EMPLOYMENT TRIBUNALS

Claimant: Ms H Simmons

Respondents: (1) Kingston University Service Company Limited
(2) Mr W O'Leary

Heard at: **London South Employment Tribunal**

On: **1-3 & 7-8 October 2019**
15 November 2019 (in chambers)

Before: **Employment Judge Ferguson**

Members: **Mrs V Blake**
Mrs C Upshall

Representation
Claimant: Mr M Curtis (counsel)
Respondents: Mr S Brittenden (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant's complaint of unfair dismissal succeeds, but no compensatory award is made.

2. The breach of contract claim is dismissed upon withdrawal.

3. The remainder of the Claimant's complaints fail and are dismissed, namely:

    a. Automatic unfair dismissal under s.103A ERA

    b. Unfair dismissal under Regulation 7 of TUPE

    c. Detriments because of protected disclosure

    d. Direct age discrimination

e. Harassment related to age

f. Indirect age discrimination

g. Direct sex discrimination

h. Harassment related to sex

i. Indirect sex discrimination

REASONS

INTRODUCTION

1. By a claim form presented on 3 January 2018, following a period of early conciliation from 23 November to 22 December 2017, the Claimant brought complaints of unfair dismissal, both ordinary and automatic because of making protected disclosures, detriments because of making protected disclosures, age and sex discrimination and breach of the TUPE Regulations.

2. The breach of contract claim was withdrawn at the start of the hearing. By the end of the hearing the complaints and issues had been narrowed and agreed as follows:

   Whistleblowing

   2.1. The Claimant relies on the following protected qualifying disclosure: Written complaint in respect of a former Managing Director of the First Respondent submitted jointly by the Claimant and an SMT colleague to Matthew Hilton and Kate Allan on 21 April 2016. The Respondent accepts that this amounted to a protected disclosure.

   Automatic unfair dismissal

   2.2. Can the First Respondent show that the principal reason for the Claimant's dismissal was redundancy? If not, was the reason or principal reason for the Claimant's dismissal the fact that she had made the above disclosure?

   Detriments

   2.3. Did the First Respondent subject the Claimant to a detriment? The Claimant relies on the following as detriments:

      2.3.1. Allegedly being told not to attend work for 9 weeks from September 2017 when there is no garden leave clause in the Claimant's contract.

      2.3.2. Verbally being put at risk of redundancy on 6 September 2017.

2.3.3. Formally being put at risk of redundancy on 23 October 2017.

2.3.4. Not following adequate meaningful consultation.

2.3.5. Not being offered alternative employment instead of being made redundant and notified of all vacancies in good time as part of the consultation.

2.4. Do the above amount to detriments? Would or might a reasonable worker take the view that they had been disadvantaged in the circumstances?

2.5. If the First Respondent subjected the Claimant to a detriment, was the Claimant subjected to such a detriment on the grounds that the alleged protected disclosure was made or does the First Respondent show that the alleged protected disclosure did not materially influence any found detrimental treatment?

Ordinary unfair dismissal

2.6. Did the First Respondent have a potentially fair reason for dismissing the Claimant? The Respondent relies upon the potentially fair reason of redundancy. The Claimant does not accept that there was a genuine redundancy situation.

2.7. Was the procedure followed fair within section 98(4) of the Employment Rights Act 1996 ("ERA")? Did the Respondent's decision to dismiss the Claimant fall within the range of reasonable responses that a reasonable employer in those circumstances in that business might have adopted bearing in mind the following:

2.7.1. The extent that the Claimant was warned and meaningfully consulted with about the proposed redundancy.

2.7.2. Whether the First Respondent reasonably considered suitable alternative employment and notified the Claimant of all suitable vacancies in good time as part of the consultation.

Age discrimination

2.8. The Claimant was 54 at the time of her dismissal.

Direct discrimination

2.9. The Claimant relies on the following as allegations of direct discrimination:

2.9.1. At a meeting on 6 September 2017 the Second Respondent allegedly told the Claimant he was aware that the Claimant was a Granny and that being made redundant would give her more time with her grandchild.

2.9.2. Allegedly being suspended for 9 weeks from September 2017. There is no garden leave clause in her contract

2.9.3. Selecting the Claimant for redundancy and making her redundant prior to her 55th birthday, when if she had been made redundant after she was 55 and she had still been a member of the LPFA she would have been able to take her pension immediately without actuarial reduction.

2.9.4. Not being offered alternative employment instead of being made redundant.

2.10. Did the above occur?

2.11. If so does it or they amount to less favourable treatment against the Claimant compared to how the Second or First Respondent treated or would treat others? The Claimant relies on Ms Ilza Malkoun or a hypothetical comparator.

2.12. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude, in the absence of any other explanation, that the difference in treatment was because of her age? The Claimant identifies her age group as 50-54 years old. She asserts that a comparator who was older or younger than this age group would have been treated differently.

2.13. If so, what is the Respondents' explanation? Can they show a non-discriminatory reason for any proven treatment?

2.14. If any proven treatment is found to be because of the Claimant's age, can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon are to increase customer focus, to create efficiencies and to make efficient use of resources within budgeting constraints.

Indirect Discrimination

2.15. Did the following occur and amount to a provision, criterion or practice ("PCP") for the purposes of section 19 EqA ?: In considering who to put at risk of redundancy and who to make redundant, preferring the selection of those employees who would be more expensive to buy out of the LPFA defined benefit pension scheme during employee consultations if the scheme closed for further accrual.

2.16. If so, does or did the First Respondent apply (or would apply) that PCP to persons who do not share the Claimant's protected characteristic?

2.17. If so, did (or would) the application of the PCP put employees of the First Respondent who share the Claimant's protected characteristic at a

particular disadvantage compared to others? This will involve consideration of the appropriate pool for comparison.

2.18. Was the Claimant put at that particular disadvantage?

2.19. Can the First Respondent show the PCP to be a proportionate means of achieving a legitimate aim?

Harassment

2.20. Did the Second Respondent engage in unwanted conduct as follows:

2.20.1. Imposing unreasonable deadlines on the Claimant to consider the option of a settlement with no pension loss information being provided despite the Second Respondent having told her on 13 September 2017 that he had the information and would provide it;

2.20.2. Giving insufficient notice of redundancy consultation meetings;

2.20.3. Sending an email to the Claimant on 6 October 2017 with an alleged threatening and intimidating tone;

2.20.4. At a meeting on 6 September 2017 the Second Respondent allegedly telling the Claimant that he was aware that the Claimant was a Granny and that being made redundant would give her more time with her grandchild.

2.21. In respect of each of the allegations relied on by the Claimant, was the conduct related to the Claimant's identified age?

2.22. In respect of each of the above allegations, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

<u>Sex discrimination</u>

Direct discrimination

2.23. The Claimant relies on the following as allegations of direct discrimination:

2.23.1. At a meeting on 6 September 2017 the Second Respondent allegedly told the Claimant he was aware that the Claimant was a Granny and that being made redundant would give her more time with her grandchild.

2.23.2. Allegedly suspending the Claimant for 9 weeks from September 2017 when there was no garden leave clause in her contract.

2.24. Did the above occur?

2.25. If so does it amount to less favourable treatment against the Claimant compared to how the Second or First Respondent treated or would treat others? The Claimant relies on a hypothetical comparator.

2.26. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude, in the absence of any other explanation, that the difference in treatment was because of her gender?

2.27. If so, what is the Respondents' explanation? Do they prove a non-discriminatory reason for any proven treatment?

Indirect Discrimination

2.28. [As for indirect age discrimination above.]

Harassment

2.29. Did the Second Respondent engage in unwanted conduct as follows:

2.29.1. [As for age-related harassment above.]

2.30. In respect of each of the allegations relied on by the Claimant, was the conduct related to the Claimant's gender?

2.31. In respect of each of the above allegations, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

<u>TUPE</u>

2.32. For the purposes of regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), have the following activities ceased to be carried out by the First Respondent on its own behalf and are carried out instead by Kingston University Higher Education Corporation or another organisation on behalf of the First Respondent: The role and responsibilities undertaken by the Claimant in her role as Head of HR and Communications (non everyday operational or strategic HR and senior level Employee Relations matters).

2.33. Alternatively, for the purposes of regulation 3(1)(a) TUPE was there a transfer of a part of a business or undertaking to another person where there was a transfer of an economic entity which retained its identity?

2.34. When did any transfer occur?

2.35. Was the sole or principal reason for the Claimant's dismissal the transfer, contrary to Regulation 7 TUPE?

2.36. Can the First Respondent establish an "ETO" reason and if so has it acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal? The First Respondent asserts the following ETO reason: redundancy, if it is found to have been a TUPE transfer.

2.37. Is the First Respondent liable for any unfair dismissal?

Remedy (if liability is proven)

2.38. Should any reduction be made to any compensation to be awarded because of the principles in Polkey v AE Dayton Services Ltd [1987] ICR 142?

3. We heard evidence from the Claimant and, on her behalf, from Michael Blackwell. The Second Respondent gave evidence on his own behalf and that of the First Respondent. We also heard from Irene Bews, Sally Driver and Joanne Woods on behalf of the First Respondent.

FACTS

4. The First Respondent, known as KUSCO, is a specialist service and facilities management company working exclusively for Kingston University ("KU"). The company was established in 1997 and is a wholly owned subsidiary of KU. The Second Respondent has been the Interim Managing Director of the First Respondent since January 2017.

5. As at the date of the Claimant's dismissal, the First Respondent employed about 260 people.

6. The Claimant commenced employment with the First Respondent on 1 June 2009 as Head of Human Resources and Communications. This role formed part of the Senior Management Team ("SMT"), which consisted of the Managing Director and three "Head of" roles, Head of Finance, Head of Building and Security Services and Head of HR and Communications. The HR team, which the Claimant led, consisted of three other employees at a lower level who reported to her.

7. The First Respondent has a Board of Directors and there is substantial overlap between membership of that Board and staff employed at a senior level at KU and/or members of KU's Board of Directors. The Chair of the First Respondent's Board between April and December 2017 was Irene Bews, who was also Director of Finance at KU.

8. On commencement of employment the Claimant joined the "LPFA" (London Pension Fund Authority) pension scheme, which gave her membership of the Local Government Pension Scheme, a salary-related, defined benefit scheme. The Second Respondent closed this scheme to new entrants from 2012. Existing members were given the option to remain in the LPFA or transfer to

the Group Personal Pension Scheme ("GPP scheme"), which is a defined contribution scheme. The Claimant opted to remain in the LPFA.

9. One benefit of the LPFA scheme over the GPP scheme was that if a member over the age of 55 is made redundant or retired in the interests of business efficiency, benefits are payable immediately with no early retirement reduction.

10. In around August 2015 the managing director of the First Respondent left the business and was replaced by a new managing director, PH. On 21 April 2016 the Claimant and the then Head of Building and Security Services, Michael Blackwell, reported PH under the whistleblowing policy by letter to Kate Allan, Head of Legal for KU. PH was suspended and the Claimant and Mr Blackwell were given anonymity, but there came a time when Ms Allan said it was possible their names would have to be disclosed to PH as part of the disciplinary process. Although the Claimant complained about this her witness statement, she accepted in cross-examination that Ms Allan's stance was reasonable and in any event their identities were not ultimately disclosed because PH left the business.

11. At a meeting of the First Respondent's Board in July 2016 it was noted that the LPFA scheme was diminishing the First Respondent's reserves and the company would soon reach a level of negative reserves. This was said to be a major concern because if the company became effectively insolvent, it might affect KU's ability to claim gift aid on profits that were distributed to it from the First Respondent, and it would potentially trigger a corporation tax charge.

12. In January 2017 the Second Respondent was appointed as Interim Managing Director. By the time of his appointment, the First Respondent had obtained a report from KPMG on the cessation payment the First Respondent would have to pay to the LPFA scheme if it was closed.

13. At a meeting in February 2017 the Board agreed a timetable involving the potential closure of the LPFA scheme on 1 October 2017. It also decided to appoint consultants to advise on changes to terms and conditions that would be involving in removing active members from the scheme.

14. Separately at the same Board meeting, it was noted that a restructuring programme in KU would be likely to necessitate some reorganisation and cultural change within the First Respondent. Mr O'Leary was tasked with presenting some potential scenarios before the next meeting.

15. On 8 May 2017 AON Hewitt ("AON"), the consultants instructed to advise on changes to terms and conditions for LPFA members, produced a report on possible approaches and costs involved in removing active members from the scheme. At that stage there were nine active members, including the Claimant. The report advised that there were a number of different methods of calculating "compensation" that might be paid to the members and costed those options for each of the nine members. If a lump sum were given, the report estimated the compensation to the Claimant at £243,110. Using this basis of calculation she would be the second most costly to compensate. The most costly to

compensate on that basis was the Head of Finance, Ilsa Malkoun, who was 45 years old at the time.

16. By this stage the SMT had been asked to deliver £700,000 of savings by July 2017. The Claimant had responsibility for this project and made proposals, including for voluntary redundancies in the operational staff, which took effect in May and June 2017.

17. In preparation for a Board meeting in July 2017, Mr O'Leary prepared a paper entitled "KUSCO Operational Review". This noted a need to change the approach to the delivery of services, and gave examples of "no clear lines of communication or chain of command" and "Dysfunctional Senior Management Team". He proposed a new "campus centric" structure with a shift of emphasis to service delivery. He noted a number of key points relating to the proposed new structure, including the following:

> "Due to the significant reduction of staff from the transfer of Residences and the current Efficiency Exercise the HR function will be reduced. The KU HR Department will provide additional services through a bespoke Service Level Agreement when required."

18. The report appended an organogram of the proposed new structure, which had the Managing Director at the top level with six roles at the level below: Finance Manager, Contracts and Performance Manager, Head of Campus Services, HR Manager, Security & Compliance Manager and Asset Manager/ Help Desk.

19. Mr O'Leary's evidence was that the Finance Manager role was intended to be a direct replacement for the Head of Finance role, i.e. a change of title only. His evidence about the reference to "HR Manager" was somewhat unclear. In his witness statement he said that the new structure did not include the Claimant's role of Head of HR and Communications, but did not explain why, if the Head of Finance was relabelled Finance Manager the same did not apply to the Claimant's role. In his oral evidence he said that this organogram was misleading because where it said "HR Manager" it should have said "HR team", meaning the three lower level existing HR employees. We return to this below.

20. On 12 July 2019 the Board approved the recommendations in the paper.

21. Because of the potential impact on the Claimant's continued employment, it was decided that an HR consultant from KU, Sally Driver, would assist Mr O'Leary with the reorganisation project, being seconded to the First Respondent one day a week.

22. On 19 July 2019 Mr O'Leary emailed Ms Driver with more detail about the proposed reorganisation. In a document entitled "New Roles in Proposed Organisation Structure" he listed:

> "HR Manager – (1 Manager + 1 Assistant) Combination of current roles. May need new JD or amalgamation of current roles."

23. Mr O'Leary said in his oral evidence that what was envisaged at that stage was a manager at a more junior level to the Claimant. It also appears to have been a proposal to reduce the existing three HR roles to two. He said the reference to a new job description was at that stage envisaging combining an HR specialist and a training specialist but "we never got there". He said this plan later evolved and it was decided to retain the three HR staff effectively in their existing roles.

24. Mr O'Leary and Ms Driver met in late August to discuss the restructure. Shortly afterwards Ms Driver produced a table which identified the Claimant and four others, including Mr Blackwell, as being at risk of redundancy. It is relevant to note that Mr Blackwell was not in the LPFA scheme.

25. There is some inconsistency in the Respondents' evidence as to when it was first decided to remove the Claimant's role and not replace it with anything equivalent, putting her at risk of redundancy. Mr O'Leary's evidence, as explained above, was that this is what he proposed in July and was approved by the Board. Ms Driver's evidence, however, suggests that that decision was taken in late August, which is more consistent with the contemporaneous documents. Describing this meeting in her witness statement, she said:

> "In respect of Heather's role, the overall costs of the HR function (c£200k including on costs and 4 FTE) in respect of a workforce c270 was not sustainable particularly when the workforce was expected to reduce significantly owing to the outsourcing of the halls of residence.
>
> There was discussion about moving payroll under finance but this was discounted on the basis that it sat better within the remaining team. We talked through the merits of an HR manager role, the HRBP roles and anticipated demand for HR in the future.
>
> Having concluded that Heather's role of Head of HR and Communications was not likely to be required in the proposed new structure and was therefore at risk of redundancy we discussed the approach to take with her in respect of consultation…"

26. We find that the first time at which it was decided that the Claimant's role would be removed and not replaced by an equivalent role was at that meeting in late August.

27. In view of the Claimant's and Mr Blackwell's level of seniority, Mr O'Leary and Ms Driver decided to attempt to negotiate an agreed exit with each of them before commencing formal consultation. There was some email correspondence between Mr O'Leary, Ms Driver and Ms Bews (then Chair of the Board) about the approach to take. Ms Driver proposed that Mr O'Leary should inform the Claimant that her role would not exist in the new structure. She advised him to say "you do not need a senior HR function, will step back to a generalist personnel function and buy in expert advice as needed". Ms Driver suggested that at a second meeting with Ms Bews they could raise the possibility of a "package" and give the Claimant time to reflect at home. She

said "Give them time to reflect at home (so paid leave at home – there is no garden leave in the contracts), talk to relatives and will arrange to meet and talk later in the week".

28. At the end of the email Ms Driver said:

> "KU HR cannot be seen to be providing and taking on full HR support other than with the restructure and so there will need to be adequate HR support during transition from the current HR BPs in terms of business as usual to avoid any claim that the senior HR role has already been removed."

29. On Wednesday 6 September 2017 Mr O'Leary invited the Claimant to a meeting with him at the end of the day. No minutes were taken of the meeting but the Claimant produced a note of it afterwards. Mr O'Leary told the Claimant that her role of Head of HR and Communications was no longer required. The Claimant's note says that Mr O'Leary said the HR part of her role would go to KU centralised services with project work being outsourced as required. Mr O'Leary denies saying this, but the dispute is a narrow one. His evidence was that he said using KU HR might be an option in the future along with other options that had yet to be explored. Given that the Claimant's notes were made very soon after the meeting we accept that Mr O'Leary at least gave the impression that part of the Claimant's role would be carried out by KU in the future. That is consistent with his original proposal to the Board.

30. The Claimant said she was shocked and said that her main personal concern was with the timing of the decision. She explained she was 14 months short of being able to take her pension straight away if she were made redundant, and also noted the decision was being made before the buy-out of members of the LPFA scheme. She asked if the decision to make her redundant could be delayed but Mr O'Leary said this was unlikely.

31. The Claimant's note of the meeting says that after the Claimant said the pension issue would have a big impact on her and her family, Mr O'Leary said he understood she was "a Grannie and so this would give me more time with my grand child". He then suggested she take the rest of the week off to research the legal and financial issues and meet again on Monday. Mr O'Leary accepts referring to the fact that the Claimant had recently become a grandmother during the meeting (in fact the Claimant already had a grandchild, but it was common knowledge in the office that another grandchild had recently been born), but said it was not with reference to her being made redundant or taking time off to think about the matter. Mr O'Leary did not challenge this aspect of the Claimant's note of the meeting when she later sent it to him, but he did say in an email to Ms Driver that the comment was "in the context of current changes in HS's life- nothing else". We consider on the balance of probabilities that Mr O'Leary made the comment in connection with the suggestion that the Claimant take time off to think about her options. The Claimant may have interpreted the comment as being connected with her possible imminent redundancy, but we consider the most likely context for the comment was the immediate time off that was being suggested. That also accords with Ms Driver's email briefing for the meeting (see above).

32. The Claimant said at the meeting that she would need to estimate her pension losses. Mr O'Leary suggested she contact AON or KPMG.

33. That evening Mr O'Leary emailed Ms Driver, explaining what the Claimant had said about her pension. His understanding was that the Claimant either wanted compensation for "early exit" from the LPFA scheme, i.e. prior to the closure of the scheme that was planned in 3-6 months, or for KUSCO to "underwrite in some way the 14 months until she hits 55". He wrote:

> "I am not a pension expert and, to be honest, I do not fully understand the above options. I think we need someone (Keith Day?) to look at the pension issue as a whole without directly considering the above and state what the options are. All her pensions interests are with the LPFA scheme so we need some advice around what can and cannot be done.
>
> She is going to look for some advice over the next couple of days and we will meet up again on Monday.
>
> She asked if her staying until the LPFA issue had been resolved (say potentially March was a option but I said, for a number of reasons, no.
>
> Need to basically make sure she does not now come back into the business so, again, any help greatly appreciated."

34. In a text exchange the following day it was agreed that Mr O'Leary would contact AON or KPMG for the pension information.

35. Also on 7 September the Claimant texted Mr O'Leary to say she would like to "come in as usual next week" and meet him on Monday to "share some ideas". Mr O'Leary responded by email on 8 September:

> "Thank you for your text this morning offering to return to work on Monday and to discuss some ideas you have had and would like to talk through with me.
>
> I am replying via your work email as I think it is more appropriate than the informality of text and for the sake of clarity. I appreciate that me having told you on Wednesday that your role in KUSCO will not exist in the future will have come as a shock to you. For this reason I have asked you to remain at home and not return to work to consider your needs and options going forward rather than putting first the needs of KUSCO by returning to work."

36. The Claimant and Mr O'Leary agreed to meet on Wednesday 13 September. On 11 September Mr O'Leary emailed the Claimant as follows:

> "In advance of when we meet, and in order that you can consider your options, I confirm that KUSCO would be willing to offer a payment, equivalent to one year's salary of £62,258, by way of a settlement by

> mutual agreement and this would serve to bring the employment relationship to an end…"

37. The Claimant responded, confirming the arrangement to meet, but said that she was "very shocked and disappointed" that the situation had arisen. In an email exchange between Ms Driver and Mr O'Leary on 12 September Ms Driver said it appeared the Claimant was in shock. She continued,

> "Either way, the situation is sadly not going to change and so it's about supporting her to get to a place where she can move forward and not cling on to false hope that it may turn out differently. Also, important that she can get to a place (hopefully) where she can see the financial package (which is very generous) as the best route. There's also support with outplacement etc…"

38. The Claimant and Mr O'Leary met on 13 September 2017. The Claimant covertly recorded the meeting and a transcript was contained in the Tribunal bundle.

39. The Claimant queried why her post had been deleted and argued that there was a greater need for HR expertise in the immediate future because of the restructuring projects. She also queried whether the transfer of work to KU might constitute a TUPE transfer. Mr O'Leary said that a position of the Claimant's level was not needed in KUSCO going forward, given that the business was decentralising and shrinking. He believed they needed a more traditional personnel function in KUSCO. Using KU HR as a resource was possible for some of the issues "but there are alternatives". He said he would look into the TUPE issue.

40. The main focus of the meeting was the impact on the Claimant's pension. The Claimant explained that if she were made redundant now her pension would be worth 45.5% less year on year than if she were made redundant after reaching the age of 55 (in 13 months' time). She said she was not in a position to consider the offer because she did not have all the information about her pension losses. The Claimant raised the possibility of the First Respondent paying into the pension fund for the next 13 months "as if she is still an employee on either garden leave or she could be re-deployed within KU and then leave due to redundancy once she is 55". She then said that she expected compensation for what she perceived to be her pension loss, referring to the loss of service and benefits between termination and normal retirement age, as well as the 45.5% reduction on taking her pension at 54 compared to being made redundant at 55.

41. It was put to the Claimant in cross-examination that what she was asking for at that meeting amounted to around £1 million. She said she had not put a value on it, but not long after this, in a letter on 25 September 2017 (see below) the Claimant gave more detail of the alleged pension losses including an estimate of over £1 million.

42. The Claimant then asked Mr O'Leary about AON's advice on the compensation package to members on cessation. He confirmed that this advice existed and agreed to provide it to the Claimant.

43. Towards the end of the meeting the Claimant said that she was a joint whistleblower and said that that gave her protection against detrimental treatment.

44. Mr O'Leary's evidence is that he did not know the Claimant was a whistleblower until she mentioned it at the meeting. The Claimant submits that this is "highly improbable". She relies mainly on the assertion that "natural human curiosity" would have led Mr O'Leary and members of the Board to speculate and ask who the whistleblowers were that prompted the investigation into PH. She also relies heavily on a comment by Irene Bews during her grievance hearing on 15 November 2017. At that hearing the Claimant suggested Mr O'Leary probably knew about the whistleblowing before 13 September meeting. She also suggested that Kate Allan may have resented the extra work caused to her by the whistleblowing and influenced the Board as to the Claimant's redundancy. Ms Bews said "I can't tell you what she [Ms Allan] said over a cup of coffee with somebody but I can tell you it was never discussed at a Board meeting." The Claimant interprets this as a concession that Ms Allan did tell Board members outside Board meetings, and that Mr O'Leary was likely to have found out about it that way. For the first time in her oral evidence the Claimant also asserted that she believed Mr Hilton, the previous Chair of the Board, would have told Mr O'Leary who the whistleblowers were, or at least that they were members of the SMT, when Mr O'Leary was recruited.

45. On 18 September 2017 Mr O'Leary emailed Ms Allan saying that the Claimant had told him she was a whistleblower. He asked, "I just wondered if there is any action I should be taking/ be aware of in my discussions…". Ms Allan replied saying that it had no bearing on the restructure and confirming that the identities of the two whistleblowers had been kept confidential "save for KU HR/legal who were dealing with the matter, Matthew Hilton (who the issues were raised with directly), and the external investigator." She said that although other people were aware of investigation they did not know the identity of the whistleblowers.

46. Ms Bews's evidence was that she knew about the complaint against PH in 2016, but she never suspected that the Claimant was the whistleblower and indeed she suspected it was someone else.

47. We consider that the Claimant's case as to Mr O'Leary's knowledge is entirely speculative and there is no reason to doubt his consistent evidence, which is supported by the contemporaneous documents, that he did not know of her status as a whistleblower until she brought it up on 13 September. We also accept Ms Bews's evidence that she did not know about it until she became involved in investigating the Claimant's grievance (which was submitted on 2 October 2017).

48. On 16 September the Claimant emailed Mr O'Leary to chase up the calculation from AON of her likely pension losses if the LPFA scheme were closed. She also asked for the actuarial valuation on which any such calculation was based.

49. On 18 September 2017 Mr O'Leary wrote to the Claimant "without prejudice and subject to contract", repeating the offer of one year's salary plus outplacement support and an agreed reference.

50. We note at this juncture that although the Respondents initially objected to the Claimant's reliance on without prejudice communications, Mr Brittenden was content to leave the issue to closing submissions and no issue was ultimately taken on the point. All parties can be taken to have waived privilege in respect of all of these communications.

51. Mr O'Leary addressed the TUPE issue in the letter of 18 September, saying that it was not the intention to transfer the HR function to KU, but rather KUSCO would buy in strategic HR advice as and when required from a range of third parties.

52. On the pension issue, the letter did not mention the AON report, and Mr O'Leary simply said he was unable to increase the offer. Mr O'Leary's oral evidence to the Tribunal was that he had been advised by this stage that the report was confidential and could not be disclosed. It is not in dispute that Mr O'Leary never communicated to the Claimant that was the reason for not disclosing the report. The Claimant accepted in her oral evidence that it was Mr O'Leary's prerogative not to send it to her.

53. The Claimant chased the pension information again and asked for the deadline for responding to the offer to be extended. Mr O'Leary responded on 20 September 2017 saying that the offer was not dependent on the position of her pension and was a final offer. The deadline for acceptance remained noon on 25 September.

54. On 25 September 2017 the Claimant wrote a very lengthy letter to Mr O'Leary. She maintained that there was a TUPE situation. She claimed that the short timeframe for responding to the offer amounted to bullying and intimidation. She complained about her "indefinite suspension". She also alleged that the true reason why he and the Board wanted to dismiss her was because she was a whistleblower. She said she had clear evidence of Mr O'Leary's discrimination of her based on sex and age, referring to the "Granny" comment. She asserted that any decision that impacts on her pension has a disproportionate effect on her as a woman of her age.

55. The Claimant estimated her pension losses as follows. She valued the 45.5% actuarial reduction, compared to being made redundant at 55, at £400,000. As to the estimated value of her pension if she retired at 67, for the rest of her life, compared to the estimated value if made redundant at 54, she said her pension losses were, conservatively, over £1 million. She also referred to the imminent closure of the LPFA scheme and said that an actuarial valuation would be required to work out the cost of buying her out of the scheme.

56. She intimated Tribunal proceedings and pointed out that Mr O'Leary could be personally financial liable. She also made Freedom of Information and Subject Access requests.

57. On 2 October 2017 the Claimant raised a grievance, raising the same matters as in her letter of 25 September.

58. Also on 2 October 2017, Mr O'Leary replied to the Claimant's letter of 25 September. He said that the matters raised by the Claimant would be investigated. He reiterated that she was not required to attend work, and said "I have asked you to remain at home". He said consultation on the proposed restructure would commence on 23 October 2017. He said, "As your role may be impacted by this restructure it would clearly not be appropriate for you to lead this change process and I am also conscious of this in asking you to remain at home for the time being".

59. He wrote another "without prejudice" letter on the same date repeating the same offer of settlement and enclosing a draft settlement agreement. The deadline for acceptance was extended to 5pm on 12 October 2017.

60. The Claimant chased the pension loss information again on 4 October 2017.

61. On 6 October 2017 Mr O'Leary wrote to the Claimant saying "please find attached as you have requested a pension benefits summary with an estimate of your pension benefits if your last day of service was aged 55 on 5 November 2018". He also enclosed an estimate of her pension as at 5 November 2017 "for comparison purposes". Mr O'Leary accepted in cross-examination that it had been wrong to say he was providing this information "as you have requested" because it was not what the Claimant had asked for. He said he could not provide the AON report because it was confidential and accepted that he did not explain that to the Claimant.

62. At the end of the email Mr O'Leary wrote:

> "On a separate matter, in trying to comply with your request for information on your pension and in preparation for the restructure, I have had to check the terms and conditions of your employment and for other KUSCO staff. It would appear that the pension clause in your contract, clause 12, is different to that of all other staff employed within the organisation. I should be grateful if you could let me know by return when these terms were agreed and by whom as the much more beneficial term appearing in your contract appears very much at odds with other staff. Given that this is not my area of expertise and I am the subject of your grievance, I have asked that this matter is discussed with you in parallel to the grievance investigation."

63. It appears that what had concerned Mr O'Leary was a reference in the Claimant's contract to the employer's contribution to the GPP scheme, which appeared higher than for other staff. The Claimant explained on 9 October that

there had been an error and her contract (and that of the Head of Finance, Ms Malkoun) should have referred to the LPFA scheme. The incorrect entries referred to an offer that was made to them in 2013 to join the GPP on preferential terms if they left the LPFA scheme, but they both refused the offer. The Claimant claimed that Mr O'Leary's email was evidence of bullying and harassment. She also pointed out that the pension information provided was not what had been promised.

64. Mr O'Leary responded further on 11 October 2017. It suffices to say that the discussions about settlement had effectively broken down by this point.

65. On 23 October 2017 Mr O'Leary wrote to the Claimant formally notifying her that her post was at risk of redundancy in the restructure. The letter said that there would be a consultation period of at least two weeks. The Claimant was invited to a meeting on 25 October. The Claimant responded the following day saying she had only just picked up the email and it was insufficient notice to attend the meeting because she needed to prepare. Mr O'Leary said that no preparation was required, but said that he would send her all the information he would have shared in the meeting and offered a reconvened meeting on 1 November. He also said she would be required to attend a second consultation meeting on 8 November.

66. On 26 October 2017 Mr O'Leary sent the Claimant a more detailed explanation of the reasons for her role being deleted in the restructure. He enclosed a Powerpoint presentation that included an organogram of the proposed structure showing "HR Business Partners x 3" reporting directly to Mr O'Leary. On the issue of redeployment Mr O'Leary said:

> "…if you refer to the organisation proposed in the presentation there are no positions which would suit your skills and experience and current salary. The skills required in the team will be based on either technical, customer service and delivery or commercial/ financial background."

67. On 31 October the Claimant emailed Mr O'Leary to say she could not drive because of neck and shoulder problems. She said she would not be able to attend any meetings until after she had seen her GP again in the week commencing 13 November.

68. A Board meeting took place on 1 November 2017. Mr O'Leary provided an update on the restructure. His paper confirmed the four positions at risk of redundancy and the new posts being created, namely three Campus Service Managers and one Contracts and Performance Manager. This involved an overall saving on salaries of just over £11,000 a year. In his evidence to the Tribunal Mr O'Leary said that the driving force for the restructure was decentralisation, not a reduction in personnel. The new structure would, he said, allow for additional efficiency opportunities in the future. He said that that aim had in fact been realised.

69. The closure of the LPFA scheme was also discussed and it was confirmed that the target date of 1 October 2017 had had to be put back.

70. The Claimant made a further whistleblowing complaint on 7 November, making allegations of improper conduct by Mr O'Leary and other members of the KUSCO Board. It is unnecessary to give any detail because the Claimant no longer alleges that this disclosure influenced the decision to dismiss or any of the alleged detriments.

71. Also on 7 November 2017 the Claimant wrote to Mr O'Leary enclosing a 27-paragraph document entitled "Challenges to proposal to make KUSCO Head of HR & Communications redundant". On the issue of alternative employment the Claimant wrote:

> "22. The new structure shows 3 x HR Business Partners. There are currently 1.4 FTE HR Business Partners in KUSCO so this means that there is a vacancy for a HR Business Partner. Why have I not been offered this?
>
> …
>
> 27. No alternative employment options have been made available to me in Kingston University but they should have been in a fair process. Also I have not been supplied a list of current vacancies, Job descriptions and salaries including those in KUSCO new structure. Why not?"

72. Mr O'Leary responded to the document on 8 November addressing each paragraph. In respect of the two queries above he wrote:

> "22. There is no vacancy for an HR Business Partner. The three people referred are [the three existing members of staff]. The statement is nothing to do with FTE's.
>
> …
>
> 27. This was set out in the process explained in the 'At Risk' letter issued to you. Since then I have been trying to contact you to discuss all of these potential alternatives."

73. A consultation meeting ultimately took place on 15 November 2017. During the meeting the Claimant again raised the role of HR Business Partner. She maintained that one of the members of staff referred to by Mr O'Leary was not in fact an HR Business Partner, so there was a vacancy. She said, "Whether it's suitable in status is my choice as an affected staff member subject to a redundancy process; it isn't KUSCO's." The Claimant also said that she understood "on the grapevine" that there was to be an "Implementation Manager" role at an equivalent salary to hers, on a 12-month contract. She said she would have been suitable and it should have been offered to her. She asked for a job description. Mr O'Leary said that this was a technical, engineering role related to maintenance and statutory compliance. He said the Claimant had not been considered because she did not have the technical skills.

74. A grievance hearing took place on the same day, conducted by Irene Bews.

75. On 17 November Mr O'Leary emailed the Claimant purporting to attach job descriptions for the roles of Campus Services Manager, Contracts Performance Manager and Head of Campus Services. They were mistakenly not attached to the email.

76. On 20 November 2017 Mr O'Leary wrote to the Claimant to confirm the outcome of the redundancy consultation meeting. He said that KUSCO had decided to make her post redundant and unfortunately it had not been possible to identify any alternative employment or any way in which her redundancy could be avoided. In a section headed "Suitable Alternative Employment" he wrote:

> "At the meeting on 15 November and in follow up to my written communication during consultation we talked about whether there were suitable alternative roles for you which would avoid the need to make your post redundant. I confirmed that there were no positions that were suitable and which would suit your skills and experience and current salary. The skills required in the team will be based on technical, customer service and delivery, or commercial/financial background.
>
> You questioned why the Head of Finance had not been placed at risk of redundancy given the change of role to Finance Manager and stated that you had been treated less favourable than your colleagues. I explained that there were no changes to that finance role other than the change of job title and that there was a continuing requirement for the finance role in its current format. The role is also for a qualified accountant. Going forward this is a critical role within the organisation in light of the £5.3M salary bill and the need to fully understand and manage these costs.
>
> You also said that you should have been offered the role of the Campus Service Manager and the transitional role (now that another individual had turned down that opportunity). As explained in previous correspondence throughout the consultation process, I explained that the Campus Service Manager role was not a suitable alternative role for you as it required technical expertise in engineering and is therefore outside your skills set, knowledge and experience. I did not consider your proposal that you should be offered the role and allowed to complete the necessary training to enable you to fulfil the role to be viable. The role requires someone with the technical skills to perform the role now and not in three years' time. The transitional role discussed with your colleagues was an interim role given that individual's expertise as a chartered engineer. Again, you do not have the skills set or qualifications to fulfil this short term assignment. The role of Head of Campus Service manager is an expanded role for the current Cleaning and Campus Support Manager.

> You asked why you had not been offered the vacant role of HRBP which you understood to be available from the slide pack. I explained that there are no changes within the remaining HR team and there are no vacancies within the remaining HR team. The slide pack simply explains that there is a head count of 3 individuals in the HR team plus the Payroll Officer. The day-to-day duties are been (*sic*) carried out by the current team and will continue to be so. Due to illness and maternity leave they are functioning at below full capacity but have managed to deliver the necessary services.
>
> You questioned why you had not been considered for roles within Kingston University. As previously explained and reiterated at our meeting Kingston University is a separate legal entity and in respect of which KUSCO has no control, it is not appropriate to consider alternative roles outside of KUSCO and, as you have been informed, there are no suitable alternative roles in Kingston University in any event."

77. The job descriptions that Mr O'Leary intended to send on 17 November were sent to the Claimant on 21 November. It is unnecessary to give any detail about them because the Claimant accepted in closing submissions that none of these roles were suitable.

78. The Claimant appealed against her dismissal and a hearing took place on 19 December 2017. By letter dated 8 January 2018 her appeal was dismissed.

79. The Respondents produced evidence, and it is not in dispute, that the Implementation Manager post was filled in January 2018. In an email announcing the appointment on 2 January 2018 Mr O'Leary said this person had been employed because of the "absence of technical expertise in the business at senior level". He described the role as having "specific focus on the technical element of the facilities managed", including "support with any technical knowledge required on the Statutory Compliance works to be carried out". The Respondents' evidence was that this individual left and was replaced by another Chartered Engineer between February and July 2018, when the role came to an end.

80. In the course of the Tribunal proceedings the Claimant has referred to a number of vacancies in KU which she says would have been suitable. During the course of the evidence and submissions the Claimant accepted that some of the posts referred to were not available at the relevant time. She ultimately relied only on the vacancies which arose in the period between September 2017 and her dismissal on 20 November 2017, namely:

    80.1. Development Manager (Major Gifts). This was a permanent role at Grade 8.

    80.2. HR Shared Services Advisor. This was a 12-month fixed term role at Grade 6.

80.3. Project and Communications Officer. This was a 23-month fixed term role at Grade 6.

80.4. Business Relations and Placements Manager. This was a permanent role at Grade 8.

80.5. Development Officer (Major Gifts). This was a permanent role at Grade 7.

80.6. HR Talent Management Coordinator. This was a permanent role at Grade 6.

80.7. Equalities and Charters Manager. This was a permanent role at Grade 9.

80.8. Placement Specialist. This was a permanent role at Grade 6.

81. The Claimant accepted in cross-examination that all of the roles mentioned were significantly more junior than her role as Head of HR and Communications. She also accepted that they would involve a substantial reduction in pay. The Grade 9 role would entail a reduction of around £10,000 a year. The Grade 6 roles would entail approximately a 50% reduction in salary.

82. Ms Driver's oral evidence was that the Grade 9 role, Equalities and Charters Manager, was very specialised and not suitable for the Claimant. We note that the job description states that expert knowledge and experience of applying for equality charter awards was an essential requirement of the job. The Claimant does not fulfil that requirement. We accept it was not suitable.

83. All of the other posts are Grade 8 or below. The Claimant's evidence as to her position in respect of lower paid roles was somewhat vague. She said in her witness statement:

> "Whilst the salaries for the HR posts in Kingston University were lower than my role at KUSCO, I had made the point in all meetings and discussions on and after 13 September 2017 (including at the grievance investigation meeting and hearing) that I was prepared to take a lower status role and less salary because of the LPFA rules about this not affecting final salary pension calculations when the lower level post is taken as an alternative to redundancy."

84. She did not actually assert either in her witness statement or in her oral evidence that she would have accepted any of the above roles if they had been offered to her. Further, contrary to the claim that she had made it clear in the meeting of 13 September she would accept a lower status role, there is no reference to this in the transcript of the meeting. The Claimant's oral evidence ended at the end of the second day of the hearing and she was given the opportunity to come back to this issue the following day to identify any reference to such a comment in the transcript. She did not do so. The best evidence of her having said during the consultation process that she would accept a lower

paid role is in her 27-paragraph document referred to above in which she suggested she might have considered the HR Business Partner role, but even then she did not say that she would have accepted it; she was simply complaining that she had not been offered it.

85. Given the importance with which the Claimant viewed the benefit in the LPFA scheme of taking a full pension if made redundant at 55, and her query on 13 September, asking whether she could be placed on garden leave until that point in order to protect her pension, we accept that she may have been willing to accept almost any role if it involved her remaining employed until she reached 55 and then being guaranteed redundancy at that point. It has not been suggested, however, that KUSCO should have made such an offer. The fixed term posts would not have guaranteed redundancy when they came to an end.

86. The Claimant has never said that she would have accepted a permanent salary reduction of more than £10,000 a year. We heard no evidence about the pension being protected in the way suggested by the Claimant in her witness statement. But even if her pension would have been protected in some way, the loss of immediate income and status would have been so substantial we would need very good evidence to find that she would have accepted any of the above roles. The Claimant has not provided such evidence. She has not even positively asserted that she would have accepted any such roles if offered. We conclude, therefore, that even assuming all of the roles at Grades 6-8 above were suitable for the Claimant (which the Respondents deny), the Claimant would not have accepted any of them if offered to her.

87. It is not in dispute that the Claimant's role of Head of HR and Communications no longer exists within KUSCO and that no-one has been recruited since her departure to carry out the role. The Claimant accepted in cross-examination that some of her role, including the whole of the communications aspect, was now being carried out by Mr O'Leary.

88. Mr O'Leary's unchallenged evidence as to what has happened since the Claimant's departure was that it has not in fact been necessary for KUSCO to seek support from KU HR and no service level agreement has been put in place. KUSCO has taken ad hoc legal advice and has an annual £10,000 retainer with Mentor for this purpose. It has also taken advice for more complex matters from an employment solicitor.

89. The Claimant gave evidence that she understood, from talking to former colleagues, that the HR work in respect of the Halls of Residence, including the transfer of Halls staff under TUPE, which would previously have been carried out by KUSCO, was now being done by KU HR. This was disputed by Mr O'Leary. He said that the transfer of KUSCO staff was being handled by a member of the KUSCO HR team and, as far as he was aware, there had been no input from KU HR. We note that the Claimant's understanding of this issue is not based on her own knowledge and we accept Mr O'Leary's direct evidence that KU HR has not carried out any work for KUSCO since the Claimant's departure.

90. As to the others who were placed at risk of redundancy, Mr Blackwell accepted voluntary severance terms, following a similar negotiation process to that adopted for the Claimant. Mr O'Leary's evidence, which was not challenged, was that the other three placed at risk of redundancy went through a consultation process following which two stayed with the company in alternative roles and the other was made redundant after an unsuccessful trial in another role.

THE LAW

Unfair dismissal

91. Pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or "some other substantial reason". Redundancy is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

92. In redundancy cases, the employer will not normally act reasonably "unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, per Lord Bridge).

93. In Williams v Compair Maxam Ltd 1982 ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These include, so far as relevant to the present case, considering whether the employee could be offered alternative employment instead of being dismissed. The EAT emphasised, however, that the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead it should ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted".

94. The obligation to consider alternative employment may extend to considering vacancies in other companies within the same group as the employer. In Vokes Ltd v Bear [1973] IRLR 363 the NIRC upheld a finding that failure to look for alternative employment within the group rendered the dismissal unfair. The case did not lay down any binding rule, however, and the reasonableness of the employer's approach in this type of case depends on the extent to which the companies' affairs are integrated and whether the same individuals were involved (see Euroguard Ltd v Rycroft EAT/842/92).

95. If the Tribunal finds the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey).

Whistleblowing

96. Section 47B ERA provides:

> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

97. Section 103A ERA provides:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

TUPE

98. Regulation 3 of TUPE provides, so far as relevant:

> **3 A relevant transfer**
>
> (1) These Regulations apply to—
>
> (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
>
> (b) a service provision change, that is a situation in which—
>
> …
>
> (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
>
> …
>
> and in which the conditions set out in paragraph (3) are satisfied.
>
> …
>
> (3) The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—
>
> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

99. Pursuant to Regulation 7, an employee is treated as unfairly dismissed if the sole or principal reason for dismissal is a transfer. If, however, the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer, the dismissal is not automatically unfair. It will be treated as a dismissal for redundancy or some other substantial reason for the purposes of s.98 ERA.

Equality Act 2010

100. The Equality Act 2010 ("EqA") provides, so far as relevant:

13 Direct discrimination

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

(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.

…

19 Indirect discrimination

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

…

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

101. Age and sex are both protected characteristics under the EqA.

CONCLUSIONS

Reason for dismissal

102. The principal dispute in this case is whether the Claimant was genuinely dismissed because of a redundancy situation or whether, as she believes, she was dismissed either because of the cost of buying her out of the LPFA scheme (which she says was connected to her sex and age) or because she was a whistleblower.

103. It is convenient first to deal with the Claimant's assertion that the Respondents applied a PCP of preferring the selection of those employees who would be more expensive to buy out of the LPFA scheme. This assertion cannot be sustained on the evidence before us. The restructure originally involved five employees being put at risk of redundancy. Of the three members of the SMT, the Claimant and Ms Malkoun were members of the LPFA scheme. Mr Blackwell was not. The Claimant and Mr Blackwell were made redundant. Ms Malkoun was, at least on one method of calculation in the AON report, the most expensive to buy out of the LPFA scheme. We had no evidence as to the position of the other three who were placed at risk of redundancy as regards their membership of the LPFA scheme, but we note that two of them remained with the company which suggests that a genuine consultation process was undertaken in their cases and there is unlikely to have been an ulterior motive for their selection.

104. The question, then, is whether in the Claimant's individual case membership of the LPFA scheme was a factor leading to her selection for redundancy. It is understandable that the Claimant believes it was. The timing of the restructure, discussions about which were running in parallel with the Board considering the financial difficulties presented by the LPFA scheme and impending negotiations with members to buy them out, raises the possibility of a link. It cannot be denied that the termination of the Claimant's employment had the effect of saving the First Respondent a substantial amount of money because of her membership of the LPFA scheme. The difficulty for the Claimant is that there is no actual evidence of Mr O'Leary or anyone else having been motivated by that.

105. We found Mr O'Leary's evidence of the rationale behind the restructure logical and convincing. It was driven by a desire to make KUSCO less top heavy and more campus-centric. When the restructure was first proposed, it was not immediately obvious that the Claimant's role would be removed, but it was always the intention to reduce the HR function. The decision to remove her post and place her at risk of redundancy, made in late August 2017, was a logical way of achieving that aim. The fact that no-one has since been recruited to carry out any part of her role and one of the main the aims of the restructure, namely enabling further efficiencies, has been achieved, supports Mr O'Leary's credibility and good faith.

106. It is not in dispute that Mr O'Leary knew the Claimant was in the LPFA scheme and had seen the AON estimates as to the cost of buying her out of the scheme before she was placed at risk of redundancy. We find, however, that that was not in the forefront of his mind at the time. It is clear that from the moment the possibility of redundancy was raised it was the Claimant who was focused, almost exclusively, on her pension situation. The email Mr O'Leary sent to Ms Driver on the evening of 6 September 2017 suggests that he had not previously given much thought to the issue. We accept that his comment that he did not "fully understand" the options the Claimant had raised was genuine. He also gave persuasive evidence that it would be damaging to his reputation to design business solutions based on where the biggest "prize" was in financial terms. We accept that his primary concern was getting the structure of the company right for the future, and he was not motivated by the Claimant's membership of the LPFA scheme. Nor did he appreciate the significance of the Claimant reaching the age of 55 until she raised it.

107. Further we do not accept that there was any transfer for the purposes of TUPE, or that Mr O'Leary has sought to conceal or avoid the consequences of such a transfer. It may have been intended originally that KU HR would undertake some work for KUSCO as required, but that did not ultimately happen. The Claimant's only evidence of any HR functions moving to KU was what she had been told about the Halls work, but as noted in our findings above her understanding on this was not correct.

108. There is a concern that arises from some of the correspondence that Mr O'Leary had decided by 6 September 2017 that the Claimant was going to be dismissed no matter what. He said in the email to Mr Driver on that date "Need

to basically make sure she does not now come back into the business". Ms Driver also said on 12 September, "the situation is sadly not going to change". There is also the fact that the Claimant was asked to remain at home. The Respondents' case was that this was mutually agreed, but we do not accept that. The Claimant indicated that she wanted to return to work and Mr O'Leary repeatedly said that she should remain at home.

109. While we do consider that these were failings in the redundancy process, which we address below, we do not accept that they are sufficient to justify inferring an ulterior motive for the dismissal. As at 6 September Mr O'Leary was focused on attempting to negotiate a settlement. That was by far the most desirable outcome for KUSCO and considerable thought had gone into how to achieve it. It is not surprising that he (and Ms Driver) wanted to give the impression to the Claimant that her redundancy was inevitable in order to support their negotiating position. It is also the case that there were no suitable posts in the new structure at KUSCO, so we accept that Mr O'Leary genuinely believed that her redundancy was inevitable. We read the comment about making sure she did not come back into the business as reflecting that belief, as well as the awkwardness of such a senior member of staff being in the office while delicate negotiations were ongoing.

Unfair dismissal

110. For the reasons given above we accept that redundancy was the genuine reason for the Claimant's dismissal, and it was not connected to any TUPE transfer.

111. We must consider whether the First Respondent acted reasonably within the meaning of s.98(4) ERA. It was of course open to the First Respondent to seek to resolve the situation via a settlement agreement before embarking upon formal consultation. The difficulty was that by the time formal consultation was commenced on 23 October 2017 the relationship between the Claimant and Mr O'Leary had become very strained indeed, largely because of the breakdown of the negotiations. She had raised a formal grievance against him, accusing him among other things of sex and age discrimination and harassment.

112. We do not consider it was unreasonable in itself, in the circumstances, only to hold one consultation meeting. There had been a great deal of discussion and correspondence about the restructure and the reasons for it. The Claimant had been adequately informed and consulted about it. We find, however, that Mr O'Leary did not approach the formal consultation with an open mind and failed to give any proper consideration to the possibility of alternative employment. While it is understandable from a personal point of view that Mr O'Leary would not have wanted to continue working with the Claimant, given the difficulties in the relationship by this stage, we consider that his failure to consider alternatives to redundancy rendered her dismissal unfair.

113. We accept that there was no need to consider roles in KUSCO because there was nothing suitable for the Claimant. The only role which the Claimant

now says might have been suitable was the temporary Implementation Manager, but we accept the Respondents' evidence that this was primarily a technical engineering role and the Claimant was obviously not qualified for it.

114. It is clear from the dismissal letter that Mr O'Leary discounted the possibility of alternative employment at KU on the basis that it was a "separate legal entity". Although he also said "there are no suitable alternative roles in Kingston University in any event", there is no evidence of him having investigated what vacancies there were at KU, other than a vague assertion in his witness statement that he had "checked", although he was unsure whether he had done so himself or through Ms Driver. The Claimant was certainly never given a list of vacancies at KU.

115. We consider that the relationship between KUSCO and KU was so close that it was unreasonable not to consider the possibility of vacancies in KU and alert the Claimant to any that were potentially suitable. This is not a situation where the two entities operate truly autonomously, as in Parfums Givenchy Ltd v Finch EAT 0517/09. KU is KUSCO's sole client and its parent company. The close integration is also demonstrated by Ms Driver being seconded to KUSCO to advise on the restructure, and by the overlap in senior staff and Board membership in the two organisations.

116. We find that Mr O'Leary, for the personal reasons explained above, did not give genuine consideration to the question of redeployment at KU. There were vacancies that the Claimant should have had the opportunity to consider, albeit that they were at a more junior level. Mr O'Leary knew that the Claimant's principal concern was the protection of her pension, and she had raised a query about the role of HR Business Partner at KUSCO which was significantly more junior, so he ought to have given her the opportunity to consider any vacancy for which she might have been qualified.

117. Having said that, we consider that the Claimant would inevitably have been dismissed even if proper consideration had been given to alternative employment at KU. First, even if consideration had been given to the KU roles, neither KUSCO nor Mr O'Leary personally had any power to offer a role to the Claimant. They would have needed the agreement of KU to give the Claimant priority over other applicants. We have heard no evidence as to whether such agreement would have been forthcoming. Secondly, we have found above that the Claimant would not have accepted any of the KU roles for which she was suitable, even if they had been offered to her. Applying the principles in Polkey, therefore, we make no compensatory award.

Whistleblowing

118. We have accepted that redundancy was the reason for the Claimant's dismissal. We have also found above that at the time Mr O'Leary decided to put the Claimant at risk of redundancy he did not know that she was a whistleblower. Nor is there any evidence of anyone who did know having any influence on the decision or the redundancy process. We do not accept,

therefore, that the protected disclosure was the principal reason for the Claimant's dismissal.

119. As for the alleged detriments, the first two (being told not to attend work from September 2017 and being put at risk of redundancy on 6 September 2017) both occurred before Mr O'Leary knew that the Claimant was a whistleblower. The first he knew of it was in the meeting of 13 September. Mr O'Leary did repeat the instruction not to attend work after 13 September, but this was pursuant to the discussions with Ms Driver that had taken place previously. There is nothing to suggest that he was motivated at any stage by the fact that the Claimant was a whistleblower.

120. The third to fifth alleged detriments are all aspects of the redundancy process. The Claimant being formally put at risk of redundancy was the inevitable result of not having reached a negotiated settlement; the decision to do so had been made before Mr O'Leary knew about the whistleblowing. As for the subsequent failings in the process, we have already found that the reason was the breakdown in the relationship between the Claimant and Mr O'Leary. The Claimant's entirely unrelated protected disclosure that had taken place some 18 months previously had nothing to do with it.

Age discrimination

121. The "granny" comment is relied upon as an act of direct discrimination and harassment. We have not accepted that the comment alleged (to the effect that "being made redundant will give you more time to spend with your grandchild") was made. We have found that Mr O'Leary made the comment in the context of the time off that he was giving the Claimant to consider her options. It was arguably insensitive to suggest that any part of the process was beneficial to the Claimant, but at most we consider this was a misguided attempt to soften the blow of what was bound to be devastating news. The Claimant had made it known in the office that she had recently had another grandchild. Mentioning that fact in the meeting, albeit somewhat insensitively, could not amount to a detriment let alone conduct that had the proscribed purpose or effect under s.26 EqA.

122. The Claimant also says it was an act of direct age discrimination to "suspend" her for 9 weeks. There can be no doubt that this was a detriment to the Claimant. It was potentially damaging to her reputation and it excluded her from the office at a time when she was going through a redundancy consultation process. Having said that, the Claimant did not push to return to work. She said in the first few days that she would like to return the following week, but after that she made no request to return. She did complain about her "indefinite suspension" in her grievance, but relations between her and Mr O'Leary were so poor by this stage that realistically she could not have returned. We accept that the reason for the original request to remain at home was to facilitate the settlement negotiations; it was part of the agreed strategy with Ms Driver. There is absolutely nothing to indicate that that decision had anything to do with the Claimant's age. The reason the situation continued for so long was because by the time the settlement discussions had ended relations between the Claimant

and Mr O'Leary were poor and the Claimant did not specifically ask to return to work. We find that the Claimant's age was not a factor.

123. We have already found that the reason for selecting the Claimant for redundancy was the fact that Mr O'Leary decided, for legitimate business reasons, that her role was no longer required. Mr O'Leary was not motivated by her age or her membership of the LPFA scheme.

124. As for the failure to offer alternative employment, we have found that this was because of the breakdown in the relationship between the Claimant and Mr O'Leary. It was not because of her age.

125. The Claimant relies on the following additional matters as instances of harassment related to age:

125.1. Imposing unreasonable deadlines to consider the settlement offer, with no pension loss information being provided.

125.2. Giving insufficient notice of redundancy consultation meetings.

125.3. Sending an email to the Claimant on 6 October 2017 with an alleged threatening and intimidating tone.

126. We do not accept that any of the above matters are made out on the facts. The Respondents were entitled to set deadlines for the settlement offer and they were not obliged to provide the information that the Claimant was seeking about her pension. Mr O'Leary should not have offered to provide it, and he should have later explained that he could not provide it because it was confidential, but neither of those failings made it unreasonable to put a deadline on the offer. Further, the offer was extended numerous times and the Claimant had ample opportunity to make whatever enquiries she wanted to make with the pension administrators. It is evident from the correspondence in which the Claimant valued her "pension losses" in excess of £1 million that she had unrealistic expectations as to the amount of any settlement. Even if Mr O'Leary's conduct was unreasonable, it was not related to the Claimant's age and does not reach the threshold of harassment.

127. We do not accept that the Claimant was given insufficient notice of redundancy consultation meetings. She was given more than 24 hours' notice of the first meeting, the purpose of which was simply to provide the Claimant with more information about the restructure. In any event Mr O'Leary offered to move the meeting to 1 November and at the same time gave notice of a further meeting on 8 November. The Claimant did not attend either because of her neck and shoulder problems.

128. We do not accept that the 6 October email had a threatening and intimidating tone. Mr O'Leary raised a genuine query about a provision in the Claimant's contract that the Claimant accepts was wrong. He said "I should be grateful if you would let me know by return when these terms were agreed and by whom", but he also acknowledged that this was not his area of expertise and

suggested that it be handled by someone else partly because of the ongoing grievance investigation. As her line manager he was entitled to ask for an explanation, and as soon as one was provided he accepted it. The email does not come close to the definition of harassment and there is nothing to indicate it had anything to do with the Claimant's age.

129. The indirect age discrimination complaint fails because we have not accepted that the alleged PCP was applied.

Sex discrimination

130. The alleged instances of direct sex discrimination are the same as the first two allegations of direct age discrimination. For the same reasons, we do not accept that the "granny" comment amounted to a detriment (or harassment). The reasons for asking the Claimant to remain at home are set out above and had nothing to do with her sex. The allegations of sex-related harassment are the same as those relied upon as age-related harassment. We do not accept that they are made out on the facts or that they meet the threshold for harassment.

131. The indirect sex discrimination complaints fails for the reason given above.

Summary

132. In summary, we conclude that the Claimant was unfairly dismissed because the First Respondent did not give adequate consideration to alternative employment, but that the Claimant would have been made redundant in any event so we make no compensatory award. The remainder of the Claimant's complaints fail and are dismissed.

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Employment Judge Ferguson

Date: 20 December 2019