Appeal No. UKEAT/0225/19/BA

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 7 February 2020
Judgement handed down on 2 July 2020

Before

GAVIN MANSFIELD QC

DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

ARGOS LIMITED — APPELLANT

MS K KULDO — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	NICHOLAS BIDNELL-EVANS (of Counsel) Instructed by: Lewis Silkin LLP Southgate House Wood Street Cardiff CF10 1EW
For the Respondent	In Person

SUMMARY

UNFAIR DISMISSAL

REDUNDANCY

The Respondent employer appealed against a Judgment holding that the Claimant had been unfairly dismissed.

In a restructuring exercise the Respondent had sought to "map" the Claimant into a new role and did not treat her as redundant. The Claimant resigned in protest, claiming constructive unfair dismissal, wrongful dismissal and a redundancy payment. The Tribunal found that the new role was significantly different to the old role, and that the Respondent had breached the implied term of trust and confidence when it failed to consult, failed properly to assess the roles, and failed properly to address the Claimant's grievance and appeal.

The Tribunal committed no error of law in finding that the Claimant was constructively dismissed. Its overall conclusion and findings of fact were not perverse. However, in finding that the dismissal was unfair the Tribunal failed to direct itself that this was a separate issue, failed to address the issue of reason for dismissal and fairness, and/or failed to give proper reasons for its conclusion that the dismissal was unfair. The Tribunal erred in law to that extent, but that error did not undermine the finding of constructive dismissal. Both parties argued that, if there was a dismissal, the reason was redundancy. The case would be remitted to the Employment Tribunal (to the same Employment Judge) to determine whether the dismissal on grounds of redundancy was unfair.

The claims of wrongful dismissal and for a redundancy payment remained to be heard in the Employment Tribunal.

MR GAVIN MANSFIELD QC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. This is an appeal from the decision of the Employment Tribunal in Cambridge, Employment Judge James sitting alone. The Judgment and Reasons were sent to the parties on 8 March 2019, following a two day hearing held on 6 and 7 September 2018.

2. I will refer to the parties as they were below. The appeal is brought by the Respondent, which is represented here, as below, by Mr Bidnell-Edwards of Counsel. The Claimant was represented by a solicitor before the Tribunal but has appeared in person in the appeal.

3. By an ET1 presented on 6 January 2018 the Claimant brought claims of unfair dismissal, wrongful dismissal and a claim for a redundancy payment. The Tribunal found that she had been constructively unfairly dismissed, with remedy to be determined at a subsequent hearing. The Tribunal made no specific findings in relation to the wrongful dismissal claim, nor the claim for a redundancy payment. It may be that the Tribunal had in mind to deal with those claims at the unfair dismissal remedy hearing. I note that paragraph 66 of the Reasons states that further evidence may be needed to establish whether an enhanced redundancy provision would have applied to the Claimant if she had been made redundant. That suggests that the Tribunal had in mind there remained claims to which such matters would be relevant. In any event, those claims have not yet been determined.

4. The Respondent appeals against the finding of unfair dismissal. The Respondent advances six grounds of appeal. The appeal was allowed through to a full hearing on all grounds when sifted by HHJ Stacey on 17 April 2019.

The Outline Facts

5. The Claimant commenced employment with the Respondent on 5 November 2007. She was initially employed as an Assistant Financial Analyst. She was promoted to Group Central Costs Manager ("the Original Role") with effect from 1 May 2016.

6. In September 2016 Sainsbury's plc acquired the Respondent's parent company. The acquisition immediately led to the redundancy of a number of roles, but the Claimant's role was not included in these "Phase 1" redundancies. Subsequently, the Respondent considered a restructure of its finance function, and commenced consultation on proposals for a new structure on 22 June 2017. 55 roles were identified as being at risk of redundancy.

7. During June 2017 the Claimant was informed of the proposed restructuring of the finance function and was advised that her role was at risk of redundancy. She was informed that she was to be pooled together with Ms Hannah Cropp ("Argos Central Costs and Establishment Manager") and that they would both be considered for the newly created role of "Central Costs Manager" ("the New Role"). The Claimant was given information about the proposed collective and individual consultation process. Shortly before going on holiday in July 2017 she was provided with the job description for the New Role.

8. While she was abroad on holiday, the Claimant received a text from her line manager informing her that Ms Cropp had resigned, and that therefore she would be mapped into the New Role. Mapping was the process adopted by the Respondent to determine whether an existing employee's role was redundant, or whether there was a role in the new structure into which they could be transferred. The Respondent applied a 70:30 rule – an old role could be mapped to a new role if there was a difference of not more than 30% between the two roles. The Respondent's

position was that the New Role was sufficiently similar to the Claimant's role that she could be mapped into it, with no risk of redundancy once Ms Cropp had resigned.

9. On 1 August 2017, following her return from holiday, the Claimant met with her line manager. The Claimant did not agree that the Original Role mapped to the New Role and did not believe the New Role was suitable for her. She considered it a role with lower status, fewer senior responsibilities, and a change of job content. She did not believe that it was 70% similar to her existing job. She set out her position and some counter-proposals in documents dated 31 July 2017 and 6 August 2017.

10. The Respondent treated the Claimant as having raised a grievance, and there was a grievance hearing on 18 August 2017. The grievance outcome, contained in a letter dated 4 September, was that the Respondent stood by its position that the Claimant would be mapped into the New Role.

11. The Claimant made clear that she did not accept the New Role in an email on 4 September and asked the Respondent to confirm that her employment was finishing on grounds of redundancy. However, on 8 September the Respondent sent her a letter stating that, with effect from 8 November 2017, she would carry out the same duties as previously but with the job title Central Costs Manager.

12. On 10 September the Claimant appealed the grievance decision and on 11th September she was signed off as unfit for work with anxiety for one month. She attended a grievance appeal meeting on 18 September. The outcome, dated 2 October 2017, was to reject the appeal.

13. On 12 October the Claimant's solicitors sent the Respondent a letter before claim. On 9 November 2017 the Claimant resigned with immediate effect.

The Tribunal's Decision

14. After dealing with the facts, the section of the Reasons headed "Decision" begins at paragraph 33 and runs to paragraph 72. At paragraph 33 the Tribunal identified three matters which caused significant concern:

a. The lack of any proper consultation with the Claimant.

b. The use of the so called 70:30 comparison of the Original Role and the New Role and the apparent lack of understanding of how to apply the metric.

c. The lack of any evidence to show that any person undertook a full and proper assessment of the 70:30 metric.

15. The Reasons then went on to deal with each of those points in turn. Paragraphs 34-39 deal with consultation. It sets out what the Respondent's own documentation said about the consultation process, before contrasting it with what happened in the Claimant's case. The Tribunal found that there was no individual consultation with the Claimant. It found (paragraph 39) that the Respondent considered that once Ms Cropp resigned there was no longer a pool and there was no need to consider any consultation. In the same paragraph the Tribunal concluded:

> **"I find that this is wrong and contrary to the Respondent's consultation proposals at Section 4 of the Review Documentation noted above. I find there is nothing within the documentation to indicate that the mapping process fell outside the consultation process. I am satisfied that the Respondent failed to undertake any consultation with the Claimant and that this represents a breach of the implied term of trust and confidence as well as the stated policy of the Respondent."**

16. Paragraphs 40-46 set out the Tribunal's concerns as to the mapping process. At paragraph 46 the Tribunal concluded as follows: "*I am satisfied that the Respondent did not adopt a proper analysis for the mapping of roles.*" A number of criticisms of the mapping process are set out,

leading to the conclusion that the Respondent's actions were a breach of the implied condition of trust and confidence as well as being a breach of their own policy.

17. The Tribunal next considered whether a proper analysis of the old and new roles had ever been undertaken and if so, what the analysis showed (paragraphs 47-60). In those paragraphs the Tribunal found flaws both in the assessment process conducted by the Respondent, and in the communication of the rationale for the assessment to the Claimant. At paragraph 58 the Tribunal said "*I am satisfied that the Respondent has at no time done an assessment based on percentages in relation to the Claimant's existing and new roles.*" At paragraph 59 the Tribunal found that this left the Claimant without any proper understanding of the basis on which she had been mapped.

18. Paragraphs 61-65 consider whether there was any justification for the Claimant's assertion that her role would change by more than 30%. The Tribunal found that the Claimant's position was "*much diminished in status and responsibilities*" in the new role. At paragraph 65 it found that the changes were a direct result of the Sainsbury's takeover and were necessary changes. However, it found that the difference between the two roles exceeded 30% and the Claimant should not have been mapped into the new role. It found that doing so represented a breach of the implied condition of trust and confidence by the Respondent.

19. At paragraph 68 the Tribunal stated the following conclusions:

> **"I am satisfied that the failure to undertake consultation; the failure properly to assess the existing role against the new role for the purpose of mapping and the failure to conduct a proper assessment for the purpose of the Claimant's appeal (even though this was clearly recognised as appropriate by Ms Peddar) are all breaches of the implied condition of trust and confidence. Further, I am satisfied that they are each sufficiently serious to be repudiatory. I am satisfied that the Claimant resigned in response to those breaches. It is clear that she did not affirm the breaches as she made it abundantly clear that she would not accept the new role."**

20. The Tribunal then went on to reject three further or alternative arguments made by the Respondent:

a. At paragraph 69, an argument by the Respondent that the New Role was suitable alternative employment.

b. At paragraph 70, an argument that if there were procedural errors the Claimant would have been dismissed in any event.

c. At paragraph 71, an argument that the Claimant did not resign in response to any breaches of contract on the part of the Respondent.

21. Paragraph 72 then concludes that the Claimant was constructively unfairly dismissed and directed that the claim would be listed for a compensation hearing in due course.

The Grounds of Appeal

22. The Respondent appeals on six grounds.

a. Ground 1 and Ground 2 allege errors of law in the approach in finding that there had been breaches of the implied term of trust and confidence.

b. Ground 3 alleges that, having found there to be a constructive dismissal, the Tribunal erred in holding that the dismissal was unfair without making findings as to the reason for dismissal and whether the Respondent had acted reasonably in all the circumstances.

c. Grounds 4 and 5 relate to the exercise of comparison of roles:

i. Ground 4 alleges that the Tribunal misdirected itself, and/or misapplied or misinterpreted the law in failing to recognise that the Claimant had waived changes to the Original Role though conduct.

ii. Ground 5 alleges that the Tribunal misdirected itself and/or misapplied or misinterpreted the law in finding that the New Role was not a suitable alternative role.

d. Ground 6 alleges perversity in the finding that the Claimant had resigned in response to the alleged failure to consult with her.

Grounds 1 and 2

23. Ground 1 is that the Tribunal wrongly directed itself only to **Section 98 Employment Rights Act 1996** ("ERA") to determine the claim of constructive unfair dismissal; as a result it erroneously applied a test of reasonableness and/or the range of reasonable responses to the question of whether there has been a breach of the implied term.

24. Ground 2 is that the Tribunal misdirected itself, misapplied and misinterpreted the objective test of whether conduct amounts to a breach of the implied term of trust and confidence.

25. The Respondent points out, correctly, that the Reasons contain no section setting out the law and makes reference to no authorities and to only one statutory provision. The sole reference to the law is at paragraph 5, which reads "*The relevant law is found at s.98 of the Employment Rights Act 1996*."

26. The Respondent argues that this shows that the Tribunal adopted a range of reasonable responses test, or a test of reasonableness, to the question of whether there had been a constructive dismissal. Such a "reasonableness" approach, the Respondent submits, is contrary to the guidance in **Buckland v Bournemouth University Higher Education Corporation** [2010] IRLR 445 at paragraphs 22-28 per Sedley LJ. In paragraph 22 Sedley LJ identified the correct approach in a

constructive unfair dismissal case based on an alleged breach of the implied term of trust and confidence:

a. In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the "unvarnished" test in **Malik v BCCI** [1997] ICR 606 should be applied.
b. If, applying the principles in **Western Excavating v Sharp** [1978] ICR 221, acceptance of the breach entitled the employee to leave, he has been constructively dismissed.
c. It is open to the employer to show that such dismissal was for a potentially fair reason.
d. If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see **Sainsburys v Hitt** [2003] IRLR 23) fell within the range of reasonable responses and was fair.

27. Ground 1 relates to the first and second questions identified in **Buckland**: those are the relevant questions to determine whether there was a constructive dismissal. The third and fourth discuss whether such a dismissal was fair.

28. **Section 98 ERA**, referred to by the Tribunal at paragraph 5 of the Reasons, is part of the relevant law in this claim for unfair dismissal: it sets out the framework for determining whether there is a potentially fair reason for dismissal, and whether the dismissal was fair in all the circumstances. However, it says nothing about whether or not there was a dismissal, constructive or otherwise. In determining that, question **s.95** is the relevant statutory provision, together with the common law principles set out in **Western Excavating**, **Malik**, and **Buckland**.

29. Had the Tribunal regarded the question of constructive dismissal simply to depend on whether the employer's actions were reasonable, or within a band of reasonable responses, then that would indeed be an error of law. However, it is plain from the Reasons that this was not the Tribunal's approach.

a. It made three specific findings that the Respondent's conduct amounted to a breach of the implied condition of trust and confidence: paragraphs 39, 46 and 65; in paragraph 68 those three breaches are drawn together.
b. Having found there to be three breaches of the implied condition, it expressly found that each was sufficiently serious to be repudiatory (paragraph 68).
c. It found that the Claimant resigned in response to those breaches and did not affirm the contract (paragraph 68 and 71).

30. Those findings show that although the Employment Judge did not refer to the well-known authorities I have mentioned above, he had the relevant legal framework in mind and applied it to the findings of fact. He addressed each of the ingredients of a constructive dismissal claim and made express findings in relation to each ingredient. In the light of that structured approach it is impossible to say that the Tribunal applied the test in **s.98** to determine whether there was a constructive dismissal.

31. Ground 1 goes on to argue that although the Tribunal made findings that there had been a breach of the implied condition of trust and confidence it erred in the approach to that condition. Namely by applying its own judgment as to whether there were "failures" on the Respondent's behalf and whether the Respondent's actions were "wrong, correct or acting properly", and applying the Employment Judge's own standard of reasonableness looking backwards. It is argued that the Tribunal should have made an express finding as to whether, considered

objectively from the perspective of the Claimant at the time the apparent conduct of the Respondent was likely to destroy or damage the relationship of trust and confidence.

32. To my mind, the criticism that the Employment Judge applied his "own standard" of whether the Respondent's behaviour was "wrong" is at odds with the criticism that he applied a reasonableness or band of reasonable responses test. The Tribunal set out a detailed analysis of the failings of the Respondent, as the Employment Judge found them to be, including breaches of the Respondent's own stated processes. It had regard to the Claimant's perception of the Respondent's failings, yet clearly carried out an objective assessment of those alleged failings. It concluded that the Respondent's failings were such as to amount to a breach of the implied term in three respects.

33. The Respondent points to the language used by the Employment Judge in stating his conclusions, for example in paragraph 46 "*I am satisfied that the Respondent did not adopt a proper analysis for the mapping of the roles*" "*I consider that the Respondent's actions are a breach of the implied condition.*" (The Respondent's emphasis added in each case). Language of this kind is a way of introducing a judicial conclusion, and synonymous with expressions such as "I find that" "I hold that" or "In my judgment". In no way does it suggest that the Tribunal applied an incorrect test.

34. While it would undoubtedly have been preferable for the Employment Judge to have set out the term as formulated in **Malik** the fact that he failed to do so does not give rise to a concern that he misunderstood or misapplied the term. The implied term is long established and is central to much litigation in the Employment Tribunal. I would hesitate to find that an experienced Employment Judge had misunderstood the term in his repeated findings that it had been breached There is nothing in the Reasons that suggests the Employment Judge misunderstood the term.

35. Ground 2 traverses much common ground with the second limb of Ground 1. Ground 2 again focusses on the Tribunal's alleged failure properly to address the question of whether there had been a breach of the implied term. It is alleged that the Employment Judge adopted a subjective approach in assessing whether the Claimant subjectively believed the conduct of the Respondent to breach the implied term. The Respondent argues that the Tribunal should have approached the matter from an objective basis, more specifically on an objective consideration from the perspective of a reasonable person in the position of the Claimant.

36. This ground is at odds with the complaint under Ground 1 that the Tribunal applied its own assessment of whether the Respondent's actions were "wrong" or "incorrect" or "failures". From a reading of the Reasons it is clear that the Tribunal carried out an objective assessment of whether the Respondent's actions amounted to a breach of the implied term and did not simply base his conclusion on the Claimant's subjective view of matters. Furthermore, the Tribunal's assessment was based on the evidence available at the time: matters of which a person in the Claimant's position would have been aware. There is no suggestion in the factual findings that there were material events which were in evidence before the Tribunal but which were not known to the Claimant at the time.

37. The Respondent relies (paragraph 23 of its Skeleton Argument) on a list of nine matters which it claims the Tribunal would have taken into account had it considered the matter objectively from the perspective of someone in the Claimant's position. These are all matters of evidence which it was for the Tribunal to evaluate. I can see no reason why those matters would assume any different significance whether one approaches the position from an objective or subjective position. Nor in this case would it make any difference whether the facts were looked at from someone in the Claimant's position at the time or not: there is no suggestion that there

were facts in evidence that were not known to her at the time. In effect, the argument is that the Tribunal should have more attached weight to these factors in its assessment of the evidence. That is a challenge to the factual findings and discloses no error of law.

38. Ground 2(b) is that the Tribunal made a perverse finding that the failure to consult with the Claimant amounted to a breach of trust and confidence. In my judgment the Tribunal, having heard and analysed the evidence, came to a conclusion it was entitled to make, and there is nothing approaching the high hurdle necessary for a perversity challenge. This issue is also the basis of Ground 6, which I address below.

Ground 3

39. Ground 3 is that the Tribunal, having found that there was a constructive dismissal, assumed that any constructive dismissal would be unfair without making explicit findings on the reason for dismissal and whether the Respondent had acted reasonably in all the circumstances.

40. The Respondent is right in its contention that a constructive dismissal is not necessarily unfair. As a matter of principle, where there is a constructive dismissal there remains a separate question as to whether that dismissal was unfair. Answering that issue requires the Tribunal to determine the reason for dismissal, whether that reason is a potentially fair one, and whether the dismissal was reasonable in all the circumstances.

41. The Tribunal found at paragraph 72 that the Claimant was constructively unfairly dismissed. It may be that the Tribunal considered the question of the fairness of the dismissal separately to the question of whether there was a constructive dismissal, but I cannot be confident that it did. Nor can I be confident that it did not make the assumption that because this was a constructive dismissal it was by definition unfair by reason of that fact alone. It is clear that the

Tribunal did not direct itself as to the legal principles. There is no clear finding as to the reason for dismissal. The Reasons move rapidly from the finding that there was a constructive dismissal (paragraph 68) to the conclusion that there was an unfair dismissal (paragraph 72). The paragraphs in between do not directly address the questions of reason nor fairness.

42. I find that the Tribunal erred in failing directly to address the question of the unfairness of the dismissal, and/or failed to give proper reasons for its conclusion, and I uphold the appeal on ground 3. I will return to the consequences of that error after considering the remaining grounds of appeal.

Ground 4

43. Ground 4 is that the Tribunal misdirected itself, misapplied and/or misinterpreted the law in failing to recognise the Claimant had waived changes to the Original Role through her conduct, and so it no longer provided a proper basis of comparison with the New Role.

44. The Respondent's argument is that when considering the change to the Claimant's role presented by the New Role, the relevant comparison is not with the Original Role, but with a changed role that the Claimant carried out after September 2016. When that comparison is drawn, according to the Respondent's argument, the change to the New Role was not significant.

45. In support of that argument, the Respondent alleges that the terms of the Claimant's contract had changed from those under which she worked in the Original Role, and she had accepted new terms in working under the post-September 2016 role, which the Respondent calls the "As Is Role".

A

46. The Respondent relies on **Cumbria County Council v Dow (No.2)** [2008] IRLR 109 in support of the proposition that a change even to fundamental terms may eventually be agreed if an employee works under unilaterally imposed terms without protest. The Respondent argues that the Claimant had worked without protest under a new structure following the September 2016 acquisition. The Respondent argues there was no "coherent reason" for the Respondent to have regard to an historic contract of employment.

B

C

47. The Respondent criticises the Tribunal for finding that the changes to the Claimant's role were "*temporary changes pending the full restructuring of the financial department*" (paragraph 61). The Respondent points out that the change to the restructure of Argos Ltd. and Home Retail Group was irreversible, and the recharge work that the Claimant had done prior to September 2016 was "not ever coming back". That misses the point. The Tribunal did not find that the changes were temporary in the sense that there may be a return to pre-September 2016 arrangements. The Tribunal found (paragraph 61) that the changes were temporary in the sense that they applied pending the full restructuring; a restructuring that the Respondent had said would entail consultation. On the evidence, that was a finding that the Tribunal was entitled to make. In my judgment, it negates the argument that the Claimant is to be taken as accepting a variation of her contract. Unlike the situation in **Dow** it is not to be inferred that the Claimant had accepted a variation to her terms by working under the "As Is Role": that was not an ongoing role, but a temporary one pending fuller consultation about a further restructure.

D

E

F

G

48. The Respondent's argue that the Claimant could and should have raised a grievance about the change from the Original Role to the As Is Role, rather than working without protest. That is unrealistic. Where an employer tells employees that a change to a role will be in effect pending consultation about further restructuring, it is understandable that an employee may wait and see what that further consultation brings and raise her objections in the context of that consultation.

H

49. Grounds 4(b) and 4(c) both raise perversity challenges to the Tribunal's findings. Both of these "sub-grounds" are without merit. Perversity is a high hurdle, as the Respondent acknowledges. In the light of the evidence I refer to above the Tribunal was entitled to reach the findings it did.

Ground 5

50. Ground 5 is that the Tribunal misdirected itself, misapplied or misinterpreted the law in finding that the Claimant's New Role was not a suitable alternative role.

51. At paragraph 69 the Tribunal rejected the Respondent's assertion that, in the event that the Claimant was redundant, the New Role was suitable alternative employment. The Tribunal held that the role could not be a suitable alternative as it was more than 30% different from her existing role.

52. In making that finding, the Tribunal does not identify the issue to which it relates. The question of suitable alternative employment potentially arises in two ways in a redundancy case:

a. It may be relevant to the question of the fairness of a dismissal on grounds of redundancy. Most commonly, it is the Claimant who argues that the dismissal was unfair because the Respondent failed to take adequate steps to offer suitable alternative employment. The position here is the opposite. The Respondent relies on the existence of suitable alternative employment as a factor suggesting that the dismissal was fair (paragraph 22 Respondent's closing submissions before the Tribunal).

b. It is a relevant issue in a claim for a redundancy payment. An unreasonable refusal of suitable alternative employment may defeat a claim to a redundancy payment – **s.141 ERA**.

53. The Tribunal did not analyse this legal framework. Nor did it direct itself as to the legal principles relating to **s.141** which have been put before me, by reference to extracts from **Harvey** which are in the Respondent's Skeleton Argument at paragraphs 44-46 and to **Bird v Stoke on Trent Primary Care Trust** [2011] UKEAT/0074/11/DM. In fairness to the Tribunal, those legal principles do not appear to have been put before it: the Respondent's Written Submissions to the Tribunal did not address the redundancy payment claim.

54. In **Bird**, a claim for a redundancy payment, the EAT (Keith J and members) approved the following passage from **Harvey** (now found at E-240):

> **"Under 'suitability' one must consider the nature of the employment offered. It is for the tribunal to make an objective assessment of the job offered (*Carron Co v Robertson* (1967) 2 ITR 484, Ct of Sess). It is not, however, an entirely objective test, in that the question is not whether the employment is suitable in relation to that sort of employee, but whether it is suitable in relation to that particular employee. It comes really to asking whether the job matches the person: does it suit their skills, aptitudes and experience. The whole of the job must be considered, not only the tasks to be performed, but the terms of employment, especially wages and hours, and the responsibility and status involved. The location may also be relevant, because, as wryly observed by Lord Ordinary Eassie, 'commuting is not generally regarded as a joy' (*Laing v Thistle Hotels plc* 2003 SLT 37, Ct of Sess). No one single factor is decisive; all must be considered as a package. Was it, in all the circumstances, a reasonable offer for that employer to suggest that job to that employee? And the sole criterion by which that is to be judged is 'suitability'."**

55. The Tribunal's conclusion, at paragraph 69, was that the New Role could not be a suitable alternative role because it was more than 30% different to the Original Role. It is not clear to me that the Tribunal applied the principles set out in the passage from **Harvey** (quoted above) in reaching the finding in paragraph 69. Nor is it clear how the finding fitted into the overall framework of the Tribunal's decision. The issue will need to be considered afresh in any event, for two reasons.

a. First, the redundancy payment claim has not yet been determined by the Tribunal, and it remains live. The Tribunal has made no finding in relation to it and has not yet made a determination as to the application of **s.141**.

b. Second, for reasons I have set out above, I am allowing the appeal on ground 3, so the matter of the fairness of the dismissal will fall to be determined by the Tribunal afresh. The parties will be able to address the question of suitable alternative employment (both in the context of fairness, and in the context of redundancy payment) at that future hearing.

Ground 6

56. Ground 6 is a further perversity challenge – against the finding that the Claimant resigned in response to the alleged failure to consult with her.

57. I note first that the Tribunal did not specifically make the finding that the Respondent claims to be perverse.

a. At paragraph 68 the Tribunal summarised three breaches of the implied term of trust and confidence: failure to undertake consultation; failure properly to assess the new role for mapping; and failure to conduct a proper assessment for the purposes of the appeal. The Employment Judge said, in the same paragraph "*I am satisfied that the Claimant resigned in response to those breaches*. *It is clear that she did not affirm the breaches as she made it abundantly clear that she would not accept the new role."*

b. At paragraph 71 the Tribunal rejected the Respondent's argument that the Claimant did not resign in response to any breaches of contract by the Respondent, but rather she resigned because she had found another job. The Tribunal was satisfied, on the evidence it heard, that the Claimant applied for other jobs once she realised she may

be redundant, and that she had maintained "from the outset" that she should have been made redundant if the only role available to her was the New Role.

58. The Tribunal found, therefore, that the Claimant resigned in response to the Respondent's breaches as a whole, not specifically in response to the failure to consult. In essence, the Claimant's case, accepted by the Tribunal, was that the Respondent sought to force her into an unsuitable role, and failed properly to assess the significance in the change of role or to consider what she was saying about the matter. The failure to consult breach was closely related to the other breaches found to have occurred and formed part of the same series of events about which the Claimant complained. It was not necessary for the Tribunal to analyse more closely which of the three breaches was the reason for resignation.

59. The Claimant had complained consistently from an early stage about the New Role and the process by which the matter was being handled, in my judgment the Tribunal was entitled to make the findings it did, and those findings cannot be said to be perverse.

Conclusion

60. I dismiss the appeal on Grounds 1, 2, 4 and 6.

61. I uphold the Respondent's appeal on Ground 3: that the Tribunal misdirected itself, and/or failed to give proper reasons for its conclusion that this constructive dismissal was unfair. However, the effect of that error is limited in scope.

62. First, the Tribunal's error does not, in my judgment, undermine the Tribunal's findings and analysis of whether there was a constructive dismissal.

63. Second, there is, in fact, no disagreement between the parties as to the reason for dismissal The Claimant's case is that reason for dismissal was redundancy – her claims include a claim for a redundancy payment. The Respondent's case is that if there was a dismissal the reason was redundancy: counsel confirmed that at the appeal hearing. That was the way the case was put below. Even though the Tribunal erred in failing to address this point expressly, there can be no point in remitting the question to the Tribunal, as both sides point to the same reason. So I find that if the Tribunal had not erred in its approach (as per Ground 3) it would inevitably have found that the reason for dismissal was redundancy.

64. That leaves the question of whether this dismissal, i.e. the constructive dismissal for reason of redundancy, was fair in all the circumstances. In my judgment it would not be right for this Appeal Tribunal to reach its own conclusion on the question of fairness. I have considered the principles in **Jafri v Lincoln College** [2014] IRLR 544 per Laws LJ at para 21. If the EAT detects a legal error it must remit to the Employment Tribunal unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. I have indicated above that the reason for dismissal can only have been redundancy. The same cannot be said of the highly fact sensitive question of fairness. Accordingly, with some reluctance, the question of the fairness of the dismissal will have to be remitted to the Tribunal.

65. Having considered the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR paragraph 46 per Burton J (approved by the Court of Appeal in **Barke v SEETEC Business Technology Centre Ltd** [2005] IRLR 633), the appropriate course is to remit the matter to the same Tribunal. That is the proportionate response. There is no question of bias or partiality, and

the decision is not so flawed that it would be inappropriate to send it back to the same Tribunal. The Tribunal's error was in failing to address the question of fairness as a separate issue, or to give adequate reasons for its conclusion. I have no doubt that the Employment Judge will be able to give the issue proper consideration, alongside the outstanding issues of wrongful dismissal and redundancy payment. Although some time has passed since the Tribunal's decision, I see no reason to believe that the Employment Judge will not be able properly to deal with the matter.

66. I uphold the appeal on Ground 5, in this sense: it appears that the Tribunal may not have directed itself as to the issue to which the suitable alternative employment question was relevant, nor directed itself to the relevant legal principles. The finding in paragraph 69 as to suitable alternative employment relates either to the fairness of dismissal – which is a question being remitted as a result of this decision; or it relates to the claim for a redundancy payment, which has not yet been determined. Either way, the parties should be at liberty to address the question of suitable alternative employment afresh when the Tribunal determines the fairness of the dismissal and the redundancy payment claim.

67. The unfair dismissal claim will be remitted to the Tribunal to consider whether the constructive dismissal, for which the reason was redundancy, was fair in all the circumstances. While it will be a matter for case management by the Tribunal, I would hope that the issue of fairness can be determined alongside the outstanding claims for wrongful dismissal and for a redundancy payment.