EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MRS F NACONESKI BATTISTUZ	**V**	**TRAX RETAIL LIMITED**

HELD AT: LONDON CENTRAL **ON: 1 - 3 DECEMBER 2020**

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:
FOR THE CLAIMANT **Mr J Bromige (Counsel)**
FOR THE RESPONDENT **Mr J Fletcher (Solicitor)**

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.
2. The claim of wrongful dismissal is well founded and succeeds.

REMEDY AWARD

Full pay and loss of expenses 15-19 April	£523
Health insurance (100 days)	£164

Furlough pay – 20 April-24 July	£6,225
Pension contributions	£605.45
Wrongful dismissal	£4,080
Basic award	£1,614
Loss of statutory rights	£500
Award	£13,711.45
20% uplift (failure to follow Code)	£2,742.29
TOTAL	**£16,453.74**

REASONS

1. Judgment and verbal reasons were provided at the Hearing. I apologise for the very significant delay in providing written reasons to the parties; the reason for this delay has been provided to the parties in separate correspondence.

2. The claimant contends she was dismissed at a meeting on 30 March 2020 on the ground of redundancy with an effective date of termination of 10 April 2020. The respondent contends a redundancy process started with the claimant on 30 March 2020, and she resigned from her employment on 14 April 2020. In the alternative, the claimant argues that she was dismissed on 14 April 2020 because the respondent treated her employment as terminated.

3. The respondent also argues that under a fair process, the claimant would inevitably have been made redundant at the date of termination or shortly after. There was no agreed list of issues. The issues in the claim are as follows:

The Issues

4. Did the claimant resign or was she dismissed?

5. What was the effective date of termination?

6. If she was dismissed, what was the reason for dismissal? The respondent asserts redundancy.

Wrongful dismissal

7. Was the claimant wrongfully dismissed and entitled to a payment in lieu of her period of notice?

Unfair dismissal

8. If the Claimant was dismissed by reason of redundancy or for some other substantial reason was their dismissal fair or unfair (ERA s98(4)). The claimant contends it was unfair, arguing:

    a. Her dismissal was predetermined
    b. There was no proper consultation or selection criteria
    c. There was no consideration of alternatives to redundancy
    d. She was placed in a pool of 1
    e. She was dismissed at the outset of the 30 March meeting

Polkey / issues of remedy

9. If the claimant was unfairly dismissed, was there a prospect at some point in the future that she could have been fairly dismissed? If so, what was that prospect as a percentage; alternatively at what date would this have occurred?

10. If unfairly dismissed, did the Respondent fail to follow any part of a relevant ACAS Code of Practice under s207A TULRCA 1992? If so, is it just and equitable to increase any compensation pursuant to s207A TULRCA 1992, if so by how much?

Relevant legislation

The Law

11. Employment Rights Act 1996 – Pt X Dismissal

s.94(1) The right

(1) An employee has the right not to be unfairly dismissed by his employer

s.95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) …
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

s.97. Effective date of termination.

(1) Subject to the following provisions of this section, in this Part “the effective date of termination”—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

s.98 General

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

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) …
(3) ….

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

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

s.111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111

This is subject to subsections (3) to (5).

(2) In subsection (1) “ pre-termination negotiations ” means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

…

s.139 Redundancy

(1) An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
(a) …
(b) the fact that the requirements of that business –
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

12. Trade Union & Labour Relations (Consolidation) Act 1992

s.207A Effect of failure to comply with Code.

(1) …

(2) In any proceedings before an employment tribunal **…** any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

s.207A Effect of failure to comply with Code: adjustment of award

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

…

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

Schedule A2 Tribunal jurisdictions to which section 207A applies

…

- Section 111 of [the ERA 1996] (unfair dismissal)

13. <u>The ACAS Code of Practice on Settlement Agreements</u>

12. Parties should be given a reasonable period of time to consider the proposed settlement agreement. What constitutes a reasonable period of time will depend on the circumstances of the case. As a general rule, a minimum period of ten calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

13. The parties may find it helpful to discuss proposals face-to-face and any such meeting should be at an agreed time and place. Whilst not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help to progress settlement discussions.

17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle.

18. The following list provides some examples of improper behaviour
(e) Putting undue pressure on a party. For instance:

(i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code

20 In situations where there is no existing dispute between the parties, the 'without prejudice' principle cannot apply but section 111A can apply. In these circumstances the offer of, and discussions about, a settlement agreement will not be admissible in a tribunal (in an unfair dismissal case) so long as there has been no improper behaviour. Where an employment tribunal finds that there has been improper behaviour in such a case, any offer of a settlement agreement, or discussions relating to it, will only be inadmissible if, and in so far as, the employment tribunal considers it just.

Case Law

14. Unfair dismissal – redundancy

a. *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT: the following "standards of behaviour" apply generally (taking account in the present case of the absence of a trade union):
   i. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
   ii. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
   iii. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
   iv. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
   v. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

b. *Polkey*: "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.'

c. *Langston v Cranfield University* [1998] IRLR 172 EAT: 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. Moreover, the employer will be expected to lead evidence on each of these issues.

d. *Capita Hartshead Ltd v Byard [2012] IRLR 814*: A pool of one, in which actuaries have personal clients, and her client list had decreased, dismissal was unfair because there were other actuaries doing similar work, there had been no criticisms of her ability and the risk of losing clients if their actuaries had to be rearranged was 'slight'. EAT held that (a) the tribunal does have the power and right to consider the *genuineness* requirement and (b) ruling against the employer's choice of pool may be difficult *but not impossible*. "Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that (a) "It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited [1982] IRLR 83*); (b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (*UKEAT/0691/04/TM*); (c) "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 [to] the problem" (per Mummery J in *Taymech v Ryan EAT/663/94*); (d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that (e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

e. *Eaton Ltd v King [1995] IRLR 75*: it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. This approach was expressly endorsed by both Waite and Millett LJJ, in the Court of Appeal decision

f. *British Aerospace plc v Green [1995] IRLR 437* "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.'

g. *Bascetta v Santander [2010] EWCA Civ 351*: "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."

h. *Pinewood Repro Ltd v Page [2011] ICR 508, EAT* – held that consideration of the assessment criteria where an employee is seeking clarification of his low score on one particular (rather subjective) criterion as part of the consultation exercise but was met by a brick wall from the employer; it was held that this did not contradict the basic approach against rescoring by the tribunal in *British Aerospace v Green* because if the employee was given the information, put his case to the employer and still failed to have the decision changed, that case would mean that it would be difficult to challenge his selection (provided the system itself was considered fair by the tribunal).

i. Mental Health Care (UK) Limited v Biluan (UKEAT/0248/12) – there will be a wide range of reasonable choices when determining the selection criteria, and the same for the methods of competence assessment to be used. A finding that either is outside of the range of reasonable responses, "is a strong finding" which should be accompanied with an acknowledgement of the limited role of the employment tribunal in determining such issues.

j. Consideration of alternative employment: *Aramark UK Ltd v Fernandes [2020] IRLR 861* – held that what the employer must seek to find is *actual* alternative employment, not just the *chance* of it.

15. <u>Polkey</u>

a. *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 HL: Compensation should be awarded for the additional period of time for which the employee would have been employed had the dismissal been fair, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. If the prospects of the employee having kept his job had proper procedures been complied with were slender, this would be reflected in a reduction in compensation.

> "If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no

> compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. …"

b. *Lambe v 186K Ltd* [2004] EWCA Civ 1045: Compensation should be awarded for the period over which the relevant consultation would have taken place.

c. *Credit Agricole Corporate and Investment Bank v Wardle* [2011] EWCA Civ 545, [2011] IRLR 604: if there is evidence that the employee would have been dismissed or there is a realistic chance this would have occurred, then this must be factored into the calculation of loss.

d. *Parry v Ministry of Justice* UKEAT/0068/12*:* the ET fell into error and did not approach the *Polkey* issue correctly when it considered simply whether the following of a fair procedure would have resulted in the dismissal of the employee and did not give any consideration to the chance of the employee being dismissed.

e. *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274*, EAT*: A '*Polkey*' reduction has the following features:

> "First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

f. *Red Bank Manufacturing Co Ltd v Meadows* [1992] IRLR 209: The Tribunal will make an error of law if it fails to consider what might have happened had fair proceedings been complied with. In a redundancy context this will involve asking whether consultation might have resulted in an offer of alternative employment and if so where the post would have been.

g. *Virgin Media Ltd v Seddington* UKEAT/0539/08 EAT: would the employee have found, and accepted, alternative employment with the dismissing employer? The EAT concluded that the burden is on the employer to raise the argument that there was no suitable alternative employment that the employee could or would have taken. But if the employer raises a prima facie case, it is then for the employee to say

what job, or kind of job, he believes was available and to give evidence to the effect that he would have taken such a job.

16. Ambiguous language

Harvey sums up the legal authorities: *"…the preponderance of authority in relation to ambiguous statements is in favour of the objective view, ie that the issue is how a reasonable listener would have construed the words used in all the circumstances of the case…"*

Preliminary Issue

17. At the outset of the hearing the claimant raised whether or not any or all of the discussions at the 30 March 2020 meeting between the claimant, Ms Eloy and Ms Pommier are covered by the s.111A ERA 'protected conversation' rule. Mr Bromige argued that I must hear evidence of this meeting, to determine whether or not s.111A does or does apply. He accepted that this was a *"problematic and artificial situation",* but one which the Tribunal is used to making in cases involving EqA claims alongside s.111A ERA, which protects the unfair dismissal element.

18. Mr Bromige noted that the claimant denies that the 30 March 2020 meeting was referenced at any time as a 'protected conversation', so it cannot be one. Also the meeting and its outcome amounted to an unambiguous impropriety on the respondent's part. There were terms of the settlement agreement which were unreasonable and in breach of the ACAS Code and HMRC post-employment notice pay provisions. Mr Bromige outlined the documents contained in the supplemental bundle.

19. Mr Fletcher queried the relevance of the meeting: it was clear that there was a settlement agreement; he accepted that the terms of the agreement had been *"disclosed"* in the proceedings *"but the terms were open to negotiation and … subject to agreement."*

20. It was accepted that I would have to consider issues relating to the meeting – the claimant's evidence of whether she did receive notice of dismissal including communication of her 'effective date of termination'. It goes to the reason for dismissal on which the respondent has the burden, as well as the issue of fairness under s.98(4).

21. I determined that I would have to hear evidence on what was said at the 30 March 2020 meeting; if any or all of this meeting is 'protected' under the provisions of s.111A ERA 1996, I must disregard the whole or part of the meeting in determining the issues in the case.

Witnesses

22. The Tribunal heard the following evidence: for the respondent Ms Marie Pommier HR manager, EMEA, and Mr Sarim Shaikh the respondent's in-house Corporate Legal Counsel EMEA. We then heard from the claimant. All

witnesses were sworn in giving appropriate oaths/affirmations and confirming the contents of their statements.

23. The Tribunal spent part of the first day of the hearing reading the witness statements and the documents referred to in the statements. Witnesses were cross-examined, and I asked questions.

24. The Hearing was conducted by the CVP video platform. I assessed the hearing throughout to ensure that all parties were participating and could see and hear all the proceedings. Regular breaks were taken every hour to because of the additional strain of watching, listening and speaking over a video link. No concerns were raised by the parties about the format of the Hearing.

25. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

26. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The Relevant Facts

27. There was some dispute in the evidence about the claimant's day to day role. Her job title is Sales Analyst EMEA (43). The focus in her witness statement paragraph 3 is on her Sales Analyst role; she also undertook the role of Office Administrator for the London office. In her evidence she described working for global teams in her sales analyst role, she says this took up a significant part of her working time. She was the only employee in the London office performing these roles.

28. The decision to make redundancies was expanded on by Ms Pommier in her evidence. There had been a corporate merger and a decision taken at a global senior management level to make redundancies to increase efficiency and reduce costs. There were to be 40-50 redundancies globally.

29. Ms Pommier's evidence, which I accepted, was that there was then *"… identification of what positions we think should be at risk, it was not one person who took the decision, it was with each head of department who had visibility in the department – the workforce and workload."*

30. Ms Pommier also gave evidence on how the decision to make the claimant was made "…*by the Head of EMEA based in Paris in a call involving the Finance team. … For some specific roles we had too many positions that were not needed.. Ms Eloy identified [the claimant's position] could be made redundant."*

31. One of the global managers making the decisions on redundancy, Mr Adam Sands, emailed Ms Pommier on 6 February 2020 saying that the company was thinking of Paris and UK lay-offs and wanting to know local guidance on law / custom. On being asked for names, he referenced the claimant and two other

employees (whose names are redacted), saying there would be between 3-6 potential redundancies in the UK, saying *"I am keeping a list but prefer not to share until we have a solid plan"* (61-2).

32. Ms Pommier's rationale for why the claimant was chosen was as follows: *"where do we need the position to be located – we are based in France and the main sales team is in France, we are changing the organisation of the UK office and we did not need an office management team in UK, and we had more sales etc. contracts in France in than in UK. So more relevant to have this [Sales Analyst] position in France. …. [Employee B – based in Paris] and the claimant were mentioned … We said that we need one position mainly based in France. And Finance and Revenue departments discuss why and where we need the position. The conclusion was that the claimant's position was to be made redundant and not B."*

33. I accepted that this was an accurate description of the discussions which led to the claimant being selected for redundancy. I accepted also Ms Pommier's statement paragraph 3, that part of this analysis involved a planned significant reduction in the workforce in London from over 20 to under 10, which has subsequently been effected.

34. There were questions about the rationale for redundancy, particularly given the Covid pandemic. Ms Pommier's evidence, which I accepted, was that this requirement for savings was initiated pre-covid and was linked to acquisitions and mergers and the consequent need to make savings across the Group. She also accepted that at the outset of the Covid pandemic she believed redundancies were still needed *"…we required more efficiency … without covid perhaps there was no need for more efficiency at this time…"*

35. I also accepted that Ms Pommier's evidence that she sought advice from the UK HR team and was aware of the need for a consultation process prior to the final redundancy decision being taken. This is why a script was provided for her to use in the redundancy meetings that followed

36. As to why the claimant was considered for redundancy in a pool of one, Ms Pommier's evidence was that the claimant was the *"only person performing this role in London … the reason this role was identified as redundant was because of the integration of the companies".*

37. On 7 March 2020 Mr Sand sent an email titled *"Efficiency Project"* to several global HR teams, including to Ms Pommier. This identified the requirement to make a 15% cut to the operating budget stating that its aim was to find *"low performers"* and thereafter make redundancies via efficiency savings. Hiring was to be slowed down to reassess what positions would continue to be recruited into (63).

38. By 1 March 2020 a decision had been made to transition the claimant's workload amongst colleagues (64).

39. The claimant attended a zoom meeting on 30 March 2020. She believed it was going to be with her manager, Ms Eloy, and she was not forewarned about its implications. Unexpectedly for the claimant in attendance was Ms Pommier. There is dispute about what was said at this meeting. A script was produced (67). The claimant's case is that the script was not read, that she was told that her position was selected for redundancy and she would be offered a settlement agreement and she was told that her last day of employment would be 10 April 2020.

40. Ms Pommier's evidence was that the script was *"talking points to help".* I accepted that it was not stuck to line by line. The claimant's evidence was that Ms Eloy *"started telling me about the efficiency exercise, and then [Ms Pommier] told me about my role is being made redundant, she offered me the settlement agreement and told me I had to agree within 1 week."* This is the basis of some of the bullet points in the script and Ms Pommier confirmed in her evidence that statements along these lines were made.

41. There is dispute whether the claimant was made aware that there would be a 2nd consultation meeting to give her an opportunity to *"make representations".* Ms Pommier's evidence that she told the claimant of the redundancy and offered settlement *"… and if she accepts settlement her last day will be 10 April, but otherwise I did not mention termination."* Ms Pommier said that this was offered as an alternative to the redundancy process.

42. Ms Pommier also accepted that there was no suggestion that the claimant was *"at risk"* of redundancy, she was told she was redundant. She accepted that the script *"might have been clearer, but at the time we followed this."* I concluded that there was at best only passing reference to the possibility of a 2nd consultation meeting when reading the script.

43. There was dispute as to whether the words without prejudice were used at this meeting prior to the mention of a settlement agreement offer.

44. Ms Pommier accepted in her evidence that *"this is a difficult meeting to be in - maybe this could have been misinterpreted by the claimant because it's difficult information to … maybe she misunderstood".*

45. On the assessment of the evidence, I accepted that the claimant's genuine belief during and at the end of this meeting was as she put it in her evidence: *"So the only option was the settlement agreement … I was dismissed…".* I accepted the claimant genuinely believed at the end of this meeting that her last day of employment was 10 April 2020 and she was being offered a deal to leave.

46. I concluded that while the settlement agreement was offered as an 'option', the definite and unambiguous impression given to the claimant was that she was being dismissed on grounds of redundancy and that her last day of employment would be 10 April 2020. I concluded that the words without prejudice were used at the same time as the offer of a settlement agreement was being made; albeit that they were said by French-based HR manager whose knowledge of E&W legal concepts was limited and who read the words without any context or

meaning, or understanding their implication. I also accepted that the meaning of these words passed the claimant by – they meant nothing to her.

47. On 2 April the claimant emailed Ms Eloy asking to whom she would be handing over responsibilities – she was told she would be given an answer the following Monday, 6 April. The claimant did not hear anything.

48. By 6 April 2020 it was clear that the claimant was not accepting a settlement proposal, *"so we will have to start the redundancy process"* as stated in an internal email. By the time of this email the respondent had been emailed by the claimant's solicitor with a holding email pending a substantive response to the respondent about the claimant's dismissal.

49. On 7 April the claimant was emailed saying that the 30 March meeting had been a *"first notice"* that she was at risk of redundancy, and inviting her to a "*formal consultation meeting"* on 14 April 2020. Ms Pommier accepted that this was sent after the lawyer's letter, but that the intention was to hold a second redundancy meeting. The claimant's evidence was that she was *"very surprised"* to receive this invite – *"my position was made redundant on 30 March … I was dismissed. The process was unfair from the beginning – I was fired on 30 March…"*

50. On 9 April the claimant's solicitor's emailed Ms Pommier a letter setting out the following: her role had been *"deleted"* and split amongst other team members; she was told her last day of employment was 10 April; there would be a handover; there would be a settlement agreement offer. It asserts that her dismissal is unfair and there is no genuine redundancy situation; in any event no process was followed (79-80).

51. Legal counsel for the respondent replied within a ½ hour to make one point in response to the issue of the date of termination: *"[the claimant] is currently employed by [the respondent] and there are no plans for her employment to terminate on 10 April … [she] is required to attend [the 14 April] meeting"* (81).

52. Ms Pommier emailed the claimant on 14 April at 09:43 saying that the claimant was *"required"* to attend the meeting. Later that morning her solicitor's emailed saying that the claimant had been dismissed at the meeting on 30 March, her termination date was 10 April, she was under no requirement to attend this meeting (83).

53. Internal emails on 16 Aril 2020 show that the respondent was treating her termination date as 10 April 2020 (84). In response to the claimant's solicitor's email of 14 April, the respondent's legal counsel said *"on the basis of your email … we will proceed to treat [the claimant] as having left our organisation on 14 April 2020"* (88).

54. In the weeks after the claimant's dismissal/resignation, there was internal discussion about the allocation of the claimant's duties. These were set out and distributed amongst two members of staff and a new reporting/organisational structure put in place (89-90). The claimant accepted that staff in Paris took over some of her duties at this time.

55. Ms Pommier was asked what may have occurred under a *"fair"* process – whether the claimant could have retained a role. She accepted that Ms Eloy, or Finance, could have considered a role – *"it would depend on competencies … something else may have arisen, I cannot say".*

56. When the claimant was dismissed the Furlough scheme was just coming into operation; it was put to Ms Pommier that it was open to furlough the claimant. Ms Pommier stated that the scheme was published on 15 April 2020. The respondent *"avoided it because we were not familiar enough. It was quite a new scheme, and we did not have this option in mind when launching this efficiency decision.".*

57. It was put to Ms Pommier that an employee was employed from Hungary to work in the UK at or around the claimant's redundancy. Ms Pommier's evidence, which I accepted was that this was an internal relocation; it was a tech role requiring coding experience and a commercial decision was made to retain him in the company rather than lose him to a competitor. I accepted that this was not a role which the claimant should have reasonably been made aware. No other suggestions were made by the claimant about alternative roles she could have undertaken.

58. Mr Shaikh accepted that the 6 day deadline for accepting the Settlement Agreement was not in line with the ACAS Code. He said that the reason included *"… global pressures, CEO announcements … we had massive disruption and work at this particular time. I agree it was a procedural misstep, but not entirely unreasonable. It was provided Monday, so a response the following Monday was not unreasonable."*

59. Mr Shaikh was asked about the settlement agreement, that the reason for dismissal stated resignation; also that it did not include a sum for post-employment notice pay, as required by HMRC rules. He said that this was an unsigned subject to contact draft settlement agreement, that amendments would have been accepted if proposed. He accepted that some of the compensation payment proposed in the agreement would become subject to HMCR PENP rules.

Closing Submissions

60. Both parties handed up written submissions and authorities which I read in advance of verbal closing submissions. I address the central arguments raised in the 'conclusions' section below.

61. Mr Bromige first considered the s.111A issue. The 30 March 2020 meeting was not a pre-termination negotiation - it was a meeting to terminate. The settlement agreement is separate from the dismissal. It was not referenced as a protected conversation meeting. The claimant must have knowledge of and consent to a protected conversation, there must be an indication it is a protected conversation, *"you can't spring a meeting on employee and then say 'contracted in' to s111A."*.

62. Mr Bromige also argued that the respondent had engaged in unreasonable behaviour - which means the conversation is inadmissible only to the extent the tribunal considers just - but it would be unjust to determine this as inadmissible *"otherwise you lack the evidence … it would rip the evidence from the heart of the bundle"*.

63. The respondent has not sought to maintain privilege – it's in the amended Grounds of Resistance and in witness statements and disclosure.

64. Was there a dismissal? the draft settlement agreement has a termination date of 10 April, and this goes to what Mr Sand said – they work to 30 March and then give them a severance. The claimant thinks she has been dismissed – and so did Mr Shaikh – see paragraph 14 of his statement, but that a decision was taken to accept it as a resignation. *"But the two statements do not align, it's not seen as a resignation". It's a "vast leap of logic"* to treat this as a resignation.

65. There is no contribution, as the dismissal has already occurred.

66. On the reason for dismissal – there is no reduction in work, while there may be a reorganisation, this is never a redundancy. The employee in France who took on the claimant's work – and it may be acceptable to consider an employee in a group company – there is a *"cigarette paper between the two entities, the boundaries - physical and legal are blurred"* Under s.98(4) it is permitted to take these factors into account.

67. Mr Bromige considered Compair Maxim, warning of impending redundancy. But the claimant was told "you're redundant". There was no consultation, no criteria set, the issue of France employment suggests indirect race discrimination, the entire exercise was unfair. An analysis exercise has been carried out between the claimant and the French employee without consultation.

68. Mr Bromige accepted that there was an issue of "establishment" and there not necessarily being a need to consult in France, but he argued that this was in fact a *"sea of speculation"* on Polkey – the criteria was drawn up without consultation and potentially unfair.

69. On Polkey: the fact that multiple people left does not indicate that R following a fair process, or that C's employment would have ended in any event. The other employees were furloughed to 30th June. Why was it not possible to furlough beyond this point?

70. Also, there is a conflict in the rationale for redundancy. The respondent argues that it's a legitimate 15% reduction, but it is unreasonable that it did not set out its rationale in writing. The respondent argues that it was accelerated by Covid; but it would have been reasonable to furlough, which was to preserve employment.

71. Mr Fletcher argued that the only s.111A improper conduct was a technicality, giving 7 days' notice not 10; that this is not a 'hard deadline'. The claimant did

not ask for an extension *"so it's not just and equitable to lose the protection as a result".* There was no other improper behaviour.

72. There was a clear scope for a legal dispute and so it was appropriate to badge this as a without prejudice. There was a dispute when the Settlement Agreement was sent to her, as at this stage the claimant had on her case been dismissed. In any event, this is a subject to contract agreement.

73. On whether there was a redundancy, it is clear that work of a particular kind had ceased/diminished, a reduction in office admin in London. The claimant was *"appropriately placed in a pool of 1 and placed at risk of redundancy."*

74. On the meeting of 30 March - the *"key decision"* is whose evidence to prefer. Ms Pommier was clear, *"she was unsure of the script, she was unsure of the process, she was nervous and so she clung to the script and read it."*

75. It may be that the clamant understood, and she understandably considered that the script was not followed. But if the tribunal accepts that that the script was followed then I have to prefer the respondent's evidence on the discussion.

76. In addition, when the solicitor emailed on 9 April , there was a response 19 minutes later saying "no, you're wrong…". The claimant could not have believed she had been dismissed.

77. At remedy stage I heard submissions on whether the TULCRA s207A statutory uplift could apply to a breach of this ACAS Code of Practice. Mr Bromige's argument is that this is a Code issued under TUCLRA – and Schedule 2 references s.207A Code (which this is).

78. Mr Fletcher argued that s.207A and Schedule 2 relate to the regulation of disputes; there is a clear contradiction between the wording in the statute and the statement given in response to consultation that breach of this Code would not attract an uplift. There is no case law, we are on the *"realms of the unknown".* In any event, this is case where any exercise of the discretion would lead to no uplift.

Conclusions on the evidence and the law

The status of the 30 March 2020 meeting.

79. I concluded that this meeting does not attract s.111A 'protected conversation' status. I accepted that it needs to be made clear to the employee that a particular part of a meeting is a "protected conversation"; and the employee can decline to take part in it. These words are not in the script. Ms Pommier accepts that she did not use these words or offer the option to the claimant of saying 'yes or no' to a protected conversation. Hence, I concluded that this conversation was not protected under s.111A ERA.

80. If I am wrong, and this was a s.111A protected conversation, on the respondent's own case the offer was to be put to the claimant part-way through this meeting;

the first part of this meeting gains no protection in any event. This means that the conversation was not 'protected' when the claimant was told her role was redundant.

81. I also concluded that a seven day deadline to return a signed agreement was "improper behaviour". There was no good explanation for this deadline, and I did not accept that this was a minor issue. There is good reason why there is a minimum of 10 days *"as a general rule"* set out in the ACAS Code. It is to allow the employee to reflect and receive legal advice, rather than be hurried into signing an agreement.

82. In determining that the 7 day deadline was an unreasonable element the s.111A conversation (if that is what it was), I also took into account the terms of the proposed settlement agreement. I agreed with the claimant's contention that the terms of the settlement agreement appeared to suggest a scheme which meant tax would not be payable on post-employment notice pay. I accepted that this was a potentially unlawful suggestion by the respondent with clear tax penalty implications for the claimant. I concluded these were two significant areas where the respondent acted unreasonably, and that the two issues taken together amounted to improper behaviour on its part.

83. In determining that s.111A protection, if it ever applied, should be waived on grounds of unreasonable behaviour, I noted that the further requirement – that s.111A protection can only be waived if the Tribunal considers it *"just"* to do so. I also took into account the centrality of what occurred at this meeting for the claimant's case. The claimant believed she was dismissed with a etd of 10 April 2020 because of what occurred at this meeting. I therefore considered that it would be impossible for the claimant to adduce evidence of her belief of her dismissal, which would amount to an injustice, unless the s.111A protection was waived.

ETD/reason for dismissal

84. I concluded that one date was clearly communicated to the claimant – 10 April 2020. This was the date she was given at the 30 March 2020 meeting, and this is the date referenced in the only document given to her. It was reasonable for the claimant to conclude on the totality of the conversation that she had been given an actual date of termination, 10 April 2020. I concluded that this was the effective date of termination, as communicated to her (per *Morton Sundour Fabrics Limited v Shaw*).

85. I also accepted that the respondent had another view – that they were of the view that the 10 April 2020 date was communicated as an option if she signed the settlement agreement and a process would be followed if she did not. However this interpretation was lost in the process – there was no actual knowledge of the legal and procedural issues on redundancy which were implicit in the script. The meeting was not backed up in writing which may have clarified the miscommunication by the respondent.

86. I accepted that notice of termination, once it had been given, could not be withdrawn except by mutual consent. The claimant's belief, I found, was that any decision by her to accept continued employment would lead to an unfair and predetermined redundancy process. She did not consent as was her right.

87. Given the above findings, I did not therefore accept that the claimant resigned, or that the words of the claimant's solicitor letter of 9 April 2020 can be reasonably construed as her resignation.

88. I accepted that the claimant did not contribute in any way to her dismissal by the action she took. She was under the reasonable belief she had been dismissed, and once her solicitors were told that this was not the case, I concluded that she was entitled to consider any process which would follow would not be fair.

89. I next considered the reason for dismissal. There was no challenge to the underlying rationale of a global decision to reduce costs, and to do so by making approximately 40-50 redundancies worldwide. The claimant says at best this was a reorganisation and she should have retained her role. I accepted the evidence of Ms Pommier, that a decision was taken that the claimant's role could be absorbed amongst current staff in the French office, that it made economic and organisational sense to have the role based in Paris. I concluded that the respondent had a genuine view that they could cease undertaking the claimant's role from the UK, with certain admin and office manager functions being undertaken remotely and the analyst duties being absorbed into the Paris team.

90. I concluded therefore that the reason for dismissal was redundancy. The respondent believed following a reasonable internal management process, one which would be carried out by similar companies in similar situations, that the claimant's role was no longer required in London, and that her sales analyst duties could be absorbed into the Paris office. Her Office Administrator role disappeared.

Dismissal Process

91. I considered the claimant's contention that there was in fact a pool of 2, given the Paris employee B who was being compared to the claimant in meetings at the time of the restructure discussions. I concluded not; the focus at the time of these discussions was on the reduction in work and proposed redundancies in London, and the decision to consolidate sales analyst role in Paris. The claimant was in a pool of 1 because it was her role in London which was at risk. This was a decision which was within the range of reasonable responses to make.

92. I therefore concluded that the initial claimant's selection for redundancy was conducted fairly, that a reasonable employer with one employee at risk in a particular role would not have drawn up selection criteria or consulted more widely.

93. However, at the initial meeting, the process broke down. The claimant was told – quite honestly – that she had already been selected for redundancy – there was no other option. The aim of a redundancy process is to see if there is any

way of avoiding redundancies by consultation. This is why the words 'provisionally' selected, or 'at risk' of redundancy are often used by employers in letters and meetings. However the implication of the respondent's choice of words was that no process was going to be followed – she was being dismissed and her date of dismissal would be 10 April 2020. Any refence to a second meeting was so cursory that the claimant was not aware of this prospect. She believed she had been dismissed at this meeting.

94. Because of the issues arising at this meeting, and the unambiguous wording on dismissal given to her at this meeting, it follows that the claimant was dismissed unfairly. No process was followed, and it was not suggested to the claimant that a process would be followed prior to the communication of her dismissal.

Polkey

95. What would have occurred under a fair process? The claimant's case is that furlough meant her employment could and should have been preserved for at least the duration of the scheme and beyond. The respondent's position is that the claimant's redundancy was planned in any event, and furlough made no material difference to this – the decision to make redundancies still remained.

96. I concluded that there would have been a further consultation meeting on or after 14 April 2020 as already planned. At this date, furlough was a clear option. At around this date the respondent furloughed employees who had been put at risk of redundancy in the same redundancy exercise.

97. I concluded that had a consultation period commenced under a fair process, the claimant would have made significant efforts to remain employed by the respondent by taking suggestions to a 2nd consultation meeting. I concluded that in this period that furloughing would very likely have been considered while the respondent took stock at the outset of the covid pandemic. This is what it did for other employees. Accordingly, by 20 April 2020 a decision would have been taken to place the claimant on furlough along with other employees who were placed on furlough.

98. In reaching this conclusion I noted page 259, which I accept is an accurate document. 3 staff were notified of redundancy on the same day as the claimant; two left on grounds of redundancy on 10 April; one left on 24 July 2020. Other employees were put at risk end April 2020 – most of these were made redundant by end June 2020.

99. I accepted the respondent's evidence, that it held a genuine belief that it should not use furlough to delay the planned savings changes it believed it needed.

100. I concluded that during the period of furlough, under a fair process the respondent would have recommenced a consultation process with the claimant; she would have been placed at risk of redundancy. Because of the factors outlined above, in particular the continued genuine view that her position was no longer required and in the context of the costs savings required, I concluded that this process would have confirmed the claimant's dismissal on grounds of

redundancy. The claimant's last date of employment would have been 24 July 2020, the same day as one of her colleagues who was also put at risk on 30 March 2020.

101. I noted that the practice of the respondent in this redundancy round appeared to be to dismiss without notice and to make a payment in lieu of notice. The claimant is entitled to 30 days' notice under her contract of employment. I concluded therefore that the claimant would have been dismissed without working or being furloughed for a period of notice. She would have received post-employment notice pay of 30 days' salary.

Remedy

102. The respondent's evidence which I accepted was that during furlough employees' received 80% of their salary, this was not topped up by the company. For the claimant this amounts to £2,033 net monthly salary.

103. The parties agreed calculation of the Basic Award - £1,614.

104. The parties agreed calculation of salary and benefits to 14 April 2020 – £687.00

105. The parties agreed calculation of notice pay: £4,080.

106. We calculated and agreed pay during the period of furlough– 20 April-24 July: £6,225 and employer pension contributions - £605.45.

107. Having heard submissions I concluded that in the claimant has suffered a loss of statutory rights which in the current job market is significant. I awarded £500.

108. Mr Bromige argued that the ACAS uplift applied; this Code is a TULCRA Code – s.111A ERA, and Schedule A2 – it applies to the failure to comply with a Code of Practice relating to resolution of employment disputes. Mr Bromige argued for a 25% uplift. Mr Fletcher argued that Schedule A2 does not apply; if it does there should be zero uplift. I noted that requirement that it must be just and equitable to make an award.

109. I accepted that the Code on Settlement Agreements falls under the provision. The purpose of this Code on Settlement Agreements is to resolve employment disputes, and it appears therefore that this Code does apply. I accepted that there is no case law on this point, but I concluded that the purpose of this Code is to 'fast track' an employment termination without going through a dismissal process. If this Code is not adhered to, the same consequences arise for the employee – an unfair and unreasonable process. I concluded that the TULCRA uplift does apply and that it would be just and equitable to make an uplift on the award.

110. I concluded that the failure to properly apply the Code of practice was part of the wider failings of a rushed redundancy process with no consultation with employees. As a consequence the claimant was not told she was having a protected conversation, she was given insufficient time to consider the

agreement, and she was given an agreement which contained no post-employment notice pay provision, making this agreement contrary to HMCR tax provisions.

111. I concluded that these were serious errors, which caused the claimant to consider that her dismissal was unfair and an unreasonable process followed. However, they were not deliberate breaches. I concluded that in the circumstances a TULCRA uplift of 20% was just and equitable. The parties agreed this calculation at £2,742.29.

112. The total award is therefore £16,453.74.

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EMPLOYMENT JUDGE M EMERY

Dated: 21 October 2021

Judgment sent to the parties
On: 25/10/2021

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For the staff of the Tribunal office