EMPLOYMENT TRIBUNALS

Claimant: K Button

Respondent: Q Despatch Ltd (t/a On Cue Transport)

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY: London Central **On: 22-24 September 2021**

Employment Judge: Employment Judge Henderson
Members: Mr M Ferry; Ms C Buckland

Appearances
For the claimant: In Person
For the respondent: Mr S Joshi (Solicitor Advocate)

JUDGMENT

The claimant's claims of direct sex discrimination (under section 13 of the Equality Act 2010 (the EqA) do not succeed and are dismissed.

The date provisionally fixed (for 10 November 2021) to hear details of the compensation to be awarded to the claimant (the Remedy Hearing) is not now needed.

REASONS

1. This was a claim for direct sex discrimination (section 13 EqA) brought by the claimant in an ET1 lodged on 9 November 2020. The respondent defended the claim. The claimant's claims for unfair dismissal and a statutory redundancy payment had been withdrawn and dismissed on 19 March 2021 (as part of a Case Management Hearing) as she did not have the necessary length of service to bring such claims.

The Issues

2. Unfortunately, the parties had not previously agreed a List of Issues for determination by the Tribunal in this case. Following discussion with the parties on the first day of the hearing, it was agreed that the relevant Issues were:

<u>Direct Sex Discrimination</u>

-The claimant complained that her selection for redundancy culminating in her dismissal on 13 August 2020 was less favourable treatment.
-Was such treatment because of her sex? The respondent said that the reason for the claimant's dismissal was redundancy.
-The claimant referred to the following as background evidence of discrimination:

a. Bullying and public shaming of her (and another female colleague, Ms Young) by Mr Brose in management meetings: male colleagues were not subject to such behaviour;
b. Selection for immediate dismissal on 24 March 2020: the claimant said this happened only for her and Ms Young. The respondent then placed the claimant on Furlough leave;
c. Mr Brose's behaviour during a video meeting on 24 March 2020 which the claimant said was aggressive and intimidating;
d. Being accused of being unreasonable (on 24 March 2020) when she sought to maintain her employment rights (to one month's notice) – male colleagues were not treated in the same way;
e. The respondent demanded the return of her laptop computer and mobile phone on 31 March 2020;
f. Dismissal on 18 August 2020 (based on the pre-selection in March);
g. The claimant also complained that her dismissal was linked to her application to be a foster carer in June 2020;
h. Hampering her attempts to apply for alternative employment.

-The claimant referred to an actual comparator, Mr Batten, and also relied on hypothetical male comparators;
-Was there any material difference between the circumstances of Mr Batten and the claimant? (section 23 (1) EqA);
-Insofar as the matters referred to above were proven or admitted, had the claimant succeeded in shifting the burden of proof to the respondent? (section 136 EqA);
-If so, had the respondent provided a non-discriminatory explanation for the less favourable treatment?
-The parties agreed that the dismissal and selection for redundancy were the key elements of the complaint of discrimination and accordingly the claim for discrimination had been brought in time under section 123 EqA;

-Were any of the alleged acts (as above) which took place before 10 August 2020 part of a continuing act (s) of discrimination? If not, should the Tribunal exercise its discretion to extend time on a just and equitable basis?

Relevant Law

3. Under section 13 EqA direct discrimination occurs where a person (A) discriminates against another (B) if because of a protected characteristic (in this case, sex) A treats B less favourably than A treats or would treat others, who do not share that protected characteristic.

4. As explained to the claimant at the start of the hearing, the claimant must establish primary facts from which the Tribunal could infer that she was treated less favourably because of her protected characteristic. If the claimant can do this, then the burden of proof moves to the respondent to provide a non-discriminatory reason for that less favourable treatment (section 136 EqA).

5. It is not sufficient for the claimant to demonstrate the treatment and a difference in status (**Barton v Investec Henderson Crosthwaite Securities Limited [2003] ICR; Igen v Wong [2005] ICR 931**). That is, it is not enough to say, this unfavourable thing happened to me and I am a woman, so that must be discrimination. There must be evidence produced to show that the less favourable treatment was <u>because of</u> the protected characteristic.

6. As regards comparators, these must not be in materially different circumstances (section 23 EqA). As regards a hypothetical comparator: the Tribunal must consider why the relevant treatment was afforded to the claimant as opposed to others not of her sex. (**Shamoon v Chief Constable of RUC [2003] UKHL 11**).

Conduct of the Hearing

7. The hearing was held remotely using the Cloud Video Platform (CVP) over the course of three days.

   <u>Day 1</u>

8. Much of the first day was spent arranging for electronic bundles and copies of witness statements to be made available to the Tribunal Panel. There was a trial bundle of 377 pages (page references in these Reasons are to that bundle). The Tribunal had written witness statements from the claimant and on her behalf from Emma Young (formerly Patient and Partner Services Manager at the respondent). On behalf of the respondent, there were written witness statements from Torsten Brose (Managing Director); Phillip Batten (Business Development Director); James Newell (Independent Sales Coach) and Ken James (Chief Operating Officer). All the witnesses adopted their statements on oath as their evidence in chief.

9. The claimant initially expressed concern that documents had been added to the previously agreed bundle. Mr Joshi confirmed that these were the HMRC Guidance on the Furlough Scheme and the transcripts of recordings of various

meetings made by the claimant. He said these additional documents had been sent to the claimant on 1 September 2021 and so she had a reasonable time in which to read them, and would not be prejudiced by their inclusion.

10. As the claimant wished the Tribunal to view her recording (in 2 parts) of her meeting (on video) with Mr Brose on 24 March 2020, she should not object to inclusion of the transcripts. The documentation relating to the Furlough Scheme was not controversial. It was agreed that the claimant would familiarise herself with the additional documents during the break taken by the Tribunal to receive and read the witness statements and the key documents in the main trial bundle. Mr Joshi confirmed that the respondent did not object to the Tribunal viewing the claimant's video recordings.

11. Following that break, the Tribunal agreed the List of Issues (as above) with the parties. The EJ explained to the claimant (as she was a litigant in person) the procedure of the hearing and summarised the legal concepts relating to her discrimination claim, such as comparators and the burden of proof. The claimant said that this had also been done by the Employment Judge at the Case Management Hearing.

12. The Tribunal then viewed the two videos of the meeting of 24 March 2020, which lasted for just under 13 minutes in total. The claimant confirmed that the transcripts in the bundle (pages 277-295) were accurate.
13. The Tribunal heard evidence from Ms Young.

14. At the end of the first day, the Tribunal asked the respondent to produce a table/list showing the number of employees as at July 2020 and as at September 2021 with indication of their gender. The list could be anonymised. The list should also show the gender of the employees who were made redundant in July 2020. This document (which was also copied to the claimant) is referred to as the "Gender List".

<u>Day 2</u>

15. The Tribunal heard evidence from the claimant and from Mr Brose, who also gave evidence on the Gender List produced by the respondent. The Tribunal also heard evidence from Mr Batten.

<u>Day 3</u>

16. The Tribunal heard evidence from Mr Newell and Mr James. The Tribunal also received brief (short-form) written submissions from both parties and also heard oral submissions.

17. The Tribunal reserved Judgment and agreed 14 October 2021 as the date for the panel to meet for deliberations. In fact, the Tribunal was able to reach its decision during the afternoon of 24 September and did not need a further day for deliberations.

18. The Tribunal agreed with the parties, a provisional date for a Remedy Hearing (1 day) on 10 November 2021. It was explained that this would not be needed if the claimant did not succeed in her claim.

Findings of Fact

19. The Tribunal will only make such findings of fact as are necessary to determine the Issues set out above.

<u>Background</u>

20. The Respondent specialises in the provision of "care-led reliable and scalable non-emergency patient transport services". In late 2019, the respondent viewed care homes as a potential growth market and had appointed the claimant to develop that line of business (the B2C market).

21. The claimant had been head-hunted by Mr Brose for the role and had been interviewed initially by Mr Batten (whom she already knew and had previously worked with) and then by Mr Brose. Her CV was at pages 306-308. Ms Young was recruited a few months before the claimant on a salary of approximately £60,000. Mr Brose said in his evidence that he had invested a total of around £100,000 in the recruitment of the claimant and Ms Young.

22. The claimant commenced employment with the respondent on 2 January 2020 as a Sales Manager. The statement of Terms and Conditions is at pages 312-316. Her salary was £41,000 per annum. After one month's service she was entitled to one month's notice. The employment contract referred to the company's grievance procedure and the Employee Handbook (pages 317-376). The claimant accepted that she had received and read the Handbook, which contained a section on the Non-Harassment and Bullying Policy (pages 336-337).

23. Ms Young had also been dismissed by the respondent as at the end of July 2020. The Tribunal notes that although Ms Young was present at many of the same meetings as the claimant and acted as the claimant's companion/witness at several meetings, she has not brought any claims before the Tribunal. The Tribunal considered the evidence as it affected the claims brought by the claimant.

24. As regards the respective roles of Mr Batten and the claimant, the claimant accepted that Mr Batten was her line manager and that they had never carried out the same role at the same time. Mr Batten gave very clear evidence that as from mid-January 2020 his job title had been Business Development Director, although he had not received a salary increase or any promotion as such: his salary was £45,000, which was marginally higher than the claimant's.

<u>General Bullying/public shaming</u>

25. The claimant referred in paragraphs 9 and 10 of her witness statement to the aggressive "feedback" from Mr Brose in management meetings, which she said

had been focused on her and Ms Young. This included remarks that they were "fucking rubbish", "shit" and that the claimant should be "ashamed" of the work she was doing. Mr Brose had also described the claimant as "fucking useless" and "fucking embarrassing". Both the claimant and Ms Young said that comments of this type were never made to Mr Batten or other male colleagues.

26. The claimant also said in cross-examination that she regarded Mr Brose's behaviour as discriminatory on grounds of her sex because he was loud and vocal when he spoke to her or Ms Young, but his tone was "nicer" when he spoke to male colleagues. She felt that she was treated differently from her male colleagues. However, the claimant accepted in her oral evidence that she attended management meetings in person once a week (for about 3 hours) and otherwise worked from home; and so did not have the opportunity of observing Mr Brose's interaction with other colleagues at other times.

27. Mr Brose accepted that he had criticised the performance of both the claimant and Ms Young. He pointed out that he had invested a significant amount in their salaries and accordingly expected high performance levels and more business generation than they had provided. However, he denied using the language quoted by the claimant. He accepted that he could be "direct" and demanding, but said that this was his attitude towards all his colleagues regardless of gender.

28. The respondent's other witnesses described Mr Brose's management style as "passionate" and "direct". Mr Newell also described Mr Brose's approach as "brash". When the term "direct" was explored further in Tribunal questions, both Mr James and Mr Newell accepted that Mr Brose did swear consistently, but all the respondent's witnesses said that his behaviour was the same to all employees. All the respondent's other witnesses did not accept that Mr Brose singled the claimant (or Ms Young) out for any more criticism than their male colleagues.

29. Each of Mr Batten, Mr James and Mr Newell said that they had personally experienced robust and negative feedback from Mr Brose especially if he felt his questions were not being answered or that inadequate information was provided at presentations. Mr James said in his evidence in re-examination that Mr Brose did swear a great deal. He stressed that this was part of his style of language and was not aimed at any individual. Mr James said that Mr Brose also swore during meetings with clients and that he often had to "kick him under the table" to remind him not to do so.

30. The Tribunal accepts the evidence of the respondent's witnesses and finds on a balance of probabilities that Mr Brose did make the remarks cited by the claimant in her complaints. However, the Tribunal also finds that he made/would make similar comments, using similar language to male colleagues if he was unhappy with their performance or presentations at meetings. The Tribunal does not condone such discourteous behaviour especially in the workplace, but does not find that Mr Brose's behaviour was discriminatory on the grounds of the claimant's sex.

31. On 23 March 2020 the Government implemented a full National Lockdown as a result of the global Covid 19 pandemic, which had a profound impact on the respondent's business. In anticipation of the lockdown, Mr Brose sent an email of 18 March 2020 to all staff (page 59-60) which said that turnover had been reduced by 70% and as a result all staff were laid off onto short time working until further notice.

<u>Meetings on 24 March 2020</u>

32. The claimant complained that Mr Brose's behaviour during a video meeting with her on 24 March 2020 was aggressive and intimidating. The Tribunal was shown a video of that meeting (in 2 parts). This was a difficult conversation, as Mr Brose was discussing the claimant's impending redundancy and the claimant (and Ms Young as her witness) were pushing for the respondent to place them on the Government's Furlough Scheme which was in the early stages of its implementation.
33. Mr Brose was clearly determined to get his point across and he did at times talk over the claimant and on reflection, perhaps should have listened more closely to what she had to say. However, the Tribunal notes that the nature of video calls is that people frequently do talk across each other.

34. The Tribunal does not find that Mr Brose's overall behaviour was aggressive or intimidating.

35. The claimant also complains that Mr Brose was continuously vaping on his e-cigarette during the call, which was apparent from the videos viewed by the Tribunal. Mr Brose in his evidence accepted that this was a bad habit of his and said that unfortunately he did this in most of his meetings and had certainly not singled out the claimant or Ms Young for such behaviour.

36. The Tribunal finds that Mr Brose's behaviour in that meeting and his vaping was not aggressive or intimidating and was not discriminatory on the grounds of the claimant's sex.

<u>"Immediate Dismissal" on 24 March</u>

37. Mr Brose accepted in his oral evidence that if, at the meetings on 24 March, the claimant had not raised the possible use of the Furlough Scheme, and he would have dismissed her at that stage. This was he said, because the claimant's job had effectively disappeared as the pandemic and the National lockdown had decimated the respondent's B2C business in which the claimant was employed. Mr Brose said that he was persuaded by the claimant and Ms Young to use the Furlough Scheme, as the "humanitarian" option but that this was effectively only postponing the claimant's redundancy

38. This is supported by the transcript of the 24 March meeting, in which Mr Brose very clearly told the claimant that putting her on the Furlough Scheme did not change the position that her job had effectively disappeared. (Page 281).Mr Brose also said that this was why the claimant was the first person he had spoken to as part of the redundancy exercise.

39. The Tribunal accepts Mr Brose's evidence on this matter. The Tribunal also agrees with Mr Brose's observations that the Furlough Scheme was not intended to be used to continue to employ those whose jobs had clearly disappeared – the intention of the Scheme was to cover the period when employees' jobs could not be carried out because of the pandemic.

40. Based on the findings of fact set out above, the Tribunal finds that Mr Brose conceded that, were it not for the Furlough Scheme, the claimant would have been dismissed on 24 March 2020 on the basis that her role had disappeared due to the collapse of the care home market. The claimant's allegation of "immediate dismissal" is made out, but the Tribunal will go on to consider whether this was done on discriminatory grounds.

<u>Accusations that the claimant was unreasonable</u>

41. The claimant also complained of being accused of being "unreasonable" (on 24 March 2020) when she sought to maintain her employment rights (to one month's notice) and said that male colleagues were not treated in the same way.

42. The claimant was asked in Tribunal questions to identify the section in the transcript where this had occurred. The claimant was unable to do so. The Tribunal notes at pages 279-280, a reference to Mr Brose saying that he was "a bit disappointed" that the claimant was insisting on there being a full redundancy process. However, there is no reference to the claimant being unreasonable and Mr Brose's comment was about the redundancy process and not about the claimant's entitlement to a month's notice.

43. At page 278 of the transcript, which is of Mr Brose's meeting with Ms Young (where the claimant was Ms Young's witness), Mr Brose accepted that he had misread the notice provision in the contract of employment and agreed that the claimant and Ms Young were both entitled to one month's notice of termination. He made reference to difficulty for the company to pay a month's notice but did not expressly refuse to do so if required. The respondent did, in fact, pay the claimant one month's notice upon termination of her employment.

44. The claimant's complaint that she was accused of being unreasonable is not made out based on the evidence presented to the Tribunal.

<u>Return of Laptop /phone</u>

45. The respondent accepted that when the claimant was placed on Furlough leave, she had been asked to return her laptop and mobile phone. Mr Brose and Mr James said that this was because there had been a delay in the supply of new laptops from Dell at that time and the respondent needed a pool of laptops available in case any of their employees had been infected with Covid 19 and had to work from home. The Tribunal accepts the respondent's evidence that this was a valid reason to request the return of laptops from employees who were on Furlough leave.

46. The claimant's laptop had been collected by Mr Batten (even though he was technically himself on Furlough) but had then been sent on by him to the respondent's office. Mr Batten said this was after a few days, the claimant had believed that Mr Batten had retained her laptop for several weeks. Ms Young had been asked to return her laptop but the logistics of her location meant that she was unable to do so.
47. Mr Batten had not been asked to return his laptop even though he too was on Furlough leave. He said this was because he had been monitoring NHS developments online as the respondent had recently taken on an NHS tender. Mr Batten stressed that he had not been actively working during his Furlough leave.

48. On the face of the evidence, there was a discrepancy in treatment between the claimant and Mr Batten: both were on furlough leave but the claimant was asked to return her laptop /mobile phone whereas Mr Batten was not. Prima facie this could be seen as discrimination against the claimant on the grounds of her sex. However, the Tribunal finds that the respondent has provided a non-discriminatory reason for the difference in treatment; namely a practical business-related reason as to why Mr Batten needed continued use of his laptop.

Alternative employment

49. The respondent carried out redundancy consultation meetings with the claimant in June 2020 which included identifying two potential alternative roles: operation specialist and data specialist (page 87). Job Descriptions for the two roles are at pages 89-93. There was an exchange of correspondence between the parties in which the claimant expressed an interest in the role of data specialist (page 98) and sought to arrange an interview with Mr James and Mr Brose.

50. The Tribunal notes that given Mr Brose's very clear evidence that he had decided that the claimant was redundant as at March 2020, the consultation process carried out in June 2020 as to whether the claimant was redundant, must have effectively been the respondent simply going through the motions. However, the respondent did appear to comply with its obligation to offer alternative employment as a mitigating element to the redundancy.

51. However, the Tribunal also notes that the claimant herself appeared to be going through the motions as regards her application for alternative employment. At page 98, the claimant said that she could fulfil the data specialist role "on the same working conditions as my current contract role; requiring only a change of Job Title". The claimant had failed to notice that the data specialist role was at a lower salary (£25,000) and was an office-based role, whereas the claimant had predominantly worked from home attending the office only one day a week for the management meetings. Further, the claimant had made no effort to update or tailor her CV to highlight her skills for the data specialist role. The claimant also accepted that she did not have an economic background which had been expressed as preferable for the data specialist role. There was also some

dispute as to the level of experience in her Excel skills which were also required for the data specialist role.

52. The claimant complained that the respondent had placed “roadblocks” to her obtaining the alternative employment. At page 117 there was an exchange of emails/texts which demonstrated the parties’ mutual inability to find a suitable interview date. The Tribunal notes that the lack of availability was on both sides and neither party appeared to be making any real effort to accommodate the other’s commitments. The claimant withdrew her application on 30 June 2020 (page 119/120) stating that her position had become untenable and that the respondent was blocking her application.

53. Even taking the claimant’s evidence at its highest, the Tribunal notes that the withdrawal letter made no reference to the claimant’s belief that such behaviour was discriminatory on the grounds of her sex.

54. The Tribunal finds that there is no element of sex discrimination in this part of the claimant’s complaints. Further, the Tribunal notes that on 1st July (pages 125/126) Mr James did offer the claimant the opportunity to reapply for the role if she wished. She did not do so.

Scoring sheet for redundancy

55. The Tribunal was presented with a scoring sheet (undated) at pages 123/124, which was headed “*Sales job scoring- Phill Baton (sic) v Kirsty Button*”. Mr Brose and Mr James believed this had been done in the summer of 2020, although the claimant said that she had never seen this document until November 2020 after she had initiated Tribunal proceedings. Mr Batten had also been wholly unaware of the document. The incorrect spelling of Mr Batten’s name also raises a question as to who had carried out the scoring exercise.

56. The heading of the document clearly suggests that a direct comparison was being made between the claimant and Mr Batten- as indeed does the whole conduct of the scoring exercise as apparently evidenced by the document. However, in his oral evidence, Mr Brose conceded that the premise of the scoring sheet was incorrect as the claimant’s role was “a stand-alone” one and there was no redundancy pooling with Mr Batten.

57. Mr Brose also accepted that on the face of it there were errors (as pointed out by the claimant in cross-examination) within the scoring exercise including a miscalculation of Mr Batten’s length of service. The Tribunal finds that this was a cursory exercise with no in-depth analysis as regards the respective skills or experience of the two employees, unsupported by any objective evidence. The exercise was ill-conceived; superficial, cursory and inaccurate. However, the Tribunal accepted Mr Brose’s explanation as to why Mr Batten’s sickness absence in February/March 2020 had not scored against him.

58. Given his evidence that the scoring exercise had been a mistake, Mr Brose was asked in Tribunal questions what the purpose of the scoring process actually

was. He said that following discussions with his employment law advisers the scoring exercise was regarded as "belt and braces" to address the concerns raised earlier by the claimant that a proper redundancy process should be followed. He accepted with hindsight that the exercise was not a genuine one and he regretted having carried it out. He said that at the time he wanted to make sure that the respondent had not missed anything and had looked at the redundancy from every angle.

59. Given Mr Brose's very clear evidence that he had decided that the claimant's role had disappeared as at March 2020 the Tribunal accepts his evidence that the scoring exercise was a sham and effectively a back-covering exercise. The Tribunal cannot condone the carrying out of an unnecessary and inaccurate exercise but it does accept Mr Brose's evidence as being honest and truthful on this matter.

Dismissal

60. It was not disputed that the claimant was dismissed on grounds of redundancy (by a letter dated 14 July) with effect from 13 August 2020 (pages 134 and 140).

61. The Tribunal notes that the first (and only) time the claimant raised any allegation of sex discrimination (prior to the issue of Tribunal proceedings) was on 20 July (page 135) after she had received the dismissal letter. The Tribunal saw no evidence that the claimant appealed the decision to dismiss her, although the right of appeal had been offered in the dismissal letter.

62. The claimant also confirmed in her oral evidence that although she had been aware of the respondent's Non-harassment and Bullying Policy (at section 5 of the Employee Handbook) she had not followed that policy, nor had she raised any grievance that she believed she was being discriminated against. She had raised concerns about Mr Brose's behaviour at management meetings with Mr Batten (as her Line Manager), but she had not complained that this behaviour discriminated against her on grounds of her sex.

63. The claimant had also alleged that her dismissal was because she had made an application to be a foster carer in June 2020. That allegation is inconsistent with the claimant's allegations that she was pre-selected for "instant dismissal" in March 2020.

64. The reference to "instant dismissal" is consistent with Mr Brose's own evidence that she would have been made redundant in March had it not been for the Furlough Scheme (see findings of fact above).

65. The Tribunal finds that the claimant was not dismissed as a result of her application to be a foster carer.

Conclusions

66. The Tribunal has found in favour of the claimant on the following allegations: Mr Brose's behaviour and his management style in management meetings; the claimant's selection for immediate dismissal on 24 March 2020; the return of her laptop computer and mobile phone on 31 March 2020; her dismissal on 18 August 2020 (based on the pre-selection in March).

67. As regards comparators: the Tribunal has found that as regards the claimant's dismissal, Mr Batten was in materially different circumstances in that he was not carrying out the same role and was not "pooled" with her for redundancy selection. He is therefore not a relevant comparator for those issues. Mr Batten was in the same material circumstances as regards the return of the laptop, in that he was also on Furlough leave, but the Tribunal found that there were non-discriminatory reasons for his being allowed to retain his computer (see Findings of Fact above).

68. As regards hypothetical comparators when considering why the relevant treatment was afforded to the claimant as opposed to others not of her sex (**Shamoon**) the Tribunal has found that the respondent's treatment of the claimant was due to other reasons not related to her sex.

69. Even on those allegations which the claimant has factually established, the Tribunal has found that the relevant treatment was not discriminatory on the grounds of the claimant's sex. This is because the respondent has provided a satisfactory non-discriminatory explanation for the treatment in each instance (see Findings of Fact above).
70. As a result, the Tribunal does not have to consider whether such alleged acts (other than the dismissal) were continuing acts under section 123 EqA so as to fall within the relevant time limits for bringing discrimination claims.

<u>The "Gender List"</u>

71. When considering whether the burden of proof (as set out in section 136 EqA) had shifted to the respondent, the Tribunal considered carefully the Gender List which was <u>produced by the respondent at the Tribunal's request</u>. Mr James corrected some errors in the list during the course of his evidence. Both Mr James and Mr Brose were questioned by the Tribunal Panel about the List.

72. This Gender List made stark reading: as at July 2020 the respondent had 20 employees, 5 of whom were female. All the female employees were dismissed in or around July 2020 on grounds of redundancy; 2 male employees were put at risk of redundancy, one of whom (an apprentice) was dismissed and the other was given suitable alternative employment as an operations specialist. This evidence prima facie demonstrates that the redundancy process impacted on more women than men, indeed on all the women in the organisation at that time.

73. Mr Brose and Mr James said that two of the female employees who were made redundant had been either about to retire or leave for their own reasons; they

had been given generous redundancy packages and had not challenged their dismissal. They said that the remaining female employees as at July 2020 (other than the claimant and Ms Young) had been in administration roles which had not been required due to the severe downturn of the respondent's business. The claimant did not challenge this evidence.

74. The Gender List showed that as at September 2021 only 3 employees out of 34 were women. Taking the Gender List of face value, it is evidence that the respondent was and continues to be a male-dominated organisation. Mr Brose and Mr James accepted this and acknowledged a desire for change. However, Mr Brose said that the majority of applicants for roles within the organisation (which were predominantly transport roles) were male; he could not force women to apply and he could only choose the best candidate from the applicants presented to the respondent.

75. The Tribunal finds that the Gender List does show that the respondent is a male-dominated organisation which does not appear to have taken any positive action to raise the recruitment profile of women within that organisation. To that extent the Tribunal finds that the claimant has discharged the initial burden of proof to raise the issue of sex discrimination. The Tribunal also notes that the information provided in the Gender List could go some way to explaining why the claimant raised her complaint of sex discrimination.

76. However, the claimant's case is about direct discrimination against her, especially with regard to her selection for redundancy and her dismissal. The Tribunal has accepted (and the claimant did not dispute) the respondent's evidence with regard to the impact

77. on the B2C business of the pandemic and the National lockdown. The Tribunal has also accepted (and again this was not disputed by the claimant) that Mr Batten and the claimant were not in the same role at any time during her employment. Therefore, Mr Brose's evidence that the claimant was in a stand-alone role and there was no redundancy pool with regard to that role is accepted.

78. The Tribunal has also found (which Mr Brose accepted) that the scoring exercise comparing Mr Batten and the claimant was incorrect both as regards the principle and the implementation of that exercise. On the basis of that evidence, and given the fact that the respondent has established that its business could not support the claimant's role as at June 2020, and cannot do so even now (which evidence was not challenged by the claimant) the Tribunal finds that the respondent has provided an adequate non-discriminatory reason for the claimant's dismissal, namely redundancy.

79. The claimant would have been dismissed in March 2020 for that reason. The introduction of the Furlough Scheme and her (and Ms Young's) representations about use of that Scheme, served to extend her employment for a few months, but as Mr Brose had said in the meeting on 24 March, the underlying situation would not change, given the business reasons.

80. The Tribunal has set out in the findings of fact above its assessment of the redundancy scoring exercise carried out by the respondent. If this had been an unfair dismissal claim, that scoring exercise in itself would have rendered the dismissal unfair due to procedural irregularities. However, this is a direct sex discrimination claim and the Tribunal has found that the respondent presented sufficient evidence to demonstrate a non-discriminatory reason for the claimant's redundancy selection and dismissal, namely the financial realities of its business situation and the fact that claimant's role had disappeared (through no fault of her own).

81. The claim for direct sex discrimination does not succeed.

D Henderson

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Employment Judge Henderson

JUDGMENT SIGNED ON: 4 October 2021

JUDGMENT SENT TO THE PARTIES ON
04/10/2021....………………………………………
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FOR THE SECRETARY OF THE TRIBUNALS