



EMPLOYMENT TRIBUNALS

Claimant: Ms D Woodfine

Respondent: Civil Aviation Authority

Heard at: London South **On:** 2, 3 & 4 December 2019

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Ohringer Counsel

For the respondent: Mr Da Silva, Counsel

RESERVED JUDGMENT WITH REASONS

Decision

1. The Tribunal finds that the claimant's claim for unfair dismissal is not well founded and the claim is dismissed.
2. The Tribunal finds the claimant's claim for a statutory redundancy payment is not well founded and the claim is dismissed.

Claims and issues

3. By a claim form presented on 22nd of December 2017, the claimant brought a claim for statutory redundancy pay and for unfair dismissal. The claimant asserts that she was dismissed on 31 August 2017, alternatively that she was constructively dismissed when she elected to terminate her contract of employment by notice on 11 September 2017. The claimant relies on a breach of the implied term of trust and confidence and the reasons for that was set out in the claim form at paragraph 15 (a) 15 (j):
 - (a) Mr Kidger dissuading the claimant from applying for the transformation programme manager which automatically became the head of programmes and projects role, without disclosing his intentions

- (b) the appointment of Mr Kidger without considering the claimant's suitability for that role
 - (c) the failure to deal timeously or adequately with the claimant's grievance regarding the appointment of Mr Kidger
 - (d) failure to consult properly with the claimant regarding redeployment opportunities
 - (e) the inadequate consideration given to the claimant's existing role and what alternative roles could be offered
 - (f) the requirement that the claimant take up a new role from 1 September 2017 without consultation or express right of refusal
 - (g) the requirement that the claimant transfer to a new role from 1 September 2017 which involve changes as set out above which was substantially to her detriment
 - (h) the failure to adequately consider the claimant's complaint that the new role was unsuitable for her by making enquiries and consulted with her
 - (i) failing to consider whether there were suitable alternative positions which could be offered to the claimant and
 - (j) failure to adhere to its redundancy policy
4. The claimant was represented by Mr Ohringer of Counsel. The respondent was represented by Mr Da Silva of Counsel.
5. The Tribunal heard evidence from the claimant, Rachel Gardiner Poole (currently Head of General Aviation, previously Head of Portfolio Delivery) and Rory Kidger (Currently Head of the Portfolio Delivery team) for the respondent. There was also a witness statement of Rob Lewis although Mr Lewis did not appear to give evidence. The evidence in relation to Mr Lewis was agreed by the claimant save in relation to one aspect only (specifically an invitation letter to the formal grievance hearing in November 2017). The Tribunal informed both parties that this statement would be given very limited weight as is normal with a witness who does not appear to give evidence.
6. There was an agreed bundle of documents and also an agreed list of issues.

Relevant findings of fact

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
8. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken too in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

9. The claimant was employed by the respondent from August 2008 when her employment transferred to it under the TUPE regulations.
10. The respondent is the statutory regulator of all aspects of civil aviation in the United Kingdom.
11. The claimant had undertaken a variety of project roles in relation to information technology and infrastructure for the respondent. More latterly, the claimant had been responsible for the implementation of SharePoint online. SharePoint online is an application within Office 365.
12. This project had been part of the Information Services Department ('ISD') but was moved into the information strategy project ('ISP') which itself was part of the transformation programme. The claimant had moved into the reporting line of Mr Kidger in the middle of February 2017. Ms Gardner Poole had discussed the claimant's reporting line with her and while she suggested that Helen Jackson could be her line manager (who had overarching responsibility for the ISP, the claimant did not agree with this arrangement.
13. The claimant's focus on Office 365 & SharePoint online was reaffirmed when the respondent did not consider it necessary to have a separate consultant project manager (Nida Hasnain) responsible for the SharePoint online elements. This renewed focus on both aspects happened in April 2017 at which point Ms Nida Hasnain ceased working for CAA.
14. Mr Kidger's engagement with the respondent was initially via PA consulting as a project manager. PA consulting provided consultancy support to the respondent on various projects. Because Ms Gardner Poole had been tasked to create a new portfolio delivery department, Mr Kidger became the temporary transformation programme manager ('TPM'). This position subsequently became a vacancy on a two-year fixed term contract basis. At the time it was envisaged by Ms Gardner Poole that there would in addition be a separate head of projects and programmes ('HOPP') delivery role.
15. The respondent followed its standard recruitment process and advertised the TPM role externally and internally. Because of Ms Gardner Poole's knowledge of Mr Kidger's competence, she welcomed his interest in the role and had informal discussions with him about this. Nevertheless, the interview process was competitive involving a second stage interview with the chief operating officer. There were 29 applications received. The claimant did not apply for this role. A shortlist of six candidates was produced and two were invited for a face-to-face interview including Mr Kidger. Ultimately Mr Kidger was successful following second interviews on 28th of June 2017. The evidence from Ms Gardner Poole was that there were no internal applications for this position. This was not challenged by the claimant and the Tribunal accepts this evidence.
16. Concurrently with this exercise, Ms Gardner Poole was putting together a proposal for the creation of a portfolio delivery department. This proposal was essentially designed to maximise the utilisation and deployment of project and business resource and projects within the respondent organisation. Ms Gardner

Poole was appointed to lead this project as head of portfolio delivery in October 2016. All employees involved in the delivery of projects would be impacted by the proposal as they would move into portfolio delivery. The business decision to do this was not in dispute between the parties.

17. As part of the organisational design considerations for the portfolio delivery team, Ms Gardner Poole identified that a single HOPP role was more beneficial to the department than having a two-year fixed term contract TPM and a separate head of projects role responsible for the project managers who were not working on the transformation programme. This was the position which Mr Kidger was further appointed into and there was no further recruitment process adopted in this regard. This decision was a senior managerial one to provide some consistency and stability during a period of change and at a time when Ms Gardner Poole was aware that there were no internal applications for the TPM role. The TPM role was considered to be a 70% match /fit for the HOPP role and thus in accordance with the respondent's human resource guidelines, Mr Kidger was appointed into this role. Ms Gardner Poole's final decision in this regard was communicated to the Department on 17 July 2017 which email was at page 176 of the bundle. The claimant was one of the recipients.
18. In April 2017, the project manager roles together with the supporting roles within the transformation programme, business management department, information services department and the emerging technologies programme were moved into the portfolio delivery department.
19. As part of the reorganisation proposal, 3 levels of project manager were being created: senior project manager, project manager and junior project manager. Job descriptions were created to be (deliberately) generic to ensure any project manager could work on any suitable project for that level of role. All levels of project managers were to be put at risk of redundancy. This was Ms Gardner Poole's thinking set out in her email of 13th of June 2017 at page 152 of the bundle. Within the same email, she set out her thoughts in relation to rationalising the HOPP with the TPM role.
20. Ms Gardner Poole decided, with some input from Mr Kidger, that the claimant's role in the new structure was at project manager level (page 159 of the bundle). This was comparable with her current level as project manager for Office 365 (previously in the ISD) and more latterly in the ISP within the transformation programme.
21. Ms Gardner Poole gave reasons for this being the appropriate level at paragraph 42 of her witness statement. In summary she believed that the project was internally focused, it involves standard Microsoft office software, there would be little requirement to engage with other executive level directors or external organisations, there were no dealings with external government organisations, the budget was not greater than £1 million and there was no requirement to manage difficult or complex supplier relationships. By contrast, the senior project manager role would have a requirement for most or all of these factors. The (final) job description for the senior project manager role was at page 94 of the bundle. Under cross examination, the claimant accepted that

the office 365 project was internally focused and although she stated that the office 365 project was complex, there were other external projects relating to pilots and ATOL which were more complex and riskier. The claimant also agreed that there was little requirement to engage with external stakeholders. The claimant said there was some need to engage with external government agencies such as National archive. The claimant agreed that the office 365 project manager role did not require stakeholder management and there was no requirement to deal with procurement. The claimant also agreed that her budget was less than £1 million (£780,000). The claimant also agreed that the office 365 project did not require a senior project manager as it did not meet the criteria and was more readily matched as a project manager position.

22. Notwithstanding the respondent's views in relation to the claimant's role and its level within the proposed new organisation, the claimant and indeed all affected employees were entitled to apply for any role in the new organisation including a senior project manager role. The claimant agreed that this was the case and that all roles were open.
23. The respondent commenced briefing the affected employees from 11 July 2017. The presentation was in the bundle at page 209. The claimant's letter was dated 11 July 2017 and was at page 162 of the bundle together with the job descriptions. It was stated in the at risk letter that the respondent would continue to consult with the claimant as to ways in which redundancy could be avoided and further that the respondent would use the consultation period to work with her to seek alternative employment within portfolio delivery or within the wider CAA. All of the existing project managers or programme managers applied for either a new project manager or senior project manager role with the exception of the claimant.
24. Following a collective consultation meeting with the union there was a first individual consultation meeting with the claimant on 13th July. The minutes of this meeting were at page 166 of the bundle. There was discussion at this meeting about the differences between the project manager role and the senior project manager role and the differences in salary. There was also mention of senior project management career progression. The claimant requested a copy of the technology manager job description and in relation to a question about whether redundancy was an option, the response was that it would be looked at on a case-by-case basis and will depend on skill sets and available positions.
25. There was a further consultation meeting on 18th July. In advance of that meeting the claimant had queried, in particular, the salary ranges for the available jobs and what would happen in the event that she did not apply for any of the roles. In relation to the query about what would happen if she did not apply for a role, she was told that she 'may' be entitled to a redundancy payment. The claimant asked if she was interested in the technology manager role and the project manager role whether she should apply for both and it was confirmed that that was what she should do. The deadline for this was extended to 28th of July. There was further discussion about the salary ranges and the claimant queried if she was eligible for redundancy pay. It was noted that a

redundancy statement was to follow. The notes of this meeting were at page 178 of the bundle.

26. The claimant also mentioned at this meeting that she felt that she had been dissuaded by Mr Kidger from applying for the TPM role. Given that Mr Kidger had been appointed into this role, she felt that there had been a conflict of interest and that and that she had been disadvantaged in the reorganisation. The claimant sent a further email on 18th of July following this meeting requesting to know her redundancy options and also wanting to explore the options regarding submitting a grievance against how the HOPP role post was appointed. This email was at page 191 the bundle. The claimant sent a further email on 20th of July with further questions and stated in this email that she had been told that at the second consultation meeting that she would be eligible for a redundancy payment. The Tribunal does not accept that the claimant was told this at the second consultation meeting. There was no evidence in the minutes of that meeting that it was said. Ms Gardner Poole under cross examination said that it was the respondent's policy to provide a redundancy statement (via HR) if one is requested. The Tribunal accepts this evidence being consistent with routine practice.
27. The claimant's grievance in relation to how the post of TPM/HOPP had been appointed was set out in her email of 21st of July 2017 at page 203 of the bundle. The claimant commenced this email by stating that she would not be applying for any of the available roles within the portfolio delivery team and went on to state that the primary reason for this decision was as a result of her concerns about the appointment of the TPM/HOPP. She stated the current situation "is irresolvable". She went on to state in the email that she felt her position was untenable and she no longer felt able to continue her career with the respondent. The claimant provided further details about how she felt she had been dissuaded from applying for the TPM role following the internal advertisement. She stated that she had been told by Mr Kidger that it was a very specific role with a high number of direct reports, that it may not be in place along, it was a fixed term contract, based in London with a high expectation to work long hours. As her line manager was now in post, she felt there was a conflict of interest in the advice he had given her.
28. In evidence to the Tribunal, the claimant elaborated on how she felt when she submitted this grievance. She said she felt she couldn't work for the respondent, the trust had gone, she was feeling sick every day and could not see a way out. This was consistent with the theme of her email of 21st of July. The Tribunal considered this to be an emphatic statement of her position. It was an uncontested fact before the Tribunal that in relation to a further consultation meeting scheduled for 8 August 2017, the claimant did not attend. Further, by now she had engaged Solicitors and the respondent's understanding was that she had been advised not to engage in the process. This was the understanding of Gillian Hindmarsh in HR, when she attempted to rearrange a further consultation meeting on 9 August 2017 (page 298 of the bundle). The Tribunal did not have any 'open' Solicitors' correspondence before it but this position was not challenged by the claimant.

29. Whilst the claimant stated that she wished for her grievance to be dealt with formally, it was dealt with, in the first instance on an informal basis. The respondent's grievance procedure was at page 60 of the bundle and has an informal and formal procedure. By an email dated 25th of July 2017, the claimant having met with Rachael Luttmann from HR, the claimant agreed to have her grievance heard on an informal basis at this stage. This email was at page 261 of the bundle.
30. Pending resolution of the claimant's grievance, the respondent removed her reporting line from Mr Kidger on a temporary basis. This was communicated to the claimant by Ms Gardner Poole by an email of 24th of July 2017 which was at page 255 of the bundle. In addition, the claimant had raised concerns about Mr Kidger being on the interview panel for the roles of project manager and senior project manager. The respondent arranged for Chris Tingle, COO, to be the interviewer for the claimant in the event that she would apply for any of the roles. Ms Gardner Poole confirmed this in an email to Ms Hindmarsh on 24th of July 2017 at page 260 of the bundle.
31. The informal grievance meeting took place on 26th of July. The claimant was accompanied at this meeting. The output from this meeting is set out in an email dated 28 July 2017 which was at 270 of the bundle.
32. In summary it was confirmed:
- That the claimant's reporting line had been amended
 - Ms Gardner Poole felt that the claimant did have the opportunity to progress from being a project manager and would put in a development plan to coach the claimant every 4 to 6 weeks
 - Ms Gardner Poole had spoken with a previous line manager of the claimant (Matt Taylor) who had stated that at the time that the claimant was responsible for the CRM/Portal project, she was operating at a project manager level not senior project manager level.
 - Ms Gardner Poole had spoken with Mr Kidger in relation to career progression who had said that he saw the role of senior project manager as a potential career progression which the claimant could apply for or aspire to in the future.
 - Regarding Mr Kidger's appointment as the claimant's line manager when she had transferred to the transformation programme, Ms Gardner Poole had initially suggested Ms Jackson as her line manager but altered this to Mr Kidger upon the claimant's request. Further, Ms Gardner Poole stated that it was not unusual for contractors to take up managerial positions. In addition, Mr Kidger came with experience and capability and he had been recognised in PA consulting someone with exceptional talent and thus was given line management responsibility.
 - In relation to the TPM role, after outlining the demands of the role, Ms Gardner Poole ideally wanted someone with proven quantity and avoid taking a chance on somebody as a development opportunity. Thus, she felt she needed to recruit from outside of the organisation. However, if anyone had wanted to talk to her directly about applying, she would have encouraged internal candidates and was happy to be proven wrong.

- Ms Gardner Poole had spoken with Mr Kidger who had recalled one conversation with the claimant in relation to the TPM role when he had stated that Ms Gardner Poole did have high expectations, that the hours can be long, that it was London based, that it was a fixed term contract and that the claimant should think about whether now was the right time for her to take on this responsibility and pressure. His reference to other opportunities was in relation to those coming out of the current reorganisation and in particular a senior project manager role. He had also confirmed that he had had a similar conversation with Germaine Faulkner, who had been spoken to by Ms Gardner Poole, but she had interpreted her conversation with Mr Kidger differently and not someone who was dissuading her from applying. In addition, Mr Kidger said he had not decided at the time if he would be applying. (This was confirmed by Mr Kidger in evidence and was not challenged).
 - Ms Gardner Poole summarised that in relation to the HOPP, the TPM role had a 70% match to it.
33. Ms Gardner Poole's conclusion was that Mr Kidger had not actively dissuaded the claimant from applying for the role. Ms Gardner Poole further reflected on the timing of the decision to merge the TPM role and the HOPP and she was keen to minimise the disruption to people and projects.
34. She summarised that she felt there was adequate career progression for the claimant.
35. The Tribunal accepts that the email at page 270 of the bundle fairly reflects the investigation and enquiries made by Ms Gardner Poole.
36. The claimant agreed under cross examination that Mr Kidger did inform her in addition that the work was interesting and stimulating and his appraisal was genuine and honest. In addition, the claimant agreed that she now saw a senior project management role as progression and she agreed that a proper process had been followed and that the TPM role and HOPP role had a 70% match.
37. The Tribunal finds that there was one conversation in this regard. The Tribunal finds that there was a further conversation between Mr Kidger and the claimant which was referred to in paragraph 18 of Mr Kidger's witness statement which was more general about career progression and in particular in relation to the reorganisation which may lead to a senior project manager position. That is what the Tribunal finds to be the further opportunities to which the claimant referred.
38. Although the claimant was invited to a follow-up meeting in relation to her grievance on 2 August 2017, the claimant did not attend this meeting. The claimant had advised that she would not attend a meeting without her solicitor being present. Although a further meeting was arranged for 9 August, the claimant stated that she didn't see any benefit in having a further meeting as the email of 28th of July had been clear. Within this email the claimant also stated that she would not be applying for any roles in portfolio delivery. This was in response to Ms Gardner Poole's email offering to extend the deadline for

the claimant to apply for the role. These emails were at page 281 and 290 of the bundle. The Tribunal accepts paragraph 82 of Ms Gardner Poole's witness statement and her evidence was not challenged.

39. Following the conclusion of the informal grievance procedure, the claimant indicated that she wished for her grievance to be escalated as a formal grievance. Her email of 7 August was at page 288 of the bundle.
40. The Tribunal accepts the evidence of Ms Gardner Poole that on or around 7 August she also informed Ms Hindmarsh in HR that the claimant could be slotted into the remaining and only outstanding project manager role which was the Office 365 project manager role and that that should be offered to the claimant. The Tribunal accepts that this was consistent with the thoughts of Ms Hindmarsh and Mr Tingle as referenced in the email of 25th of July 2017 which was at page 263 of the bundle. The Tribunal did not hear evidence from Ms Hindmarsh and Mr Tingle about any earlier conversation or email to which this email referred. Under cross examination, Ms Gardner Poole was unable to shed any further light on the context or meaning of this email and in particular the reference to any other plan. She did state however that on her part she was still hoping that the claimant would apply for a role and that Mr Tingle was keen to place her in a project manager role too. Ultimately however it was Ms Gardner Poole's decision and the Tribunal accepts her evidence in this regard.
41. There was a delay in arranging the formal grievance hearing was initially been set for 24th of August 2017. This was because the claimant requested a different grievance hearing manager. A new grievance hearing manager was arranged which the claimant was content with. This was confirmed in her email of 4 September 2017 at page 358 of the bundle. A new hearing date was agreed with the claimant's input as confirmed by the email exchange on 6 and 7 September on page 359 of the bundle.
42. The claimant was invited to a final consultation meeting on 17th of August to take place on 23rd of August. That letter was at page 300 of the bundle. The notes of the meeting were at page 316 of the bundle. It was explained at this meeting and recorded in the minutes that a desk top assessment had been carried out and the claimant had been slotted into the project manager role which was considered to be a suitable alternative and there would be no redundancy payment or termination of employment. Ms Gardner Poole stated that the claimant was considered to be a good project manager with a professional approach that she wanted the claimant to stay in the respondent's organisation which was also the view of Mr Tingle. In a discussion about the desktop assessment, Ms Hindmarsh explained that the claimant's projects in the last 6 to 12 months had been considered. It was also confirmed that the offer was on the same terms and conditions.
43. A letter following this meeting was sent to the claimant on 23rd of August confirming her appointment into the project manager role level together with the job description attached confirming all other terms and conditions remained the same. The transfer into this role was to be effective from 1 September 2017 and

it was stated that the claimant would not be entitled to a redundancy payment and there would be no termination of her employment.

44. After this letter, the claimant raised queries in relation to the desktop assessment and Ms Hindmarsh responded with Ms Gardner Poole's. The final response was sent on 30 August which was at page 350 of the bundle. The previous reference to looking back over 12 months was corrected and it was confirmed that projects prior to April had not been considered as Ms Gardner Poole did not have a clear view of the projects for all people prior to that month. It was also confirmed in this email that the senior project manager role would have been a promotion which was open to application which the claimant had not applied for.
45. On 31st of August 2017, the claimant alleged that the respondent was in breach of contract and reserved the right to resign and claim constructive dismissal. This email is at page 352 of the bundle. This email was written in response to the respondent's letter of 23rd of August 2017. The claimant stated she did not agree that the position of project manager offered was a suitable alternative role. She referred to her meeting with Mr Kidger as a result of which she felt that adding information governance and consistency ('IG & C') and business change activities would increase her workload and duties significantly.
46. Ms Hindmarsh's response to this email dated 1 of September 2017 was at page 354 wherein she re-stated that the role carries the same grade, salary and other terms and conditions as the previous role and was essentially the same type of work. In addition, the claimant would be managing the project which she had previously managed albeit that the project content requirements would change from time to time. It was confirmed that no dismissal had taken place and her employment continued.
47. The Tribunal also accepts the evidence of Ms Gardner Poole that line management responsibilities for a project manager would only fall to a project manager who wanted it as set out in the presentation at page 218. This was an output from the consultation process.
48. In relation to the claimant's assertion that her role would involve a significant increase in her duties, there had been a meeting between Mr Kidger, the claimant and Ms Jackson on 23rd August 2017. This was in relation to the information strategy work being split into two projects. The Tribunal accepts that there was earlier high-level consideration of this, but the Tribunal did not consider that to be significant or material having regard to the totality of the Tribunal's findings below. The claimant asserted in paragraph 29 of her witness statement that as a result of what she was told at this meeting she felt that she would be picking up 90% of the original project scope. Under cross examination the claimant agreed Mr Kidger had not used or made reference to "90 %". The claimant also said under cross examination that she was told she would be picking up IG & C. Mr Kidger's position was that he had instructed the claimant and Ms Jackson that the claimant would continue to manage the Office 365 project and the IG & C project would be managed by Ms Jackson. This meeting was taking place before Mr Kidger's imminent annual leave by reason of

honeymoon and he asked them both to consider working on this split in his absence.

49. Mr Kidger's follow-up email to this meeting dated 24th of August was at page 329 of the bundle. In this email, he stated expressly that the SharePoint and Office 365 project was to be led by the claimant and the remaining information strategy/IG & C was to be led by Ms Jackson. He stated that there was to be an equal focus on both streams of activity and in his absence he asked the claimant and Ms Jackson to work on five particular areas of focus. This included scope, plan, resource, budget and dependencies. He also said that Ms Gardner Poole was a point of escalation. The claimant and Ms Jackson responded to this email on 25th of August. There was no challenge in either email to the principal instruction which had been given about the splits and responsibilities.
50. The Tribunal finds that Mr Kidger did say that the claimant would retain responsibility for SharePoint and Office 365 and not for IG & C. This is supported by his contemporaneous email of 24th of August. It is further supported by the lack of challenge by the claimant or Ms Jackson in their email of the following day. The Tribunal did not accept reference to IG & C in the claimant's email to be in the context of inheriting that project's responsibilities. The Tribunal also notes that in paragraph 29 of her witness statement the claimant did not make any reference to having understood the split to mean that she would be inheriting IG & C project responsibilities.
51. In Mr Kidger's absence, the claimant and Ms Jackson did get together to produce some output in relation to the split of the projects which were at pages 348-349 of the bundle. This did not involve any input from either Ms Gardner Poole or Mr Kidger. Under cross examination, they both expressed surprise about the inclusion of IG & C within the scope of office 365 including SharePoint online. The Tribunal was also taken to the email at page 356 of the bundle from Ms Jackson to the claimant headed "information strategy handover". There was a dispute between the parties as to the effect of what was being said by Ms Jackson in this email. The claimant's evidence broadly was it represented the details of a significant handover of IG & C responsibilities whereas the respondent believed it did not represent anything of the sort.
52. The email stated that there still needed to be a resource split conversation. Under a section headed miscellaneous, various matters were referred to.
53. In relation to the first bullet, the respondent says that the need for someone to speak with Paula Wilson was a one-off task. The Tribunal accepts that from its reading of the email. In relation to the third bullet (IGB), it was expressly stated that any project decisions in this regard were to go to Ms Jackson not the claimant. The Tribunal accepts that from its reading of the email. In relation to the fifth bullet (pathfinder engagement) this was stated to be a responsibility being picked up by somebody else. The Tribunal accepts that on its reading of the email. In relation to the sixth bullet regarding aviation security, the Tribunal finds that there was some responsibility coming to the claimant in this regard based on what was written in the email. However, it was also stated that the claimant had already been having conversations. The Tribunal also takes account of the evidence of Ms Gardner Poole that there was a separate project

stream relating to aviation security with a separate project manager. This was unchallenged by the claimant and Tribunal accepts this evidence. In relation to Future state and transition manager role, the suggestion was that a Junior PM might be needed to support which the Tribunal finds means additional project resource. There was also reference to Nicky Keeley needing to be included as resource into the governance structure. Under the section 'business change' the respondent's evidence was that there were two references to links only also under the responsibility of 'Sandra' (Rowe). The Tribunal accepts this from its reading of the second and third bullets under that section.

54. The claimant did not particularise or provide any further detail about this workload/handover in her witness statement. Under cross examination however she did agree that website based content work was not requiring her to do anything, the scheduling of roll out for 'Drop 1' was a one off decision, IGB was going to Ms Jackson, the messaging and expectation setting was for her information and that Sandra was picking up business change responsibilities, although the claimant did state that management of this rested with her. She said the same for aviation security.
55. The Tribunal finds that this email did not reflect a handover of work of 90% of Ms Jackson's tasks. It was Ms Jackson's first cut of work she was intending to pass over to the claimant and in that regard was unilateral. It was not a final position, it referenced the need to scope out resource, it did not involve at any stage any input from Ms Gardner Poole or Mr Kidger. In addition, many elements as noted above were not substantive or intending to be passed on to the claimant. The Tribunal also finds that Ms Jackson was someone with whom the claimant had a difficult relationship. The claimant had not wanted to report into her and had considered her to be ineffective (paragraph 30 of her witness statement). Ms Jackson herself had commented on there being a 'clash' (page 308). Mr Kidger too had commented on this in his email of 26 August at 332A of the bundle referring to two of them not having had the best relationship.
56. The Tribunal also has regard to the charts produced at page 310 of the bundle and the related email exchange at pages 308 and 309, following a previous meeting on 18 August between Ms Jackson, Ms Gardner Poole & Mr Kidger. The Tribunal does not consider the budget split stated on the foot of document 310 to reflect an official or endorsed statement of a budget split corresponding to the splitting of project responsibility. It was rejected as such by Ms Gardner Poole and Mr Kidger. The Tribunal notes again this was a draft put together solely by Ms Jackson. She had stated in particular in her email of 18 August: "...which is why I pulled together and presented this proposal today, believing it to be a more suitable proposal".
57. The Tribunal was referred to the email from Mr Kidger dated 18 August at page 309 and his reference to Ms Jackson's perception of having a smaller role after the split. Mr Kidger clarified in response to a question from the Tribunal what he thought she meant by this. He stated that this was because Office 365 and SharePoint online as a project had been part of the Information Strategy project which was Ms Jackson's responsibility but not that it would give the claimant more work. The Tribunal accepts his evidence in this regard.

58. In light of the above findings, the Tribunal did not feel it needed to make additional or separate findings in relation to the supplementary evidence given by the claimant regarding the duties being assigned to her from Ms Jackson (page 133).
59. By an email dated 11 September which was at page 373 of the bundle the claimant gave 3 months' notice to resign. The claimant cited the project split, that her role now required significant more responsibilities, taking on IG & C accountability. She also referred to her health and the consultation process exacerbated by her grievance.
60. The formal grievance process was concluded in the claimant's absence. This was on 9 November 2017. (It had previously been arranged for 14 September 2017 which did not go ahead). This was during the claimant's purported notice period. The claimant was signed off sick. The grievance was rejected. There was no evidence of an invitation letter to this meeting being sent and the Tribunal finds there was no invitation letter. Rob Lewis did not give evidence but his statement was agreed by the claimant save in this respect. The Tribunal notes the claimant was given a right of appeal which she did not exercise.
61. Ms Gardner Poole for the respondent also gave supplemental evidence in relation to three comparators who the claimant said were treated more favourably than her in securing an incentive to stay (Peter Bartle) or being 'granted' redundancy (Robyn Hathaway & Steven Barker). These were referred to in paragraph 26 of the claimant's witness statement. The differences were also accepted by the claimant under cross examination. The Tribunal accepts the evidence of Ms Gardner Poole in relation to the circumstances being treated on a case by case basis and in particular where a suitable role was not available, redundancy was offered.
62. The respondent's redundancy policy refers to a trial period being offered where a role offered is on different terms or substantially different. Based on the above findings, the Tribunal finds the role offered to claimant was not on different terms or substantially different.

Applicable Law

63. By S.138 Employment Rights Act ('ERA') a statutory trial period applies where the provisions of a new or renewed contract differ, wholly or in part, from the corresponding provisions of the previous contract as to the capacity and place in which the employee is employed and the other terms and conditions of employment.
64. The offer must be for the new employment to start either immediately after the end of employment under the original contract or after an interval of not more than four weeks.

65. Pursuant to ***East London NHS Foundation Trust v O' Connor EAT 2019***, the statutory trial period will not be triggered unless there has been notice of and/or an express dismissal.
66. Under S. 95 ERA an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.
67. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606***.
68. In ***Western Excavating v Sharp 1978 ICR 221*** the test for constructive dismissal is whether:
- The employer was in fundamental breach of contract
 - The employee resigns in response to the breach
 - The employee does not delay too long in resigning i.e. he does not affirm the contract
69. By s.98 (2) ERA an employer needs to have a potentially fair reason for an employee's dismissal and by S.98 (4) the employer must act reasonably in treating that reason as a sufficient for the employee's dismissal.

Conclusions and analysis

70. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Direct Dismissal

71. The Tribunal finds the claimant was not expressly dismissed or alternatively given notice of dismissal by reason of redundancy. The Tribunal considers the respondent's letter of 23 August 2017 to be communicating to the claimant her role of project manager at level 2B following the reorganisation/restructure. The letter states that the claimant will not be entitled to a redundancy payment as there will be no termination of her employment. The position was confirmed by HR subsequently in an email from Gillian Hindmarsh dated 1 September saying there was no dismissal and again on 15th of September 2017 wherein she stated that she considered there to be no statutory trial period as the claimant's terms and conditions remained unchanged from her previous role of IT project manager. The Tribunal takes into consideration all the other project manager roles had been filled and the remaining unfilled role was that of a project manager to project manage the same project before the reorganisation without any drop in grade/level or pay. The Tribunal also took into consideration that

there were other roles which were treated as redundant (Robyn Hathaway) whose position in the reorganisation following the change went from project manager to junior project manager and Steven Barker, whose position as programme manager was eliminated following the restructure. But that did not apply in the claimant's case and the respondent did not approach her situation as a termination scenario.

72. The Tribunal was referred to the decision in *Hogg the Dover College 1990 ICR 39*. The Tribunal does not consider the facts in this case to be similar or comparable with that type of situation. In particular, in that case the effect of the letter from the college which was held to have amounted to a dismissal, involved a significant drop in salary and a significant drop in status as the claimant was no longer to continue as department head. The Tribunal deals below with its analysis of the claimant's alternative claim of constructive dismissal in relation to the alleged changes to the claimant's role following the reorganisation.

Constructive Dismissal

73. The conclusions below cross reference paragraphs 15 (a) to (j) of the claim form:
- a) The Tribunal does not consider Mr Kidger's response to the claimant following her enquiry about the TPM role to have been improper or unreasonable in any way. The Tribunal concludes that this was a short informal conversation. Mr Kidger did not tell the claimant she could not apply for the role. The Tribunal also concludes that Mr Kidger did not set out to discourage or dissuade the claimant from applying for the role. That the effects of what he said may have dissuaded the claimant from applying for the role does not mean that Mr Kidger was blameworthy in any regard. The Tribunal's conclusion is also reinforced by its finding in relation to a similar conversation Mr Kidger had with Germaine Faulkner who had not interpreted her conversation with Mr Kidger as being dissuasive. The Tribunal concludes that such conversations are commonplace in the workplace and a subordinate may seek his or her line manager's feedback about promotion or career progression prospects and expect a constructive assessment. That is all that happened here. Whilst the Tribunal has found that Mr Kidger had not decided at that point to apply, the Tribunal also concludes that the claimant knew or ought to have known that Mr Kidger may himself be a possible or likely candidate for that position given that he was already in the interim post.
 - b) In relation to the appointment of Mr Kidger without considering the claimant's suitability for that role, the Tribunal repeats its conclusions in relation to the issue immediately above but also concludes that the claimant was not ruled out from consideration for this role. The claimant did not apply for the role. The position was opened up internally and externally. The Tribunal also notes with some importance that there were no internal applicants for the role which would suggest that the role might have been a step too far for any internal candidate

given the level of the role. It may also have been the case that internal candidates felt that Mr Kidger might have been a preferred choice and/or a strong candidate but that does not mean that there was conduct or behaviour on part of the respondent which was improper, unreasonable or undermining. The Tribunal also concludes that the decision of the respondent to have in place the TPM role and later merged with the HOPP before dealing with the reorganisation, was a legitimate basis to proceed to achieve its aim of achieving stability at the top and because it felt it was unlikely to find a candidate internally. The Tribunal does not consider this to be an uncommon occurrence.

- c) The Tribunal concludes that the claimant's grievance in relation to the appointment of Mr Kidger was dealt with within a reasonable timeframe and adequately. It is correct that the claimant raised her grievance as a formal grievance and ultimately at the first stage the respondent dealt with it as an informal grievance. The Tribunal concludes that that was because the respondent wished to have an attempt to resolve the grievance at an informal level if possible, which would not be inconsistent with the spirit and intention of its grievance procedure.
- (1) Ultimately, the Tribunal concludes that there was no dispute about the respondent treating it as an informal grievance initially as the claimant, following conversations with HR, accepted the attempt to resolve it in this way. The grievance was raised on 21st of July and responded to comprehensively in writing on 28 July following reasonable enquiries. This followed a discussion and the intention was for there to be a follow-up meeting. The claimant opted out of having a follow-up meeting by her email on 4 August. 2017.
 - (2) The Tribunal also concludes that the respondent did discuss re-opening the HOPP role which the Tribunal concludes was done in good faith. Whilst it might have been impracticable if this is what the claimant wanted the respondent to do, the Tribunal concludes that the respondent would have done so to the best of its abilities. The Tribunal notes from the respondent's email of 7 August 2017 at page 281B, that rather than wanting to close down the grievance when the claimant had said she did not wish to have a further meeting, the respondent was discussing proactively making the claimant aware that she could take the grievance to a further stage. A respondent who wished to simply move on, would not have acted in this way.
 - (3) In relation to the formal grievance, the arrangements for this were ultimately concluded to take place on a date by which time the claimant had submitted her resignation. The initial delay was because of the claimant's preference for there to be a different grievance hearing manager to that which had been suggested. The Tribunal concludes there was no unreasonable delay or improper conduct in the arrangements for the formal grievance hearing. The claimant was signed off sick during her notice period and ultimately a grievance hearing was arranged to take place on 9 November. The Tribunal concludes the

earlier one arranged for 14 September 2017 did not ahead because of the claimant's resignation. The formal grievance hearing took place in the claimant's absence. The Tribunal concludes there was no invitation sent out. By that time the Tribunal concludes that it was not material to the claimant's decisions. If the Tribunal is wrong in its conclusion in this regard, the Tribunal notes that in any case the claimant did not appeal against the outcome.

- d) & (e) & (i) The Tribunal concludes that the respondent did consult with the claimant properly regarding redeployment opportunities. There was a briefing in July, there was a collective consultation meeting with the trade union and there were three individual consultation meetings with the claimant. In light of the claimant's grievance and the overlapping issues, there was further dialogue and discussion between the claimant the respondent during the relevant period i.e. July and August 2017.
- (1) The minutes of the consultation meetings from that the consultation meetings show the claimant was fully engaged and in fact was querying how she should register her interest in applying for other roles including a senior project manager role and a technology manager role.
 - (2) The Tribunal also concludes that there were several exchanges between the claimant and respondent about redundancy terms. The Tribunal observes that it is common practice for employers to provide employees at risk of redundancy with redundancy estimates in the event that their position is to be declared redundant. However, the primary objective of a fair consultation process, is to find a way to avoid a redundancy situation. With that in mind, the Tribunal concludes that it was the respondent who was trying to get claimant to either apply for a senior project manager role or ultimately to accept the project manager role that she was slotted into. In many cases it is an employer's failure to offer a suitable alternative position which leads to unfairness, but it appeared to the Tribunal here that a key part of the claimant's case in these proceedings was her desire and will to be made redundant in any event.
 - (3) The respondent had sought a previous line manager's views in relation to the claimant's operating level which was used as part of the slotting in/matching process. The respondent also undertook a desktop assessment based on Ms Gardner Poole's view of the claimant's projects over a five-month period. Whilst the Tribunal considers that a longer period would have been more appropriate, the Tribunal does not conclude that this would have changed anything. Further, everybody was judged on the same period and thus there was no difference in treatment. Further, this is not a case in which the claimant was offered a role which was for a project materially different to what she had been undertaking (Office 365 & SharePoint). The Tribunal deals below with the alleged differences and variations.

- f) (g) & (h) In relation to the project manager role which the claimant was to have started to undertake from 1 September onwards, the Tribunal concludes that the role was not going to be materially different to the role which the claimant had previously been undertaking before the reorganisation and restructuring. The role was for a project manager primarily to undertake responsibilities connected to office 365 and SharePoint online. It was at the same grade/level and on the same salary and other terms and conditions.
- (1) There was at the time a split in the information strategy project and the claimant's case has been that as a result, the IG & C duties/responsibilities previously sitting with Helen Jackson would come to her. Her case was that she would inherit 90% of the responsibilities. The Tribunal concludes that this was an entirely pre-mature assessment by the claimant. The Tribunal concludes that it was not reasonable for the claimant come to such a conclusion when she had had a meeting with her line manager who had told her expressly how the division/split was to take place. He had emailed a follow-up to that meeting tasking the claimant and Helen Jackson to come up with a plan whilst he was on honeymoon for three weeks. He invited the claimant and Helen Jackson to look at matters such as scope, plan, resource, budget and dependencies. The reference to resource is significant in the Tribunal's view as it was an invitation to consider what additional resource might be required. Put differently, it was not something which would simply be resting on the shoulders of the claimant and Helen Jackson. The Tribunal is fortified in reaching its conclusion in this regard as there is reference to the possibility of scoping a junior project manager in relation to the future state transition manager role aspect of the splitting up of the project activities. The Tribunal has already found that in some respects there was already resource in place which would have ultimate responsibility for some activities, for example, aviation security which had its own project manager.
- (2) In relation to the email from Helen Jackson dated 4 September 2017 which received a lot of focus at the hearing, having regard to the findings reached in relation to this email and the content therein, the Tribunal concludes that the context of this email was Helen Jackson presenting her view of the world after the split. The Tribunal does not consider that this email represented a material transfer of responsibilities to the claimant. To the extent that the Tribunal is wrong in its conclusion in this regard and to the extent that when viewed with the other 'split-related' documents seen by the Tribunal put together by Ms Jackson, suggesting that there was going to a significant volume of work being inherited by the claimant, up to 90% and the inheritance of IG & C by the claimant, the Tribunal does not consider this to anybody else's view particularly not the view of management e.g. Ms Gardner Poole or Mr Kidger. Neither was it a final view and neither was it a view consistent with the express instructions of Mr Kidger. The Tribunal concludes that the claimant must have known this or ought to have known this and certainly in Mr Kidger's absence, the claimant could have escalated this to Ms Gardner Poole as instructed.

- (3) Also, the Tribunal believes that the views of Helen Jackson were partially infected by the previous strained relationship between her and the claimant where they had clashed and in circumstances where the claimant had not wanted to report into her. In addition, at the time of the email of 4 September 2017, Ms Jackson had been unsuccessful in her application for a senior project manager role. It is likely that she was not content at that time. The Tribunal concludes that the claimant's interpretation of this email was opportunistic on her part.
- (4) The Tribunal was also influenced by the claimant's inconsistent and/or unclear evidence in relation to what she said about the additional responsibilities coming to her. She referred to 90% of the project being managed by Ms Jackson coming to her. Separately she said her volume of work would increase by 25 to 30%. In response to a question from the Tribunal, when asked to put aside whether or not her workload was going to increase by 90% because of Ms Jackson's duties coming to her, she said her responsibilities were still being increased by another 20 to 25% in relation to the aviation security activities. The Tribunal concludes that it is simply implausible that the respondent would be attempting to load up the claimant with such a vast increase in work. This Tribunal has already expressed its view and concluded that it was not reasonable for the claimant to think that her workload was going up in the way that she was suggesting particularly as this was not been presented to her by either of the two relevant managers with whom she had been interacting over the previous two months in relation to the reorganisation and her grievance.
- (5) The Tribunal also struggled to reconcile the claimant's evidence on the importance of career progression with her failure to apply for a promotion opportunity during the reorganisation. In addition, the claimant had been disengaged since 21 July 2017, explaining her position to be untenable. This begs the question whether the issue over the split was causative of her resignation. The claimant also said in response to a question from the Tribunal that she would have reconsidered her position if there was recognition of her role and resource available. The latter had been expressly referenced. The Tribunal stops short of saying it did not have a bearing and reminds itself that even if it is a part of the reason, it can potentially lead to a causative finding of constructive dismissal if there has been a breach and no affirmation. ***Wright v North Ayrshire Council [2014] IRLR 4, EAT applied.***
- (j) The Tribunal concludes that the redundancy policy was not directly applicable/engaged in relation to a trial period. The role offered to the claimant was not on different terms or substantially different. Alternatively, having regard to the findings above, the Tribunal concludes that the respondent did not fail to follow its redundancy policy.
74. The Tribunal thus concludes that viewed objectively none of the matters relied upon by the claimant, whether in isolation or on a cumulative basis found a breach of the implied term of trust and confidence. ***Kaur v Leeds Teaching Hospitals Trust EWCA Civ 978*** applied.

75. There was no dismissal for either S.95 or S.138 (4) ERA.

Statutory Redundancy Pay

76. Having regard to the Tribunal's conclusions in relation to dismissal the Tribunal concludes that the claim for Statutory Redundancy pay must fail.

NOTE:

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Khalil

18 December 2019