EMPLOYMENT TRIBUNALS

Claimant: Susan Coulson

Respondent: RentPlus UK Ltd

Heard at: **Exeter** **On:** **17-19 August 2020**

Before: **Employment Judge Housego**
Mr I Ley
Mr J Howard

Representation

Claimant: In person
Respondent: Mr S Morris, solicitor

JUDGMENT

1. The Tribunal unanimously decided that the Claimant was unfairly dismissed by the Respondent.

2. The Tribunal unanimously decided that the award is to be uplifted by 25%.

3. The Tribunal finds (Mr Howard dissenting) that the dismissal was sex discrimination.

4. The case will be listed for a remedy hearing.

REASONS

Basis of claim

1. Ms Coulson was dismissed by the Respondent ("Rentplus"). They say that this was a fair redundancy dismissal. Ms Coulson says that it was a sham designed to remove her and was both unfair and direct sex discrimination.

Law

2. For sex discrimination, gender is a protected characteristic[1]. Ms Coulson asserts that her dismissal was direct sex discrimination[2].

3. In respect of a claim for unfair dismissal, the Respondent has to show that the dismissal was for a potentially fair reason[3]. The Respondent says this was redundancy which is one of the categories that can be fair[4]. Redundancy is defined in S139 of the Employment Rights Act 1996[5]. Rentplus has to show that the dismissal was fair[6]. This means that it must show that it had genuine redundancy situation. It must follow a fair procedure throughout[7]. There must be adequate consultation about the existence of a redundancy situation, the pool for selection, the criteria for selection and the implementation of those criteria to the individual. There should be consideration of possible alternatives to compulsory redundancy and of possible suitable alternative employment. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

4. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[8]. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[9].

5. As it is asserted that the dismissal was by reason of unlawful discrimination, for it to succeed the Tribunal must be satisfied that in no sense whatsoever[10] was the dismissal tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination[11], and if she does so then it is for the employer to show that it was not. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice that women are not, in the vernacular *"one of the boys"*. Ms Coulson asserts that the Respondents have a macho male orientated culture, and also that the new CEO and the board managed her out, undervaluing her contribution and ability by reason of

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[1] S11 Equality Act 2010

[2] 13Direct discrimination
(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

[3] S98(2) of the Employment Rights Act 1996
[4] Also S98(2) of the Employment Rights Act 1996
[5] S139 Employment Rights Act 1996 : Redundancy.
(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.
[6] S98(4) of the Employment Rights Act 1996
[7] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[8] Section 98(4) of the Employment Rights Act 1996
[9] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[10] Igen Ltd & Ors v Wong [2005] EWCA Civ 142, para 14 applying Barton v Investec Securities Ltd. [2003] ICR 1205 para 25.
[11] Igen v Wong (above), Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

her gender, in a way they would not if she been male.

Evidence

6. The Tribunal heard oral evidence from the Claimant and from Steven Collins (CEO) and from David Marshall (executive chairman).

   6.1. There was a bundle of documents of 311 pages (R1).

   6.2. At the start of the hearing the Respondent asked to add a 3 page additional document headed *"Structure"* which it was said had been delivered to the Board in October 2017 (R2). The Claimant did not object to it being added. It included screen shots of Mr Collins' computer showing a date last modified of 06 October 2017.

   6.3. During the hearing the Respondent also provided a summary from the recruitment agents of the dates when candidates for the new posts were interviewed (R3).

   6.4. In his oral evidence Mr Collins said that he had come across another document in the last week or so, minutes of the third consultation meeting on 25 May 2018. No application was made by the Respondent to admit it as evidence, but the Claimant requested it and it was produced as R4.

Submissions

7. Both Mr Morris and Ms Coulson made submissions of which I made a full note in my typed record of proceedings. Each drew attention to matters for and against the claims.

Findings of Fact

8. For the reasons which follow, in its findings of fact the Tribunal found the evidence of Ms Coulson reliable, but not that of the Respondent.

9. Rentplus is a privately funded commercial company, rather than a not for profit organisation. Its business model is to buy properties from developers (usually social housing built by them pursuant to S106 planning agreements), and to let them on 20 year terms to housing associations, who sublet them to tenants put forward by local authorities. The housing association takes 25% of the rent as a management fee, and the balance goes to Rentplus. After a period of up to 20 years the tenant has the opportunity to buy the property, and 10% of the market price is discounted by Rentplus. Thus the developer sells, the housing association has access to properties it does not have to fund, and the local authority houses people on its waiting list, and Rentplus makes a profit from the 75% of the rent it retains (and on the ultimate sale of the freehold to the tenant). Accordingly the building and maintaining of the tripartite relationship, and connection with developers, is the mainspring of the business model.

10. Ms Coulson joined in 2015, soon after Rentplus was founded. She had 20 years eclectic experience in the field of social housing, at a high level. She was paid £95,000 a year, with a car allowance of £5,000 a year. Richard

Connolly was the CEO. In April 2017 there were 9 employees (C w/s para 9), 2 of whom were part time, and 6 consultants, a social media person ½ day a week, and two of the directors were not employed but spent some time with the business, as did an employee of one of the directors (Mr Collins' w/s para 7). Rentplus was based in Plymouth.

11. Ms Coulson's job description (31-32) set out that she was responsible for managing the consultants retained by the firm, which included PR & Comms, and IT. She was to lead development of consortia arrangements with the others upon whom the business model depended. She was to work with the CEO on developing effective IT systems for the smooth running of the business. She was described as a member of the leadership team, to contribute actively to the strategic development of the business and its decision making and policy formulation.

12. For the reasons which follow it was apparent to the Tribunal that she was frozen out of that role from October 2017 onwards.

13. Steven Collins was appointed as a consultant in April 2017, to secure strategic new business (C w/s para 10).

14. The business was not prospering and towards the end of 2017 creditors were pressing.

15. Also towards the end of 2017 Richard Connolly decided that for personal reasons he could no longer continue in his role as CEO. He had introduced Steven Collins to Rentplus. Steven Collins was acting as a consultant to Rentplus. Towards the end of 2017 work for Rentplus comprised most of his commercial activity. Richard Connolly effected the introduction of Steven Collins to members of the Board, with the intention that he might succeed him as CEO.

16. The Board decided that Steven Collins would replace Richard Connolly. There was no advertisement of the vacancy, and although it was known to staff that Richard Connolly wished to step down, the appointment of Steven Collins as a full time employed CEO was a surprise to all staff when this was announced in October 2017. Richard Connolly retained his title of CEO until 31 March 2018. Ms Coulson considered that Richard Connolly remained lead CEO until the end of 2017. Steven Collins regarded himself as firmly in charge from the start of his appointment. Both accounts are true. There was no announcement or explanation given to staff. From October 2017 Richard Connolly was engaged in an ultimately unsuccessful project with the West of England Combined Authority, as he had a connection with one of its members, who was on Exeter Council. The overlap period ended on 01 April 2018, when Richard Connolly became a consultant. Ms Coulson had previously dealt with a combined authority in the West Midlands.

17. Rentplus was not making the progress it had hoped for, and there was financial pressure with creditors pressing. No new investment was forthcoming from existing shareholders.

18. From October 2017 there was effort to refinance the company. In February 2018 there was an injection of £11m equity from a new investor, a company

led by Peter George, and the share ownership altered. David Marshall and Richard Connolly retained shareholdings. The composition of the board changed as a result of this. Richard Connolly had not been a Board member. Two other shareholders' holdings were diluted and they left the Board. The non exec Chair left, and the new chair was Peter George. The other members of the Board were David Marshall, Steven Collins, Richard Pillar (another early investor) and a new non-executive director, the Plymouth MP Sir Gary Streeter.

19. After Steven Collins was appointed CEO there was a reorganisation to utilise the £11m for growth. A key government policy, the National Planning Policy Framework had been revised in February – April 2017. Ms Coulson had led the response of Rentplus to this and authored its submission (to which others, internal and external, contributed and it was signed off by the Board). She also lobbied MPs in person and in writing. These submissions were at least partly successful and this was accepted as a thoroughly efficient high level piece of important work. The injection of funds was in part because Rentplus considered that the new NPPF offered opportunity to it, and that would be achieved by using new funds to obtain new business through developers, who would be keen to sell their social housing, and through that route approach housing associations and local authorities to take on this housing. The previous approach had been to start with the housing associations and local authorities.

20. Ms Coulson says that the injection of funds was to lead to growth, and to the taking on of many staff, but it was described as a redundancy exercise, and cost cutting, and she was the only person dismissed, purportedly on the grounds of redundancy. Her claim is that this was a sham, designed to remove her, that this was unfair. She says that her work remained and was carved up between others (newly recruited) while she was being *"consulted",* and that as the only female in the entire senior management team, this was tainted by sex discrimination. She further points out that she was well equipped to apply for the role of CEO (and highlights the fact that she is now CEO of a larger organisation in this field) but was denied the opportunity to do so, as the appointment was made by the Board without anyone outside it knowing it was under consideration.

21. The Board say that the restructure was genuine, and the post disappeared as there were two regionally based appointments at lower pay, that there was no post of a similar level in the new structure, that they tried to interest Ms Coulson in those posts, but that she was not interested, either in moving to the new head office in Milton Keynes, or in taking a pay cut of £35,000 a year for a lesser and different role.

22. Ms Coulson is a highly professional individual with over 20 years high level experience in social housing. She was brought into Rentplus by reason of connection with Richard Connolly, its then CEO, who recommended her to the Board. There was no advertisement or competition for her post. She was well remunerated. It was a small organisation with some 5 employees and a similar number of consultants. Richard Connolly reposed trust and confidence in her – he secured her appointment - such that she was in effect deputy CEO. Mr Collins did not continue that closeness (for the reasons that follow), and the Tribunal accepts Ms Coulson's evidence that he marginalised her, in

effect from the start of his time as CEO, though it took a while for her to appreciate that this was occuring. Ms Coulson accepts that Mr Collins appointment was conducted in a similar way to her own: being put forward by Richard Connolly for Board approval without competition.

23. The Respondent's case was built on the assertion that after Steven Collins became CEO in October 2017 he was tasked with restructuring the company once it had been refinanced, and that he did so with consultations in April and May 2018.

24. This case was totally undermined by David Marshall's oral evidence in which he stated that the Board had decided to remove the Claimant's post in March 2017, a full year before there was any consultation with her about it. Mr Marshall accepted that this was never a cost cutting exercise save for some incidental hotel and travel costs. When preparing proposals for potential investors, as far back as March 2017, he had staffing costs mapped out, and those had not included the £100,000 a year for Ms Coulson. He accepted that this was a full year before Ms Coulson was *"consulted"* about potential redundancy. No-one in the staff was told of this, although the CEO, Richard Connolly, knew.

25. This information was, at the hearing, a revelation to Ms Coulson, who had no inkling that the Board had decided in March 2017 that her post was to be removed. It contradicts much of the Respondent's pleaded case. There is no reason to doubt what Mr Marshall said in his evidence, which came about as the Tribunal asked Mr Marshall to expand (notes 66) on the fundraising: he was absolutely clear that the decision to remove Ms Coulson's post was a year back, in March 2017.

26. Mr Collins was the author of the restructure, but it is apparent that his pre appointment discussions with the Board set out the parameters of what he was to do, and that included the removal of Ms Coulson's post. That was Mr Marshall's evidence. This accounts for her marginalisation from the start of his tenure as CEO.

27. Mr Collins gave no hint to Ms Coulson that this was in prospect, as emails from her to him of 15 and 20 February 2018 (47-48) make clear: Ms Coulson records that they met on 19 February 2018 to discuss Mr Collins' vision for the future. She wrote *"Thank you for your time yesterday and for explaining your future vision for Rentplus. Very exciting! I'm looking forward to being part of, and contributing to, the future growth and direction of Rentplus."* Plainly Mr Collins did not tell her that she was not part of that future.

28. The Tribunal noted an organogram put to the Board by Richard Connolly in October 2017 (36-7), prepared on 03 July 2017. Perhaps he was seeking to retain his protegé, but Steven Collins had no such relationship with Ms Coulson.

29. On 08 January 2018 Ms Coulson emailed Steven Collins (40) asking if he could look at the cv of someone who could become the PR & Comms officer to replace the external provider which was costing £7,500 a month, but which had ceased to provide any assistance from the end of 2017. Mr Collins was trying to negotiate a reduction from the 3 months contractual notice period,

unsuccessfully, but had stopped them working while he did so. (Ultimately they agreed to do work to that value later, having been paid 3 months while doing no work.) On 22 January 2018 she followed up, he not having replied. On 23 January 2018 (42) Mr Collins said that *"appointments are on hold at present".* He had not seen fit to discuss this with her before.

30. On 13 March 2018 the Respondent appointed Peninsular to advise it about preparation of policies and in connection with the restructure (SC w/s 10). A handbook was issued in June 2018 (it was not made clear how) and installed on the company hr system on 27 September 2018.

31. PR & Comms was expressly within Ms Coulson's remit, but as the consultation with her was going on, Mr Collins was recruiting a new PR & Comms person, and he personally interviewed someone (R3) for that role on 27 April 2018, soon after meeting Ms Coulson to tell her she was at risk of redundancy. Ms Coulson is entirely correct in her analysis that while her consultation was ongoing, and even before it started, her responsibilities were being removed from her.

32. Ms Coulson was concerned about being marginalised at the time she knew her post was to be removed. On 17 April 2018 she emailed Steven Collins (80) about 6 points where she was getting nowhere with progressing matters. One was PR & Comms. She pointed out that the agency had billed them £35k since last doing any work for Rentplus. The email is delicately phrased, but its meaning is unmistakeable.

33. The first meeting was on 16 April 2018. Ms Coulson asked if she should prepare for the meeting. She was told not. At the end of it she was handed a prepared letter (77). It said

> *"I informed you that the company anticipates having to make redundancies in the near future. Redundancies are being considered because …The company has identified the need to implement some major organisational changes, driving operational delivery and efficiencies ... I regret to inform you that these changes may entail cost cutting measures that could involve reductions in staff."*

34. The plural is used throughout, and the phrase *"cost cutting measures"*. More staff were being recruited, more than doubling the number of staff and Ms Coulson was being replaced by people who were costing more than her salary. This was not an accurate portrayal of what was occurring. It states that there would be two weeks' consultation (so ending on 30 April 2018). It states:

> *"As discussed today, I will arranged (sic) a further consultation meeting with you during the consultation period to review the situation."*

35. Mr Collins did not arrange a meeting. The Respondent sought to criticise Ms Coulson for not being proactive in fixing up a meeting. This is completely misplaced. It was the Respondent running a process, and Mr Collins had said he would arrange a meeting, and he failed to do so.

36. Mr Collins' evidence is that he was keen to retain Ms Coulson. This does not accord with the ascertainable facts. He knew before his appointment in

October 2017 that Ms Coulson's post was to go. In February 2018 he led her to believe that she had a future at a senior level in the company. He misdescribed the 16 April 2018 meeting as cost cutting and redundancies. He said a role was available to her at £35k a year less, but had not drawn up a job description for it. He promised a further meeting within 2 weeks but did not arrange one. It was, as Mr Coulson says, a sham.

37. There is in the bundle an attendance note of that meeting prepared by Mr Collins (76). It was not given to Ms Coulson while she was employed. It was not given to her in connection with her grievance hearing, or in the appeal against that outcome, nor was it given to her in connection with her appeal against dismissal. It was not given to her as part of the response to her Subject Access Request. It is referred to as a document given to the people holding the grievance meetings (160, 261). Ms Coulson thinks this was a document created later. Mr Collins could not account for how it was that he did not find this document with the SAR was answered on 10 September 2018 (notes 16). He says that he has a folder in his computer to keep documents about individuals, and so it should have been in there. The Tribunal agrees with Ms Coulson that, on the balance of probabilities it is not a contemporaneous document. It must have been in existence on 19 July 2018 and on 20 August 2018, because the grievance and appeal reports refers to it being available on those dates (115 and 155). That also requires an assumption that the document supplied to the consultants was the same as that put in the bundle, as the reports did not include the documents relied upon. As it was in existence then, it should have been included in the SAR response. More than that is not possible to deduce. Whatever the truth it is not indicative of openness on the part of the Respondent.

38. On 25 April 2018 Mr Collins sent an email to all staff (79) as an update on the Board meeting, saying that consultation would be extended by two weeks, and that job descriptions would be available from 30 April 2018. Given that the only person put at risk of dismissal was Ms Coulson, again Ms Coulson is right that one would expect more than a group email, especially as Ms Coulson was about to go on holiday, a fact of which Mr Collins was unaware. That is not indicative of him paying any close attention to Ms Coulson's situation.

39. On 28 April 2018 Ms Coulson (accurately as the Tribunal finds) set out in a letter to Mr Collins (81-82) why she thought that this was not a genuine redundancy. She pointed out that he had not been in touch with her personally at all, although she was the only person not being given a new job title, *"slotted in"* to a new role or promoted (eg Anthony Eke). She pointed out that Mr Collins had spent 24 and 25 April 2018 interviewing for roles in the new structure. Some of these roles were ones that would report to her if she were in post, but she was not told of the recruitment. The Tribunal rejects as incredible Mr Collins evidence that he was only *"testing the market".* You don't interview people to do that, and there were appointments made of some of those people within the same month.

40. Ms Coulson was on holiday and not until 08 May 2018 did she see a subsequent email of Mr Collins of 30 April 2018, which stated that job descriptions were now available. She emailed (86) noting that Mr Collins had put a meeting in her diary for 10 May 2018, but had given no time. It also

conflicted with the meeting long in her diary, in Surrey on the same date. This is a further indication of Mr Collins lack of care for the process with Ms Coulson. He had not realised that she was on holiday from 28 April 2018, though it was in the staff diary open to him, he fixed a meeting date but not a time and did not check whether Ms Coulson was doing anything else that day (or if he did took no action about the other meeting).

41. There is a note of the meeting of 10 May 2018 (89-90), prepared by Mr Collins but not provided to Ms Coulson at the time. It was given to those investigating the grievance and dealing with the appeal, but they did not give her the notes either. The Tribunal prefers Ms Coulson's view of the meeting (110C) which was that Mr Collins said that she had ruled herself out of the regional manager role in Plymouth: but Ms Coulson said that she had not, saying that she could not consider it until she saw the job description. That was an entirely reasonable thing to say. Ms Coulson's view was that Mr Collins was not supporting her for this role. The Tribunal considers this an accurate assessment, given the way that Mr Collins had conducted the process thus far.

42. On 13 May 2018 Mr Collins sent a general email (92) saying that the consultation would end at the end of 14 May 2018. 15 May 2018 Ms Coulson emailed Mr Collins (91) to say that she felt that Mr Collins was unsupportive of her as a regional manager and so it was not an option.

43. A further meeting took place on 25 May 2018. Mr Collins did not have with him the relevant paperwork (94b). He said it was part of the consultation process, although that had ended on 14 May 2018.

44. On 25 June 2018 Ms Coulson emailed Peter George, Chairman of the Board (102), with a grievance dated 12 June 2018 (94 on). She set out that the assessment that her role was redundant was not an accurate assessment of what was proposed. She complained that since Christmas (which was when she thought Mr Collins had taken over as sole CEO) he had marginalised her.

45. In late June 2018 Ms Coulson attended an opening ceremony for a new development. She did so only because Mr Collins found it convenient for her to do so, as he was doing something else. It was in Dorset, and Mr Collins lives in Bedfordshire.

46. Peter George delegated the handling of the grievance to David Marshall. This was organised by Mr Collins, who prepared an email for Mr George to send (100).

47. On 28 June 2018 Mr Collins asked managers for reports for the Board (106).

48. On 06 July 2018 Ms Coulson emailed Mr Collins (108) asking if they were still working with the PR agency, as she thought their contract had been terminated. She asked what the current arrangements were. Mr Collins told her to liaise with Stevie Pattinson-Dick who was the new PR person, and asked Ms Coulson to call her. There had been an email on 25 June 2018 (104) giving her name as one of 10 new staff. There were only 9 staff before the refinancing so this was to more than double the headcount, and in addition a new office had been opened in Milton Keynes, on 02 July 2018.

49. On 11 July 2018 Ms Coulson responded to Mr Collins by email (106) that she was being excluded from all activity, particularly the LGA annual conference, the CIH conference, and meetings with local authorities and housing associations. This was so. She asked what report he expected. He did not reply. It would be expected that someone in Ms Coulson's position would go to these conferences. They would be really important to her role. It was significant that she was not able to go to them.

50. Mr Marshall said that there were policies in place before the consultation, and that the CEO's assistant was in error when she said there was not. Whatever the case, there was no policy being followed, for if there was one, no one knew of it.

51. On 19 July 2018 Jaqueline Davis of HRFace2Face met Ms Coulson to discuss her grievance. Her report is dated 01 August 2018. She listed the papers she considered, which included *"Business Case"* and a *"Restructure Draft (March 2018)"* and minutes of meetings of 16 April and 10 May 2018. It also referred to an Employee Handbook, although there was none. This was presumably the draft handbook produced in July, and adopted in September 2018. Ms Coulson had never seen it, and did not know of it. It was, at the time, only a draft. Yet Ms Davis considered it relevant. None of these documents were provided to Ms Coulson, who did not know they were with Ms Davis until she read the report, sent to her on 01 August 2018 by David Marshall. She has now seen only the documents in the bundle prepared for this hearing.

52. David Marshall wrote to Ms Coulson on 01 August 2018 dismissing her grievance. He adopted a report from *"an independent and impartial consultant".* This was HRFace2Face. The front page of the report (115) gives that name and shows that it is part of Peninsular.

53. As Peninsular had advised Rentplus on how to implement the restructure it was unsurprising that the result of their report was not to uphold the grievance. The Tribunal did not find convincing the explanation that there was a Chinese wall between the two parts of Peninsular. This situation falls squarely within the case law about conflicts of interest.[12] This cannot be considered an impartial report.

54. Nor was if fair: it set out a list of documents considered. These included a business case, a draft restructure document of March 2018, notes of meetings of 16 April 2018 and 10 May 2018, none of which Ms Coulson was sent, and which she had not seen before they found their way into the bundle of documents for this hearing. The employee handbook was also considered relevant, even though, according to Mr Marshall it was not even a draft until late June 2018, and was not issued until September 2018.

55. The report correctly states that Ms Coulson expressly was not then claiming this was sex discrimination. That was in the grievance appeal, on 20 August

[12] Summarised in Ansar v Lloyds TSB Bank Plc [2006] EWCA 1462, and set out in Porter v Magill UKHL 67 and Lawal v. Northern Spirit Ltd [2003] UKHL 35

2018 (161). It is not uncommon for people to find it hard to appreciate that they may have been subjected to unlawful discrimination, and the Tribunal does not consider this forms some sort of estoppel, or reflect on the credibility of the evidence of Ms Coulson.

56. The report states that *"having taken into account all of the evidence"* the various heads of grievance were not upheld. The report states that Ms Coulson confirmed that she did not take any steps to arrange a meeting with Mr Collins as if that is blameworthy. It was not. Several parts of the grievance are dismissed with no reason other than the mantra above (eg paras 74 and 152), and there is no reasoning for arriving at that conclusion.

57. The report sets out that Mr Collins relied on legal advice (eg at 54) but that was presumably from Peninsular itself. At 104 is the statement that Mr Collins had not recruited into any role that was deemed suitable alternative employment. None of the possibilities were *"suitable alternative employment*" as that phrase is defined[13].

58. On 02 August 2018 notice was given by Mr Collins to end Ms Coulson's employment (137). It stated that Ms Coulson was entitled to six months' notice, but gave her only five, expiring on 02 January 2019. That was later corrected when Ms Coulson pointed it out.

59. On 08 August 2018 Ms Coulson appealed her grievance outcome (139a), by email to David Marshall. She asked for the documents referred to in the report. They were not sent to her. This is culpable and was unfair. She clearly stated on page 4 of that appeal (143) that the business case had never been shared with her. It was not given to her before the bundle for this hearing. Ms Coulson had now reassessed the position and at point 17, page 6 (145) stated that she now felt that she was a clear victim of sex discrimination.

60. David Marshall responded on 22 August 2018 (153-154). This is confusing as to dates and purpose. Another person from HRFace2Face heard the appeal on 20 August 2018, and the report is dated 24 August 2018. This did accept at paragraph 21(f) that Mr Collins should have communicated with Ms Coulson better (165). However it recommended that the appeal be dismissed (167).

61. In the notes of the meeting of 20 August 2018, Ms Coulson made reference to *"David"* (169). Ms Dennis, who was taking the meeting, replied *"Who's David?".* Ms Coulson said *"David Marshall, the director, who's supposedly overseeing this process."* Ms Dennis then said *"I'm dealing with Steve Collins, who's the chief executive."* Ms Coulson: *"Well, I have no idea why you should be because my grievances against him, and for him to be hearing my grievances totally ridiculous."* Ms Dennis then said *"He's not hearing your grievance but he's inevitably involved in this because I need to speak to him, I should imagine, afterwards, won't I?"*

62. The Tribunal finds that in practice Mr Collins dealt with all aspects of the grievance and appeal. That Ms Dennis, taking the appeal hearing, did not know who David Marshall was, and was dealing with Steven Collins makes

[13] S141 Employment Rights Act 1996

that clear. That was not fair, and nor was the repeated failure to provide the documents relied on by the decision makers. In the grievance Ms Coulson did not know they were being considered, which was bad enough, but in the appeal she positively asked for them, and they were still not provided. This was a point Ms Coulson made in the meeting (page 173). She pointed out that a number of documents had been withheld from her. Asked what, she gave the example of the business case for the restructure. The response is, in the Tribunal's view, indicative of the whole secrecy of the Respondent. After going back and forth a little, instead of saying

"Here it is, you really should have seen it." , Ms Dennis said:

"You wouldn't (see it). Faisal is a lawyer. That's a privileged document."

Ms Coulson then asked about the restructure consultation, and minutes of the meetings of 16 April and 10 May 2018, or emails about her from Peninsular. Ms Dennis said:

"It is legally privileged, I promise you."

Plainly the minutes of the meetings between her and Mr Collins were not legally privileged. So much for impartiality and fairness. Ms Dennis was provided with them, and was going to use it in deciding the grievance, but refused to let Ms Coulson see them. It is doubtful if anything between Mr Collins and Peninsular is privileged, as they are not solicitors, and this was not litigation related in any event. I observed as much in the hearing, but as it was not a point that had arisen before it was taken no further. What is beyond doubt is that the intentional withholding of documents from Ms Coulson in the grievance and appeal processes was unfair.

63. When meeting Ms Dennis who was taking the grievance hearing (218) Mr Collins told her that they *"had 5 full time staff, two or three part-time staff and then there were a couple of consultants, so it was about 10 in all."* The Tribunal returns to this later.

64. Mr Collins also accepted that Ms Coulson was marginalised (228), but he said that

"she's got herself into a cycle where actually she's marginalised herself."

The Tribunal finds this not to be the case, preferring the oral evidence of Ms Coulson, and the documentary support of the email of 17 April 2018. This is further supported by the recruitment of the PR & Comms person, interviews for which started soon after Ms Coulson first knew her post was to be removed, on 16 April 2017. As interviews were on 27 April 2018 the process must have been started some time before that date. This was a role which reported to her, or should have done. The same for IT. A new systems IT person was recruited, but Ms Coulson was not involved. The explanation, that this was a technical bespoke role not standard housekeeping IT, is not any satisfactory explanation. Ms Coulson is not an IT expert, but was perfectly capable of dealing with supervising the development of a bespoke IT system. Mr Collins has no more expertise in this area than Ms Coulson.

65. Mr Marshall made the decisions, and signed all three letters, dismissing the grievance on 01 August 2018 (114), dismissing the appeal against that outcome on 12 September 2018 (249), and appeal against dismissal 12 September 2018 (247) and 05 October 2018 (302a). The report on which the dismissal appeal was based was by Graham Hall. He said that he was impartial, but accepted that he not independent as he worked for Peninsular and they were retained by Rentplus (270). Ms Coulson pointed out to him that she had never been shown a business case, and that the only letter she had, of 16 April 2018, said only that it was cost cutting and staff reductions. Then he did not arrange the follow up meeting as promised, and his update just before the two week consultation period ended (during which she had not been consulted) was only that the Board had discussed restructure with no information (278). She pointed out that it was a fait accompli (283). The situation was clearly explained to Mr Hall. Again he did not provide the documents listed at 261. Mr Hall did not deal with any of these points. At para 29 of his report (264) he found that the consultation was meaningful. The redundancy was to save cost. Members of staff living more centrally in the country will *"save on time cost."* This was at best tangential for Mr Marshall.

66. Mr Hall found that the business rationale was sound. There was a genuine business restructure with more lower level posts in Milton Keynes and no post at Ms Coulson's level of seniority. This is the basis of the Respondent's case.

67. Despite what was said to be huge effort in dealing with the subject access request the bundle is noteworthy for the very limited communication from Mr Collins to Ms Coulson. This was not a new point to the Respondent, which could have provided documentation had there been any. The absence of such communication indicates the marginalisation of Ms Coulson.

68. Ms Coulson was the only person not to be invited to see the new office in Milton Keynes.

69. The Respondent's case, put to her in cross examination, is that Ms Coulson never put forward her case for a developmental senior role. She is clear that she did, at the meeting on 10 May 2018, and Mr Collins' witness statement says as much at paragraph 41. Whether the Board considered this or not is immaterial as from March 2017 Mr Marshall had decided that she would go. The Board changed greatly over that year, with the non executive chairman leaving, with the two investors whose stakes had been diluted. Only Mr Marshall and Mr Pillar remained of that Board. But as Mr Collins had interviews with the Board in October 2017 the departure of Ms Coulson was set as a policy objective by then, and Mr Marshall's oral evidence was that Mr Collins knew this.

Conclusions

70. This was an unfair dismissal. The reason was not redundancy. It was a desire to remove Ms Coulson from her role, and that was the basis upon which Mr Collins took the role of CEO. The company had enough money for several years. It was to expand rapidly. It opened a new office in Milton Keynes. It wanted to more than quadruple its housing stock in a short time. Its staff was to be greatly increased with four or five new appointments at £50-65k a year as well as more junior staff. If this were labelled some other substantial

reason it would still have been unfair.

71. The Respondent might have said (but did not) that its need for a person on £100k a year in Plymouth had ceased or reduced, as the headquarters was now in Milton Keynes. However most of the work of the Respondent was in the south and west of England, and the Claimant's role was national. It would not justify dismissal that there might be a bit less travel if she were based in Milton Keynes, and that was not the Respondent's case.

72. The Respondent denied that Ms Coulson had ever suggested that she should have a national role of oversight of regional managers, but then Mr Marshall said that the Board had discussed this, and Mr Collins' witness statement at paragraph 41 expressly says that she did (in oral evidence clarified as on 10 May 2018).

73. The pleaded case (para 17 of the ET3 grounds of resistance) is that

> *"the Claimant was aware of the restructure at an early stage of its development".*

This is simply not true. She knew in February 2018 that there was to be a restructure (and given £11m of new capital and a new CEO that was hardly surprising) but she had absolutely no inkling of what was in mind for her until the bombshell meeting of 16 April 2018. The decision that she was to go had been made a year before, and was the basis on which Mr Collins took the job.

74. There was, for this reason, nothing that Ms Coulson could have said that would have made any difference. She had been frozen out since Mr Collins' arrival. Her job was indeed carved up between others even before 16 April 2018. She was responsible for IT and for PR & Comms, but senior appointments for both were made without her knowledge. Mr Collins accepted that she was marginalised, but said she had marginalised herself. The paucity of documents from the Respondent clearly indicates that Ms Coulson's evidence is correct: she was systematically ignored. Her reply on 28 April 2018 (80) shows the extent of it.

75. The process itself was empty. Mr Collins promised a second meeting but did not arrange one. He extended the consultation period the day before it ended, without having contacted Ms Coulson at all. If he had been serious about retaining Ms Coulson in a lower paid role he would at the very least have had a job description prepared to discuss with her, but he did not. He did not know that she was going on holiday at about the time he posted the job descriptions. His evidence was that this had been proposed since October 2017, so he had ample time to do so. He had Peninsular on board from 13 March 2018 so could have got them to draw it. He never invited her to see the new office in Milton Keynes, and she was the only person not so invited.

76. Mr Coulson was denied sight of documentation which she should have been given, even after she specifically asked for it. She was never shown the business case for the removal of her post. There was never an intention to keep her in the business, and Mr Collins was at best lukewarm, not giving her any job description, and not arranging any follow up meeting, then blaming her for not arranging it herself. When he saw her he was unprepared for the

meeting.

77. The documentation now produced to justify the dismissal is unimpressive. The Respondent produced at the hearing (but not before) a document said to be of October 2017 by Mr Collins about restructure, and printout to show it was written then (R2). That document is itself only a brief outline, and not a professional report. It does not say that the post occupied by Ms Coulson would be removed, so even if it is as portrayed it does not support the case put forward by the Respondent. It looks like a document used by Mr Collins as a speaking note to the Board in discussion with them – the first line refers to *"your"* not *"our"* company.

78. Mr Collins produced the notes of his meeting of 25 May 2018 with Ms Coulson (R4) only during the hearing. The case management order of 19 December 2018 clearly pointed out that there was a continuing duty of disclosure. The Respondent did not comply with this duty.

79. Although the *"impartial"* reports relied on it (apparently 72-3) no business case was ever given to Ms Coulson. When she expressly asked for it, the respondent's representative refused to give them to her, and she was fobbed off with the assertion that it was *"legally privileged"* when plainly it was not.

80. Neither the business case nor any of the notes of meetings were given to Ms Coulson in response to her subject access request, which Mr Collins looked through. There were no board minutes to show that a business case had been presented to it, not any paper submitted to the board for approval. The explanation of Mr Collins that he did not notice the absence of the documents is not credible, nor that they would not have been found in looking for documents naming Ms Coulson. Mr Collins kept a folder in his computer about Ms Coulson (as for other staff). The documents were either created after the event for the purpose of this hearing, or were suppressed earlier. Neither indicates an employer acting fairly. Nor does reliance upon a policy of which Ms Coulson was ignorant, and which was not implemented at the time.

81. Mr Collins was the point of contact for the people from Peninsular conducting the grievance hearing. As Ms Coulson pointed out, that was hardly fair since her complaint was about him. HRFace2Face was not independent, as the Respondent has asserted. Peninsular was brought in on 13 March 2018 to advise on the restructure. HRFace2Face is part of Peninsular. It was hardly likely that anyone from one part of that organisation would find that another had not done its work for a new client very well. Only Mr Hall saw that he was not independent. Everyone else said that this was an independent and impartial hearing review or appeal.

82. Mr Marshall was responsible (perhaps notionally, as it seems to have been Mr Collins who dealt with HRFace2Face), and it is plainly unfair for the same person to deal with all three, the grievance, the appeal from its rejection and the appeal against dismissal. Mr Marshall's explanation, that all others were too busy or unavailable is not credible. If Peter George did not want to deal with it there was a new non executive director, and other directors.

83. The suggestion was that the work was in future now to be locally based, not national. Mr Collins spoke much about this, though the Tribunal did not find it

informative. There was no business case, or reasoned argument about what would occur and why. The Board minutes apparently say only that x or y was discussed and little more, but Mr Collins said that papers were produced for discussion. None were produced to us. The Tribunal concludes that Ms Coulson was indeed the victim of a pretext to remove her.

84. There has been no criticism of Ms Coulson's work, and this was not a disguised capability dismissal.

85. The procedure was such that it is not possible to say what might have happened had a fair procedure been followed. Accordingly there is no *Polkey* reduction[14].

86. The Tribunal therefore decided that the claim for unfair dismissal succeeds. The failures are so egregious that the Tribunal decides that an uplift in compensation of 25% is required.

87. The Tribunal has given careful thought to the claim for sex discrimination.

88. The first question is whether the Claimant has shown facts from which the Tribunal could infer discrimination. There is no other woman in a senior position. The treatment was so bad that plainly an answer is called for. The burden then shifts to the Respondent to show that in no sense whatsoever was Ms Coulson's gender a factor in that treatment. The Tribunal is unanimous in reaching that conclusion.

89. The Respondent says that it is nothing to do with gender. Ms Coulon's post went. That was a cessation of a need for employees at her level, even if her work remained to be done by others. There was no other post at the same level, so no suitable alternative employment. They say they were prepared for Ms Coulson to take a post at a lower level but that she was not interested in one. That the decision was unfair does not mean it was by reason of gender. Anyone holding the post would have been treated the same way. That all the board are male is simply a reflection of the fact that few women have the money and connection to attain such a position. That some may play golf or have yachts is not an indicator of sex discrimination. Mr Collins was appointed to his role in exactly the same way as Ms Coulson achieved hers: put forward for appointment without advertisement or competition, and so there was no difference of treatment related to gender. Ms Coulson was focussing on the tripartite relationship between Rentplus, housing associations and local authorities, and that was bottom up, and they wanted a top down approach starting with developers, so that they could then approach their two partners with schemes in which to interest them, and Ms Coulson had not much experience with developers. A board always operates behind closed doors, which is not the same as in secret. Mr Collins does not play golf and the assertion that it is a macho *"boy's club"* is unsupported by example. Removal of her car parking permit was because everyone had been issued with a permit that was inappropriate, and the organisation granting them withdrew them.

90. The Tribunal accepts that some of this is so. The reason for the removal of

[14] Polkey v AE Dayton Services Ltd [1987] UKHL 8 – as footnote 9.

the car parking permit was not challenged, and that Ms Coulson had a contractual right to such a permit is not relevant (it does not feature in the narration of facts for that reason). The absence of any other woman is not surprising given the nature of the board: principally investors who are male. There was no other role at Ms Coulson's level of seniority. There was a new CEO and changes would be expected. There is now (the Tribunal is told) no one at the level Ms Coulson was. There is a geographic expansion of the business, although extending beyond the west and south remains largely aspirational.

91. The minority view of Mr Howard is that while the Tribunal is unanimous as to the findings of fact, and the assessment of them in relation to unfair dismissal, this was no more than a very bad case of unfair dismissal. Rentplus' case is one that would have applied to any person in Ms Coulson's position such that there is no connection with gender.

92. The majority view of the Employment Judge and of Mr Ley is that the assessment of the evidence is such that the Respondent has not rebutted the inference of discrimination, for the reasons that follow.

93. There is a further factor relevant to the majority's assessment of the (lack of) good faith of the Respondent in dismissing the Claimant for totally non gender related reasons. The findings of fact in this paragraph are also unanimous. There were three case management hearings, 19 December 2019, 06 March 2020 and 27 April 2020. Ms McNulty dealt with the first two and Mr Morris the third. The first, at 2.4, clearly set out the duty of continuing disclosure. The Respondent signally failed to follow it. In the second, the Respondent sought have the Claim struck out or a deposit ordered (and so place Ms Coulson at risk of a costs order) stating that the claims had little or no reasonable prospect of success. The case management order sets out their submission in support"

> *"The Respondent alleged that the restructure which occurred in 2018 was broad and extended beyond the roles within the South West. Approximately 19 posts at various locations were involved, approximately 50% of which were held by women. All of those within the restructure either had their role titles changed and/or their salaries reduced. A significant number of individuals had to apply for different roles. The restructure was an exercise to cut costs and rationalise the business. The claimant was offered 2 alternative positions, one in Milton Keynes and another (regional manager of the South West) at an unknown location."*

94. This was highly misleading. There were not 19 posts involved. There were only 5 full time employees at the time. There was recruitment which more than doubled the full time equivalent number of employees, perhaps to 19 individuals, but that is irrelevant to the point being advanced. After recruiting new people there were more women, but the Tribunal was not directed to any at a senior level. No one else was placed at risk of redundancy. Others, such as Anthony Eke were *"slotted in"* to new roles that were promotion. A new finance director and a new IT director were appointed at salaries in excess of £50k a year. There was no cutting of costs – the salary bill after the restructure was vastly more than before (it seems about double), even after

cutting out the Claimant's salary. There was no *"rationalisation".* There was expansion. The offer of new posts was at best half-hearted and as a salary £35k a year lower not suitable alternative employment.

95. This was most unlikely to be an error on the part of Ms McNulty. Peninsular knew how many staff there were. Ms Dennis of Peninsula had referred to it in the grievance matter (para 63 above). It can only have been a deliberate attempt to mislead the Tribunal, against a litigant in person. Only Mr Marshall and Mr Collins have liaised with Peninsular (such was their evidence). Accordingly it is one or more of these three who attempted to have the claim struck out on a false basis. It is not possible to deduce which.

96. The majority consider that this adversely affects the credibility of the Respondent's case substantially. The majority also consider that the way disclosure was handled by the Respondent is also damaging to the credibility of their rebuttal case. This amounted to suppression of documents and a failure to comply with the continuing duty of disclosure. Since the Respondent was represented by Peninsular throughout what was said to be the period of the restructure it cannot be that they were unaware of that duty. There was a refusal to give Ms Coulson documents to which she was clearly entitled (specifically notes of meetings and restructure plans and documents). There was the pretence (with the partial exception of Mr Hall) that the grievance and appeals were impartial and independent. There was the revelation in the hearing from Mr Marshall that it had been decided in March 2017 that the Claimant would go. The Claimant was Mr Connolly's protegé, which was doubtless why she was included by him in the business plan for October 2017, but as Mr Marshall was interviewing Mr Collins it is clear that Mr Collins took the CEO role on the clear understanding that Ms Coulson's role would not continue. Mr Marshall was clear that Mr Collins knew that was the Board's wish. However, Mr Collins concealed this from Ms Coulson, who after discussion with Mr Collins in February 2018 was enthusiastic about the opportunities that were now open, given £11m of new funding. As she was the person who had led the submission to government about the changes to the NPPF, including meeting MPs and authoring the submission (albeit as part of a team), it was entirely understandable that she should see herself as having a big role in the expanding future of the Respondent, and Mr Collins did not disabuse her of that perception.

97. Ms Coulson points out that when Mr Collins was appointed she was not considered as someone who might become CEO, despite all that she had done and was doing, and the salary she was on. Mr Connolly did not put her forward, but with only 5 employees the Board knew all about Ms Coulson. That Ms Coulson was appointed in the same way as Mr Collins is a different point. He was new to the business – some 6 months – and was a consultant not an employee. He had no more experience relevant to developers than Ms Coulson (at least none that was shown to the Tribunal) and Ms Coulson also has experience at Board level. She had not been a CEO before, but nor had Mr Collins. Ms Coulson now heads, as CEO, a larger organisation than the Respondent: plainly she has the talent. The claim of detriment is limited to the dismissal, but this background set of facts is relevant in assessing the dismissal. When the CEO went, the Board got in Mr Collins and got rid of Mr Connolly's appointment: Ms Coulson. Mr Connolly did not suggest Ms Coulson as his successor. He was not a witness, and the possible reasons

range from stereotypical assumptions on his part, to an understanding that the Board was unlikely to appoint a woman: but the one fact that is known is that Mr Marshall said (without explaining why) that it had been decided in March 2017 that Ms Coulson's role would go. Accordingly once Mr Connolly decided to step down he would no longer be able to protect Ms Coulson (if that is what he was doing) and there would be no point in putting her forward. The recruitment of Mr Collins in the same way as Ms Coulson is thus not a reason to find that this was not in part gender based, and may on the contrary be supportive of Ms Coulson's case.

98. The many flaws identified above (by an organisation with more than adequate funds, and advised) are also, by reason of their number and type, supportive of the Claimant's assertion that there were stereotypical assumptions that a woman would not be considered as a CEO. This was always a business with a high capital investment. There was no equal opportunities or any other sort of policy put in place. Plainly the Board did not have oversight of the need for proper policies. Organisations which care about such matters do have policies.

99. The Claimant attempted to assemble a comparator from parts of others, but in reality this is a hypothetical comparator case (and the Respondent accepted that this was the Claimant's case in the alternative).

100. When assessing the explanation of the Respondent as to why no inference should be drawn, given all these factors, the majority considered that if not in such a case, when would an inference ever be drawn? There is a badly handled dismissal, done on advice, which was not simply incompetent or unfair but not undertaken in good faith (for the reasons set out above). The Respondent has accordingly not rebutted the presumption and the claim for sex discrimination succeeds.

101. In short, the Board decided in March 2017 that the Claimant's role would go, nothing was done while Richard Connolly was CEO, but as soon as he was replaced by Mr Collins a restructure was effected which removed her. In the circumstances set out above the majority finds that the Respondent has not rebutted the inference that this was connected with her gender, tainted by sex discrimination and so the claim for sex discrimination succeeds.

Date 27 August 2020
Employment Judge Housego