EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Fisher	**v**	**Dale Power Solutions Ltd**

Heard at: Watford **On:** 20 and 22 September 2022

Before: Employment Judge George
Miss S Hamill
Ms C Grant

Appearances:

For the Claimant: In person
For the Respondent: Ms O Dobbie, Counsel

JUDGMENT having been sent to the parties on 29 September 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. A brief procedural history of this case is that, following a period of conciliation which lasted between 26 February 2020 and 26 March 2020, the claimant presented a claim form on 24 April of that year. It was defended by the respondents who entered a response on 3 June 2020. By that claim she complained of unfair dismissal and sex discrimination arising out of her dismissal from her role as an external sales executive, ostensibly for reasons of redundancy. Her employment by the respondent started on 1 August 2016 and ended on 17 February 2020.

2. At a Case Management Hearing on 14 April 2021 which was conducted by telephone by Employment Judge Alliott, the issues were clarified as set out on page 41 of the bundle. Judge Alliott also identified that the claimant would need to apply to amend her claim if she wished to claim as she had indicated bringing an equal pay claim. Such an amendment application was heard and dismissed on 30 November 2021 by Employment Judge Quill.

3. The hearing was originally scheduled to be heard over four days from 19-22 September, but 19 September was declared a Bank Holiday out of respect following the death of Her Majesty Queen Elizabeth II. The parties have co-operated in order to enable the hearing to be heard over the remaining three days and we thank them for their assistance in that regard.

4. We had the benefit of a bundle of documents that ran to 204 pages (including the index). Pages on the hardcopy bundle are numbered from 1 to 201 and page numbers in these reasons refer to those on the hard copy bundle. There was also a supplemental bundle of documents and page numbers is that are referred to as SuppB pages 1 to 17 as the case may be. Ms Dobbie produced written submissions which were provided on 21 September 2022 and which she supplemented orally. The claimant made oral submissions.

5. We heard oral evidence from three witnesses: the claimant herself and, for the respondent, Lance Lewis - who at the relevant times was the sales and marketing director and Andrew Marr - who was and still is the finance director. The claimant also relied on supporting witness statements from David Jackson, who was formerly her line manager, and from Christopher Grimes, who had sent an email on 4 August 2021. Following a discussion on the first day of the hearing about whether this could be relied on when it had not been signed, the claimant produced a copy that had been signed on 21 September. We accept that as indicating that it is in fact the statement that Mr Grimes wished to put forward in support of the claimant. He was unavailable to attend the hearing to be cross-examined on his statement. Ms Dobbie stated that she had no questions of Mr Jackson and his statement was admitted.

6. When clarifying the issues at the outset, Ms Dobbie asked that any issues relating to the prospects that the claimant would, in any event, have been dismissed by reason of redundancy had a different pool been chosen, be considered by us together, in the alternative, when considering whether the unfair dismissal claim or sex discrimination claim succeeded. Mr Lewis has subsequently left the business and the respondent wished to avoid needing to recall him. However it was clear that Mr Lewis had not covered such points in his witness statement and the claimant had not had notice of how he was likely to deal with them. During the course of the hearing, the respondent took instructions from Mr Lewis which were put forward in a supplementary witness statement. Having had notice of the supplementary evidence that Mr Lewis wished to give, the claimant objected to the additional evidence being introduced at a late stage. We considered that the claimant would be disadvantaged by having to respond to the evidence in the supplementary witness statement on such short notice and that the proportionate approach was for the hearing allocation of 20 to 22 September 2022 should only be concerned with issues of liability and that, if appropriate, a further remedy hearing should be scheduled at which further evidence could be given by Mr Lewis. Given our finding on liability, no remedy hearing was needed.

7. Where there is a challenge to the evidence set out in the statements of witnesses

who have not attended to be cross-examined upon them, then we give the hearsay statement evidence less weight than we would have done had they been present to respond to that challenge.

Issues

8. the issues between the parties which fall to be determined at the final hearing are as set out in paragraph 6 of the order of Judge Alliott:

Unfair dismissal

a. what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (hereafter referred to as the 'ERA')? The respondent asserts that it was redundancy.

b. In particular, the claimant complains of unfair selection for redundancy and that the process was unfair in that there was a pool of one.

c. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so called "band of reasonable responses"?

EQA, section 13: direct discrimination because of sex

d. it is not in dispute that the respondent subjected the claimant to the following treatment: selecting the claimant for redundancy from a pool of one and terminating her contract of employment.

e. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators, namely the five other men in her Sales Team.

f. If so, was this because of the claimant's sex?

Remedy

g. If the claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Relevant Law

9. It is for the respondent to prove that the reason for dismissal was one of the potentially fair reasons set out in s. 98(1) ERA which include redundancy. Redundancy is defined in s.139 ERA and dismissal is taken to have been by

reason of redundancy if it is wholly or mainly attributable to a broad range of situations set out in s.139(1) of the ERA.

> "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."

10. The wording of s.139(1)(b) ERA means that it is the requirement for *employees* that must have ceased or diminished (or be expected to do so) rather than the amount of work itself that must have ceased or diminished in order for the redundancy situation to arise. Requirements for employees may diminish even if the work to be done has not diminished. For example, the respondent may decide that it is necessary for them to make costs savings, which means the same work has to be carried out by fewer people, or they may be making efficiencies due to automation or other process changes. If the redundancy situation exists, the employment tribunal has limited scope to investigate the business decision to make the claimant redundant. The employer does not have to show an economic justification for the decision to make redundancies. However, that is qualified by the tribunal's jurisdiction to determine whether the redundancy situation is in fact the reason for the claimant's dismissal.

11. In Safeway Stores plc v Burrell [1997] ICR 523 the EAT set out a three stage test based upon the statutory formulation:

    a. Was the employee dismissed?

    b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

    c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

12. If we are satisfied that redundancy was the sole or principal reason for dismissal we have to go on to consider whether the dismissal was fair or unfair, applying the tests in s.98(4). This can involve consideration of matters such as whether the respondent used objectively fair and justifiable selection criteria? Did they give sufficient warning and engage in meaningful consultation? Were alternatives to redundancy actively considered? We are particularly mindful of the well-known House of Lords decision of Polkey v AE Dayton Services Ltd [1988] ICR

142 which provides that, in general circumstances, an employer would not have acted reasonably or fairly in treating redundancy as a fair reason for dismissal unless they have given suitable warning or consultation of any affected employees, have adopted a fair basis on which to select redundancy and have taken reasonable steps to avoid or minimise the loss of jobs by redeployment within their own organisation.

13. In this case, the principal, but not only challenge, to the fairness concerns how the claimant was selected for redundancy and whether she should in fact have been pooled against other individuals who she argues were in substantially the same position as her. There is a considerable latitude given to employers about how to choose the appropriate pool and it is, primarily, a matter for the employer to determine. The Tribunal must consider whether the choice that was applied fell outside the range of reasonable responses. This is a consequence of the well-known guidance in Williams v Compare Maxam Ltd [1982] IRLR 83, EAT to the effect that the overall question is whether the dismissal was within the range of conduct which a reasonable employer could have adopted. As explained by the EAT in Capita Hartshead Ltd v Byard [2012] IRLR 814 (paragraphs 26 to 28 and, in particular in the summary at para.31 of the judgment) the Tribunal has an obligation to scrutinize whether the employer has genuinely applied the statutory requirement when selecting the pool of employees from whom the employee or employees to be made redundant is to be chosen. There is no legal requirement that a pool should be limited to employees doing the same or similar work. If the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy then it will be difficult, but not impossible for an employee to challenge it.

14. When it comes to a sex discrimination claim, employees are protected from discrimination by s.39 EQA. The following are the most relevant sections of the Act.

15. Section 136 of the 2010 Act reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

16. This section applies to all claims brought before the Employment Tribunal under the EQA. By s.39(2) EQA an employer must not discriminate against an employee including by dismissing them.

17. Direct discrimination is defined by section 13 (1) EQA to be:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

18. The Claimant complains that she has suffered direct discrimination on grounds of the protected characteristic of sex.

19. On a comparison of cases for the purposes of section 13 EQA, there must be no material difference between the circumstances relating to each case: s.23(1) EQA.

20. The statutory burden of proof as set out in s.136 EQA has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

21. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical male comparator did or would have received and that the reason for the treatment was sex. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race.

22. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

23. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

24. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have

a bearing upon the outcome. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

25. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of sex, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

26. Section 23(1) EQA is explained in the EHRC Code of Practice on Employment (2011) para.3.23 to require that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator. As said in Shamoon, those include those circumstances that the alleged discriminator takes into account when deciding to treat the claimant as it did. Whether the situations are comparable is one of fact and degree. It may be possible to construct a picture of how a hypothetical male comparator would have been treated in materially the same circumstances from the way that individuals have been treated whose circumstances are too dissimilar for them to be a statutory comparator.

Findings of Fact

27. The claimant started her employment with the respondent on 1 August 2016. Initially she was engaged as an account executive (internal) which involved full time telesales of a range of products sold by the respondent known as commercial uninterruptible power supply or Commercial UPS. There is a distinction between the "internal" sales executives and others who are focused on tele-sales and "external" which, put simply, means that the sales executive is going on field visits to visit the customers.

28. The claimant was given a new contract as a sales executive (external) in early 2018. From that time she was based at the Hemel Hempstead office although it was permissible for her to work from home when she was not in the field, visiting customers.

29. There was a further change with effect from 13 May 2019 when her line reporting structure changed so that she reported directly to Andy Warner, who was then the head of sales. The following month there was a sales team restructure to

divide the team by client. We have been taken to the organogram at page 111 which sets out that structure.

30. There was a redundancy process that did not affect the claimant in the middle of 2019, but then in January 2020 the respondent decided that they needed to undergo a further round of redundancies and the claimant was put at risk by a letter dated 13 January 2020, page 52. She was invited to a first consultation meeting on the same day. The notice of redundancy programme of the same date says that, following the July 2019 redundancies it had been hoped that the respondent would be able to make sufficient progress to avoid further cost reductions in 2020 but that the expected sales levels in 2020 would not of themselves be sufficient to met the financial requirements of the business meaning that costs needed to be reduced.

31. The brief notes of the consultation meeting were taken by Mr. Grimes (page 55). Mr Lewis told the claimant that the reason for the redundancy process was the company's financial situation rather than individual's performance and warned her that her role was at risk. The claimant questioned why it was her and not some newer staff. The claimant expressed shock and emphasized that her own performance had been above target which she contrasted in general terms with other members of the team. Mr Lewis's explanation was that the decision had been not based on personal performance but on the company performance. One of the things we note from that is that there was no explanation in that first meeting of the reason why her role in particular had been selected as being at risk. The reason for the need to cut cost was the financial situation of the company but that did not explain to the claimant what the reason to choose her role, rather than others, was. The claimant and invited to the second consultation meeting which had to be postponed because of her sickness absence.

32. On the same day a notice was posted (page 53) which set out the positions at risk and the numbers of individuals in the pool. We are told and accept that the reason why this notice was put up in the form that it was is that it is part of the formal process that has been agreed with the works council. The claimant reasonably points out that her role is misdescribed, her position is misdescribed in the notice as an *internal* sales executive when she was an *external* sales executive. Her argument is that this suggests that her role was not evaluated alongside others in the external sales team as it should have been had the respondent been genuinely exercising its mind to how to define the pool of affected employees.

33. We accepted Mr Lewis's evidence that this was a simple error which was corrected as soon as it was drawn to his attention and for which he apologized. We accept that he had the claimant's actual and current position in mind when deciding which roles in the Sales Team were least business critical (LL para.23). No inference can be drawn from it that the respondent took into account irrelevant matters when deciding to put the claimant's role at risk.

34. Although the posting of the notice may have been in accordance with a works

council agreed practice, since each of the positions that had been put at risk were only occupied by one individual, each position had next to it the name of the individual postholder. They are described on the notice as being the only person affected with that particular title which the claimant reasonably found to be pointed.

35. The claimant wrote to Mr Lewis 14 January 2020 (page 54) asking whether she could view the redundancy criteria and why her role was in a pool of one. It was in response to that that Mr Lewis told her that the criteria for selecting the sales role was "based on keeping core skills (technical) within the business whilst achieving the sales goals to meet the requirements of our financial plan for 2020".

36. The claimant was provided with a list of the vacancies in the company at the time (page 61). She agreed in oral evidence that she did not have the skills or experience for the first two roles on that page. Although the third role was geographically and by content something that might have been suitable, it was only a part-time position and she did not consider it to be suitable for that reason.

37. When the claimant returned to work from a short period of sickness absence she wrote to ask when her second meeting would be and asked further questions (see the email of 6 February 2020 at page 63). Although the claimant has at some points argued that she was not provided with answers to all the questions that she had asked, in fact if one looks at the response at the top of the same page, answers to all of the questions were provided as she accepted in cross-examination. She was not happy with the answers, she did not agree with the answers but answers consistent with the information that had previously been given were provided. So, in particular, when she asked for the criteria for the redundancy for the scoring, the same answer was provided by Mr Lewis on 10 February as had been provided in his email of 16 January.

38. The claimant was invited to a second consultation meeting to take place on 11 February. This followed a sales meeting at which Mr Lewis gave a presentation which starts at page 112 of the bundle (see LL's witness statement at paragraph 44). Amongst other things in this presentation, at page 115, LL presented clear evidence that the company had been performing poorly compared with the budgeted performance and sales were considerably below those that had been projected for 2019. The explanation for the future strategy that Mr Lewis gave at the time is outlined at the slide on page 118 and it is consistent with the evidence that he gave to us. He says in the presentation that

> "Recently, the company has focused on service with an emphasis on a more commercial approach to its markets.
>
> In particular it has looked to develop the FM and Commercial UPS market opportunities. This has moved the Company away from its core competencies of technical expertise, problem solving and workable solutions and has a knock on effect of changing the sales employees' profiles away from technical competency."

39. In the next bullet point he then says that "the new strategy is to move back toward

a more problem solving technical position where we can add value to both our product and service offering". Mr Lewis explained, and we accept, that there had been an earlier decision by the board to take a more commercial approach (compared with a focus on the technical solutions offered to clients), that that had not produced the sales revenue that had been anticipated. Very cogent evidence was given by him and Mr Marr as to the impact that that had on the company finances and the difficulties it was causing to the company, as became apparent by January 2020. The company had consulted with KPMG who had recommended that they refocus their energies on their core strengths and that had led to the new strategy that the board had decided upon as was outlined in the second bullet point on page 118.

40. It was on the same day as the sales meeting that the claimant had the second consultation meeting. The notes are at pages 66 to 69. It was at this meeting that Mr Lewis apologized for the incorrect description of the claimant's role in the notice of posts at risk. Among the matters raised by the claimant, she asked why she had been chosen, why she had been in a pool of one when she considered herself to be in a team of six people.

41. This argument is at the heart of the claimant's case and we set out our conclusions on that argument below. At this point we simply record the answer provided at the meeting by Mr Lewis. He said that "the criteria for redundancy was to choose people with higher technical knowledge within the business not specific to a product range". He stated that his understanding was that the sales team had "different and unique roles and that [the claimant's] role was external sales and different to the other Sales Team".

42. That is clearly not a position the claimant agrees with. However, when we look at the exchange that is noted on page 66, we consider that this amounts to the claimant be given an opportunity for meaningful consultation about why her role was selected and she was able to put forward her point of view, although it was not one with which Mr Lewis agreed.

43. The claimant also raised at that meeting the question she has relied on in support of her sex discrimination claim about different commissions. She questioned why the other five individuals that she considers to be part of the sales team were on different commissions. An explanation was given to her; again it was not one that she was happy with.

44. She also stated that when she returned to work after sickness absence and contacted a customer she was told by them that they had been told that she had left the business. This must have been extremely upsetting for her and we can well understand how the claimant concluded from that and from the notice of redundancies dated 13 January 2020 that the outcome of the consultation was a foregone conclusion. The claimant told Mr Lewis that a lady called Judith had told the customer that the claimant had left the business so Mr Lewis said he would investigate it.

45. Mr Lewis gave evidence to us about his conversation with Judith. She had told him that she had seen the notice that sets out the positions at risk and identifies the post holders by name – each in a pool of one - and then the claimant had been absent on sickness leave. Judith had apparently drawn the conclusion that the claimant had already left the business. We accept that this was an unfortunate consequence of the way that the respondent followed the procedure that had been agreed with the works council. They may wish to consider whether this is appropriate when an individual is in a pool of one because of the upsetting consequences that can happen, as happened in this case. However, we accept that it was an agreed procedure and therefore we think that putting the notice up in this way was within the range of reasonable approaches to the redundancy process.

46. The notes of the meeting of 11 February 2020 show that, when the claimant emphasized her personal good performance Mr Lewis reiterated that the criteria for choosing roles and choosing individuals was "technical suitability based on moving forward in the business" and referred to the explanation given in the sales meeting that was specifically set out in the slide that is at page 118.

47. The notes of that meeting were sent to the claimant afterwards and then she had a third consultation meeting on 17 February 2020 at which she was told that the decision to select her role and to make her redundant was confirmed and she was dismissed with a month's pay in lieu of notice. 17 February 2020 is therefore the date in which the employment was terminated.

48. The claimant sent an email with the subject heading "Grievance" on 18 February (page 77) which sets out four bullet points. The first two argue that she is owed particular sums by way of bonus. The first one referred to a historic bonus and she stated that £300 was owed to her from two years previously when she was part of the internal team. The second referred to a sum which she says was outstanding from quarter 1, the balance of which should have been paid at the end of 2019. She also complained about unequal pay in relation to bonuses and, in the fourth bullet point, stated that she has been unfairly selected in the redundancy process. She sent that grievance to Mr Marr.

49. One of the complaints she made under the heading of "Unfair selection in the redundancy process" was that she returned from sick leave with no back to work meeting. We accept that she was told that the back to work element of her meeting would be covered within the meeting between her and Mr Lewis on 11 February, formally the second consultation meeting. By this time the claimant's line manager, Mr Warner, had been himself made redundant and therefore Mr Lewis had assumed line management responsibility. It is also clear (indeed it is accepted by the respondent) that, contrary to what the claimant was told in advance, the meeting on 11 February did not cover the return to work elements. However, we do not think that that adversely affects the fairness of the redundancy process.

50. Mr Marr responded on 19 February and explained that his decision was that the

first three points that concerned bonus and commission - which were not relevant to the redundancy appeal process - should be dealt with as grievances and he forwarded them to Mr Lewis. He decided to deal with the allegation that there had been unfair selection in the redundancy process as having been made by way of appeal. By this, the respondent through Mr. Marr were trying to address the points that the claimant raised about the fairness of her redundancy selection. We consider it to have been open to the reasonable employer to act in this way. Indeed, an employer receiving emails such as that of 18 February could be criticised for not addressing the compliant about dismissal as if it were an appeal.

51. Mr. Marr then followed a short process in that he reviewed very quickly the sales organisation and the job functions within the structure. He identified that the claimant's job title (sales executive – external) was the same as that of another individual, SMcK. For that reason, although the two were based in geographically different areas, Mr. Marr came to a very swift conclusion that they should have been compared against one another. In this it seems that Mr Marr was coming to a different view about what pool was appropriate for comparing individuals than did Mr Lewis but we remind ourselves that it is not unusual for the question of what pool should be selected to which there can be more than one answer.

52. Mr. Marr then told the claimant that she had not been dismissed but would still be at risk of redundancy and would be assessed against the specified criteria attached in the document attached to the email as would SMcK. SMcK was also put at risk.

53. We accept that this was a reasonable approach in all of the circumstances. Speed was important and Mr. Marr took into account the claimant's arguments in accepting that in his view, the job titles were relevant to whether both post holders should be at risk of redundancy. We remind ourselves that the claimant herself does not argue that she appealed, and within these proceedings does not argue that she was not given a fair appeal

54. The claimant, however, wrote saying that she did not wish to participate in the selection process as she had no trust and confidence in the respondent's ability to act reasonably given the matters that had occurred previously. She invited them to participate in without prejudice conversation. The common position is that, since the claimant did not engage with the further selection process, the date of termination remained the date on which she was dismissed.

55. Mr Lewis replied to the claimant's grievances and she was paid the bonus that was outstanding at 2019 but also the historic discretionary bonus.

56. On 2 March 2020 ScBi started his employment with the respondent as a commercial and industrial sales manager. This is understandably something that the claimant has drawn to our attention and indeed it is something that she relies on in relation to her sex discrimination claim. So we considered very carefully the explanations we have been given by the respondents and in particular by Mr

Marr about the circumstances in which ScBi was made an offer of employment and the reasons for it.

57. In general we found the respondent's witnesses to give clear and detailed evidence. Where the witnesses was challenged the explanations they gave appeared to us to be satisfactory and consistent with the contemporaneous documentation where it exists. In general we accept that they were reliable witnesses who were doing their best to explain the decisions that they had made truthfully to the Tribunal.

58. On the basis of Mr Marr's evidence we accept that there were fundamental differences in the role that the claimant was doing and that ScBi was required to deliver. He was appointed as a commercial and industrial sales manager, which is at a completely different level to the sales executive role that the claimant had occupied. We accept Mr Marr's evidence that the opportunity to recruit ScBi arose after the decision to make redundancies in order to cut costs had been made. That decision was made in January 2020, certainly the initial announcement was on 13 January.

59. Given that ScBi started on 2 March 2020, it is certainly possible that that first contact to explain that ScBi had come on the job market was made by the headhunter to Mr Lewis during the claimant's consultation process which had been extended because of her sick leave. However, we accept that the circumstances in which ScBi's availability came to the respondent's attention were an approach to them from outside the company rather than as the result of an approach to ScBi by the company. The reason why he was recruited was entirely to do with the opportunity he brought to the business. In the context of the financial circumstances of the company, we accept that that opportunity was one not to be missed. The details are in Mr Marr's paragraph 17 but the key aspects were that ScBi had previously worked for an employer that had gone into liquidation and, because his previous employer was no longer able to do so, he would be able to effect an introduction to a customer that produced a letter of intent to provide business in the renewables sector that was assessed as potentially worth £10m per annum revenue for a period of at least five years.

60. In order to evaluate the respondent's decision on who should be put at risk of redundancy we need to make findings about the products that the respondent sells and the likely needs of the customers who buy those products. Mr Lewis gave a clear explanation of the difference between the commercial uninterrupted power supply (or 'UPS') and industrial UPS. That explanation was cogent and reliable and was essentially unchallenged. He described the commercial UPS as a plug and play device which we took to mean it can be plugged in and it is ready to be used; a more simple device, usually installed in offices and clean environments. The industrial UPS is used in an industrial environment. It can be integrated into hospital systems, used in the oil and gas industries or environments such as electrical substations. He said that those UPS devices were more complex machines and by their nature they required more technical understanding of the product itself but of the difference applications of the

product.

61. He went on to explain that the sales executive selling an industrial UPS would need to be able to understand more about the application of the product and how it interacted with other systems than would a sales executive selling a commercial UPS. That meant that the sales executive selling an industrial UPS would be providing a level of technical advice that a sales executive selling a commercial UPS would not necessarily be providing. No doubt a sales executive selling a commercial UPS is selling a technical product. They need to know what it does; they need to know which device to recommend for a particular application. However, it seems that the one-off cost is also different. The industrial products are all higher end items which also likely lead to a greater commitment to servicing and maintenance and an ongoing contract which would need managing. The generators that were sold by the respondent are a different product again and Mr Lewis also explained that the respondent sells control systems upgrades and gets involved in redesigning exhaust systems which requires the salesperson to have a knowledge of acoustics.

62. We accept that if the salesperson's customer portfolio means that they are predominantly selling industrial technical products then that role demands a breadth of technical knowledge that cannot conveniently be replicated by inviting an engineer to accompany the salesperson into the field. Further, the maintenance service contracts would need managing so the activities are not confined, or mostly confined to selling particular devices.

63. The respondent addressed an argument raised by the claimant which can be summarized as being that she must have had technical knowledge because she was excused from the commercial UPS training course which her colleagues were required to do. We accept that the commercial UPS training course she referred to amounted to a one-day or thereabouts course covering information about what the range of commercial UPS products do. The training required to bring a sales person up to the level of knowledge that is required for the industrial products we have referred to would be of longer duration and greater intensity and would probably require a formal qualification.

64. The core of the claimant's complaint is that her role was interchangeable with or should have been regarded as essentially the same as all the other direct reports of Mr Warner who would deal with external sales. She referred to that as her team although when the respondent referred to the sales team they were, it seemed clear, to be including all of the roles of postholders within the structure as a whole and not only those in external sales.

65. We have already referred to the organogram at page 111 which dated from after the June 2019 restructure. Since then CW and JM had apparently both left and not been replaced by the time the need for redundancy was announced in January 2020. The claimant argues that the roles held by her, and by YM, CJ, JA, JB, and SMcK were so similar that they should have been considered alongside one another and scored using the agreed scoring criteria.

66. We have already outlined how the claimant reached her position. She was initially a sales executive (internal), she was promoted to sales executive (external) in 2018 selling commercial UPS. Mr Jackson has not come to be cross-examined on his statement or his supplementary statement that he provided. On balance we would prefer what Mr Lewis said about who was responsible for the claimant's promotion, but we consider this to be a minor point because in any event the promotion had to be approved by Mr Lewis. The respondents have said consistently, and we accept unreservedly, that the claimant's performance in her role is not in question. Her abilities and success in her role is not criticised within these proceedings at all.

67. After the 2019 re-organisation the claimant took on some accounts. In particular, when CW, who had been a regional sales manager, left she took on some of that sales manager's accounts. Her evidence was that there were 157 additional other customers. This is an indication of a somewhat broader customer base than only those interested in the commercial UPS product range; broader than she had had when she first became an external sales executive. We remind ourselves that any sales executive could be accompanied by an engineer on a field visit if needed although at a time of costs pressures there would be an incentive to reduce the occasions when that was necessary.

68. We do not think that there is evidence from which we can judge whether the 157 additional other customers is a large number in the context of the numbers of customers on the claimant's list, the number of visits she carried out during a week or month, or the volume of work that she generated. Furthermore, there is no evidence of a comparison with the customers serviced by other sales executives. We think, on the basis of all of the evidence we have heard, that it is fair to describe the claimant as predominantly selling commercial UPS products and predominantly working in the south. Not exclusively in the south: she gave evidence of five customers in the Midlands and in the north. We also accept that simply taking on a regional sales manager's customers does not entitle someone reasonably to say that they had taken on the manager's role. The element of management does not transfer with those clients. This is not sufficient to enable her to show that she was managing client accounts, let alone managing a region.

69. We compare the evidence that has been provided by the claimant on the one hand with that provided by the respondent about the several roles. In our view, the respondent's witnesses were, by dint of their positions, more knowledgeable and gave reliable evidence. Mr Lewis was at the time the Sales and Marketing Director. AW, the then Head of Sales, reported to him. He was better placed than the claimant to know the bigger picture of the roles carried out by individuals in the sales team and of the customers served by them. The claimant's level of the understanding of the roles carried out by her colleagues was more limited. This is not a criticism of her. It was something that she accepted in cross-examination and indeed was only to be expected.

70. Overall, we found Mr. Lewis's explanations of the roles that were carried out by

the alleged comparators (LL statement paragraph 13) to be credible. He said that the other individuals included three Regional Sales Managers. We accept his evidence that CJ and SB were recruited at a manager level even if their titles changed during the period of their employment. The claimant complains that she did not have the opportunity to be considered for those positions, but we accept that there is a difference in the nature of the roles carried out by a manager on the one hand and an executive on the other and the claimant's lack of detailed knowledge of the accounts serviced by those colleagues makes her evidence that they did substantially the same role as her, despite the different title, not reliable.

71. It is also relevant that they were focused in different geographical areas to the claimant and were also managing those areas. In the case of CJ, his portfolio had a particular presence in the aviation sector which we accept is something that could reasonably be regarded as a different role with a more technical content.

72. Then there was SB, who is a business development manager. We accept the evidence that, not merely by his title, but by his focus on a particular industry and on sales of service contracts this meant that his role was distinct to that of the claimant.

73. There is then SMcK who had the same title as the claimant - although that appears to have changed between the June 2019 chart and the date of the redundancy. He was based in Scarborough and we accept that his day-to-day tasks were more weighted to service sales generally, to sales generator upgrades than they were to sales of commercial UPS or strands of work carried out by the claimant. His role was predominantly industrial rather than commercial and technical in nature and he was northern based.

74. As part of considering the fairness of the exercise carried out by the respondent we need to consider whether Mr Lewis genuinely applied his mind to who should be in the pool; whether he genuinely applied his mind to which roles should be selected. It was put to him by the claimant that he judged her technical expertise only based on his opinion – and did not rely on objective evidence. This was not accepted by him without reservation. His response was that he had also relied upon and had access to details of qualifications that she disclosed on her application form so he was not simply judging her on the basis of subjective opinion only. Mr. Lewis also gave evidence, which we accept, of his direct knowledge of the qualifications of SMcK and SB. His inference about the qualifications of CJ seemed to us to be reasonable since CJ had come to the respondent from a business in the aviation industry and could therefore be presumed to have a certain level of engineering qualifications.

75. We accept that Mr Lewis genuinely applied his mind to the question of which roles could be dispensed with in furthering the aim of focusing the business on producing technical solutions. In doing so, we bear in mind his evidence about AW, the Head of Sales, and why that role was selected. AW's background was

in man-management and sales but he personally did not have technical expertise. This meant that his function and skills could be taken on by Mr Lewis himself predominantly. Deleting AW's role from the structure was consistent with the stated purpose of the reorganization which supports our conclusion that that was the management's genuine aim.

76. The regional sales managers, the business development managers and SMcK carried out roles which were heavily focused on the industrial sector and products and on supplying services, all of which required a greater technical expertise than did the claimant's role. Her role was predominantly focused on the technically less sophisticated products. We accept that when one looks at the claimant's role, where the customers were located geographically, and the products that she was predominantly involved in providing, it was easier and it was reasonably regarded as easier for her role to be redistributed than for the other roles reporting directly to AW. We accept that these were all matters that Mr Lewis genuinely took into account when he made the decision that he made and therefore conclude that it was reasonable for him to regard her role as distinct because it involved predominantly, but not exclusively, commercial UPS sales whereas the others' involved predominantly, but not exclusively, service generated sales renewals and industrial UPS sales with upgrades linked to those products and other products for the industrial setting. We accept this was a reasonable basis on which to make a distinction between the claimant's role and the other roles reporting directly to AW when seeking to cut costs and reposition the company back to its core competencies of technical expertise, problem solving and workable solutions.

Conclusions on the Issues

77. The respondent's financial circumstances were such that they had defaulted on a bank covenant. The financial picture as a whole was such that there were more than reasonable grounds for the senior leadership team to be concerned about the continued existence of the company as a going concern if it did not cut cost and change direction.

78. We accept that the reason for the redundancy situation was the need to save cost. The claimant argued that it did not make sense to choose her given the amount of money she made for the business but we found Mr Marr's evidence countering her evidence that she had made £1m for the company in four months to be convincing. We take that into account in its entirety. The fact that Mr Lewis selected AW for redundancy shows that they had selected the most expensive member of the sales team, namely the Head of Sales, probably one of the most expensive members of staff. That is another reason why we conclude that cost cutting was a genuine reason. If one looks at the wider redundancy exercise, not focusing solely on the sales team, seven roles were affected. We are quite satisfied that there was a genuine redundancy situation.

79. The criteria for choosing roles was to keep the most technical roles, to keep those staff whose tasks could least easily be absorbed by other staff and those with

technical skills and experience as opposed to commercial skills and experience. This was as a result of the respondent accepting KPMG's advice to pivot the focus of the company away from a commercial approach to a technically expert approach. There is contemporaneous evidence, not only the presentation but also Mr. Lewis's comment in the sales meeting on 11 February 2020 (see para.38 above) that supports a finding that those were genuinely the criteria that were used.

80. Fundamentally, it is a business decision for the respondent as to what the focus of their energies are to be. For all of these reasons we conclude that the requirements of the respondent's business for employees to carry out work of a particular kind had diminished because they required the work to be done by fewer employees in order to save costs.

81. We turn then to whether the claimant's dismissal for redundancy was fair or unfair in all the circumstances. We are satisfied that the claimant had sufficient warning, that a meaningful consultation was carried out and that, overall, the process was within the range of reasonable responses. She was told that she was at risk on 13 January 2020 at a first meeting (para.31 above). Questions which she raised in writing were answered. The formal consultation was paused during her sickness absence. There was a sales meeting where Mr. Lewis explained the rationale to the whole sales team and the individual consultation exercise resumed with a second meeting on 11 February 2020. In that, greater detail was provided about the reason why the company had to save costs and why the claimant's role had been selected to be in a pool of one (para.41). We are satisfied that the basis on which the selection was made was discussed with the claimant. She had the opportunity to put forward her point of view. It was simply that she did not agree with the judgment that had been made. She received an apology for the misdescription of her role in the notice that she (and others) were at risk of redundancy. There was a third meeting at which she was informed that her redundancy was confirmed. The part of her grievance which concerned the redundancy was reasonably dealt with as though it were an appeal and Mr Marr took a different (but also permissible) view as to whether the claimant's role should be considered to be in a pool of one. The claimant declined to participate in a grading exercise with SMcK who had the same job title as she did.

82. For the reasons that we have already outlined (see paras.69 to 76), we accept that the respondent used a fair basis connected with the content of the role on which to select that only the claimant's role of AW's direct reports should be put at redundancy. That was that Mr Lewis reasonably regarded the claimant's role as distinct because it involved predominantly, but not exclusively, commercial UPS sales whereas the other direct reports of AW were predominantly, but not exclusively, engaged in service generated sales renewals and industrial UPS sales with upgrades linked to those products and other products for the industrial setting.

83. The respondent took such steps as they could reasonably take in the

circumstances to find alternatives to redundancy, but they did not have suitable vacancies at the time (see para.36 above). For those reasons the claim of unfair dismissal fails.

84. There are some specific factors that the claimant argues are matters from which we could infer, in the absence of any other explanation, that the selection for redundancy was sex discrimination. She pointed to the missing bonus, the unpaid bonus that she said had been unpaid for two years. In summary the facts concerning this seem to be that over a period of some two years the claimant had been arguing that she was entitled to be paid a discretionary bonus and had earned it. Mr Lewis had referred her argument to the board who ultimately were in the position of making a decision on this point. It is unfortunate that it took so long for a definitive answer to be produced but we consider that even if at meetings Mr Lewis had said at any point that he would get this for her or that she would be paid it, it was not something that was within his gift. We do not consider there to have been any deception on his part but, in any event, there was no taint of sex discrimination in relation to this episode and the bonus was accepted and was paid in the end.

85. The claimant also points to what she regards as a discriminatory commission structure and we make some additional findings about that. Mr Lewis, in particular, gave credible evidence about why each individual salesperson has a bespoke commission and bonus covenant. In principle the stance that everyone should have their own bonus covenant seems very sensible. We accept the evidence that the range of products, the value of those products and the profit generated by them varies so greatly that all the individuals can only be treated fairly if they are not treated the same. For the purposes of a sex discrimination claim, we only need to be satisfied that this was, genuinely the reason why the salespeople had bespoke bonus covenants and that there was no discriminatory impact of it. We refer back to our conclusions about the differences between the role carried out by the claimant and by the other direct reports of the Head of Sales. We are satisfied that these objective differences were genuinely the reason individual bonus covenants were viewed as fair and were in place.

86. We do not have evidence about the amounts of bonuses received by the other individuals. However, there are a couple of other specific points the claimant drew to our attention. The respondent's evidence was that the bonus covenant is not updated during the course of the bonus year. This was part of the reason why the claimant was not on the same bonus structure as colleagues; she was on her old bonus structure despite moving during the course of the bonus year. The respondent explained the reason for this as being the difficulty of identifying who was responsible for particular business opportunities or sales if roles or customer responsibility had changed during a bonus year, which was why the standard approach was taken that no changes to the bonus covenant were made.

87. Again, for the purposes of the sex discrimination claim the question is whether we accept that the commission structure was genuinely such that if you changed

roles during the course of the year your covenant was not changed. We do, and this is not something from which it can be inferred that the respondent had a discriminatory attitude to employee's bonus covenants.

88. The claimant stated that, of her knowledge, some of her colleagues received a 1% bonus if they made any commercial UPS sale – which was a higher bonus than she received on an individual sale. We accept that the purpose of this was simply to incentivise cross-selling by individuals who did not otherwise sell a large quantity of commercial UPS and that that was a non-discriminatory reason for the different.

89. The claimant pointed to her selection for redundancy and relies on the fact that she was the only woman out of the six direct reports to AW. For the reasons that we have already explained, we have accepted that the claimant was chose genuinely for non-discriminatory reasons. Therefore, even were we minded to accept that the claimant has satisfied the burden on her of showing matters from which we could infer sex discrimination, we have accepted the respondent's cogent evidence that she was selected for non-discriminatory reasons.

90. She also points to the appointment of and we remind ourselves of our findings that this was a genuine unexpected opportunity. We do not think in those circumstances it is right to infer an intention on the part of the respondent to clear out female sales people and to recruit male sales people. Two other sales people were made redundant, Mr Warner and Mr Farmer, and we also bear in mind Mr Marr's evidence in paragraph 7 of the previous redundancy exercise and the impact on the workforce of that exercise by gender.

91. There is cogent evidence that the recruitment of ScBi was separate to the redundancy (see paras.56 to 59 above). We do not infer from that recruitment that the respondent used redundancy as a way to remove the only female member of the sales team and achieve an all male team.

92. For all of those reasons we are satisfied that the claimant's selection was not because of sex and it was entirely to do with the need for cost cutting in the respondent company, the need to recommit to delivering technical expertise to customers and the greater prospect that her role could be absorbed by others in the team than that she would be able effectively to absorb one of theirs. Her sex discrimination claim fails.

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Employment Judge George

Date: …19 December 2022….

Judgment sent to the parties on: 24/12/2022
N Gotecha - For the Tribunal office