradford of the 29 June 2018 to someone clearly using the service who had submitted online feedback. In this letter he explained how the review had seen a reduction in the number of posts in the Definitive Map and Enforcement Tea. He explained that historically:

‘in response to a growing number of applications to modify the Hertfordshire DM (Definitive Map) over the years, HCC has resourced the growth of this team from a ½ to 3 posts in 1994 and to 5 posts plus a team leader towards the turn of the Century. This was again increased in past years with the appointment of a more junior position. The latest iteration of this team is made up of 4 DM Officers, 2 Senior DM Officers and a DM team leader who also manages the Enforcement Officer. Their roles have been re-focused and other areas of activity spread across the wider team and volunteer activity’

He went onto explain how they hope to derive more income generating work within the team which they hoped would lead to future recruitment on a 'self-funding' basis. that would then present and increased resource and reduce pressure on the tea. He stated that the writer was correct that the team faced 264 outstanding applications to modify the Definitive Map and that some cases on its books may be up to 20 years old. There was nothing in this response to a member of the public to suggest that the work of the Team had reduced.

The Law

128. Redundancy is a potentially fair reason for dismissal within s98(2)(c) Employment Rights Act 1996 (ERA). It is defined in section 139 ERA as follows:

Redundancy.

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

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

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

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

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

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

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

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

129. Another potentially fair reason for dismissal relied upon by the respondent is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" (section 98(1)(b) ERA).

130. Redundancy does not only occur where there is a poor financial situation within the employer although of course it can do. It can occur where there is plenty of work, but the employer decides to reorganise because the business is overstaffed. The amount of work may remain the same, but the decision is taken that a lesser number of people are required to perform the same functions.

131. A reorganisation may result in redundancies within the definition or it may not. If work is only redistributed amongst existing staff there may be no reduction in the number of employees doing work of a particular kind.

132. To establish 'some other substantial reason' the employer only has to show a 'sound good business reason' for the reorganisation. (Hollister v National Farmers Union [1979] ICR 542 CA). It is not for the tribunal to make its own assessment of the advantages or otherwise of the employer's decision to reorganise and the employer need only show that there were clear advantages in the changes.

133. The claimant also claims direct sex discrimination under Section 13 Equality Act 2010

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

134. The burden of proof provisions provide at section 136 that the tribunal must find discrimination if:

'...there are facts from which the court could decide, in the absence of an explanation, that a person (A) contravened the provision concerned...'

135. It is well established that a difference in treatment and difference in protected characteristic is not sufficient to pass the burden of proof to the employer. (Madarassy v Nomura International plc [2007] ICR 867 CA)

136. Indirect discrimination

Section 19 Equality Act 2010

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are—
- age;
 - disability;
 - gender reassignment;
 - marriage and civil partnership;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

137. Ms Bewley for the claimant handed up British Airways plc v Stamer [2005] IRLR 862 in which the EAT held that the tribunal was entitled to find that the employers decision was a 'provision' notwithstanding that it was a discretionary management decision not applying to others. There was no necessity for the provision to actually apply to others. In the light of the wording of the subsection the detriment to be considered can be that of the hypothetical comparator.
138. The EHRC Employment Code confirms that the term 'provision, criterion or practice' is capable of covering a wide range of conduct including for example 'any formal or informal policies, rules, practices, arrangement, criteria, conditions, prerequisites, qualifications or provisions' paragraph 4.5. It is not only written and clearly applied rules and regulations that are covered.

Submissions

139. The representatives handed up skeleton arguments and spoke orally to them.

Conclusions

Unfair dismissal

140. Reference will be made to the paragraph numbers in the list of issues as set out above.
141. List of issues paragraphs 1 & 2. It is for the respondent to satisfy the tribunal that it had a potentially fair reason for dismissal falling within section 98 ERA. The respondent's primary case is that this was redundancy. The tribunal does not accept that a redundancy situation existed. There is no evidence that there was a diminution in the requirement to carry out work of a particular kind as envisaged by s139 ERA. There was a requirement to save money but none of the contemporaneous documents evidenced that the respondent needed fewer people to do the work. The work continued. There are documents, for example the initial plans and the reply to a service user, where the respondent was explaining that there may be further delays due to the cuts.
142. Other than its statement in the Phase 2 documents that the staff feedback had suggested that the Phase 1 proposed restructure was top heavy with managers the respondent provided no explanation for the deletion of the claimants role. The work remained and was transferred into the new role of Definitive Map & Enforcement Team Leader. It never explained the rationale for needing fewer people to do that work.
143. The respondent as an alternative reason seeks to rely on 'some other substantial reason'. That has not been established either. The respondent has not shown its sound business reason for that decision. No justification has been shown for selecting the claimant's role as the one to be deleted. The work she was doing remained. This was demonstrated by the Phase 2 structure charts for the old and new structures. The claimant's work and indeed role were still there but within the new title of Definitive Map & Enforcement Team Leader. The respondent had decided to restructure to make the required savings. In Phase 1 the claimant's role was still there. Merely as a result of the staff feedback stating that the proposed structure was top heavy with managers did the respondent then move, with no further explanation or justification, to the removal of the claimant's role.
144. It follows that as the respondent has not satisfied the tribunal it had a potentially fair reason for dismissal within section 98 ERA the dismissal of the claimant is unfair. If the respondent had satisfied the tribunal that it had a potentially fair reason for dismissal, either redundancy or some other substantial reason the tribunal would still have found the dismissal of the claimant to be unfair in all the circumstances of the case.

145. List of issues 3(a). With regard to producing its business case the tribunal accepts that the respondent produced Phase 1 and 2 documents consultation documents although the Phase 2 documents did not give adequate explanation for the deletion of the claimant's role.
146. List of issues 3(b). That the other candidates were told they had been successful at interview before the determination of the claimant's appeal cannot go to unfairness. An employer must tell everyone interviewed at the same time whether they have been successful or not. It would be unworkable not to do so
147. List of issues 3(c) The respondent did fail to consider slotting in. There is no evidence as to whether that was even investigated. The tribunal has concluded from the evidence heard and an examination of the claimant's existing role with the new role of Definitive Map & Enforcement Team Leader that it contained a huge amount of her original role. That it did was acknowledged eventually by Tony Bradford in cross examination. This tribunal cannot say, and it is not for it to determine if the claimant would have been slotted in, but the fact is that the respondent did not consider it, adequately or at all. As stated above it went from Phase 1 in which the claimant retained her role to Phase 2 where it had been deleted. The Occupational Change Policy states that slotting in 'must be used' where the new post is 'predominantly the same job role'. There is a 'process' set out in the policy that the respondent should go through. It refers throughout to identifying and assessing the new substantive against the new post. There is no evidence that was done in this case. In paragraph 16 of his witness statement Tony Bradford merely states 'having considered the feedback from employees' the Phase 2 document was issued and the first 'outcome' of the Phase 1 consultation was the deletion of the post of Definitive Map Team Leader, the claimant's role. There is no other explanation. It cannot be fair that an employee's role is deleted based on staff feedback that the new structure had too many managers.
148. It is further not clear what process was gone through in considering ring fencing. The tribunal does not know what the rationale was for ring fencing all three team leaders to the two new roles, particularly where in claimant's case she had not done much if any of the countryside management role. Lee Tyson must have accepted that he did not have much experience of definitive map work as he did not apply for that role.
149. The staff were querying the ring fencing. Lee Tyson queried why the claimant was ring fenced to the new Team Leader Countryside Management role and did not receive an answer that gave justification for this.
150. Helen Denton queried the position about the Team Leader Definitive Map and Enforcement role and the ring fencing. Rachel Hide did acknowledge that it was 'not a new role' as it incorporated job outlines that

currently existed. None of these points raised by the staff in the consultation altered the respondent to concerns with the process.

151. This led to further unfairness at interview which was a so called 'generic' one for the two posts. Lee Tyson did not want the Definitive Map & Enforcement role and had not applied for it. The claimant only wanted the Definitive Map & Enforcement role but was told to apply for both. There was no consideration given to the inherent unfairness in that approach.
152. List of issues 3(c)(ii). The respondent failed to complete the redundancy selection matrix. No rationale has been provided by Tony Bradford for his decision that it failed to differentiate between the candidates. To reach that conclusion it needed to have been done. The tribunal does not know that would have been the case as it is not known how each would have scored. It was an assumption made by Mr Bradford. It is part of the policy. By not completing it there was a failure to bring into the equation other areas where the candidates may have performed well or not.
153. In her email of the 24 January 2018 Rachel Hide cut and paste the section of the policy referring to the matrix in her response to Mr Bradford. He gave evidence that he sat down with Rachel Hide to look at the matrix to see how it would work and decided it would not give him enough differentiation. He accepted he did not complete the matrix. There is no other evidence before the tribunal of this discussion and what form it took. The tribunal did not hear from Rachel Hide. It was part of the respondent's own policy that the redundancy selection criteria matrix that it be completed, and it was not. That adds to the unfairness.
154. The matrix (seen at page 761) awarded up to 40% of the marks for 'qualifications skills and experience'. The job outline for the new Definitive Map & Enforcement role stated at the end of the person specification that 'extensive knowledge and experience of documents, legislation and processes for management of the Definitive Map and Commons and Village Green Registers' was required as was 'experience of dealing with complex enquiries and complaints, public inquiries...' The experience of the respective candidates was not assessed as it was not tested at interview which was stated to be on the managerial skills only. That raises the question of how it could fairly be said that the three candidates were all level on technical ability and the matrix not required when everyone has acknowledged that the claimant had nationally recognised knowledge and experience in the definitive map area.
155. HR played a limited if any role in this process which seems to be have been managed by only Tony Bradford. This meant that there was no other review mechanism. Under the policy the redundancy selection matrix should have not only been completed but 'reviewed independently by HR who will challenge where required'. There no evidence of this happening. There are no documents or notes to indicate HR approval of the way the process was being dealt with. As already found, some of the questions asked of Tony Bradford by the claimant could easily have been answered by HR.

156. The tribunal found it particularly strange of the respondent to call Melanie West who had no direct knowledge of this case. The person who did have such knowledge even attended the tribunal on the first day but did not give evidence. There has been no adequate explanation for this. This is not a small employer. It has a discreet HR department and particularly where a policy specifically provides for HR involvement at certain stages the tribunal would expect to see evidence of that.
157. List of issues 3(d). The tribunal has concluded that the interview panel was independent. It was bound to have the manager on the panel and there has been no evidence that Simon Brown and Martha Goodhill were in any way compromised. They both had experience of interviewing.
158. List of issues 3(e). The tribunal has concluded that Tony Bradford did not answer all the claimant's questions about the process. He accepted in evidence that he could have answered the claimant's email of 25 January 2018 by replying to all three candidates. The claimant had to cancel the 22 January meeting as she was too stressed. This is an example of a question Tony Bradford could have passed to HR to answer and again demonstrates their lack of involvement.
159. List of issues 3(f). There was consultation. Tony Bradford did a presentation and then met with the claimant when she had been unable to attend that. The tribunal has seen a few emails to trade union but no replies and so is not aware of any position taken by it. One aspect of the unfairness the tribunal has found is the immediate reaction to the Phase 1 feedback of removing the claimant's role without any rationale being provided for that.
160. It is not clear to the tribunal what the point was of the expression of Interest evaluation tool. It must have formed some part of the respondent's thinking otherwise why do it. There was an inherent unfairness in not distinguishing between the two roles and stating that they were generic management competencies. If the claimant, which has not been disputed, had worked on public enquiries, attended select committees, given lectures it is hard to see how she could only score 1 point for Technical Leadership in Countryside Management meaning that one of the markers scored her nil. The tribunal did not see the original markings. Again, there was no HR involvement in this process.
161. At paragraph 26 of his witness statement Tony Bradford stated that he 'used the evaluation matrix to assess the expression of interest forms submitted' and to 'set the context for the forthcoming interviews'. The matrix he said was designed to 'help the panel draw out for the applications the experience, competence and knowledge of the applicants.' This is inconsistent with the next paragraph in which Tony Bradford stated that all the candidates had the technical knowledge and he did not consider it necessary to test that again. The interview did no such thing as Tony Bradford had decided that the interview would only cover

managerial competencies. It was not designed in anyway to test the experience and knowledge of the applicants. If it had been some of the questions posed would have focused on that but they did not.

162. Only Tony Bradford and Simon Brown used the evaluation matrix. It is only their scores and Martha Goodhill did not take part in that exercise. Her evidence, which the tribunal accepts, was that she had not seen the scoring on p371 until a few months before this hearing. It is unfair that one of the interviewers was not involved in the process.
163. Simon Brown stated that the evaluation matrix gave them a 'wider understanding of the three candidates.' The tribunal does not accept that it could have done. These were three people who were already going forward for interview and the matrix did not give the interviewers any further knowledge of them.
164. This leads onto the fact that as the redundancy selection matrix was not completed the panel had no knowledge of the candidates. They did not have information from their appraisals, training records or one-to-ones.
165. It cannot be disputed that the claimant did not perform well at interview. This however must be seen against the background that she was suffering stress and anxiety at having to apply for what she thought was her role. There is evidence of at least one meeting that did not take place as the claimant was not well enough to attend. The claimant had not attended an interview since 2002. She had asked questions about the process and not got answers. The areas in which she excelled namely her technical expertise, which were required for the role she was applying for were not even tested.
166. The dismissal was fundamentally unfair taking into account all of the circumstances of the case and the size and administrative resources of the respondent.
167. The burden is on a respondent to show that had a fair procedure been followed the claimant would still have been dismissed. It has not done so.
168. As a result of the various stages in the Occupational Change Policy that were not followed it is not known what a correctly assessed slotting in exercise would have resulted in and whether the claimant would have been slotted into the new Definitive Map and Enforcement Team Leader role. It is not for this tribunal to conduct that exercise. The difficulty is that the respondent did not do it as a result of which the tribunal does not have evidence before it that the claimant would still have been the one to be dismissed.
169. It is also not clear how the two new posts were ring fenced. Lee Tyson and other staff raised issues with this.

170. No rationale has been produced for the deletion of the claimant's role at Phase 2 when it remained in Phase 1, other than the feedback of staff. That is not justification for the deletion of an employee's role.
171. The redundancy selection criteria matrix was not completed so the tribunal does not know how the candidates would have scored. The respondent has not produced any evidence to show how, even retrospectively, that would have been scored.
172. The tribunal has concluded that it would be far too simplistic an approach to just make an assessment of the percentage chance of a fair dismissal having occurred in any event on basis of three people applying for two jobs particularly as had the ring fencing been done differently those proportions might have been different.
173. The tribunal has therefore concluded that there should be no deduction under the principles set out in Polkey in the circumstances of this case.

Sex Discrimination

Direct

174. The claimant has not established facts from which the tribunal could conclude that she was treated less favourably on the grounds of her sex. A difference in treatment and a difference in protected characteristic is not enough to transfer the burden of proof to the respondent.
175. List of issues 6(a) – the tribunal accepts that Tony Bradford talked over the claimant at meetings but finds that he also talked over others. The claimant's own witness at her appeal Richard Cuthbert, whilst acknowledging that he and the claimant came up with a scheme to help her be heard at meetings accepted that Tony Bradford spoke over men too.
176. The claimant asks that the tribunal draw inferences from the alleged desire of Tony Bradford to remove the role of Isabel Cuthbert, another woman. The difficulty with this comparison is that there were some performance management issues with this employee which the claimant was not involved in and so does not know the details of. Her circumstances were therefore different and she remained in the organisation. It does not demonstrate a desire to only remove women
177. List of issues 6(b). The claimant asserts that each failing she relies upon in the redundancy process was less favourable treatment on the grounds of sex as set out in the list of issues. This has not been established. The fact that the tribunal has found it to be unfair is not enough. Unreasonable actions do not necessarily amount to discrimination.
178. The claimant has not established facts from which the tribunal could conclude that the asking of questions solely relating to management

experience and not technical was less favourable treatment on the grounds of sex. That was applied to all candidates. The male candidates did not have their technical skills tested either.

Indirect

179. The tribunal does not accept that the respondent applied a provision, criteria or practice (PCP) of 'the provision of higher marks to interview candidates who supply answers to questions about managing change which are not based on a collaborative approach.'
180. This emerges from one piece of feedback given to the claimant in relation to only one of the questions at interview. Even taking into account the case law referred to on behalf of the claimant ,to suggest that a one-off comment of this nature could be held to be evidence of a PCP is not accepted.
181. It is further not accepted that even if the PCP were accepted that the claimant has established that it puts women at a particular disadvantage. The claimant has produced various articles in the bundle to support her argument, but the tribunal does not accept them as providing sufficient evidence of the disadvantage claimed.
182. The claim of indirect discrimination must fail and is dismissed.

Employment Judge Laidler
Date:28.08.19.....
Sent to the parties on:06.09.19.....
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For the Tribunal Office