EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Zöe Hague v Office for Students

Heard at: **Bristol** **On:** 23-26 January 2023 (26th in chambers)

Before: **Employment Judge Housego**

Appearances

For the Claimant: **J Hague, husband of the Claimant**
For the Respondent: **Georgia Hicks, of Counsel, instructed by Ellen Goodland of Burges Salmon LLP**

JUDGMENT

1. The Claimant was unfairly constructively dismissed by the Respondent.

2. The Claimant is entitled to pay in lieu of notice.

3. The reason for the dismissal was redundancy.

4. The Claimant was a civil servant not entitled to a statutory redundancy payment by reason of S159 of the Employment Rights Act 1996.

5. The Claimant is entitled to an award for unfair dismissal (basic and compensatory awards) and the case will be relisted for a one-day remedy hearing.

REASONS

Summary

1. The Respondent is a statutory body which acts as the regulator for tertiary educational bodies.

2. The Claimant is a skilled computer programmer who had worked for the Respondent in that capacity for about 20 years until she resigned following a reorganisation.

3. The Respondent decided to change the way it effected its IT requirements from a bespoke approach to programming (the Claimant and her colleagues designed wrote and delivered programs) to a "low code / no code" (LC/NC) approach. This meant buying in packages and configuring them as a first option.

4. The Respondent says this was a cost saving measure, and an evolution of the Claimant's role, and that there was still a lot of coding to be done. They say that the Claimant's role was the delivery of computer programs, and this was a more efficient way of doing the same job she had always done.

5. The Claimant says that this was to remove her core function of designing writing testing and delivering whole programs, and that the type of coding needed for this new role would lead to an atrophying of her skills. She says that while of course the Respondent was entitled to make such a change, this was a redundancy situation because the needs of the Respondent for bespoke developers had diminished.

6. She also says the process of her grievance about this was unfair, and that was why she resigned. She says that was an unfair constructive dismissal, and that it reinforced her view that she was redundant.

7. The Respondent says that even if so, the Claimant was a civil servant and S159 of the Employment Rights Act 1996 means she is not entitled to a statutory redundancy payment.

8. I decided that the change to the work was more than an evolution and did amount to a diminution of the Respondent's need for skilled computer programmers to design write test and deliver whole programs, so that the Claimant was in a redundancy situation.

9. This was for a variety of reasons.

    - The amount of coding was to be substantially reduced.

    - The coding needed to configure an *"out of the box"* package, or to link such packages, is skilled but not in the same way as to build a whole program.

    - LC/NC was to be considered first when looking at every project. If it was not available, or suitable bespoke software was needed, then consideration would be given to outsourcing the project. This would mean that while the Claimant would have a lot of work to do, little of it would be bespoke work, and that was her particular skill and role pre-reorganisation.

- Of the six skilled programmers, five left at the time of the reorganisation, this despite most of them having many years' service and the advantage of a pension scheme into which the Respondent contributed over 29% of salary.

- After the reorganisation and these resignations, the team is a little smaller, and half of the team members are junior staff without the skills of the Claimant and her colleagues.

10. The Claimant says that it was an unfair constructive dismissal because the Respondent took a very long time to deal with her grievance (which was that this was a redundancy situation), and (she says) did not deal with the grievance fairly. The Claimant says that if the grievance had been conducted fairly it would have resulted in her dismissal on the grounds of redundancy and that although this would not have been unfair (and she would have volunteered for redundancy) the fact that she had to resign and not be dismissed as redundant was a fundamental breach of contract, because the grievance was not handled fairly.

11. I decided that the Claimant resigned and that this was a constructive dismissal. The fundamental breach of contract was not correctly to analyse the change, and to impose the change on the Claimant, through to the conclusion of the grievance. The reason for dismissal was the redundancy which the Claimant (correctly I decided) said occurred.

12. The dismissal was unfair, for reasons developed later in this judgment.

13. The Claimant said she would have been entitled to a four-week trial period (and this is correct), but it is irrelevant since she reasonably refused to accept the proposed change.

14. The Respondent is recognised by statute as an employer of civil servants. Civil servants are excluded from claiming statutory redundancy payments by S159 of the Employment Rights Act 1996. The Claimant will need to seek recourse under the Civil Service Compensation Scheme to claim such a payment. This Tribunal does not have jurisdiction in relation to that scheme, although findings of fact made in this judgment may be relevant to such a claim.

15. The dismissal was unfair, because the Respondent breached the term of mutual trust and confidence by failing to deal with the situation appropriately in the reorganisation and in the handling of the grievance process.

Evidence

16. There was a bundle of documents of about 450 pages. For the Respondent oral evidence was given by:
    - Sarah Trewella (Chief Technology Officer)
    - Andrew Jackson (Deputy Chief Technology Officer)
    - Andrew Beaton (IT Technical Products Manager)

A witness statement was tendered on behalf of Sarah de Vere, HR Business Partner, but she was not called upon to give oral evidence. Her statement was

largely uncontentious as to facts. It contained opinion which was not evidence and so I did not give that part of the witness statement any weight.

17. The Claimant gave oral evidence.

18. All the witnesses who gave oral evidence were cross examined and I also asked them some questions.

The Hearing

19. The hearing took place over 3 days in the Tribunal, in essence a day and a half for the Respondent's evidence, half a (long) day for the Claimant's evidence and submissions on the third day, after time for the parties to consider. Counsel for the Claimant provided a full written submission to which she spoke, and the Claimant also provided a written submission.

20. The written submission of Counsel for the Respondent was very thorough, and I do not attempt to summarise it here. It can be read by a higher Court if required.

The issues

21. In a careful Case Management Order EJ Self set out the issues as they appeared to be at a telephone hearing. At the hearing Counsel provided a revised list of issues, as she (correctly) thought the list in the Case Management Order did not cover the full decision tree. Mr Hague expressed some unease about this revision. I assured him that I would ensure that there was a fair hearing. I am satisfied that it was a fair hearing.

22. As the case progressed it became clear that the issue of unfair dismissal was not as set out in either list of issues. What the Claimant was saying was that she felt strongly that this was a redundancy situation and filed a grievance to that effect. She says that this took far too long to deal with, was handled badly and that the outcome was wrong, as it was not upheld, that she resigned in consequence of that outcome, that the (mis) handling of the grievance was a breach of mutual trust and confidence, that she resigned in consequence of this and so it was an unfair dismissal.

23. However, she says that had a fair procedure been followed she would have been assessed as redundant and would have been dismissed, fairly, for redundancy. The Claimant's case is that that had a fair procedure been followed she would have been fairly dismissed by reason of redundancy, but that the process was unfair to the extent that it was a fundamental breach of contract, in response to which she resigned and so was unfairly constructively dismissed.

24. The Claimant has never disputed the right of the Respondent to change the way it fulfils its IT needs: what she is unhappy about is the effect on her, which she says fundamentally affected her role, effectively removing it.

25. What this case is about is whether the reorganisation of the Respondent's IT needs was an evolution or a revolution, and that issue

determines whether the Claimant was in a redundancy situation, as she claims, or whether she resigned because she did not like the direction of travel of the way the Respondent's IT needs were to be met.

26. The Claimant says that she is a skilled bespoke coder used to being briefed to provide a computer solution to a task, analysing what needs to be done, designing a computer program to effect that task, writing it *"from the ground up"* as it was described, testing and implementing it and then tweaking it and fixing bugs once it was operational. She says that the new approach required some coding skills, but nothing like that, and her skills would atrophy. She says that buying in *"out of the box"* solutions and configuring them, or linking them, is a completely different role and not one requiring her skills.

27. The Respondent says that the job role was not one of specialist coder of computer programs, but that of delivering computer programs to meet the organisational needs of the organisation. That used to be done by writing programs from scratch, but the work methods of all organisations change over time. Technology moves on apace, even faster in IT than most areas of work, and now many things that used to be written can now be bought ready made from a software house and configured to the needs of the end user. They say that the LC/NC designation is an industry phrase, and in reality they are a unique organisation so that every piece of software bought in will need to have code written to integrate it with their systems and their work. They say that this change is much more economic, and much more productive, so that the team would be able to get much more work done in the same time, at less cost, and so it is much more efficient. They say that they had no wish for the Claimant to leave, and valued her expertise, which they needed in order for these new programs to be made to work effectively. There would be so much work that they would need to consider outsourcing bespoke programs, so that there was no redundancy situation.

28. The Claimant responds that the very term LC/NC is self-explanatory, and as she is a coder it is self-evident that the needs of the business for expert coders has diminished, however much work is put through the IT department.

29. I decided that the guidance in Parekh v LB of Brent [2012] EWCA Civ 1630[1] meant that I should deal with the case on this basis, and both parties agreed.

30. I enquired about the team now in place and it is smaller than before the reorganisation and about half are junior staff, when there were none before.

31. I decided this issue in favour of the Claimant: she was constructively dismissed by reason of redundancy. As the Claimant's case is that she should

[1] 31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v. Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v. Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v. English Heritage [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.

have been dismissed as redundant and would have volunteered for redundancy it could be argued that this is a case of a fair constructive dismissal for redundancy. I decide otherwise. The fundamental breach of contract of the Respondent is in failing to address the restructure as a redundancy situation, so as to seek unilaterally to impose substantial changes to the Claimant's contractual terms and conditions of employment, as a result of which she resigned.

32. That is not the end of the issues, however, for the Claimant seeks a statutory redundancy payment (over £12,000), as the gateway to an enhanced Civil Service Compensation Scheme ("CSCS") redundancy payment (over £80,000). The Respondent relies on S159 of the Employment Rights Act 1996 to deny that the Claimant is entitled to a stat redundancy payment. They say that the CSCS gives rise to expectations, and does not confer rights, and that the Employment Tribunal does not have jurisdiction over that scheme. In any event, they say, this would be a claim in contract and would be limited to £25,000 because that is the limit of the Employment Tribunal's jurisdiction in breach of contract claims.

33. The Claimant responds that at least the findings of fact of the Tribunal may enable her to apply to the CSCS for payment.

34. I determined this issue in favour of the Respondent. I have needed to make findings of fact in this judgment. It is not for me to opine as to whether these findings may assist the Claimant in applying for payment under the CSCS.

35. However, as there was a constructive unfair dismissal the Claimant is entitled to a basic award equivalent to a redundancy payment and to a compensatory award.

Facts found

36. There was a lot of evidence. I make findings of fact necessary for my judgment. I have considered all the evidence put before me and it is not necessary for me to make findings of fact for everything about which evidence was given.

37. In 2001 the Claimant started working for the Respondent as a junior applications developer at the Higher Education Funding Council (HEFC"), having been encouraged to apply for that role by a professor at the University of Bristol where she was working as a secretary. (The Claimant is rightly proud of her career progression, and her strong feeling that she did not wish to regress is completely understandable.)

38. The Claimant was twice promoted. In April 2018 her employment transferred to the Respondent, created by a merger of the HEFC and the Office for Fair Access. Her role was *"mapped"* to that of *"Digital Developer"*. In her witness statement she described her role as a continuation of designing and building bespoke software solutions, determining the most appropriate technologies, frameworks and languages to use, taking responsibility for code quality and mentoring junior developers. In her oral evidence she expanded that

description. Her role was to agree the scope of a program, analyse the task, write the program, test it, and ensure that its implementation was successful (debugging and amendments).

39. Sarah Trewella is Chief Technical Officer. She is not a hands-on programmer. In January 2021 it became known that Ms Trewella was looking to restructure the IT department and in February 2021 a document about a project indicated that the Respondent was looking to adopt a *"configuration over code"* approach. This caused the Claimant concern.

40. The Claimant approached Sarah de Vere of human resources about this. Ms de Vere's witness statement reports that there was no approach by the Respondent to the Cabinet Office to approve enhanced redundancy payments (as would have been required if such payments were to be offered or paid). Ms de Vere stated that it had been decided (presumably by Ms Trewella, or the senior management team) that this was because the reorganisation was not considered to have any reduction of work of a particular kind, and no intended reduction in headcount (as an increase was intended). As can be seen from the summary above, I find the first conclusion was wrong, and in fact the headcount has reduced, both in number and in levels of expertise.

41. On 12 April 2021 Ms Trewella told IT staff that job descriptions were to be reviewed and updated. On 10 June 2021 consultations were announced about the changes which were to be implemented. There was no discussion about whether the changes should or should not be implemented, and the discussion was to be about roles going forward. The Claimant takes no issue with this. Her case is (and always has been) that the Respondent was entirely within its rights to change the way it handled its IT (or any other) needs. Her case is that the discussion should not have assumed that there was no redundancy situation but discussed that as an issue, and having done so should have concluded that there was a redundancy situation.

42. The plan was sent to the Claimant and others on 21 June 2021[2]. The strategic principles were four:

- *Digital and Technology services should demonstrate they have sought to use existing approved technologies before delivering new ones.*
- *Where it is not possible to use existing approved technologies, commercially available products should be considered.*
- *Only having ruled out the former two options should a new solution be built, either in-house or through third parties. New solutions must be sustainable long term.*
- *The main principal (sic) will be to adopt a low code / no code approach to software development. Configuration of existing products and solutions should be the first option, using standard tools for development wherever possible.*

43. Plainly this is completely different to using an in-house team of programmers to design build install and test bespoke systems. This is the nub of the Claimant's case. It is self-evident that the work the Claimant was doing

[2] From 169, 14 pages

was to be the last resort to be used only if there was no other way of getting a project done, and even if it was necessary to build a bespoke solution it might be outsourced.

44. The consequences of this are obvious. Since all systems were designed by the Claimant and her team, the change meant there was to be less coding work in future. What was bespoke would if possible be replaced by off the shelf solutions which would be tailored, and anything that could not be met that way might be outsourced and not done in house. This is a diminution in the work the Claimant did. The Respondent does not dispute this but says that there would be a great deal of IT programming to do, that configuring systems requires coding skill, and that the swift evolution of IT systems meant that the roles of programmers needed to evolve swiftly too.

45. I decided that the Respondent's arguments were sound arguments in principle, but there came a point when the change was so great a deskilling of the role that it was not a development due to technical changes and enhancement, but to replace the work of a skilled programmer with work that can be done by someone with a lower level of expertise, and that this change was of that kind not the former. There was less work of the type the Claimant did, and what she was offered was not a suitable alternative.

46. This is clear from the proposal itself, for the following reasons.

47. The proposal contains the statement:

> *"It is imperative that IT skills are at the right level in the right area to deliver service, provide support and manage the level of change the organisation requires"*

I note the phrase *"at the right level"*. This can only mean, in the context of this reorganisation, that there were too many high-level skills and not enough lower level (less expensive) IT team members.

48. Under the heading *"Rationale for Strategic Principles"* is the statement:

> *"Software development requires significant resources and ongoing support to ensure systems and services are kept up to date both in terms of functionality and ongoing security. Smaller organisations typically struggle to keep up with demand, resulting in bottlenecks to development, delays to delivery and security vulnerabilities. The OfS' core responsibility should always be our regulation obligations and over the past few years the organisation has been moving away from spending significant resources in bespoke software development, therefore the strategic principles will support this continued direction of travel."*

49. From this it is apparent that the aim is to reduce cost, and to reduce in house bespoke software development. That was the Claimant's job.

50. The plan set out organisational changes, set out at 5.1. It was stated that the existing roles would remain the same, but some would have different job

titles or reporting lines. At 5.3 it was stated that new posts would be a suitable alternative for existing post holders. The Claimant was earmarked for the role of *"Lead Digital Developer"*, of whom there would be two.

51. Two points arise. First, if this was a *"suitable alternative"* that presupposes the existing role has been removed. Secondly, there were only two such roles. By reason of the title *"Lead"* the other roles were less senior than that of the Claimant. There were (at 5.4 of the proposal) 4.5 roles as *"Digital Developer*", which from the job title is self-evidently a lesser role.

52. Accordingly, the document proposing the restructure was on the basis that the Claimant's role was to go, and that a new role that was said to be suitable alternative employment was offered, and in the new structure there were fewer roles at the Claimant's level.

53. For the second reason set out above there was a redundancy situation. For the first reason set out above the Claimant herself should have been a person made redundant, because the Claimant wished to have voluntary redundancy, and there were only 2 posts at her level of a team of 6, and when faced with a redundancy situation an employer should first consider voluntary redundancies before compulsory redundancies (and there was no reason put forward as to why the Claimant would have been denied voluntary redundancy had the Respondent accepted that it was a redundancy situation).

54. This presupposes that the new role was suitable employment, and I conclude that it was not, so that anyone not wishing to take the role was within the definition in the Employment Rights Act 1996 of redundancy.

55. There was consultation. The Claimant voiced cogent objection to the Project Manager role, which was one destination for coders. She said that managing a project was managing not coding.

56. This approach was what Ms Trewella intended to implement. She emailed a colleague of the Claimant (her line manager PN), who shared the email with the Claimant. The date of the original email was not clear, as it was the text that was copied and pasted to the Claimant and that did not include the date. The Respondent did not produce the original. (I make no criticism of the Respondent in this regard (or in any other) for the text of the email was accepted as genuine and it does not appear that they were asked for it. The Respondent's witnesses all gave clear coherent evidence. That I do not agree with their conclusions should not be taken as any criticism of their bona fides or reliability as witnesses.) That email said:

> *"The Low/No Code approach will refer to everything we do. The strategy is to move away from bespoke in-house development across all applications used in the organisation. As outlined in the consultation document the whole strategy for all services and products will be to Use, before Buy, before Build and if we decide that we need to build then consideration will need to be given about whether that development is done in-house by our in-house team.*
>
> *As a fairly small organisation we haven't got the level of resources to have a high performing in-house software development function. That is*

not to say we don't have good people, we do – but it is proving difficult for the small team to keep up with the level of change and development the organisation will need…

Having said that, it is recognised that some development may still be required and this is reflected in the JD."

57. This email can only mean that high level coding will be only an incidental part of the available work. High level coding was the whole (or the major part) of the Claimant's job. That job was to go.

58. On 22 June 2021 the Claimant was invited to a consultation meeting. The letter set out in five bullet points the matters to be discussed. The fourth was to *"confirm your preferred suitable alternative role"*. This assumes that, first, an alternative role is needed (meaning that the current role was no longer available) and that all the roles offered were considered suitable. The question of whether any of them were suitable was never discussed, as the Respondent took the view that this was not a topic for discussion.

59. The job description provided for the Claimant[3] was originally as IT Solutions Manager. That idea was dropped when the Claimant objected to the removal of almost all coding work. The first page stated:

"The aim of the role … is to contribute to the agile delivery of the Digital Solutions team's objectives through design configuration or development, implementation, testing, documentation and support of OfS business applications and systems both internal and public facing utilising a low/no code approach wherever possible."

It goes on to detail configuration of bought in software products and implementing the use of Apps.

In the design and build section the first stated job role is to identify and support a low/no code approach to development wherever possible.

60. The job offered to the Claimant in the new structure was to cease designing and building software solutions to the Respondent's software needs, and instead to seek out off the shelf packages and then configure them to integrate into the Respondent's other software. The whole point of the restructure was to avoid in-house bespoke development whenever possible, and it was the Claimant's job to provide that, and the Respondent was to do as little of it as possible. The issue, therefore, is whether the roles offered to the Claimant were *"suitable alternative employment"*.

61. I find that there was no suitable alternative employment for the Claimant within the Respondent's new structure. The skill required to do the work of configuring and integrating low/no code solutions should not be underestimated, as the phrase *"no code / low code"* might indicate a low level of skill is required. To make a bought in program fit the organisation and (even more complex) to make it marry seamlessly with other programs is plainly far from simple. It is,

[3] Page 151 et seq

however, a long way away from designing from scratch a software solution and then writing it in Python or other coding language, testing and installing it and amending it as necessary.

62. Further, it is clear from the evidence of the Claimant, and from the experience of Andrew Beaton and of Sarah Trewella, that high level coding skills have to be used or are lost.

63. The Claimant was a long serving team member who had expected to have a one organisation career, particularly given her pension entitlement, largely irreplaceable in the private sector.

64. She found the process and the fact that the Respondent was pressing on with moving her to a role that she felt (reasonably) would be the destruction of the career she had created for herself over the previous 20+ years very distressing. She was not reassured when she found out that it was intended that she be referred to occupational health.

65. On 28 July 2021 the PCS sent in a detailed response[4]. This was with great input from the Claimant. It clearly set out the deskilling and loss of status argument[5].

66. On 29 July 2021 she was signed off from work with (in effect) work related stress anxiety and depression. She did not return to work and ultimately resigned on 15 November 2021 with immediate effect.

67. On 05 August 2021 the result of the consultation was announced, and the process would continue. It was accepted that a Project Manager role (originally offered to the Claimant) was not suitable, but this was not a problem as one of the software developers had resigned, so there were enough *"Digital Specialist"* roles for the others.

68. Ms Trewella's evidence was that at the time of the restructure she expected coding work to be about 30% of the Claimant's work after the restructure, but that the work of the seniors has turned out to be 50% or so. That is inevitably more than predicted because now about half of the department are more junior so do less complex work. It is still a considerable reduction. The statistic does not deal with the other point, which is that the work is of a different calibre to that she had been doing, as I find to be the case.

69. On 13 August 2021 the Claimant raised a six-page grievance about the restructure. It said that the Respondent should have carried out a redundancy consultation. It is lengthy but is summed up in three short excerpts. At the foot of page 2 the *"work of a particular kind"* which had cease or diminished was *"the development of bespoke software"*. Part way down page 3 – *"I do <u>not</u> wish to be forced into a role that changes my career path against my will and progressively deskills me by side-lining my professional skills in favour of a less specialised skillset."* and at the end, that she hoped that the Respondent would reconsider the request of her union, PCS, that people in her situation should be offered voluntary redundancy.

[4] Page 202 et seq
[5] Point 2b) page 203

70. The Claimant also pointed out in her grievance that Sarah Trewella did not have the skills and experience necessary to assess matters correctly. This is the case, because Andrew Jackson appointed Andrew Beaton to report for the grievance appeal for that reason. Mr Jackson is Ms Trewella's deputy. She does not have coding skills or knowledge greater than those of Mr Jackson.

71. Mr Jackson felt that he had not the technical expertise to report on matters, and so asked Andrew Beaton to undertake a review. Mr Beaton's evidence was that he was IT Technical Products Manager. He had been a programmer and to avoid losing that expertise undertook voluntary work outside of his work for the Respondent (he designed and built a program called *"Home Assistant"* used by his local authority to enable everyone to find out with ease which bins will be collected when). Plainly managing is not suitable alternative employment for a software coder, and that was what the Claimant was originally offered, until someone resigned and so there were now enough programmer roles for all the team.

72. The Claimant started applying for other roles. On 19 August 2021 she was offered the job she now has. She did not accept it. She resigned on 11 November 2021, the day after the grievance outcome meeting (and because of that meeting). She then contacted the company who had offered her the job, and the vacancy had not been filled, and she started there on 29 November 2021.

73. The Claimant's witness statement sets out the chronology of events.

74. The colleague who had sent her the email was her long-time manager. He did not feel it right to deal with her grievance as he would not be or be seen to be impartial. He suggested an external person be appointed to deal with the grievance. The Respondent did not agree, and appointed Andrew Jackson to deal with it. He is Deputy Chief Technology Officer. That means he reports to Sarah Trewella who is Chief Technology Officer. The grievance was against the way Ms Trewella had dealt with and implemented the restructure. The Claimant's perception that it was unlikely that Mr Jackson would overrule his boss is entirely understandable.

75. The implementation of the new structure was postponed because of the grievance. On 21 August 2021 Mr Jackson asked the Claimant to a meeting, held on 26 August 2021. Mr Jackson felt that while he was experienced in IT he had not worked *"on the ground"* (as he put it in his witness statement[6]) for some years he wanted a report from someone who understood the technical requirements of the Claimant's job. He asked Andrew Beaton, IT Technical Products Manager to investigation the grievance.

76. Mr Beaton is within the IT department, and Mr Jackson is senior to him. The Chief Technical Officer's decisions were the subject of the Claimant's grievance, and her deputy was handling it, and depending on an investigation report from someone below him in the management structure. I do not doubt the integrity of any of the three witness for the Respondent, but the likelihood of *"group think"* or *"confirmation bias"* is plain.

[6] Paragraph 13

77. It is apparent also that the only people in the decision-making process who really understood the Claimant's job were the Claimant and her colleagues.

78. Mr Beaton had input from a programmer, CA. However, he was a short-term contract worker, and it is unclear why Mr Jackson found the short email from CA dated 18 October 2021[7] to be compelling evidence. That email says:

> *"In summary, we can't go full on 'Low-Code No-Code as we have items in the CASP backlog which require some dev works. I went through the CASP backlog with Nimesh (the new contractor Dynamics Developer) and he says "it will be unmanageable in the long term if we went down the route of Low Code No Code on a full scale. He said if it's to maintain 'simplicity' then yes 'configuration only' will suffice but the moment the business starts to require more options added, it will immediately become an issue".*

It continued ended with a chart of projects being handled, and before that the observation:

> *"… se below, you can see that there are a lot of work requiring actual writing of codes. I must stress however, that the difference here is that before any work is started on any User Story[8], we will ask the question "can this be done with configuration/out of the box Dynamics functionality?" before going to the coding."*

79. This is, in fact, wholly supportive of the Claimant's case. It has never been the Claimant's case that no coding would be required of her in the new structure. Her case was always been that there would be much less of it, because the whole point of the restructure was to avoid coding wherever possible, and that when it was needed it would be configuring out of the box systems not writing new ones. The comment that they could not go *"full on"* Low Code / No Code meant only that there would be a transition period during which some coding would be needed. The last sentence reiterated that going forward before any project started they would look to see if it could be completed in a Low Code / No Code way. This all reinforces the intention to cease or diminish the Claimant's work.

80. There were many analogies used in the hearing, which the parties and I found helpful. Perhaps the most apt analogy for the situation of the Claimant is that if she was a brain surgeon, and the hospital had found a robot to do much of the work, but the surgeon would still need to make the incisions and stitch the patient up at the end and tend the robot now and then, which a much less skilled person could do, it would be impossible to say that the needs of the hospital for skilled brain surgeons had not ceased or diminished.

81. The report of Mr Beaton took until 26 October 2021. This was 2½ months. Mr Beaton was a sincere witness. At the start lots of people were on holiday. He was sick for a week. He had quite a lot of paperwork to look at, and people to interview. He had his own job to do. He cancelled other holiday to

[7] Page 293
[8] A new software solution project.

finish it. It was too long a period, as he accepted, with regret, but I do not find the delays so long (or for reasons) that make it culpable.

82. Andrew Beaton's conclusion was that the Claimant had not fully understood the Low Code / No Code process. He concluded[9] that the role of IT Digital Solution Specialist was not fundamentally different to the Digital Developer role. Reference to specific coding language had been removed from the job description and become more generic. His opinion was that:

> *"…the direction of the role would not be detrimental to the long term career of the software developers or would negatively impact their skills. On the contrary, my findings were that it would add an extra skill and would provide even more opportunity for learning and development."*

83. A judge should rightly be wary of contradicting the sincerely expressed evidence of a witness giving evidence about computer programming matters, who is skilled and experienced in his field. However, I am comfortable disagreeing with that conclusion, and agreeing with the Claimant's contrary opinion.

84. This is because of the answers to my enquiries of the Respondent at the end of the hearing. Of the 6 people in the Claimant's erstwhile role, all but one has left. There is now one person fewer than before, and about half of the team are now lower skilled. The 5 who left all left employment they enjoyed, and in most cases had been there a long time and with a pension contribution from their employer of 29% of salary. The one who remains (MK) is relatively new and was trained by the Claimant. It is likely her skill level was not as high as some of the others. They voted with their feet.

85. Andrew Beaton provided his report to Andrew Jackson, and that ended his involvement. Andrew Jackson held a meeting with the Claimant and her trade union representative on 10 November 2021, about two weeks after Andrew Beaton's report. This was not overlong. It was a Teams meeting. His witness statement records[10] that *"the LC/NC strategy would provide the opportunity to provide new skills"* and that there was *"a significant ongoing requirement for software development that needs developers to be knowledgeable and skilled in software development."* The Claimant's point, which I accept, is that she did not want new skills which she viewed as being of a lower skill (and status) level than her present role. I agree with the Claimant also that the fact that coding skills were needed to configure and to integrate bought in packages, or to adjust bespoke programs written by outsourced contractors, was not comparable to designing writing and making operational a program from scratch. The Respondent's need for people able to do that had almost completely ceased. It was the major part of the Claimant's role. It was not suitable alternative employment.

86. Andrew Jackson also concluded, as had Ms Trewella and Mr Beaton that the IT Digital Developer Solution Developer role was not fundamentally different to the Claimant's existing role. In coming to this conclusion Mr Jackson relied

[9] Witness statement paragraph 14
[10] Paragraph 20

heavily on the report of Andrew Beaton, with the attendant difficulties referred to above.

87. The meeting of 10 November 2021 was held on Teams. Mr Jackson talked the Claimant through his decision letter. He said that there was a significant ongoing requirement for the Claimant to undertake bespoke coding work, that there had been adequate consultation and that this was not a redundancy situation.

88. There are two flaws in this reasoning:

- while there would be coding to be done, the trajectory was downwards, because the whole point of Low Code / No Code was to reduce the need for bespoke coding; and

- the type of project was different – it was configuring *"out of the box"* proprietary software packages, not designing whole systems, and while requires skill it is more limited than designing writing and implementing whole systems.

89. The Claimant correctly points out in her witness statement that the investigation did not involve her colleagues. Asked about this, Mr Jackson said that he had been advised by human resources that they should not be consulted, as they too were part of the process. This is inexplicable. Who better to ask about what was proposed than those affected by it? They might have a personal interest in the outcome, but what they had to say about it should have been ascertained and evaluated. What that was is apparent from the fact that all but one left at or soon after the change was made.

90. It is, of course, possible that they all found an evolution of their roles unacceptable, but an evaluation of the reasons advanced by the Claimant that this was a lower status and deskilling change is convincing.

91. Instead of interviewing all the Claimant's colleagues, only two people were interviewed, CA and RW. CA has been referred to above[11]. In the restructure RW became IT Technical Solutions Manager, which was a promotion, and so benefitted from the restructure. There is no reason apparent to me why his view was considered important to the grievance but those of the Claimant's colleagues was not.

92. Mr Jackson also interviewed Ms Trewella, on 21 September 2021. She said that she had put one of the software developers into the Project Manager role, because there were not enough designer roles in the new structure, but this was not necessary when one of the Claimant's colleagues resigned. As the Claimant correctly sets out in her witness statement[12] this clearly shows that there was a redundancy situation even on the Respondent's own case. There was one too many so one was to be moved to a project management role, which became unnecessary when one resigned so matching the numbers of people needed. This means that before that resignation there were in the restructure fewer roles than before – one person was redundant. (The

[11] Paragraph 78 of this judgment
[12] Paragraph 76

Respondent accepted that this would not have been suitable alternative employment for the Claimant, and this is apparent from the evidence of Andrew Beaton, who maintains his programming skills out of work.)

93. The Claimant felt that it took 3 months to get this outcome, and that the process was unfair. Andrew Jackson had consulted unfairly, speaking to his line manager, relying on Andrew Beaton and only two others (CA and RW). He had left out her colleagues and not given adequate consideration to the trade union representations.

94. One of the grievances was that the CTO had not the technical understanding to assess alternatives. Mr Jackson said that the CTO had referred to technical members of the team "to ensure that the correct technologies were included" but recommended that *"any future Restructure Policy should give consideration to providing managers with the opportunity … to consult with subject matter experts outside of the process in respect of highly specialised roles"*. It is hard to think of a more highly specialised role than that of the Claimant. Both Ms Trewella, who made the decisions, and Mr Jackson, who dealt with the grievance, accepted that they did not have detailed knowledge of the Claimant's work and skills. There could hardly be a clearer case for an external impartial report on whether the Claimant could reasonably be expected to move to the new role set out for her.

95. Andrew Jackson's six-page report dated 26 October 2021[13] contains a recommendation that:

> *"If there is an opportunity to expand the development team, potentially hiring of more junior developers at the lower banding will allow htem to work on the implementation of low code solutions alongside our more experienced developers who can then in turn concentrate on the more technical parts of any solutions needed."*

96. Logically it is possible for these new junior people to be additional to the more skilled developers, but that was not the case – the plan was to have five not six, until one resigned. That must mean that some of the five would be doing work that could be done by more junior staff. And this was what happened once the restructure took place and people resigned. Some of them were replaced by junior staff.

97. I have considered whether the fact that some new senior developers have been recruited means that the new senior role was similar to the Claimant's role. I decided:

- that people were recruited at a similar pay rate does not mean that the roles are the same. For the reasons given above I find that the new role is different to that of the Claimant, and;

- even if it was the same type of role, the number of people holding the new senior role after the reorganisation was three, and before it was six, so 50% of the senior people were redundant because of the reorganisation; and

[13] Pages 295-300

- that the reorganisation intended to keep all 6 (initially) does not alter that, because to make such people redundant required Cabinet Office approval because the cost of doing so is so high, and it could be preferable to pay people over the odds instead, particularly as they would be over skilled for the jobs they were doing.

98. The Claimant resigned a day after the grievance decision meeting. This was the *"final straw"*. I find that it was the reason for the resignation. I find that the resignation was without delay. I find that there was no affirmation of the contract of employment because the conduct of the grievance was itself a fundamental breach of contract, and the Claimant found this out only on the day before she resigned.

99. For these reasons I find that this was a constructive dismissal. The reason was redundancy. It was unfair, because although the Claimant wished to volunteer for redundancy, the Respondent refused to accept that there was a redundancy situation, and so the Claimant was left with no choice but to resign.

100. The Claimant did not appeal the grievance outcome. She was right not to do so. There was no one to whom she might appeal with any hope of success.

101. I find that the Claimant did not resign to go to her new job. Had that been her wish she would have resigned when she was offered it, and even that would not have been fatal to her claim. She wanted to stay with the Respondent, in her role, and if that was not possible, to be made redundant. When that was not permitted, she left and by doing so mitigated her loss.

102. The Claimant is therefore entitled to a basic award and to a compensatory award for unfair dismissal.

103. The basic award is the same as a redundancy payment. The entitlement to a redundancy payment is extinguished by the receipt of a basic award.

104. Counsel for the Respondent is correct in her submission that the Claimant was a civil servant not entitled to a statutory redundancy payment by reason of S159 of the Employment Rights Act 1996. I do not award a redundancy payment. The claim is in the alternative, and the claim for unfair dismissal succeeds. S159 of the Employment Rights Act 1996 does not affect the rights of Civil Servants to claim compensation for unfair dismissal.

105. The award for unfair dismissal is unlikely to contain much if anything in the way of loss of income for the Claimant was able to move almost immediately to the job she now has, at a similar salary.

106. The Claimant will have substantial pension loss, and consideration will have to be given to the calculation of such loss. A compensatory award is limited to one year's pay even if the loss is larger.

107. A remedy hearing will be needed to calculate the awards unless the parties agree.

108. I do not reduce the award for failure to appeal, for the reason given above.

109. I do not increase the award for failure to follow the Acas Code on grievances. While I disagree with the outcome that is not a reason to augment the compensatory award. The Claimant has not identified any part of the Code that was breached by the Respondent.

Employment Judge Housego
Dated: 16 February 2023

Sent to the parties on: 06 March 2023

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For the Tribunal:

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