Case Number: 3330917/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R Mascarenhas	**v**	**LondonEnergy Limited**

Heard at: Watford **On**: 10-14 August 2020

Before: Employment Judge R Lewis
Members: Mr M Bhatti MBE
Mr A Scott

Appearances
For the Claimant: Mr D Welch, Counsel
For the Respondent: Ms J Kennedy, Counsel

JUDGMENT

1. The claimant's claims of breach of contract are dismissed on withdrawal.

2. The claimant was not at the material time a person with disability and her claims of disability discrimination are dismissed.

3. The claimant's claims of age discrimination fail and are dismissed.

4. The claimant was unfairly dismissed and her claim of unfair dismissal is upheld.

5. Remedy for unfair dismissal will be determined separately.

REASONS

Introductory case management

1. This case had been listed by Employment Judge Laidler following a preliminary hearing on 17 July 2019. It appeared from her order that although both sides were professionally represented, the preparation of the case was not well advanced.

2. On 11 September 2019 the respondent confirmed that having read the claimant's disability impact statement and other material, it denied that she met the section 6 test of disability at the material time, because there was insufficient evidence of impact on day to day activities (81A). The claimant was then professionally represented, and her then solicitors remained on the record until 9 July 2020.

3. At the start of the hearing, the tribunal received a bundle of about 400 pages. While the pleadings section of the bundle was arranged clearly and correctly, the remainder, some 80 percent or so of the bundle, was in reverse chronological order. This was not usual practice, and certainly not helpful.

4. Mr Welch had been instructed shortly before this hearing, and we were grateful for his assistance. Counsel agreed with the tribunal's view, which was that the time available to us should be used to hear the claim on liability and Polkey issues only, remedy to be reserved to a different hearing if required.

5. The Judge suggested an adjournment during which the tribunal would read the material and evidence available on section 6 disability, and would decide that as a first discrete issue. The parties agreed.

6. Items 7 to 13 in the agreed list of issues before Judge Laidler set out claims which, the Judge suggested, had no reasonable prospect of success. He indicated that at the same time as hearing the section 6 evidence, the tribunal would invite Mr Welch to show cause why those issues should not be struck out as having no reasonable prospect of success.

7. Issues 7 to 9 appeared to have no prospect of success because they were a claim for breach of contract in which the breach complained of was the failure to enter into a settlement agreement. That seemed to us logically unsustainable: a failure to contract cannot itself be a breach of contract.

8. Issues 10 to 13 alleged breaches of trust and confidence, but those are not matters which a tribunal has jurisdiction to hear unless pleaded either as acts of discrimination, or as leading to resignation and therefore as elements in a claim of constructive dismissal. Neither of these was the case.

9. The parties referred the tribunal to the extracts from the witness evidence and bundle to be read in relation to disability, and the tribunal then adjourned for about 50 minutes.

10. When the tribunal resumed, Mr Welch confirmed that items 7 to 13 inclusive in the list of issues were not proceeded with, and that the claim for breach of

contract should therefore be dismissed on withdrawal. Later in the day, we suggested to the parties that there was no need to amend the witness statements, or to cross examine on matters in the witness statements which were not pursued.

Section 6 disability

11. We proceeded, on the first afternoon, to determine the s.6 disability issue.

12. The claimant was sworn and gave evidence in which she adopted paragraphs 4, 5 and part of paragraph 50 of her witness statement and was briefly cross examined. She had submitted a statement on impact (337) which she confirmed as accurate. She had annexed to it a print out from her GP records. She gave no analysis of the records. There was no other medical evidence. The respondent called no evidence on disability.

13. The tribunal read the medical notes and letters as lay people in medicine, applying common sense and if necessary general knowledge. The tribunal was of its own experience able to read the blood pressure readings quoted in the evidence and broadly understand whether they were high or low. We could not bring to the reading any greater knowledge or medical expertise than that.

14. The tribunal found the following.

15. The medical condition relied upon is hypertension, and the claimant referred to manifestations of high blood pressure.

16. The medical records showed that the claimant was in November 2012 found to have high blood pressure, although the reading was not recorded (340). A separate record in the same month (dates were missing from our copies), wrote (345),

> 'JBS cardiovascular disease risk 10-20% over next 10 years.'

17. The claimant had a medical assessment in India in late 2014 or early 2015, leading to an undated report (348-352). We note that the word 'normal' appears over ten times in the outcomes, and that in a list of seven conclusions, the first listed is 'Hypertensive heart disease.'

18. The GP record shows a number of investigations and tests dated 23 February 2015, which we understand to have been undertaken as a result, after the claimant's return to England (344-5). We could not understand the technicality of the 23 February entries, apart from the sentence,

> 'Suggest urgent referral for an ECG.'

19. We also understood the entry for 10 August, which said (344),

> 'Laboratory procedures Complete = Y Action Text = Tell Patient Normal.'

20. We could find no reference to, or indication of, a blood pressure or hypertension issue in any of the medical records, other than those set out in the two preceding paragraphs.

21. The claimant stated that she had been on medication (Lisinopril) for blood pressure since 2012, with a view to preventing or lowering the risk of heart attack or stroke. She said that the dosage had over the years been increased from 10mg to 20mg twice per day.

22. The pagination of the GP records appeared to show that we had a complete print out. We could find no reference to the 2012 diagnosis and original prescription; or to the increase in dosage; or to any form of monitoring or follow up; or to any specialist referral.

23. The only reference to this medication in the records was that a printout in August 2019 named Lisinopril under the heading 'Repeat Dispensing' on 5 July 2019 (which, perhaps wrongly, we interpreted as the date of the most recent prescription). The dosage was 20mg twice per day. The tribunal had no knowledge of this medication, or evidence about it except the claimant's. The period which was material in this case ended on 31 March 2018.

24. In her impact statement of 24 August 2019, the claimant wrote about techniques for managing stress, including exercise and diet. She gave no evidence of any impact on day to day activities. The only reference to work activities (338) was in her impact statement,

> 'Although I had a demanding job, I liked my work and did not have any issues with my work responsibilities, and coped without feeling any adverse health impact from my high blood pressure.'

25. At this hearing, the claimant agreed that she had said in her impact statement that her hypertension did not affect her at work. She gave no evidence about impact on activities outside work, save to repeat that she was aware of the benefits of managing a medical condition through exercise, sensible diet, and learning particular breathing patterns.

26. In the impact statement the claimant had written, (338),

> 'I do not believe that I would have been able to carry out the extensive responsibilities of my job without medication.'

27. This was repeated and amplified at this hearing in paragraph 5 of the claimant's witness statement:

> "Were it not for my being on medication, I do not believe that I would have been able to carry out my day to day activities either at home or work. I believe I will need to be on medication for the rest of my life and if my high blood pressure wasn't being treated and managed by medication, the condition would in all likelihood deteriorate potentially leading to a stroke or a heart attack."

28. The case fell to be considered under section 6 and Schedule 1, paragraph 5, of the Equality Act.

29. The first of those states:

> "A person has a disability if she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on her ability to carry out normal day to day activities."

30. In Schedule 1 at paragraph 5(1), the following is stated:

> "An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if
>
> (a) Measures are being taken to treat or correct it, and (b) But for that, it would be likely to have that effect.
>
> (2) Measures include in particular medical treatment…"

31. Mr Welch put the case as a combination of common sense and that it stood to reason. The claimant was on medication to reduce and stabilise her blood pressure. Without that measure, her blood pressure could reach a dangerous level. The tribunal was required, applying para 5(1) of Schedule 1, to disregard the Lisinopril. If the tribunal did that, it would find that the claimant would suffer from uncontrolled blood pressure, which in turn would have substantial adverse effect on her ability to carry out normal day to day activities, and could lead to a stroke or heart attack and / or her death.

32. Ms Kennedy's submission was that it was for the claimant to prove that she fell within the section 6 definition, and that she had not produced evidence to do so. On the contrary, she had stated in terms that she had no need of any specific support at work, and that her medical condition did not prevent her from doing her work or make it more difficult for her to do it, or lead her to need more time for it; and she had given no evidence of any adverse effect on activities away from work.

33. Ms Kennedy submitted that the claimant had not identified any task which she was unable to do, and she had called no witness evidence to explain her condition or shed light on the medical records.

34. She submitted that the medical records do not show any form of treatment or monitoring or other interaction engaging the claimant's blood pressure or hypertension since 2012, apart from the one quoted reference to repeat medication.

35. The question for the tribunal therefore is whether it has been shown that but for the Lisinopril taken by the claimant, it would be likely that her impairment would have a substantial adverse effect on her ability to carry out normal day to day activities.

36. We agree with Ms Kennedy that the burden of proof rests on the claimant, and that there is no evidence on the point. We note that this has not been an issue which has arisen by surprise. It was a live issue before Judge Laidler, and since 11 September 2019, it has been within the claimant's knowledge that the area of dispute was the effect on day to day activities. The claimant was professionally represented for another ten months after that.

37. We accept the possibility that the medical records in the bundle are incomplete, although the numbering shows no gaps, and they form the evidence before us. We note that they are at least inconsistent with the claimant's own evidence: there is for example no evidence in the medical records of the GP having taken the blood pressure reading in December 2017 quoted in the impact statement.

38. The medical records contain no evidence of diagnosis, prescription, advice to the claimant, monitoring of the medication, or referral for specialist support, other than the suggested ECG referral. There is no evidence in the medical records which confirms the claimant's assertion that her dosage was increased from 10mg twice per day to 20mg twice per day, or when or why.

39. For our purposes, there is simply no evidence to support the proposition quoted at #27 above from the witness statement. This would not require a great deal; but there is not even a letter from the GP or a specialist nurse or other practitioner.

40. We have asked whether we can infer by means of judicial notice that Mr Welch's common sense proposition is made out. We have no specific medical knowledge or expertise. We can envisage a situation where drawing on either our own experience, or on general common knowledge, the tribunal might be able to infer from a history of prescription, the conclusion to which Mr Welch invited us: a claimant taking insulin for diabetes, or carrying an Epipen in case of a severe allergic reaction, would be two obvious examples.

41. We do not consider that we have the knowledge or ability to take that step in this case. We accept Ms Kennedy's submission that the claimant has failed on evidence to discharge the burden of showing that at the material time she met the s.6 definition.

42. We draw together this aspect of the case. There is no evidence before us of any effect on day to day activities, whether at work or otherwise; there is one passing contemporaneous indication of the impairment being spoken about on a single occasion during the events in question (see next paragraph); there is no narrative medical evidence (eg a report or discharge letter); the medical records do not support the claimant's assertions, and lack corroboration of almost any of them; and we can find no reference in the records to the medication which was crucial to the case until some 15 months after the material events had ended. Almost all of these points have been live since some 11 months before the start of this hearing, during the majority of which the claimant was professionally represented.

43. We find that the claimant has not discharged the burden of proving that at the material time she fell within the s.6 definition. Therefore the claim of disability discrimination is struck out. In striking out the case, we reminded the parties that it was open to them to refer to any health issue if relevant to the fairness of the claimant's dismissal; in the event, neither side did so, although we noted one brief mention in the bundle, #106 below.

44. We turned to the remainder of the case on the second morning.

Further management

45. The parties had exchanged witness statements. The claimant was the only witness who attended on her own behalf. She had attached material from the previous Managing Director, Mr David Sargent. No reference was made to Mr Sargent's additional material at this hearing and we understood his unsigned comments of July 2020 to form part of the claimant's case. The respondent called two witnesses. The first was Mr Mark Beattie, who has been employed by the respondent since 2001 and is currently Head of Development and Property. He had been Head of Central Services, and the claimant's line manager, from 27 January 2016 until her dismissal. The respondent's second witness was Mrs Mary Czulowski, who joined the respondent on 11 April 2016 and was then and remains Finance Director and Company Secretary.

46. We were grateful to the parties for the effective use of time. The claimant's evidence took up most of the second listed day of hearing, and we adjourned slightly early when her evidence concluded. The respondent's witnesses took up most of the third listed day. We heard submissions on the morning of the

fourth day. We delivered judgment on the morning of the fifth day, the parties jointly electing to receive judgment in person and not, as we offered, by CVP.

47. This hearing was limited to liability only, including the principle of any Polkey application. In light of our having given judgment, we put to the claimant her choice of remedy in accordance with s.112(2) ERA, and then invited the parties to dispose of any compensation hearing by consent.

General approach

48. We preface our findings with a number of general observations.

49. In this case, as in almost all others, we heard evidence about a wide range of matters, some of it in some depth. Where we make no reference to a matter of which we heard; or where we do so, but not to the depth to which the parties dealt with the point, that is not oversight or omission, but reflects the extent to which the point was truly of assistance to the tribunal.

50. While that observation is applicable to many hearings, it was particularly relevant to this case, where the claimant's strength of feeling about a range of events in her former workplace seemed to us at times still live. We understand that strength of feeling, but it is not a factor in our analysis of the evidence.

51. At times, the parties appeared to bring to this case a binary approach, namely the approach of acknowledging no shortcomings on their own side and no positives on the opponent's side. That approach did not assist us. It rarely does, because it rarely reflects the reality of a workplace. Likewise, we do not approach our task, as the parties at times appeared to, by expecting a standard of perfection of those involved, and drawing adverse inferences from a departure from that standard. Our approach is realistic, and that when human beings go to work they make mistakes. Where a mistake is made, the questions which follow relate to the nature of the mistake and the learnings from it. It does not follow that any mistake necessarily carries any more meaning or inference than that a human mistake has been made.

52. In this case, as in many in our work, we bear in mind that there are shifting perspectives. It has been important to remind ourselves that if we have to consider an event in say 2016, what has been said or written about it in 2017 may have some evidential value but our conclusions must be based on what happened in 2016 not what the parties said about it later. Equally, witnesses are called to give their view of events, giving evidence truthfully in 2020, which may involve the benefit of hindsight.

53. We approach the evidence on the understanding that all witnesses told the truth as they knew it. Where we find the claimant a less credible witness, it is because we find that a recurrent theme of these events was that the claimant demonstrated poor judgment of documents, events and people at the time in question. We find that she reacted quickly and emotionally to what she read; and that having done so, she stuck to her response, irrespective of any calmer analysis. In particular, as set out below, she adhered to misjudgment of at least four important documents in the course of these events: her contract of employment; Mrs Czulowski's letter to the brokers; the Paralegal advertisement; and the draft settlement agreement.

54. One final overarching observation is that Mr Welch cross examined the two witnesses on the basis that their management of the claimant was aggressive, and that in general terms the management of the respondent organisation was inadequate. On the first point, our finding in general terms is that the management of the claimant was conflict averse and generous in spirit. On the second point, we refer to our findings below on what we call undermanagement.

Findings of fact

55. The claimant was born in 1955 and at the time of this hearing was aged 65. Mrs Czulowski at the time of this hearing was aged 62 and Mr Beattie aged 59.

56. The respondent is a public authority, which has a London-wide remit for waste disposal and recycling. It has one shareholder, the North London Waste Authority, and has its roots in local government. Mr Beattie told us that in 2016, it still employed some staff on terms and conditions issued originally by the GLC (abolished in 1986). It has over 300 employees, and a recognised trade union structure.

57. The claimant began employment in 1991 and at the time of her dismissal had completed just under 27 years service. Outside the events with which this tribunal was concerned, we heard no criticism of any aspect of her contribution to the life and development of the respondent. She was a dedicated and committed employee for many years, who plainly took pride in her work. It was clear that over the years she had enjoyed harmonious working relationships with many colleagues, including members of the Board. She reported for many years to Mr McGeehan, who was Mr Beattie's predecessor. As Assistant Company Secretary, the claimant had a functional reporting line to the Company Secretary Mrs Czulowski. That structure, with a functional reporting line which is not the same as the line management reporting line, is commonplace in practice, and criticism of it seemed to us misplaced.

58. As Mrs Czulowski pointed out, the claimant occupied a near unique place in the respondent business. This was in part because she was the only

employee who attended all Board meetings other than the members of the Board themselves. She also attended a number of the key Board subcommittee meetings. We intend no disrespect to the claimant in saying that we infer from that evidence that she was important to the organisation but not senior, and that the distinction between importance and seniority may not always have been clear to her.

59. The evidence which we heard from Mr Beattie and Mrs Czulowski leads us to find that by the end of 2015 the respondent company was significantly undermanaged, and probably had been for a number of years. We say so on the basis of drawing together a number of pieces of information about the company background. The word undermanaged is our word and was not used by any witness. We were told that with a relatively modest workforce of under about 350 people, the respondent in 2016 employed staff on over 25 different sets of terms and conditions. That there was a person on conditions dating back to the days of the GLC is no more than a historical curiosity, but the accumulation of TUPE related terms and conditions indicates a failure to manage the consequences of many TUPE transfers over the years.

60. In addition, there was at the end of 2015, no standard uniform system for annual development review or appraisal; it was not clear that there was the suite of employment procedures which one would expect in public service or in an employer of this size. There was no redundancy procedure. We understood there to be two bonus schemes, although we were taken to no written definition of either. One was a discretionary management bonus, which appears to have operated entirely at the discretion of senior management, and for which the claimant was eligible. The other, as we understood it, was related to company performance against targets. The claimant was not a member of that. The existence of a wholly discretionary bonus scheme may be seen as an indication of old fashioned management, and distribution of bonus, without criteria, is not free from risk.

61. There did not appear to be a developed HR function which supported management, or set uniform standards for the conduct of meetings. These are matters upon which we comment because they fall within the general remit of an employment tribunal. We are not in a position to say whether they were replicated in functional areas of the company's work, save to note that Mrs Czulowski's evidence was that the company needed significant infrastructure development and investment if it were to plan for a business future. She also mentioned a smaller example in evidence, which was that not long after her appointment, the respondent installed cameras on vehicles. That did not seem to us like new technology, and may just have been belated catching up.

62. We add the further comment that what we call undermanagement seemed to us an accumulation over many years. We do not refer to it as a criticism of the claimant or of the previous Managing Director as an individual, but to set the scene for early 2016, when Mr Beattie became the claimant's line manager, shortly before Mrs Czulowski was appointed.

63. We see considerable significance in the arrivals in post of Mr Beattie and Mrs Czulowski. The former had at the time of appointment about 15 years' service and therefore considerable knowledge and understanding of the company. Mrs Czulowski was new to the company, but brought to it significant commercial experience, and therefore a fresh perspective, which may be something which it needed. They probably made a helpful combination.

64. The claimant was, in January 2016, Assistant Company Secretary. She had a number of administrative responsibilities. Most significantly, she had the responsibility of administration and co-ordination of Board meetings. She prepared papers and circulated them, attended the meetings, took minutes, and drafted the minutes which arose from the meetings. She had a historic skill in shorthand, which was of great assistance in preparing minutes. In 2010, Mr Sargent (who was then MD, and remained so until July 2015) tasked her with preparing confidential minutes which we understood to be minutes, not for signature, which were available as a further aide memoir of what had been said in Board meetings without being recorded in the formal signed minutes.

65. The claimant had responsibility for liaison with insurers. The respondent had insurance for employer liability, public liability and road traffic, and the claimant was the contact point with brokers and insurers in relation to insurance questions. We accept Mrs Czulowski's caveat on that aspect of the claimant's role. She described the claimant's role as one of process and administration, and not one involving policy, strategy, or decision making. We accept that evidence and add that it is an instance of the claimant having a role which was important but not senior.

66. One overarching matter which began before 2016 and continued was referred to a number of times in evidence. The claimant's task of working with the respondent's insurers was an important part of her work, but it was rarely time critical, and its overall volume was in decline. We accept that it was in decline, and we accept that this was the product of a number of factors. One was that the insurers moved to a system of online reporting, which enabled all employees to report safety concerns immediately and directly; one was the development of enhanced awareness of the need to be alert to potential safety issues and to report them, leading to a fall in incidents; and one was a decline in the actual number of reportable incidents and accidents. Mrs Czulowski mentioned in that context that the installation of cameras on the respondent's vehicles had led to either a fall in the number of incidents; or a

significant reduction in the area of dispute about the incidents, as potentially disputed events were captured on camera.

67. In early 2016 the respondent embarked upon a process which was intended to bring structure and uniformity to its employment systems. It was a project which was intended to involve analysis of terms and conditions, with a view to consultation and consolidation so that at the end of the process there would be a single status set of terms and conditions. We accept that that was a long overdue reform, and we also accept that it was bound to be a challenging task.

68. As part of that exercise, Mr Beattie was tasked with reviewing the terms and conditions and job descriptions of his direct reports, of whom he had about 20, including the claimant. That review led him to the view that the claimant was "under utilised". As that word was much used in this case, we think it important to define it. The word "under utilised" does not imply that the claimant was spending her days idle. The term means that objective analysis by managers of the claimant's role, drawing both on the claimant's job description, and on the managers' knowledge of what the tasks involved, led the managers to the view that the claimant's job did not require 37.5 hours work per week. When Mr Welch asked Mrs Czulowski how she could come to that view, simply from looking at the tasks on the job description, she gave the compelling answer that she knew because she had done all the jobs herself at some point in her career, and knew what they involved. That analysis of the claimant's role was a key part of this case. We accept that that was the genuine analysis of Mr Beattie and Mrs Czulowski; that it was evidence based; and that it was objectively well founded.

69. At a team meeting in January 2016, Mr Beattie asked the claimant to take on the additional responsibility of minute taking for the respondent's Health and Safety Committee. The claimant initially declined, stating that she had no capacity for additional work, and raising an objection as to the way in which the request had been put to her; after further conversations with Mr Beattie, she agreed to do so. We accept Mr Beattie's view that this was a reasonable request, in particular as the work of the committee had a clear potential for overlap with the claimant's insurance experience and responsibility.

70. Likewise, in the first quarter of 2016 and as part of the process of change, the respondent's offices were converted in part from separate offices to open plan. Building works in a workplace are always a source of some stress, and many workers who have had personal space are unhappy about the move to open plan. The claimant had a closed office which was being converted into open plan space. We accept that during the course of the building works she, in common with a number of colleagues, had to move to a temporary

relocation. It was common ground that the claimant was the only one of those affected who had to move three times. We accept that she had an interface with Mr Beattie when he stressed the need to have her office contents packed and ready to move to the builders' deadline. We accept that one move arose because one of the temporary spaces was felt by the claimant to be unsafe. We do not underestimate the inconvenience and irritation of all this, but accept that there was a reasonable operational need for all the events which we heard about relating to building work.

71. Mrs Czulowski took up post in April 2016. She took on huge responsibility at a time of significant change. We attach weight, in the context of an allegation of age discrimination, to the fact that she joined the company at the age of 57 or 58; given that her role was of strategic importance, and required continuity for some years, that was an indication that age was most certainly not a factor which counted against Mrs Czulowski in her appointment. Mrs Czulowski said that from her experience of working with the claimant, and in light of her own experience, she came in time to share the view that the claimant was underutilised.

72. Another change was that the Board decided to have in time a fully qualified Company Secretary. There was therefore a process of discussion between Mr Beattie, Mrs Czulowski and the claimant on the question of whether the claimant would undertake the training required to qualify formally as a Company Secretary. The claimant agreed that this was supported planning for the future. The respondent researched methods of in service training, and in due course it was agreed that the claimant would undertake a module of the training starting in September 2016. The respondent agreed to pay for the training costs and gave the claimant one day per week release for training purposes. The claimant selected a module which interested her and in which she expected to do well. That arrangement was in place from September to December 2016, and we accept that in effect it put any other management issues involving the claimant on hold, at a time when her managers had other priorities.

73. The tribunal attached weight to the above. If the claimant had completed the training and gained the qualification, she would have qualified at the age of 66 or so, and would have had a limited number of productive years as Company Secretary in front of her. It seemed to us that a respondent which offered that opportunity, and provided support for it, had conducted itself in a way which was wholly at odds with an allegation of age discrimination.

74. In the event, the claimant failed the module, and scored 40 to 45%, with a pass mark of 50% (261). She informed Mr Beattie and Mrs Czulowski of this by email on 31 January 2017. She said that she did not wish to continue with the study. It was of course a voluntary matter. The position therefore by the end of January 2017 was that the two managers remained of the view that the claimant was underutilised, despite servicing the Health and Safety committee. The claimant's exam failure reopened the question of her

utilisation, and led Mr Beattie and Mrs Czulowski to think of what other tasks were available or appropriate for her to do.

75. In that context, in March 2017, Mr Beattie asked the claimant to take up the task of cash counting. The respondent had a retail outlet or outlets, from which cash takings were sent to the office, where they were kept secure, and operated in part as a petty cash float. The respondent estimated that the counting took up about 30 minutes a day, and about up to three hours administration per month. The task was being undertaken in the respondent's Accounts Department.

76. Mr Beattie offered the claimant the opportunity to undertake this task, and she declined it. We accept that it was not part of her role, and that she was sensitive to the appearance of taking on less skilled work. We accept that cash handling might sit more easily within an Accounts Department; but we can also see the logic of cash counting not being undertaken by qualified accounts staff. It is an essential task, but not one of any great status. At about the same time the claimant received a bonus (260). We accept Mrs Czulowski's evidence, which was that at a busy time, she more or less nodded through the bonus and it carries no particular mark of distinguished performance.

77. We have referred above to the respondent's move to reform its contracts of employment. In about June 2017 new contracts of employment were issued, after a process of reform and consultation. The contract of employment issued to the claimant contained a factual mistake. It was based on her working the respondent's usual 39 hour week, as opposed to the 37.5 hour week which she worked. That was no more than clerical or administrative error which was corrected when the claimant drew attention to it, and nothing more turns on the point.

78. The claimant's correspondence at the time however indicates a number of aspects of poor judgment. She appeared to show little insight into the magnitude of the task of reforming the contracts, the desirability of uniformity (reflecting the widespread change to single status in other public services) or tolerance of others' mistakes. One aspect was what appeared to be unshakeable conviction based on simply wrong reading of the document. There was no basis whatsoever for her to believe that because the contract included a probation period, she would, in her 27th year of service, become subject to probation when the contract came into force. The document quite clearly stated that while the contract was issued on 1 June 2017 the claimant's continuous service ran from July 1991. The claimant also challenged a number of drafting points.

79. We note that the claimant had attended Board meetings for many years, and must have been aware of the corporate demand for the issue of contracts, and had some insight into the work which had been done to reform the existing system and consolidate them into a single document. She appeared not to understand that the entire point of that process was to achieve uniformity on standard terms and conditions, and therefore to remove individualised contracts, such that her drafting points could never be accepted. Her comments seemed to us examples of poor judgment.

80. The claimant was unaware of her tendency to express herself in ways which were at times confrontational, disproportionate and on occasion downright rude. Her email to Mr Beattie of 16 June at 10.37 (257) is an example. The subject was the most recent draft of her contract, and while the email should be read in full, we noted, in context, (italics in original),

> 'The latest version .. was never .. agreed by me and as my line manager you should have been aware of this …
>
> I cannot be expected to sign .. and *your* work pressures should not leave *me* in a weakened negotiating position.'

81. Completion of the contract process led Mr Beattie and Mrs Czulowski to return to the issue of under-utilisation, and then to reconsider the claimant's job description. As a result, they had a meeting with the claimant on 7 July 2017. It is no matter of hindsight to say that this was a crucial meeting: it was bound to be. It is an indication, in our view, of the respondent's underdeveloped HR system that neither Mr Beattie nor Mrs Czulowski thought it prudent to request the presence of an HR member of staff to support the meeting; that neither took notes; and that neither confirmed the outcome of the meeting after it had taken place, despite the emotion expressed. We had the claimant's note of the meeting (251) which was accepted as broadly accurate.

82. There was a discussion of under utilisation. The managers raised the question of their knowledge of the claimant's actual tasks and the time they took. The claimant's note states:

> "They thought I should provide a diary for the month; I said I could but this would not provide details other than of meetings and wouldn't give a feel for the workload. I offered to keep a log of the work carried out but I was told this wouldn't be necessary."

83. We heard discussion about the difference between a diary and a log. Mr Welch criticised the respondent for failing to provide the claimant with a template of a diary. We agree that it was not put formally to the claimant in writing that she should do some form of time recording, which would record both a generic activity (eg 'prepared file') and the time taken (eg 'prepared file, 45 minutes'). We accept Mr Beattie and Mrs Czulowski's evidence that the mere log of activities was of no use; and we are sure that the claimant

understood that what was being asked for was a form of manual time recording, even if that phrase was not used. We also accept that the claimant declined to provide either. We accept that the respondent did not provide a template, although we accept also that the managers thought the request was sufficiently clear. The meeting was left without any clear outcome. It is impossible to avoid the comment that an HR professional might have helped lead a more constructive meeting to a productive outcome, and then recorded it in writing.

84. It was also common ground that the managers asked the claimant at the same meeting to minute the Technical Committee, and that she declined to do so on the basis of lack of technical knowledge. In our judgment, the request was reasonable. The claimant had vast experience of attending meetings and minuting them, and clearly did so over a period of years to a high standard. Given her experience of the company, including of insurance and health and safety issues, we are confident that she would readily have understood most technical issues and would have been able to ask about any which she did not understand. The request was entirely commensurate with her skill and experience as Assistant Company Secretary.

85. The position therefore by summer 2017, was that over a period of 18 and 15 months respectively, Mr Beattie and Mrs Czulowski remained of the view that the claimant was under utilised; the one task which she had agreed to undertake was that of the Health & Safety Committee; and she had refused two additional specific tasks, and had also refused to provide a diary.

86. In that setting, there were a number of relevant events between 7 July and 27 October 2017, which was the date of a major trigger event.

87. The claimant saw from Mr Beattie's electronic diary that he was to attend a meeting which was also attended by representatives of insurance brokers. (Although the evidence was that this was in August 2017, we note from the bundle (232) that the meeting may in fact have been on 11 October). As she was traditionally the point of liaison with insurance brokers, this gave rise to a question in her mind as to whether she had been excluded from the meeting. We accept the evidence of Mr Beattie and Mrs Czulowski that the meeting was with the North London Waste Authority and was to discuss details of a property lease, which had insurance implications. It was therefore a meeting focussed on commercial and property considerations, and we accept that the claimant had no legitimate expectation of being asked to participate: Mr Beattie said evidence in evidence that clauses in the lease which were discussed then remain in dispute at time of this case nearly three years later.

88. We accept also that in September 2017, and without involving the claimant, Mrs Czulowski undertook a task in relation to Companies House filing. As Assistant Company Secretary the claimant had been responsible for most of the routine filing on behalf of the respondent at Companies House. Mrs Czulowski explained that the particular task in September 2017 was of considerable corporate significance; and was something which neither she nor the claimant had ever done before. It was particularly important for it to be done on a single day in correct sequence, and Mrs Czulowski took the view that in those circumstances she should not delegate the task but should do it herself. She did so. Her actions seem to us an indication of leadership, for which she cannot be criticised.

89. The final matter in this sequence is that on a date in October 2017, Mrs Czulowski wrote to the insurance brokers (234) to make a complaint about the service given to the respondent by its solicitors. The letter must be read in full. It is written in some anger. Mrs Czulowski's point was that there had been two cases in which the insurers nominated solicitors to defend claims against the respondent, and that the approach and conduct of the solicitors led Mrs Czulowski to the view that the solicitors failed to represent the best interests of the respondent but rather favoured the interests of the insurer. In that detailed context, and in discussion of the two cases, Mrs Czulowski complained of how the solicitors had dealt with witnesses, and wrote the following:

> "Regina Mascarenhas gave direct telephone numbers of the witnesses to [X of the solicitors] on 21 February. I have since advised Regina that she should not have done this. Having obtained their numbers X telephoned them…"

90. We accept that Mrs Czulowski had a legitimate reason for conveying the information that the telephone numbers had been given to the solicitor, because the complaint was about how the solicitor had approached the witnesses. The point of saying that she had told the claimant that this was a mistake was to place the complaint against X in the context of the respondent recognising that while it had done something that should not have been done, the solicitor had then proceeded in an unacceptable manner. We accept that the claimant was hurt to be named in the letter, but reading it proportionately as a whole, and without focussing on the single sentence naming the claimant, Mrs Czulowski made a legitimate complaint expressed in professional language, in which it was appropriate to refer to the claimant's actions. The claimant may have been embarrassed, but we see no more in this point. We stress the importance of reading the document as a whole and in context.

91. Perhaps the most single significant event in this case took place in late October 2017. Mrs Czulowski's evidence (WS18) was the following:

> "On or around August or September 2017 I reviewed the level of external legal advice that the respondent was contracting for and the annualised cost of this. The Executive Team discussed this and we agreed that the appointment of a Paralegal

> would be beneficial to the respondent in bringing a qualified legal advisor in house."

92. The job specification which the respondent drew up (304) opens "The person" section with the words "The successful post holder is a qualified lawyer." The respondent placed the advertisement with an agency (Michael Page) from which in turn it was placed on a website, www.totally legal.com.
In due course Mr Diep was appointed. He was a lawyer qualified in Australia, with recent experience with a prestigious global law firm (306).

93. The website posting was seen by the claimant. It said nothing about a qualified lawyer being required. it simply said, "The successful post holder will have previous Paralegal experience." Ms Kennedy agreed that
Paralegal was the job title, but it is not a regulated legal professional role.

94. The claimant saw that the 'Detailed job description' section of the totally legal posting set out ten bullet point headings, of which she considered that five were 'her job'. She did not consider or analyse the other five, which were consistent with emphasis on commercial and property contracting, employment law, and other responsibilities which were beyond her capability. The listing also stated: 'Opportunity to train as Company Secretary' which the claimant had begun but not pursued.

95. The bundle contained a version of the posting which the claimant had marked up with the five elements which she said were her job (226-7). We consider each briefly. In doing so, we do not find that because they were five points out of ten, they represented half of the role of the Paralegal. We find that taken together, and compared with the five other points, the five points marked by the claimant made up under half of the Paralegal job.

96. The first marked point was to maintain a library from the 'relevant legal document management database.' We do not accept the claimant's submission that there was a complete overlap between the first marked point and the claimant's role as archivist. We do not agree that maintaining a legal database is the same as the role of archivist; the former involves proactive professional assessment of resources; the role of archivist suggests maintaining precedents, without legal analysis.

97. The second marked point was 'Deliver and maintain a high quality and professional company secretarial service to the FD and Board'. We accept that the claimant had, in Mrs Czulowski's words, dealt with process and administration of Board Meetings and Board minutes and that she had done that job well for many years. We do not accept that that equated her with a Company Secretary. We find that the advertisement was for a higher skilled professional role than that which the claimant had undertaken. In particular,

the word 'professional' seems to us in context to suggest the qualification which the claimant lacked.

98. The third item marked by the claimant was, 'Co-ordinate board meetings, including documentation and collation and printing of documents if required. Draft meeting minutes, memos and follow up actions as required'. We accept that that comes closest to the claimant's role, although to the extent that she co-ordinated Board meetings, she did so as a matter of process and administration. Mr Welch's comment that it was bizarre to recruit a solicitor to do photocopying was not well made: there might well be instances when a confidential document was to be copied by a senior employee in secure conditions.

99. The fourth and fifth points marked by the claimant related to managing insurance claims and working with the brokers, insurers and insurers lawyers; and compliance related documenting of accidents and incidents.

100. We accept that the task of liaison with insurers had been part of the claimant's work. It was agreed that much of that work had fallen away due to insurers having enabled online access. We do not accept the ready equation between this role and the claimant's role of managing claims. We return to Mrs Czulowski's distinction: the claimant's liaison with insurers and brokers was to do with process and administration. The tasks to be done by the Paralegal involved policy and decision making, including (as the claimant did not have) authority to negotiate and resolve claims.

101. Taking the document as a whole, the claimant did not appreciate at the time that the totally legal version differed from the company's version, and it is perhaps unhelpful to speculate on whether this case would have proceeded as it did had she seen that the opening words of the requirement were for a qualified lawyer. Swathes of the job were plainly outside the claimant's role or capability. We accept that the Paralegal role had some areas of functional overlap with the work done by the claimant. We do not agree that the advertisement was of her job or even of a large share of it. We do agree that there was overlap, and that to the extent that that would lead to a portion of her work being absorbed by the Paralegal, her utilisation would decrease. Our over view is that the claimant's job was being broken in two: less skilled work had been devolved downwards to staff by the insurer's use of direct online reporting; those of her tasks which demanded more skill were now to be absorbed upwards into a more senior professional role.

102. We accept that the claimant was upset to read the posting. Her response to it was emotional, and we could not see a point at which she moved to a more reflective analysis of both her role, and where it stood in the developing changes within the respondent. We accept that she was upset, at least in part, because the job had been created and advertised without any discussion with her. She said in evidence that reading the advertisement was the point when she lost all remaining trust in her management.

103. At the end of the same day, 27 October, the claimant wrote to Mr Beattie to express a number of concerns. He replied, telling the claimant that he was on leave, and arranged to meet to discuss her email after his return. He set the meeting for 9 November (217-220).

104. On 6 November the claimant wrote to Mr Paul Mancktelow of HR to put in a Stage 2 grievance against Mr Beattie; in the Company's procedures Stage 1 was informal resolution and Stage 2 was formal.

105. The bundle contained the claimant's note of the telephone conversation which the claimant had the same day with Mr Mancktelow. We take it as another indication of undermanagement within HR that faced with a formal written grievance from a distressed employee of over 26 years' service, Mr Mancktelow seems neither to have made a note of the conversation, or to have confirmed it to the claimant in writing, or to have advised Mr Beattie about its meaning and effect. The note contains the seeds of its own misunderstanding:

> "Paul thought that an informal approach could help and recommended that I attend the meeting on 9 November."

106. We find that Mr Mancktelow thought that by agreeing to meet Mr Beattie on 9 November the claimant was agreeing to Stage 1 informal resolution. Mr Welch suggested that the meeting on 9 November was in fact a purported grievance meeting. There was no reasonable basis for the claimant to believe that, as we are confident that both she and Mr Beattie understood that it could not be the grievance meeting as it was a meeting with the person grieved against. If Mr Mancktelow thought that the claimant's attendance with Mr Beattie on 9 November meant that the written grievance need not progress, he should have written to her to say so. Equally, it was open to the claimant, after 9 November, to write to Mr Mancktelow to confirm formally that she wished to proceed to Stage 2.

107. There was a meeting on 9 November between the claimant and Mr Beattie and Mrs Czulowski. The claimant had a Unison representative with her. Mr Beattie's note of the meeting was available (214). We repeat our earlier observation about the absence of an HR contribution to the meeting. There was discussion of the Paralegal recruitment, the absence of a work diary which had been raised on 7 July, and the claimant's concerns about tasks which she identified as having been taken from her. The managers drew to the claimant's attention what they considered to be shortcomings and mistakes, including the confrontational tone of some of her emails. We agree with Mr Welch's observation that it was not necessarily good practice to have introduced performance concerns into a meeting triggered by a grievance.

Late in the meeting the claimant, in the wording of her note (emphases added, 212), 'made you aware that I am already on medication for hypertension' and Mr Beattie replied that 'it was the first time he had heard' about it. The underlined wording was important and self-explanatory. The meeting was left on an uncertain basis, that everyone would reflect on the next step.

108. In the course of November there were discussions between Mr Beattie, Mrs Czulowski and the Managing Director, Mr Sharpe. As the managers saw it, the claimant had over two years become even less utilised than before. She had accepted one new additional responsibility in early 2016 and none since. She had not produced a work diary. She was seen as having given good and lengthy service, and had worked with all Board members over a period of years, so enjoyed the strength of those working relationships. She had mentioned the effect of stress on her health, and she was, in November 2017, aged 62.

109. Mrs Czulowski with Mr Sharpe's support agreed to put to the claimant the offer of an early retirement package as an alternative to any other form of management action. We do not fault her in the slightest for seeking to resolve matters with the claimant through informal conciliation. When in evidence she spoke of a 'dignified' resolution, we understood her to mean an amicable separation, without the stresses of a possible conflict. However, the decision to proceed in that way meant that there was never a formal, written analysis of the respondent's case on redundancy.

110. Slightly out of order, and only because it is a pleaded point on age discrimination, we deal with the bonus distribution in February 2018. As we have found at #60 above, the claimant was a member of the discretionary bonus scheme. In February 2018, she was notified that she was not to receive a scheme bonus (188). We accept Mrs Czulowski's explanation in evidence for the reasons why not: in her judgment, the claimant's performance in 2017 did not justify a bonus. The claimant had remained under utilised, and had failed to take up any opportunity of remedying the position; she was also seen to have made a number of mistakes in the course of her work.

111. It was common ground that the claimant and Mrs Czulowski had a conversation protected by ERA s.111A on 26 January 2018 and that after that there were negotiations between representatives, on the principles and detail of severance. Privilege had been waived in all of those items, all of which were in the bundle.

112. It is not necessary for us to rehearse any detail. On Sunday 4 March 2018, the claimant wrote to her then representative, Mr Williams of Unison (181) to the effect that she would go to work the next day for handover, and that she expected her last day of service to be Tuesday 6 March. We heard no evidence about the mechanics of her handover. On 6 March the claimant sent emails to a number of colleagues, and to outside contacts at the

insurance brokers and NLWA, all starting, "Today is my last day at LondonEnergy" and all written in amicable terms (173). She then left. Mrs Czulowski gave evidence that after 6 March, she distributed the claimant's responsibilities, absorbing much of the claimant's work herself, and found that there was little to distribute, and that it was a relatively quick and easy task to do so. Negotiations about terms of settlement continued after 6 March, with the mutual expectation that the compromise agreement would confirm 6 March as the final day of service.

113. Mrs Czulowski sent the claimant flowers and chocolates as a leaving gift. They were delivered to the claimant's home, and the claimant sent them back. That small act seemed to us a powerful indication of her mindset at that time, and she perhaps was not aware of the impact of rejection of a gift.

114. The tribunal asked Mr Welch to clarify the claimant's status in the period between 6 and 26 March. The tribunal understood (wrongly) that she was using untaken annual leave. Mr Welch took instructions, and the claimant confirmed that she had been on holiday. That was wrong. She was not on annual leave. She was later paid in lieu of her untaken holiday. After 6 March the claimant was absent from work by consent because both sides thought that her employment would in due course be agreed to have ended on 6 March.

115. In the event, agreement was not achieved on the terms of settlement, and on 22 March her then new solicitor, Mr Compton, wrote to Mr Mancktelow, and included the sentence (134),

> "Please confirm that our client is and remains employed with your company. If not, please give particulars as to when and how the employment relationship was terminated."

That was a clever and opportunistic piece of writing, which recognised the possibility of a tactical advantage to be gained. The advantage was that if terms of severance could not be agreed, the onus reverted to the respondent to terminate the claimant's employment fairly, a process which it had never triggered.

116. While the bundle contained correspondence between the parties during the negotiation period, as well as some letters of advice sent to the claimant by Mr Williams of Unison, we make no finding about the detail of the negotiation, or whether it can be said that the failure to agree was the fault of one side or the other. We can say that Mr Williams strongly advised the claimant to accept the terms which she had been offered (eg on 1 March, 182), and that he attempted to reassure her that her concerns about taxation were unlikely to arise in practice. (The claimant was to receive a tax-free sum of less than

£30,000, with an employee's indemnity in the event of the respondent being found liable for tax on any part of the lump sum. On 22 March Mr Williams advised the claimant that these terms were normal, and that there was 'very little chance of you being asked to pay tax' (135). From our experience of such settlements, we agree with both of those observations).

117. We find nevertheless that the claimant was then, and remains, convinced that the offer made to her was unacceptable, and that the wording of the offer, and the course of the negotiations, added to her sense of anger and grievance.

118. A deadline for signature was set by the respondent for the following afternoon. By the afternoon of that day, Friday 23 March, Mr Mancktelow knew that it had been missed (125). He certainly knew that agreement had not been reached. We take it that it was on his instruction that an "at risk" letter was then prepared. We accept that the breakdown in negotiation was not communicated to Mr Beattie or Mrs Czulowski. They both gave evidence that they were surprised when the claimant arrived at work on Monday 26 March.

119. Neither Mr Beattie nor Mrs Czulowski was expecting the claimant to return to work, and both were taken aback when she did so on 26 March. She had a meeting with Mr Mancktelow at which she was handed the "at risk" letter dated the previous Friday (123) and suspended. She attended a redundancy meeting with Ms Moreno on 28 March (115). The claimant was unaccompanied. Ms Moreno was accompanied by Mr Diep, the Paralegal, as note taker. Mr Diep's notes suggest an unstructured meeting, into which the claimant sought to introduce a range of the issues which had arisen over the previous two years or so. By letter the same day, the claimant was dismissed for redundancy with effect from 31 March; the letter containing accurate calculations of all sums due including a statutory redundancy payment (114).

120. The dismissal letter advised the claimant of her right of appeal, which she did not exercise. She did however write at length to Mr Mancktelow (109), who was then on leave. He replied on 19 April (107). His letter should be read in full: it was the first, and only, written overview of the events which had led to the claimant's redundancy, and therefore of the case which the respondent defended at this hearing.

Discussion

121. This was primarily a claim for unfair dismissal.

122. Our first task is to ask what was the reason for dismissal, namely the operative consideration in the mind of the dismissing officer. We find that it was redundancy, namely that the respondent's requirements for work of the

particular kind undertaken by Assistant Company Secretary had with the passage of time diminished and then ceased. We find that this took place over a period of time with in effect the reduction in work of the kind involved in dealing with insurance through external factors referred to above; and the distribution of Company secretarial functions to Mrs Czulowski, Mr Diep and others through professionalisation of the tasks of Assistant Company Secretary.

123. We add for the sake of completeness that at the end of evidence the Judge asked both representatives to address an alternative analysis. That was the question of whether the tribunal had open to it on evidence the option of concluding that the redundancy process began after 6 March 2018. That was the period when the claimant was no longer at work, and had stated that she would not return. All her tasks were distributed. The Judge's question was whether or not the tribunal could on evidence find that that was a wholly fresh set of events, disregarding those which preceded it. Neither party adopted that suggestion and after deliberation neither do we.

124. Redundancy is a potentially fair reason for dismissal, and we must then consider it through the spectrum of s.98(4) ERA and the procedural requirements of fairness.

125. We find that although there had, over a period, been a number of meetings and conversation with the claimant about her 'underutilisation,' and its consequences, and a prolonged negotiation to achieve compromise, there had never, before 26 March 2018, been any form of consultation in which the claimant had been told in terms that her employment was considered to be at risk, and why, and that the purpose of consultation was to investigate with an open mind the possibilities of saving her employment.

126. We acknowledge that when the claimant returned to work on Monday 26 March, much of the goodwill which she had built up in the company had been dispelled. We acknowledge that her rejection of what the respondent saw as generous early retirement terms was not regarded as sensible, and that there was irritation with how she had conducted the negotiation.

127. However, since the previous Thursday the respondent had been on notice that the claimant had identified the potential strategic point to be made out of the fact that her employment was continuing; and since the following day it had been aware that settlement negotiations had come to an end. The severance negotiations had all been conducted on a without prejudice basis, and the respondent was not to know that privilege in them would be waived. The respondent found itself unexpectedly and belatedly having to address termination of the claimant's employment from the start of the process.

128. The claimant was, on 26 March, an employee approaching 27 completed years' service, without any formal blemish on her record. She faced the loss of her employment through organisational change and economic and technical development. In our judgment she was on 26 March entitled to be treated as an employee entering into a redundancy consultation afresh. She was therefore entitled to be told in writing each of the following. First, to have information about the analysis undertaken by the respondent which had led the respondent to the view that there was a redundancy situation, such as would enable her to represent her own interests by replying. Secondly, she was entitled to be informed of the procedure that was being followed. The respondent conceded that it had no tailored redundancy procedure at that time, and Ms Moreno referred her to what she called (116) "Gov.UK." That was shabby advice from an HR professional to an employee of over 26 years' service. There is, as Mr Welch said, no such website. If Ms Moreno meant Acas guidance, fairness required her to print the procedure being followed, or, at the very least, to refer the claimant to the correctly identified website.

129. Thirdly, the respondent maintained an intranet containing job vacancies. Ms Moreno and the claimant exchanged views on who was responsible for accessing the intranet, obtaining details of current vacancies and printing them. We find that although the claimant did herself no favours when discussing this issue, the obligation to conduct the procedure fairly fell fully on the respondent, and it could and should have produced at least a list of vacancies from the intranet for the claimant to see. Having reviewed the procedure, Mr Mancktelow on 19 April wrote that there were no suitable vacancies at that time. We accept that evidence, although it was unsupported by the relevant documentation. Our acceptance of the evidence does not prevent us from finding that Ms Moreno's failure to do so was a further element in our finding of unfairness.

130. In our judgment, fairness required that the claimant be given all this material and sufficient time to prepare to discuss and answer it, ask questions, have them answered, and for that process to be done with an open mind.

131. We find that the failure to take any of the above steps meant that the claimant was unfairly dismissed. We find that the procedure which took place between 26 and 28 March 2018 did not meet the requirements of fairness.

132. We must then consider in accordance with s.123(1) ERA and the Polkey approach whether process which was fairly conducted in accordance with our above findings would have led to a different outcome. Our primary view is that fair procedure, conducted in accordance with #128 above, would have taken two weeks to complete, but as Sunday 1 April 2018 was Easter Sunday, we add a third week to make allowance for Bank Holiday closure and absences. Our finding therefore is that it would have taken the respondent three weeks to conduct a fair redundancy consultation.

133. Mr Welch cross examined on the issue of whether or not consultation should have taken place with an open mind and before the claimant's redundancy was decided upon. It is a good question in theory, but less good in light of the circumstances which in fact presented on 26 March: the claimant's unequivocal emails of 6 March, which she described as her last day; the distribution of her tasks; her absence pending signature of the compromise agreement; the anger implicit in returning Mrs Czulowski's gift; and her unexpected return. The reality was that consultation began after termination had been decided, and it was in our view sufficient that the respondent kept an open mind to her return to employment in a suitable role.

134. We must next ask what would have happened if the respondent had followed fair process. The tribunal is confident in concluding that had fair procedure been followed, the claimant's employment could not have been saved, and that there is a 100% prospect of her having been fairly dismissed after three weeks. We say so for three main reasons. First, we accept that as Mr Mancktelow later wrote, there was at that time no available alternative employment. The second is that at the end of her evidence the claimant was asked by the tribunal whether, at the meeting with Ms Moreno on 28 March, she actually wanted to go back to her job. Her answer was "I didn't feel I could trust the line management anymore." She added that that had been her feeling since she saw the Paralegal advertisement the previous October. We accept that that was truthful evidence, consistent with the emotion implicit in rejecting Mrs Czulowski's gift. In light of that evidence, we do not accept that it was feasible to manage the claimant's return to work.

135. Finally, we find that in these unusual factual circumstances, the respondent cannot be faulted for taking the claimant at her word on 6 March, and disposing of the remains of her responsibilities. We accept that having done so, Mrs Czulowski's view was that there had been so little to redistribute, and the redistribution had been so quick and easy to implement, that her earlier opinion that the claimant was seriously underutilised had been confirmed.

136. We discount more or less out of hand Mr Welch's suggestion that in order to give full consideration to facilitating the claimant's return, fair redundancy consultation required the respondent to create a bespoke line management arrangement for the claimant which would bypass the line management of both her functional Head of Service and the functional Director, ie Mr Beattie and Mrs Czulowski. That was not reasonable or realistic. It is difficult to envisage how the Assistant Company Secretary could report to anyone other than the Company Secretary.

137. We find therefore that the period for which it is just and equitable to make a compensatory award for unfair dismissal is limited to three weeks.

Discrimination

138. Although this hearing did not in the event proceed as a disability discrimination claim, we repeat that no mention was made of the claimant's health as a factor in any of the evidence before us, save for the late, oblique passing reference at #107 above. The wording of that exchange strongly suggested that health-related issues had played no part whatsoever in the matters which we had to consider.

139. The claimant's case of age discrimination is set out in eight allegations at page 71 of the bundle. We preface our specific findings on the specific allegations with a number of general points.

140. Unlike the position in many other discrimination cases, we heard no evidence of any hostile use of language towards the claimant related to the protected characteristic; or of the patronising language of which we sometimes hear in age discrimination cases. The claimant adduced no evidence of discrimination against other older people. Mr Welch put to the witnesses that they might have thought of the claimant by stereotyping her as someone who was 'stuck in her ways', or 'past her sell by date'. Those were his phrases, which were clear in context. We accept that there was no evidence to support that either phrase represented the mindset of either witness. We do add that there was in fact powerful evidence that the claimant was resistant to change (if that is what is meant by stuck in her ways). One was in her response to the 2017 contract of employment; but much more striking was the claimant's evidence that she had written to the Managing Director, over Mrs Czulowski's head, to query Mrs Czulowski's abolition of the practice of confidential minutes introduced in 2010 by the previous MD. That incident seemed to us considerably revealing of the claimant's aversion to change, as well as of a fundamental disregard of the discipline of line management.

141. We note two strong indications that this was a workplace where age was not a factor which managers took into account. The first was the Company Secretary offer made to the claimant referred to above; and the second was Mrs Czulowski's appointment to a critical post at the age at which she was appointed.

142. We now follow the numbering of paragraph 14 of the list of issues.

143. At 14.1 we accept that the claimant did move desks in early 2016 three times. We accept that the reasons were rebuilding and safety considerations. The rebuilding work affected a number of people and was an operational decision. There was no evidence whatsoever that the claimant's age was a factor.

144. At 14.2 we find that questions raised about the claimant's workload, and under utilisation, were raised by Mr Beattie and Mrs Czulowski for the reasons set out above, and that age played no part whatsoever in the actions of either.

145. We understand issue 14.3 to refer to the events which we have described at #88 above relating to the lease meeting and the Companies House matter. We repeat our findings at #88 above and find that age played no part whatsoever in any of these decisions or points.

146. Issue 14.4 refers to the Paralegal advertisement. The claimant's case was that as Mr Diep was appointed, and was considerably younger than her, there was age discrimination. We disagree. The matter complained of is the advertisement. The advertisement could have led to the appointment of a candidate of any age. There was nothing in it which was age-specific. The advertisement was placed for the reasons which we have found at #91101 above and we find that age played no part whatsoever in the decision to advertise, or in the contents of the advertisement.

147. If the real sting of issue 14.4 is (as was not pleaded) that the job description included some overlap with the claimant's responsibilities, we repeat our findings in particular at #101 above and we find that age played no part whatsoever in the configuration of the role. This was an operational decision to professionalise an area of the respondent's operation.

148. Issue 14.5 has been set out at #105 above. We find that the decision not to proceed with the claimant's grievance was misunderstanding on the part of Mr Mancktelow; his failure to communicate and record his decision and the reasons for it; and the claimant's failure to reopen the matter. There may have been misunderstanding on both parts, but there is no evidence of age discrimination.

149. Issue 14.6 refers to Mr Beattie's discussion of mistakes made by the claimant at the meeting on 9 November 2017, and a reference made by Mrs Czulowski in the protected conversation to the claimant's performance. We understand, having heard the case, that the claimant's pride was hurt by these criticisms. We understand further that the sting of the phrase "without giving her an opportunity to improve" relates to the decision to discuss mistakes and shortcomings outside the framework of performance improvement.

150. We repeat our findings at #83 and #107 above. The choice of which issues to raise at each meeting were discretionary management decisions, and while we agree that they might be faulted on their merits, and that matters could have been handled differently, we can see no evidence that the claimant's age played any part whatsoever in any of them. We add that we find that the

comments and criticisms that were put forward were believed by both managers to be well founded, evidence-based, and were made in good faith without any taint whatsoever of the claimant's age.

151. We accept at issue 14.7 that the claimant was in a wholly discretionary bonus scheme which was not related to individual targets. We accept that for reasons stated at #110 above Mrs Czulowski formed the view in February 2018 that her individual performance did not warrant a bonus. We accept that that was a decision wholly unrelated to age and was related solely to the claimant's continued under-utilisation in 2017, and her failure to respond to requests to change the position.

152. On the final matter, which was the redundancy procedure, we have nothing to add to our discussion above save that the claimant's age played no part whatsoever in any part of the process.

153. Our finding therefore is that the burden of proof does not shift in relation to any of the claimant's age discrimination allegations, but that if it did, we would accept the respondent's explanations.

Remedy

154. We gave oral judgment. After giving judgment, the Judge advised the claimant of her rights under S.112(2) ERA. After an adjournment of about 45 minutes, Mr Welch confirmed that the claimant applied for a reemployment order. The application has been listed by separate order.

155. We were informed that the parties had agreed the calculation of 3 weeks' pay as £1,635.03. Mr Welch stated that the claimant applies for an award for loss of statutory rights of £400.00. Mr Welch informed us that the claimant sought a figure for pension loss.

156. We have made a separate case management order for those matters to be addressed. We do not envisage postponing the remedy hearing until any appeal process has been heard. We do not envisage postponing pending the involvement of the Pensions Ombudsman. The Judge has pointed out that the claimant's period of employment with the respondent was about 1,391 weeks (52 x 26.75 years); and that the period of pension loss is 3 weeks.

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Employment Judge R Lewis

Date: ……1.09.2020……..

Sent to the parties on: .....
14.09.2020
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For the Tribunal Office