EMPLOYMENT TRIBUNALS

Claimant: **Mrs S M Pearson**

Respondent: **AWP Assistance UK Ltd (t/a Allianz Partners)**

Heard by CVP **On:** **10 and 11 November 2020**

Before: **Employment Judge L Burge (sitting alone)**

Representation
For the Claimant: **Mr H Davies, Counsel**
For the Respondent: **Mr M Stephens, Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal is well founded and succeeds;

2. The Claimant is awarded compensation of £17,858.99 to be paid by the Respondent to the Claimant. This award consists of:

    a. Basic award: nil
    b. Compensatory award: £17,858.99

3. The Respondent's application for specific disclosure is denied on the basis of the overriding objective and in particular proportionality.

REASONS

Introduction

1. The Claimant worked as a Senior Solicitor for the Respondent from 18 August 2009 until 31 March 2019 when she was dismissed and paid a redundancy payment.

The hearing

2. The hearing was held by CVP. The Tribunal was provided with an electronic bundle running to 208 pages. Over the course of the hearing a further email was added to

the bundle as page number 209 and a list of the Claimant's job applications was added as page 210.

3. The Tribunal was provided with an extract from Harveys on reorganisations and the authorities of *Hollister v National Farmers' Union [1979]* IRLR 238 and *Whelan and another v Richardson* [1998] IRLR 114 from Mr Davies. Mr Stephens provided the authorities of *Dench v Flynn & Partners* [1998] IRLR 653, *Ging v Ellward Lancs Ltd* [1991] ICR 222, *D N Robinson v British Island Airways Ltd* [1977] IRLR 477 and *Brandeaux Advisers (UK) Ltd v Chadwick* [2011] IRLR 224.

4. Neil Travell (the Claimant's line manager) and Michael Hynd (Proximity Manager for Mr Travell and Chief Finance Officer) gave evidence for the Respondent. The Respondent had also provided the witness statement of Audrey Thomas (HR business Partner) but the Tribunal was informed that she had left the Respondent in October and that she would not be giving evidence. The Claimant gave evidence on her own behalf. Both representatives gave oral closing submissions.

The Issues

5. The parties agreed that the document at pages 26 – 27 of the bundle comprised the issues for the Tribunal to determine, namely:

   Reason for dismissal

   1. What was the reason (or if more than one the principle reason) for dismissal?
      a. The Respondent contends that that the Claimant's dismissal was for a potentially fair reason, namely redundancy or some other substantial reason namely a business reorganisation.
      b. The Claimant disputes that there was either a genuine redundancy situation or another substantial reason of a kind such as to justify the dismissal of the Claimant.

   Fairness

   2. If dismissal was for a potentially fair reason was the Claimant's dismissal unfair within the meaning of s98(4) of the Employment Rights Act 1996? The following matters will be in issue (judged in each case by the standard of whether the Respondent acted within the range of responses open to a reasonable employer):
      a. Should the Respondent have considered appointing an additional solicitor(s) to work with the Claimant rather than to dismiss the Claimant?
      b. Should the Respondent have considered, and did it fail to consider sufficiently or at all and/or to implement a job share with the Claimant for the full time role being proposed?
      c. Did the Respondent fail to consider and/or offer the Claimant any suitable roles that were reasonably available in order to avoid her dismissal?

Facts

6. The Respondent is an assistance company and registered insurance intermediary with the Financial Conduct Authority. It is part of the Allianz Partners Group, which in turn is owned by the Allianz SE Group (headquartered in Munich). In the UK, the Allianz Partners Group includes the Insurer (AWP P&C SA (UK Branch)), which is a branch of the French-registered Insurer. The Legal & Compliance Department is

based in Croydon (where the Claimant worked) and provides a legal and compliance service to both UK entities and an assistance company based in Dublin, equivalent to the one in Croydon, which services the Republic of Ireland.

7. The Respondent employs 600 people (580 full time equivalent positions) 34 of which work part time. In 2018/2019 the Legal & Compliance Department consisted of three lawyers – Neil Travell (the Claimant's manager), the Claimant, Veena Kaur as well as two compliance personnel. In addition, an individual called Adrian Heath sat within the Legal & Compliance Department. He was employed as a contracts lawyer to cover a period of maternity leave for the Mobile & Digital Data Risks ("MDDR") part of the business.

8. The Claimant was experienced, she qualified as a solicitor in 1987. She joined the Respondent on 18 August 2009 and worked 3 days per week as a Senior Solicitor under a written contract of employment. In that contract it stated that the Claimant worked 21 hours per week, Monday – Wednesday and that she "may be required to work over her set hours" with "no entitlement to payment of overtime". The Claimant mainly drafted and negotiated insurance related contracts but her work also giving legal advice, data protection, IT and regulatory issues. Her colleague, Ms Kaur was also employed as a Senior Solicitor working 3 days per week (Monday – Wednesday) and also gave legal advice, worked on contractual/commercial matters, data protection and undertook the litigation. Mr Travell managed the team and did a broad range of legal work. The Claimant was happy in her role, she enjoyed the work and got on well with her colleagues. Mr Travell gave evidence to the Tribunal that the Claimant performed well and had achieved bonuses. Mr Hynd also confirmed that there was no concern about the quality of the Claimant's work.

9. The Claimant was paid £57,500 (FTE) per annum while her colleague Ms Kaur was paid £47,000 (FTE) per annum. They were of similar years' experience. Mr Heath, however, was paid £75,000 per annum. The Respondent's explanation for this difference was that Mr Heath was working for the business handled out of Ireland and, due to difficulties in securing contract lawyers in the Irish market, the UK business agreed to employ Mr Heath but that his salary and benefits had been negotiated and agreed by the MDDR business.

10. In mid-2017 the Claimant's manager Karen Perry was replaced by Mr Travell and the Claimant started regularly (but not every week) working a four day week to work on a new multi million-pound contract with Lloyds Home Emergency. Mr Travell and Mr Hynd agreed that the Claimant would be paid for the extra day when she worked it. The Claimant worked hard and enjoyed working on the Lloyds contract. There is no dispute that it was agreed between the parties that she would be working extra days to service the Lloyds contract and that she was in fact paid for those additional days.

11. In October 2017 Mr Travell tried to encourage the Claimant and Ms Kaur to increase their working days to four days per week. They were both open to the idea but asked for a salary increase to what they considered to be market rate. The Claimant had undertaken legal research and her view was that market rate for a Senior Solicitor in Croydon was between £65,000 - £80,000. The evidence she gave, which the Tribunal accepts, was that she suggested £75,000 with the expectation that there would be a negotiation and they would end up agreeing at between £65,000 - £70,000 (FTE).

12. In November 2017 the Claimant had a meeting with Mr Travell, her contemporaneous handwritten note appearing at page 93O of the bundle. The note detailed, and the Claimant's oral evidence confirmed, that at the meeting Mr Travell said that Mr Hynd had decided that the Claimant should not get a pay rise, that Mr Hynd and Maureen Stapley (Director of HR) considered there to be a lack of commitment by the whole of the legal and compliance team. Mr Travell also said that he considered that both the Claimant and Ms Kaur were paid below the market rate and that he was surprised by what the Claimant earned. He told her that Mr Heath's pay was what she had asked for (£75,000). Mr Travell said that Mr Hynd wanted something in return - if she agreed to be the legal lead in the GDPR project she could get a bonus and that they might consider a pay review if she performed well. In his evidence Mr Travell denied telling the Claimant what Mr Heath's pay was. The Tribunal prefers the Claimant's evidence. She was a credible witness, she was frank with the Tribunal and the Tribunal believed her. The Claimant gave evidence that she felt stupid and she was shocked that Mr Heath was getting paid so much more than her. She was also shocked that it was considered that the team were not committed when they were working so hard. Nevertheless she went back to Mr Travell and said that if they gave her the pay rise she was requesting she would undertake the GDPR project. The response to the Claimant's pay request came a month later in a two line email saying that Mr Travell had had a discussion with Mr Hynd and "it wasn't something he wanted to agree to" (page 203).

13. Mr Travell had recognised that the work coming into the department had increased, in a large part due to GDPR implementation, the EU Insurance Distribution Directive and Brexit. In early March 2018 Mr Travell and Mr Hynd exchanged management emails. Of particular relevance is the following exchange between Mr Hynd and Mr Travell on 2 March 2018 (pages 93A and 93B)*:*

> "in legal I do think 2 part timers doesn't work for you.
> Also the idea that everything is on top effort requiring overtime is something I don't like and doesn't show commitment. *Agreed*.
> …
> The cost position is secondary I would say to ensure we have the proper support for the business.
> …
> I don't like the ransom attitude of it I work an extra day my global value per day increases – it does not. The question is whether [the Claimant] or [Ms Kaur] are worth market rate? *I am not sure they are really – not without an acceptance that they need to work longer hours without any overtime"*
> [*quotes from Mr Travell in italics*]

14. The Tribunal finds as a fact that the Respondent never told the Claimant that they did not think that she should be paid overtime for the extra days worked nor was she told that it was their view that she should be working longer hours. Both of the Respondent's witnesses gave the impression that the Claimant did not work over her contracted hours for the business. The Claimant's evidence was that she did take work home on an evening/weekend. No documentation was provided to substantiate either view but the Tribunal does not believe that this matters - it is common ground that the Claimant cancelled leave over Christmas in order to work on some important contracts and also that she worked extra days on the important Lloyds contract. That was not enough to demonstrate commitment for Mr Travell or Mr Hynd, although they did not share this view with her until disclosing the above email as part of this litigation and when writing their witness statements.

15. The Claimant continued working hard and a performance review took place in mid-2018 which was positive. Members of the team now had to complete a worksheet setting out what work they were doing and Mr Travell wanted members of the team to work in all areas so as to provide a better service to customers. The Claimant's evidence was that she would have been happy to take on additional work but she was already so busy, she would not be able to fit it into her three days. When the need for increased legal support was spoken about at meetings she assumed they would recruit another lawyer to address the issue.

16. In the Respondent's witness statements and evidence it was stated that there were problems covering the Claimant's work on a Thursday and Friday and having to update the Claimant on a Monday. However, the Claimant had no recollection of her absence on Thursday and Fridays ever being raised with her and the Respondent provided no documentary evidence to show that any problems arose or that they had reported them to her. The Claimant was a credible witness with good recollection, the Tribunal prefers her evidence. The Tribunal therefore concludes that the Claimant's absence on a Thursday and Friday did not cause any issues over and above those of a colleague being absent for other reasons such as holiday, other work, sickness absences etc. Mr Travell says that he did not consider asking the Claimant or Ms Kaur to swap their days (so one worked Monday to Wednesday and the other worked Wednesday to Friday for example) because it stated Monday – Wednesday in the Claimant and Ms Kaur's contract. The Tribunal does not find this credible, particularly as he was an experienced commercial lawyer. The Claimant's evidence is that she would have swapped her days had she been asked.

17. In his witness statement Mr Travell stated:

    "*I was keen to have the new legal/compliance function carried out by two fulltime lawyers reporting to me (rather than, say, one full-time and two part-time lawyers). If we simply recruited an additional lawyer on 0.8FTE (i.e. four days per week), this would not solve the continuity issue. I had identified a need for approximately 0.3FTE compliance work which would predominantly take some of my internal group compliance work from me.*

    I wanted to avoid this being diluted across a number of part-time lawyers, considering that a more robust compliance function would be delivered by having a full-time combined legal and compliance role at a relatively senior level."

18. By September 2018, Mr Travell put together a business case together for a restructure of the Department. He drafted job descriptions for the new roles and requested some salary benchmarking for the new role. He emailed Bobby Mudhar (Talent Acquisition Business Partner) on 17 September 2018 and provided him with a draft Job Description for a senior legal and compliance lawyer. Mr Mudhar reverted with salary ranges provided by the recruitment agencies who had been previously used by the Respondent to recruit employees. The pay for a Senior Lawyer would be approximately £95,000 and a newly qualified lawyer would be approximately £45,000. The Respondent did not want to pay these amounts.

19. On 22 January 2019 the Claimant and Ms Kaur had a meeting with Mr Travell and Ms Thomas who advised that due to the increased work and a necessity to support the business, their roles were no longer required, there would be two new full time

positions and that the Claimant and Ms Kaur could apply for the new full time roles or be made redundant. The two new full time positions would be a senior legal and compliance role paying £60,000 per annum and a junior commercial lawyer role paying £30,000 per annum. Mr Travell said that they should make any suggestions that could avoid the potential redundancies and did mention that they might wish to propose a job share between the two of them. This was deemed to be the first consultation meeting. This meeting came as a shock to the Claimant and Ms Kaur. The Claimant received a letter of same date from Mr Travell confirming the meeting, setting out the consultation process, the job descriptions of the two new roles and provided prospective figures for redundancy (pages 108 - 118). The Claimant was told that if she wanted to apply for either of the new roles she should do so within a week.

20. A meeting took place with Ms Thomas, the Claimant and Ms Kaur 6 days later on 28 January 2019. The Claimant and had prepared some questions to be discussed during that meeting. At that meeting the Claimant says that Ms Thomas immediately told them that a job share working 2.5 days each in the senior role would not be acceptable to the Respondent. According to the Claimant she went on to say that "clearly Neil [Travell] wanted [the Claimant] to leave, and that [the Claimant] was probably better off leaving the Company". Mr Travell, in evidence, denied that Ms Thomas would have said either of these things as he had not said those things to her. As explained above Ms Thomas was due to give evidence but did not do so having left the Respondent suddenly last month. The only other person present was Ms Kaur who is still working for the Respondent yet the Respondent did not ask her to provide evidence to this Tribunal. The Tribunal prefers the Claimant's version of events, she was at the meeting and she was credible. The Tribunal finds as a fact that at the meeting on 28 January 2019 the Claimant was told that the Respondent would not consider a job share and that Mr Travell wanted her to leave.

21. The answers to the Claimant's questions came back from Mr Travell on 30 January 2019. Of particular note is that the Claimant reminded the Respondent of her and Ms Kaur's offer to work 4 days per week each and the Respondent's confirmation that this was declined by the Respondent because it would be accompanied with a pay rise. Further, in response to the Claimant's question "how can an increase in workload be consistent with a redundancy situation and why pick on part time employees?", the response was that the business had an increase in work load that it was the current legal roles that were affected. To the question of why the decision had been taken to get rid of two part time roles and replace them with full time positions the answer was that two new full time roles were needed to complete the level of work involved and meeting business requirements/needs. This accords with the Claimant's evidence, and the Tribunal finds as a fact, that the Claimant was never told that there was an issue that both part timers worked Monday – Wednesday and that therefore there was no coverage on a Thursday or Friday.

22. On 4 February 2019 the Claimant wrote to confirm that she did not agree with some of the points but that she saw little point in engaging. She also confirmed that she did not wish to apply for either of the new legal roles (pages 142-143). Ms Kaur also emailed on 4 February 2019 (page 205) saying that she felt that "overall, this situation has been poorly handled. I would have thought that as my manager, Neil would have discussed this with me first before going down the redundancy route. I do not agree with some of the answers to the points raised in our meeting with Audrey. Between [the Claimant] and I, we have coped with the increased legal workload despite only working 3 days a week. I would not have been able to take

on any other compliance or company secretarial workload without working an extra day that I had previously proposed on several occasions and which I have never received a response."

23. The Respondent sent the Claimant other vacancies at the Respondent. In evidence Mr Travell confirmed, and the Tribunal finds as a fact, that these roles were not suitable for someone with the Claimant's profession and skills.

24. The Claimant was given the opportunity to appeal the decision but did not do so. The Claimant's evidence was that as it had been made clear that Mr Travell did not want her in the organisation there was no point in appealing.

25. Later in February Ms Kaur did however apply for and obtain the full time Senior role. Mr Travell gave evidence that subsequently the Respondent could not find any junior commercial lawyers willing to work for £30,000 (the 5 interviewed candidates all requesting in excess of £45,000) and so ultimately two full time senior solicitors were recruited (one of which was Ms Kaur). The two full time senior solicitors are still employed at the Respondent and are paid a salary of £65,000 per annum. Mr Travell also gave evidence that in relation to the work that she had less experience of which she now undertakes as part of her full time role, Ms Kaur upskilled and continues to perform well. The Tribunal finds as a fact that that the Claimant was likely to have similarly done so had she applied for and got the role.

26. A meeting took place on 6 March 2019 informing the Claimant of the outcome of the consultation process and informing the Claimant that her employment would terminate on 31 March 2019. She was paid 9 weeks in lieu of notice. The Claimant received £6858 as statutory redundancy pay and an ex gratia payment of £2980 from the Respondent.

27. The Claimant applied for approximately 145 jobs before she commenced work in her current job on 6 January 2020 where she is paid £68,000 for working a 4 day week (£85,000 FTE).

Law

28. Section 94 of the Employment Rights Act ("ERA") states that an employee has the right not to be unfairly dismissed by his employer.

29. Section 98 ERA states:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection ***(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held***

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) ***is that the employee was redundant, or***

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment..

…

(4) ***Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case

[Tribunal's emphasis]

30. Section 139 ERA states:

(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.

31. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied. The helpful test is the range or band of reasonable responses, a test which originated in the misconduct case of *British Home Stores v Burchell* [1980] ICR 303, but which has been subsequently approved in a number of decisions of the Court of Appeal. An approach based on the "Burchell test" can be useful in cases other than conduct cases, albeit that the focus must always be on the statutory wording.

32. The manner in which the employer handled the dismissal is important in considering whether the Respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e. within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

33. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer.

34. The case of *Gwynedd Council v Shelley Barratt & other Respondents* [2020] UKEAT UKEAT/0206/18/VP involved the dismissal of the Claimants for redundancy following the closure of the school where they worked. They were unsuccessful in applying for positions at a new school that opened at the same location. The Tribunal held that the dismissals were unfair because of the failure to provide the Claimants with a right of appeal, the absence of consultation and because of the manner in which they were required to "apply for their own jobs".

35. S.123(1) of the ERA provides that the compensatory award shall be 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal'.

Conclusions

What was the potentially fair reason for dismissal?

36. It is the job of this Tribunal to determine what the reason for dismissal was or, in other words, what was at the forefront of the employer's mind? The only potentially relevant part of s.139 ERA in relation to redundancy is (1)(b)(i) "the fact that the requirements of that business for employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish". Looking at the facts of this case in conjunction with the wording of the statute, it cannot be said that the requirements of the Respondent for employees to carry out work of a particular kind had ceased or diminished. There was more work to be done, including the work that was already carried out by the Claimant. Mr Stephens says, relying on the case of *Robinson*, that as long as you can point to a difference in work it can be a redundancy situation. That may be so in other situations but this Tribunal cannot reconcile the wording of the statute with the facts of this case and finds that the reason for dismissal was not redundancy.

37. Was the reason for dismissal "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" in accordance with s.98(1)(b)? In *Hollister v National Farmers' Union*, the Court of Appeal said that a 'sound, good business reason' for reorganisation was sufficient. It is not a matter for this Tribunal to determine as to whether or not it is a sound good business reason, but one for management (*Scott and Co v Richardson*). The evidence in this case shows that there was too much legal work for Mr Travell, the Claimant and Ms Kaur to undertake. At the forefront of the employer's mind was the need for an increased legal resource to undertake the increased workload in order to provide proper support for the business. This was an "other substantial reason" and thus a potentially fair reason.

Was the dismissal fair/unfair (having regard to the reason shown by the employer) (s.98(4)) ERA?

38. The answer to this question will depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the Respondent acted reasonably/unreasonably in treating it as a sufficient reason for dismissing the employee, and is to be determined in accordance with equity and the substantial merits of the case. The Tribunal reminds itself that it should not determine what it would have done had it been in the employer's shoes.

39. Having decided that there was a need for an increased legal resource to undertake the increased workload in order to provide proper support for the business, the Respondent was blinkered in how this requirement could be achieved despite knowing that for personal reasons the well-performing Claimant did not want a full time role. Even though Mr Travell had mentioned a job share in the 22 January meeting, on 28 January it was confirmed that a 2 ½ day each job share was not acceptable to the Respondent. The Respondent did not consider alternative ways of achieving the desired outcome such as recruiting a third lawyer to work in conjunction with the Claimant/Ms Kaur and/or altering their hours so they worked

across the week. The Respondent did not want to explore a job share and did not want to discuss an increase in working days to 4. It had ruled this out without discussion when the Claimant/Ms Kaur had requested a salary increase to accompany the working day increase despite acknowledging that the two part timers were paid significantly under market rate and in the knowledge that a male full timer had been paid at market rate. While finances were an issue in so far as not wanting to approve unnecessary increased costs for the business, the Respondent's position was encapsulated in the email fully quoted above dated 2 March 2018: "the cost position is secondary I would say to ensure we have the proper support for the business".

40. The so called "consultation" was anything but. The Claimant, having been told that there was a need for increased legal support in order to provide proper support for the business was also told that there were to be two new full time roles, that if she did not apply she would be redundant, and that that the Respondent would not consider a job share with Ms Kaur working 2 ½ days each. She effectively had two options – apply for the full time role or be made redundant.

41. The agreed list issues in relation to fairness stated that in order to have a fair procedure as required by s.98(4), the Respondent should have actively considered the following to explore whether dismissal could be avoided:

    a. … appointing an additional solicitor(s) to work with the Claimant rather than to dismiss the Claimant
    b. … implement a job share with the Claimant for the full time role being proposed
    c. … offer the Claimant any suitable roles that were reasonably available in order to avoid her dismissal.

42. These were some of a number of alternatives that could have been explored by the Respondent in order to see whether dismissal could be avoided. Another significant element of unfairness was that the Respondent failed to articulate its concerns to the Claimant – she was not told that they thought she was not committed because she was paid overtime for working an extra day a week on an important contract. She also did not know that they had an issue with Thursdays and Fridays not being covered. Had they acted reasonably and disclosed these reasons to her she could have entered into meaningful dialogue with them and may have been able make suggestions such as working different days to Ms Kaur, both working 4 days per week, explaining the benefits to them of retaining her experience, held further salary discussions and explaining how she could make a job share work in respect of the management of a junior solicitor.

43. In *Gwynedd* the Employment Appeal Tribunal considered the relevance of consultation in situations where a traditional redundancy procedure was in place, and where employees had to apply for their own jobs in order to avoid dismissal. The EAT stated:

> "The fact that the redeployment decisions were to be taken by way of a recruitment exercise conducted by the Governing Body of School 2, rather than the Respondent, does not necessarily mean that consultation is rendered irrelevant. We do not think that the decision in **Morgan** established any principle of law suggesting otherwise. The claimant in that case had contended that there was a failure to apply the third and fourth factors in **Williams**, namely, the establishment of objective criteria for selection and the application of those criteria. The EAT held that the **Williams** factors did not address the situation in **Morgan**, where there was a reorganisation of two roles down to one new role and an interview

> process to determine the successful candidate. The "*forward-looking*" nature of the recruitment exercise led the EAT to conclude that, "*whereas Williams-type selection will involve consultation and a meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process*" (emphasis added): per HHJ Richardson at [30]. The EAT did not thereby suggest that consultation can never be relevant in such an exercise. In our judgment, consultation may remain relevant. Whether or not that is so in any particular case is a matter for the Tribunal, as the arbiter of compliance with s.98(4) of the 1996 Act, to determine. In the present case, there was, as the Tribunal found, no consultation at all, merely the communication of decisions made. Clearly, the Tribunal considered that there were matters about which the Claimants could have been consulted, including the adoption of a procedure involving the dismissal of staff at affected schools and the process of recruitment to the new schools." [para 71]

Gwynedd was a case involving redundancy dismissals whereas this case is a dismissal for SOSR. Also, the replacement jobs that the Claimant (and Ms Kaur) had to apply for were different to their own jobs (the new jobs were full time, they would cover a broader area of commercial legal work and they were supposed to manage a junior lawyer). In *Gwynedd*, as this Tribunal also finds in the present case, the consultation process amounted to "the communication of decisions made" rather than a process designed to see if dismissal can be avoided, an approach that no reasonable employer would take. The fact that this is a dismissal for SOSR does not mean that the employer has any less responsibility to adopt a fair process. The Respondent did not attempt to have any meaningful discussion as to how a dismissal could be avoided. It is this Tribunal's view that the Respondent acted unreasonably in treating the reorganisation as a sufficient reason for dismissal in all the circumstances. It did not follow that the reoganisation (the need for an increased legal resource to undertake increased workload in order to provide proper support for the business) meant the inevitable dismissal of the Claimant and Ms Kaur. The Claimant had worked for the Respondent for almost 10 years. By the time she left she had over 30 years' experience. She enjoyed her job and she performed well. The Respondent should have been able to put in place a fair procedure to properly consider the implications of the reorganisation on the Claimant – it employed 600 people and had at least two human resources professionals working for it at the time. The employer's actions were outside of the band of reasonable responses – no reasonable employer would have conducted the reorganisation process in this way. This renders the dismissal substantively unfair. The Respondent followed a redundancy process that was predicated on work of a particular kind not continuing which was not in fact correct. For this reason and the reasons above relating to the intransigent attitude of the Respondent in the "consultation", the dismissal was also procedurally unfair.

44. The process was so flawed so as to render an appeal pointless. However, appeals are part of these sort of processes for a very good reason - in not appealing the Claimant was denied the opportunity to have an independent person consider alternatives to dismissal and enter into proper consultation with her. We know, however, that the appeal manager was to be Mr Hyde and we also know from his email his views on having two part time employees in the department. It is highly unlikely he would have done anything other than rubberstamp the decision.

Remedy

45. Had the Respondent acted reasonably and adopted a fair procedure, how likely is it that the employee would have been dismissed? Ms Thomas told the Claimant that Mr Travell wanted her to leave. Even if the Respondent had undertaken a proper process and appropriately considered alternatives, it is clear that the

Respondent was entrenched in its view – they would not consider anything other than replacing the two part time employees with two full time employees. The evidence given by Mr Travell shed some light on why he formed this view. He gave evidence that he doubted a job share could effectively manage a junior employee, in his witness statement he says "[h]ad we retained Sandra and Veena in part-time roles, the supervision of the proposed junior solicitor would have had to be split between them which was less than ideal". He also says in his witness statement:

> "If we had retained Sandra and Veena in their existing roles, we would have had to look for 0.8 FTE junior solicitor. I was pretty confident that this would be a difficult ask as solicitors at that stage of their careers, are not keen to work part-time."

No evidence was put forward to show that any enquiries had been made to back up his views. As Mr Davies stated, law firms and companies across the country employ functioning part-timers where a series of practices are in place to ensure that the roles and supervision are carried out effectively. Whether, having heard all his concerns at the time, the Claimant could have convinced Mr Travell that there could be workable alternatives is highly speculative.

46. The case of *Polkey v AE Dayton Service Ltd* [1988) ICR 142 enables the tribunal to consider whether, if a fair procedure had been adopted by the respondent, there was a chance that the claimant would still have been dismissed and an appropriate deduction can then be made to the basic and/or compensatory award. In this case the Respondent had a substantially fair reason for reorganising the workforce but the processes by which they decided to dismiss the Claimant were inherently flawed so as to be unfair by virtue of s.98(4). Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to formulate the hypothetical question of what would be the percentage chance the employee had of still been dismissed even if the correct procedure had been followed (*Davidson v Industrial & Marine Engineering Services Ltd* EATS/0071/2003). That is the case here. If the Respondent had followed a fair procedure there are a number of outcomes that are possible and it is impossible to formulate the hypothetical question of what the chances would have been had the dismissal been fair. For these reasons no *Polkey* deduction is made.

47. Mr Stephens reminded the Tribunal that the general rule is that the Claimant's new earnings should be offset against the overall losses incurred (*Ging v Ellward Lancs Ltd* 1991 ICR 222, EAT). This means that where an employee obtains higher paid employment this will have the effect of reducing the amount of compensation payable by the respondent employer. However, s.123(1) ERA requires tribunals to award such sums as they consider just and equitable. In the case of *Lytlarch Ltd v Reid* 1991 ICR 216, the Employment Appeal Tribunal, while acknowledging the general rule in *Ging*, said that the rule may not necessarily apply where there is a long delay between dismissal and the compensation hearing. Further, in *Fentiman v Fluid Engineering Products Ltd* 1991 ICR 570, the Employment Appeal Tribunal added that the *Ging* method of calculation would not necessarily be appropriate in circumstances where new earnings are considerably higher than the old and where a significant period of time had passed between the employee starting the new job and the date of the tribunal's assessment of compensation. In that case a period of 39 weeks in the new job was considered to be sufficiently 'permanent' to justify limiting the assessment of the claimant's compensation to the date when he started the new job. In this case, the Claimant was dismissed some 84 weeks prior to the date of the hearing. She commenced work in her new role on 6 January 2020 and some 44 weeks have elapsed since that date. This Tribunal similarly considers that

it is just and equitable to limit the assessment to the date when she started her new role, ie to 6 January 2020. As such no deductions are to be made on account of the Claimant's earnings from her new employment.

48. The burden of proof is on the Respondent to show that the Claimant acted unreasonably in not mitigating her loss. The Respondent has not discharged that burden. The Claimant applied for 145 jobs and commenced her new role within 10 months. The Tribunal's view is that this is entirely reasonable.

49. Mr Stephens raised in cross-examination and closing submissions that any compensation to the Claimant should be reduced because of the alleged serious misconduct that took place post termination. He says that there were confidential emails that the Claimant had taken home in contravention of the section concerning confidential information in the Claimant's contract of employment. The Claimant's evidence was that once the Respondent had brought their concerns to her attention she either returned or destroyed the emails. The allegations were not contained in the pleadings, nor were they the subject of an application before the Tribunal, copies of the emails were not part of the bundle and the allegations had not been included in the Respondent's counter-schedule which was given to the Tribunal on the first day of the hearing. In these circumstances, the Tribunal is not satisfied that any misconduct has taken place and declines to make a reduction of the compensatory award on this basis.

50. The Claimant receives nil as a basic award as she has already received £6858 redundancy pay.

51. The Tribunal awards £500 for loss of statutory rights, this was the amount claimed in the Claimant's Schedule of Loss and the Respondent's counter-schedule agreed was a reasonable figure.

52. The recoupment provisions do not apply because the Claimant did not receive any relevant benefits during the prescribed period from the effective date of termination until she secured alternative employment.

53. The Claimant is to receive £17,858.99 in relation to the compensatory award:

Loss of basic salary to the date of commencement of alternative employment	£16,840.60
Loss of pension benefit to date of commencement of new employment	£3498.39
Loss of statutory rights	£500.00
LESS ex gratia payment	(£2980.00)
	£17,858.99

Employment Judge Burge

Dated: 27 November 2020

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