EMPLOYMENT TRIBUNALS

Claimant: **Ms S Tyler**

Respondent: **Priory Central Services**

Heard at: **Bristol** **On:** **1 and 2 July 2020**

Before: Employment Judgment Midgley

Representation
Claimant: In person
Respondent: Miss J Duane, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The claim of unfair dismissal is well founded and succeeds.

2. The requirement for employees to undertake work of the kind undertaken by the claimant had not ceased or diminished, nor was it expected to cease or diminish. The reason for the dismissal was some other substantial reason, namely a business re-organisation, but the respondent did not act reasonably in treating that as sufficient reason to dismiss the claimant.

3. A remedy hearing will take place on 3 August 2020 at 10am with a listing of a day by video using the Cloud Video Platform. The parties will be sent separate notice of how to participate in that hearing.

REASONS

1. By a claim form presented on 30 August 2019 the claimant brought a claim for unfair dismissal which the respondent defended.

Procedure hearing and evidence

2. The parties had agreed a bundle of approximately 50 pages. In addition, I was

provided with the following witness statements. For the claimant I received statements from:

2.1. The claimant herself

2.2. Mr Adrian Dallison, who was formerly employed as the Group Estates and Development Director of the respondent between 2007 and 2019.

2.3. Mrs Helen Perrins, who was formerly engaged as a consultant interior designer by the respondent and his engagement ended in February 2020.

3. For the respondent I was provided with statements from the following:

3.1. Mr Gary Bradley, the Director of Estates and Facilities Management for the respondent. He conducted the consultations with the claimant during the redundancy process and sat on the interviews for the new post as detailed below.

3.2. Mr Matthew Atherton, the Group Director of Marketing and Communications. He conducted the appeal process.

4. Each of the witnesses gave evidence by affirmation and answered questions both from the other party and from myself.

5. In addition, I was assisted by concise and considered written submissions from both the claimant and the respondent's counsel, Ms Duane, and heard oral submissions expanding on the key points from each.

The issues

6. The respondent relies upon redundancy as the reason for dismissal, which is a potentially fair reason for dismissal in accordance with section 98(1) ERA 1996. Accordingly, the issues to be determined were as follows:

6.1. Was the Claimant's role redundant within definition in section 139 ERA 1996? In particular, was the reason for the claimant's dismissal mainly or wholly attributable to the fact that the requirements of the respondent's business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish? Here the work in question was that of Interior Design Director.

The claimant disputes that her role was redundant within the definition above, arguing that the need for an interior design function continued in the role of 'Interior Designer' in the Respondent's new structure. The Respondent avers that the Claimant's director role was no longer required, and the Interior Designer was significantly lower in status and salary and had fewer responsibilities.

6.2. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular, did the respondent:

6.2.1. adequately warn and consult with the claimant;

6.2.2. adopt a reasonable selection decision, including its approach to a selection pool;

6.2.3. take reasonable steps to find the claimant suitable alternative employment?

The respondent argues that it did, the claimant was in a pool of one and there were two consultation meetings at which the proposals were discussed, but the claimant did not identify any alternatives. As the respondent regarded the Interior Designer role as lower level and status, it was not suitable alternative employment and there was no requirement to slot the claimant into the role, and it was entitled to fill the role following open competition. The claimant applied for the role, was fairly scored in relation to relevant and objective criteria but was scored the lowest of the applicants.

The claimant challenged the fairness of the procedure in the following respects:

(a) she argued that the outcome of the restructuring process had been predetermined, and in consequence the respondent did not conduct any or any sufficient consultation on measures to avoid the need for her role to become redundant;

(b) she should have been slotted into the role of the Interior Designer and should not be required to undergo an interview process which was open to external candidates;

(c) in respect of that process, the interviewers were the same individuals who had determined that her role was redundant, and were not impartial but sought to affirm the decision they had made and so did not score her fairly;

(d) Mr Bradley was biased in the scores that he awarded her because of an affinity and personal connection with another interviewee, Claire Royle, who was subsequently appointed to the post.

6.3. If the respondent did not use a fair procedure, what is the percentage chance that the claimant would have been fairly dismissed in any event and, if so, when would that have occurred?

Background facts

7. I make the following findings of fact on the balance of probabilities having considered the evidence of the parties, the documents in the bundle and the parties' written and closing arguments.

<u>The appointment of the claimant</u>

8. The claimant was appointed to the position of Interior Design and Projects Manager with the respondent on 10 January 2019. At that time, her line

manager was Mr Dallison, who was the Group Estates and Development Director of the respondent ("Estates Director").

9. The claimant's appointment was subject to a six-month probationary period, and in discussions between Mr Dallison and the claimant it was agreed that if the period were completed satisfactorily the claimant would be awarded a pay rise.

The claimant's job description

10. The claimant's primary key accountabilities as set out in the job description were as follows:

    10.1. to project lead refurbishments with the agreement of the Estates Director and Deputy Estates Director:

    10.2. providing support to sites with site manager projects on matters of interior design, finishes and furnishings;

    10.3. identifying and agreeing appropriate beneficial commercial terms with suppliers of interior fittings, materials and finishes in conjunction with the Procurement Department and Commercial Director;

    10.4. supporting operational teams to ensure that interior design, furnishing and finishes meet the relevant current safety standards; developing and improving standardised colour, furnishing and finishing schemes;

    10.5. creating and introducing new budget models for future projects with the Estates Director; and

    10.6. ensuring projects were delivered on time and to budget.

The practical reality of the claimant's work

11. The claimant worked remotely from a home office. The Estates team notified the claimant of premises that required interior decoration projects, and would set a budget, following discussion with the claimant, for that project. The claimant would either oversee the project herself, sourcing the FFE or would work in conjunction with consultant interior designers to deliver the project. One of the claimant's responsibilities, as addressed above, was to ensure that she negotiated the best commercial agreements in respect of the provision of the FFE and, secondly to ensure that the FFE were compliant with the necessary regulations applying to the premises at which the project was being conducted.

12. The consultants were engaged on a project by project basis to manage costs given the fluctuating demand for project work. If the claimant could not undertake a project because she was too busy, she would assign it to a consultant interior designer.

13. The cost of consultants for each project was a matter within the remit of the Estates team, and formed part of the budget for the project. The claimant's responsibility was to ensure that each project was delivered on time and in accordance with the agreed budget. Where she had delegated projects to the

consultant interior designers, she was responsible for ensuring that they delivered the project on time and in accordance with budget.

14. The consultant interior designers also worked remotely from home offices. Both the claimant and the interior designers habitually attended project sites, most frequently at the beginning and at the end of a project fit, but occasionally to monitor progress during its course. One consultant, who worked entirely from home without visiting site, was engaged to manage the respondent's "Priory by Design" website, which was used to enable clients to order equipment, and in that way to funnel the smaller projects.

15. Given the demand for project work during the early years of the claimant's the employment, three of the six consultants were engaged on a full time basis and work was attributed to them by the claimant according to its nature and their preference and skill set. Nevertheless, the claimant was consistently engaged in project work herself; she did not cease to conduct her interior design function.

16. The nature of the interior design projects undertaken could vary from small commissions for sofas and pictures (valued at between £2,000 to 3000), to extensive refitting of entire wards or buildings which could be valued in the millions. Thus, by way of example, in the period between 2012 and 2018 the respondent undertook approximately 4000 projects involving interior design input with a combined value or £150 million, averaging at 600,000 per annum. Mr Dallison gave evidence about the Roehampton project, in which the claimant was involved in the design of equipment, which consisted of eight projects, one with a value of between £6 -7 million. The project lasted more than a year.

17. Consequently, the volume of projects fluctuated, with the effect in some years the project values were significantly higher and project numbers were significantly greater. Larger projects might themselves involve individual smaller projects (as in the Roehampton project).

18. The respondent maintained a record of the projects on the 'Proactus' system. In addition the respondent required its employees whose work was capitalised, such as project managers, surveyors and the claimant, to maintain timesheets and those timesheets were analysed to produce figures enabling the respondent to analyse time against cost in respect of projects. Consultant interior designers were not required to complete the timesheet as they were not on the respondent's payroll.

Variation to the claimant's contract and the end of the probationary period

19. The claimant performed above expectations in the role, but experienced difficulties in negotiating beneficial commercial terms with suppliers of the FFE on the grounds that they did not believe she had sufficient seniority to threaten to withdraw the use of particular suppliers product lines in circumstances where the suppliers were not offering competitive rates. Similar problems were encountered in relation to the claimant's discussions with the directors.

20. In consequence on 20 July 2013, Mr Dallison issued a contractual variation letter. The contractual variations consisted of three additional responsibilities which were as follows:

20.1. responsibility for developing the annual budget for interior refurbishment projects;

20.2. a more active role in the procurement of goods and services, cooperating with the procurement department;

20.3. specific responsibility to develop and agree design standards in conjunction with the managing directors of the respondent service lines.

21. Mr Dallison's evidence, which I accept, was that the Director of Strategy required some evidenced rationale for the increase in salary which had been pre-agreed with the claimant to be awarded upon conclusion of her probationary period. His evidence in relation to the additional responsibilities, which was not directly challenged or rebutted by the respondent, was that the responsibilities identified in the letter of 20 July reflected the activities that the claimant was already undertaking but in respect of which it would assist the claimant in her role given the difficulties already described, if those problematic elements of her job description were given "additional emphasis", to use his words. In addition, it was hoped that the change of title to interior Designs Director would allow the claimant further and greater traction in her negotiations with suppliers and with the senior management team.

22. Insofar as the claimant was ostensibly given responsibility for developing the annual budget (referred to as the 'General Furnishing' budget ("GF")), in reality it continued to be set by Mr Dallison and Mr Bytheway (although the claimant would be consulted to understand how much similar projects had cost in previous years) and the claimant was required to operate within the budgetary constraints that they had determined. She was consulted in relation to the necessary budget, given she had the expertise in the costs of FFE, but she did not have autonomy to determine its level.

23. During a project, the claimant would liaise with the Natalie Jones, the Property Acquisitions Manager, on an ongoing basis as to the extent to which the project work was progressing in accordance with the agreed budget for that project. More generally, the claimant argued, and I accept, that the process of interior design was not one that naturally lent itself to the setting of an annual budget, because the spend was necessarily dependent upon the number of projects that occurred during that year. It was, in her words, a reactive process, looking at the costs of the previous year's projects and trying to predict what the costs of the future year's projects.

24. For those reasons, Mr Dallinson drafted the letter of 20 July and subsequently sent a letter dated 30 July to the Head of Resources and Improvement indicating that the salary increase was consequent to the role adopting new responsibilities. I accept, however, that the claimant's responsibilities had not changed, and she continued to undertake the work that she had previously.

25. Whilst the job title was changed to Director, there was no consequent change in the claimant's standing within the respondent's structure, and no change to her notice period, which remained equivalent to statutory notice. In particular, the respondent produced a proposed structure chart for the purpose of the restructuring exercise which showed the the claimant on the same management level as the Estates Operations Manager and Property

Acquisitions Manager. I accept Mr Dallison's evidence, which was not challenged by the respondent, that prior to the restructure the respondent operated with a very flat management structure.

26. Following an increase to the claimant's car allowance in January 2014, the claimant's salary and benefits consisted of a salary of £61,000 and a £5,200 car allowance. The respondent did not adduce evidence identifying whether that package was commensurate with other directors within its employment.

The business restructuring

27. In 2019 the parties accept that the volume of large projects was decreasing, and the respondent identified a need to consolidate its business model and restructure. The claimant accepts the respondent was entitled to do so.

28. The claimant produced a document summarising the roles and responsibilities of her role and the consultant interior designers. The document identified the number of major, standard and "Priory by Design" projects that each had undertaken in the two-year period.

29. The document revealed the claimant had undertaken 19 major projects and 124 standard projects. Claire Royle, a consultant whose function was identified as the "Major Projects Interior Designer and Project Manager" had undertaken 63 major projects and 45 standard projects. The document did not reveal the comparative values of the projects or the comparative times involved, although those figures were available to the respondent. Similar details were provided for the other consultants, although they are not relevant to the matters before me.

30. In addition, in identifying the functions of each role, Miss Royle's functions included particular emphasis on end to end project management, and other work on site. The claimant's role was described in a more managerial capacity.

31. The respondent, led by Mr Bradley, conducted a review of the roles and functions within the Estates and Projects teams. It determined that it no longer needed and interior design director, but rather required an interior designer who would have a more hands-on role in delivering projects on site. Eight other roles, including those of Estate Operations Manager, Estates Manager, Estates Compliance Officer and Senior Estate Administrator were identified as being no longer required, and a new post of Estates Finance Manager was created.

32. In reaching those conclusion, Mr Bradley had had regard to the "roles and responsibility" document had been by produced by the claimant. He did not however look at her job description nor did he speak to her to understand what her role entailed on a day-to-day basis and how much time was taken in respect of each of her functions. He did not speak with the consultants to understand the work that they did or how and to what extent it connected to was directed by the claimant's role. He did not look at the respondent systems to understand the number of projects that the claimant had undertaken all their value of the time involved in them.

33. In consequence he determined that the claimant's role was largely managerial, as it was primarily responsible for managing the consultants who would have the hands-on responsibility to deliver the projects, and was at a higher level

because it included responsibility to communicate and liaise with the CEO and managing directors in relation to interior design project queries and FFE design. He concluded that contractors would be used in future but on a project by project basis, and on that ground concluded that there was no longer a requirement for a director or leadership role within the Interior Design function with any budgetary responsibility.

34. On 24 May 2019, following the departure of Mr Dallison from the respondent's business, the respondent notified its employees that the Estates and Projects teams would be merged into a single team with effect from 1 June 2019. Mr Bradley, who had been appointed Director of Projects following Mr Dallison's departure, sent an email confirming the changes to the affected employees, which included the claimant. The employees were shown a proposed organisational structure chart in which the claimant's roles and others have been deleted, and a new role of Interior Designer was included.

The respondent's redundancy policy

35. The respondent had a redundancy policy in place at the time, which provides (insofar is relevant to the issues before me) as follows:

> "7.1 Priory Group will make every effort to redeploy any colleagues who are selected for redundancy to suitable alternative work. Such colleagues will … be given an opportunity to discuss with their line manager which vacancies are likely to be suitable for them. While priority will be given wherever possible to colleagues at risk of redundancy, Priory Group reserves the right to select the best available candidate in relation to any given vacancy.
>
> 7.3 Priory Group may make an offer of 'suitable alternative employment' as an alternative to redundancy. Whether a role is considered 'suitable alternative employment' will depend on a range of factors including the degree of similarity between the offered role and previous role, the terms on which the alternative role is offered, the pay and other benefits. This is not an exhaustive list and the question of suitability will be determined on a case by case basis."

The Interior Designer role

36. The respondent prepared a job description from new role. It reported to the Head of Estates and listed amongst its key responsibilities the following:

36.1. provide advice on all matters concerning interior design and FFE;

36.2. lead interior design activity for projects and routine refurbishment requirements;

36.3. working closely with the Estates Finance Manager, help inform and manage the interior design/FFE element of the group Estates Capital Plan;

36.4. Ensure all activities are within budget, escalating to the Finance manager and head of Estates where they were not;

36.5. advise on and manage any third party interior design support, including consultants and contractors;

36.6. support the estates and Project teams and delivering to desired end states on time and within budget;

36.7. finally, helping to develop future plans and budgets, including the formulation of individual project business cases.

37. The salary bracket for the new role was £50,000-£55,000 with a car allowance of £4200. It therefore represented a 10% decrease in salary and benefits to those enjoyed by the claimant in her former role.

<u>The consultation process.</u>

38. On 10 June 2019, the respondent wrote to all the affected employees advising them that they were at risk of redundancy and that consultation would begin. Appropriate notification of the right of representation was provided.

39. The respondent also provided an structure chart showing the proposed new structure and a document entitled 'Announcement Estates Restructure' which set out the rationale for the restructuring process, identifying the following reasons: the requirement to combine several teams into one, a shift of emphasis from growth to consolidation as a consequence of a reduced number of major projects, the need to streamline the organisation within the team, and the need to make cost savings.

40. The announcement identified five roles that would be made redundant, if the proposed structure were adopted, including the claimant's role as Interior Design Director. In addition, it identified the new post of Interior Designer, stating that it would be advertised competitively.

41. On 11 June 2019, the claimant attended her first consultation meeting which was conducted by Mr Bradley and Mr Bytheway. She did not require a representative. A detailed minute was taken. During the meeting, the respondent advised the claimant of the proposed changes in the rationale for the restructure as detailed above, explaining the need to make cost savings giving the lack of growth in the business. There was, however, no discussion with the claimant to ascertain whether she had any proposals to avoid the need for her role to be made redundant, and the claimant did not offer any.

42. There was discussion as to whether the contractors would still be engaged, and if so whether the interior design role would continue to be involved in their management and appointment. The respondent agreed that they would still be engaged and allocated projects but that their costs would be managed by the Estates Finance Manager.

43. The claimant argued that she believed that the role was identical to her own, given her role was a director in name only and that there was no true redundancy given the number of employees had not reduced and the need for the work she undertook had not reduced. The respondent maintained that the new role was at a lower status and pay level and with reduced responsibilities. The claimant was told that the role would be advertised and that it would be open to external candidates, such as the interior design consultants, to apply

for it, albeit the respondent would have to consider the risk that she may use the role as a stopgap. She indicated her willingness to accept the role.

44. On 14 June 2019, the claimant emailed Mr Bytheway and Mr Bradley setting out her objections to the process. She disputed that her role was redundant and argued that there had been no consultation with her prior to the decision to make it redundant if it truly were but had been presented as a fait accompli. Secondly, she suggested that the new role was very similar if not identical to her current role and in consequence it should not be advertised externally, but that she should be slotted into it.

45. The respondent replied by letter and email on 14 June 2019, disputing that the interior design role would be suitable alternative position due to the fact that it was at a lower status and pay and, in addition, the respondent needed to consider the risk of loss of continuity to the business if the claimant were to use the role as a stopgap until a more senior role became available. It appeared that that was part of the respondent's rationale for determining that the rule was not a suitable alternative role. The respondent confirmed that there would still be a requirement to use contractors, but they would be allocated to specific projects on an as and when needed basis and the cost budget for their use would be managed by the New Finance Manager.

<u>The selection and appointment of the New Interior Designer</u>

46. In the event, the claimant applied for the new interior Design role. The consultant interior designers also applied.

47. On 19 June 2019, the respondent conducted interviews for each of the applicants. It used template questions identifying criteria relevant to the role and scoring mechanisms for them. A maximum of three marks could be gained in respect of each question, but in order to obtain the marks the applicants had to provide evidence-based examples demonstrating the quality, skill or attribute detailed in the scoring criteria.

48. The interviews were conducted by Mr Bradley and Mr Bytheway. After interviews they discussed the scores they had each attributed to an applicant to ensure consistency, and an overall mark was produced by combining the scores. The responses of each applicant were recorded on the scoring sheets and the marks attributed to them by the interviewer.

49. During her interview, the claimant regrettably did not provide the evidence base responses the respondent's interviewers required, partly because in her view she was already doing the role and, in her words, she "felt at the time that she shouldn't have to be interviewed for a role that she was already doing and was more than capable of doing" and her prior performance stood (as she viewed it) as evidence of her capacity to succeed in the new role. In addition, she regrettably said that her attention could wane on a project and that she "was a starter and not a finisher."

50. Consequently, the claimant received the lowest score of the four applicants, and subsequently was not invited to a second interview. The successful candidate was Miss Royle who scored a combined score of 89 out of a possible 108 points, whilst the claimant scored 55. Mr Bradley awarded the claimant 29 points, Mr Bytheway 26.

51. The two candidates with the highest scores were shortlisted for a second interview on 27 June 2019, and Miss Royle commenced in the role of Interior Designer with effect from 1 July 2019.

52. The claimant attended a second consultation meeting on 24 June 2019. It was conducted by Mr Bradley and Mr Bytheway and, as before, a detailed minute was taken. The claimant indicated that the vacancies that had been sent to her were unsuitable, given that they were not interior design roles and required skills that were outside of her skill set. The claimant expressed her unhappiness that the decision to make a role redundant had been made by Mr Bradley and Mr Bytheway in circumstances where they had spent no time to identify what role entailed and without seeing a job description, but rather had based their decisions on two factors of budget and responsibility for managing the contractors, which she maintained continue to form part of the new job description. The meeting was a difficult one.

53. On 28 June 2019, the respondent wrote to the claimant to confirm that her role would be made redundant and she would be given notice with effect from that day. In the event the respondent had miscalculated the claimant's notice period, but the matter was corrected following her appeal.

54. The claimant appealed by letter dated 4 July 2019. Amongst the claimant's grounds of appeal with the following:

    54.1. the respondent had failed to consult with the claimant prior to concluding that her role should be made redundant, had it done so she would have identified the means of making the necessary cost savings to avoid the need for her role to be made redundant at all;

    54.2. the Interior Designer role was identical to her role;

    54.3. the respondent's assessment of the factors that distinguished her role from that of the Interior Designer was erroneous, as her role was not at director level;

    54.4. the claimant should have been slotted into the Interior Designer role and afforded preference over external candidates such as the consultants.

55. The claimant's appeal was heard on 22nd July 2019 by Mr Atherton, the Communication and Marketing Director. The claimant was accompanied by Natalie Jones. A minute was taken. The claimant expanded upon the points made in her letter of appeal. During the meeting, the claimant provided a copy of her job description and the contractual variation letter; it was the first time that the respondent had considered either during the restructuring process. She added the caveat that the original job description was six years old. The claimant again maintained that as the Interior Designer role was identical to hers it should been offered to her without the need to participate in open competition.

56. The claimant observed, in relation to the two consultants who were shortlisted for the Interior Design role, that one, Miss Perrins, had been appointed as an administrator and did not like to travel to sites, preferring to work from home.

57. Mr Atherton wrote to the claimant by letter dated 30 July 2019 rejecting her appeal. Whilst Mr Atherton accepted that the information relating to the claimant's role was scarce, he concluded that the new role was more operational and project/design focused than the claimant's and had significantly reduced financial management responsibilities in comparison. In consequence he did not regard it as a suitable alternative post and rejected the claimant's argument that she should been slotted into it without a competitive interview process. In relation to the interview process, Mr Atherton concluded that it had been carried out in good faith, was based on clear standards and there was evidence to substantiate the scores that had been given, allowing for clear definition of what constituted good answers, so that he was satisfied that a fair process had taken place and the best two candidates were shortlisted.

Continuing use of contractors

58. The respondent accepts that contractors continued to be used until 7 February 2020. That is consistent with the evidence I had from Miss Perrins that she continued to be engaged on projects until that date by Miss Royle adopting the same process as she had with the claimant, namely that she was allocated to projects by Miss Royle and reported back to her regarding the progress and compliance with budget and the project in question. She maintained that Miss Royle remained the first point of contact for any interiors related queries or issues made decisions about the manner in which the project was carried out. Miss Perrins was still required to approach Miss Royle for direction or to answer questions that she might have.

59. The overall effect of her evidence was that the day-to-day practice of the Interior Designer was identical, insofar as it related to the management and conduct of projects, with the role of the Interior Design Director. The basis for that conclusion, was derived from Miss Perrins experience of speaking to this while on a daily basis.

The relevant law

Redundancy

60. Redundancy is a potentially fair reason for dismissal permitted by section 98(1) ERA 1996. Other potentially further reasons include conduct, capability and some other substantial reason ("SOSR").

61. Redundancy is defined by 139 ERA 1996 which provides:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish

Redundancy and business reorganisation

62. A redundancy situation will not always arise in every business reorganisation. The essential test remains that set out in section 139 ERA 1996 above. Consequently "a reorganisation of the business that involves simply reshuffling the workforce may not create a redundancy situation if the business requires just as much work of a particular kind in question and just as many employees to do it, even if individual jobs disappear as a result" (see Barot v London Borough of Brent EAT 059/11). What is crucial, is whether the restructuring essentially entails a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees is numbers nonetheless remained the same.

63. Thus, where, for example, a senior employee is dismissed because his or her work is to be done in future by an employee of lower status, the reason for dismissal will not be "redundancy", although it may be for "some other substantial reason of a kind such as to justify the dismissal" within the meaning of section 98 (1) (B) ERA (see Pillinger v Manchester Area Health Authority [1979] IRLR 430, EAT; and examples of the principle in Excel Technical Mouldings Ltd v Shaw EAT 0267/02 and Chorus and Regal Hotels plc v Wilkinson EAT 0102/03).

64. Where the employer has made a genuine mistake as to the correct categorisation of the reason for dismissal and where the facts (or beliefs) that led it to dismiss were known to the employee at the time of the dismissal and those facts (or beliefs) were fully aired in the tribunal proceedings, the tribunal may ignore the wrong label (see Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA; confirmed in Brito-Babapulle v Ealing Hospital NHS Trust [2014] EWCA Civ 1626).

65. It is essential however that the tribunal allows the parties an opportunity to comment upon any proposed new reason for dismissal prior to reaching its conclusion; the failure to do so will amount to an error of law (see Murphy v Epsom College [1985] ICR 80, Court of Appeal). Furthermore, the reason identified by the tribunal cannot be one that has been expressly rejected by the respondent (see Devonshire v Trico-Folberth Ltd [1989] ICR 747, CA).

66. The burden of proving the potentially fair reason for dismissal rest upon the respondent. Consequently, where the tribunal and identifies a different reason, such as SOSR, the burden remains on the respondent to prove that potentially fair reason through the evidence adduced at the hearing.

Fairness of the redundancy

67. The determination of whether a dismissal on ground of redundancy is fair is to be made in accordance with the provisions of section 98 (4) ERA 1996 which provides:

"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

68. The tribunal should adopt a three-stage approach (see <u>Safeways Stores Plc v Burrell</u> [1997] IRLR 200 at [24]) namely:

68.1. was the employee dismissed? If so,

68.2. had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,

68.3. was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage II above?

69. At stage II it is irrelevant to consider the employees terms and conditions of employment. When considering stage III and assessing the question of causation, if the requirement for employees to do work of a particular kind remains the same, there can be no dismissal by reason of redundancy notwithstanding any unilateral variation to their contracts of employment.

70. The factors to be considered in determining whether dismissal for that reason was fair in accordance with section 98 (4), albeit not acting as a substitution for the words of the statutory language itself, were identified in <u>Williams v Compair Maxam Ltd</u> [1982] IRLR 83:

1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

71. Not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. However, there would have to be good reason to depart from one of them. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.

72. The requirements of selection, consultation and seeking alternative employment in a redundancy case, must be considered by the Employment Tribunal in each case, whether or not they are raised by the parties, and, the employer will be expected to lead evidence on each of these issues (see Langston v Cranfield University [1998] IRLR 172).

73. Selection: It is now well established 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. However, as the EAT made clear in the Williams, it is important that the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment.

74. The factors set out in Williams do not seek to address the process by which newly created roles are to be filled (see Morgan v Welsh Rugby Union [2011] IRLR 376 at [29] to [32]). The EAT observed:

    "Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role." [30]

75. In reaching that conclusion, the EAT in Morgan reviewed the authorities and concluded that the touchstone in such a situation was reasonableness, rather than the application of either agreed selection criteria for redundancy or the application of objective criteria, but the exercise must be carried out in good faith (referring to Ball v Balfour Kilpatrick Limited (EAT/823/95) and Darlington Memorial Hospital NHS Trust v Edwards and Vincent (EAT/678/95).

76. Consequently, whilst Williams type selection will involve consultation and a meeting, an appointment to a new role is likely to involve something much more like an interview process.

77. A tribunal considering the fairness of such a process must apply s.98(4). A tribunal is entitled to consider, as part of its deliberations, how far an interview

process was objective, but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair.

78. Consultation: Where unions are recognised, consultation will generally be with the trade unions (primarily in relation to need for redundancies and the selection criteria where redundancies must be made), although the obligation to consult in addition with individual employees will remain.

79. Consultation must be fair and genuine (see R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and ors [1994] IRLR 72, Div Ct) and 'involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely' (see Rowell v Hubbard Group Services Ltd [1995] IRLR 195, EAT). That requires that the employee should be provided with adequate information regarding their selection and the basis of selection (British Coal Corporation).

80. Consultation with individuals will generally arise once they have been at least provisionally selected, and should as a matter of good practice address:

80.1. the fact of the individual has been provisionally selected for redundancy;

80.2. an explanation for the basis of that selection;

80.3. an opportunity for the employee to comment upon that basis;

80.4. consideration of alternative employment.

81. The following factors are relevant to the determination of fairness in relation to consultation (see Mugford v Midland Bank [1997] IRLR 208):

> (1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
>
> (2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.
>
> (3) It will be a question of fact and degree for the tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

82. Search for alternative employment: In order to act fairly in a redundancy situation an employer is obliged to look for alternative work and satisfy himself that it is not available before dismissing for redundancy (with the same employer or elsewhere in a group of associated employers, if appropriate). The duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment (see Thomas and Betts Manufacturing Co v Harding [1980] IRLR 255, CA).

Some Other Substantial Reason ("SOSR")

83. Some business reorganisations do not give rise to a redundancy situation (see Johnson v Nottinghamshire Combined Police Authority [1974] IRLR 20). They may however amount to some other substantial reason for dismissal. The EAT in in Ellis v Brighton Co-operative Society [1976] IRLR 419 suggested that there must be a pressing business need in order for a dismissal of this nature to be justified.

84. In Hollister v National Farmers' Union [1979] ICR 542, CA, the Court of Appeal quoted Ellis where it was said 'Where there has been a properly consulted upon reorganisation which, if it is not done, is going to bring the whole business to a standstill, a failure to go along with the new arrangements may well—it is not bound to, but it may well—constitute 'some other substantial reason'. Lord Denning MR observed:

> "Certainly, I think, everyone would agree with that. But in the present case Arnold J expanded it a little so as not to limit it to where it came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation. I must say I see no reason to differ from Arnold J's view on that. It must depend on all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement."

(Emphasis added)

85. This reason is not one the tribunal considers sound, but one 'which management thinks on reasonable grounds is sound' — Scott and Co v Richardson EAT 0074/04.

86. It is not for the tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns. In fact, the employer need only show that there were 'clear advantages' in introducing a particular change, to pass the low hurdle of showing SOSR for dismissal. The employer does not need to show any particular 'quantum of improvement' achieved but must show that it has discernible advantages and a mere statement to that effect is insufficient — Kerry Foods Ltd v Lynch [2005] IRLR 680, EAT. I

Conclusions

87. Applying the law above to the facts as I have found them, I reached the following conclusions:

Was the Claimant's role redundant within definition in section 139 ERA 1996?

88. I remind myself that the burden of proving redundancy rests upon the respondent. The respondent argues that there was a redundancy situation because the need for the work of a director level interior design post had ceased or diminished or was likely to ceased or diminish. In that context the respondent argues that the Interior Designer role was significantly lower in status and salary and had fewer responsibilities than the claimant's because:

    88.1. the director level element of the role and been removed with the result that the interior Designer role did not have overall responsibility for the interiors function across the group, that function had been allocated to the Head of Estates;

    88.2. the responsibility for the annual budget had been removed and reallocated to the Estate Finance Manager;

    88.3. there was no longer any remit to deal directly with the CEO, Chief operating officers or managing directors and, finally,

    88.4. the responsibility for recruiting consultants either did not exist at all or had been reallocated to the Estate Finance Manager.

    88.5. In addition, the respondent points to the difference in salary and benefits, amounting to a reduction of approximately 10%.

89. In my view, focusing on the status and level of the Interior Designer role is to apply an incorrect test; the question to be asked in each case, as was identified in Safeways Stores Plc v Burrell, is whether the requirement for employees to carry out work of a particular kind had ceased or diminished. In that context, the correct question is not whether the functions identified by the respondent above had been removed from the claimant's role, but rather whether the requirement for work of the kind undertaken by the claimant had ceased or diminished and, if so, whether there was any reduction in the number of employees engaged to undertake the work.

90. The matters raised by the respondent (above) may be relevant to the question of whether the respondent acted fairly in dismissing the claimant rather than engaging her in the new interior design role. I address that issue later in the judgment.

91. I turn then to consider the functions of the claimant's role and to assess whether those functions, insofar as they connected to a particular kind of work remained within the respondent's business.

92. The primary function of the claimant's role was that of an interior designer. That is reflected in the first and second key accountabilities contained in the job description dated January 2013 ("to project lead refurbishments" and to "provide support to sites with site managed projects on matters of interior design, finishes and furnishing.") A component element of that function was the need to ensure that the FFE used in the interior design projects were compliant with the necessary care and safety standards (see the fourth key accountability in the job description of January 2013).

93. There is no dispute that that function remained following the restructure in July 2019. Mr Bradley accepted that if the functions of negotiating with contractors

for the provision of FFE, the need to develop standardised interior design packages of differing budgetary values, and the need to manage the contractors were removed from the claimant's role, the remaining function, which was a significant part of the claimant's role, of interior design remained. The requirement for work of that kind continued after 1 July and was then the responsibility of the Interior Designer (see the job description dated 9 June 2019 - first box and points 1 and 2 in box 2 in particular).

94. Whilst there is a dispute as to the extent to which the claimant was actively involved in establishing the annual budget, it is clear that the requirement for the General Furnishings annual budget to be set (following consultation with an employee skilled in interior designer) remained. The process of its discussion, negotiation and conclusion initially involved the claimant, Mr Dallison and Mr Bytheway; after 1 July 2019 the process continued but was then conducted by Mr Bradley in conjunction with the Interior Designer. The contribution of the Interior Designer to the discussion was their understanding of the costs per room, or per standard project, which would enable a budget for the coming year to be set by considering those item costs with the predicted projects for the future year.

95. Similarly, the requirement for the respondent to have an individual with whom the CEO, chief operating officers and senior managers could liaise and discuss matters of interior design remained. Initially that position was filled by the claimant, subsequently the function was carried out by the Interior Designer. There was no one else who could provide the necessary insight and experience in respect of the interior design work as no one else in the respondent's employment had the necessary interior design qualifications or experience, and the respondent did not suggest or identify anyone that it alleged could or did fulfil that function apart from Miss Royle.

96. Finally, the requirement for an individual to manage consultant interior designers did not cease or diminish until February 2020. Previously the claimant had allocated projects to them, liaised with them in relation to the work on the project and monitored that the project was being delivered in accordance with the designated timescales and budgetary constraints. Mr Bradley suggested that the need for contractors (and hence their management) had been removed altogether. That argument conflated the position at the time of the hearing (when the need for consultants no longer existed) with the position at the time of the business restructuring in June 2019 (and the need for consultants that the respondent foresaw at that time).

97. I reject Mr Bradley's evidence and argument on that point. Mrs Perrin's evidence, which was largely unchallenged by the respondent, was that Mrs Royle continued to engage and manage consultants, just as the claimant had done before, until 7 February 2020. That is consistent with the respondent's intention at the time of the business restructuring, which was reflected in its correspondence and discussions with the claimant during the consultation process. At the time of the consultation meetings, the respondent was clear that consultants would continue to be engaged, but the extent to which their work would be necessary would be reviewed on an ongoing basis. There was no suggestion that the work would cease or diminish in the near future.

98. The function of monitoring the consultant's budget remained and was largely the responsibility of the Interior designer (see the requirement in the 2019 job description to "advise on and manage any third party interior design support, including consultants and contractors" and to "support the estates and project teams and delivering to desired end states, on time and within budget.") That function was initially carried out by the claimant and was subsequently carried out by Miss Royle in conjunction with the Estate Finance Manager. For the purposes of the statutory test it is irrelevant whether the appointment and recruitment of consultants was carried out by the Estate Finance Manager or the Interior Designer, what is critical is that the need for that work, and an employee to undertake it, continued.

99. Looking at matters in that way, and applying the statutory test in section 139, in my judgement the requirement for an employee to carry out the work of the Interior Design Lead had not ceased or diminished, nor was it likely to cease or diminish. The respondent's focus on the contractual terms applicable to the positions of Interior Design Director and Interior Designer is misplaced in that context (see the analysis of the correct test, rejecting the contractual test in Safeway Stores).

100. In my judgement the claimant's role was not therefore redundant and the respondent has not proved that reason for dismissal.

101. Following the parties closing arguments, I raised with the respondent's counsel whether, if I were to conclude that the reason for dismissal was not redundancy, it would seek to rely upon some other substantial reason in the alternative. In that context I drew the authorities of Barot and Pillenger to Miss Duane's attention. I then discussed the principle from Abernathy that it may be permissible to relabel the reason for dismissal to SOSR on the basis that both parties accepted that there was a business restructuring consequent to a reduction in major project work and such a change would not alter significantly the evidence which would have been called. I invited each of the parties to make any additional submissions that they wished to address the circumstance where I might conclude that the reason for the dismissal was SOSR rather than redundancy.

102. For the respondent, Miss Duane argued that in those circumstances the dismissal was fair applying section 98(4) because the respondent had followed a reasonable process of consultation with the claimant and had opted to fill the new position by competitive interview, as the respondents redundancy policy permitted, and as Morgan entitled it to do. The claimant, she said, had been fairly evaluated during that process but reasonably assessed as scoring lower than other applicants.

103. Miss Tyler for her part argued that the roles were identical and she should have been slotted into the position of Interior Designer, and the consequent failure to do so rendered the dismissal unfair.

104. I am satisfied that the respondent has shown that it had a sound, good business reason for the reorganisation generally, in this sense of needing to reduce costs and streamline the Estate team's function. The reallocation some functions, to a limited extent, from the claimant's role was a part of that process. The reduction in salary and benefits was also connected to that streamlining

and cost saving process. The claimant did not seek to challenge the rationale or the need for the reorganisation.

Did the respondent act reasonably in all the circumstances in treating the [business reorganisation] as a sufficient reason to dismiss the Claimant?

105. This is a particularly finely balanced issue, and largely the reason why I felt unable to deliver an extempore judgment on the second day of the hearing.

106. The critical issue is whether the Interior Design role was a "new role" as identified in Morgan. In this context the parties' arguments as to the extent and nature of any changes to the role become relevant. If the changes are as significant as the respondent argues that may lead to the conclusion that the Interior Design role was a new role rather than a new title applied to the same role that had been filled by the claimant. If the functions (or the balance of those functions) remains, then in my judgement that may indicate that the role is not a new role and all that has occurred is a change in title and salary.

107. If the role were not a new role, it would follow that the claimant was required to participate in a competitive interview in relation to a role that was her own and in circumstances where her role was not redundant. That would weigh heavily against treating the business reorganisation as a sufficient reason for the claimant's dismissal; given that she indicated a willingness to accept the role even on lower pay and benefits (at the time of the appeal).

108. There is a significant dispute between the parties as to whether the Interior Designer post differed significantly from the claimant's. The respondent argues that the Interior Design role was a significantly junior role to the claimant's in three or four respects, and whilst the argument was initially positioned in relation to the question of suitable alternative employment, the arguments remain relevant here:

108.1. first, it did not have overall responsibility for the interiors function across the group, which it argued rested with the Head of Estates.

108.2. secondly, it had no budget responsibility, the budget for projects was set by the Head of Estates and managed by the Estates Finance Manager;

108.3. thirdly, it had no remit to deal directly the CEO and managing directors;

108.4. finally, it had limited responsibility for the management of consultant interior designers, given that their involvement was to be reduced, and responsibility for their recruitment and engagement was transferred to the Estates Finance Manager role.

108.5. it was not a director level role, given the salary reduction.

109. The claimant argues that the respondent is misrepresenting the functions of the role in the new job description. Thus, she argues:

109.1. first, that the role continued to lead interior design activity, which was apparent from the first box of the job description (see second sentence) and the fact that the Interior Design was line managed by the Head of

Estates was no different to her being line managed by Mr Dallison, the Group Estates and Development Director.

109.2. Secondly, she argues that she had no budget responsibility beyond ensuring that projects were delivered within the budgets agreed with the Group Estates Director (as indicated in point 7 of her job description). She contributed to discussions during which the GF budget was set but did not have autonomy to set it herself.

109.3. Thirdly, she denies that she had a direct line of communication to the CEO and managing directors, but argued that she would only speak to them in relation to projects as and when they required, and that level of communication was shared by Miss Royle, who would speak to the CEO and managing directors in relation to the projects for which she had primary responsibility.

109.4. Finally, insofar as the management of interior designers is concerned, she argues that that requirement continued until February 2020 and certainly at the time that the job description was drafted and the redundancy process was conducted the requirement remained. I have already preferred that account to that of the respondent on this issue

109.5. Finally, she argues that her role was never truly at a director level, and therefore there was no change in status. Put simply she says role as described was her own, albeit there was a reduction in salary to £50,000 to £55,000, with a reduced car allowance of £4200.

110. I address each of those arguments in turn:

110.1. Interior Design Leadership for the reasons given in paragraph 92 and 95 above, I am persuaded that the Interior Design role continued to lead on all matters where an input from interior design was required. The respondent did not identify precisely what element of leadership it says existed in the former role that did not exist in the latter.

110.2. Budget Responsibility. The respondent did not lead any evidence beyond producing the variation letter dated 20 July 2013 to establish that the claimant had the primary responsibility or any autonomy for the level of the GF budget. I have accepted Mr Dallison's evidence and that of the claimant there was no significant change to budgetary practice occasioned by that letter. The claimant's role was intended to contribute to the discussion about GF budget (paragraph 11 of Mr Dallison's statement), but did not have autonomy to set it, that decision was made by him and Mr Bytheway. Following the restructure, the responsibility for General Furnishing budget was reallocated to the Estate Finance Manager, but the Interior Designer would still be required to contribute to that discussion.

110.3. I accept that the claimant formerly had responsibility for managing the delivery of projects in conjunction with the budget which had been agreed with the directors, and that responsibility for that function was transferred to the Estates Finance Manager from 1 July 2019. However, there was no evidence before me as to the extent of the claimant's time that was taken up with that task, and had the function been removed from her during the course of her employment neither the claimant nor the

respondent would regard her as undertaking a different or necessarily a lesser role. In consequence, this change was not so significant as to render the Interior Design role a "new" role within the meaning of Morgan.

110.4. Direct communication with the CEO, Chief operating officers and senior management. I have already found that the claimant's ability to communicate with the senior management was limited to occasions where interior design input was required; the respondent led no evidence to suggest that the claimant had attended senior management meetings or reported directly to the board. Had that been the case, then Mr Atherton would no doubt have given evidence to that effect, given his position at Group Director level. The need for the Interior Designer to liaise with the senior management remained even after the claimant's departure; Mr Bradley accepts as much in his statement. As the claimant argued, there was no one else employed by the respondent who was qualified to express any view in relation to matters of interior design. Whilst the role reported to Mr Bradley as the Director of Estates and Facilities Management, he had no interior design qualification or any extensive experience in that field. I am satisfied therefore that any enquiries in relation to the interior design function would be directed to the Interior Design role holder, Miss Royle.

110.5. Management of consultant interior designers. For the reasons given in paragraph's 96 and 97 above, save for the slight reduction in the number of consultants, the responsibility for managing the consultants' work continued to be that of the Interior Designer, whilst responsibility for the recruitment of interior designers and the terms on which they were engaged was the responsibility of the Estates Finance Manager. However, the reality of the situation as is apparent from the respondent's evidence is that over the seven months from July 2019 until February 2020, the number of consultants was reduced. There was therefore no requirement to recruit and negotiate with consultants, and certainly the respondent has led no evidence on that point.

110.6. Was the claimant's role at director level? In relation to the last point, I have concluded that the claimant's role was at director level in name only. The reason for that conclusion is threefold:

110.6.1. First, there was no material change to the terms or conditions of the claimant's employment caused by the change in the job's title, in particular there was no change to the notice provision and the respondent did not adduce any evidence to demonstrate that other directors were only afforded statutory notice. Insofar as there was an increase in salary, I accept Mr Dallison's explanation that that increase had been agreed at interview and was to occur in any event upon the successful completion of the claimant's probationary period.

110.6.2. Secondly, I do not accept respondent's argument that the change in title and salary was contingent upon an increase in roles or responsibilities. I accept Mr Dallison's evidence that the functions described at the contractual variation letter of 20 July 2013 were functions that the claimant was already undertaking, and their identification in the letter was to satisfied the Strategic Director that there was a material basis for the increase in pay and to permit the

claimant extra 'traction' when liaising and negotiating with the senior members of the respondent's management and external contractors.

110.7. Thirdly, I have rejected the argument that the claimant's role had the remit to liaise with the CEO, chief operating officers and managing directors that the respondent suggest. Thus, although the new role was not at director level, that did not affect a material change to the role that the claimant had been undertaking.

111. On the basis of those specific factual findings, I reject respondent's argument that the Interior Designer role was a new role. Had the respondent conducted reasonable enquiries in relation to the actual functions and nature of the claimant's role, in my view on the balance of probabilities it would have reached the same conclusion. However, the decision that the role was a new role was made almost entirely on the basis of the "roles and responsibilities" document that the claimant had drafted; there was no analysis of the project work times and values before the respondent determined that the claimant's role was not 'on the ground' or operational, but mainly managerial. Certainly, I heard no evidence from the respondent that there was any discussion with the claimant or with the consultants as to how her role had operated in practice. The failure to obtain the claimant's job description and to explore with her what she did was fundamental in the circumstances.

112. There was not a redundancy situation on my findings and therefore clause 7.1 of the respondent's redundancy policy did not apply. As the role that resulted from the restructure was, on the evidence presented to me, almost the entirety of the claimant's role it was, in my judgment, outside the band of reasonable responses open to a reasonable employer to seek to fill the role through open competition without offering the claimant the opportunity of slotting into the role before seeking candidates from the open market.

113. The claimant maintained throughout the consultation process that the role was her own. While she did not state at the time of the initial consultation meeting that she would accept it, by the time of the appeal the claimant's argument that she should have been slotted into the role had crystalised, and during the appeal hearing she stated that it was suitable alternative employment for her.

114. The respondent failed to engage with that argument; it did not revisit the basis for its decision or consider the data which it possessed relating to the project work which may have shifted it perspective. The repeated suggestion that the claimant might not wish to apply for the role and the respondent's reference to its concern that the claimant might use the role as a stopgap, give some limited support to the claimant's fear that Mr Bradley and Mr Bytheway had a view of who they wanted in the role, and the claimant did not fit with that. It is reasonable for an employer to fear that a senior redundant employee might accept a lesser role only as a stopgap, but here the claimant argued that she was the sole breadwinner, had a significant mortgage and worked in a niche market making employment opportunities very limited.

115. The failings of the initial consultation were largely repeated at the appeal. Mr Atherton did at least have the benefit of the claimant's job description and the variation contract document, but he did not explore with the claimant the

nature of the work that she undertook, or consider the available data to verify whether the perception of the claimant's role as a arm's length managerial one, as opposed to a hands on operational one was correct, and on his conclusion that the role was not a suitable alternative was therefore unsafe and unsound.

116. In conclusion, the respondent did not act reasonably in the circumstances as treating the business reorganisation as a sufficient reason to the dismiss the claimant and her dismissal was outside the band of reasonable responses.

117. The claimant's claim of unfair dismissal is therefore well-founded and succeeds.

118. In the circumstances, the issue of Polkey falls away as a fair process would not have led to the claimant's dismissal.

119. If I am wrong in my conclusions that the claimant's role was not redundant, I would have found that the respondent acted within the band of reasonable responses in dismissing the claimant - the claimant was in a pool of 1, the consultation was reasonable within that context and the decision to conduct an a competitive and open selection process was within the band of reasonable responses where there was a genuine redundancy. The criteria used to score that interview were objective, relevant to the role and reasonable and the reason for the claimant's poor scores was her failure to provide evidence based examples of the matters identified as being relevant to those criteria. In the event, her argument that Mr Bradley was partial or biased are misplaced. He scored her more highly than Mr Bytheway.

Employment Judge Midgley

Date: 5 July 2020