EMPLOYMENT TRIBUNALS

Claimant: Mrs S Rose

Respondent: Exeter Leukemia Fund

Heard at: Exeter **On:** 17 – 19 October 2022

Before: Employment Judge Cuthbert

Representation
Claimant: In person
Respondent: R Hignett (Counsel)

JUDGMENT

The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

1. These written reasons are provided following oral judgment and reasons being given at the hearing and a request for written reasons being made on behalf of the respondent.

Issues

2. The claim was for unfair dismissal only. The issues were agreed as follows at the outset of the hearing, mirroring issues previously agreed at a Preliminary Hearing:

    2.1 Reason for dismissal

        1. Was there a genuine redundancy situation i.e., a potentially fair reason for dismissal?

        2. Alternatively, was the dismissal potentially fair for SOSR, namely business reorganisation?

    2.2 Fairness

        1. Was the Claimant's selection for redundancy unfair?

2. Was there adequate consultation with the Claimant?

3. Did the Respondent properly address the issue of suitable alternative employment?

3. I agreed with the parties that I would hear evidence on liability only (and Polkey) in the first place and defer issues of remedy compensation.

Procedure

4. The claimant appeared in person. The respondent was represented by counsel, Mr Hignett

5. I was provided with a 512-page hard copy bundle, a supplementary 18-page electronic bundle and a chronology prepared by Mr Hignett. One further email was disclosed by the respondent during the hearing. References in square brackets as follows [xx] are to page numbers in the main bundle.

6. Witnesses were: the claimant; Erik Salomonsen, the Chair of the respondent's Board of trustees at the relevant times; and a member of the Board, Joanna Hawkins. Each provided a witness statement.

7. I spent the morning of day one of the hearing reading witness statements and documents referred to within them. On the afternoon of day one and into day two I heard oral evidence from each of the respondent's witnesses and then from the claimant.

Findings of fact

8. I made findings of fact on the following relevant matters. I did not mention or make findings of fact on every matter which was raised in the evidence before me, as some of those matters were not relevant to the issues in the claim.

Broad background to events in 2021

9. The respondent is a small registered charity which supports patients with blood cancer and other disorders who attend the haematology centre at the Royal Devon & Exeter Hospital. At the start of the relevant events below, the respondent employed 19 staff and by the time of the response to the claim, in late 2021, the number was just 11.

10. At the relevant times, the respondent was run by a management board of volunteer trustees ("**the Board"**) and, until her own redundancy took effect in March 2021, a salaried Chief Executive Officer ("**CEO"**), Mags Naylor.

11. The claimant was employed by the respondent from 4 January 2017 as a Project Manager and from January 2018 as a Community Support Service Manager. She was responsible for the respondent's "@Home" service, which enabled volunteers to help patients in their own homes on behalf of the respondent charity. The claimant was the only member of paid staff assigned to this service.

12. The COVID 19 pandemic and related lockdowns had a significant negative

effect on the respondent's income and activities. Its charity shops were forced to close during lockdowns and it suffered reduced fund-raising income, running at a monthly deficit. In October 2020, a forecast predicted that it would have to close completely in six to nine months, as recorded at a Board meeting at the time [81].

13. In response to these challenges, the respondent took various measures: it decided to sell a flat which it owned, to surrender leases to a number of charity shops and to focus its future activities on serving patients attending hospital and to cease providing a community service.

14. In December 2020, Erik Salomonsen, until then a member of the Board, became Chair. Cost-saving exploration and measures continued, discussed at a further Board meeting in December 2020 [87 – 92]. A number of staff roles at the respondent were identified for potential redundancy: the CEO, a Fundraising Manager, a Filling Time Supervisor, various Retail Shops Managers/Assistants, and the claimant's role. The claimant was furloughed over much of the relevant period, due to the impact of the pandemic on the @Home service.

15. On 4 January 2021 [93], Erik Salomonsen updated various stakeholders about the financial position at the respondent. He indicated that the CEO was to prepare a paper summarising her recommendations including a "redundancy scheme" for herself, the claimant and the fundraising manager role.

16. On 5 January 2021, a paper to this effect was sent to him by the CEO [465 - 467]. This paper set out the financial difficulties and measures proposed, including the redundancy of the CEO and of the claimant. The claimant was envisaged, in the paper, as undertaking a potential new role of "Operations Manager", leading on services and health and safety, alongside her colleague, Samantha Peacock. Samantha Peacock was presently the Business Manager, but was suggested as likely to take up another potential new role, as "Finance Manager", to lead on finance, admin and HR. There would be some joint responsibilities in this dual structure.

Claimant placed at risk and start of consultation – January/February 2021

17. On 19 January 2021, the clamant was formally placed at risk of redundancy by letter and email [96 - 98] and a consultation process started between the claimant and the CEO.

18. Samantha Peacock, the Business Manager, was not placed at risk of redundancy at this stage, notwithstanding that the respondent was contemplating removing the Business Manager role from its structure, as noted earlier. Erik Salomonsen accepted in evidence that this decision, by the trustees, was contrary to advice which the respondent had received from its then HR consultants, Peninsula. He also accepted that the reason for this was (as it was put by the CEO during a grievance investigation) [246], that they *"needed [Samantha Peacock] as she did the finance"*.

19. During the course of three consultation meetings between the claimant and the CEO, Mags Naylor, on 22 January [99 – 108], 29 January [122 – 138]

and 5 February 2021 [144 – 153], a potential new role of "Service Manager" was discussed with the claimant. Over this period, the CEO, Mags Naylor, was preparing to leave the respondent, having recommended that her own role be made redundant and that recommendation was accepted (she left on 31 March 2021).

20. The claimant subsequently claimed that she had been offered and had accepted the potential role of Service Manager as suitable alternative employment during the first two of these meetings. I found that the role in question had not yet crystallised (and in fact never came into existence). The discussions in the consultation meetings merely established a broad agreement in principle that the potential role was one into which the claimant could be deployed, and in which the claimant was interested. A possible start date of 1 April 2021 was mentioned, but there was no conclusion reached and no final agreement was made.

21. From the end of January and during February 2021, there were various meetings, emails and letters which were geared towards firming up the possible Service Manager role, which morphed into a possible "Operations Manager" role, for the claimant. At the same time a potential Finance Manager role, which morphed into a revised potential Business Manager role, was being shaped for Samantha Peacock.

22. There was clearly a common and serious intent amongst the CEO, the Board, the claimant and Samantha Peacock for the potential roles to be finalised by the time the CEO left the respondent and much time was invested by all involved. Draft job descriptions and objectives were circulated and discussed and amended between the claimant, Samantha Peacock, Mags Naylor, and some of the trustees, particularly Shaun Cooper and also Erik Salomonsen.

Events from 25 – 28 February 2021 and the potential Operations Manager role

23. The discussions above included a meeting on 25 February 2021 (of which there were no notes before me). Erik Salomonsen said in evidence that he had no specific recollection of the meeting and it formed part of many broader discussions going back and forth. The claimant's case was that she had been offered and had accepted the potential role of Operations Manager by the end of the 25 February meeting.

24. As with the earlier discussions in January 2021 with Mags Naylor about the Service Manager role, which *were* recorded and documented, I found that at no point in late February 2021 was a clear offer of alternative employment, capable of acceptance, made to the claimant during that time; rather the potential role of Operations Manager was not finalised then or subsequently.

25. In particular, it was evident from the following email which the claimant sent to Shaun Cooper (Friday 26 February 2021, 19:38), that agreement had not been reached on the fundamental issue of salary for the role [188].

> *Thank you for sending through the amended job description for the role of Operations Manager. I've only a couple of comments*

regarding the detailed responsibilities I'd like the Board to consider:

(HR) … [amending appraisal timings]

(Cultural Change) … [surveys of staff]

Regarding the salary, I was offered the post of Service Manager in October 2020 with a salary at £36,465. I appreciate the circumstances in which ELF finds itself but I was hoping that salary would at least be matched.

I am aware that particularly in regard to salary I'm unlikely to hear until the Board meet on Monday. Unless you feel differently, my plans are to return to work on Monday morning. I've plenty to catch up on prior to a statement being issued, hopefully on Tuesday….

26. The reference by the claimant in that email to October 2020 was to a draft statement of terms and conditions for a Service Manager role which was drafted between the claimant and Mags Naylor during 2020 [76 – 79] but again the potential role was not finalised or accepted at that earlier time. The claimant accepted in evidence that the October 2020 role had not been finalised; the reasons why she did not accept it at the time were not relevant to the issues I had to decide.

27. On Sunday 28 February 2021, timed 1217, Shaun Cooper replied to the claimant's email of 26 February as follows, having discussed the Board's position on the telephone (but not the wording he used) with Erik Salomonsen [189]:

Thank you for your email outlining two revisions (comments)…[which the board would consider]

Re your issue concerning proposed salary for the new role that has been developed over the past few weeks, the board were completely unaware you had been offered the post of Service Manager in October 2020 in as much detail to discuss salary, ahead of any discussion on the structure. An investigation is therefore required on this matter and as such I cannot provide an answer to your query at this point. Rest assured it will be settled at the earliest opportunity.

To clarify, we have not formally offered you the role of Operations Manager but appreciate you and Sam helping us to develop this new role for Elf following the recent structure and leadership changes.

In light of this, the board do not think it fair to you, or the recruitment/appointment process, to expect you to work tomorrow…As mentioned we have a Board meeting tomorrow when the budget and the job descriptions for the Ops Mgr and Service [sic] Managers roles will be reviewed…

28. The claimant replied shortly afterwards on 28 February (timed 1233) [188]:

…that is not my understanding as I was offered the position as part of the redundancy consultation process…I am quite shocked by your

email and so have made the decision to wish ELF well and accept my redundancy package.

29. The email exchange on 28 February was very unfortunate on both sides, viewed objectively, as relations between the claimant and the respondent became strained from this point onwards. The email from Shaun Cooper, sent on a Sunday lunchtime, was somewhat strongly-worded and as such took the claimant by surprise. Additionally, the claimant's response to that email was almost immediate and she had inferred that the Operations Manager job which was being discussed at the time was now off the table, which was neither expressly stated nor could it reasonably be inferred from Shaun Cooper's email. The Board were saying they needed more time to consider what the claimant had raised with them and making it clear they were not yet in position to make an actual offer of employment. As I found above, the claimant mistakenly believed at that time that she *had* been offered and accepted the Operations Manager role in the 25 February meeting.

March - May 2021 – the claimant's grievance and appeal

30. On 1 March 2021, a Board meeting took place, at which the Board agreed to accept the claimant's decision to take redundancy. A decision was also made to wind down the @Home service [184 – 186]. Erik Salomonsen's witness statement stated that a decision was made to *"close"* the @Home service whereas the meeting notes refer to an agreement to *"turn down"* the service. In cross examination, he said the phrase in the minutes was curious but confirmed that the service was wound down and closed although he could not say exactly when it was closed.

31. It was apparent that, as is very common in such a situation, there were some "without prejudice" discussions between the claimant and the respondent seeking to resolve the redundancy issue by way of a COT3 agreement. Rightly, I was not privy to any details of such discussions and I read nothing into the mere fact that they took place.

32. On 2 March 2021, the claimant informed Mags Naylor that she had changed her mind and would not now be taking redundancy and was, as Mags Naylor reported back to Erik Salomonsen, *"making an appointment to see a solicitor for unfair dismissal"* [195].

33. On 4 March, the claimant raised a formal grievance [197 – 199]. The relevant aspects of the grievance to these proceedings were that:

    33.1 the claimant said that she was offered the role of Service Manager in her first consultation meeting (22 January) meeting and accepted this during the second meeting (29 January) and agreed to develop the job description and areas of responsibility;

    33.2 the claimant said that it was unfair that Samantha Peacock was not put at risk of redundancy and this complicated the discussions about the alternative role; and

    33.3 the claimant said that, at the meeting on 25 February, she had agreed to return to work on 1 March, that a statement detailing the

new structure would be issued and that the CEO would support the new roles until she left. She was in effect saying that she had been offered and accepted the Operation Manager role. She said that the email from Shaun Cooper on 28 February breached redundancy legislation in terms of the respondent's obligation to offer her suitable alternative employment.

34. She also said in her grievance that she felt shocked by the email from Shaun Cooper and *"mislead", "manipulated"* and *"embarrassed"*.

35. The redundancy consultation process with the claimant was suspended by the respondent whilst the grievance was investigated. The respondent appointed an external HR consultant, Amanada Saunders to investigate the grievance. The CEO was due to depart imminently by this stage.

36. On 18 March 2021, a trustee replied to an email from Erik Salomonsen [213] including the statement: *"It sounds like you've had a very tricky time with [the claimant]. Thank you for managing this difficult situation".*

37. On 23 March 2021, a grievance meeting took place between the claimant and Amanda Saunders [217 – 238]. During that meeting, the claimant said, *"everything is broken down, confidence is broken down".*

38. Amanda Saunders discussed the grievance with the claimant and subsequently with Mags Naylor and on 29 March produced a draft investigation report [246 – 250]

39. On 6 April 2021, the claimant (who remained on furlough) was signed off with stress and anxiety and remained signed off work until 6 June 2021.

40. On 7 April 2021, Amanda Saunders wrote to the claimant to set out her conclusions on the grievance [259 – 260]. On the relevant issues, she concluded:

    40.1 that suitable alternative employment (the potential Service Manager role) was proposed (in January 2021 by Mags Naylor) subject to successful development of the job role, the new structure, and the claimant's acceptance of the fully-developed role. There was no evidence of a formal offer and there were outstanding particulars to be settled and agreed. This complaint was not upheld;

    40.2 the existing Business Manger role (Samantha Peacock's role) was initially not expected by the respondent to change sufficiently in the new structure but when it became apparent that it would, the role should have been placed at risk of redundancy. This complaint was upheld; and

    40.3 there was no evidence of a formal offer of employment (of the potential Operations Manager role) prior to the email from Shaun Cooper of 28 February 2021. The email from Shaun Cooper came with short notice and was strongly-worded, but the Board were inadequately informed of the consultation position and decided to pause the start date for the proposed new role until the foundations of the new structure were set and details including salary, had been

finalised. This complaint was not upheld.

41. The letter informed the claimant that she had 10 days to appeal against the grievance findings.

42. The claimant appealed against the grievance outcome on 13 April 2021 [261 – 262]. The claimant attended a grievance meeting with Hollie Flower (HR consultant) [264 – 274] on 22 April 2021. During that meeting, the claimant stated that the respondent had had *"no consideration"* for her during the redundancy process and that *"everything is broken down, confidence is broken down"*.

43. The claimant then raised some further complaints with the respondent about her pay and about furlough pay (one of which was upheld, the rest were not). These matters were not directly relevant to the present proceedings, save to note that this correspondence further impacted on relations between the claimant and the Board, evidenced by the following:

    43.1 On 29 April 2021, the claimant emailed Mr Salomonsen to inform him that she would be raising a further grievance for *"breach of contract"*. He replied that her *"further grievance would be passed to the charity's HR consultants who will be paid from the reducing funds available to the charity to support those with blood disorders"*. The claimant replied that this comment was *"unjust and upsetting"*.

    43.2 On 30 April 2021, the claimant emailed Erik Salomonsen and Shane Cann (a trustee) to allege that furlough legislation had been breached by the respondent and this was *"potentially fraud"*.

    43.3 On 30 April 2021, Erik Salomonsen emailed two trustees in response stating [295] that *"we need to write to her in the clearest terms for later disclosure if needs be…the threat of an allegation of fraud touches on reputation of the charity and must be disposed of"*

44. On 25 May 2021, the claimant was informed by letter of the grievance appeal outcome, which was that the appeal was unsuccessful [305 – 311].

45. The claimant repeatedly raised, during Mr Salomonsen's oral evidence at the hearing, an issue as to why the Board did not have any direct contact with her in the period after she raised her grievance and after the grievance process had concluded. Contact with the claimant on behalf of the respondent was made primarily via HR consultants appointed by the respondent (save, it appeared, in relation to issues around pay, where there were various emails exchanged directly). By this stage, it must be noted that the CEO Mags Naylor had left the respondent by the end of March 2021 and so there was no CEO or replacement role in place, which left in effect a vacuum, in the absence of a new management structure being agreed and implemented. The process of filling that vacuum had been derailed by the email from Shaun Cooper of 28 February and the claimant's response to it.

46. Mr Salomonsen explained variously in his oral evidence on the issue of contacting the claimant that:

46.1 the trustees on the Board were all volunteers and they paid for and took advice from their HR professionals;

46.2 once the claimant had raised her grievance alleging unfairness, they did not want to be seen to prejudice the grievance investigation process;

46.3 he considered that it would have been unusual for him to be having a conversation with the claimant whilst the grievance process was ongoing and he did not think that direct contact between the Board and the claimant would have been constructive at that time; and

46.4 after things had taken *"an adverse turn"* the Board felt on the back foot after the grievance; they were concerned about a further grievance if contact with the claimant went badly – they were *"very concerned it could end in tears"*

47. He also candidly acknowledged the possibility the position adopted vis-a-vis the claimant may have been a *"failing"* or a *"mistake"*.

The Charity Manager role and further consultation – June/July 2021

48. On 25 June 2021, the claimant was sent a letter from HR consultants, Fitzgerald HR, appointed by the Board to assist them with the redundancy process.

49. The letter from Vicki May of Fitzgerald informed the claimant of the resumption of the redundancy consultation [315 – 317]. The letter explained that:

49.1 Fitzgerald had been appointed to support the redundancy process – they were looking at the consultation process "from the beginning".

49.2 Due to the financial position of the respondent, the future management structure had been further reviewed. The joint potential roles of Business Manager and Service/Operations Manager, which had been envisaged earlier in the year, were no longer proposed, due to a continued reduction in the work and financial position of the charity.

49.3 A new Charity Manager role was now proposed, to work closely with the trustees and be responsible for the day-to-day operations of the charity as well as the financial aspects

49.4 A consultation meeting for the claimant would take place, with Joanna Hawkins and HR, on 1 July 2021.

50. The claimant replied by letter the same day, 25 June 2021, expressing concerns about the redundancy process to Vicki May [318 – 319]. The claimant stated that *"the implied term of trust and confidence has been broken"* and the Board had conducted itself *"in a manner calculated or likely to damage the relationship of trust and confidence without reasonable cause"*. She added that she failed to see how the continuation of the redundancy process was *"legally fair"*. Despite these comments (which

allude to the claimant potentially considering resigning and pursuing a claim for constructive unfair dismissal as they expressly reference the relevant legal test) the claimant did not resign from her employment.

51. On 25 June 2021, Samantha Peacock was also placed at risk of redundancy by the respondent and subsequently attended various consultation meetings.

52. On 1 July 2021, the claimant attended the first consultation meeting [324 – 328] with Vicki May and Joanna Hawkins. At the meeting, the rationale for the creation of the Charity Manager role was explained to the claimant. The claimant was informed that the respondent did not consider there to be any suitable alternative employment opportunities for her. The claimant asked to see the job description for the Charity Manager role and raised some other matters not relevant to these proceedings.

53. The job description for the role [330 – 331] included references to financial duties, management duties and health and safety responsibilities. It required, amongst other things, financial management experience and relevant qualifications in finance. Mr Salomonsen said in evidence that he understood that the document had been prepared by the HR advisers with input from the Board.

54. Vicki May sent a letter on 1 July 2021 to the claimant, summarising the consultation meeting [332 – 333] and attaching the Charity Manager job description The claimant was informed in the letter that the respondent (at that time), did *not* consider the Charity Manager role to be suitable alternative employment due to the level of financial experience required.

55. The same day, 1 July 2021, Samantha Peacock attended a consultation meeting with Joanna Hawkins and Vicki May. Samantha Peacock was informed that the Charity Manager role *was* deemed to be suitable alternative employment for her by the respondent as it sat *"closely"* with her current role.

56. On 8 July 2021, the claimant attended a second consultation meeting with Vicki May and Joanna Hawkins [349 – 359]. During the meeting:

    56.1 the claimant challenged the respondent about the Charity Manager role and whether it had considered her CV (which it said it had not at this stage). The claimant said that she wished it noted for the record that the Board had deemed the Charity Manager role not suitable for her without discussing it with her or considering her CV. She was told that the purpose of the consultation meeting was an opportunity to discuss that and for the respondent to understand if she *did* in fact potentially have the skills and experience for the role.

    56.2 The claimant indicated that she had the skillset for the role and wished to be considered for it.

    56.3 She was critical of the job description. She suggested that it omitted many of the areas where a Charity Manager should be responsible, and suggested it was skewed in favour of financial management responsibilities, inferring that this favoured Samantha Peacock. In

her evidence before the tribunal and at the consultation meeting the claimant referred to a role she had undertaken as a "Scheme Manager" for a previous employer, which she said was in effect a charity manager. She suggested that her experience in that role gave her insight as to the requirements of the Charity Manager role.

56.4 The claimant wished to know if Samantha Peacock was placed at risk of redundancy and was told that she had been.

56.5 The claimant also wished to know if the fact that she had submitted grievances was impacting on decisions by the respondent about her employment and she was told that it was not.

57. There was also some discussion in the meeting about a possible new role of "Patient Liaison Co-ordinator" and a draft job description was sent to the claimant to consider. The claimant expressed an interest in the potential role but in the event that role did not come into being (and by the time of the tribunal hearing well over a year later in late 2022 the role still had not crystallised, due to a lack of available funding for it). As such, that role was not of any further relevance, as it was at no stage available to be taken up by the claimant.

58. On 9 July 2021, Vicki May wrote to the claimant summarising the consultation meeting [360] and inviting the claimant to a competency-based interview with herself, Shaun Cooper and Erik Salomonsen on 14 July, to assess each candidate's suitability for the Charity Manager role.

59. Various emails followed [363 – 366] in which the claimant challenged the interview process, requesting that *"stakeholders"* be included on the interview panel. In cross examination, the claimant was not able to indicate the number of stakeholders she was seeking, but said that they could include funders, volunteers, beneficiaries, other employees and she appeared to require at least three stakeholders to *"balance"* the three existing panel members and *"avoid bias"* (i.e., she sought at least six people on the interview panel). She did accept in cross-examination that a competency-based interview was a potentially fair means of selection in principle.

60. The respondent's position, explained in an email from HR to the claimant [365] was that the trustees would be playing the leading role in designing and implementing the organisational structure and it would be disproportionate to set up a stakeholder panel. The claimant did accept in evidence that the trustees were themselves stakeholders.

61. On 13 July 2021, the claimant wrote to decline the invite to the offer of the interview [361 – 362] and asserted that the process was biased, unfair and pre-determined.

62. The claimant was informed in response that if she did not attend, the role would be offered to the other candidate i.e., Samnatha Peacock, which proved to be the case.

63. The claimant was asked in evidence if she accepted that Samantha Peacock was better qualified and more experienced than the claimant on

the financial side of the Charity Manager role. The claimant accepted that she was.

64. On 16 July 2021, the respondent posted online about a new *"retail assistant"* whom it had employed in one of its charity shops [370]. The role was not raised with the claimant by the respondent at the time and nor did the claimant raise the role with the respondent. There was no evidence about this role before the tribunal save for the online posting (a very short announcement). The claimant she said that she was not aware of the vacancy at the time before she was dismissed, but she thought she had raised in during her appeal (below). She then accepted that she was mistaken, as the retail assistant role was not mentioned in the letter of appeal or the appeal meeting notes, when taken to these in evidence. In her witness statement, the claimant merely said that she was not informed of the role and not that she considered it to be suitable for her. She was asked twice during cross-examination if she would have accepted the role had it been offered to her and she would not commit further than saying that she would have *"considered it"*.

65. On 26 July 2021, the claimant attended a final consultation meeting with Vicki May, Erik Salomonsen and a companion [374 – 389]. This was clearly a very difficult and fractious meeting for all concerned. It was mostly focused on the claimant revisiting the past issues and her concerns about treatment and putting these to the respondent. Erik Salomonsen found the claimant to be *"ill at ease"* and said that she *"presented as aggressive"*. In the meeting notes he objected several times to being *"cross examined"* by the claimant and raised a number of concerns about how she had sought to characterise the actions of the Board and the tone of her criticisms. The claimant said that she felt *"insulted"* by how she was treated in the meeting.

66. By this point it was abundantly clear that the claimant was going to be dismissed for redundancy having declined the Charity Manager interview and there being no other suitable alternative employment.

Dismissal, appeal and ET1

67. The next day, 27 July 2021, Erik Salomonsen wrote to the claimant on 27 July to confirm the termination of her employment for redundancy with effect from that date [396 – 398].

68. It had become apparent to me during the hearing that part of the claimant's case appeared to be that the consultation process which had followed on from the letter of 25 June 2021 amounted to the respondent going through the motions, or in other words that it was consulting with the claimant but not doing so in good faith. I therefore asked Erik Salomonsen during his oral evidence, following up on a similar question from the claimant, if he retained trust and confidence in the claimant during the time of the further consultation process during June/July 2021.

69. He explained that this was a time when the Board were seeking to keep the charity alive and was dealing with many issues, of which the claimant's situation was just one. He accepted that he had made an error in not including Samantha Peacock in the earlier redundancy process but said that

he was able to leave that to one side/keep it at arms' length. He said that the dealings with the claimant had been a strain and a stress and continued to be so at the hearing before me; they made him feel *"a little pressed"*. It had not been *"a happy time for anyone".* He said, however, if it was alleged that the Board had acted in bad faith or that the claimant's redundancy was a done deal that was not the case. Had the claimant attended the potential interview mentioned earlier, he would have interviewed her in accordance with the role competencies and taken HR advice. He said that it would not be right for the tribunal to conclude that the Board had already determined that the claimant should leave and had manipulated the process. He said that had the respondent's HR advisers been instructed to ensure that the claimant left the respondent's employment, the documents before me would have said that.

70. I accepted Erik Salomonsen's evidence. A finding of fact that the remainder of the redundancy process had been conducted in bad faith by the respondent would be a serious one to make and I considered that it would require clear and cogent evidence to support it. There was no direct evidence before me to indicate that the respondent was acting in bad faith during the consultation process which followed with the claimant during July 2021 nor evidence to demonstrate that the process was merely a sham and that the respondent had already decided to dismiss the claimant. There were various internal emails disclosed, referred to above, which indicated that the Board was finding the issues raised by the claimant challenging, but the emails went no further than that. They did **not** evidence any prior intention to dismiss the claimant or that the outcome of the redundancy process was a foregone conclusion. So, I did *not* find that the respondent was acting in bad faith or that the process was a sham, on the balance of probabilities.

71. The claimant appealed against her dismissal on 28 July [401].

72. The appeal was considered by David Rose, of Fitzgerald HR, who met with the claimant on 5 August 2021 [407 – 420] to discuss the points raised in her appeal.

73. On 17 August 2021, the claimant's appeal was dismissed by way of a letter from David Rose [436 – 442].

74. The claimant commenced ACAS Early Conciliation on 19 August 2021 and was issued with an EC certificate on 30 September 2021. She submitted her ET1 for unfair dismissal on 21 October 2021.

75. Subsequent to these events, as Erik Salomonsen explained in evidence, the Charity Manager role continued to be performed by Samantha Peacock, full-time until September 2022 when she stepped back to carry out the role on a part-time basis. The respondent has recently created and appointed to a new Chief Executive role going forwards.

Unfair dismissal, the relevant law

76. The right not to be unfairly dismissed is conferred by section 94 of the Employment Rights Act 1996 (**ERA**). The question of whether any such

dismissal is unfair turns upon the application of the test in section 98 ERA. The material parts of that section are as follows:

98 General.

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

a. the reason (or, if more than one, the principal reason) for the dismissal, and

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

2. A reason falls within this subsection if it –

…

c. is that the employee was redundant…

….

3. ….

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

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the case.

77. The first part of the test focuses on reason for the dismissal. The burden of proof is upon the employer to show that the dismissal was for a potentially fair reason. In this case the respondent primarily says that the principal reason for the dismissal was redundancy.

Redundancy as a potentially fair reason for dismissal

78. A dismissal will not be by reason of redundancy unless the statutory definition of redundancy is met. Redundancy is defined in section 139 ERA. The material parts of that section read as follows:

139 Redundancy.

> *(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—*
>
> *…*
>
> *(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.*
>
> *(2) - (5)….*
>
> *(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason…*

79. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell* [1997] ICR 523 and held that section 139 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal of the employee is wholly or mainly attributable to that state of affairs.

80. Section 139(1)(b) refers to the "requirements" of the employer. Where the employer has taken the decision to reduce the numbers of employees for a genuine business reason it is not open to the tribunal to investigate whether that decision was sensible - a good commercial reason is enough: *Moon and ors v Homeworthy Furniture (Northern) Ltd* [1977] ICR 117, EAT; *Hollister v National Farmers' Union* [1979] ICR 542, CA; *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386.

81. There is no requirement for the employer to show an economic justification for the decision to make redundancies: *Polyflor Ltd v Old* EAT 0482/02. The tribunal should be satisfied that the employer held a genuine belief in the facts relied upon to conclude that employees needed to be made redundant, acting on reasonable information (*Orr v Vaughan* [1981] IRLR 63).

82. In short, the tribunal is entitled to ask whether the decision to make redundancies was *genuine*, not whether it was *wise*.

83. The existence of facts that might support a genuine need to make redundancies does not by itself demonstrate that an employee dismissed in those circumstances was dismissed for the reason, or principal reason, of redundancy. Whether that is the case is a question of fact and causation for the tribunal: *Manchester College of Arts and Technology (MANCAT) v Mr G Smith* [2007] UKEAT 0460/06

84. If the employer is unable to show that a dismissal was for a potentially fair reason, then the dismissal will always be unfair. If that burden is discharged, then the tribunal must go on and apply the test of fairness set out in section 98(4) set out above.

Fairness

85. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a *"range of reasonable responses"*, so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439. That test recognises that two employers faced with the same circumstances may arrive at different decisions, but both of those decisions might be reasonable.

86. The EAT in *Williams v Compair Maxam Ltd* [1982] IRLR 83 gave general guidance to the factors that need to be considered by the tribunal when assessing the fairness of a dismissal by reason of redundancy. It was said:

> *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.*

87. The tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out above will not necessarily lead to the conclusion that the dismissal was unfair. The tribunal must look at the

circumstances of the case in the round.

Consultation

88. In *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72 the features of a fair consultation process were identified:

> *Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting.*

89. The key components of fair consultation were further identified in *British Coal* as:

89.1 Consultation when the proposals are still at a formative stage.

89.2 Adequate information on which to respond.

89.3 Adequate time in which to respond.

89.4 Conscientious consideration of the response to the consultation.

90. The importance of consultation in general but also with individual employees was emphasised in *Mugford v Midland Bank plc* 1997 ICR 399, EAT where HHJ Clarke said:

> *It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.*

Selection

91. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255 it was held that the employer need only show that it has applied its mind to the issue of selection and acted from genuine motives.

92. As was said in *Capita Hartshead Ltd v Byard* [2012] IRLR 814, provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, albeit not impossible, for an employee to challenge it. A decision to create a pool of one is potentially permissible, depending on the circumstances.

Alternative employment

93. A dismissal is likely to be unfair if, at the time of dismissal, the employer gave no consideration to whether suitable alternative employment existed within its organisation (*Vokes Limited v Bear* [1973] IRLR 363)

94. The duty on the employer is not to make every possible effort to look for alternative employment but to make reasonable efforts (*Quinton Hazell Ltd v WC Earl*) [1976] IRLR 296

95. The employer is not obliged to create alternative employment for redundant employees where none already exists.

96. The employers should also provide employees with sufficient information about any vacancies so that they are able to take an informed view as to whether the position is suitable for them (*Modern Injection Moulds Ltd v Price* [1976] IRLR 172).

97. In the context of alternative employment, where the employer is dealing with more than one potentially redundant employee, it should ensure that all potentially redundant employees are made aware of any suitable vacancies and consider how it will choose to which employees to make any offer of alternative employment. This may include undertaking a competitive interview process and appoint the candidate the employer considers to be best for the job, even though based in part on its subjective view (*Morgan v Welsh Rugby Union* [2011] IRLR 376).

Procedural defects and fairness

98. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair. Conversely, a less serious defect may not render the employer's procedure, and in turn the dismissal, intrinsically unfair (*Fuller v. Lloyds Bank plc* [1991] IRLR 336).

The parties' submissions

The respondent's closing submissions

99. I heard oral submissions firstly from Mr Hignett, who also provided a 10-page written submission to supplement his oral submission. In summary, he submitted as follows.

    99.1 This was an *"incredibly sad case"*. The respondent provided an important service to a vulnerable part of community. It was in very difficult circumstances, due to the global pandemic. A significant part of its operation could not happen and could not carry on as before. The claimant lost her employment against that background. It was a sad case for both sides.

    99.2 In terms of the decisions made by the respondent, the remit of this tribunal was limited, constrained to whether the respondent had a

potentially fair reason for dismissal and was the dismissal, for that reason, fair in all the circumstances?

99.3 He then took me through his analysis in his written submission, in summary, highlighting the following points.

99.4 He referred to paragraphs 5 and 6 of his submissions and the oral evidence as to the state of affairs at the respondent at the time: Board meetings in October and December 2020 and the 5 January 2021 document. This all added up to a redundancy state of affairs. This included the CEO eliminating her own role. It was a position of integrity and of desperation.

99.5 Mr Hignett then referred to paragraph 8 of his submission: the test was whether the dismissal was "broadly attributable" to that state of affairs. It was a loose test and not a detailed question of causation; the reason attributed by the respondent was the state of affairs in January 2021 – the legacy of the pandemic which continued into 2021 and which also existed in June 2021.

99.6 Between February 2021 and the resumption of the consultation process, the world had changed again. The respondent had been looking at three roles into two; it was now looking at two into one. At times it was suggested by the claimant that the respondent should have stuck to its original position. That was not right. It was the employer's decision and it was not for the tribunal to say it should have done something different or that something else was more suitable.

99.7 Between February and June 2021, the claimant initially accepted the redundancy, then retracted her acceptance, brought two grievances and appealed the outcomes. The structure was re-looked at and the respondent decided on a different proposal.

99.8 He submitted that the respondent's consultation went "beyond" what was adequate.

99.9 One argument had been superimposed on the case and this was not addressed in the written submissions, namely, the suggestion that trust and confidence had broken down in March 2021 and therefore the dismissal was unfair. The law on trust and confidence was really reserved for constructive dismissal and the issue for the tribunal was the range of reasonable responses; the EAT had repeatedly resisted attempts to elide these questions. The tribunal was concerned only with questions of fairness in this case. The claimant did not assert to the respondent directly that trust and confidence had broken down.

99.10 Through the lens of fairness, this was a tiny employer, consulting on a set of proposals where the employee was resistant and were allegations made against the respondent. It was inevitable that relationships under would be placed under strain. Erik Salomonsen had candidly accepted that relations were strained and this partly explains the comments in the 26 July consultation meeting. That did

not mean that relations had broken down irretrievably, which was what the issue would have been when one looked at the law on trust and confidence.

99.11 It could not be the case that the trustees were prohibited from continuing to consult with the claimant. If the claimant wanted to achieve that, she needed to resign and bring a different case and she did not do that.

99.12 On the issue of selection, I was referred to *Morgan* (above) and the question was whether the respondent's system of assessment between the candidates within range of reasonable responses. He was grateful to hear the claimant accept that a competency-based interview was a fair way of making an assessment.

99.13 The issue of alternative employment did not require the respondent to explore every opportunity but rather where a role existed and the claimant could be a candidate.

99.14 The claimant complained that someone at the respondent had decided that the Charity Manager role was not suitable alternative employment for her and that was unfair. No unfairness arose – I was referred to the decisions of *Hall v Whitbread* and *Fuller* (the latter of which I refer to above): the fact that the respondent may have initially decided that role was not suitable, was corrected and the claimant was invited to interview for it. It would be a different basis if the opportunity was denied to the claimant.

99.15 The claimant had objected to the ingredients of the Charity Manager job description in that it made no mention of safeguarding or health and safety responsibilities. There was mention of health and safety and safeguarding was not significant and the absence of it in the job description was not a substantive basis for the claimant to refuse to be interviewed.

99.16 The claimant then objected to the interview on the basis that the respondent's minds were made up. There was nothing in the evidence to the effect that minds were made up. The respondent may have had a view on who might emerge but that did not indicate bias or that unfairness resulted. I was invited to accept what Erik Salomonsen said in evidence and that the claimant would have been given a fair interview and opportunity.

99.17 It was not for the claimant to dictate how the interview panel was made up. What the claimant suggested would have meant expanding the panel to 6, 7 or even 8 people. The respondent's decision must have been within the band of reasonable responses, with the panel consisting of HR and two trustees.

99.18 The Patient Liaison Co-Ordinator role did not really arise, as it did not exist at the time. The claimant was sent details of the potential role as the respondent was seeking to consult on all bases and this underlined how fair the employer was being.

99.19 The retail assistant role was briefly mentioned in paragraph 34 of the claimant's witness statement. She did not say that she wanted it and the extent of her complaint was that she was not informed of it. It was not referred to in her appeal. It was not an issue before the employer to consider. If it had been an oversight, it could have been looked at through the appeal process. It was a very different role and clearly was not suitable alternative employment – it was not on the same terms and did not involve an exercise of the claimant's skills.

99.20 Submissions were also made on the issue of *Polkey* but these did not become relevant in view of my decision.

The claimant's closing submissions

100. The claimant made oral closing submissions, in summary as follows.

100.1 The trustees advised her that they were not speaking directly with her, but through HR. She did not tell the trustees directly that trust and confidence had broken down but did tell them in a letter [319]. That was prior to her knowledge that Samantha Peacock's role had been put at risk. Had she been treated equally by the Board following Peninsula's advice [to put Samantha Peacock at risk], the need for her grievances would not have occurred

100.2 She was not suggesting that the respondent should not restructure to just one role of Charity Manager – the claimant herself had questioned how the two joint roles would work at the beginning of the consultation process.

100.3 Had the grievances not occurred, she could have competed equally for the Charity Manager role with Samantha Peacock.

100.4 The respondent had slanted the Charity Manager job description towards Samantha Peacock. The role description was not apt for a Charity Manager role – it was written with the other candidate in mind and slanted towards her. The claimant did not know of any Charity Manager role which required a qualified accountant. (At this point Mr Hignett interjected as this was not an issue on which any evidence had been heard and I reminded the claimant that her submissions on the evidence should be confined to that which had been heard by the tribunal and the claimant confirmed that she understood this).

100.5 From the submission of the first grievance, Erik Salomonsen felt he could have no direct conversation with the claimant and she felt that was the case until her dismissal by the trustees.

100.6 The respondent said that fairness resumed when Samantha Peacock was placed at risk, but that was not so as the relationship had broken down. This was not the case between Samantha Peacock and her employer.

100.7 In her grievance, the claimant wrote that that the employer breached a duty of care and the relationship had broken down in that breach.

100.8 The claimant submitted that only two witnesses had appeared for the respondent. Shaun Cooper's email changed the course of events but he failed to write a statement and Mags Naylor had been asked to give a statement and had declined. All were involved in the proceedings and in where the relationship had broken down.

100.9 The HR consultants breached the respondent's grievance policy which had a response time of 20 days. The first grievance took 24 days and the appeal took 30 working days.

100.10 The respondent could not produce evidence to support a claim in the ET3 that an email of 15 February had informed the claimant that the Operations Manager role had not been signed off by trustees.

100.11 In summary, the claimant said she had been treated differently and unfairly compared to her colleague. Ultimately, she had been dismissed and her colleague had remained in the organisation.

Reply by Mr Hignett

101. Mr Hignett replied briefly as follows to matters raised by the claimant which he had not addressed in his initial submission.

101.1 Paragraph 8 of the ET3 should have referred to the email of 28 February 2021, not 15 February.

101.2 The claimant had suggested that there were no conversations with her by the trustees from 28 February 2021 until her dismissal. This was not correct – there had been the consultation process in June/July and in the meantime there had been the intervention of the grievance processes.

101.3 On the question of the witnesses called by the respondent, whilst in discrimination cases it may common to draw inferences, this was an unfair dismissal case. The respondent had called the decision maker. The appeal process was external and so the tribunal could reach a view on why the respondent did not call the appeal manager. It was the employer's decision and there was no basis for drawing adverse inferences. Shaun Cooper played a small part in the process.

Discussion and Conclusion

Was there a genuine redundancy situation i.e., a potentially fair reason for dismissal?

102. Applying the legal principles summarised above to the facts of this case, the first question I asked myself was whether the respondent had established that the reason or principal reason for the dismissal of the claimant was redundancy.

103. The background was that the respondent was facing serious financial issues. It had high staffing costs, in the region of £441k [466]. As a result of the impact of the COVID pandemic its income was much reduced [88, 465]

and by the last quarter of 2020 it was running at a deficit in the region of 20k per month [465], predicted to get worse. Its retail side was deemed no longer viable as a result of lockdowns combined with increased expenditure [82, 465] and so a number of its shops would have to close [466]. The situation in hospitals meant much of its service delivery could not take place [465]. The @Home Service was substantially affected as volunteers could not visit patients in their home and the service was wound up during 2021, as Erik Salomonsen confirmed in evidence.

104. The CEO proposed a reduction in the staffing structure, including the deletion of her own role and a number of other roles including that of the claimant.

105. The COVID pandemic continued to affect the respondent during 2021 and there was no evidence that its position had materially changed by the time of the claimant's dismissal in July 2021.

106. The claimant's substantive role at all relevant times remained that of Community Support Service Manager. The respondent's need for an employee to perform that role, and in particular managing the @Home service, which I found to be "work of a particular kind", ceased as a result of the above situation. I found that there was a redundancy situation at the relevant times in 2021, within the meaning of s.139 ERA.

Was the dismissal of the claimant attributable to that redundancy situation?

107. I accepted the respondent's unchallenged case that the problems faced due to the pandemic continued during late 2020 and into 2021 through to June 2021 when the respondent reviewed its earlier proposed restructure. There remained no need for claimant's substantive role in either structure and there was no change to the decision to close the @Home service.

108. There was some suggestion by the claimant during the latter stages of the consultation process that the respondent had taken against her because of the grievances she had raised, but this was denied at the time by the respondent and there was no positive evidence before me to support this assertion (in the sense of it having affected the redundancy process). It was not an argument which the claimant pressed at the hearing.

109. I also accepted Erik Salmonsen's evidence on the balance of probabilities that he retained trust and confidence in the claimant at the relevant times. I did not find as a fact that the redundancy process was conducted in bad faith, for the reasons given above. As such I did *not* find in turn that the real reason for the claimant's dismissal was because of a mutual breakdown in trust and confidence, as opposed to redundancy.

110. I concluded that the claimant's dismissal *was* attributable to the redundancy situation which arose, particularly the deletion from the respondent's structure of the claimant's substantive role, arising in particular from the financial issues faced by the respondent and the winding down and closure of the @Home service. That was the reason or principal reason in the mind of Mr Salomonsen when he dismissed the claimant in July 2021.

Fairness

111. I then addressed the question of whether the dismissal was fair or unfair, applying the test set out in section 98(4) ERA.

112. I reminded myself that I must not substitute my decision for that of the employer and the test was whether the steps taken by this respondent in respect of consultation, selection and alternative employment were within the "range of reasonable responses" and that I must look at the process in the round.

113. The respondent was a very small employer with limited resources, for much of the relevant time being run without a CEO or other senior manager in charge and so in effect by volunteer trustees paying for external HR support. Its limited size and administrative resources were to be taken into account when I applied the range of reasonable responses test.

Consultation

114. The respondent held six consultation meetings with the claimant about the redundancy proposals after she was put at risk. Three were in respect of the original proposals in early 2021 which entailed the two potential senior roles at the top of the management structure, and then three further meetings were held about on the revised proposal of just one role at the top, the Charity Manager role.

115. Concerns raised by the claimant about the redundancy process were also considered and addressed on behalf of the respondent during the grievance and the grievance appeal process, which I found formed part of the overall consultation process undertaken by or on behalf of the respondent.

116. The respondent ultimately acted on concerns raised by the claimant about (i) Samantha Peacock not being put at risk and (ii) about the claimant's potential suitability for the Charity Manager role. These matters evidence that the consultation process was a meaningful one and points raised by the claimant were considered. The respondent was not bound to agree with all of the points and concerns raised by the claimant during the process but I was satisfied that it had properly considered them.

117. The findings of fact earlier in these reasons summarise the various consultation meetings which occurred and when they occurred and I do not repeat them. I accepted the respondent's evidence that the latter stages of the consultation were not undertaken in bad faith with the claimant, despite the tensions which arose during the course of it.

118. By the time of the sixth and final consultation meeting, with the claimant having declined to attend the Charity Manager interview role, it was plain to the claimant that she now stood to be dismissed, and so there was little or no meaningful discussion to be had as to possible alternatives. The meeting was clearly very difficult and tense all around and that was seemingly unavoidable in the circumstances. The claimant made various assertions and accusations to Erik Salomonsen about her treatment and Erik Salomonsen at times took umbrage at her approach in that meeting.

119. I found that the overall consultation was adequate (*Mugford*) in the circumstances and within the range of reasonable responses.

Was the selection for redundancy fair?

120. In effect the claimant's selection for potential redundancy and being put at risk was an inevitable consequence of the deletion of her substantive role of Community Support Service Manager. She was the only individual in that role. This was not a redundancy case in which the respondent was reducing headcount amongst individuals employed on the same or a similar basis and so the question of devising objective selection criteria or a selection matrix to decide between such individuals did not come into play. Rather the issue of selection, such as it was, fell more to be considered under the question of suitable alternative employment and who should be appointed to the possible alternative role of Charity Manager (see *Morgan*), which I address below in these reasons.

121. I dealt briefly with the question of Samantha Peacock, Business Manager, not being placed at risk of redundancy for the first part of the redundancy process. This was found to be an error during the grievance, which the respondent accepted. She was therefore put at risk along with the claimant. I did not consider that the error materially affected the position of the claimant or made the selection of the claimant unfair, because the respondent did put the position right. Both the claimant and Samantha Peacock were placed at risk by the end of June 2021 and the consultation process in effect restarted based on the position as it then stood, with the Charity Manager role at the head of the proposed management structure. I did not consider that this initial error was so serious or material so as to render the overall process or the dismissal unfair (see *Fuller*, above)

Did the respondent act reasonably in relation to considering alternative employment opportunities with the claimant?

122. I firstly considered the claimant's position in respect of the potential Service Manager and Operations Manager roles, which the claimant contended that she had been offered and had accepted.

123. I found that, following being put at risk in January 2021, the claimant twice erroneously concluded that firm (and in effect legally binding) offers of potentially suitable alternative employment had been made by the respondent and accepted by her and, in her view, withdrawn by the respondent. Specifically:

    123.1 Whilst there was an agreement in principle on 29 January 2021 about the potential Service Manager role being lined up for the claimant, from that meeting and from what followed it was clear that further details of the potential role still needed to be discussed. The potential Service Manager role did not exist as such at the time when the claimant said it was offered and accepted and it never came into existence.

    123.2 Likewise, there was no offer and acceptance of the potential Operations Manager role in late February 2021 because again the

finalised role did not exist at the time or ever come into being.

124. The correct position in each case was that there remained key details to be ironed-out before any firm and sufficiently certain offer, capable of being legally binding, could be made and accepted. There was a broad agreement in principle in each case but no binding legal agreement. The resulting sense of unfairness on the part of the claimant, based upon her mistaken view of the legal position about each of these potential roles, appears to have significantly contributed to her feelings of lost trust and confidence going forwards.

125. There was no failing in either case by the respondent to consider suitable alternative employment because neither potential role ever came into being. There is no positive duty on an employer to *create* a role for a potentially redundant employee. The duty on the employer is essentially to *consider* alternative roles which *actually* exist at the relevant time.

126. The other main issue on alternative employment is the Charity Manager role. In relation to this role:

126.1 the claimant was informed in June 2021 that the respondent was no longer considering the roles of Business/Finance Manager and Operations Manager but one role of Charity Manager.

126.2 There was no sufficiently clear evidence before me to conclude that the respondent's decision as to what it needed in a Charity Manager, in terms of the weight placed on financial expertise or otherwise in the job description, was not a genuine one (as the claimant suggested at the time). A tribunal is not generally well-placed or entitled to question such operational decisions and there was no basis in the evidence to justify the tribunal going behind that particular decision. I did not find the claimant's evidence about her previous experience as a scheme manager sufficiently persuasive to enable me to legitimately second-guess the respondent's decisions as to what it considered it needed in a Charity Manager.

126.3 The role of Charity Manager was further discussed at consultation meeting on 1 July 2021 and the claimant was provided with job description after that meeting.

126.4 The respondent took the initial view that the role of Charity Manager was not suitable alternative employment for the claimant because of the level of financial experience required. However, at the consultation meeting on 8 July 2021 the claimant said that she had the skills for the role and she would like to be considered for it. In response, the respondent invited the claimant to be interviewed for the role. It did consider her for the role.

126.5 Selection was to be determined by way of assessment through a competency-based interview around the required competencies for the role. I found that an assessment as to which employee was to be selected, by way of a competency-based interview was within the range of reasonable responses in this scenario (see *Morgan* above).

126.6 It was not for the claimant to determine how that assessment process was to be conducted. Thus, the respondent's position that (i) the interview should be conducted by a panel made up of trustees and HR, and (ii) its rejection of the claimant's invitation to expand the interview panel to include further stakeholders were each within the range of reasonable responses

127. As such I found that the respondent did reasonably consider suitable alternative employment, in terms of the Charity Manager role. It accepted that the claimant was potentially suitable for the role and it was entitled to decide which employee was better-suited. The claimant chose not to participate in that interview process.

128. The only other actual alternative role which arose during the redundancy process, in the evidence before me, was the retail assistant role, filled in July 2021. This role was raised at a late stage in the present proceedings by the claimant, in her witness statement. I found that a retail assistant role was very far-removed from the claimant's managerial role. The claimant in oral evidence, when pressed, would say no more than that she would have *"considered it"*. I found it highly unlikely that she would have accepted it, having previously worked in a senior management role in the same organisation – it would have been a huge step down within that organisation. In the circumstances, the failure by the respondent to offer the retail assistant role to the claimant did not take the respondent's conduct of the redundancy process outside the range of reasonable responses.

129. In view of the above, I found that the respondent did reasonably consider all suitable alternative employment opportunities with the claimant.

Trust and confidence

130. I dealt with this issue briefly. It was not an identified issue as such but it was mentioned in several places during the evidence.

131. Although the claimant alluded to trust and confidence being *"broken"* during the redundancy consultation process, she did not resign but instead chose to remain within the consultation process until she was dismissed for redundancy. As such, I reminded myself that the test in this case to be applied was the range of reasonable responses test; I was not assessing the respondent's conduct through the different lens which would apply to alleged breaches of trust and confidence in a constructive unfair dismissal claim.

132. The respondent was in effect bound to continue with the redundancy process, so long as the claimant remained in employment and her substantive role was being deleted, and it did so. It remained willing to interview the claimant for the Charity Manager role, based on her competencies. Erik Salomonsen's evidence was that he would keep her complaints about the respondent at arms' length, which I accepted. As Mr Hignett submitted, this was a very small employer, consulting on set of proposals where the employee was resistant and made various allegations and complaints and so it was inevitable that relationships would be put under strain; Erik Salomonsen had accepted that relations were strained.

133. The claimant ultimately chose not to be interviewed and so she could do no more than speculate about what may or may not have occurred had she actually proceeded with the interview and I made no findings about what the outcome might have been.

134. This was not a case in which trust and confidence on both sides could be said to be broken irretrievably. If trust and confidence was broken from the claimant's point of view, she could potentially have resigned and pursued a constructive dismissal claim rather than remaining in the redundancy process. She did not do so.

Mistakes by the respondent

135. The respondent did make some mistakes in the overall process, in my assessment, as follows, and which I considered when assessing all of the circumstances.

    135.1 It should have placed Samantha Peacock at risk of redundancy alongside the claimant in early 2021 given that the changes to her role envisaged at the time were substantial (and as it was advised to do by HR). It accepted this mistake and corrected it during the process.

    135.2 The communication from Shaun Cooper to the claimant on Sunday 28 February 2021 should have been more carefully and sensitively expressed and the timing of it was unhelpful. However, as indicated above, I considered that the claimant's immediate reaction to this email was not a reasonable one and it was based upon her mistaken perception of having received and accepted a (second) binding offer of employment having the same withdrawn by the respondent.

    135.3 There was a delay of a month between the end of the grievance appeal (25 May 2021) and the claimant being informed, on 25 June 2021, that the respondent was resuming the redundancy consultation process. The claimant should have been informed sooner what the next steps were going to be.

    135.4 The respondent should have deferred any initial decision as to whether or not the Charity Manager role potentially amounted to suitable alternative employment for the claimant until the claimant had been given a chance to consider the role and outline her potential suitability. Instead, it deemed the role as not being suitable on 1 July and on the same day wrote to Samantha Peacock to inform her that the role *had* been deemed suitable alternative employment in her case. It was only subsequently when the claimant raised her past experience that the respondent then proposed the competency-based interview process. It was understandable that this caused the claimant concern, particularly given her perception of the earlier events. As already stated, however, I have not found that the respondent acted in bad faith during the consultation process, including when it arranged the potential interview to choose between the claimant and Samantha Peacock. The claimant chose not to attend that interview.

136. The criticisms above were made in the context of the respondent being run at the time by volunteer trustees (due to the departing CEO, leaving somewhat of a vacuum at the top). The trustees each had other roles aside from their roles on the Board. The Board was heavily dependent on instructing external HR advisers and considering their advice, before acting. It was in a very difficult financial position and its future was uncertain. These were all significant mitigating factors which formed part of all of the circumstances I considered.

Conclusion

137. Overall, the various concerns which I identified above in respect of the process, were not sufficient to take the respondent's process in the circumstances outside the range of reasonable responses. Other employers might have acted differently in some respects, but that is not determinative. I found that in the particular circumstances of this case this employer acted reasonably in treating the redundancy situation as a sufficient reason to dismiss the claimant and in the process that it followed.

138. Accordingly, the claimant's complaint of unfair dismissal failed and was dismissed.

Employment Judge Cuthbert
Date: 31 October 2022

Judgment & Reasons sent to the Parties:
08 November 2022

FOR THE TRIBUNAL OFFICE