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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108989/2021

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Heard in Glasgow on the 27 and 30 August and 9 September 2021

Employment Judge L Wiseman

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Mrs Angela Wilson

**Claimant
Represented by:
Ms K Bain,
Friend**

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West Dunbartonshire Council

**Respondent
Represented by:
Mr S Miller
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on the 8 April 2021 asserting she had been unfairly dismissed when the respondent terminated her contract of employment and offered her alternative employment which she accepted. The claimant believed the reason for her dismissal was redundancy.

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2. The respondent entered a response in which they admitted the claimant had been dismissed for some other substantial reason (SOSR), but denied the dismissal had been unfair.

3. The tribunal heard evidence from Ms Joyce White, Chief Executive; Ms Victoria Rogers, Chief Officer (People and Technology) and from the claimant. It was also referred to a folder of jointly produced documents. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

4. Ms White has been the Chief Executive of the respondent since November 2011. She was appointed to lead a change programme and to deliver and improve services following a critical Best Value Review in 2008 and a subsequent public enquiry.
5. The claimant commenced employment with the respondent on the 1 March 2012. She was employed as an Executive Director of Corporate Services.
6. Ms White has significant private sector experience in the delivery of service and best value. She decided there was a need to reduce the number of layers in the respondent organisation (in some areas of the Council there were up to 10 layers or tiers of functions) and to focus on multi-functional working. All of this was to try to achieve the delivery of services more effectively in circumstances where there is less money available but more demand.
7. The first phase of restructuring took place in 2016. This phase introduced 4 Strategic Director posts (although this subsequently reduced to 3 and then 2), supported by Strategic Leads and Advisers.
8. The claimant took on the post of Strategic Director, Transformation and Public Service Reform. The job description for the post was produced at page 326. The claimant had five Strategic Leads reporting to her,
9. The second phase of the restructuring took place in 2019. The claimant retained the title of Strategic Director, Transformation and Public Service Reform, but took on additional responsibility for Procurement. The claimant

was disappointed with this restructuring (which she considered was a redundancy situation) and with having to take on Procurement

10. The structure in place in 2019 was shown on page 360. There were two Strategic Directors in place (Mr Richard Cairns and the claimant) who reported to the Chief Executive and 8 Strategic Leads (with one of the Strategic Leads, responsible for Shared Services, Roads and Transformation, being a shared services post with Inverclyde Council).
11. The strategic Directors were employed on grade 46 – 48; and the Strategic Leads were employed on grade 32 – 34
12. The 2019 restructure also involved the alignment of the Strategic Leads for the three professional functions of Resources, People and Technology and Regulatory, so that they reported directly to the Chief Executive. This created capacity for the claimant to lead changes in Procurement.
13. The Chief Executive's vision for the organisation was to move to a more agile structure. An opportunity to implement this phase of the restructuring arose when Mr Cairns was successful in obtaining a secondment and one of the Strategic Leads indicated his intention to retire. The proposed restructuring would mean the deletion of the Strategic Director posts (x 2 although one post was vacant due to the secondment) and Strategic Lead posts (x 8 although one post was vacant due to a retirement), and the introduction of Chief Officer posts (x 8). The Chief Officer posts would be tier 2 posts, reporting directly to the Chief Executive.
14. The work previously carried out by the Strategic Directors and the Strategic Leads did not reduce or diminish, and it was subsequently carried out by the Chief Officers.
15. Ms White informed the claimant of the proposed restructuring in a one-to-one meeting on the 27 July 2020, and followed this up in a letter dated 28 July (page 370). Ms White explained to the claimant that two opportunities had emerged which allowed her to proceed to phase 3 of the restructure plans. Ms White confirmed she wished the claimant to take on the role of Chief

Officer with responsibility for Supply, Distribution and Property. The letter confirmed the claimant would be offered two years' pay protection in the post. The letter further confirmed the consultation process with the claimant had started.

- 5 16. The claimant responded to this with a list of questions (page 373). Ms White replied to the claimant by letter of the 31 July (page 375, issued by email on or about 11 August). Ms White explained the changes were necessary because the Council was facing significant financial challenges, and the proposals would deliver cost savings and an agile team of chief officers reporting directly to the Chief Executive. Ms White confirmed the claimant's job role and attached a draft job description. Ms White also referred to the claimant having been advised during a one-to-one on the 3 August, of the proposed restructuring and of having a further opportunity to discuss it. Ms White confirmed her intention to take the proposals to the recruitment committee in late August/early September to ratify the decision to implement the new structure. The trade unions would be made aware of the proposals once the new structure had been approved.
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17. The claimant was not happy with the proposals. She considered her post was being made redundant and that she was being offered an alternative role at a lower grade and salary (page 382A). The claimant also complained about no longer chairing the Change Board. She was advised it was an evolving picture and the focus was on aligning resources to the priorities. Each of the Chief Officers would be given an opportunity to chair the Renew (formerly Change) Board.
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- 25 18. Ms White wrote to the claimant on the 26 August 2020 (page 390) in response to various emails sent by the claimant. Ms White confirmed she had provided the role profile, the key aspects of the restructuring process, the implications for the claimant and the rationale and financial implications for her and the wider organisation. Ms White considered the questions asked by the claimant had been answered. Ms White confirmed the proposed restructuring had to go to the Recruitment and Individual Performance committee for approval,
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and that this would take place in September. The new structure would take effect on the 1 October 2020 and the claimant would be placed at the highest point of spinal column point 36 – 38, but, in accordance with the respondent's SWITCH policy and pay protection, she would remain on a salary of £95,872.

5 19. The claimant responded by email of the 7 September (page 392) in which she set out her belief that two options remained: either retaining her current status, role and terms and conditions, or her job being redundant and getting access to redundancy or early retirement.

10 20. Ms White responded on the 25 September (page 394). She confirmed the reorganisation deleted the Strategic Director and Strategic Lead titles from the organisation, and replaced both with the new term Chief Officer. Ms White referred to it being not uncommon for titles to be adjusted periodically. Ms White addressed each of the points raised by the claimant:

15 *“Status – In the current structure you are a Tier 2 manager (reporting directly to the Chief Executive) and line manage two at Tier 3 and one at Tier 4. In the new structure, you remain Tier 2 (reporting directly to the Chief Executive) and line manage 3 individuals all of whom are Tier 3. Your reporting line remains as is.*

20 *Salary – I fully appreciate this change presents a potential reduction, following pay protection on a cash conservation basis for two years. I am prepared to extend this to pay protection on a cash conservation basis in perpetuity.*

Conditions – it is not entirely clear what is meant by this.

25 *The role is substantially the same as you retain responsibility for Procurement, and two large/complex service areas with the same form of management required although functional areas are different.”*

21. Ms White concluded the status quo was not a reasonable option for the organisation. She confirmed the claimant had, as an alternative to redundancy, been offered suitable alternative employment with pay protection, and that unreasonable refusal of the offer would render the claimant ineligible for a redundancy payment and the respondent would proceed to dismiss the claimant on the grounds of some other substantial reason (being reorganisation).
22. The term “pay protection” meant the claimant’s salary would be preserved in circumstances where the claimant had been earning more in her post of Strategic Director, than the salary for the Chief Officer post. The effect of pay protection is that the claimant would not benefit from cost of living, or pay, rises. The claimant’s salary would, in effect, mark time, until the salary for the Chief Officer post caught up with her salary.
23. A certificate of material change was also issued. The purpose of this certificate is to protect the pension contributions made for a period of 10 years. This, in effect, means that if the claimant retires at any point within the next 10 years the certificate will protect the pension contributions made as if she had been receiving the pay awards.
24. Ms White had been in discussion with the cross-party leaders’ group regarding the planned restructuring, and she presented a Report to the Recruitment and Individual Performance committee on the 29 September 2020 (page 213). The committee approved the new proposed structure, which involved the *“replacement of Strategic Directors and Leads with an organisation of equal Chief Officers from 1 October 2020”*.
25. Ms White wrote to the claimant on the 2 October (page 401) following a one-to-one discussion, to formally confirm the Committee had approved the proposed reorganisation. The letter confirmed the replacement of the Strategic Director and Strategic Lead titles with the new term Chief Officer, from the 1 October 2020. The new Chief Officer job profile and offer of contract were enclosed and the claimant was invited to sign and return a copy of the contract if she agreed to the change. The letter went on to explain that an

unreasonable rejection of the change would leave the claimant ineligible for a redundancy payment and that her date of termination would be the 29 December.

- 5 26. The claimant, by email of the 8 December (page 413) confirmed she accepted the offer (which she considered to be alternative employment, rather than suitable alternative employment) with effect from the 29 December. The claimant confirmed she further considered the reason for dismissal to be redundancy and not some other substantial reason. The claimant set out details of the pay and pension she believed she would lose as a result of accepting the new post.
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27. The respondent's SWITCH (Redeployment) policy was produced at page 191. The purpose of the Policy was to provide a clear framework for managing employees through the redeployment process. The matching process (set out at page 209) confirmed a match existed where the new post is broadly similar (for example 70% or more) to existing posts.
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28. The respondent produced an HR Information Note regarding Early Retirement and Voluntary Severance, dated 1 December 2019 (page 187). The Note confirmed in the introduction that the respondent was committed to avoiding compulsory redundancy wherever possible. The Note also set out definitions of the terms redundancy and efficiency.
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29. The respondent will investigate the cost of making an employee redundant and will look for "a return" on their investment within 2/3 years. The respondent did not regard the claimant's role as redundant: there was a need for the role and the respondent would have had to recruit someone to fill the role if the claimant had left. The cost of making the claimant redundant would have been in excess of £500,000, and it would have taken 4/5 years for the respondent to recoup this.
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30. Ms Victoria Rogers, Chief Officer People and Technology, informed the trade unions at a meeting on the 25 August that due to someone leaving the organisation, there would be a restructuring of the Senior Leadership Group
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which would require the approval of the Recruitment committee. Further information was provided at meetings in October, November and December.

31. The trade unions were concerned about the lack of consultation. The SWITCH policy, at paragraph 2 (page 208) states the recognised trade unions will be advised of any proposal to undertake restructuring within a chief officer area, section or service with a view to reaching agreement. The trade unions sought assurance that subsequent restructures would follow the usual process of the trade unions being consulted before decisions are made. Ms Rogers disagreed with the trade unions on this point because in the 2016 restructure a specific template for what was to be done, was agreed, and referred to scrutiny by elected members. These provisions had been carried through to 2020.

Credibility and notes on the evidence

32. There were no issues of credibility in this case: each of the witnesses gave their evidence in an honest and straightforward manner. The claimant was clearly upset by what had happened: she saw herself as the Chief Executive's "number 2"; they worked well together and she described that she "had Ms White's back". The claimant's unhappiness about the changes to her role started in 2019 when she was asked to take on Procurement. Then in 2020 the claimant believed her role was made redundant and she was offered the Chief Officer role as suitable alternative employment. The claimant did not consider it to be suitable alternative employment, but ultimately she accepted it. The real issue in this case was the reason for the dismissal.

33. The focus of the claimant's case was twofold: firstly that the need of the respondent for Strategic Directors had disappeared and therefore she was redundant; and secondly, that the change was not simply a change in job title and a comparison of the job descriptions for the claimant's previous post and the new Chief Officer post demonstrated this.

34. Ms White was a credible witness who spoke of the pressures on local government finances whilst, at the same time, there being more demand for services. I understood from her evidence that often at senior level, when

posts are vacated (for whatever reason) they are not filled and in this way, through natural wastage, savings may be made. Redundancy and early retirement are last resorts because of the cost to the respondent. Change is constant.

5 35. Ms Rogers was also a credible witness who spoke to the discussions with trade unions and the respondent's HR policies.

36. The respondent accepted that it had made an error in some of its correspondence with the claimant, when it referred to redundancy and suitable alternative employment (see for example page 394).

10 **Respondent's submissions**

36. Mr Miller provided a written skeleton submission which he spoke to. He confirmed the parties were in agreement regarding the issue to be determined by the Tribunal, which was "what was the reason for the dismissal". Mr Miller submitted that a review of the relevant case law demonstrated one clear point,
15 and that was that each case was fact specific.

37. The timing of the third phase of the restructure had been opportunistic because of the changes in the management structure. In 2019 the changes had been mutually accepted and therefore there had been no need to give notice of termination of contract. In contrast, in the phase three restructure,
20 dismissal of the claimant had been required because the respondent needed to introduce a new job title, which the claimant was not willing to accept, and to freeze her pay. Mr Miller invited the Tribunal to note the respondent could have achieved the same structure by designating the Strategic Leads as Strategic Directors and paying them so. This illustrates dismissal was needed
25 because of the change to the contract rather than because of redundancy.

38. Mr Miller submitted the order of events was critical in circumstances where there was no budget for voluntary early retirement or redundancy. Redundancy in local government is a last resort and the Chief executive had only been able to proceed with phase 3 of the restructure because of the

secondment of a Strategic Director and the retirement of a Strategic Lead: this was the catalyst for advancing phase 3.

39. There was no dispute regarding the fact the functions to be discharged by the Senior Leadership Group had not diminished, and if anything they had increased over time. Furthermore, the people who left were not replaced and their work was an additional burden on those who remained. However, the introduction of a flatter, more efficient structure, compensated for this. It was this the claimant objected to and the only way this could be resolved was to terminate the contract and offer re-engagement. The reason for the termination was some other substantial reason, namely business restructure, and not redundancy.

40. The job descriptor anticipated the changes in management responsibilities which the claimant and others experienced, and the significant changes which had already been achieved in phases 1 and 2. The pattern from 2012 was a reduction in the number of Directors from 5, to 4, to 3 (in 2016) and to 2 in 2019. All of these changes were achieved within the terms of the existing contracts.

41. Mr Miller referred to various cases regarding the reasonableness of a dismissal for some other substantial reason. He referred to **Hollister v National Farmers' Union 1979 ICR 542; Kerry Foods Ltd v Lynch 2005 IRLR 680** (at paragraph 14) and **Garside and Laycock Ltd v Booth 2011 IRLR 735** (at paragraphs 6, 10, 11 and 13). Mr Miller submitted that change is constant at the level of seniority of the senior management team. The claimant ultimately accepted there had been no loss of status because she still reported directly to the Chief Executive, and deputised for her from time to time. There had been no real term loss of salary and the pension certificate preserved salary for 10 years. There had been individual consultation and the trade unions had been notified of the changes. The respondent had adopted a reasonable approach.

42. Mr Miller invited the Tribunal to find the reason for dismissal was some other substantial reason (business reorganisation) and to find the dismissal had

5 been fair. If however the Tribunal found the dismissal unfair, he noted the calculation of the basic award had been agreed as £6456. The pension figures were disputed, and it was submitted there had been no evidence to allow the Tribunal to rule on it. Further, the pension losses did not flow from the dismissal. Mr Miller invited the Tribunal to question to what extent the claimant had suffered a loss of earnings in circumstances where she had taken the Chief Officer post and there would be no loss until she did not receive the cost of living award. The claimant had also failed to factor in life factors.

10 Mr Miller responded to the submissions made by the claimant and these points are dealt with in the discussion below.

Claimant's submissions

15 43. Ms Bain prepared a written submission which she spoke to at the hearing. She noted the respondent admitted dismissing the claimant, and the key issue was the reason for the dismissal. The claimant's position, put simply, was that there was no longer a requirement for two employees at Strategic Director level (grade 46 – 48). The new Chief Officer structure saw the same amount of work done by less employees: there had been a reduction in the number of employees from 10 to 8. The claimant's dismissal was wholly or
20 mainly attributable to redundancy.

44. Ms Bain referred to the terms of section 139 Employment Rights Act and to the cases of **Kingwell v Elizabeth Bradley Designs Ltd 2003**; **Safeway Stores plc v Burrell 1997**; **Murray v Foyle Meats Ltd 1998**; **Knox v Biotechnology and Biological Sciences Research Council 2007**;
25 **Havering Hospitals NHS Trust v Peek 1996** and **Chagger v Abbey National plc 2009**.

45. Ms Bain submitted the respondent had treated the claimant as redundant, had used the SWITCH policy and had offered her suitable alternative employment, which the claimant refused. If the respondent had considered the alternative
30 suitable, they could have dismissed the claimant with no redundancy

payment. Instead, they used some other substantial reason as a way to avoid paying redundancy.

46. The respondent's position was that only the claimant's title had changed, and the size and scope of her role remained the same. However, the two so-called "service areas" were not service areas, they were functions. The claimant moved from having corporate oversight, to managing teams. Tier 2 of the organisation was removed and not replaced by tier 3. A move from Director to Chief Officer was not permitted by the claimant's contract because of the move to a lower grade and duties. The claimant was effectively demoted.

47. Ms Bain acknowledged the earlier restructures in 2016 and 2019, but submitted that although the claimant's portfolio had changed, she had remained a Director on the same pay and grade. The job description for the claimant's Strategic Director role and the Chief Officer role had been compared and put to the Chief Executive in evidence: one of the key points being the Chief Officer role provided oversight only.

48. Ms Bain invited the Tribunal to find the reason for dismissal was redundancy and to make an award based on the schedule of loss which had been provided.

Discussion and Decision

49. I firstly had regard to the terms of section 98 Employment Rights Act which provides:-

"(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."

5 (2) The terms of section 98 Employment Rights Act make clear that it is for the employer to show the reason for the dismissal. The burden of proof on employers at this stage is not a heavy one. Ms Bain suggested in her submission that the employer had to “*prove that none of the other potentially fair reasons apply*”. I could not accept that submission because it is not for the employer to prove reasons do not apply: the onus on the employer is to show the reason for the dismissal.

10 (3) The respondent accepted it had dismissed the claimant and asserted the reason for the dismissal was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, in terms of section 98(1)(b) Employment Rights Act. The “*substantial reason*” was the restructuring which had taken place.

15 (4) The claimant disputed this was the reason for her dismissal because she believed the circumstances of her dismissal fell within the definition of redundancy in terms of section 139 Employment Rights Act.

(5) I next had regard to the terms of section 139 Employment Rights Act which set out the definition of redundancy. It states:

20 “(1) *For the purposes of this Act 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) *the fact that his employer had ceased or intends to cease –*

25 (i) *to carry on the business for the purposes of which the employee was employed by him, or*

(ii) *to carry on that business in the place where the employee was so employed, or*

(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 a place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.”

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50. I also had regard to all of the case law to which I was referred, and in particular to the cases set out below. I found it instructive to note the term “redundancy” has a technical, legal definition whilst the term “reorganisation” simply means a change in working structures and has no legal meaning. In **Corus and Regal Hotels plc v Wilkinson EAT 0102/03** it was said “*each case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of redundancy*”. Also, it was recognised by the EAT in **Barot v London Borough of Brent EAT 0539/11** that what is crucial is whether the restructuring essentially entails a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees whose numbers nonetheless remain the same.

20 51. In **Safeway Stores plc v Burrell 1997 ICR 523** the EAT set out a three stage test for the Tribunal to decide: (i) was the employee dismissed; (ii) if so, had the requirements of the employer’s business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish; (iii) if so, was the dismissal of the employee wholly or mainly caused by the cessation or diminution. It was said “*There are no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question to be asked when determining stage (ii) of the three stage test is whether there was a diminution in the employer’s requirement for employees (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant’s contract. The terms of the contract are only relevant at stage (iii)*”

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when determining, as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal."

52. The test set out in the **Burrell** case was endorsed by the House of Lords in the case of **Murray v Foyle Meats Ltd 1999 ICR 827**. Also, in **Shawkat v Nottingham City Hospital NHS Trust (No 2) 2002 ICR 7** the Court of Appeal confirmed the correct approach is for a Tribunal to decide, as a question of fact, whether the employer's need for employees to carry out work of a particular kind had diminished. It is, therefore, the kind of work that must be defined rather than the kind of employee. In that case the employee had been employed as a thoracic surgeon. The respondent decided to merge the cardiac and thoracic surgery departments and informed the employee he would be required to carry out both forms of surgery. The employee objected and was dismissed. It was held the respondent's requirement for employees to carry out thoracic surgery had not diminished and, therefore, there had been no diminution in the respondent's requirement for employees to carry out work of a particular kind.
53. There was no dispute in this case regarding the fact the restructuring in 2020 was phase 3 of a restructuring process which had started in 2016, although overarching all of this was the fact that (a) since 2012 the number of Directors employed by the respondent had reduced from 5 to 2; (b) change at senior level (in terms of duties, responsibilities and titles) is constant and anticipated within the job descriptor and (c) redundancy and early retirement are options of last resort for the respondent.
54. The timing of events in this case was important. The claimant sought to argue that the secondment of a Strategic Director and the retirement of a Strategic Lead were part of the restructuring and it was implicit in this that the total number of employees (2 x Strategic Directors and 8 x Strategic Leads) reduced from 10 to 8. I could not accept this analysis because I preferred and accepted Ms White's evidence that the secondment and retirement presented her with an opportunity to proceed with the phase 3 restructuring.

55. The Strategic Director who was seconded was not replaced and (the tribunal understood) would not be returning to the organisation. I acknowledged Ms White still had to obtain the approval of the relevant committee regarding the retirement, but there was no doubt the retirement was happening with or without the restructuring. This was not a situation where the secondment and retirement occurred as a consequence of the restructuring. This, in contrast, was a situation where the secondment and retirement were happening and, because of this, there was an opportunity for Ms White to proceed with a restructuring. So, in terms of number of employees, the secondment meant there was one Strategic Director and 7 Strategic Leads, giving a total of 8 employees at the time of the restructure and those 8 employees, in turn, became the 8 x Chief Officers.

56. The claimant also suggested the employee who retired had been “bumped” to create a vacancy for her. I could not accept that suggestion because I preferred Ms White’s evidence that the Strategic Lead postholder who wished to retire had informed her that he was retiring: it was not a situation where he was persuaded to do so to create a vacancy for the claimant.

57. I next addressed the question of whether the requirements of the respondent for employees to carry out work of a particular kind had ceased or diminished. The claimant argued the respondent’s need for employees to work as Strategic Directors had diminished, and the Strategic Director posts had been deleted from the organisation. The fact the Strategic Director posts were deleted from the organisation was not in dispute. The key question is whether the requirements of the respondent for employees (my emphasis) to carry out work of a particular kind had ceased or diminished. I found as a material fact that the work done by the Strategic Directors did not disappear or reduce. All of the work/duties/responsibilities of the Strategic Directors still had to be done. I concluded from this that the requirements of the respondent for employees (my emphasis) to carry out work of a particular kind had not ceased or diminished.

58. The component parts of the Director role in terms of budget responsibility, organisational transformation and reform, deputising for the Chief Executive and management of staff were all parts of the Chief Officer role. It was suggested to Ms White that the Chief Officers had no responsibility for delivering the key objectives of the respondent. In effect it was suggested “someone” set the objectives and the Chief Officers delivered them. Ms White rejected that suggestion and confirmed “*the strategic plan is down to the team and the organisation. The ethos is about collective endeavour to deliver the strategic plan*”.
59. Ms White was also asked about supporting elected members regarding the strategic plan and direction. Ms White accepted it may not have been referred to in the job purpose, but it was still very much part of the role. She rejected the suggestion the responsibility fell entirely on her shoulders.
60. I acknowledged the claimant’s job/role changed and that she was no longer required to do parts of the job she had previously done. However this is different to looking at whether the work carried out by Directors still had to be done. I was entirely satisfied the work of the Directors still had to be done: the difference was that the respondent chose to carry out that work in a different format. I would describe this simply as the Directors’ duties and responsibilities being carried out by more people so, the Chief Officers would carry out the duties and responsibilities (previously carried out by the Director) in respect of the areas/functions for which they were responsible. I considered there was support for that conclusion: the claimant agreed in cross examination with the suggestion that the “size of the pie” was the same, but it was cut into fewer slices; and, that some people would have more on their plate than previously. She also agreed the Chief Officers would deputise for the Chief Executive in relation to their specific remit and not generally.
61. I also considered the fact the Chief Officer role was graded at a level between that of Strategic Lead and Strategic Director demonstrated (and supported) the fact the Chief Officers took on further duties and responsibilities to merit that grading. Those further duties and responsibilities were the duties and

responsibilities previously carried out by the Directors. This was recognised by the claimant when she acknowledged the role of Chief Officer had been upgraded because they had taken on responsibility for budgets, and when, in the submission, it was stated *“the functions of the Directors were absorbed into existing jobs namely the Chief Executive and the Chief Officers”*.

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62. Ms Bain in her submission stated *“Mrs Wilson’s job as a Director was to influence the strategic direction of the council by supporting elected members and taking decisions on strategic and policy issues. It was her job to consider external influences and recommend appropriate responses for the council. Her role was one of leadership not management. She provided corporate oversight and direction, support and inspiration to a number of Strategic Leads who managed the employee teams within her Department.”* Ms Bain went on to say that *“the job purpose of a Chief Officer is to ensure that the council’s aims and objectives are reflected through strategic management, planning and delivery of services. This is an entirely different role to that of a Director”*.

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63. I acknowledge Ms Bain had a very good knowledge of the workings of local authorities/local government and that she sought to compare and contrast the job profiles for Director and Chief Officer posts, and to demonstrate the Chief Officer role was a much lesser job than that of Director. I also acknowledged the Chief Officer role was a lower graded post and that there were undoubtedly differences between the duties and responsibilities of both roles. However the question of whether the requirements of the respondent for employees to carry out work of a particular kind had ceased or diminished is not answered by comparing and contrasting the job profiles for the posts. The claimant accepted the “size of the pie” was the same. The pie was the duties and responsibilities of the Strategic Directors and Strategic Leads: the size of the pie was the same after the restructure: it was simply divided differently so that rather than having a Director and Strategic Leads to carry out the work, it was to be done by the Chief Officers.

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64. I referred above to the **Shawkat** case where it was said that it is the kind of work that must be defined and not the kind of employee. The kind of work was the duties and responsibilities of the Strategic Directors, and there was no diminution in the need of the respondent to have that work done. Ms Bain suggested some of the Directors duties had been absorbed by the Chief Executive, but there was no evidence to that effect. Furthermore, even if the Chief Executive had taken on some of the duties, that merely demonstrated the continuing need to have that work done.
65. I also referred above to the questions set out in the **Burrell** case. I answered those questions as follows: (a) yes the claimant was dismissed; (b) no, the requirements of the respondent for employees to carry out work of a particular kind had not ceased or diminished and were not expected to cease or diminish and (c) no, the dismissal of the claimant was not caused by the cessation or diminution of work because there wasn't one.
66. I concluded there was no redundancy situation. I next asked whether the respondent had shown the reason for dismissal was some other substantial reason, being business reorganisation. In **Hollister v National Farmers' Union** (above) it was said that "a sound good business reason" for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. Also, in **Kerry Foods Ltd v Lynch** (above) it was said that it is not for the Tribunal to make its own assessment of the advantages of the employer's business to reorganise, and that the employer need only show that there were clear advantages in introducing a particular change to pass the low hurdle of showing SOSR for dismissal.
67. The claimant "absolutely agreed" that it was the Chief Executive's prerogative to pick the structure for the organisation and to make financial savings. The tribunal accepted Ms White's evidence that her key objective was to "delayer" the organisation to create efficiencies (both financial and otherwise) and promote multi-functional working. The report to the Recruitment and Individual Performance Committee in September 2020 (page 213) described the current

structure as “being static, operating in distinct service areas, with a strong but rigid hierarchy.” In contrast, the structure Ms White wished to introduce was described as “an agile organisation (designed to be stable and dynamic) is a network of teams within a people centred culture that operates in rapid learning and fast decision cycles... Such an agile operating model has the ability to quickly and efficiently reconfigure strategy, structure, processes, people and technology toward value based opportunities..... A new agile leadership team working collaboratively will enable further flexible delivery of services in the achievement of the strategic priorities...”

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10 68. The advantages to the respondent in introducing the new structure were not only a cost saving, but also a leaner, flatter more agile senior leadership team.

69. The claimant challenged the structure introduced by the Chief Executive and queried why a Chief Operating Officer had not been introduced to sit between the Chief Officers and the Chief Executive. It is not for this Tribunal to assess the advantages and/or disadvantages of this proposal. The tribunal accepted the evidence of Ms White when she told the Tribunal she had given consideration to this idea, but had decided not to proceed with it because she favoured the flatter structure which removed the layer between the Chief Executive and the Chief Officers.

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20 70. The claimant was offered the position of Chief Officer (page 370) which she rejected. Ms White ultimately wrote to the claimant by letter of the 2 October 2020 (page 401) to inform her the Recruitment and Personal Performance committee had approved the proposed re-organisation of the senior leadership group. The letter confirmed the replacement of the Strategic Director and Strategic Lead titles from the organisation, with effect from 1st October 2020, with the new term Chief Officer. The letter went on to invite the claimant to agree to the change and to sign and return one copy of the letter. The letter further confirmed that unreasonable rejection of the change would leave the claimant ineligible for a redundancy payment and, should the claimant not agree to the change, she would be given notice of termination of

employment effective 29 December 2020 on the grounds of SOSR (reorganisation).

- 5 71. The claimant did not agree to the change and accordingly she was given notice of termination of employment, with her date of termination of employment being the 29 December 2020.
- 10 72. The reason for the termination of the claimant's employment, in those circumstances, was SOSR, being reorganisation. The claimant would not agree to the changes made as a consequence of the reorganisation and dismissal was needed to introduce the job title the claimant would not willingly accept and to freeze her pay. Ms Bain acknowledged this in her submission when she confirmed "a move from Director to Chief Officer was not permitted by the contract".
- 15 73. I decided, having had regard to all of the above points, that the respondent had shown the reason for dismissal was SOSR, being business reorganisation. I must now go on to consider whether dismissal for that reason was fair or unfair. I noted that if there is a sound business reason for a reorganisation, the reasonableness of the employer's conduct must be judged in that context. There are a number of factors which may be relevant to the issue of reasonableness under section 98(4) Employment Rights Act. The factors may include balancing the needs of the employer and employee; 20 whether or not the proposed new terms have been agreed with a recognised trade union; consultation with both the trade union and individual employees; the number of employees who ultimately agree to accept the changes to terms and conditions and whether the employer had reasonably explored all alternatives to dismissal. 25
- 30 74. Mr Miller referred the Tribunal to the case of ***Garside and Laycock Ltd v Booth*** (above) where the EAT provided guidance regarding the issue of balancing the needs of the employer and employee. The EAT stressed that the focus of the Tribunal, under section 98(4), should be on the reasonableness of the employer's decision, not on the reasonableness of what the employee has done. It was said "*the focus of the Tribunal's attention*

is thus required to be on the reasoning and reasonableness of the employer and not upon what it is reasonable or unreasonable for the claimant to do.”

5 75. I had regard to balancing the needs of the employer and employee. I noted the Tribunal had set out above the fact it was satisfied the respondent had a sound business reason to introduce the new structure: the Chief Executive wanted to “delayer” the organisation to achieve an agile senior leadership group, promote multi-functional working and achieve efficiencies. The claimant saw the Chief Officer role as a demotion. The claimant however accepted there was no loss of status. She had previously held a tier 2 post, reporting directly to the Chief Executive and deputising for her from time to time. The Chief Officer post was a tier 2 post, and the postholder reported directly to the Chief Executive and deputised for her from time to time.

15 76. There was no dispute regarding the fact that change is constant at that level of seniority in the organisation. The claimant’s role had been subject to change, and she herself had proposed changes. The content of the claimant’s role changed over time. The claimant had, prior to 2019, been responsible for five service areas within which there were twenty different functions. In 2019 this was amended to being responsible for two service areas with nine different functions, plus responsibility for procurement. In 2020 the Chief Officer role had responsibility for one service area and three functions; it also comprised the Director functions relevant to that service area and those functions in terms of, for example, budget, organisational transformation and reform.

25 77. The post of Chief Officer was, on the face of it, a demotion because it is a post at a lower grade than that of Director and is therefore paid at a lower salary. The respondent however sought to offset that disadvantage to the claimant by preserving her salary in perpetuity. The claimant did not lose any money by moving to the Chief Officer post and will not have any direct loss until there is a cost of living increase which she will not receive the benefit of.

78. There was also protection for the claimant's pension by way of a pension certificate which will be in place for 10 years and protects contributions based on the conserved salary.
79. I next had regard to the fact the new structure was endorsed by the Recruitment etc committee which was the appropriate committee to oversee such matters.
80. I also took into account the fact the trade unions were informed of the proposed structure in August 2020 and were consulted in various meetings up to and including the 15 December. The trade unions clearly believed they ought to have been consulted at an earlier stage, prior to any decision being made. Ms Rogers agreed the organisational change procedure required consultation with the trade unions, but also suggested that a specific template for the 2016 restructure had been agreed and used. This was not challenged in cross examination.
81. I considered the evidence demonstrated that consultation with the trade union had taken place and whilst there may be disagreement regarding the timing of the consultation, it was not in dispute that the unions were informed of the proposals and had an opportunity to raise questions and have them answered by Ms White.
82. The respondent also carried out individual consultation with the claimant. Ms White met with the claimant to inform her of the proposals and the fact the claimant would be matched to a Chief Officer post. The claimant and Ms White exchanged a considerable amount of correspondence in which the claimant raised issues which were addressed by Ms White. This included the claimant putting forward two options: to retain a post at her level or to be made redundant, and Ms White responding to explain why neither of those options were possible. The consultations also led to the salary conservation being increased from 2 years to perpetuity.
83. I also had regard to the respondent's SWITCH (Redeployment) policy which includes a section (page 209) entitled "*Matching*" which provides that

employees would be matched to posts in the new structure; and, a match is where the new post is broadly similar (e.g., 70% or more) to existing posts. Ms White told the Tribunal that a “*significant proportion of the new role was the same as the old one, for example, procurement and the qualities required to do the job*”.

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84. The SWITCH policy also provided for an appeal against matching. The claimant acknowledged this and agreed she had forgotten about this until January and then it had been too late to proceed with a matching appeal.

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85. I also considered whether the respondent had considered any alternatives. I referred above to the fact Ms White acknowledged she had given consideration to having a Chief Operating Officer, but had rejected that idea because she wanted to “delayer” the organisation. There was no suggestion that any other alternatives were available.

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86. The respondent also provided costings to the claimant (at her request) regarding the cost to the respondent of the claimant leaving the organisation on efficiency grounds or for redundancy. The cost to the employer, in terms of the amount they would be required to pay to the pension fund to compensate it for the claimant going early, was over £400,000. Ms Rogers described this as the highest cost she had ever seen. Ms White added to this
20 to explain there would be additional costs because the respondent would require to recruit someone to fill the post.

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87. I had regard to the fact that in some of the respondent’s correspondence there had been reference to the “right to a redundancy payment being withheld”. Ms Bain argued that it was implicit from this language that the respondent thought the claimant was facing redundancy. I acknowledged the language might suggest redundancy, but I could not accept the statements could be viewed out of context. It was necessary for the respondent to explain clearly to the claimant the consequences of her action in rejecting the Chief Officer position. I considered, in that context, it was appropriate and necessary for
30 the respondent to ensure the claimant clearly understood that she would not be receiving a redundancy payment.

5 88. The claimant also argued the respondent had “used” SOSR to deny her a redundancy payment. I acknowledged there is scope for an unscrupulous employer to label a redundancy situation as SOSR and thereby avoid paying a redundancy payment (unless successfully challenged). However, the claimant’s argument presupposes there was a redundancy situation. I decided above there was not a redundancy situation. Accordingly and for that reason, I could not accept the claimant’s argument.

10 89. I next stood back to ask whether the decision of the respondent in the circumstances, and having regard to all of the factors and points set out above, was fair. I decided the respondent’s decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in the circumstances. I decided the claimant had been fairly dismissed. I decided to dismiss the claim.

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20 Employment Judge: Lucy Wiseman
Date of Judgment: 01 November 2021
Entered in register: 02 November 2021
and copied to parties

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