EMPLOYMENT TRIBUNALS

Claimant: Mrs Maria Thomas

Respondent: Shaw Trust Limited

Heard at: Cardiff by CVP **On:** 11th and 12th February 2021

Before: Employment Judge G Duncan

Representation
Claimant: Mr Kember, Counsel
Respondent: Mr Lewis, Counsel

RESERVED JUDGMENT

It is the decision of Employment Judge G Duncan that the Claimant's claim for unfair dismissal is dismissed.

REASONS

Introduction

1. The Claimant, Maria Thomas, started her employment with the Respondent, Shaw Trust Ltd, on the 3rd May 2011. At the time of dismissal on 18th October 2019, she had reached the role of Director of Partnership Wales. The Respondent is a large charity operating mainly in the welfare to work sector and have approximately 4000 employees and 1000 volunteers working with them.

2. The Claimant was represented by Mr Kember of Counsel. The Respondent was represented by Mr Lewis of Counsel.

3. The hearing has taken place by way of two day CVP hearing. Both parties agreeing that the full hearing was capable of being heard remotely.

4. Both parties have been represented throughout these proceedings.

5. By ET1, received by the ET on 29th January 2020, the claimant claims that she was unfairly dismissed by the respondent. The particulars of complaint accept that, as a result of the downturn in anticipated turnover, the respondent had a need to restructure but it is not accepted that the respondent acted fairly in selecting her for redundancy. Broadly, she states that the respondent failed to take adequate steps to secure appropriate alternative employment, failed to fairly consider her for an alternative role to which she applied, namely, Commercial Partnership Manager, that the scores awarded for that role were unreasonable, that the Respondent had pre-empted her decision to appeal and then unfairly considered the appeal in her absence. She states that the decision to dismiss was procedurally and substantively unfair for the reasons outlined at paragraph 29 of her particulars. She further considers the appeal process was unfair for the reasons outlined at paragraph 33 of her particulars.

6. The respondent, through the ET3 and accompanying grounds of resistance, asserts that she was selected fairly, they followed a formal collective consultation, sought alternative employment roles and followed a fair and transparent process for both the application for alternative employment and the decision to dismiss on account of redundancy. They dispute that the Claimant was dismissed unfairly.

7. The matter came before Employment Judge Jenkins on 3rd June 2020 for telephone hearing. The date had originally been set for the full hearing of the matter, however, as a result of the pandemic, the full hearing was vacated. At the hearing, the issues to be determined were agreed as per paragraph 7 of the order. It is agreed that those remain the relevant issues albeit, quite rightly, both Counsel raise various matters that need to be determined to inform those overarching considerations.

Documentation

8. In consideration of the matter I have had the benefit of a 322 page bundle with an additional mini-bundle of documents taking the total size of the bundle to 331 pages. I have also been provided with copies of the statements of the claimant, Andrew Canniford, Richard Clifton and Judith Denyer.

9. In addition, I granted permission for the respondent to rely upon a further document as a result of their application on the afternoon of Day 1 of the hearing. On return from the lunch adjournment, I was informed that the respondent sought to rely upon an email, dated 23rd July 2019, and that as part of the respondent's ongoing duty of disclosure it was sent to the claimant's representatives. Unfortunately, through no fault of his own, Counsel for the claimant had limited opportunity to consider the document over the lunch adjournment and take instructions. It was therefore agreed that a short break would be taken on conclusion of the cross-examination of the witness, Richard Clifton, and both parties could consider their respective positions. At that juncture, the respondent formally applied to rely on the email and the application was opposed by the claimant. Following short submissions, I granted permission to rely upon the document despite the fact that it had been disclosed late in the proceedings and almost certainly came to light as a result of investigations being made in response

to the oral evidence heard during the morning. Against the prejudice caused to the claimant, I balanced the fact that this document went to the heart of one the central issues in the case, the claimant was a recipient of the email, the claimant would be given an opportunity to respond to the email in supplementary questions in evidence in chief and a further opportunity would be granted to the claimant to cross-examine Mr. Clifton upon the document, if so required. The document was plainly relevant to the issues that required determination and it was in the interests of justice for the document to be relied upon.

Findings of Fact

10. Over the course of two days, I heard oral evidence from the respondent's witnesses: Mr Andrew Canniford, Commercial Director; Richard Clifton, Chief Commercial Officer; and, Judith Denyer, Operations Director. I heard oral evidence from the claimant.

11. The claimant attended a meeting on 16th July 2019 with Richard Clifton, Chief Commercial Officer, Karen Hegarty, Employee Voice Representative, and Pretika Khentani, HR Business Partner. At that meeting, the claimant was informed that she was at risk of redundancy as a result of an anticipated reduction in the respondent's turnover and a need to reduce overheads. It is agreed between the parties that the respondent had a need to restructure the organisation as a result of the downturn. The minutes of the meeting can be found at page 83 of the bundle. The attendees discussed the restructuring and the claimant was shown a number of slides as found at page 91 of the bundle. The claimant was informed that a consultation period would commence, that the respondent's employee representatives would be involved in the process and she could have 1 to 1 meetings on request. She was informed of the process by which interviews would be undertaken for alternative job roles.

12. The claimant was sent a letter, dated 17th July 2019, to state that she was at risk of redundancy, the letter can be found at page 89 of the bundle. Within the letter, it is stated that the respondent "will make every effort to try and seek alternatives to redundancy, for example, suitable alternative employment for you, within your department and in the Shaw Trust Group". The letter clearly signposts the claimant to internal vacancies under the internal Intranet.

13. On 17th July 2019, the claimant was emailed six job descriptions relating to a number of vacancies within the organisation. The job descriptions appear between pages 93 and 128 of the bundle. By way of email, dated 23rd July 2019, the claimant was one of a number of recipients to an email from Richard Clifton with the subject 'Expression of Interest Process'. The email reiterates the roles available, as detailed in the earlier email, and states that expressions of interests should be made by Friday 26th July 2019. The claimant makes some criticism of the fact that she did not have access to an electronic platform, used in the commercial team for data sharing, named "Huddle". The relevance of this criticism appears to be limited, at this time, given the fact that she was sent alternative job descriptions via email. Further, she accepted in her oral evidence that she realised that she could not gain access to Huddle when she was sent a link via email that she could

not open. The email had been sent to her and other individuals that may be considered at risk of redundancy. It is accepted that she had knowledge of the roles identified in the email dated 17th July 2019.

14. The claimant states at paragraph 14 of the Particulars of Compliant that she "assumed" that she would be guaranteed an interview for the role of Commercial Partnership Manager for Central England and Wales. She went somewhat further in her oral evidence by stating that she understood from the meeting on the 16th July 2019 that she would be automatically ringfenced into one of the roles for which she had been sent the job descriptions. She asserts that she was told that she did not need to formally apply for the role. Her assertion does not sit comfortably with the email dated 23rd July 2019 from Richard Clifton outlining the need to show an Expression of Interest. Regardless of the extent of the criticism levied by the claimant towards the respondent on this point, she accepts that she was prompted by HR prior to the closing date for applications and accordingly made an application for the role.

15. I find that the respondent made it abundantly clear in in July 2019 that there was an expectation that the claimant should formally apply for alternative roles. I have particular regard to the email dated 23rd July 2019.

16. The claimant applied for the role of Commercial Partnership Manager. The claimant accepted in her oral evidence that this was the obvious role to which she would apply. There was only one other candidate for this role, Adrian Thacker. In response to the expression of interest, Adrian Thacker was offered a 1 to 1 meeting by Andrew Canniford, Commercial Director. In oral evidence, he explained that the purpose of offering Adrian Thacker a meeting was to discuss the structure and job description. He stated that no meeting was personally offered to the claimant as she had already been offered a 1 to 1 at the meeting on 16th July 2019 with Richard Clifton. He stated that he offered the meeting to Adrian Thacker to ensure that the a fair and equitable process was followed. Andrew Canniford was clear in his oral evidence that he did not discuss any issues that may have come up in interview and Adrian Thacker did not have access to the interview questions. I accept his oral evidence on these matters. Andrew Canniford was an impressive and consistent witness. Further, there is no evidence to suggest that Andrew Canniford gave Adrian Thacker an unfair advantage by engaging in a 1 to 1 prior to his interview.

17. Adrian Thacker was interviewed on the 30th July 2019. The claimant was interviewed on 5th August 2019. I have the detailed interview notes of both candidates at pages 129 to 164 of the bundle. In oral evidence, the claimant accepted that the three person interview panel was suitably experienced, that the questions were read out to her in the terms stated in the interview notes and that they were a reasonable selection of questions to ask. It is clear from the interview notes and accompanying documentation that each candidate would be scored out of five for each of the seven questions. The scores were then aggregated and weighting applied. The claimant scored 45 and Adrian Thacker 50. Accordingly, Adrian Thacker was offered the role on 6th August 2019. The same day, the claimant was informed that she was unsuccessful and was given some general oral feedback. She requested written feedback and was provided with one of the documents at either 165

or 177 of the bundle – it is unclear as to which of the documents was provided to the claimant but it would appear that they are substantially the same.

18. On 8th August 2019, the claimant sent an email to Sharon Barton, HR Business Partner Manager, to state that she would like to formally appeal the outcome of the selection process [247]. The email does not provide any detail as to the basis of the challenge, Sharon Barton therefore requested that the claimant provide more detail. In the email exchange that follows on 9th August 2019, Sharon Barton confirms that she and Richard Clifton will hear the appeal and both have availability on 13th August 2019. When the claimant is informed that Richard Clifton was to hear the appeal, she raised an objection on the basis that she considers him to be conflicted on account of the fact that two of the three interview panel report directly to him. She expresses a strong preference that her appeal be heard by colleagues from the respondent's central services as opposed to within the commercial directorate. At the request of the claimant, the appeal meeting is delayed until 16th August 2019 so to allow further time for her to review the documentation arising from the interview process. Sharon Barton, in response to the suggestion that Andrew Clifton is conflicted, disagrees with the view expressed by the claimant and explains that, as Chief Commercial Officer, he is best placed to manage the appeal in order to ensure that a fair and transparent process has taken place.

19. On the 16th August 2019, the claimant was certified as unfit to attend work by her General Practitioner and the meeting is cancelled.

20. There appear to be two limbs to the claimant's case that the appeal should not have been heard by Richard Clifton on 16th August 2019.

21. Firstly, the fact that two of the interviewers report to him. I have carefully considered this as an allegation and find it to be entirely without evidential basis. As a starting point, a senior manager within the directorate would be well placed to consider an appeal of this nature. He clearly had a grasp of the relevant issues and had the type of departmental knowledge to allow a proper review of the process followed. Further, the claimant has praised Richard Clifton's professionalism and integrity throughout her oral evidence. I accept her oral evidence in that respect as it accords with my view that Richard Clifton presented as a fair, measured individual that was actively striving to ensure fairness. I find that it was entirely appropriate for Richard Clifton to have been the individual chairing the appeal process due to his experience and position within the organisation.

22. Secondly, the claimant alleges that Richard Clifton was attending meetings with Adrian Thacker prior to the appeal meeting that had been due to take place on 16th August 2019 and that Adrian Thacker had begun work in his new role. The thrust of the claimant's criticism related to a meeting on 14th August 2019. I note, at this juncture, that it was as a result of the claimant's request that the meeting was moved from the 13th August 2019. Had this entirely reasonable request not been made, then the appeal would have taken place before the meeting on the 14th August 2019. I have had regard to an email sent by Sharon Barton to the claimant on 16th August 2019, at page 193 of the bundle, that states Richard Clifton has confirmed that he

did not organise the meeting with Adrian Thacker and that the structure and agenda for the day were organised by other individuals. Once the appeal had been moved, it would appear that little consideration was given as to the perception this may give to the claimant. I consider her perception expressed in oral evidence to be genuine but entirely misplaced. Richard Clifton gave oral evidence to state that offering a route of appeal following a selection process was uncommon and that in offering such a route it was his intention to ensure that a fair process was followed. He informed the Tribunal that had there been an issue with the fairness of the process then the option available would have been to withdraw the offer to Adrian Thacker and recommence the process. He conceded the practical difficulty that this decision would have presented him with but given the claimant's own evidence relating to the integrity and professionalism of Richard Clifton, I accept his evidence on this point. I also have regard to the fact that Adrian Thacker was an internal candidate and already employed by the respondent. I have considered the uncommon nature of an appeal of this nature, the fact that the Claimant was offered the role the day after interview and the respondent's own business needs when progressing the restructuring. I conclude that there was no conflict or unfairness to the claimant in respect of her secondary limb of complaint that any meetings amounted to a conflict. I therefore find, for the reasons above, that Richard Clifton was entirely suitable to conduct the appeal process relating to the selection process.

23. Following the cancellation of the meeting on the 16th August 2019, the respondent was faced with a decision as to how to progress the appeal. The decision was complicated as the claimant was declared unfit for work until 22nd August 2019 and thereafter had a period of annual leave until 9th September 2019. The path chosen was to request that the claimant provide a comprehensive statement of appeal by close of play on 19th August 2019. It would appear that there was no response to the email at page 193 and a formal letter was thereafter sent on 20th August 2019 at page 195 of the bundle. The letter again invites the claimant to inform the respondent of the reasons for appeal by 22nd August 2019 – thereby extending the previously set deadline. The claimant outlines her reasons for challenge in a lengthy and detailed email response on 21st August 2019. The claimant details precise objections relating to scores provided in her interview and that of Adrian Thacker.

24. The outcome of the appeal is communicated by letter dated 20th September 2019 [P205]. Andy Clifton provides a detailed response to each of the areas of challenge raised by the claimant. In oral evidence, Andy Clifton was unable to provide a precise date upon which he considered the appeal. He thought that it was likely to have been approximately a week prior to the letter being drafted. I accept that he was trying to do his best to assist the Tribunal on this point. I accept his evidence on this issue as it would have made little practical sense to have undertaken the appeal on paper and then waited a number of weeks to pass before sending the appeal outcome letter. The approximation by Richard Clifton allows me to conclude that the appeal hearing would have been undertaken at a time when the claimant was back at work. Plainly, this is a point of concern for the claimant and she gave oral evidence to state that she would have wanted to attend to give her views and to have a discussion as to how the respondent had unfairly considered

her interview responses. The claimant is keen to draw my attention to the opening paragraph of her email dated 21st August 2019, namely, the reference to "this does not cover all the challenges I have". She invites the Tribunal to consider that there were further points that she wished to raise in person at the appeal meeting. I find that there is little substantive difference in the issues raised in her email and the precise challenges outlined at paragraph 18 of her Particulars of Complaint. I asked the claimant what else was it that she wanted to raise in the appeal hearing? The focus of her response was that she wanted to engage in a discussion but did not give any additional areas of challenge that she wanted to raise. I consider this to be telling and supportive of my finding that there is little substantive difference between the contents of the email dated 21st August 2019 and the areas of challenge in the Particulars of Complaint.

25. The respondent invited the claimant to a formal at notice meeting, by way of letter dated 15th October 2019, for a meeting on 18th October 2019. The minutes of the meeting can be found at page 213 of the bundle. Further to the meeting, the respondent wrote to the claimant on the same day to confirm that she was to be made redundant [217]. The claimant appealed by way of email on 25th October 2019 [219]. In the appeal request, the claimant makes a Subject Access Request. The appeal meeting took place on 22nd November 2019 and was chaired by Judith Denyer, Operations Director. The minutes can be found at 223 of the bundle. It is accepted that the appeal hearing was convened at a time when the Subject Access Request had not been fully actioned. As a result of this, it was agreed that the claimant could raise any additional concerns in writing following the appeal meeting. The claimant accordingly sends two emails to Ellie Alderdice, HR Business Partner, and Judith Denyer on 26th November 2019 [275 and 277]. A letter dismissing her appeal was sent to the claimant, dated 9th December 2019 [235].

The Law

26. The key statutory considerations are found under section 98(1) and (2) of ERA 1996. It is for the employer to show the reason for dismissal. Where the employer can show a potentially fair reason for dismissing the claimant, the determination of the question whether a dismissal is fair or unfair 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 shall be determined in accordance with equity and the substantial merits of the case.

27. I am grateful for Counsel for the respondent in preparing a note in respect of the relevant legal principles at paragraph 5 to 19 of his written submissions. Those paragraphs are agreed by Counsel on behalf of the claimant as being an accurate summary of the applicable legal principles and the framework within which I should base my considerations. Those principles are uncontroversial and are outlined in the paragraphs below as principles that I have carefully considered.

Redundancies Linked to Re-organisations

a. *Where redundancy arises in consequence of a re-organisation and there are new roles to be filled, the employer's decision is likely to be forward-looking and to centre on an assessment of the ability of the individual to perform in the new role.*

b. *In such cases, the "Williams guidelines" (set out in the case of Williams v Compair Maxam Ltd [1982] IRLR 83) are unlikely to be useful, as appointment to the new role is likely to involve something more akin to an interview than a traditional selection process. The EAT held in Akzo Coatings plc v Thompson EAT 1117/94 that the Williams guidelines were concerned with the formulation and application of objective criteria related to selection for dismissal from a pool where some employees would be retained and others dismissed. They did not apply to selection for alternative employment, where the issue was whether an employer had taken reasonable steps to find alternative employment.*

c. *In Darlington Memorial Hospital NHS Trust v Edwards EAT 678/95, an ET found dismissals for redundancy unfair because, in offering alternative employment, the employer had not followed similar principles of fairness to those applying to selection for redundancy. The EAT overturned the decision on the same grounds as Akzo. However, it added some gloss, noting that the employer is at least obliged to conduct the selection process in good faith and give proper consideration to the redundant employees' applications.*

d. *Ultimately, an ET considering whether the process of appointment to a new role is fair simply has to apply s.98(4) ERA, as the ET did in Ralph Martindale and Co Ltd v Harris EAT 0166/07.*

e. *While an ET remains entitled to consider how far the process was objective, it should recognise that the decision as to which candidate will perform best in the new role will involve a substantial element of judgment: see Morgan v Welsh Rugby Union [2011] IRLR 376, which confirmed the centrality of s.98(4) and other points set out above. The assessment tools to be used in an interview of that kind – which was not a redundancy selection exercise – are a matter for the employer's discretion.*

f. *The overriding importance of applying section 98(4) of the ERA and the range of reasonable responses test in this context was again emphasised by the EAT in Green v London Borough of Barking & Dagenham (UKEAT/0157/ 16/DM) (10 March 2017, unreported).*

Selection Approach

g. *In general, the decided cases indicate that the courts will not be willing to carry out a detailed re-examination of the way in which the employer applied the selection criteria. In Eaton Ltd v King [1995] IRLR 75, the Scottish EAT stated that it was sufficient for the employer to have set up a good system for selection and to have administered it fairly.*

h. *That approach was expressly endorsed by the Court of Appeal decision in British Aerospace plc v Green [1995] IRLR 433, where Waite LJ summed up the position as follows:*

   (a) *"Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge, namely a swift, informal disposition of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him." [at 3]*

   (b) *"The tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the appeal tribunal in Eaton Ltd v King … that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessments on which the selection for redundancy was based." [at 25]*

i. *Similar sentiments were expressed in Bascetta v Santander [2010] EWCA Civ 351 [at 29].*

Efforts re Alternative Roles

j. *In relation to any argument by C that there were insufficient efforts by R to find alternative work, such as to avoid her redundancy, the real question again, having regard to the extent of the obligation, is whether the steps taken by R were so inadequate that they fell outside the range of reasonable responses. The duty on R is limited: it only needs, in law, to take reasonable steps. It will be nowhere enough for C to merely show that some further or other step would have been reasonable. It's all about the range of reasonable responses.*

k. *This, it is submitted, is consistent with the EAT's view in Quinton Hazell Ltd v Earl [1976] IRLR 296. It upheld an employer's appeal against an ET finding a dismissal unfair because the employer had not been sufficiently "energetic" in seeking alternative employment.*

l. R highlights Fisher v Hoopoe Finance Ltd UKEAT/0043/05/LA, too. At paragraph 17, it was held: "In our judgment the law should be that where there are one or more possibilities of suitable alternative employment available to an employee who is to be made redundant then the employer should normally inform the employee of the financial prospects of those positions. We note that it may not be practicable to provide such information because the financial prospects of a particular position may not yet have been determined. Furthermore, a failure by an employee to indicate an interest in a particular position and/or to request further information (including financial information) is a factor which the Employment Tribunal may wish to take into account in reducing an award under ss 112 (3) and 123 (6) of the Employment Relations Act 1996."

m. As to offering a job in a subordinate position, R notes that the Scottish EAT concluded in Barratt Construction Ltd v Dalrymple [1984] IRLR 385 that it may be reasonable for the employer to assume that this will be unacceptable to the employee unless the employee indicates otherwise. The EAT expressed its observations on as follows: "Without laying down any hard and fast rule we are inclined to think that where an employee at senior management level who is being made redundant is prepared to accept a subordinate position he ought, in fairness, to make this clear at an early stage so as to give his employer an opportunity to see if this is a feasible solution."

n. The question of timing can be important. Since the reasonableness of a dismissal is dependent on the situation known to the employer at the time of the dismissal, the appearance of an alternative job after the employee has been dismissed cannot make the dismissal unfair. In Octavius Atkinson and Sons Ltd v Morris 1989 ICR 431, CA, work became available only hours after the employee was dismissed on account of redundancy. The Court held that made no difference to the question of fairness.

Cured on Appeal?

o. As with conduct and capability cases, a defect in a redundancy consultation process can be cured on appeal (irrespective of whether that appeal takes the form of a review of the decision or a full re-hearing) provided the appeal is a rehearing and not merely a review of the original decision: Taylor v OCS Group Ltd [2006] IRLR 613.

Conclusions

28. I have carefully considered the evidence relating to the reason for the dismissal and the evidence on the issue is overwhelmingly in support of a finding that this was a genuine redundancy situation. The claimant accepts that there is a need for restructuring within the organisation as a result of the financial downturn that is plainly evidenced. I therefore find that the reason for dismissal was redundancy as defined by section 139(1)(b) of ERA 1996. Accordingly, the reason for dismissal is a potentially fair reason and I am required to move on to consider whether the dismissal was fair or unfair.

29. In considering whether the respondent acted within the range of reasonable responses, the parties identified four substantive areas that form the crux of the claimant's case. I agree with the principle issues identified and that the Tribunal's determination in respect of these issues will determine whether the respondent acted within the range of reasonable responses. Those four main areas are as follows:

a) Insufficient efforts regarding alternative roles;

b) The system for selection for alternative roles and the scoring itself;

c) The process for appeal from the selection exercise; and,

d) Final decision to dismiss and the appeal.

I shall consider each of those areas in turn.

Efforts regarding alternative roles

30. In consideration of the efforts made by the respondent relating to alternative roles, I have regard to the discussion in the consultation meeting on 16th July 2019. The claimant was offered a 1 to 1 meeting and invited to feedback on the job descriptions available. She did not take the claimant up in respect of either opportunity. Further, she is critical of the respondent throughout the documentation as to the availability of information relating to alternative roles. I find this surprising given the email sent to her attaching job descriptions, the email link having been sent to her and the information having been provided to her to state that vacancies are available on the respondent's intranet. Further, the email of 23rd July 2019, explaining the need for an expression of interest is particularly relevant. In my view, it clarifies any possible confusion that could have arisen regarding the need for the claimant to take some positives steps to either apply or make expression of interests in available roles. I consider the above as a clear demonstration on the part of the

respondent that they were being proactive in trying to secure alternative roles for the claimant. The fact is, the claimant was not helping herself during the process.

31. It is, in my view, highly relevant that this respondent was going through a process of significant restructuring through a considerable downturn. Swaths of the workforce were 'at risk', the respondent made the claimant aware of the position yet she appears to have been in denial or minimised the extent of the position in which she found herself. This is demonstrated by the oral evidence of the claimant when it was put to her that she could have been under no illusions that her job was at risk, she responded by stating that she "assumed" that she would be ringfenced into another role – this flies in the face of the lengthy discussion that took place on 16th July 2019 at the consultation meeting, she was plainly at significant risk of redundancy. Sadly, the claimant has demonstrated throughout the process that she has made a number of assumptions that placed her in positions of even greater difficulty – this is one example of that. I consider that it was the claimant, not the respondent, that was failing to be sufficiently proactive in the early stages of the consultation process.

32. Regardless of the claimant's evidence as to her understanding as to whether she needed to apply for roles or not, the respondent was proactive in chasing her towards the end of the application period. Had it not been for HR, it appears that the claimant would have simply missed the deadline for the role of Commercial Partnership Manager. I consider this evidence to be a further demonstration of the respondent's commitment to take steps to find alternative roles for the claimant.

33. I shall consider the selection process and scoring below, but having failed in her attempts to secure the Commercial Partnership Manager role, the claimant in her witness statement at paragraph 30c)iv) states that the respondent failed to inform her of a Business Development Manager post that became available in or around August-September.

34. In my view, it is highly relevant that the role was available in July and was indeed one of the roles that she was sent in the email of 17th July 2019 – she chose not to apply for the role at that time. It was plainly a role that the claimant could have applied for having been sent the job description. The role was subsequently offered to an individual that accepted the role but resigned shortly thereafter. The job was therefore readvertised on the respondent's intranet in early September during a period that she was back at work following sick leave and annual leave. It is relevant that she did not apply in July as it demonstrates, in my view, that even if she was aware of the job in September, she was unlikely to apply at that time, regardless of the respondent view that she was unsuitable for the role. It further demonstrates that despite the

respondent informing the claimant that jobs would be placed on the internal intranet, she did not check the website during the relevant period of advertisement. It is surprising that a claimant that, by this stage had not been successful in obtaining her preferred role, was not checking the very location on the intranet that she had already been told would be the place that vacancies would be made available. It is sadly, another example of the claimant failing to be proactive when the respondent had, in my view, properly outlined the mechanism for identifying alternative roles, explained the process by which individuals should apply and reminded the claimant of the need to apply when a deadline approached. I consider the appeal letter of 26th September 2019 to be particularly relevant to the issue of the respondent's attempts to secure alternative roles [206]. It states that:

'You also ask as to why you were not given sight of other operational roles available. This was because there were no other operational roles available – the operational roles at your level are being removed and not reduced. The remaining vacant roles were not of a similar standing or skillset to your current role, therefore they were not suitable alternative roles but they were also not considered as other viable vacancies, irrelevant of their suitability, because they require clinical qualification which we understand you do not hold or could not reasonably have been trained to obtain'.

35. In my view, the letter demonstrates active consideration of other vacancies and for two reasons consider and explain why those roles were not appropriate. The letter was written by Richard Clifton, an individual that had worked with the claimant for a number of years and that the claimant spoke highly off. Richard Clifton knew the claimant's skill set when reaching this view. The same letter also, in my view, clarifies the position regarding the ringfencing of roles. The claimant states that she was under the impression that she could not apply for roles outside her directorate. Whilst I note the lack of specific reference to the ring fence discussion in the minutes to the meeting on 16th July 2019, I consider that, on balance, Andrew Clifton explained the situation to the claimant regarding ringfencing of roles and that this is reenforced by the letter at page 206.

36. This is a redundancy process in which the claimant had opportunities to express interest in other roles and chose not to do so. I accept the submission that the claimant placed 'all her eggs in one basket' in respect of the Commercial Partnership Manager role. She assumed that she would get the role and she assumed she would be successful in overturning the appeal – she was wrong to make these assumptions and only compounded her position in the face of the respondent taking efforts to find alternative roles.

37. For the reasons outlined, I find that the respondent took steps that fall within the reasonable band of responses in respect of the efforts to find

alternative roles. The respondent identified roles, assisted the claimant, chased her for responses and interviewed her in the role of her choice.

The system for selection for alternative roles and the scoring itself

38. As previous outlined, the claimant in her evidence, accepts the interview panel was suitably experienced, the questions were fairly structured and they were reasonable questions to ask. I have already found that there was no unfair benefit in a 1 to 1 meeting between Andrew Canniford and Adrian Thacker, and that he did not provide any information to Adrian Thacker that may have assisted him in interview. The claimant states that she requested information from Andrew Canniford prior to the interview and that she did not receive a response. I accept the evidence of Andrew Canniford on this issue and consider that he classed the request by the claimant as low priority and unlikely to have had an impact on the interview. I also have regard to fact that the claimant did not ask for the interview to be delayed, nor did she chase the information on the morning of the interview.

39. The crux of the claimant's case relating to the selection process is that she was improperly marked for her questions and that Adrian Thacker's responses were marked too highly. I have embarked upon a careful consideration of the respective challenges by the claimant and the explanation in response by Andrew Canniford. I have regard to the fact that there is considerable room for subjective analysis when marking answers during an interview. I consider that improper subjectivity is guarded against by a process of aggregation and moderation – that is precisely what happened in this case. I have no doubt that the claimant considers that her scores were too low for her answers, but the reality is that the respondent has presented a balanced interview panel, a clear structure to the questions, a clear framework for the answers and they have marked within that framework. As forceful as the claimant was with her challenges, Andrew Canniford was equally forceful with his explanation and rebuttal. It was the panel's view that Adrian Thacker met the marking criteria to a greater degree than the claimant and, on the evidence available, that is a conclusion that they appear to have been perfectly entitled to reach. I am satisfied that the panel embarked upon a fair and balanced scoring process, they did so impartially and with the intention of identifying the best candidate in accordance with the selection criteria. As the case law makes plain, I am not entitled to embark upon a reassessment exercise in the way in which the claimant invites me to but I have carefully listened to each of her criticisms and find that, individually and cumulatively, they do not lead me to the conclusion that the respondent acted outside the range of reasonable responses. This was, on the evidence available, a fair selection

process, applied fairly, with no overt signs of conduct that mars the process of fairness.

The process for appeal from the selection exercise

40. I have already found that Andrew Clifton was fairly and properly placed to conduct the appeal. The central issue, having found that Andrew Clifton was a proper individual to undertake the appeal, is whether the process followed was fair.

41. I firstly have regard to the evidence of Andrew Clifton when he states that this type of appeal is uncommon and that the appeal was heard so to ensure fairness. I accept this. In my view, the respondent initially acted entirely reasonably by delaying the appeal meeting from 19th to 22nd August. In light of the claimant's ill health and leave, the respondent decided to request information from the claimant in writing. Having missed one deadline, the respondent extended the deadline further. In my view, the respondent acted fairly and within the reasonable band of responses when faced with a appellant that was sick whilst faced with a pressing business need to try and resolve the situation.

42. In responding in the manner that the claimant did on 21st August 2019, the claimant presented a detailed list of challenges that she felt needed to be considered. She did not, at any stage, express the view that she felt unable to communicate her points of challenge in writing. In my view, this is with good reason as, given my findings that there is no substantial difference between the written concerns and the Particulars of Complaint, the claimant was perfectly capable of articulating her grounds of appeal in writing.

43. In the concluding section of the email, she expresses a hope that the panel will convene in the week of her return. I consider this to be a clear expressed desire on the part of the claimant to be in attendance.

44. In light of my earlier finding, the appeal hearing thereafter proceeded at a time when the claimant was back in work following annual leave. In considering whether the respondent acted outside the reasonable band of responses in hearing her appeal when the claimant was back at work, I have regard to the following:

    a) Richard Clifton is accepted to be a man with professional integrity;

    b) Richard Clifton was best placed to hear the appeal given his knowledge of the claimant and the department;

c) Richard Clifton made enquiries with members of the selection panel in consideration of the claimant's appeal and to investigate the allegation that Andrew Canniford failed to respond the claimant's email;

d) The claimant had included her principle points of challenge in her email and therefore Richard Clifton was able to consider the same;

e) The respondent increased the mark for one question, in my view demonstrating that this was an appeal that properly considered the merits of the claimant's challenge;

f) The thrust of the claimant's reasoning in seeking a meeting was to have a discussion in respect of the questions, a discussion that inevitably would have centred on points that she detailed in her email.

45. In consideration of the above, I do not consider that the respondent's actions in failing to convene a face to face meeting fell outside the reasonable band of responses. In my view, the respondent acted in good faith throughout the process and is likely to have failed to invite the claimant to the meeting as a result of a genuine error. I attach some weight to the fact that the claimant at no stage chased the outcome of the appeal or contacted the respondent to enquire as to the status of the appeal hearing.

46. Having considered the entirety of bundle, and carefully listed to the claimant's oral evidence, it is difficult to understand what the claimant would have said at the appeal hearing that is not contained in her email dated 21st August 2019. Had she attended, I find it likely that the outcome would have been precisely the same. I have particular regard to the fact that the respective candidates were separated by some five marks – it was not the case that Adrian Thacker had been successful by a very small margin.

Final decision to dismiss and the appeal.

47. I consider that Judith Denyer carefully considered the grounds of appeal raised by the claimant. She outlines her detailed responses in her outcome letter, dated 9th December 2019. It is clear that she has taken account of each of the claimant's concerns. The key question, in my view, is whether it was unreasonable to conclude the appeal process whilst the Subject Access Request was outstanding. I note that the claimant does not request that the appeal hearing be adjourned or postponed to allow her to consider documents from the SAR. Further, the SAR is specifically discussed at the conclusion of the appeal hearing and it is outlined that the claimant could send any

relevant documentation to Judith Denyer if anything relevant were to be identified. The claimant exercised this mechanism by further emails on 26th November 2019. In those emails, the claimant does not state that she is requesting a further appeal hearing in light of new information, nor does she say that the new information requires an oral explanation. She simply sends the information with an explanatory email. It is clear from the date of the appeal outcome letter on 9th December 2019 that Judith Denyer considered the "subsequent documents you asked me to consider from your subject access request and from further investigations". In my view, the respondent acted reasonably in offering the claimant a chance to draw to their attention information that the claimant may identify following the appeal hearing. The respondent acted within the range of responsible responses and ensured that the claimant was presented with a fair opportunity to present her case.

Decision

48. In consideration of the claim, I conclude that the respondent followed a fair process and fairly dismissed the claimant. I therefore dismiss the claim.

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Employment Judge G Duncan

Date 17th February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 18 February 2021

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FOR EMPLOYMENT TRIBUNALS