EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Mrs S Bamforth	**AND**	**Officers Association**

Heard at: London Central (By CVP video link)

On: 14 - 15 July 2021 & 16 July 2021 (In Chambers)

Before: **Employment Judge Brown**
Members: **Mr D Carter**
Mr P de Chaumont-Rambert

Representation:

For the Claimant: **In person**
For the Respondent: **Ms G Crew, Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. **The Respondent did not subject the Claimant to age discrimination.**

2. **The Respondent did not unfairly dismiss the Claimant.**

REASONS

Preliminary

1. The Claimant brings complaints of unfair dismissal and age discrimination against the Respondent, her former employer.

2. At the start of the hearing the issues to be decided were agreed as follows:

Unfair Dismissal

1. What was the reason for the Claimant's dismissal? The Respondent says that the Claimant was dismissed for the potentially fair reason of redundancy, within the meaning of section 98(2)(c) of the Employment

Rights Act 1996 ("ERA"). Alternatively, some other substantial reason, namely a business reorganisation within the meaning of section 98(1)(b).

2. If the Claimant was dismissed for a potentially fair reason, whether the dismissal was otherwise fair within the meaning of section 98(4) of the ERA. In particular, as the Respondent says this is a redundancy case, whether the dismissal was fair in accordance with the guidelines set out in Williams v Compair Maxam Ltd [1982] ICR 156. The Claimant says that the dismissal unfair because:

    i. She says she unfairly selected for redundancy in that Mr Holloway was not impartial as she had raised informal concerns and complaints against him.
    ii. The Claimant was in a pool of one for redundancy.
    iii. In terms of consultation, the Respondent did not properly explain the concept of "bumping" to the Claimant and did not offer to bump the Claimant into any of the potential roles;
    iv. The Claimant only received the business case for her redundancy on the 9th March 2020, the day before her first consultation meeting, and it did not include the list of possible roles to be bumped.
    v. The Claimant did not receive the recording and the meeting notes of the first consultation meeting of the 10th March until the 11th March 2020.
    vi. The Claimant did not receive a recording of the second consultation meeting dated 16th April 2020 or the written responses given verbally to her in that meeting despite her request for the same.
    vii. The Claimant says that she did not receive the transcript of the 16th April 2020 consultation meeting until the 30th April 2020.
    viii. The Respondent failed to consider alternatives to redundancy for the Claimant, in particular failed to consider the Claimant's ongoing governance duties.
    ix. The Claimant says that the Respondent sought to diminish her governance role prior to her redundancy.
    x. The Respondent failed to consider suitable alternative employment for the Claimant, in particular the PA role.

3. If the dismissal was procedurally unfair, whether the Claimant would have been dismissed in any event had a fair procedure been carried out.

Age Discrimination

4. The Claimant was 65 years old at the time of her dismissal.

5. Whether the Respondent treated the Claimant less favourably because of her age by:
    (i) Deciding to make her redundant.
    (ii) Not offering her the PA role which the Claimant says was offered to a younger woman.

3. At the start of the hearing, the Tribunal made clear that, while the Claimant had raised matters in her witness statement which might have been allegations of protected disclosure detriment or victimization, the Claimant had not brought such claims. She had not said that her dismissal was automatically unfair. Accordingly, the Tribunal would not determine such claims.

4. The hearing was listed to determine both liability and remedy, if appropriate.

5. The Tribunal was provided with:

   a. an indexed Bundle of documents (page references in these reasons are to pages in that Bundle);
   b. a
   c. a witness statement from the Claimant her witness, Mr Singleton, who was formerly a trustee of the Respondent; and
   d. witness statements on behalf of the Respondent: from Mr Simon Allen, Chief Operating Officer; Mr Lee Holloway, Chief Executive Officer; Mrs Jo Killip, Finance Director; and Mr John Lea, Trustee

6. The hearing was conducted by CVP videolink. The parties could hear what the Tribunal heard. Members of the public could attend and did attend.

7. The Tribunal heard evidence from the Claimant and from all the Respondent's witnesses.

8. Both parties made submissions. The Respondent made its submissions both orally and in a skeleton argument. The Tribunal reserved its judgment.

Findings of Fact

9. The Respondent is a registered charity providing support to former officers of the Armed Forces.

10. The Claimant started work with the Respondent on 17 October 2013, p 45. She was originally employed as an Executive Assistant, a newly created role, working directly with the Chief Executive Officer, Mr Lee Holloway.

11. The Chief Operating Officer resigned in March 2015. Mr Simon Allen, the current Director of Finance, took on the financial aspects of the COO's old role, and the Claimant assumed temporary responsibility for the remainder of the COO's duties. The Claimant told the Tribunal that, around this time, she raised concerns with Alex Spofforth, then Chair of the Finance Committee, about irregularities in the CEO's expenses claims.

12. The Respondent created an Administration Support Manager post in 2015. The Claimant told the Tribunal that she applied for this post and was placed on the shortlist, but, on 7 May 2015, after she had challenged the CEO regarding a sum he owed to the Respondent for car hire, she was removed from the shortlist.

13. There was no dispute between the parties that the Claimant had considerable skills and talents and was, at all times, a dedicated and very hardworking employee.

14. In 2016, the Claimant studied for and obtained an ICSA Certificate in Charity Law and Governance. At the same time, the Claimant was organising a dinner for the Respondent, with 130 guests, at Greenwich.

15. The Claimant told the Tribunal that, in early 2017, she again raised concerns with Trustees about the CEO's expenses, meeting Alex Spofforth, now Chair of Trustees, and his replacement as Chair of the Finance Committee, Richard Sankey, off-site. It did not appear to be in dispute that the Claimant raised concerns about the CEO's expenses in 2015 – 2017 and that the CEO knew about this.

16. Mr Holloway, CEO, proposed that the Claimant become Data Protection Officer (DPO). Having undertaken training, the Claimant was appointed to the role of Data Protection Officer on 2 October 2017, p60. The Claimant's new salary was £42,000, a salary increase of £3,000.

17. The Claimant told the Tribunal that, while she welcomed this "meatier role with a new intellectual challenge, and a higher salary", she had always felt that, at least in part, the CEO's motivation was to move her aside and to install someone who would not challenge his expense claims, or query his movements.

18. The Claimant still reported to the CEO as her direct line manager, however, p60.

19. In the Claimant's job description, her key responsibilities were stated to be: "**Data Protection Officer**. Act as the Data Protection Officer (DPO) of the OA in accordance with the relevant regulatory guidelines… **Development of Policy and Procedures.** Assist the OA with the development of policies, procedures and initiatives so that they are GDPR compliant …. **Governance Advisor** Act as the OA's advisor on governance matters…. **Data Protection Advice or Support to Other Charities.** Provide data protection advice and support to other charities by agreement, subject to being able to fulfil the other responsibilities of the role."

20. The Claimant agreed in evidence that the job description was accurate. The Tribunal decided that the Claimant's predominant duties in her role were directed to Data Protection.

21. The Claimant told the Tribunal in her witness statement that, at no time was it suggested that this was a short-term, temporary or part-time appointment. However, she agreed in evidence that Mr Holloway, the CEO, was concerned that her DPO role would not provide enough work to occupy the Claimant for 5 days a week and that he therefore envisaged that her DPO services would be offered to other charities for 2 days a week. She agreed that such work for other charities did not materialise. The Claimant said that she had taken on other responsibilities, including acting as a clerk to the governance committee and drafting policies.

22. In the Claimant's Performance and Development Review, completed in January 2020, Mr Holloway noted that other charities had not taken up the offer of the Claimant's DPO services, p109.

23. The Claimant told the Tribunal that, in March 2019, the CEO had proposed offering her a role of governance in relation to legacies, which the Respondent would be pursuing as a new source of income. She said that, later that month, the CEO asked the Claimant her age, which she told him he was not supposed to do.

24. Mr Holloway told the Tribunal that the average age of staff at the Respondent is in the 50's. He said that one employee is 71 and that another employee is about 64, like Mr Holloway. Mr Holloway said, in cross examination by the Claimant, "I like the wisdom older people bring to a job. You were definitely not let go because of age. I was the one who hired you – I was well aware of your age – I hired you because of your experience and depth of knowledge."

25. The Claimant told the Tribunal that, in December 2018 two young female employees had raised concerns with senior management about inappropriate behaviour by a senior staff member. She said that the two complainants had become increasingly distressed by an apparent failure of management to act. The Claimant told the Tribunal that she had contacted Alastair Singleton, a Trustee, the Chair of the Employment Committee, and member of the Governance Committee and Vice Chair of Trustees, about management's lack of action. The Claimant then met Deanne Thomas, another Trustee, to discuss the situation.

26. The Claimant told the Tribunal that a colleague, Andrea Hodson, had informed her that the CEO had told Ms Hodson that he knew that the Claimant had met with Deanne Thomas. The Claimant told the Tribunal that her heart sank on hearing this, as she felt that there would be consequences.

27. Mr Singleton gave evidence to the Tribunal. He told the Tribunal that he left the Respondent in September 2019 but, before he left, an "informal decision was made to get rid of" the Claimant. He was asked when that was. He responded that he probably could "..not recall with exactitude but it was probably in 2018 and 2019 that the view was that she was being such a pain in the side for the organisation that she was kicked upstairs to the GDPR role and there was no intention to keep her long term."

28. There was no email or other record of an informal decision to dismiss the Claimant. The Tribunal did not accept Mr Singleton's evidence that there was an informal decision to remove the Claimant before September 2019. While he stated boldly that this had happened, he gave no details about who made the decision and when they made it. There was no other evidence to corroborate his assertion.

29. Mr Singleton also told the Tribunal, in oral evidence, that he knew, from conversations with Mr Holloway, that Mr Holloway was aware that the Claimant had spoken to the trustees about the young women's complaints. Mr Singleton was challenged about this in cross examination, as he had not put this important evidence in his witness statement. Mr Singleton said that he had given the answer in oral evidence because he was being asked to delve into his memory and come up with answers. He said that he had clearly not thought it was important enough to put in his witness statement when he had drafted it.

30. Mr Holloway told the Tribunal that he did not know, until these proceedings, that it was the Claimant who had raised management lack of action, regarding the two young women's complaint, with the trustees. He believed that Andrea Hodson had done so. Ms Hodson had also raised the matter with him. Ms Hodson is still employed by the Respondent.

31. The Tribunal preferred Mr Holloway's evidence to Mr Singleton's on this matter. Mr Holloway was a straightforward witness who appeared to be careful to be accurate in his evidence to the Tribunal. He made admissions when appropriate and was frank when he could not remember the details of an event. Mr Singleton appeared less careful in his evidence. While he made extremely confident assertions, but was unable to provide basic details of those assertions, when challenged. The Tribunal concluded that Mr Holloway did not know that the Claimant had spoken to the trustees in secret meetings about lack of action on the 2 women's complaint.

32. Since 1919-20 the Respondent has received 60% of its funding from an agreement with The Royal British Legion ("RBL") whereby by 7.5% of the annual Poppy Fund Street Collection is donated to the Respondent.

33. In early 2018, the RBL told the Respondent that it intended to withdraw its funding. The RBL agreed to withdraw gradually, over a 5-year period ending in 2024. The Claimant agreed that the Respondent was losing this funding.

34. This decision by the RBL meant that the Respondent would lose 70% of its annual funding and would be dependent on its reserves (£14Million), with an operations budget of approximately £4Million per annum (including deficit spending). Mr Holloway told the Tribunal that the situation was made worse by the fact that the Respondent has no existing fund-raising capability or personnel.

35. Mr Allen, COO, told the Tribunal that, as a result, in August 2019, Mr Holloway asked him to review the Respondent's support functions and come up with options for making salary savings.

36. Mr Allen produced a paper later that month, pp113-117. His main recommendations were: not to replace a vacant Research Manager post; to review whether to replace the Project Manager when his contract expired in March 2020; and to consider outsourcing the Data Protection Officer role.

37. Mr Holloway approved the proposal not to replace the vacant Research Manager post.

38. Mr Allen told the Tribunal that, in the event, he felt that he required the support of a project manager. A major IT upgrade project was pending and Mr Allen, as COO, did not feel able to take responsibility for that project in addition to all his other duties. He asked for, and was permitted, to appoint a project manager on a 12 month contract. That had become a permanent position, because it was clear that the Respondent would require further IT and technical projects to ensure its future. The Tribunal accepted Mr Allen's evidence about the need for a project manager. He had intimate knowledge of the Respondent's ongoing projects.

39. Mr Allen and Mr Holloway both told the Tribunal that, as an alternative to making the Claimant's post redundant, Mr Holloway tried to persuade other charities in 2019 – 2020 to use the Claimant's data protection services. This was intended to offset some of the cost of her post.

40. Mr Holloway told the Tribunal that, between August 2019 and February 2020, he had approached 3 charities. He had approached SSAFA, the Services, Sailors and Airforce Association, and had talked to SSAFA's financial director, who declined the offer of the Claimant's services but did not give a reason. Mr Holloway had made a point of sending the Claimant to all meetings with SSAFA, as DPO, to give her the chance to make an impression with her professionalism. He said that he had also approached the Army Benevolent Fund. In addition, Mr Holloway told the Tribunal that the Respondent is in a hub with other charities in same building, many of whom did not have a DPO, and he thought that there was a sound business case for the Respondent's DPO to provide services to them. However, all declined. He also approached the Confederation of Service Charities, Cobseo, which has 280 – 300 member charities. He offered the Claimant's services 1 day a week. He said that he had approached all these organizations and forcefully put the case for the Claimant providing DPO services to them, in the interests of keeping the Claimant in her job, but none had accepted.

41. The Tribunal accepted Mr Holloway's evidence on this. He was able to give a detailed account of his own actions and of the relevant organisations' responses.

42. The Claimant told the Tribunal that, during her Performance Appraisal and Career Development discussion in November 2019, she had asked that her role as clerk to governance committee be included in her job description, to reflect her job duties more accurately. Mr Holloway declined to make this formal part of her job description, p110. The Claimant told the Tribunal that she believed the Respondent was restricting her role. She contended that this indicated that the Respondent had already decided to make her redundant, in that it did not want to expand her job description beyond her DPO role, which it was intending to delete.

43. The Claimant cross examined Mr Holloway about this. Mr Holloway said that the Claimant's role as clerk to the governance committee was an additional task which the Claimant had been asked to undertake informally, as part of her existing job, because she had a good eye for detail. He said that the Claimant was trying to turn it into a formal role, but that neither he, nor the Chairman, agreed that the Claimant should be given an additional formal role. Mr Holloway said that this was a managerial decision.

44. The Claimant also told the Tribunal that she had sent the CEO an email in January 2020, asking if she could take up an invitation to attend the ICO Data Practitioners' conference in April 2020, which he had previously promptly agreed. She said that, despite reminding him twice, she did not receive a response on this occasion.

45. In the appeal outcome, the Claimant was told that the CEO did not recall the request and that the email could not be found, p315.

46. The Claimant told the Tribunal that, on Wednesday 5 February 2020, she had been excluded from a file structure meeting dealing with Governance; she was told that the Finance Director, Jo Killip, was taking part instead.

47. Later, in March / April 2021, the Respondent transferred to a new IT system. The migration took place while the Claimant was on sick leave with covid19. On transfer, governance ownership was now given to the COO, Simon Allen, and the Director of Finance, Jo Killip, and ownership of all committee files, including the governance committee, was given to Simon Allen.

48. In the Claimant's appeal outcome, p315, the Claimant was told that, on migration to the new system on 21-23 March 2020, the owner of the Governance site had access to the entire site. This included libraries to which the Claimant had not had access on the old site. As a result, she was not given ownership of Governance on the new site.

49. In January 2020, Mr Holloway told Mr Allen that he had not been able to find any other charity that wanted to pay for data protection services. He told Mr Allen to prepare a business case to consider the detailed options for the future of the data protection officer role.

50. Mr Allen drafted the business case, pp118-121, with advice from Peninsula, the Respondent's HR advisory service.

51. Mr Allen told the Tribunal that he decided that it would not be appropriate to pool the data protection role with any other roles, as the data protection role was a distinct role with only one incumbent, and with little overlap with other duties.

52. He was cross examined about the choice of a pool of one. He said, "We looked at roles in support department and elsewhere. The majority of your role was to provide data protections advice... If you had sales team of 3, you would pool all 3, even if there were different regions. With you, your role was mostly Data Protection – there was no one else to pool you with. There was little appreciable overlap with any other role."

53. He said that he considered two options; to change the DPO role from full time to part time (3 days / week) or to outsource it, p119. Of the two, outsourcing the role offered significantly greater savings and was therefore the preferred option.

54. Mr Allen said that he had identified 8 other staff with less than two years' service who could, in principle, be "bumped" as an alternative to redundancy and for which the Claimant might apply, p121. However, he noted that, with the exception of two junior administrative roles, the roles required certain technical expertise or particular experience which he thought it was unlikely that the Claimant would have.

55. Mr Allen said that, nonetheless, this would not have precluded the Claimant from proposing that she be given one of these roles as an alternative. He said that, if she had, the Respondent would have seriously considered it.

56. Mr Allen also told the Tribunal that he considered two roles that had become, or were about to fall, vacant. One of these was the Digital Marketing Manager and the other, Mr Holloway's PA. However, he said that the Respondent had begun to

reconsider whether these, too, might be outsourced. In the meantime, it was decided that the PA role would be covered by part-time agency staff when Mr Holloway's PA left.

57. On 6 March 2020, the Claimant was told that she was at risk of redundancy.

58. She was invited to a First Consultation Meeting with Joe Thomas from Peninsula, to be held on 10 March 2020, and was given Mr Allen's Business Case for the redundancy of her role on 9 March 2021, p131.

59. The Business Case included a discussion of alternatives to redundancy, p133.

> "11. Alternatives the alternatives to redundancy might be:
> a. Reduce the DPO role to three days / week ..
> b. No overtime is worked, so not an option;
> c. the DPO is on more than two years' service so might apply to take over a post from a short service staff member on that pay and T&C, however with the exception of two junior non-specialised roles the DPO is unlikely to have the skills or experience needed;
> d. redeploying DPO to gapped roles elsewhere is unlikely to be an option as they are vacant pending decisions on the future of those posts."

60. The Business Case had been slightly amended from its original draft to remove the details of the short service staff whose roles the Claimant might wish to apply for.

61. The Claimant raised this change in cross examination of Mr Allen. He said that he had taken advice from Peninsula, who said that it was not necessary to include the names of the individuals with short service, as the Claimant might not want to take any of those roles and it would not be fair on the individuals, who might become aware that they were at risk of being bumped, if they were specifically named.

62. The business case stated that responsibility for governance compliance could either be outsourced to a company secretary service or could be fulfilled by the Finance Director, who had governance expertise and existing governance responsibilities,p133.

63. At the first consultation meeting on 10 March 2020 the Claimant raised the possibility of being appointed to the vacant PA role.

64. The transcript of the meeting recorded that Mr Thomas asked, "The PA role: is that something you would seriously consider as an alternative employment?" The Claimant replied, " I may do; I'm not prepared to give a commitment at this stage, but it's something I would consider given that I was very successful in the role, looking back my appraisal normally exceeded expectations in most aspects of the role." P154.

65. On 11 March 2020, the Claimant was provided with the first consultation meeting notes and a link to the recording of the First Consultation meeting, p 142, 147.

66. The Claimant said that this was provided 36 hours after the meeting. She agreed in evidence that she was not prejudiced by this, but said that it was a change from what had been committed to her.

67. The Claimant was off work, sick, with covid19 from 13 March – 14 April 2020.

68. The Claimant attended a second consultation meeting on 16 April 2020, with Joe Thomas of Peninsula. The Claimant told the Tribunal that she had been very ill covid19 and was still exhausted as a result, during the meeting.

69. The Tribunal also noted that, taking into account the Claimant's sick leave, there were only 4 days between the first and second consultation meeting when the Claimant was fit to be at work.

70. However, it appeared that the Claimant did not ask for the meeting to be adjourned because of these things. She specifically agreed to proceed with the meeting, p201.

71. The Claimant was asked during the meeting whether she had suggestions for alternatives to the redundancy proposal. The Claimant replied," I would seek advice on that.", p206. The transcript of the meeting recorded the following questions and the Claimant's answers,

"(Mr Thomas) you met the Chief Executive on the 6th of March. Then you met with me on the 10th of March. Today's the 16th of April, so we've had two consultation meetings, plus the original briefing. Do you have any other comments on the redundancy consultation at this point in time?

SB: Not at this stage.

(Mr Thomas) Can I just clarify, is that because you haven't had the time to further look at the report?
Is that-, is that because-,

SB: I'd be seeking legal advice before I make any comment at all.

(Mr Thomas) Have you got any other comments or questions that you'd like me to take back to the business?

SB: No, not at this stage.", p207.

72. The Claimant told the Tribunal that she had been muddle-headed in the meeting and wanted the recording to be sent to her promptly.

73. Despite Mr Thomas promising the Claimant a copy of the recording, and the responses which were provided to her in the meeting, the Claimant was only provided with a transcript of the second consultation meeting on 30 April 2021, p 200.

74. On 29 April 2020 Mr Thomas produced a report to the Respondent, p 191. He recommended that the Respondent proceed with the Claimant's redundancy and said that there were no suitable alternatives currently available, p198.

75. At the Tribunal, the Claimant pointed out that, in Mr Allen's original review document in August 2019, the PA role had been considered core/essential. The Tribunal noted that the document did say, "a. Core Support Functions. This core capability is provided by the COO, the Support Manager and the CEO's PA."

76. The Claimant also said that, in December 2019, the CEO's PA was put forward for a salary increase. However, she said that the Respondent suddenly considered the PA role to be a potential temporary role, just at the time when the Claimant was being considered for redundancy. She suggested that the Respondent had deliberately decided not to replace the PA role so that the Claimant could not be appointed to it.

77. She cross examined Mr Holloway about this.

78. Mr Holloway told the Tribunal that the Claimant had always considered as a possibility for the PA role, if the Claimant was interested in it, but she had never expressed an interest. She had only said that she would take legal advice. As a result, Mr Holloway felt that he would make the decision himself about whether to maintain a permanent PA role. He said that, while he would have liked a permanent, in-house PA, the business case dictated differently.

79. Both Mr Allen and Mr Holloway told the Tribunal that Mr Holloway had a temporary agency PA, on reduced hours, 10am – 3pm, from March 2020 until about August 2020, because the Respondent was considering what nature of PA support Mr Holloway required.

80. It did not appear to be in dispute that the temporary agency PA was a young woman.

81. The Claimant cross examined Mr Allen about appointing a temporary PA in March 2020, when previously he had identified the PA as a core function. He said, "We had already identified that we could make saving in that area too. We didn't know the future of the [PA] role. We knew it would change, but not whether it would be part time or outsourced. The temporary role was 10am-3pm, it was not for full day…. By March 2020 our experience of looking into virtual DPO service changed our thinking in other areas too. CEO was pushing me to save support staff costs."

82. Both Mr Allen and Mr Holloway told the Tribunal that, since summer 2020, Mr Holloway has had a virtual PA, only, saving the Respondent £33,000.

83. The Respondent also moved its London premises to Reading in summer 2020, resulting in further significant savings.

84. On 4 May 2020 Mr Holloway met with the Claimant and told her that she would be made redundant, p213. He confirmed this in writing, p213. In the letter he said, "the reason for proposing a redundancy is that as TRBL funding is being withdrawn, changes need to be made immediately. The role of Data Protection Officer was needed prior to the introduction of GDPR however now that it is two years since this was introduced the need for a full time Data Protection Officer is no longer there. All ways of avoiding the redundancy and all alternatives have now been considered and

explored. We are not recruiting at the moment for any suitable permanent roles and as such there are no alternative roles available."

85. On 20 May 2020,p 229-235, the Claimant appealed against her dismissal.

86. On 10 June 2020, the Claimant attended an appeal hearing chaired by Jo Killip and John Lea, p255.

87. On 17 June 2020, the Respondent sent the Claimant an appeal outcome letter, dismissing her appeal p 310.

88. Mrs Killip told the Tribunal that she had mistakenly told the Claimant that Mr Allen's original August 2019 review had been oral and not written.

Relevant Law

Unfair Dismissal

89. *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

90. *s98 Employment Rights Act 1996* provides that it is it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA,* " .. or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

91. Redundancy and "some other substantial reason" are both potentially fair reasons for dismissal.

92. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 6. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, *Orr v Vaughan* [1981] IRLR 63.

93. Redundancy is defined in *s139 Employment Rights Act 1996.* This provides, so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
…
(*b*) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind…

have ceased or diminished or are expected to cease or diminish."

94. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

95. *Williams v Compair Maxam Ltd* [1982] IRLR 83 sets out principles which guide Tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

96. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

97. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

98. In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

99. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296; *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70.

100. In *Samels v University of Creative Arts [2012] EWCA Civ 1152*, the Claimant the Court of Appeal said at paragraphs 30 and 31 that it is not compulsory for an employer to consider bumping particularly given the detrimental effect it can have on employee relations, and that it is a voluntary procedure.

101. In all these matters, the employer must only act reasonably and there is a broad band of reasonable responses open to a reasonable employer.

Polkey

102. If an employer has dismissed an employee in a way which is unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v Dayton Services* [1987] 3 All ER 974.

Age Discrimination

103. By *s39(2)(c) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him.

104. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

105. Direct discrimination is defined in *s13 EqA 2010:*

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

106. By *s5 EqA 2010*, age is a protected characteristic. A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

107. In the case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

108. Regarding causation, the ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?" Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, Para [77].

109. However, if the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only, or even the main, reason. It is sufficient that it is significant in the sense of being more than trivial, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

110. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and the Annex to the judgment.

Discussion and Decision

Reason for Dismissal - Redundancy

111. The Tribunal considered whether the Respondent had shown that the reason, or principal reason, for the Claimant's dismissal was redundancy (or some other substantial reason).

112. It also considered whether there were facts from which the Tribunal could conclude that the Respondent had dismissed the Claimant because of age, or that it had not offered the PA role to the Claimant, but offered it to a younger woman,

because of age. The Tribunal also considered whether the Respondent had shown that age was no part of the reason that it acted as it did.

113. The Claimant contended that Mr Holloway had wanted to remove her from the organisation because she had queried his expenses and intervened on behalf of the young women who had made complaints.

114. The Tribunal found, as a matter of fact, that Mr Holloway did not know that the Claimant had had secret meetings with trustees, or made complaints, about management handling of the young women's complaints.

115. The Tribunal also found, as a matter of fact, that the Respondent had not made an informal decision to dismiss the Claimant before 2019.

116. The Claimant did not suggest to Mr Allen that he had drafted the business case for redundancy of the Data Protection Officer role because she had queried the CEO's expenses, or had secret meetings with trustees.

117. Looking at the totality of the evidence, the Tribunal was satisfied that Mr Holloway asked Mr Allen to undertake a review of the Respondent's support function because of the catastrophic loss of income resulting from the impending withdrawal of the RBL funding.

118. The Tribunal was satisfied that the Claimant, herself, was not singled out for redundancy. Pursuant to Mr Allen's August 2019 review, a vacant Research Manager post was not filled. The Respondent moved its London premises to Reading in 2020 to reduce costs. From summer 2020, Mr Holloway only had a virtual PA, as the PA post was removed from the establishment too.

119. The Tribunal was also satisfied that Mr Allen genuinely considered that the DPO was not required and that it was a standalone role.

120. On all the evidence, the Tribunal accepted that reason for dismissal was that set out in Mr Holloway's letter of 5 May 2020, "the reason for proposing a redundancy is that as TRBL funding is being withdrawn, changes need to be made immediately. The role of Data Protection Officer was needed prior to the introduction of GDPR however now that it is two years since this was introduced the need for a full time Data Protection Officer is no longer there. All ways of avoiding the redundancy and all alternatives have now been considered and explored. We are not recruiting at the moment for any suitable permanent roles and as such there are no alternative roles available."

121. The Tribunal was satisfied that the reason for dismissal was nothing to do with age. Anyone who had been in the Data Protection Officer role, whatever their age, would have been made redundant for those reasons.

122. Moreover, the Tribunal found that the Claimant was not given the PA role because she did not ask for it. It was clear from the notes of the first consultation meeting that she reserved her position on whether she was interested in it. In the second consultation meeting, the Claimant did not express any interest in any role and

declined to comment on the detailed business case for redundancy which had been sent to her. This was nothing to do with the Claimant's age.

123. The Tribunal also accepted Mr Holloway's evidence about the reason a temporary agency PA was appointed in about March 2020. The Tribunal concluded that the Respondent retained a temporary agency worker to carry out the PA role because it was continuing to review its establishment, with a view to reducing costs further. By March 2020, the Respondent was considering using a virtual PA service. It retained an agency PA while it considered its PA requirements. The temporary PA worked reduced hours, 10am – 3pm. The Respondent's decision to appoint an agency worker was entirely to do with its staffing review, and saving costs, and nothing to do with age. The agency worker could have been anyone, of any age.

124. The Respondent showed that the reason for the Claimant's dismissal was that it no longer needed a Data Protection Officer. The Claimant was dismissed for the potentially fair reason of redundancy. Age was no part of the reason for her dismissal and no part of the reason she was not offered the PA role.

Fairness of Dismissal

125. The Claimant says she unfairly selected for redundancy in that Mr Holloway was not impartial as she had raised informal concerns and complaints against him.

126. The Tribunal rejected the contention that Mr Holloway was not impartial. The Tribunal refers, again, to its findings of fact, that Mr Holloway did not know about the Claimant's secret meetings with trustees about the young women's complaints. Mr Holloway had not previously made a decision to dismiss the Claimant.

127. Mr Holloway's actions demonstrated that he was entirely impartial. He had made strenuous efforts to find charities who would use the Claimant's DPO services, to offset the costs of her post and avoid redundancy.

128. As the Respondent pointed out, Mr Holloway had proposed the Claimant for a promoted, better paid post, after she had queried his expenses. This indicated that he did not bear any ill-will towards the Claimant. It was not credible that this promotion had been an attempt to side-line the Claimant and remove her from scrutinising the CEO's activities, in the circumstances that the Claimant continued to report to Mr Holloway in this new role and that her new role had a governance element to it.

129. In any event, it was Mr Allen who proposed making the Claimant redundant and Peninsula's representative Mr Thomas, who carried out the consultation. Mr Thomas recommended that the Respondent proceed with the DPO role redundancy. By the time Mr Holloway made his decision, there were few, or no, alternatives available to him.

130. The Tribunal also rejected the contention that the Respondent must have pre-determined the decision to dismiss because Mr Holloway declined to change the Claimant's job description, and removed her from governance areas of the IT system, amongst other things.

131. The Tribunal accepted the Respondent's explanation for these things. They appeared to be routine managerial decisions.

132. The Claimant was in a pool of one for redundancy.

133. The Respondent clearly applied its mind to the selection of the pool, *Taymech v Ryan* [1994] EAT/663/94. Mr Allen explained the rationale for putting the Claimant in a pool of one – the data protection role was a distinct role with only one incumbent, and with little overlap with other duties. This decision was within the broad band of reasonable responses of a reasonable employer.

134. In terms of consultation, the Respondent did not properly explain the concept of "bumping" to the Claimant and did not offer to bump the Claimant into any of the potential roles.

135. The Respondent identified, in its business case, which it provided to the Claimant on 9 March 2020, that there were other staff whose roles the Claimant might wish to apply for, p133.

136. Despite the Respondent raising this in the business case, the Claimant never suggested that she should be given a role currently occupied by another employee.

137. The Tribunal considered that the Respondent acted within the broad band of reasonable responses in its approach to bumping. It raised the possibility that the Claimant might wish to apply for other roles. Bumping is a voluntary process; it was not incumbent on the Respondent to encourage the Claimant to seek to displace other employees.

138. The Claimant only received the business case for her redundancy on the 9th March 2020, the day before her first consultation meeting, and it did not include the list of possible roles to be bumped.

139. It was correct, as a matter of fact, that the Claimant was only given the business case on 9 March, before the first consultation meeting on 10 March. Nevertheless, that was only the first consultation meeting. It was always envisaged that there would be a second consultation meeting, which then took place on 16 April 2020. The Claimant did not ask for a postponement of the second consultation meeting. The decision to dismiss the Claimant was not made until 5 May 2020. The Claimant had ample opportunity, in the time between 9 March and 5 May, to make representations and ask questions about the business case, whether in consultation meetings, or in writing. The failure to provide the business case until 9 March did not prevent meaningful consultation.

140. Further, it was reasonable for the Respondent not to name the individuals with short service in the business case which it disclosed to the Claimant. It was reasonable to take the view that the Claimant might not want to take any of those roles and it would be unfair to destabilise other individuals, who might become aware that they were at risk of being bumped, if they were specifically named.

141. Claimant did not receive the recording and the meeting notes of the first consultation meeting of the 10th March until the 11th March 2020.

142. The Claimant agreed in evidence that she was not prejudiced by this. The Tribunal considered that it was not an unreasonable delay and did not render the process unfair.

143. The Claimant did not receive a recording of the second consultation meeting dated 16th April 2020 or the written responses given verbally to her in that meeting despite her request for the same.

144. The Claimant received a full transcript of the second consultation meeting, which incorporated the verbal responses at the meeting. The purpose of hearing notes is that a party can see what has already been discussed.

145. The Tribunal considered that the failure to provide the transcript until 30 April 2020 did not render the process unfair. The relevant consultation meeting had taken place on 16 April, when answers had been provided orally to the Claimant. She agreed to go ahead with that meeting. The Claimant did not explain, to the Tribunal, what difference receiving the transcript earlier would have made.

146. In any event, the appeal process took place after the Claimant received the 16 April consultation meeting transcript. The appeal provided written answers to all the questions the Claimant raised. The Claimant was not dismissed until the appeal outcome on 16 June 2016. The Claimant had an opportunity to raise any matters arising out of the transcript before she was dismissed.

147. The Respondent failed to consider alternatives to redundancy for the Claimant, in particular failed to consider the Claimant's ongoing governance duties.
148. The Claimant says that the Respondent sought to diminish her governance role prior to her redundancy.
149. The Respondent failed to consider suitable alternative employment for the Claimant, in particular the PA role.

150. The Tribunal concluded that the Respondent made reasonable efforts to find alternative work for the Claimant. It raised the possibility of bumping in its business case. The Claimant did not ask to be considered for any role occupied by another employee. Mr Holloway made considerable efforts to obtain other DPO work for the Claimant, to avoid redundancy.

151. In the consultation process, the Claimant was specifically asked whether she was interested in the PA role, but she declined to say that she was.

152. The Respondent did not fail to consider the Claimant's ongoing governance duties. The business case stated that responsibility for governance compliance could either be outsourced to a company secretary service or could be fulfilled by the Finance Director, who had governance expertise and existing governance responsibilities,p133.

153. The Tribunal accepted the Respondent's evidence that the Claimant's governance role was part of her existing role and that Mr Holloway did not diminish it.

154. In conclusion, the Tribunal considered that there had been fair consultation, fair selection of pool and a reasonable consideration of alternative work. The Respondent provided the Claimant with its detailed rationale for redundancy, on 9 March 2020. It undertook 2 consultation meetings thereafter, when the Claimant had the opportunity to ask questions and put forward alternatives to redundancy. The Claimant did not say that she wanted to be considered for other posts. The decision to dismiss was within the broad band of reasonable decisions of a reasonable employer.

155. The Claimant's claims fail.

Employment Judge Brown

Dated: …19 July 2021……

Sent to the parties on:

19/07/2021.

For the Tribunal Office