Case Number: 1602145/2019

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs B Blaze**	
Respondent:	**(1) The Governing Body of Ysgol Penrhyn** **(2) Wrexham County Borough Council**	
Heard at:	**Cardiff (CVP)**	**On: 7, 8, 9 and 10 June 2021**
Before:	**Employment Judge S Jenkins**	
Members:	**Mr P Bradney** **Mrs L Owen**	

Representation:
Claimant: Mr C Adkins (Trade Union Representative)
Respondent: Mr K McNerney (Counsel)

JUDGMENT

(1) The Claimant was unfairly dismissed and her claim of unfair dismissal therefore succeeds, albeit that the compensatory award shall be reduced by 50% to reflect the ***Polkey*** principle.

(2) The Claimant was not treated less favourably because of her age and her claim of direct age discrimination therefore fails.

REASONS

Background

1. The hearing was to consider the Claimant's claims of unfair dismissal and direct age discrimination following her dismissal, ostensibly by reason of redundancy, on 31 August 2019, as a teacher employed by the Second Respondent to which we will refer as "the Authority", having worked at the

school of which the First Respondent was the governing body, to which we will refer as "the School".

2. In terms of one specific procedural matter, Regulation 6 of the Education (Modification of Enactments Relating to Employment) (Wales) Order 2006 provides that where an employee is employed at a school having a delegated budget, which is the status of the School in this case, any application to a tribunal must be brought against the governing body. However, the Regulation also provides that, where an application is made against a governing body, it must notify the employing authority within 14 days, and the authority is then entitled to be made an additional party.

3. In this case, the claims were brought against both Respondents, and Responses were submitted by both of them, so we proceeded on the basis that the process outlined in the Regulation had been complied with.

4. In terms of the hearing itself, we heard evidence from Mr Martin Mathias, Headteacher; Mr Keith Lea, Chair of Governors; Mr Arwel Davies, Governor; and Ms Tina Jones, Human Resources Officer; on behalf of the Respondents, and we heard from the Claimant on her own behalf.

5. We considered the documents in a bundle spanning 349 pages to which our attention was drawn and we had regard to the closing submissions of both representatives.

Issues and Law

6. In terms of the issues and prevailing law, the issues to be decided in the case had been set out by Employment Judge Davies at a Preliminary Hearing on 29 January 2020. It was agreed at the outset of the hearing that if the claims were successful we would deal with remedy matters at the end of the hearing or, if insufficient time was available, at a later date.

7. Looking at the issues and relevant prevailing law in more detail we noted, with regard to the unfair dismissal claim, that the first matter for us to assess was whether we were satisfied that the Respondents had had a potentially fair reason for dismissal, falling within Sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA"), the burden of establishing that being on the Respondents.

8. It was not however disputed that the reason for dismissal was redundancy, it being apparent that the statutory definition of redundancy had been made out, there having been a reduction in the requirement for employees to carry out work of a particular kind, namely classroom teachers.

9. With regard to the fairness of dismissal we would have to have regard to the guidelines set down by the Employment Appeal Tribunal ("EAT"), in Williams -v- Compair Maxam Limited [1982] ICR 156. In that case, the EAT put forward four factors that a reasonable employer might be expected to consider in such circumstances:

   a. Whether the selection criteria were objectively chosen and fairly applied.
   b. Whether the employees were warned and consulted about the redundancy.
   c. If there was a Union, whether the Union's view was sought.
   d. Whether any alternative work was available.

10. We considered that the first factor also needed to involve an assessment of whether an appropriate pool was applied in relation to whom the selection criteria were applied, which was a live issue in this case.

11. We also noted that the EAT, in Langstone -v- Cranfield University [1998] IRLR 172, noted that it is incumbent on a Tribunal, in the context of a claim relating to a redundancy dismissal to consider the issues of selection, consultation and alternative employment.

12. In this case, the specific focus of the Claimant's challenge to the element of selection was on the pool used and the way in which the selection criteria were applied.

13. With regard to pooling, we noted that the EAT, in Kvaerner Oil and Gas Limited -v- Parker (UK EAT 0444/02), confirmed that the employer's choice of pool must be assessed by consideration of whether it fell within the range of reasonable responses open to an employer in the circumstances.

14. With regard to the application of the selection criteria, we noted that the Court of Appeal in British Aerospace PLC -v- Greene [1995] IRLR 433, had endorsed the EAT's direction, in Eaton Limited -v- King [1995] IRLR 75, that it is sufficient for an employer to show that it has set up a good system of selection and that it was fairly administered, and that ordinarily there will be no need for the employer to justify all the assessments on which the selection for redundancy was based.

15. We also noted that the Court of Appeal, in Northgate HR Limited -v- Mercy [2008] ICR 410, endorsed the EAT's decision in that case that the lawful basis for intervention by an Employment Tribunal would be where a glaring inconsistency, whether as a result of bad faith or simple incompetence, evidenced a decision which was outside the band of reasonableness.

16. We were conscious that the burden of proof in assessing the fairness of any dismissal by reason of redundancy is neutral, and that we would need to assess matters from the perspective of Section 98(4) of the Employment Rights Act, by considering whether the dismissal was fair or unfair taking into account all the circumstances and determining the question in accordance with equity and the substantial merits of the case.

17. In that regard we were conscious that the assessment of fairness would not involve consideration of whether the Respondents' actions were correct, but an assessment of whether the actions taken were open to a reasonable employer acting reasonably in the circumstances. Our overriding approach was to consider whether the Respondents' actions at each step of their conduct of the redundancy process fell within the range of reasonable responses.

18. Turning to the Claimant's age discrimination claim, we noted, with regard to the burden of proof, that Section 136 of the Equality Act 2010 provides that we would first need to consider whether there were any facts from which we could decide, in the absence of a non-discriminatory reason from the Respondent, that an act of unlawful discrimination had taken place. If so, the burden would then shift to the Respondent to demonstrate a non-discriminatory explanation. In this regard the appellate courts have regularly made clear, for example the Court of Appeal in Khan -v- The Home Office [2008] EWCA Civ 578 and the EAT in Chief Constable of Kent Constabulary -v- Bowler (UK EAT 0214/16), that Tribunals should avoid a mechanistic approach to the drawing of inferences. We were also conscious that the Court of Appeal, in Madarassy -v- Nomura International plc [2007] ICR 867, had noted that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities a respondent had committed an unlawful act of discrimination.

Findings

19. There was little significant dispute between the parties on the factual background to the claims, and our findings, on the balance of probabilities where there was any dispute, were as follows.

20. The Claimant, aged 62 at the material times, was, by that stage, a teacher with over 30 years' experience. She had been a teacher at the School for some 6 years, teaching a Year 4 class. Up to the 2018/19 academic year the School had operated with 7 full-time classes and a part-time nursery, and at 6.7 full-time equivalent teaching staff in addition to a headteacher and a deputy headteacher. It also had 8 teaching assistants.

21. The Claimant was at the top of the upper teaching pay scale. The evidence put forward by the Respondents, which was not challenged, was that two other teaching members of staff were in receipt of additional teaching and learning responsibility allowances and thus had a higher salary than the Claimant. In addition, one member of staff was, like the Claimant, on the top of the upper pay scale, and another was going to reach that level very shortly. We also noted Ms Jones's evidence, again not challenged, that a teacher performing well can reach the top of the upper scale by their early 30s.

22. Over the preceding few years, the number of pupils at the School had declined, from 226 in September 2015 to 198 in January 2019, and the number of pupils in the nursery had particularly declined.

23. The School received its indicative budget for the 2019/20 year from the Authority at around the middle of February 2019, which showed a shortfall of £114,000 for the 2019/20 academic year. In March 2019 the School therefore produced a business case for dealing with the shortfall, proposing to merge the nursery and reception classes into an early years' unit. It was initially proposed that two teachers and four teaching assistants would be made redundant. However, after discussions with the Authority, it was agreed the School could run a deficit budget over a three- year period, which meant that only one teacher redundancy was required and not two.

24. The business case outlined that the pool for selection in relation to the teacher redundancies would be all teaching staff with the exception of the Headteacher and Deputy. It included an indicative timetable based on the Authority's model. This indicated that relevant unions would be formally notified of the proposals in early March, and that individual, and if requested collective, consultation meetings would take place throughout March. Selection assessments would then be made in early April, a representation meeting with the affected employee would take place at the end of April, and any appeal hearing would take place in early May. If either of the representations or the appeal was successful, the process would be repeated with the next identified candidate, but, if not, formal notice would be issued by the end of May, with the selected employee's employment ending on 31 August 2019.

25. Mr Mathias, the Headteacher, sent a formal notification letter outlining the proposals to the relevant Trade Unions on 8 March 2019, using the Authority's template. The letter confirmed that the Authority's procedures for managing redundancies would be followed, using its model selection criteria. Comments on the proposals were requested by 15 March, but none were received.

26. Ms Jones confirmed, in unchallenged evidence, that the Authority's process, including the selection criteria, was used in thirteen other schools within the Authority at that time, and had been used on many occasions in the past.

27. Mr Mathias undertook initial individual consultation meetings with all teaching staff, including the Claimant with whom he met on 20 March 2019, in which he went through the selection criteria and the selection assessment form. He also raised the prospect of volunteers being requested, but none came forward.

28. The Claimant at this time did make an enquiry of the Authority's HR Team as to her redundancy entitlement, but did not pursue a formal request. Ms Jones confirmed in her evidence, which we accepted, that, whilst she was aware of the Claimant's request, she did not make Mr Mathias or the Governors aware of it.

29. The checklist used to record the individual consultation meetings noted that other suggestions for mitigating redundancies, such as flexibility in working hours, would be discussed, and the Claimant in her evidence indicated that she had offered to move to a job-sharing role.

30. Mr Mathias, whilst not being able to remember clearly, accepted that the Claimant may have raised that, and that he did not think that he had made other staff aware of it, and we considered that that was indeed what had taken place.

31. The teaching staff, the need for teaching assistant redundancies having been removed by the voluntary redundancy of three and the move to another school of one, then completed the selection forms, grouped under four headings covering ten criteria. Upon receipt of the forms, they were allocated candidate numbers so that they could be marked anonymously, although we observed that someone with knowledge of the teachers may have been able to discern the identity of at least some of them from their entries.

32. The Claimant was given some assistance by the Headteacher, as he pointed out to her that she had not included any information in relation to one section and allowed her to complete that. There was also an indication that at least one other staff member had sought some assistance from the Deputy Headteacher on completing the forms although there was no evidence of the nature of that assistance. We did not consider that any assistance, whether to the Claimant or anyone else, was material.

33. Following the receipt and anonymisation of the forms, a Staffing Committee made up of four Governors, chaired by Mr Lea, met over two evenings, on 8

and 9 April 2019, to mark the forms. Mr Mathias and Ms Jones were present at both meetings to provide any clarification required by the panel, although it did not appear that any particular assistance from them was required. The panel considered each form in turn and marked the candidates against each of the criteria, scoring each between 0 and 3. 0 indicated that the candidate did not meet the requirements, 1 indicated that they partially met the requirements, 2 that they fully met them, and 3 that they exceeded them. A total of 30 marks were therefore available.

34. The panel assessed four forms on the first night and four on the second, meeting for approximately four hours on each occasion. The Authority's guidance indicated that the panel had the option of each member marking individually and then moving to agreeing a collective score, or of marking as a group, and the latter approach was adopted. After each candidate beyond the first was marked, the panel checked the scores in relation to those applied previously to try to ensure consistency. At the end of the second meeting the scores were added up. The scores ranged from the Claimant's 13 to the highest of 28, there being two other scores of under 20, of 17 and 18 respectively. At that point the envelope noting the names of the candidate was opened, and it became known that the Claimant had scored the lowest mark.

35. Mr Mathias met the Claimant the following day to inform her of her provisional selection. He advised her of the need for her to get in touch with her Trade Union Representative which she did shortly afterwards. A representations meeting, at which the Claimant could make representations about her scores, was initially arranged for 30 April, but ultimately took place on 2 May. The Claimant, who had injured her knee whilst on holiday, attended by phone, but her Trade Union Representative attended in person.

36. Although the evidence was not completely clear, only one, the later, of the Claimant's selection forms being in the bundle, the accepted position appeared to be that the Claimant's original form had spanned 7 pages, but that the committee at the representations hearing had considered a further form spanning 18 pages in which the Claimant had expanded on the information she had provided.

37. The outcome of the meeting was that the committee accepted that the Claimant had been underscored in relation to two criteria and that her marks for those should be increased by 1 in each case, taking her total score to 15, still below her nearest colleague.

38. Notes taken of the meeting indicated that the committee felt that if additional points were to be given to the Claimant in relation to other sections it would mean that they would have to give additional points to other staff. Mr Adkins on the Claimant's behalf described that comment as "damning". However

we interpreted that comment as the committee forming the view that, in relation to the other areas, if the Claimant's scores were to be increased then the scores of other candidates would also have had to have been increased because the forms were broadly similar. Ultimately therefore, as the Claimant remained the lowest scoring candidate, her redundancy was confirmed, subject to appeal. A letter confirming that was sent to her on 3 May 2019.

39. The Claimant challenged the decision and an appeal hearing took place on 9 May before a panel of three different Governors, chaired by Mr Davies. The Claimant again participated by telephone due to her injury, and her Trade Union Representative, Mr Adkins, was present.

40. The Claimant had submitted a written document to the appeal committee and Mr Adkins made oral submissions focussing on; the selection pool, the clarity of the selection criteria, concerns over specific scores, and matters of procedure. The Authority's model procedure noted that an appeals committee should consider whether the staffing committee had applied the procedures correctly and selected the employee fairly and equitably. It did not indicate that a remarking process should be undertaken.

41. Following the hearing the appeal committee concluded that the original decision was fair and correct, and a letter was sent to the Claimant on 10 May 2019 responding to the points made on her behalf and confirming that her appeal had not been upheld. In accordance with the procedure, the School then notified the Authority, the Claimant's contractual employer, of the decision that the Claimant be dismissed on the ground of redundancy with effect from 31 August 2019, and the Authority then sent formal notice of termination of employment to the Claimant on 14 May.

42. The Claimant then participated in the Authority's redeployment process from that point on, and was given details of all vacancies within the Authority every week. However, nothing suitable arose and the Claimant's employment therefore ended on 31 August 2019. She received a redundancy payment of £6,820.27, higher than her statutory entitlement due to the removal of the cap on the amount of a week's pay.

Conclusions

43. Applying our findings to the issues to be determined in the context of the applicable law, our conclusions were as follows.

44. We dealt first with the Claimant's claim of direct age discrimination which we could address quite briefly. As we have noted, we first had to consider whether the Claimant had demonstrated primary facts from which we could conclude, in the absence of a non-discriminatory explanation from the

Respondent, that discrimination had occurred. We were also mindful of the direction of the Court of Appeal in Madarassy, that the bare facts of the difference in status and/or treatment would not, without more, give rise to such a conclusion.

45. In that regard, we noted that the Claimant contended that the Respondents had been motivated to dismiss her due to the fact that greater future salary savings could be achieved by dismissing her, a senior teacher at the top of the upper pay scale. She contended that a more experienced, and thus older, teacher would be more likely to be at that level of salary. However, as we noted above, two members of staff were in receipt of additional teaching and learning responsibility allowances and thus paid more than the Claimant, one member of staff was, like the Claimant, on the top of the upper pay scale and another was going to reach that level very shortly. She was therefore only approximately in the middle of the range of salaries of the teaching staff.

46. In addition we noted the evidence of the Respondents' witnesses about the anonymisation of the redundancy process and that costs savings beyond those achieved by the redundancies played no part in the decision making process, and we accepted that evidence. It did not seem to us therefore that there were any primary facts from which an inference of discrimination could be drawn, and therefore the Claimant's claim of direct age discrimination failed.

47. Turning to the unfair dismissal claim, the first point for us to consider was the reason for dismissal. There was no challenge to the Respondents' assertion that the reason for dismissal was redundancy, and we noted the reduction in staff numbers, both at teacher and teaching assistant level. We were therefore satisfied that the reason for dismissal had been redundancy.

48. Turning to the question of whether dismissal for that reason was fair in all the circumstances, as we have indicated we were satisfied that a genuine redundancy existed in that the School had identified a reduction in the requirement for teaching staff in order to address its budget shortfall.

49. Before moving to consider the Compair Maxam guidance, we first considered the Claimant's challenge to the selection pool. In that regard we noted the Claimant's contention that the pool should have been limited to the nursery and reception teachers as that was the area of the School in which the redundancy was being made. However, we noted that all teachers in the School were employed as classroom teachers, without reference to a specific year group or key stage, and that although staff were not moved around within the School with any regularity, moves did occur, and the ability to move staff to different classes remained at all times.

50. We also noted that the process adopted within the Authority's primary schools had, for many years, been that all staff would be placed in a selection pool regardless of where the redundancy was proposed, and that the Trade Unions had participated in that process on many occasions. Overall therefore, we were satisfied that the pool applied by the School was a reasonable one. It certainly fell within the range of reasonable responses.

51. Turning to the Compair Maxam guidance, we looked closely at the question of whether the selection criteria had been objectively chosen and fairly applied. With regard to the former, we again noted that the criteria were ones used across the Authority's schools, and had been used with the engagement of the Trade Unions on many occasions in the past without, as we understood things, any complaint. Indeed, in this case no issue was raised at the time with regard to the appropriateness of the criteria themselves.

52. Concern was however raised about the application of the criteria. In that regard we were conscious of our need to assess the Respondents' actions within the framework of the range of reasonable responses, and that we should avoid taking a fine-tooth comb to the School's decision, only intervening where there was a glaring inconsistency.

53. We noted that whilst the Claimant's witness statement covered concerns over a number of criteria, her Claim Form focussed on two; primary experience, and additional skills relevant to the strategic needs of the School. With regard to the former, the Claimant had scored 2, with three of her colleagues scoring 3. We noted that the Claimant's two closest scoring colleagues scored 2 and 1 respectively.

54. The Claimant contended that her experience was obvious, having taught for over 30 years, but we noted that the form simply recited her experience in bullet points. We noted that of the five other forms in the bundle, one had been marked 3, but that teacher had developed her experience beyond a list and had explained what she had gained from her experience. Therefore, looked at from the perspective of the forms in front of the committee, we could see why it could have felt that that candidate merited a 3 and the Claimant only a 2; in other words, that the Claimant only met expectations and did not exceed them.

55. With regard to the latter the scores had been almost universally low, with the Claimant and two other colleagues being marked as zero. Four others, including the Claimant's nearest scoring colleagues, being marked 1, and one being marked as a 3. The Claimant's greatest concern appeared to relate to the individual with the score of 3. However, we noted that that candidate had focussed on her information technology skills, potentially enabling her to assist in the marketing of the School and in the attraction of

more pupils. We could understand that the committee could have found that attractive, in light of its falling roll, and could therefore have awarded a high mark. We noted, in any event, that that particular candidate had the highest overall score of 28, and that even if her score had been reduced to zero she would still have remained the highest scorer.

56. Within the bundle however, were forms of four other teachers, three of whom had been awarded a score of 1 for the additional skills criterion. On considering those forms in comparison with the Claimant's, we could see no discernible difference between them. We could understand why none were considered to demonstrate acceptable performance, as the entries did not demonstrate much that was relevant to the strategic needs of the School, but we could not see a reason for the Claimant being awarded 0 and the others 1. In our view, there was a "glaring inconsistency" in that score, and we felt that the Claimant should have had a mark of 1. However, we did not consider that there were any other such glaring inconsistencies and therefore, even the addition of one mark, would not have lifted the Claimant from being the lowest scorer.

57. In relation to the application of the selection criteria therefore we did not conclude that the School's actions were unfair. We did however have some misgivings about the processes adopted which the School, and perhaps more particularly the Authority, may wish to consider for the future.

58. The first was that we considered that the guidance surrounding the process, both that provided to the staff and to the Governors, could have been more comprehensive. Whilst we noted that Mr Mathias had explained to the staff that they would be judged on the content of the forms and the evidence included within them, we felt that it would have been better had it been made explicitly clear in writing that the form would be the employees' only opportunity to provide evidence of their skills and experience, and that they should not rely on any such evidence arising from any other source. Had that been explicit, it may be that the Claimant would have spelled out her skills and experience more obviously, and our perception was that she may have rather taken her position for granted. Overall, we did not think that our concern took the Respondents' process outside the range of reasonable responses, as it was adopted in the same way for all, but we felt that it could have been improved.

59. From the Governors' perspective, we felt that they were given very little guidance on how to approach their marking. They were told the criteria and the marking scheme, but they were not provided with any indication of what level of skill or experience would match a particular mark. Indeed, we noted that the Governors had asked Mr Mathias, subsequent to the selection process, to produce a form with best examples of answers in relation to

each criterion, as that could be helpful in any future exercise, which we agreed would be the case.

60. We also noted that no specific training was provided to the Governors as to how to carry out the role, although there was general training available on handling a redundancy process. We felt that some bespoke training, via a course or written materials, would have assisted the Governors in carrying out their duties. Again however, notwithstanding our misgivings about the processes adopted, we did not consider that any aspect of them took them outside the range of reasonable responses.

61. Turning the question of consultation, we noted that there was an initial meeting with the Claimant, and indeed all staff, at which the potential for redundancy and the process to be followed was discussed. However, a consultation process does not simply involve the giving of information by the employer, it also involves a dialogue between the employer and the employee, and consideration of points raised by the employee, and that was where we considered that the School was at fault.

62. We noted that the Claimant raised the question of moving to a job-share during her first meeting with Mr Mathias. We also noted that Mr Mathias had not taken that discussion forward and had not discussed it with the other members of staff. We noted Mr McNerney’s contention on the part of the Respondent that the Claimant did not raise that point any further, whether at the representation meeting or the appeal, but we also noted the Claimant’s contention, developed by Mr Adkins, that, by the time the Claimant had been provisionally selected, it would have been much less likely that one of the other members of staff would have put themselves forward to job-share, as, by then, they would have known that, subject to representations and appeal, they were secure. We agreed that was likely to be the case.

63. We noted that the form used to record the consultation meeting made specific reference to other suggestions for mitigation, and specifically the prospect of the employee requesting flexibility in working hours. We also noted that the Authority’s model procedure in a section dealing with measures to avoid dismissals or reduce the number of staff affected, refers to inviting volunteers for reducing hours of work, or for part-time work, or for job-sharing where school business or curriculum needs permit.

64. Overall therefore, we considered that a reasonable employer in the circumstances would have explored with other staff members the question of whether they would be interested in job sharing with the Claimant. Had that happened it might have become apparent that a job-share was not feasible, but there would have been a chance that it would. By not exploring that, we felt that the Respondents’ actions fell outside the range of reasonable responses and therefore led to the dismissal being unfair.

65. We noted that the query about job-sharing was not developed by the Claimant in her claim form and therefore did consider whether it would be appropriate for us to use that as the basis, and we noted the only basis, for our finding of unfair dismissal. However, we noted the direction of the EAT in the Langstone case, that a Tribunal is expected to consider defects in consultation when assessing the fairness of a redundancy dismissal, and therefore considered it appropriate to do so.

66. With regard to consultation with the Union, the formal notification of the proposed redundancy and the method for carrying it out was provided to the relevant Unions, including the Union of which the Claimant was a member, before the implementation of the process. In accordance with the Authority's model policy, the notification letter sought written comments on the proposal and/or on the selection criteria, and also offered a meeting if that was desired. Mr Adkins criticised the time given for response, noting that at most a week, and in practice possibly slightly less than a week, was provided, and that the Trade Union Representative was not a full-time official. However, we noted that the process and criteria to be followed were the ones being used by thirteen other of the Authority's schools at that time, and had been used in the Authority's schools over many years. We felt that the representative would have been very familiar with the process and the criteria in any event. We did not therefore consider there was any deficiency with regard to the seeking of the Union's views.

67. Turning to the final element of the Compair Maxam guidance, the question of alternative work, we noted that the Claimant had participated in the Authority's redeployment process throughout her notice period, and had received notice of all vacancies across the Authority, the School obviously having no vacancies at that time.

68. The Claimant did not contend that there were suitable vacancies for which information was not provided, and we therefore did not consider that any criticism could be levied at the Respondents in that regard.

69. As we have noted however, we did consider that unfairness had arisen due to the School's failure to explore the prospect of job-sharing and therefore concluded that the dismissal was unfair.

70. In terms of remedy, whilst, as we noted at the outset, the calculation of the specific remedy remains to be assessed, and there was insufficient time to do that at the end of the hearing, we moved to consider whether any adjustments should be ordered to any compensatory award that may be due. In that regard we consider the long established principle, set out in the House of Lords decision of Polkey -v- A E Dayton Services Limited [1988]

ICR 142, that account should be taken of the prospect that a fair dismissal could have ensued if the identified deficiency had not arisen.

71. We noted that there was no evidence that any other staff member had expressed an interest in job-sharing during the individual consultation discussions. However, we considered that if, as part of the consultation process, the other members of staff had been made aware that one of their number had expressed an interest in job-sharing, there was certainly a chance that another of them may have concluded that they would be willing to be part of a job-sharing arrangement. That may have arisen because it suited their own personal circumstances, or may have arisen because they would have felt that it was better to have the security of half a job than to run the risk of losing their job entirely.

72. Overall, doing the best we could, we felt there was as much a chance of a job-sharing arrangement being successfully implemented as not, and therefore concluded that there should be a 50% reduction from the compensatory award to reflect that.

73. The precise amount of compensation to be paid by the Respondent to the Claimant will now need to be determined unless the parties can reach agreement. We observed however that there will be no basic award, due to the application of Section 122(4)(b) ERA, and that the amount of the redundancy payment made to the Claimant in excess of her statutory entitlement will need to be deducted from the compensatory award pursuant to Section 123(7) ERA.

Employment Judge S Jenkins
Dated: 22 June 2021

JUDGMENT SENT TO THE PARTIES ON 24 June 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche