# EMPLOYMENT TRIBUNALS

**Claimant:** Chloe Adams

**Respondent:** Plymouth Proprietary Library Association (a charitable incorporated organisation)

**Heard at:** Exeter Employment Tribunal **On:** 25 and 26 April 2022

**Before:** Employment Judge Danvers

**Representation**
Claimant: In Person
Respondent: Mr Murray, Counsel

**JUDGMENT** having been sent to the parties on **13 May 2022** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## CLAIMS AND ISSUES

1. At the outset of the hearing, I confirmed with the Claimant that she is pursuing a claim of unfair dismissal only pursuant to s.94/98 Employment Rights Act 1996 ('ERA 1996'). This claim arises out of her employment with the Respondent which ended on 14 August 2020.

2. I was not provided with a copy of the Claimant's Early Conciliation Certificate, but Mr Murray provided me with the dates on the certificate. The Claimant notified Acas of a claim on 12 November 2020, within three months of the agreed Effective Date of Termination. An early conciliation certificate was issued on 26 December 2020 and her ET1 was submitted within a month of that date. Accordingly, the claim was submitted in time. All parties were content that the Respondent was correctly identified.

3. At the start of the hearing the Respondent, through Mr Murray, conceded that the Claimant's dismissal was unfair under s.98(4) of the Employment Rights Act 1996 ('ERA'). Therefore, I was required to determine remedy only.

4. Following a discussion with the parties, it was agreed I would need to address the following questions:

   4.1. The Claimant wishes to be reinstated to her previous employment or re-engaged to comparable employment or other suitable employment. Should the Tribunal order reinstatement or re-engagement?

   If the Claimant is not to be reinstated or re-engaged:

   4.2. What basic award is payable to the Claimant, if any?

   4.3. Should there be a compensatory award and how much should it be? The Tribunal will consider:

      4.3.1. What financial losses has the dismissal caused the Claimant?

      4.3.2. Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

      4.3.3. If not, for what period of loss should the Claimant be compensated?

      4.3.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

      4.3.5. If so, should the Claimant's compensation be reduced? By how much?

**PROCEDURE, DOCUMENTS AND EVIDENCE HEARD**

5. At the start of the hearing I was provided with:

   5.1. a bundle running to 82 pages;

   5.2. witness statements of Mr Peter Smerdon and Mrs Sandra Greenhalgh for the Respondent;

   5.3. a witness statement of the Claimant;

   5.4. a Schedule of Loss prepared by the Claimant.

6. References in [ ] below, are to pages in the bundle.

7. In light of the time that had elapsed since witness statements were prepared and because none of the witnesses had directly addressed issues of remedy in their statement, they were all given an opportunity to provide evidence in chief on those points. Mr Smerdon gave evidence first, he provided some evidence in chief and then was cross-examined by the Claimant. During the course of his cross-examination he made reference to an additional document that appeared relevant, namely the job description for a Library Manager role advertised in November 2021. The Claimant agreed that this could be handed up and it was added to the bundle at [83-84] prior to Mr Smerdon's evidence concluding. I next heard evidence from Mrs Greenhalgh and then the Claimant. Evidence was concluded by the end of day 1 and oral submissions took place at the start of day 2. Although the Claimant would normally give submissions first, Mr Murray suggested that as a litigant in person the Claimant might benefit from giving submissions after him. The Claimant confirmed this would be of assistance and so submissions took place in that order.

## FINDINGS OF FACT

8. The Claimant commenced employment with the General Committee of Plymouth Proprietary Library ('PPL') on 28 July 2006 as a Library Assistant. Mr John Horton started in the same role shortly after the Claimant. On 11 November 2019, PPL became a Charitable Incorporated Organisation under the name of Plymouth Proprietary Library Association ('hereafter the Respondent') and the Claimant's employment transferred to the Respondent in accordance with the Transfer of Undertakings (Protection of Employment) regulations 2006 ('TUPE').

9. The Respondent is an independent library founded in 1810. Members of the Respondent pay an annual fee of £60. The membership fees support the running costs of the Respondent. The Respondent is run by a committee of unpaid Trustees including Mr Smerdon, who is Treasurer, and Mrs Greenhalgh.

10. In 2011 the Claimant was warned of a possible redundancy arising out of the need to save costs [32]. The Claimant was put in a pool along with the Librarian at the time and Mr Horton. Following consultation, a selection exercise took place against various criteria. The Claimant was interviewed and scored by 4 Committee Members and scored 319/360 as against Mr Horton's 293 and the Librarian's 226. The Librarian was made redundant and Mr Horton and the Claimant both continued in employment as Information Assistants.

11. At around the same time, two computers were introduced into the library. While the Claimant was able to use a computer and uses an iPhone herself now, the Claimant admits that she did not embrace the IT part of her Information Assistant role easily. Further, whether by reason of Mr Horton being more proactive or at times being asked, it is common ground that he tended to do more of the aspects of the work in the library that required the use of computers, such as banking and digitising membership records. He also used Twitter whereas the Claimant did not and does not use social media.

12. In the summer of 2018, the Respondent received 3 complaints from Members about the Claimant's conduct. This was at around the same time there was some internal controversy about the culling of books and a change of premises. The Respondent took no action in respect of the complaints and the Claimant was not made aware of them prior to disclosure as part of these proceedings.

13. On 10 July 2019 the Claimant was written to informing her that a Member had brought to the Respondent's attention that the Claimant had shared the Member's address without permission. The letter states that this was a breach of the Data Protection Act, and that the Claimant should ensure it does not happen again. There was no investigation into this matter and the letter is not headed 'warning' or otherwise. The Respondent now accepts that this did not amount to a disciplinary warning.

14. Prior to the start of the Covid-19 pandemic the Respondent was open Monday to Thursday 11am to 3pm and Saturday 11am to 2pm. The Claimant and Mr Horton worked two 4-hour days each and the rest of the hours were covered by the Trustees. The only other employee was a cleaner.

15. On around 22 March 2020 the Respondent was forced to close due to Covid-19 restrictions and the Claimant and Mr Horton were placed on furlough.

16. At a meeting of the Trustees on 3 August 2020 it was decided that upon reopening on 14 September 2020, opening hours would be reduced to just two four-hour sessions per week and that any additional opening hours in the foreseeable future would be staffed by Trustees. The Trustees also discussed that as part of longer-term plans to grow membership they felt the Respondent needed to be more involved in social media and proactive in growing membership. So eventually, once things had settled in respect of the Covid-19 pandemic, they decided they would aim to employ a Library Manager with the skills to undertake that work.

17. The Trustees decided that the Claimant should be made redundant as opposed to Mr Horton (the reasons for this are discussed below).

18. On 14 August 2020 the Claimant received an email (which was also sent to her via post) informing her that she was being made redundant effective immediately and that she would be paid in lieu of her notice period. The Claimant was not warned of or consulted about this decision.

19. The Claimant appealed on 20 August 2020 [66-67]. Her appeal was considered by the Trustees at a meeting to which the Claimant was not invited to attend. By a letter dated 25 August 2020 the Trustees responded to the Claimant's appeal confirming that Mr Horton remained employed in his role and they did not revoke the dismissal decision.

20. In Autumn 2021 the Trustees revisited the need to hire a Library Manager and subsequently advertised the role [83-84]. The Claimant was made aware of this role but chose not to apply on the basis that it was more hours than she wished to do and a more senior role than she wanted.

21. After a competitive process an individual was appointed and started early in 2022, but then went back to her previous employer. Another individual from the recruitment round was offered the job and he started as Library Manager around a month ago (March 2022). Prior to the Respondent advertising for the Library Manager role, Mr Horton had already informed the Trustees he intended to retire in early 2022. He gave formal notice ending on 1 June 2022 to allow for a handover with the new Library Manager. Mr Horton's role will cease at that time and not be filled. The Respondent currently opens for 2 weekdays (four hours per day), which will be covered by the Library Manager, and on Saturday which is covered by unpaid Trustees.

## LAW

### Unfair Dismissal

22. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

23. S.98 ERA provides so far as relevant:

> **(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) A reason falls within this subsection if it—**
> **…**
> **(c) is that the employee is redundant …**

**…**

**(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 case.**

24. A redundancy situation is defined by s.139 ERA.

**(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 has ceased or intends to cease—**

**(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 the place where the employee was employed by the employer,**

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

**…**

**(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.**

25. It is not for Tribunals to investigate the rights or wrongs of a commercial decision leading to a redundancy situation, although the Tribunal may need to consider in some cases if the decision to make redundancies was genuine (*James W Cook & Co (Wivenhoe) Ltd v Tipper and ors [1990] ICR 716*).

26. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with equity and the substantial merits of the case.

27. In many redundancy dismissals, the starting-point will be the guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT:

**'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function**

**of the Industrial 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. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.**

**19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:**

> **1. 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.**
>
> **2. 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.**
>
> **3. 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.**

**4. 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.**

**5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.**

**The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'**

28. Consultation with an employee must be fair and genuine and in so far as possible: be undertaken when proposals are at a formative stage, provide the person being consulted with a fair and proper chance to understand fully the matters about which they are being consulted and express their views on those matters and then those views should be considered properly and genuinely by the employer (*Rowell v Hubbard Group Services Ltd [1995] IRLR 195* applying guidance given by the Divisional Court in *R v British Coal Corporation [*1994] IRLR 72).

29. A tribunal must decide whether the employer's choice of pool was within the range of reasonable responses; it should not substitute its own view as to what the pool should have been: *Hendy Banks City Print Limited v Fairbrother and others* UKEAT/0691/04/TM).

30. Similarly, a tribunal may not substitute the selection criteria it would have chosen for those used by the employer. The Tribunal should consider if the criteria fall within range of reasonable responses: *Post Office v Foley* [2000] ICR 1283. As stated in *Compair Maxam*, criteria so far as possible should be able to be objectively checked.

31. Tribunals will not generally get involved with the details of how individual scores are arrived at, unless there are exceptional circumstances such as bias or obvious mistakes: as indicated by the Court of Appeal in *British Aerospace Plc v Green and others* [1995] IRLR 433, and again by the Court of Appeal in *Bascetta v Santander* [2010] EWCA Civ 351. Instead, a tribunal should focus on whether the employer has a good system in place for assessing employees against the criteria.

32. Where a warning has been given for misconduct and that warning has since expired, that does not mean that the misconduct which was subject of the warning could never be taken into account by the employer when deciding whether to dismiss the employee, or by a tribunal when deciding whether the employer acted reasonably or unreasonably in so dismissing: *Airbus UK Ltd v Webb* [*2008] ICR 561 (*a case decided in the context of a misconduct dismissal).

**Reinstatement and Reengagement**

33. S.113-117 ERA 1996 are the provisions relating to orders for reinstatement and re-engagement. S.116 provides:

> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—**
> **(a) whether the complainant wishes to be reinstated,**
> **(b) whether it is practicable for the employer to comply with an order for reinstatement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
> **(3) In so doing the tribunal shall take into account—**
> **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.**
> **(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.**
> **(6) Subsection (5) does not apply where the employer shows—**
> **(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or**
> **(b) that—**
> **(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and**
> **(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.**

34. The following paragraphs from *Davies v DL Insurance Services Ltd [2020] IRLR 490* provide a helpful summary of the law in respect of reinstatement and re-engagement:

> **'13. These provisions have been interpreted so as to require the Tribunal to make an express determination on the evidence as to whether it is practicable for the employer to comply with an order for re-engagement. That obligation arises from the wording of the provision which is in the mandatory form, 'shall take into account': see Port of London Authority v Payne [1994] IRLR 9 at 13, [1994] ICR 555 at 569A–B.**
>
> **14. In Coleman v Magnet Joinery Ltd [1974] IRLR 343, [1975] ICR 46, the Court of Appeal, in considering the predecessor provisions, held that the term 'practicable' in this context means not merely 'possible' but 'capable of being carried into effect with success': per Stephenson LJ at [1974] IRLR 343 at 345, [1975] ICR 46 at 52B–C. In assessing practicability, the matter is to be judged as at the time the order is made; Rembiszewski v Atkins Ltd UK EAT/0402/11/ZT, [2013] All ER (D) 206 (Feb) at para 39, and due weight should be given to the commercial judgment of management: see Port of London Authority v Payne [1994] IRLR 9 at 16, [1994] ICR 555 at 574D–F.'**

35. Per Mrs Justice Simler in *Lincolnshire County Council v Lupton [2016] IRLR 576:*

> **'18… Re-engagement is not to be used as a means of imposing a duty to search for and find a generally suitable place within the ranks for a dismissed employee irrespective of actual vacancies. That, as the council contends, puts the duty too high. An employer does not necessarily have a duty to create space for a dismissed employee to be re-engaged. The question at the end of the day is one of fact and degree by reference to what is capable of being carried into effect with success…'**

## Termination of employment in any event ('Polkey')

36. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (*Polkey v AE Dayton Services Ltd* [1988] A.C. 344).

37. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that 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 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.'**

**Mitigation**

38. The Claimant is required to take reasonable steps to mitigate the loss she suffers as a result of the unlawful dismissal. She is expected to search for other work and will not recover losses beyond a date by which the Tribunal concludes she ought reasonably to have been able to find new employment at a similar rate of pay.

39. The burden is on the Respondent to prove a failure to mitigate (*Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331). If the Claimant has failed to take a reasonable step, the Respondent must show that any such failure was unreasonable (*Wright v Silverline Car Caledonia Ltd*, UKEATS/0008/16). The question of reasonableness is to be determined by the Tribunal itself; the Claimant's perception is only one of the factors to be taken into account.

**SUBMISSIONS**

40. Mr Murray for the Respondent submitted that reinstatement or re-engagement would clearly not be practicable and should not be ordered. He contended that a consultation process would have only taken a few days and the Claimant would have inevitably still been made redundant following a fair process because of Mr Horton's greater aptitude or willingness in respect of IT and the lack of complaints on his file. He said that the Claimant would not have been offered the chance to split the hours with Mr Horton because of the burden that placed on the Respondent and, in any event, at the very least, would have been dismissed when the new Library Manager started. He further argued that the Claimant has unreasonably failed to mitigate her losses.

41. The Claimant invited me to reinstate or re-engage her and disagreed that it would not be practicable. She said that she considered simply consulting with her would not have rendered the dismissal fair because the selection process itself was unfair. She did not agree that had a fair process been undertaken, like there had been in 2011, Mr Horton would have come out on top. She explained that she had not applied for alternative roles because working in a library was what she had done for 14 years and she had been in a medical library before then, and she thinks finding a job in that area would have been hard. Further, she is 72 and does not drive, so thinks that would have made it hard to find a job.

## CONCLUSIONS

42. The Respondent has conceded that the Claimant's dismissal was unfair under s.98(4) ERA 1996 and accordingly her claim for unfair dismissal succeeds and I am concerned with remedy only.

### Reinstatement

43. Pursuant to s.116(1) ERA 1996, I am required to consider first, whether the Claimant wishes to be reinstated, which she does. Second, whether it is practicable for the Respondent to comply with an order for reinstatement, which I will come on to. Third, where the Claimant caused or contributed to some extent to the dismissal, whether it would be just to order her reinstatement. I can also take into account other relevant circumstances.

44. Mr Murray said, for the Respondent, that there was some potential fault on the part of the Claimant arising out of the 2018 complaints and a lack of willingness to engage with IT, but that he does not seek to argue that the Claimant caused or contributed to some extent to the dismissal. In any event, I did not have evidence before me from which I could conclude on the balance of probabilities that the Claimant acted in the way alleged in the complaints and nor did I find that any disinterest in IT on her part would mean it was unjust to order reinstatement.

45. However, I have concluded that it would **not** be practicable for the Respondent to comply with an order for reinstatement. In reaching this decision I am particularly persuaded by the following factors:

    45.1. The Respondent is a very small charitable organisation that is funded by the contribution of its Members, which have dwindled in recent years. I accept the evidence of Mr Smerdon that since lockdown the organisation has been struggling financially and that the appointment of the Library Manager and discontinuation of Mr Horton's post is in order to try to attract Members and other sources of revenue, which is crucial for the continuation of the Respondent. I accept, as he put it, that the Respondent does not 'have the money' to have the Claimant back at 8 hours per week in her old role.

    45.2. The Claimant's role has genuinely been deleted and therefore her role does not exist to be reinstated back into.

    45.3. The Respondent is currently only open for 2 days per week, staffed by paid staff, and Saturday morning, staffed by trustees. The opening hours for the two weekdays are covered by the Library Manager who is also engaged to undertake other work for his remaining hours. The Trustees have no plans to open for further regular hours given the

current number of Members and financial state of the Respondent. Therefore, reinstating the Claimant would mean having to run overstaffed.

46. I was not particularly persuaded, having heard the evidence of the Respondent's witnesses, that reinstatement would be impracticable because of the personal relationships between the Claimant and the Trustees or Members of the Respondent. Mrs Greenhalgh expressed the view it would be 'difficult' if the Respondent were ordered to take the Claimant back. However, when asked why, she said that Members had had difficulties with the Claimant during her employment and were not happy to go to the library when she was there. However, if that were so, it did not stop the Respondent employing the Claimant prior to her redundancy and so I do not see that it would be a bar now. Mrs Greenhalgh did not reference the dismissal itself or subsequent matters having made it too hard internally.

47. However, the Claimant herself in closing submissions said that she did not feel there had been any breakdown 'until' she received the redundancy email. This appears to acknowledge that there has been some breakdown as a result of the redundancy and litigation. Given the size and nature of the organisation, this breakdown is another factor that would mean reinstatement would be unlikely to be capable of being carried into effect with success.

**Re-engagement**

48. In relation to re-engagement I am required to consider essentially the same matters as for reinstatement, although under s.116(2) I am also required to take into account any wishes expressed by the Claimant as to the nature of the order to be made.

49. The Claimant said she did not have any particular role in mind in relation to re-engagement, but was not seeking to be re-engaged in the Library Manager role. She said she would be open to a different role if the Respondent sought to find one and to only working a few hours if necessary.

50. My comments in respect of causing or contributing to dismissal apply again here and I do not find that this applies. However, again I have concluded that it would **not** be practicable for the Respondent to comply with an order for re-engagement. This is for the same reasons as given in respect of reinstatement and, additionally, there is no vacant role for the Claimant to be re-engaged to and it would be too high a burden to require the Respondent, particularly in their financial circumstances, to create a role for her.

## Compensation

51. Having decided not to make an order for reinstatement or re-engagement I set out my reasons in respect of compensation below.

Basic award

52. The Claimant's period of service was not in dispute and was 28 July 2006 to 14 August 2020, which was 14 complete years. The Claimant was over the age of 41 for that period and therefore the multiplier is 1.5 x 14 = 21. The Claimant's gross weekly pay was agreed between the parties as £69.28 and so the total basic award is: £1,454.88. Pursuant to s.122(4) this sum must be reduced by any payment made by the employer on the ground that the dismissal was by reason of redundancy. The Respondent made such a payment in the sum of £1,247.04 (having, I am told, accidentally miscalculated the amount to which the Claimant was entitled). Therefore, the balance which I award to the Claimant is **£207.84.**

Compensatory award

*What financial losses has the dismissal caused the Claimant?*

53. As the Claimant was over state pension age, her pay was not subject to any deduction and her weekly net pay was £69.28. She was assisted by a solicitor in preparing her schedule of loss and has not claimed for any other ongoing loss arising from her dismissal. The Claimant said she had no intention of retiring and I accept her evidence that she intended to carry on working for some time. For the reasons that follow, it is not necessary for me to determine if she would have chosen to stop working for the Respondent at some point in the future.

*Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?*

54. The Claimant has not taken any steps to replace her lost earnings. I do not accept this was reasonable. Whilst I accept that she thought it was unlikely, at her age and with her experience, that she would find another role that would be suitable and she would enjoy and that her time has also been taken up to some extent by this litigation, it was unreasonable for her not to at least look for alternative work and explore the possibility.

*If not, for what period of loss should the Claimant be compensated?*

55. However, I am not persuaded that had the Claimant made reasonable efforts, she would have been successful in securing a different role to date. The Claimant's experience for over 14 years was working in libraries. On her own evidence she does not frequently use computers and did not use computers in her employment with the Respondent to any degree that would be likely to

assist her in getting a role that would involve such use. This would have been a particular barrier for her at a time when many roles were being conducted from home via electronic means. I note the Claimant was not able to participate in a remote hearing that was scheduled in this case and her lack of technological expertise would have made it hard to get a different job working remotely. The Claimant does not drive. The Respondent has not put forward any evidence of roles or work that it says, in those circumstances, the Claimant could have got or would have been suitable if she had made reasonable efforts.

56. Mr Murray invited me to take judicial notice of the fact that after lockdown ended in summer 2020 many organisations were looking for staff. While I accept that this appeared to be the case in some sectors, such as those involving food delivery and front-line services, I am not persuaded that this desire for employees in some sectors would have resulted in the *Claimant* getting suitable employment if she had made further efforts.

57. Therefore, while I accept that the Claimant has not made reasonable efforts to get a new role, I have concluded that had she done so, such efforts would nonetheless not have involved her securing employment to date.

*Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (Polkey)? If so, should the Claimant's compensation be reduced? By how much?*

58. My starting point is that the Claimant should have been properly warned and consulted in respect of the redundancy, which is a matter that the Respondent admits.

59. Mr Murray, for the Respondent, says that had she been so consulted, this would have delayed dismissal by a matter of days. The Claimant said that the 2011 redundancy process took 2 or 3 months and therefore, if done properly, this would have taken the same.

60. My conclusion is that a proper consultation period would have taken 4 weeks. I note that during that time, Covid restrictions were in place, this was double edged in that the Trustees were likely to have more time on their hands to progress matters promptly, but there also was likely to have been some delays in making arrangements for redundancy meetings etc. The Trustees would have had to consult with two individuals, consider selection criteria, mark the candidates and allow for a proper period for all of that to have been commented upon by the Claimant and Mr Horton.

61. Accordingly, during that period of 4 weeks I make no reduction to the Claimant's compensation for the chance that she would have been fairly

dismissed in any event (although notice pay received during that time will be deducted).

62. I then considered whether, following fair consultation, there was a chance the Claimant would have been dismissed in any event.

63. Mr Murray invites me to find it was certain or highly likely that following a fair process the Trustees would still have decided to make the Claimant redundant. He notes there was no dispute there was a genuine redundancy situation. He says that she would have been selected following consultation particularly considering the complaints that counted against her and her reluctance in relation to IT.

64. I accept, and the Claimant does not contest, that there was a genuine redundancy situation.

65. I also accept the Claimant's evidence that at least one thing she would have urged the Trustees to consider if she had been consulted, was splitting the hours between her and Mr Horton. I find this possibility was considered to some extent by the Trustees notwithstanding the lack of consultation. However, had the Claimant advocated for it as part of consultation it would have been considered more carefully.

66. In the response to the appeal where the Claimant asked why she was not offered reduced hours as an alternative to redundancy, the only answer was '[a]s a part time employee this is not applicable' [67]. Mr Smerdon's evidence was that the possibility was discounted because of additional costs associated with matters such as payroll and training. However, no evidence was put forward as to the extent of those costs or whether they outstripped the cost of making a longstanding employee redundant. He also talked about difficulties with handovers, but I am not persuaded this can have featured overly heavily because the arrangement had been that Mr Horton and the Claimant worked on separate days for some time. Given neither costs nor practical issues were mentioned in the reply to the appeal I find that they must not have been major obstacles to such an arrangement.

67. When asked directly what would have happened if both individuals had been consulted and been happy with the suggestion of splitting the hours Mr Smerdon initially said that he did not know because they did not have that discussion.

68. I conclude that if it had been raised in consultation and properly considered, there was a prospect that the Claimant would not have been made redundant and instead the Trustees would have decided to split the hours between her and Mr Horton.

69. Further, I do not accept that, even if the Trustees had chosen to make one Information Assistant redundant, it would inevitably have been the Claimant following a fair procedure.

70. I accept that the matters the Respondent relied on in deciding to select the Claimant were the complaints they had received about her (which they referred to as her 'disciplinary record') and her perceived reluctance in respect of IT.

71. Using an individual's disciplinary record as a selection-criteria can be reasonable and is not uncommon. However, I find it was outside of the range of reasonable responses to use such criteria in this case, because the Respondent meant by 'disciplinary record' any complaints that have ever been made about the employee, whether investigated or not and whether historic or not. The 2018 complaints were not investigated or relayed to the Claimant. Further, the letter in respect of data protection was not a disciplinary warning and was also not investigated prior to being sent. Accordingly, a dismissal which relied on those matters as forming part of the 'disciplinary record' was not and would not have been fair.

72. I accept that relying on 'IT skills' as one of the selection criteria could be reasonable. I do not accept a more general category of 'keenness' in respect of IT, which is what the Respondent used, was within the range of reasonable responses. I accept Mr Murray's point that most criteria require some level of subjectivity (save for attendance and length of service), but am mindful of the guidance in *Compair Maxam* set out above that a reasonable '**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**'. I find that in this case, the selection criteria which was based on a broad assessment of attitude towards IT was so subjective as to fall outside of the range of reasonable responses.

73. That being said, I find that the Trustees would have, if acting fairly, still used some sort of IT related criteria, perhaps by way of an assessment to see how competent and familiar the Claimant and Mr Horton were at operating the necessary systems or what experience they had. Had they done so, in light of the Claimant's admitted reluctance to use for example, social media, and Mr Horton's background at the Respondent of taking responsibility for IT-related tasks like banking, I have concluded that he probably, although not certainly, would have scored more highly than the Claimant.

74. Taking all of that into account and taking into account that if the Claimant *had* been employed on split hours she would have only received 50% of her pay, I have decided to make a reduction of 80% to the Claimant's compensation from 4 weeks following her actual date of dismissal onwards for the likelihood she would have been dismissed fairly in any event.

75. Finally, I have concluded that even if the Claimant had been retained either as well as or instead of Mr Horton, that employment would have ended by 14 April 2022. This is on the basis that the new Library Manager started about a month ago and if the end of employment was not tied to Mr Horton's retirement and/or there were more costs associated with two Information Assistants still being engaged then it is likely that it would have been decided that the handover period could be shorter than that which actually took place. Therefore, the Claimant's loss ends as of 14 April 2022 when I find her employment would have ended fairly in any event by reason of redundancy of any remaining Information Assistants.

76. In respect of loss of statutory rights, the £300 claimed by the Claimant is a reasonable starting point but should be reduced by 80% to reflect that the Claimant would have been fairly dismissed soon after she was. Accordingly, I award £60**.**

*Total compensatory award*

77. The total compensatory award is below the statutory cap and calculated as follows:

| **Loss of earnings** | | | | | | |
|---|---|---|---|---|---|---|
| | Start | End | Weeks | Pay per week | Sub total | |
| Period 1 | 15/08/2020 | 12/09/2020 | 4 | £69.28 | £277.12 | |
| Less notice in period 1 | 15/08/2020 | 12/09/2020 | 4 | £69.28 | £277.12 | |
| Sub-total | | | | | £0.00 | |
| Likelihood of dismissal in any event | | | | | 0% | |
| Total period 1 | | | | | £0.00 | |
| | | | | | | |
| Period 2 | 13/09/2020 | 14/04/2022 | 82.57 | £69.28 | £5,720.55 | |
| Less notice in period 2 | 13/09/2020 | 08/11/2020 | 8 | £69.28 | £554.24 | |
| Sub-total | | | | | £5,166.31 | |
| Likelihood of dismissal in any event | | | | | 80% | |
| Total period 2 | | | | | £1,033.26 | |
| | | | | | | |
| **Total loss of earnings** | | | | | | **£1,033.26** |

S.38 Employment Act 2002

78. I am also required to consider under s.38 of the Employment Act 2002 whether when the proceedings were begun, the Respondent was in breach of its duty to the Claimant under s.1 or s.4 of the ERA 1996. Those duties are to provide a statement of initial employment particulars and a statement of any changes to those particulars.

79. The Claimant was provided with a Contract of Employment which she signed in March 2012 [42-44]. This set out the matters required by s.1 ERA 1996. On 22 November 2019 the Claimant was informed her employment had TUPE transferred to the Respondent and that she would receive an updated contract. It was not in dispute that this was not received. However, s4(6) & (7) ERA 1996 provide that where, after an employer has given to a worker a statement under s.1 ERA 1996, the identity of the employer is changed in circumstances in which the continuity of employment is not broken and there are no changes other than to the name of the employer, the employer is not required to give the Claimant a new statement of particulars under s.1 ERA 1996. The employer is only required to give a written statement of the particulars of the change of employer, which the Respondent in this case did on 22 November 2019 [56]. Therefore, I find that the Respondent was not in breach of their obligations under s.1 or s.4 ERA 1996 when proceedings were begun and I do not increase the award under s.38.

Total award

80. In total, the Claimant is awarded compensation in the sum of £1,301.10, calculated as follows:

| Basic Award | | | | | |
|---|---|---|---|---|---|
| 1.5 x 14 x £69.28 | | | | | £1,454.88 |
| Less redundancy payment | | | | | £1,247.04 |
| Total | | | | | **£207.84** |
| | | | | | |
| Loss of earnings | | | | | |
| | *Start* | *End* | *Weeks* | *Pay per week* | *Sub total* |
| Period 1 | 15/08/2020 | 12/09/2020 | 4 | £69.28 | £277.12 |
| Less notice in period 1 | 15/08/2020 | 12/09/2020 | 4 | £69.28 | £277.12 |
| Sub-total | | | | | £0.00 |
| Percentage reduction for likelihood of dismissal in any event (*Polkey v AE Dayton Services Ltd [1988] A.C. 344*) | | | | | 0% |
| Total period 1 | | | | | £0.00 |
| Period 2 | 13/09/2020 | 14/04/2022 | 82.57 | £69.28 | £5,720.55 |

| | | | | | |
|---|---|---|---|---|---|
| Less notice in period 2 | 13/09/2020 | 08/11/2020 | 8 | £69.28 | £554.24 |
| Sub-total | | | | | £5,166.31 |
| Percentage reduction for likelihood of dismissal in any event (*Polkey v AE Dayton Services Ltd [1988] A.C. 344*) | | | | | 80% |
| Total period 2 | | | | | £1,033.26 |
| | | | | | |
| Total loss of earnings | | | | | **£1,033.26** |
| | | | | | |
| Loss of statutory rights | £300 | less 80% percentage reduction for likelihood of dismissal in any event (*Polkey v AE Dayton Services Ltd [1988] A.C. 344*) | | | **£60** |
| | | | | **TOTAL:** | **£1,301.10** |

**Employment Judge Danvers**
Date: 10 July 2022

REASONS SENT TO THE PARTIES ON
15 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE