



EMPLOYMENT TRIBUNALS

Claimants: Mrs L Connor
Mrs C Dixon

Respondent: Carpetright Plc (in creditors voluntary liquidation)

Heard at: East London Hearing Centre

On: Wednesday 30thOctober and Friday 1st November 2019

Before: Employment Judge McLaren

Members: Ms K Freeman
Mr P Lush

Representation

Claimants: In person

Respondent: Mr. P Sands Solicitor Eversheds Sutherland (International) LLP

JUDGMENT

The unanimous judgment of the Employment Tribunal is:-

1. The claim of unfair dismissal by reason of age discrimination brought by the first claimant, Mrs Connor, fails.
2. The first claimant's claim for "other payment" is dismissed on withdrawal by the claimant.
3. The second claimant, Mrs Dixon, was unfairly dismissed.

REASONS

Background

1 The claimants were employed as Head of Financial Operations (Mrs Dixon) and Merchandise Ledger manager (Mrs Connor). Both were made redundant and bring claims following that redundancy. In Mrs Dixon's case for unfair dismissal and in

Mrs Connor's case for direct age discrimination. It was confirmed that Mrs Connor was not pursuing a claim for any other payment as indicated on her ET1.

2 We heard evidence from James Collis, HR Business Partner, Amy Webb, HR Manager, John Stanhope, Buying and Merchandise Manager who heard Ms Dixon's grievance, and Marcel Borlin, Chief Technology Officer who was the appeal chair in relation to Mrs Dixon's grievance. The claimants both gave evidence. They were supported by the evidence of Julian Cherry who was a colleague at the relevant time.

3 We were provided with a bundle of documents amounting to some 506 pages. Our attention was directed to specific pages and we considered those pages to which we were directed and all the witness evidence which we heard in reaching our decision.

The issues

4 At the outset of the hearing the issues of fact and law we must determine were agreed as follows: -

Mrs Connor

- 4.1 It is not in dispute that she was made redundant. Was this less favourable treatment? i.e. did the respondent treat the claimants less favourably than it treated comparators? The claimant relies on the following comparators – Ashley Worrall and Terianne Woodham, they are in their early 20s or 30's, the claimant is in her 50's.
- 4.2 If so, was this because of the claimants 'age? the respondent says it was not.

Mrs Dixon

- 4.3 The claimant says her role was not redundant as it remained in place in the final structure and there was therefore no fair reason for her dismissal. The respondent contends that the claimant was dismissed by reason of redundancy.

Relevant law

Discrimination

5 The Equality Act 2010 ("EqA") prohibits certain types of conduct linked to specific protected characteristics. Age' is listed in S.4 EqA as one of the protected characteristics covered by the Act. The scope of the protection accorded to the protected characteristic of age is then set out in S.5 EqA which states that a reference in the Act to a person who has the protected characteristic of age is 'a reference to a person of a particular age group', and a reference to persons who share that characteristic is 'a reference to persons of the same age group'. An 'age group' is a group of persons defined by reference to age, whether to a particular age or to a range

of ages — S.5(2). In other words, whenever the Act refers to the protected characteristic of age, it means a person belonging to a particular age group.

6 This is a claim for direct discrimination which is defined as:

- (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.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

7 An employee claiming direct age discrimination will need to show that they have been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different from theirs. The relevant circumstances are those factor the employer took into account in deciding to treat the claimant as it did, with the exception of the protected characteristic itself.

Burden of proof for a discrimination claim

8 Igen v Wong Ltd [2005] EWCA Civ. 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove – again on the balance of probabilities – that the treatment in question was 'in no sense whatsoever' on the protected ground.

9 The claimant's attention had been directed at the preliminary hearing to Madarassy v Nomura International plc in which the Court of Appeal issued a lengthy and discursive judgment on the burden of proof in discrimination cases. It held (among other things) that a claimant must show more than a difference in sex and a difference in treatment to establish a prima facie case of sex discrimination. The ruling has reinforced the point in Igen v Wong that a claimant must show more than the mere possibility of discrimination before the burden of proof shifts to the respondent: the primary facts must be such that a reasonable tribunal, having heard all the evidence from both sides, could conclude that the respondent committed (not merely "could have committed") the discriminatory act.

Unfair Dismissal

10 There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR).

11 Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

12 Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

“... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

13 By the case of Sainsbury's supermarkets Ltd v Hitt [2003] IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Compensation

14 Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

Findings of Fact

The structure of the Department prior to the redundancies in 2018

15 The claimants have both been employed for several years by the respondent in their head office. They both worked in the central finance function. In 2018, at the time of the redundancies which form the subject matter of these claims, Mrs Dixon was

working in the role of Head of Reporting, Planning and Analysis. She had been seconded to this position from her home role of Head of Financial Operations.

16 The secondment had arisen because Mrs Dixon had handed in her notice in July 2017 to go to another company. To encourage her to stay, which she did, the respondent increased her salary to £66,000 and offered her the seconded role. Mrs Dixon's move created some further secondments.

17 In 2017 the Role of Head of Financial Operations had two direct reports, Financial Operations Manager carried out by Ms Woodham and that of Merchandise Manager which was carried out by Mrs Connor. Both Mrs Connor and Mrs Woodham were at the same level in the hierarchy, the role of Head of Financial Operations was one level further up the hierarchy.

18 When Mrs Dixon moved to the Head of Reporting Planning and Analysis the lady who had occupied that role, Mrs Chawhan, was seconded to cover the role of Director of UK Finance. That role had previously been occupied by Mr Jeevan Karir who was moving to a new internal role managing an IT project. Mrs Dixon therefore reported to Mrs Chawhan while on secondment. Both Mrs Dixon and Mrs Chawhan's home roles were at the same level in the hierarchy.

19 To cover Mrs Dixon's absence, Mrs Woodham was seconded to the role of Head of Financial Operations and became Mrs Connor's line manager. These are agreed facts. There is a dispute in relation to the secondment/appointment of one other individual role.

20 Mrs Woodham's home role was left empty by her secondment. It was Mrs Connor's evidence that backfill for the Financial Operations Manager role was not part of the original secondment plans. She believed that this role was advertised externally as a temporary 18-month role and that Ashley Worrall, who worked in a role in procurement which dealt with cash management, applied for that job. Mrs Connor also believed that this is Worrall's home role was permanently filled and she therefore had nothing to go back to when the secondments ended.

21 Amy Webb told us that that was not the case. She told us that she had written all the secondment letters to Mrs Dixon, Mrs Chawhan, Mrs Woodham, and to Mrs Worrall. She told us that Mrs Worrall was also seconded and that her home role remained available to her at the end of the 18 months.

22 The respondent failed to produce any evidence in support of this statement but nonetheless we accept Mrs Webb's evidence on the point because she is in a position to have first-hand knowledge of this role while Mrs Connor's knowledge is based on recollection of seeing an advertisement and she has no direct knowledge of the arrangements that were made with Mrs Worrall.

23 So matters stood in March 2018; five people were seconded out of their home roles, Mr Karir, Mrs Chawhan, Mrs Dixon, Mrs Woodham and Mrs Worrall. We accept

that all these arrangements were temporary secondments and it was intended that at their conclusion the individuals would revert to their home roles.

Background to the redundancies and the overall process.

24 On 21 March 2018 the respondent announced that it was exploring the feasibility of a company voluntary arrangement. On 24 April 2018 staff in head office were called to a meeting and were told that the company were proceeding with the CVA.

25 This had implications for staff across the business. The respondent planned to close several stores across the country, but also to reduce the number of roles in head office. This included a proposal to restructure the firm in which both claimants worked. The details of initial set out any documents provided to staff at pages 64 a to 64m in the bundle.

26 The respondent began a process of electing representatives and holding collective and individual consultation meetings. There was no dispute as to the process followed and we are not therefore setting out the details of these meetings or their chronology. We accept that redundancy arose and that on paper the process set out looked appropriate and fair. We are not commenting on the selection process at this point.

27 We note that there was at best, some confusion in the process about the roles that Mr Collis was carrying out. He was both the elected representative for the HR and finance department but also then took an active part on behalf of the respondent in some of the consultation meetings. He was clearly in a position of conflict. Although, because he was not a decision maker, we find that his limited understanding of finance and his conflicted position is unlikely to have impacted the outcome.

Proposed restructure of the finance department

28 At the first announcement meeting both claimants were provided with information about the proposed new structure in the finance department. This was in the bundle at pages 64a to 64m. This sets out that four roles were proposed as removed. The three that are relevant to the issues in this matter were the Head of Reporting Planning and Analysis, Mrs Chawhan's home role, Head of Financial Operations, Mrs Dixon's home role and Merchandise Ledger Manager, Mrs Connor's home role.

29 It was further proposed that the accounts payable and merchandise ledger functions merge into one team with some reduction in numbers of the clerks in those teams (reducing the number of ledger clerks from 4 to 3) and by broadening the role of two accounts payable or merchandise clerks to become supervisors. The newly merged team would be under the leadership of a Financial Operations Manager and that Mrs Woodham return to her enhanced home role. Mrs Woodham was not one of the individuals put at risk as a result of this proposal.

Events in relation to Mrs Connor

30 The facts set out below are not disputed and are these. On the day of the announcement, 24 April, Mr Karir announced that were going to be redundancies in the finance department as set out above.

31 At the end of that meeting Mr Karir provided Mrs Connor's with copies of the paperwork showing that Mrs Woodham would manage the merged teams and that her job was placed at risk of redundancy. Mrs Connor asked why isn't the Financial Operations Manager put at risk.? Mr Karir's response was that he was only making her redundant. He then asked Mrs Connor, t did she think that he should keep her and make Mrs Woodham redundant? Mrs Connor said no, they should both be placed at risk if the departments were to be merged.

32 Mr Karir ignored this comment and then told Mrs Connor that he wanted her to stay until the end of the year and would pay her incentive bonus to do so. Mrs Connor was upset by this news and was told that she could leave the office. From the 25th until 30th of April, was then unable to go to work because of the stress caused by what she felt was unfair and personal redundancy process.

33 On 1 May Mrs Connor was signed off by her doctor for two weeks. She was suffering from chest pains and high blood pressure and was therefore advised to go directly to the local accident and emergency department because of the concerns that she was suffering from a heart attack. Mrs Connor let Mrs Woodham know this.

34 The period of sick leave was extended for a further two weeks from 14 May due to stress. As part of the respondent's process once absence has reached a four-week mark, the claimant attended an occupational health appointment with a doctor in London. That confirmed that she was suffering from stress as a result of the redundancy situation and recommended a phased return to work. Mrs Connor did indeed return to work on a phased basis on 16 June 2018.

35 During this period of sick leave, Mrs Connor contacted her elected representative, Mr Collis and asked him to raise a number of questions on her behalf. This is a page 293 of the bundle. The questions included why when two departments are being merged only her management role was at risk and not that of the Financial Operations Manager, Mrs Woodham.

36 Mrs Connor did not receive a reply her email of 14 May and therefore forwarded this on to Amy Webb on 16 May. Despite Mrs Connor chasing for a response, her questions were not put to the collective consultation meeting and was not given a substantive response by her elected representative until the 25th of May. This response, at page 298 of the bundle, said that Mrs Dixon had made a counter proposal which suggested that both Mrs Connor's role and Mrs Woodham's role should be pooled but he was unclear as to whether or not that proposal was going to be submitted. He therefore asked Mrs Connor to submit a counter proposal and let her know she had until 8 June to do so.

37 Mrs Connor therefore put forward a proposal to Mr Collis and he informed her on 13 June in a telephone call that her role was now in a pool. This process, however, overlapped with individual consultation meetings. Mrs Connor attended a first stage consultation meeting on 4 June and a second stage on 8 June. Both meetings were with her line manager, Mrs Woodham, the very individual she felt should also be put at risk. Mrs Connor felt that she was unable to raise challenges to the process or questions because she would have to do so to Mrs Woodham, and they concerned her.

38 On 23 July Mrs Connor was called a meeting with Mr Collis and Neil Page, the Chief Financial Officer. Mr Page advised Mrs Connor that having looked over the structure again, he had made changes to it. The role of planning and analysis was to be retained and Mrs Chawhan was therefore no longer at risk of redundancy. The respondent now proposed creating a new Head of Department role as a merger of three roles, the Head of Financial Operations that is Mrs Woodham's role, the Merchandise Manager that is Mrs Connor's role and The Head of Financial Operations that is Mrs Dixon's role. Mrs Connor was also told that the role of stock accountant was now changed to incorporate cash.

39 Mrs Connor asked for job descriptions and salaries for both these newly created roles and did not receive both piece of information until 31 July. At that point she realised that the salary for the financial operations role was between £60 and £65,000, £28,000 more than she was currently earning and the other role of stock and cash analysis was £9000 less. Mrs Connor felt that the stock and cash analysis role was not one that she could apply for because she had no cash experience, and this was something the company were aware of. In her view the role had been created to retain Mrs Worrall who had significant cash experience and who was some 20 years younger than her.

40 On 1 August Mrs Connor attended a meeting with Mrs Woodham and Mr Karir in which he was asked to go over some of the points Mrs Dixon had made with regard to the percentages of the new head of department role. The document prepared it is in the bundle 108 to 109. Mrs Connor explained that she was not given sight of the document either at that meeting or thereafter and that Mr Karir simply asked her some questions about some points of the roles. She could not recall exactly what he asked her. He said that he would give her a copy of what was discussed and the percentages that he had put down for the tasks what percentage each role carried out, but this was never done.

41 On the same day, Mrs Connor emailed Mr Collis and said that both the vacant roles had been placed out of her reach and therefore asked to proceed to her third consultation meeting. In this meeting Mrs Connor explained that she felt he had no opportunity to go for the two roles that had been created by the respondent. Mr Karir commented that he thought the head of role qualified person. Mrs Connor explained in relation to the role which was paid £9000 less than she was it was a mixture of the salary and the fact that she had no knowledge of cash. At that point, Mr Collis who was attending that meeting as a company witness, asked whether red circling salary would make a difference. He did not explain what this meant not give any details as to

whether it would be agreed or over what period such red circling would continue. Mrs Connor's evidence was that she did more or less understand what this meant at the time but it did not take into account the fact that the company had created a role for which she did not have the skill set by deciding to bring into the finance function a cash expertise that had always sat elsewhere. She was formerly made redundant on 3 August and given 13 weeks' notice.

42 Mrs Connor asked to leave early, and it was agreed that she could leave 31 August, but because she had not worked out her full notice period she would not be paid in lieu of notice. While she was working out some part of the notice period on 14 August her access to some key systems was blocked. On 23 August Mrs Connor was called to a meeting with Mrs Webb and was placed on garden leave because of a rumour that she was going to a competitor. This was untrue.

Evidence of age discrimination

43 Mrs Connor felt that he had been discriminated against because of her age. She named two comparators, both of whom are some 20 years younger than she is. In relation to her first comparator, Mrs Woodham, her complaint was that Mrs Woodham had not been pooled at the time that she was and she was never given any explanation as to why this was the case.

44 The respondent did not provide any direct witness evidence on this point as the individuals who were the decision-makers were not called by them to give evidence. Mrs Webb provided some evidence which was her speculation as to the possible reason. She suggested that it could have been that the decision not to pool originally, which she characterised as an oversight, was because Mrs Woodham's team was larger than that of Mrs Connor. Mrs Woodham's team included some eight or nine people, Mrs Connor's four. While the accounts payable and merchandise functions would be merged that is only part of Mrs Woodham's team but the whole of Mrs Connor's.

45 In relation to the second comparator, Mrs Worrall, the claim was that the vacant role had been created with Mrs Worrall in mind and that this was because the company wished to retain younger workers in preference to the claimant. Up until that point the cash function had not been part of the finance department but had formed part of the procurement area. She could see no reason why the cash element was introduced into the newly created role if it were not to accommodate Mrs Worrall. She also believed that Mrs Worrall had taken the role in the finance department on a temporary basis with no home role to go back to that this suggested some form of pre-determined outcome in the later redundancy. We have already found that this was not the case and Mrs Worrall had a role to return to which was not at risk of redundancy.

Previous "targeting"

46 Mrs Connor was asked whether there was any indication of previous poor treatment of herself or others on the grounds of age by Mr Karir. She said that there was no general such treatment but did refer to one previous incident which involved a

former colleague. We also heard evidence from Mrs Dixon in relation to this lady. This account was not challenged by the respondent and we therefore accept the account given by Mrs Dixon and Mrs Connor.

47 This colleague was a lady in her late 50s but not yet at retirement age. There had been some concerns around her health and there had been some absence issues. Mrs Dixon was instructed by Mr Karir to construct a redundancy to remove her. Mrs Dixon said that she objected to this and was able to obtain a more generous payment for this individual, but she nonetheless carried out the instructions given. Her evidence was that the dismissal was motivated by the individuals age.

48 Mr Cherry, a former colleague explained in his witness statement that Mr Karir had on previous occasions identified individuals that he wanted to exit from the business and had done so via redundancy programmes. Mr Cherry's evidence was that while number of people were told they were at risk, private conversations were then held with Mr Karir who told specific individuals that despite his public pronouncements they were safe.

49 Mrs Dixon's statement referred to the same practice and to an incident involving Ms Noble. It was her case that a restructure was put in place specifically to remove Ms Noble. The bundle also contained at 270 the text sent by Ms Noble to Mrs Dixon confirming that she, Ms Noble, had been told on occasions by Mr Karir to put individuals at risk and he had then told those in favour that they were nonetheless safe.

50 Mrs Dixon also told us in the relation to the restructure which ended with Ms Noble leaving the business, her role was amalgamated with the Head of Reporting Planning Analysis Role which was at that time held by Mrs Chawhan. The individuals were not pooled, and Mrs Chawhan was not placed at risk at that time.

51 The respondent did not challenge any of these accounts. We find that. Mr Karir was in the habit of determining who he wished to retain in the business and identifying to those people that he wished to retain that this was the case. We find he would tell some people that they were not really at risk even though they were publicly in a redundancy situation with other staff.

Events in relation to Mrs Dixon

52 As set out above prior to the April 2018 redundancy exercise Mrs Dixon was on secondment to the role of Head of Reporting Planning and Analysis. Mrs Chawhan was her line manager in that role. Mrs Dixon acknowledged that at the time she moved to this seconded role she had found her home role to be insufficiently challenging.

53 Mrs Dixon complained that during her time in this seconded role she was subject to numerous verbal criticism and unprofessional conduct by Mrs Chawhan. She became concerned about this behaviour and on the advice of Mrs Connor started to take a log of what occurred.

54 On 9 April 2018 Mrs Dixon told us that while she was working in the office Mr Karir was seen working with Mrs Chawhan on a restructure document. On 13 April just for she left for the evening Mrs Dixon witnessed Mr Karir hand over the finance restructure document to Mrs Chawhan in the open plan office. Mrs Dixon's account she could see what the document was, and he also verbally stated this is the updated finance restructure document as he handed it to Mrs Chawhan. Mrs Dixon made an immediate note at this point in her log.

55 On 19th of April Mrs Dixon had a meeting with Mr Page when she told him about what had happened and commented that it was inappropriate for Mr Karir to be providing such a sensitive document to another colleague in an open plan office. Mr Page dismissed this concern. Mrs Dixon also raised with Mr Page concerns about Mrs Chawhan's conduct to her and he told that he would speak to Mr Karir about those points.

56 The restructure announcement then took place on 24 April 2018. Mr Karir took Mrs Dixon through the proposal document. She was very upset by this She immediately asked a question about the proposed structure as it stated that her role as head of financial operations and Mrs Connor's role were to be made redundant, but that the financial operations manager was not at risk. Mrs Dixon questioned Mr Karir's rationale about this, but he was argumentative and responded that it is not your role and its Mrs Woodham's role. Mrs Dixon believed that was a fundamental error in the structure and was based on a predetermined outcome to ensure the safety of Mrs Chawhan and Mrs Woodham.

57 It is Mrs Dixon's belief that Mrs Chawhan had had been told she was not at risk, despite the public announcement and her role being seen in the announcement pack as at risk. This belief was based on previous experience of Mr Karir's conduct and on Mrs Chawhan's behaviour. She referred to a meeting in Costa Coffee on 24 April at which she felt that Mrs Chawhan's attitude was not that of someone who had been told they were at risk of redundancy.

58 Mrs Dixon raised concerns on the redundancy restructure with Mr Collis as her elected representative ahead of the collective consultation meeting on 9 May 2018 and submitted a counter proposal. This was not included in the consultation meeting and therefore on 17 May Mrs Dixon submitted this again

Mrs Dixon's grievance

59 On 26 April Mrs Dixon said that she was taken to a meeting room by Mrs Chawhan and subjected to intimidating behaviour. At this meeting Mrs Chawhan said that she was going to apply for the role of financial controller and was very aggressive and Mrs Dixon felt belittled by this.

60 On 9 June, during the consultation process, Mrs Dixon submitted a grievance against Mr Karir and Mrs Chawhan. This was in two parts. It raised allegations about intimidating behaviour by Mrs Chawhan and stated that Mr Karir had shown Mrs Chawhan the new financial restructure in advance. She presented this as evidence

that redundancy process has a predetermined outcome, namely, to protect Mrs Chawhan.

61 The grievance was heard 18 June by Mr Stanhope. He concluded that there was no evidence of collusion between Mrs Chawhan and Mr Karir and was supported in his conclusion by the fact that Mrs Chawhan's substantive role was redundant in the first proposal. In reaching this conclusion Mr Stanhope spoke to Mr Karir who denied this.

62 Mr Stanhope did uphold part of Mrs Dixon's grievance namely that she had been subject to inappropriate, although not intimidating, behaviour by Mrs Chawhan.

63 Mrs Dixon appealed this decision, and this was heard by Mr Borlin on 11 July 2018. He again confirmed the position and did not find any evidence of collusion and did not therefore overturn Mr Stanhope's decision.

64 Mrs Dixon in her evidence pointed out that both Mr Stanhope and Mr Borlin had failed to consider the specific incident of 25 April which she said was Mrs Chawhan exhibiting intimidating behaviour. Mr Stanhope's answer was that while it was not mentioned in the minutes, he was confident that he had addressed it. Mr Borlin did not answer this point directly. On balance we conclude that it was not addressed.

65 This outcome added to Mrs Dixon's feeling that matters were predetermined and further assisted her in her decision that she could no longer remain at the respondent organisation because of the way she was treated what she felt was the pre-determination and the respondent's lack of support for her during the individual and collective consultation process.

66 As we have accepted that on other occasions Mr Karir did speak to those he wished to retain giving them private information about their status, we find that, on the balance of probabilities, Mrs Dixon did see Mr Karir showing Mrs Chawhan the documentation. We are not making a finding as to the fairness or otherwise of the grievance procedure. Our finding is limited to whether the respondent's redundancy proposals were to any extent predetermined.

Mrs Dixon's counterproposal

67 Mrs Dixon's counterproposal was for the department overall rather than just Mrs Dixon's own job. When she first submitted it Mr Collis, he came back to her and said that the committee asked her to speak to the other individuals who were named in this counterproposal to ensure that their views on it were also put forward. Mrs Dixon felt that was inappropriate since that included Mrs Chawhan with whom she was in conflict and an individual on maternity leave as well as Mrs Connor who was on sick leave.

68 The respondent reconsidered its initial proposal following the counter proposals submitted by both Mrs Connor and Mrs Dixon and a third and final structure was proposed by the respondent on 18 July. This now retained the position of Head of

Reporting Planning Analysis and Mrs Chawhan was therefore no longer at risk. It also removed three positions Head of Financial Operations, Mrs Dixon's role, Financial Operations Manager, Mrs Woodham's role and Mrs Connor's role.

69 The respondent proposed the creation of what it said was a new role as the Head of Financial Operations. Page 134 the bundle described this to be a new role because it was an amalgamation of three current roles and would be responsible for cash operations, reporting, forecasting and end-to-end ownership of stock those activities, on the respondent's case, not being part of the current role. The new role had the same job title as Mrs Dixon's home role job title, occupied the same place in the management hierarchy, reported to the same level, that is the Finance Director, and was paid the same salary. Mrs Dixon challenged this, considering that the new role was in fact essentially the same as her existing job.

New role and existing role, are they the same?

70 This area was disputed by the parties. Mrs Dixon was cross examined at length on this topic and we were taken to pages 108/109, page 119 being the job description for the new role, pages 261 263 and page 257.

71 It appears from the correspondence that on 27 July James Collis, on the instructions of Mr Karir, asked Mrs Dixon to complete a document. This email stated;

"it is important to remember that this deals with your substantive role, not seconded role. Critical to remember that this is about the actual tasks that are carried out by the substantive role as opposed to things that are overseen or managed"

72 The document Mrs Dixon was sent was a pro forma. That again contained instructions in the top left-hand side of the page which explained that Mrs Dixon was to enter the percentage of existing substantive tasks/process applicable and to enter the percentage and state which job will perform these. The document then listed 24 key processes under three headings, accounts payable, cash flow management and other, and identified that the new role of Head of Operations would be 100% responsible for these 24 processes.

73 There appeared to be little relationship between these tasks and the bullet points in the job description and it is hard to reconcile either the tasks set out in the job description or the correspondence between the parties which apparently fleshed out the position.

74 Mrs Dixon completed a percentage split and, other than for item 9, did not identify that her current role was 100% responsible for any of these processes. She indicated a split between the three roles and also indicated for some of the tasks, a substantial part was carried out by a junior member of staff.

75 In answer to cross examination questions she confirmed that she was not sure whether she was completing the level of supervision that role had, which was 100%, or whether not she been asked about the tasks that each individual role carried out. The

instructions provided by Mr Collis' email of 27 July talks about tasks and not things that were overseen or managed. The instructions on the sheet also contained that instruction. Mrs Dixon was clear that her role was 100% accountable for all these items but the tasks were completed by others.

76 The respondent submitted that the instructions meant that Mrs Dixon should focus on the main things the role did and not tasks carried out by others and that is supported by the proforma identifying the new role as 100% responsible. That was clear that Mrs Dixon was to answer about the tasks her role did, she completed it on this basis and her own evidence was she did not do the same role. Page 108/109 shows that the roles are not the same because Mrs Dixon has not shown that in her current role, she was 100% responsible for the same processes.

77 On balance we take those words at their face value and find that the instructions were not to talk about things that the role managed, but the tasks carried out by the substantive role and we accept that Mrs Dixon answered on that basis. She therefore provided a % breakdown about the elements that went into delivering a process from end to end and not about the responsibility and accountability for the process. We find that the respondent had confused accountability with production when it asked Mrs Dixon to complete this document. We also find and that these tasks which the respondent set out as done by this role cannot be clearly linked to the job description for the role at page 119 which has a greater focus on accountability.

78 The respondent did not produce any witnesses who could talk to the job description. The two HR witnesses identified in their evidence they had no knowledge or understanding of how finance roles worked and were unable to assist on this issue.

79 In the absence of any direct evidence from the respondent we prefer Mrs Dixon's account. She has been a credible coherent and well-prepared witness throughout the hearing. Her evidence is supported by documentation and we find that she was in the best position to understand whether a role was or was not the same as the tasks that she was currently carried out.

80 We therefore find that the new role and the old role were either the same job so sufficiently similar to amount to the same job. We accept that the roles could not be identical as two direct reports had been removed and there was therefore going to be some reallocation of tasks among the team who reported to the new role but, nonetheless, overall responsibility and accountability for the critical tasks undertaken by those team members were the responsibility of the new role in the same way as they had been the previous role.

The redundancy process

81 It was not disputed that Mrs Dixon attended stage 1 consultation meeting on 1 June and which she confirmed she was interested in voluntary redundancy. Similarly, on 8 June at her second stage consultation meeting she also confirmed she had put in for voluntary redundancy. On 3 August at the final meeting she was issued with notice with a leave date scheduled for 19th of October.

82 Mrs Dixon explained that she asked for voluntary redundancy because she had no confidence the outcome would be anything other than it was. In the end it turned out exactly as she had expected in that she was made redundant. Mrs Dixon explained that she asked for voluntary redundancy because she could not contemplate working for the respondent in the circumstances as they had been so unsupportive.

83 She confirmed in answer to cross-examination questions that had things been different and she had been given her own role without having to apply for it she would have remained with the organisation. She had been there 11 years, she was the main breadwinner for her for her household and, while she had been bored with the role in 2017, she would have been happy to go back to the role in 2018 because she felt that the introduction of new technology and the reduction in staff numbers meant the role would now have fresh challenges which she wished to embrace.

Conclusion

84 Based on our findings of fact above and considering the relevant law as it applies to the agreed issues we conclude as follows.

85 While there was a genuine reason for redundancy and on paper the process adopted by the respondent appeared fair, it was certainly handled poorly. The process undoubtedly caused both claimant's distress which could be avoided had the consultation been handled with an appropriate degree of professionalism. These process flaws are not, however, sufficient to render the dismissals substantively unfair and no claim was brought by the claimants in relation to procedural issues.

Mrs Connor

86 She believed that her selection for redundancy was predetermined and based on her age. The less favourable treatment she complains of is this redundancy. Two comparators were identified.

87 We conclude that Mrs Woodall's circumstances were sufficiently similar for her to be an appropriate comparator, namely she did a comparative role to Mrs Connor, and her role was also put at risk of redundancy, albeit subsequently. The less favourable treatment complained of, however, is dismissal and the failure to pool Mrs Woodhall and Mrs Connor initially is not what led to the claimant's dismissal.

88 We have found that Mrs Worrall, was also seconded into the Department, but she was not at risk of redundancy and occupied a more junior position and we do not consider that she is an appropriate comparator.

89 We have, nonetheless, gone on to consider in relation to both suggested comparators whether Mrs Connor has proved enough facts from which we can infer discrimination has taken place so as to shift the burden of proof to the respondent. Mrs Connor needed to show such facts on the balance of probabilities, and these needed to be more than a difference in age and the difference in treatment.

90 In support of her case Mrs Connor gave very heartfelt evidence that she concluded age was the reason for her treatment. She was clear; however, this was not something that she immediately thought of but a conclusion that she reached after her dismissal because the respondent did not provide any other explanation for her treatment. We heard evidence about the treatment of another individual where it is possible that age was a motive in the dismissal.

91 We have found that Mr Karir favoured some staff over others and in various redundancy procedures he engineered the position to retain those he preferred. We do not find that this and Mrs Connor's belief amount to sufficient facts to conclude the respondent committed, not merely could have committed, the discriminatory act. We have sympathy with Mrs Connor's position and have already concluded that the redundancy process was handled poorly. We also accept that it caused her significant distress and led to her sickness absence from work, however Mrs Connor has not provided sufficient facts to meet the first stage and the burden of proof does not move to the respondent. Her claim for age discrimination does not succeed.

92 We conclude that Mrs Connor was dismissed by reason of redundancy. This was a genuine redundancy and the respondent is entitled to restructure Department and to remove and merge roles. It did this and as Mrs Connor herself concluded her role having been removed there were no other positions that she was qualified to take as alternatives.

Mrs Dixon

93 We have found that the new role that was created by the respondent was her job. She was not therefore redundant, and the dismissal is accordingly unfair.

94 We have found that she would have stayed within the respondent organisation and therefore no *Polkey* reduction to any compensation is appropriate.

Employment Judge McLaren
Date: 11 November 2019