EMPLOYMENT TRIBUNALS

Claimants: **Miss E Moses**
Mrs A Cameron

Respondent: **NSL Limited**

Heard at: **East London Hearing Centre**

On: **22, 23, 24, January 2020 and (in chambers) 29 January 2020**

Before: **Employment Judge Jones**

Members: **Ms A Berry**
Ms H Bharadia

Representation

Claimants: In person

Respondent: Miss L Kaye (Counsel)

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that:-

1. **The Dismissal was fair. The complaint of unfair dismissal fails and is dismissed.**

2. **The complaint of sex discrimination fails and is dismissed.**

REASONS

1. Full reasons and judgment were given to the parties on 29 January in open court. The Tribunal's judgment at the time was that the dismissal was procedurally unfair but that there should be a 100% Polkey deduction. In preparing these written reasons, the Tribunal has had an opportunity to reconsider that judgment on its own initiative under

Rule 70 of the Employment Tribunals Rules of Procedure 2013. The judgment is now as set out above.

2. The Tribunal apologises for the delay in the provision of these written reasons. This was due to pressure of work.

Claim and issues

3. Both Claimants brought complaints of direct sex discrimination and unfair dismissal against the Respondents. By a judgment dated 21 August 2019 EJ Tobin decided that Ms Cameron's unfair dismissal complaint had been issued out of time and that the Tribunal did not have jurisdiction to hear it. Ms Cameron withdrew her claim for a redundancy payment. Her complaint of sex discrimination was also out of time but he used his discretion to extend time so that the Tribunal did have jurisdiction to hear it.

4. The Tribunal heard both Claimant's complaints of direct sex discrimination and Ms Moses' complaint of unfair dismissal.

Evidence

5. The Tribunal had an agreed bundle of documents. It also had witness statements from each of the Claimants and from Deborah Cooper, People Director of Marston Holdings Ltd who dismissed the Claimants; and Keith Hanshaw, Managing Director of Project Centre Ltd, which was another company within Marston (Holdings) Ltd group; who heard their appeal.

6. All witnesses gave live evidence at the Hearing.

7. From the evidence the Tribunal made the following findings of fact. The Tribunal endeavoured to only make findings on those matters relevant to the issues in the case.

Findings of Fact

8. Both Claimants worked initially as Training officers with NSL Ltd. Ms Moses, the 1st Claimant, started in 2008 and Ms Cameron, the 2nd Claimant, started in 2009. NSL Ltd provides enforcement support for Local Authorities and the DVLA across the UK enforcing road fund licence payments, issuing parking tickets and running a parking appeal service. The first Claimant was the northern area representative covering a patch stretching from Oxford North to Inverness in Scotland. The second Claimant was the south area representative covering London and the South of England.

9. Both Claimants received recognition for their work. In October 2012 Ms Cameron was promoted to the position of Development and Resourcing Manager. Her evidence was that year on year her performance was recognised by being awarded the grade of 'over performer' in her performance reviews and she was usually awarded a pay increase. Ms Moses was also promoted and at the end of her employment she was the Development & Resourcing Manager supporting contracts within the Midlands and the North.

10. The evidence from both Claimants was that their job descriptions split their roles as 70/30% with 30% being the delivery of training courses but that in reality they only did

about 10% training. There were job descriptions in the bundle for the Training Manager position which was the position both Claimants held before their promotion as well as the job descriptions for the development and resourcing manager posts that they held at the time of the reorganisation. The Respondent confirmed in its response that both Claimants were involved in the day to day management of trainers in their region and that they personally delivered training content. Both Claimants gave evidence of devising training.

11. The Respondent was acquired by Marston Holdings in January 2017. Marston operates a group of subsidiary companies which retain their company names and structures, to a degree. We heard from Mr Hanshaw who conducted the Claimants appeals who continues to be employed as managing director of Project Centre Ltd and sits on the Board of NSL. Project Centre Ltd is within the Marston (Holdings) Group.

12. Before it acquired NSL, Marston had a training department as part of its central function. Steve Penney was already employed by Marston as the its Learning and Development Manager. He heads a team of trainers and admin staff. At the time of NSL coming in to the Marston (Holdings) Ltd – the team consisted of Baiba, Michelle, Sabrina, David and Russell – 5 trainers, plus1 IT person called Rob and 4 admin staff. At the time of acquisition, NSL had the Claimants with 6 training staff under Emma Moses's management and 5 training staff under Ann Cameron's with two admin officers. These two teams began to work together as one team to a certain degree, from the time that NSL joined Marston. The Claimants remained employed by NSL.

13. Just before NSL joined Marston, the Head of Resourcing and Development at NSL was Barry Hopley. He took early retirement around the time of the acquisition. We find it likely that the NSL staff structure was not mirrored in the Marston structure. That meant that no one was specifically appointed to be Head of Resourcing and Development after Mr Hopley left.

14. At the time, Deborah Cooper was Group Organisational Development Director at Marston. That post was more senior than the post that Mr Hopley held and so when he took redundancy, Ms Cooper became the person that the training team at NSL reported to.

15. The teams did not join seamlessly together. Instead, although they were the training team, they continued to work on their respective areas of the business. The Claimants continued to work on NSL matters and Mr Penney continued to work on Marston matters. The Claimants were unclear as to whether Mr Penney attended Board meetings and Ms Cooper was not entirely clear on the ways in which the Claimants' day to day role differed from their job descriptions or the tasks that they had done prior to NSL being incorporated into Marston. She was clear on what they did once they were in Marston.

16. The job description for their Development and Resourcing manager job described the post-holder as taking responsibility for the day-to-day management of the training officers, ensuring that they perform well. They also had to manage, motivate and develop the team in the provision of first class professional support, guidance, expertise and learning and development delivery. This would involve them designing and delivering learning and development solutions, supporting the implementation of the learning and development strategy, and motivating and developing the training officers team in providing first class professional support and guidance.

17. After a year of working as a team, and sometime in 2018, Ms Cooper was tasked by Marston with reviewing how the Learning and Development department operated and whether the team structure as was, best supported Marston's future objectives. This was part of a consolidation programme that Marston undertook which included examining its structures and processes to determine how best to position itself for the future.

18. There were no papers submitted to us in relation to this review but Ms Cooper's evidence was that she concluded following her review that the team structure needed to be streamlined. It was Ms Cooper assessment that what was required was just one role of Learning and Development Manager for NSL Ltd rather than two. She envisaged that this would be at a more senior level than the role occupied by the Claimants, but not at the level previously occupied by Mr Hopley. Ms Cooper believed that the Respondent's bests interests would be served by having someone in post at NSL operating at Mr Penney's level. The board accepted her proposal that the Claimants role of Development and Resourcing Managers should be placed at risk of redundancy and a new post created.

19. On 9 July 2018, the Claimants went to the Marston building believing that they were going to a team meeting. They were called in to a separate meeting with Ms Cooper and Amie Feltham, Marston's HR advisor. In that meeting, Ms Cooper went through the business proposal. She informed the Claimants that the proposal was to have one L&D (learning and development) manager to whom the NSL trainers would report. The Claimants were told that their jobs were at risk of redundancy and that there would be a formal consultation process. She stated that the first step in the process was to give them the job description for the new L&D manager role so that they could take it away and review it.

20. The Claimants were given the job description for the new role. They were not told that the job was at a different level than their Development and Resourcing Manager role but they had been told that it would be a different job. The Claimants asked for the terms and conditions of the job but were told that they would get that information in their individual consultation meetings, if they expressed an interest in the role. They were asked to indicate by 11 July, either by phone or email whether they were interested in applying for the new job. It is likely that Marston assumed that they would understand that the job was at a different level by the wording of the job description.

21. After the meeting Steve Penney saw the Claimants talking together about the new role. He came over and looked at the job description and confirmed that it was the same as his job description.

22. The letter of the same date which both Claimants were given at the meeting, stated that the individual consultation meetings would take place following the recruitment process for the new role. In reality the consultation process had begun as they were informed in the meeting that their roles were at risk of redundancy and they were told about the reorganisation and its aims.

23. During the evening of 9 July, Ms Moses emailed Ms Feltham with her initial thoughts on the situation. She referred to the job description that they had been given. She contended that it was not significantly different to the job that she was doing. She asks how it was different and why Mr Penney was not pooled with her and Ms Cameron as he was the training manager at Marston. At that point she thought that the role would

be advertised internally and she also asked about that. Ms Moses also asked for details of the redundancy package that would be due to her, if she were to be made redundant. In response, Amie directed them to the government's online redundancy pay calculator but also stated that this would be discussed at the individual consultation meetings that were due to take place in two weeks' time. She also sent both Claimants the most up-to-date vacancy list for Marston.

24. The Respondent made it clear that Mr Penney was not going to be in the pool with the Claimants and that the redundancy situation only involved them. Ms Cooper's evidence was that she was happy with the role that Mr Penney was performing but that she wanted a more strategic role at the NSL side of things. She wanted the post-holder at NSL to be operating at a different level to where she saw the Claimants.

25. In another email on 9 July, Ms Moses raised the issue of the fact that she was given only 48 hours to make a decision, without having the benefit of the terms and conditions of employment for the new, proposed job. She was clearly upset by the way the Respondent had handled the matter to that date and confused by the information that she had been given.

26. On the following day, 10 June, Amie Feltham from HR responded to Ms Moses. Unfortunately, Amie's reply added some clarity but not enough for the Claimant. She informed her that it was a Grade 4, management level role but she did not go on to provide specifics as to salary and other terms. She stated that the grade would be reflective of a management position. NSL's structure was different to Marston's grading system so this information did not assist Ms Moses in her understanding of what was being proposed but it did let her know that the Respondent considered this to be a management grade level job. Ms Feltham informed her that this was not suitable alternative employment as it was not at the same grade as her current role but then referred to there being a 3-month trial review period for the successful candidate, which is something that would only be possible if this were suitable alternative employment.

27. She stated that at this point, the Respondent only wanted to know if Ms Moses or Ms Cameron were interested in the role. They would then go through the selection process, for which she would be given adequate time. She informed Ms Moses that the interviews for the role were scheduled for the following Wednesday and that the position would be a Marston position as opposed to one within NSL.

28. Ms Feltham also stated that the package and specifics would be discussed after interview, which did nothing to provide Ms Moses with the information she needed to know in order to make the decision as to whether she wanted to apply for the role. She suggested that Ms Cooper should speak to the Claimant to give her a deeper insight into the role. Ms Cooper was copied into the email.

29. Ms Moses spoke to Ms Cooper on 10 July. They discussed the role further, although the Claimant was not given the terms and conditions of the new role. Ms Cooper invited her to a meeting on 11 July as she felt that a further meeting to discuss the role, terms and conditions and selection process would be of assistance. She emailed both Claimants to see if they would be available to meet on 11 July.

30. Both Claimants were able to meet with Ms Cooper and Ms Feltham on 11 July. We find that in that meeting the Respondent provided the Claimants with the terms and

conditions of the new role. Ms Cooper told the Claimants that the role would be a more strategic one as the post-holder would be expected to feed into corporate strategy and develop policy. Ms Moses said to us in evidence that the job description did not use the word 'strategy'. Although that is correct, the detail of the job description on pages 129 and 130 of the bundle described the role as reporting directly to the Group Organisational Development Director and being responsible for managing, organising and growing L&D initiatives ensuring the Marston's values are embedded, along with maintaining and exceeding quality service standards.

31. The post-holder was expected to identify key learning objectives and training needs of groups and individuals, manage and deliver training and development products using appropriate methodology and material in the most cost effective and appropriate manner and determine and utilise assessment strategies to identified standards. The post-holder would be expected to promote a culture of continual development, develop and manage internal systems and processes to achieve and maintain corporate accreditation and manage the performance and conduct of the L&D team and coach and develop staff.

32. Although some tasks such as designing and developing training products and managing a team of trainers were tasks common to both the Claimants and this new job description there were other tasks, such as growing L&D initiatives, developing internal systems, designing and developing training products through multiple learning and development solutions using creative and emerging technologies and techniques; that were unique to the new role and appeared to be aimed at a more strategic level i.e. addressing more long-term, underlying aspects of Marston's L&D department and developing it for the future. Ms Cooper confirmed in evidence that her vision of the new role was that it was about building, designing and delivering on strategy, as opposed to supporting it, which is how she saw the Claimants' role.

33. In evidence, Ms Moses agreed that neither she nor Ms Cameron attended board meetings as that was part of Mr Hopley's role. Although they stepped in for him on occasions when he was away, that did not include attending board meetings. Mr Hopley devised the Respondent's strategy while the Claimants fed into the formulation of that strategy. Ms Moses agreed that Mr Hopley drove the L&D agenda at NSL rather than her and Ms Cameron but that he did so with their support.

34. The minutes confirm that they were told in the meeting that the Respondent wanted someone to take on a more strategic leadership role at NSL to reflect the work being done by the manager on the Marston side. The post-holder would be expected to establish the direction of the department and develop a learning and development strategy for NSL. Ms Cooper stated that the process of consolidating the two teams had taken some time as Ms Cooper wanted to properly assess what was being done. Having taken a year, she was now confident that she understood what NSL needed which was one manager working at a different level to that on which the Claimants worked. Ms Feltham described the grades operating at Marston as they were not familiar to the Claimants. The terms and conditions applicable to the role i.e. pension, annual leave, car allowance, fuel card and salary were discussed. It was noted that they were told that if only one of them decided to apply for the role, the Respondent would still go through a recruitment exercise. This also confirmed that the Respondent did not consider the post to be suitable alternative employment.

35. Ms Moses agreed in evidence that there was a need to consolidate the L&D team at Marston and that there was a business need to reduce the NSL team from 2 L&D managers to one.

36. Following the meeting on 11 July, Ms Cameron confirmed that she wanted to apply for the role. On 12 July, Ms Moses also expressed an interest in the role. They were both still unhappy that Steve Penney had not been included in the pool and made Ms Feltham and Ms Cooper aware of that.

37. At this stage in the process the role was ringfenced to the two Claimants. The Claimants were told that they had to complete a short, written report which they would present to the interview panel. They were given written instructions on what the report should cover. It should detail their thoughts, planning and strategy relating to the following questions: - the value that L&D currently adds to the organisation, how their strategy and recommendations would add further value to the organisation; details of who they would involve in formulating strategy to obtain buy in and engagement from staff; and set out how they would measure the success of their strategy/recommendations.

38. The interviews were due to take place on 18 July.

39. On 14 July, in preparation for her presentation, Ms Moses wrote to Ms Cooper to ask if she could assist her with information on Marston corporate strategy, attrition figures for 2017/2018 and the qualifications issued for the same period. Ms Cooper pointed the Claimant to the corporate strategy on the website and referred her to contact someone called Charlotte for details of the enforcement qualifications. When they spoke on 13 July it is likely that Ms Cooper also advised her to speak to Mr Penney for further information. Ms Moses was not happy about this. Ms Cooper's reason for not providing the information was that she did not want to be seen to be assisting Ms Moses to prepare for the interview, while not doing the same for Ms Cameron. She did not think that it was inappropriate for her to refer Ms Moses to Mr Penney for assistance, even though Ms Moses had made it clear that she was unhappy that he had not been pooled as part of the redundancy process. Ms Cameron had not asked for any information.

40. On the evening of 17 July, Ms Cooper wrote to the Claimants to inform then that an NSL representative, Mr Christian Constantinides (Associate Director) was going to be on the panel with her. The Claimants were unhappy about being told this so late in the day. Anne Lippiat, Group HR Director who sat on the Marston board was also on the panel.

41. The interviews took place on 18 July. We find that Ms Moses did not answer a few questions in her interview. One question was about her strategic involvement over the previous 12 months. Her evidence to the Tribunal was that she was unable to answer that question as she had not done strategic involvement during the referenced period of time. She felt that it was unfair for the Respondent to choose the period of a year as she had not been required to do strategic work over that period and the Respondent should have asked her about a longer period of time. Her evidence was that she considered the second question to be too basic for her to answer. It was also her evidence that she was upset because of how she believed she had been treated in the process up to that date and although she knew that the interview was her opportunity to show how she met the job criteria, it caused her to not give her best performance.

42. Ms Moses agreed that the tasks she was asked to do for the interview were tasks she was likely to be asked to do in the new role. In her discussion with Ms Cooper on 23 July she stated that she accepted that she had not done her best at the interview and that it was her choice to answer the questions in the way she did. She stated that by the time she attended the interview, she had already got it into her head that she did not want the role.

43. Ms Cameron became very emotional in her interview which meant that she also did not give her best performance. Both Claimants were upset that they had not been given the full information about the job until a few days after they were asked to indicate their interest in it. Also, they were both upset that the redundancy consultation was not due to start until after the Respondent had decided out of the two Claimants, who would be appointed to the new job, by which time, it was likely that the other person would most likely be made redundant.

44. Both Claimants were graded at 2, while the top grade was 5. Grade 2 in the Respondents scoring system was defined as *"displaying strong weaknesses across some area and some weaknesses on the rest*". Ms Cooper's evidence was that Ms Moses displayed the skills of an Operational Team Leader but not the level of skill required for the Learning and Development Manager role which required strategic leadership. She did not believe that Ms Moses grasped the differences between the two roles and was unable to provide any recent examples to back up some of her answers. As far as Ms Cameron was concerned, Ms Cooper did not feel that she had the skills or experience necessary for the level required for the new role, even if she had not become emotional during the interview. Her assessment was that Ms Cameron's answers to questions showed that she had not grasped the fact that the focus of the new role would be on strategic growth.

45. By letters dated 18 and 19 July the NSL team were formally informed of the redundancy situation. Ms Cooper confirmed in the hearing that the letters only went to the NSL team and not to anyone in the Marston team. The Claimants were the only recipients of the letter. Both letters were identical. They were told that this was the start of the formal consultation process. They were asked to put forward any comments regarding the proposed redundancy and any ideas/suggestions of ways to avoid redundancy or potential alternatives. They were advised that the Respondent would inform them of the outcome of the recruitment for the new L&D Manager position through the consultation process. Both Claimants were invited to individual consultation meetings on 23 July.

46. The Claimants were advised that they could be accompanied to that meeting by a colleague or an independent trade union representative.

47. Ms Moses was scheduled to drive to Edinburgh to do some training and other work on 23 July. The Claimant's case was that she had told Ms Cooper that she would be unable to make a meeting on 23 July some time before. Once Ms Cooper was reminded of this, there was a series of emails between them which were in the bundle, which demonstrated their efforts to find another convenient date for the meeting. There was also discussion by email on whether the Claimant's representative could attend by conference call or in person. Ms Cooper cancelled the meeting so that the Claimant could attend this meeting. Ultimately, the meeting went ahead on 23 July and Ms Moses was accompanied by Ms Bryan. Ms Cooper travelled to Birmingham to conduct the meeting. She was attended again by Amie Feltham of HR.

48. The meeting began with Ms Cooper informing Ms Moses that she had not been successful in her application for the role. She was also told that no one had been appointed to the role.

49. The Claimant was then asked if she had any suggestions for alternative roles or structures. The Claimant challenged the way in which the Respondent had handled this process and suggested that the Respondent should have done the redundancy consultation before the recruitment. She asked how she could be asked to go away and come up with proposals when the Respondent had already decided on the structure. It felt as though the form of the new structure had already been settled. Ms Cooper and Ms Feltham explained that the Respondent's intention was to propose the role and run the consultation process in parallel to the recruitment. As the role arose from the process, they decided to recruit to it but they were clear that no final decisions had been made as they wanted to review any counter proposals they received during the consultation process.

50. Ms Moses pointed out that she did not see how it could be a fair process as once the Respondent decided on who would get the role, it was obvious that the other person would be made redundant. Ms Feltham stated that yes, the role was proposed and if someone is successful in the recruitment, why would the Respondent go through a full consultation with them? However, she also stated that although the Respondent had run the recruitment process for the potential role through the consultation period, as no one had yet been appointed to the role, there was still an opportunity for the Claimant to question and make counter proposals.

51. The Claimant found it difficult to focus at this meeting having just been told that she had been unsuccessful in the role. She stated that she did not believe that the roles were significantly different. It was still an issue for her that Mr Penney had not been in the pool with her and Ms Cameron and she voiced that at this meeting. The Respondent asked the Claimant to go away and think about alternative proposals. If she had any counter proposals she was to let the Respondent know by close of business on Friday 27 July.

52. Ms Cooper explained that the new role was not an operational manager role. She was not looking for someone to predominantly deliver training. She stated that she wanted this person to work alongside Steve Penney but on the NSL side of the business. That person would be managing a group of 10 – which could eventually become 20 - members of staff as the role would eventually become group-wide. The post-holder was expected to develop the L&D strategy and assist with the growth and agility of the business.

53. Ms Cooper also explained in the meeting that the Respondent's view was that Mr Penney had been responsible for the certification process which comes with a high level of responsibility. Ms Moses indicated that she was also responsible for certification at the BTEC level 2 and that to say that he worked at a higher level was patronising as they were all part of the same team. Ms Moses confirmed that she understood the Respondent's explanations although she still did not agree with its rationale.

54. Ms Moses was asked whether she was interested in a training officer role which was based in Edinburgh. It was not something that she was interested in and was not feasible for her in terms of distance from home.

55. Ms Cameron had her first consultation meeting on 25 July. Her meeting was with Ms Cooper and Ms Feltham and she was accompanied by Mr Boxhall. In that meeting Ms Cooper informed Ms Cameron that the Respondent wanted to replicate the structure at Marston in NSL with just one L&D manager position with more strategic management.

56. Ms Cameron asked why Mr Penney had not been part of the pool with her and Ms Moses since they were part of the L&D team. Ms Cooper's reply was that she was happy with the way that the Marston side was working and that she wanted to replicate that on the NSL side and therefore that was the side that needed to be re-organised.

57. The Claimant was informed that she had not been successful in the recruitment. They had a detailed discussed of the feedback from the interview process. The common thread in the feedback forms completed by the panel members was that Ms Cameron's answers to the questions were not of the depth or breadth that the Respondent wanted.

58. Ms Cooper told Ms Cameron that she had made enquiries across the business to find out whether there were other roles that both Claimants could occupy. She stated that she was looking for other options to try to retain her within the business. The training officer role in Edinburgh was also mentioned to Ms Cameron but it was not a role that she was interested in. The training officer role would have been a step down for both Claimants.

59. We find that in the meetings, neither of the Claimants came up with alternative suggestions to the Respondent's proposal. Ms Cameron asked whether she could have a trial period with the role and the Respondent refused.

60. The discussion then moved on to a discussion on the figures for her redundancy pay.

61. On 30 July Ms Cameron wrote to Ms Cooper setting out her idea and suggestion of a potential alternative structure for the L&D function within Marston. She stated that she would like to put herself forward for the role on a three-month trial basis and that if it did not work out she would expect the redundancy to still stand.

62. She then set out her concerns about the process which was that Mr Penney had not been in the pool, that she could not see how the new role differed significantly from the role that she had been doing. She referred to a conversation that she had had with Ms Cooper on 17 July in which Ms Cooper had asked her how she was getting on with her report for the interview. Ms Cooper told her that the interview would consist of questions about the report and competency questions. Ms Cooper then said to her that if Ms Moses performs better than her, she would get the job and Ms Cameron would be out of a job. This upset her and she stated that it was one of the reasons why she was emotional at the interview. In her live evidence Ms Cooper stated that she felt that in this conversation she was giving Ms Cameron what could be described as a 'pep talk' and that she certainly did not intend to upset her by encouraging her to do her best in the interview process.

63. Ms Cameron was also given a date by which she could let the Respondent have any counter proposals or suggestions.

64. Ms Cooper wrote to Ms Moses on 30 July to answer questions that the Claimant raised in her consultation meeting on 23 July. in that letter Ms Cooper discussed the process and repeated detail on the Respondent's vision for the L&D department and the difference between the jobs. She also gave again the Respondent's explanation in relation to the pooling issue and in particular that in addition to managing the L&D team in Epping, Steve Penney was responsible for the certification of enforcement agents which was a business-critical process on which all of Marston Group Enforcement was dependent. He also led the business in terms of strategic implementation and continuing expansion of the company-wide Learning Management system. He was leading the project to implement and integrate the Cascade system. His role was therefore the benchmark for the new L&D role in NSL.

65. Ms Cooper acknowledged that Ms Moses had been trying to find clarity on the difference between the jobs by focussing on the job description. She felt that during her discussions with the Claimant on 9, 11, 18 and 23 July she had elaborated on the job so that it should now be clear what the differences were. She was confident that Ms Moses had not been working at the level at which the new job was pitched and the interview process had been an opportunity for her to demonstrate her skills and experience for the Respondent to consider whether she could fill the role. She was disappointed that Ms Moses had not taken the opportunity to do so at the interview.

66. A similar letter was sent to Ms Cameron on 31 July.

67. The Claimants' final consultation meetings took place on 1 August. The Claimants were accompanied as before, as was Ms Cooper. We find it likely that these meetings were really to discuss arrangements for the end of their employment. The Claimants did bring up again their concerns on the job description, the makeup of the pool and the process the Respondent followed by conducting the recruitment exercise before the consultation. Their employment ended on 1 August

68. On 6 August, the Respondent wrote to both Claimants and informed them that their employment had terminated on 1 August. The letters set out the makeup of the Claimants' redundancy pay and their right of appeal.

69. Ms Cooper's evidence at the hearing was that she asked around the departments at Marston if there were any vacancies that the Claimants could apply for. There were no vacancies apart from the training officer role in Edinburgh. The Claimants had already been provided with a vacancy list and there were no additional vacancy lists produced before their employment terminated.

70. We find that both Claimants appealed their termination by reason of redundancy. Their appeal letters were dated 10 August. In their letters of appeal both Claimants referred to what they saw as the Respondent's failure to consult, failure to follow the NSL's redundancy policy and process, failure to follow an appropriate pooling process and failure to mitigate the redundancies appropriately.

71. We find that there was a draft redundancy policy at NSL. The Claimants believed that it had been incorporated but it had not. At the hearing both Claimants accepted that

the NSL redundancy policy had not been incorporated by NSL. The policy also stated that it was not contractual.

72. The Claimants appeals were conducted by Mr Hanshaw. Mr Hanshaw had not been involved in the process prior to conducting the appeals. Mr Hanshaw was senior within Marston (Holdings) Ltd. He was managing director of Project Centre Ltd which was part of Marston. He had not known the Claimants before handling their appeals.

73. He considered that he was hearing their appeal on the redundancy consultation process. He considered that the Claimants grounds of appeal were as follows: the Respondent had failed to consult appropriately, the Respondent had failed to follow its own policies and processes, the Respondent had failed to mitigate the redundancies appropriately, the Respondent had failed to follow an appropriate pooling process; there had been a significant breach of trust and confidentiality between those at risk and those making appointment decisions, and there was a failure to correctly calculate the redundancy and notice period appropriately.

74. In conducting the appeal, Mr Hanshaw interviewed both Claimants and contacted Ms Cooper and Mr Constantinides. He took advice from Jonathan Caddy in HR. Mr Hanshaw considered the recruitment process as well as the redundancy process. His opinion was that he had seen redundancy situations in the past where the employer had run the consultation process before the recruitment and he had also seen it done the way the Respondent had chosen to do it, which was to run the two processes in parallel.

75. Ms Cooper wrote a long email to him dated 11 September in which she set out her answers to the questions he had asked her. Ms Cooper clarified in a further email that there other some posts that had been deleted as part of the consolidation of the L&D department but as they were vacant posts there had been no need to make anyone redundant.

76. In his outcome letter to Ms Moses on 20 Sept he confirmed that Marston did not have a redundancy policy and that the policy which the Respondent had from NSL was only a draft and had never been adopted. The Respondent believed that it had followed the ACAS process although a copy of the process followed was never referred to us.

77. Mr Hanshaw commented on the recruitment process. The Respondent had chosen the selection method of a panel interview, with a written report and he felt that this was the fairest and most objective method. He concluded that a consultation process had been followed and he did not find evidence that further meetings would have changed the outcome of the process. He could not find evidence that the Respondent had failed to follow policies or processes. He decided that the Respondent had not made a decision on the proposed redundancies before the consultations took place. He considered that the consultation process had been adequate. He confirmed the Respondent's position in relation to the pooling issue. It was his decision that Steve Penney's role was a different role to the development and resourcing manager post the Claimants had occupied as it involved development, planning and design of training compared to the Claimants role of team management, training delivery and accreditation. The Claimants role was regional whereas Steve Penney's role was national and included Marston's self-employed agents. He concluded that the new L&D role was not suitable alternative employment because of its standing in the business, the skills and experience required. He concluded that the Respondent had made efforts to mitigate the Claimants loss of their roles.

78. The confidentiality issue related to Ms Moses' allegation that Ms Cooper had disclosed details of an email to Ms Cameron. Mr Hanshaw concluded that he could not find evidence that that had happened and so he did not uphold that part of the appeal.

79. He also established that the methods used to calculate the notice and redundancy pay for both Claimants was correct.

80. Mr Hanshaw did not uphold any of the points of appeal made by either Claimant. He confirmed that their employment ended on 1 August 2018.

81. The post was advertised externally and the successful applicant was a woman. The advert for the job was in the bundle. Ms Cooper did not draft the advert as it was done inhouse by HR. It also did not mention the word 'strategy' but it was clear from the wording that it was a post with significant responsibility in the company. The advert listed a variety of tasks that the post-holder would be carrying out which consisted mainly of leading the team, promoting a culture of continued development and learning; identifying key learning objectives and training needs of specific groups and individuals; managing, planning designing and developing training products; designing, managing and delivering prevention and awareness initiatives; facilitating, coaching and mentoring the team and evaluating training, learning and development programmes and take appropriate remedial action.

82. The skills necessary for the role were stated as experience of working in a L&D specialist role, implementing, evaluating and delivering an L&D strategy that meets the needs of the business. The Respondent was looking for a graduate with a recognised L&D or CIPD qualification as well as a recognised management qualification and relevant project managing and budgeting experience.

Law

83. The parties did not refer to any law in their submissions but the Tribunal looked at *Harvey* and the following law.

Unfair Dismissal

84. Section 98 of the Employment Rights Act 1996 (ERA) sets out the law on unfair dismissals. It states that redundancy is a potentially fair reason for dismissal. The Tribunal is firstly concerned with determining the real reason for the dismissal.

85. The burden is on the Respondent to prove the reason why it dismissed the Claimant and that it was for redundancy. Ms Moses accepted that the reason for her dismissal was redundancy.

86. Was it fair? Under section 98(4) ERA, the determination of the question whether is fair or unfair, having regard to that reason; 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.

87. The Claimant did not dispute that there was a redundancy situation here.

88. Her complaint of unfair dismissal related to the formulation of the pool for selection and the Respondent's decision to conduct the recruitment exercise before or alongside the consultation process. Ms Moses' case was that those decisions made her dismissal unfair.

89. Guidance was set out in the case of *Williams v Compare Maxam Ltd* [1982] IRLR 83 the EAT to assist tribunals in determining whether a dismissal for redundancy is fair under section 98(4). Tribunals were advised to consider whether:

a. the employee was given as much warning as possible to enable her to take steps to inform herself of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment;

b. the employer consulted the union, if applicable, and sought to agree with them or if not, the employees, the criteria to be applied in selecting employees to be made redundant;

c. the employer sought to establish criteria that did not depend solely on the opinion of the person making the selection but which could be objectively checked i.e. on attendance records, experience or length of service;

d. the employer sought to ensure that the selection was made fairly in accordance with these criteria and considered representations made to it;

e. the employer sought to see whether instead of dismissing an employee he could offer her alternative employment.

90. Although these were not principles of law but guidelines and standards of behaviour which may alter over the course of time, the courts have confirmed that they are a good way of measuring of the fairness of the employer's decision. As has been stated in the case of *Polkey v A E Dayton Services* [1987] IRLR 503

a. *"…in the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.*

b. *If an employer has failed to take the appropriate procedural step in any particular case, the one question the tribunal is not permitted to ask in applying the test of reasonableness prosed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this question is simply irrelevant."*

91. Procedural failings will therefore render a dismissal unfair even if the employee would definitely have been dismissed in any event had the procedural breach not occurred. The question of how the employee would have been treated had a fair procedure been adopted is relevant to the question of the appropriate remedy due and even, whether any compensation should be awarded at all.

92. The system for choosing the pool must be fair and if there is a customary arrangement or procedure then that should be followed unless there is a good reason for not doing so. The pool should include all those employees carrying out work of that particular kind but may be widened to include other employees such as those whose jobs are similar to, or interchangeable with, those employees.

93. The makeup of the pool from which the selection will be made is a matter for the employer to decide. In the absence of a customary arrangement or procedure, it will be difficult for an employee to challenge, especially where the employer can show that it acted reasonably. This point was addressed in the case of *Capita Hartshead Ltd v Byard* [2012] IRLR 814. In that case the EAT stated that the reasonable responses test is applicable to the selection of the pool. Silber J also stated: -

a. "….. the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) "It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited* [1982] IRLR 83);

(b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn"

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan* EAT/663/94);

(d) the Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

94. *Harvey* notes that tribunals cannot substitute their own principles of selection for those of the employer. They can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did.

95. There must be evidence that the employer took into account the characteristics of his employees when determining who to select. Referring to the guidance from *Williams* set out above, it is important that the criteria chosen for determining the selection should

not depend solely on the subjective opinion of a particular manager but should be capable of at least some objective assessment.

Direct Sex discrimination

96. Direct sex discrimination is prohibited by section 13(1) of the Equality Act 2010 (the Act). It states that 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.

97. The burden of proving the discrimination complaint rests on the complainant bringing the complaint. Section 136 of the Act states that:

> a. *"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the court must hold that the contravention occurred [but] if A is able to show that it did not contravene the provision then this would not apply."*

98. There is a substantial volume of case law that seeks to provide guidance on the concept of the "shifting burden of proof" enshrined in that section. It was dealt with most authoritatively in the case of *Igen v Wong* [2005] IRLR and confirmed in subsequent cases including *Madarassay v Nomura International Plc* [2007] IRLR 246.

99. In the case of *Laing v Manchester City Council* (EAT) ICR 1519 the EAT spelt out how the burden of proof provisions should work in practice:

> a. *"First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation can be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race."*

100. In the same case tribunals were cautioned against taking a mechanistic approach to the proof of discrimination by reference to the Race Relations Act 1976 [which would also apply to the Equality Act] in following the guidance set out above. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against her. The tribunal can consider all evidence before it in reaching a conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay)*.

101. In every case the tribunal has to determine the reason why the claimant was treated as she was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572: "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment then that is sufficient to establish

discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

102. *Harvey* advised that a claimant must establish more than a difference in status (eg sex) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed (*Madarassay*). There does not have to be positive evidence that any difference in treatment was on a prohibited ground in order to establish a *prima facie* case, but even if the tribunal believes that the respondent's conduct requires explanation, before the burden can shift there must be something to suggest that the treatment was due to the claimant's possessing a protected characteristic.

103. However, as Elias J stated in the case of *Laing* in some cases it is still appropriate to go right to the heart of the question of whether or not the protected characteristic was the reason for the treatment.

> a. *"The focus of the tribunal's analysis must at all time be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'. Whilst ….it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error in law to fail to do so."*

104. In a complaint of direct discrimination, the complainant can use an actual or hypothetical comparator and in this case the Claimants used an actual comparator as they relied on the fact that unlike them, Steve Penney was not put in the pool and not dismissed. It was their case that this was one on the grounds of their gender.

Applying law to facts

105. The parties confirmed that the correct Respondent to these proceedings was NSL as their former employer.

106. Ms Moses brings the only complaint of unfair dismissal. Both Claimants complain of sex discrimination.

<u>Dealing first with the complaint of unfair dismissal</u>

Has the Respondent proved the reason for dismissal?

107. Both Claimants agreed in their submissions that the reason for their dismissal was redundancy. They did not challenge the Respondent's reason for dismissal.

108. The Respondent has shown that the reason it dismissed both Claimants was redundancy. The letters of dismissal dated 6 August stated that the reason for dismissal was that their posts had been made redundant and the Respondent had no posts that were suitable for them to occupy. The Claimant's appealed against their dismissals but they did not challenge the reason for dismissal. Instead, they challenged the process by which the Respondent came to that decision.

109. It is therefore this Tribunal's judgment that the reason for the Claimants dismissal was redundancy.

Was Ms Moses' dismissal a fair dismissal?

Dealing with point 3 in the list of issues: -

Had the Respondent identified an appropriate pool for selection?

110. The law as set in *Harvey* is that the pool should be made up of the all the employees in an organisation that are carrying out work of a particular kind. In the broadest sense, Steve Penney was also doing L&D work and so he could be said to be doing work of the same kind although for a different employer. The Claimants were employed by NSL and he was employed by Marston they were not doing work of a particular kind for the same employer.

111. Although Mr Penney was also in the L&D department, the Respondent proved that his job was sufficiently different to that of the Claimants that it made sense to leave him out of the pool. The evidence showed that the Respondent had genuinely applied its mind to the issue of the pool and that the explanation given to the Claimants at the start of the process was the explanation that the Respondent maintained all the way through and at the hearing. Due to her observations of the L&D department over the period of a year, Ms Cooper had a good understanding of what the Claimants did and what Steve Penney did. She then applied her mind to what would be the ideal setup for the Respondent and for its business going into the future. The decision to leave Mr Penney out of the pool was not a spur of the moment decision or one that was irrational and subjective. There was a clear, well thought out reason which Ms Cooper and Ms Feltham explained to the Claimants at all the meetings in July and in correspondence. He did a different job within the L&D department. The Respondent wanted to replicate his job in NSL. His side of the business was functioning well and the issues that this process was to address were on the NSL side. The Respondent wanted someone who could operate at a different level to that at which the Claimants operated. His job was used as the template for what the Respondent wanted at NSL. Those were the reasons why he was not in the pool. The question is not what the members of the Tribunal would have done in this situation but whether what the Respondent did was outside the band of reasonable responses. It is our judgment that it was not.

112. The law is also that ultimately the pool from which the selection will be made is for the employer to determine, and, in the absence of a customary arrangement or procedure, it will be difficult for an employee to challenge where the employer can show that he has acted reasonably.

113. In our judgment – it was within the range of reasonable responses, given the knowledge that Ms Cooper had about his role and given the absence of a procedure and

any customary arrangement that we were told about, for the Respondent to make the decision not to place Steve Penney in the pool with the Claimants during this redundancy process.

The next question for us is whether the Respondent warned and consulted the 1st Claimant on the proposed redundancy

114. The Claimants were warned and consulted about the redundancy situation. The Respondent decided that their roles as development and resourcing managers would cease as part of this reorganisation and that what the department needed was one post of a learning and development manager (L&D) to lead on strategy, direction and development of the department at NSL. Ms Moses agreed in the hearing that it was appropriate for the Respondent to have the intention to have one L&D manager in NSL as opposed to two.

115. The Respondent notified the Claimant of this at the beginning of the process, in the meeting on 9 July. Although it was not spelt out at the 9 July meeting that the role was at a different grade from the one she occupied at the time, Ms Moses was told that she would have to go through a recruitment process to get it. The Respondent was not proposing that either she or Ms Cameron could assimilate into the role.

116. The Respondent conducted the two processes – the redundancy consultation and the recruitment to the post – alongside each other. The Tribunal cannot say that no reasonable employer would have done the recruitment and consultation at the same time. It is common to see the consultation process happen first and then the employer recruits to the jobs that arose out of the consultation process. In this case, the Respondent chose to do both simultaneously. At the end of the recruitment process the Claimants were informed that neither of them had been successful in being appointed to the role but that they could come back with suggestions as to how the look of the department or the post could be changed. Although Ms Feltham made the comment that if one of them had been successful there would have been no need to consult that person, there was still room for manoeuvre because in this case, neither of them had been appointed and the Respondent was open to considering other ways of achieving the outcome it wanted. Ms Moses was too upset to come up with any suggestions at the meeting of 23 July but was given the opportunity to do so in writing up to the 27 July.

117. This means that, as Mr Hanshaw found, the Respondent had not fully decided on the redundancies until the consultation process concluded. It is likely that the consultation process concluded at the end of the day on 27 July when the Respondent had not had any workable proposals from the Claimants.

118. The Tribunal had the following concerns about the process:-

119. The Claimants were not given the terms and conditions of the new job at the time that they were asked to consider applying for it. The Respondent's HR advice was that it should not give details at that time but to give the Claimants the job description and invite them to declare their interest in the job before being given any other details. That was unusual advice as it meant that the Claimants did not have all the information they needed in order to make an informed decision about the new role.

120. The job description on its own, which is all that they were given on 9 July, was not sufficient for them to understand the strategic nature of the role. It is also the case that when Steve Penney briefly saw the job description on 9 July he immediately recognised it to be the same as his.

121. However, Ms Cooper and Ms Feltham gave the Claimants full details of the job two days later, on 11 July. This was after they asked for it but nevertheless, they were given the full details, including salary, benefits and the responsibilities of the job at the meeting on 11 July; which was well before they applied for the job. They were sent the minutes of that meeting before the interviews, which gave them an opportunity to review what had been said. The Claimant would also have known that the job entailed working on strategy and the future development of the department from the brief given to her to prepare her presentation for the interview panel. The whole focus of the paper she had to write was on her thoughts about planning and strategy on L&D in NSL and any recommendations she had for taking that forward and adding value to it in the future.

122. In our judgment, the Claimant did not accept the Respondent's decision to leave Mr Penney out of the pool and that affected her approach to the process. In her discussions with Ms Cooper on 9, 11, 18 and 23 July, she chose to focus only on the job description given to her on 9 July and to ignore the information given to them subsequently.

123. More details were provided in Ms Cooper's letter of 30 July after the recruitment and after the 1st consultation meeting but it is our judgment that the Claimant had all the relevant information at the end of the meeting on 11 July.

124. The second fact that concerned the Tribunal was the Respondent's decision to inform the Claimant that she was unsuccessful in the recruitment at the same time and on the same day that she was asked for ideas for avoiding redundancy. The Claimant was upset by the news that she had not been appointed to the role although it could not have come as a surprise to her given that she had declined to answer two questions in the interview and had decided that it was unlikely that she would accept the job, even if it had been offered.

125. The point of consultation is to work with the affected employees to see if there are any ideas or suggestions that would avoid the redundancies. If employees are presented with the new job before their one-to-one formal consultation meeting begin that could look as though the employer had already decided the way in which the department is going to look at the end.

126. In the meeting on 23 July, Ms Feltham stated that if the role is proposed and if someone is successful in the position, why would we go through a full consultation with them? But the full minutes of that meeting shows that that was not the complete picture. After informing her that she had not been successful, the Respondent was proposing to continue to consult with the Claimant as no one had been appointed to the role. Even if one of them had been appointed, it was still going to continue the consultation process as they may have come up with ideas about how the department was organised and other posts they could occupy, to prevent redundancy.

127. Ms Cameron's idea was that she be given a trial period in the role but as she had not been considered to be suitable for the role, that was not appropriate. Ms Moses had

no suggestions at the meeting of 23 July and did not subsequently submit any to the Respondent.

128. In conclusion, the Tribunal's concerns were addressed by the fact that the Claimants were given the details of job two days after the were given the job description. By the end of the day on 11 July they had all the information that they needed to be able to make a judgment on whether they wanted to be considered for this role. Ms Moses never agreed that Mr Penney's role was at a different level to hers but she did have the information. Although Ms Moses never agreed with the Respondent on the status of Mr Penney's role, it cannot be said that she did not understand the Respondent's position on it and its intention to create a similar role at NSL.

129. In addition, the Claimant was given the right to appeal against the decision to terminate her employment on the basis that her post was redundant. She took up the opportunity and Mr Hanshaw investigated her concerns and decided to uphold Ms Cooper's decision. In the Tribunal hearing Ms Moses' case was that she did not challenge Mr Hanshaw's decision.

130. Mr Hanshaw's conclusions on the appeal were the same as the points made by Ms Cooper made in the 30 July letter. It was not clear how she could dispute Ms Cooper's decision and yet agree with Mr Hanshaw when they came to the same decision.

131. In our judgment, the points made by Ms Cooper in the 30 July letter were the real reasons for the redundancies. The Respondent reorganised the L&D department as it wanted to have someone at NSL doing similar work to that already being done by Mr Penney on the Marston side of the business. That is borne out by the terms of the advertisement that was subsequently put out for the job after the Claimants left.

132. It is the Tribunal's judgment that the Respondent followed a fair and open consultation process in which it informed the Claimant what was happening and why, quite early on. It gave her the opportunity to attend a ring-fenced interview and it consulted with her after she was informed that she had been unsuccessful at interview. It also gave her an opportunity to put forward other ways to avoid redundancy, after it informed her that she was unsuccessful in the role.

<u>The next question was whether the Respondent considered alternatives to compulsory redundancies</u>

133. The Respondent sent the Claimant one vacancy list. The Tribunal accepted the Respondent's case that there was only one vacancy list produced during the short time of this redundancy process.

134. We also accepted Ms Cooper's evidence that she asked around the other departments for jobs that the Claimant could apply for. There was nothing that they could apply for during the redundancy consultation period. It was not part of the Claimants case that there were jobs that they could apply for, which the Respondent failed to tell them about. There was no evidence that Ms Cooper wanted to get rid of the Claimant or that there were any issues between them.

135. There was a training officer role in Edinburgh but the Claimant felt unable to accept it given that she would be working with people who she used to train and manage. That decision was understandable but the Respondent had to offer her the job that was available as if she had accepted it, she would have avoided the experience of redundancy.

136. In our judgment, the Respondent warned and consulted the Claimant as an employee who was directly affected by this reorganisation. The Respondent genuinely applied its mind to the issue of the pool and decided to restrict the pool to those working in the company where the reorganisation was happening and those doing the same job. The Respondent consulted with the Claimant before, during and after it conducted the interview process. The interview process did not decide everything because, as neither Claimant was appointed, there was room to change things. In the end, there were no other proposals and the Respondent decided to continue with the original plan and recruit someone to take on a strategic, developmental role within NSL. The Respondent took steps to minimise redundancy by offering the Claimant the only post to which she could have been redeployed but she understandably felt unable to accept it.

137. It is our judgment that the decision given on the final day of the hearing in January was the Tribunal stepping in to the shoes of the employer. This was not permitted. On reconsideration, it is our judgment that the decision to dismiss fell within the band of reasonable responses available to an employer in these circumstances.

138. Ms Moses' dismissal was fair and her complaint of unfair dismissal fails and is dismissed.

Sex

139. The only fact we found from which we could infer that sex discrimination was relevant to the decision not to include Mr Penney in the pool was the fact that he was a man and the Claimants were women.

140. To lay the factual foundation or to prove facts from which a finding of discrimination, absent an explanation can be found, the Claimants need to prove more than simply a difference in gender and a difference in treatment. There needs to be something more. As was said in *Madarassy*, there must be something to suggest that the treatment was due to the Claimant's gender. Was there something more in this case?

141. In our judgment, the Respondent proved that Mr Penney was not doing the same job as the Claimants had been doing for NSL. The Claimants did not agree with that but on balance we find it likely that he was doing different tasks from the Claimants in addition to the tasks which they had in common. His remit was the whole of the UK whereas theirs was regional. He attended board meetings to make presentations whereas they did not. This was a task Mr Hopley performed when he was employed. They did not develop strategy but did feed into Mr Hopley's work on strategy while Mr Penney did develop strategy. He was responsible for the certification of enforcement agents which was a business-critical function for Marston. The Claimants were involved in different certifications.

142. Even if Ms Cooper was incorrect in her assessment of what Mr Penney did, it is our judgment that she did not decide to leave him out of the pool because of the

Claimants gender but because she had a genuine belief that his job was different from theirs, even though they were in the same L&D team.

143. We did not find any facts from which we could conclude that the decision not to include Mr Penney in the pool was based on his or the Claimants gender.

144. In our judgment, the burden does not shift to the Respondent for a non-discriminatory explanation for the treatment. In our judgment, this is a case similar to *Laing* in that we are satisfied that the reason given by the Respondent is a genuine one and does not disclose either conscious or unconscious sex discrimination. In those circumstances, that is the end of the matter.

145. The Claimants have failed to prove facts from which the Tribunal can conclude, barring an explanation from the Respondent, that the decision not to include Steve Penney in the pool was based on their gender.

146. In our judgment, the reason why Mr Penney was not included in the pool was because the Respondent determined that he was doing a different job from the Claimants.

147. For those reasons – the sex discrimination case fails.

148. The first Claimant's complaint of unfair dismissal fails and is dismissed.

149. The Claimants' complaint of sex discrimination fails and is dismissed.

Employment Judge Jones
Date: 19 May 2020