EMPLOYMENT TRIBUNALS

Claimant: Mrs S Millar

Respondent: The Oak Trust

Heard at: Manchester Employment Tribunal **On:** 23, 24, 25 and 26 January 2023

Before: Employment Judge Dunlop
Mrs D Radcliffe
Mr I Taylor

Representation

Claimant: Mr I Millar (Claimant's husband)
Respondent: Miss R Kight (Counsel)

JUDGMENT having been sent to the parties on 27 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is an Academy Trust operating one secondary school and two primary schools in Oldham. The claimant was formerly the business manager at one of those schools, Fir Bank Primary school. She was dismissed by reason of redundancy. She challenges that dismissal as being both unfair and discriminatory on the grounds of age.

The Hearing

2. The hearing took place fully in person at Manchester Employment Tribunal. We had regard to a 600+ page joint bundle of documents and a small supplemental bundle prepared by Mrs Millar. We considered the documents which were referred to in the witness statements and to which we were expressly directed. We did not read every document in the bundle.

3. We heard evidence from the following witnesses. For the respondent: Mrs Gillian Hindle, co-CEO, Mrs Joy Clark, (former) CEO and Mr Maurice Scott, Governor. Mrs Millar gave evidence on her own behalf and called two

supporting witnesses, Mrs Val Rutherford, a former colleague and Mrs Christina Holdsworth, the Head Teacher of Hillside Nursery School. Both parties prepared helping written closing submissions which the Tribunal Panel read carefully, before inviting the representatives to supplement their written submissions with further oral submissions.

The Issues

4. The issues in the case were set out a case management summary prepared by Employment Judge Horne following a preliminary hearing on 3 March 2022. They were set out as follows (the numbering has been adjusted):

Unfair dismissal

1. **It is common ground that the claimant was dismissed. (In its response, the respondent denied that there had been a dismissal. That denial was based on an argument that, under the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999, the claimant was deemed not to have been dismissed. It is now accepted that the 1999 Order has no effect on dismissals for the purposes of Part X of the Employment Rights Act 1996.)**

2. **The issues are these:**

    2.1 Can the respondent prove that the sole or principal reason for the dismissal was that the claimant was redundant? (This is will turn on whether the sole or principal reason for dismissal was that the requirements of the respondent's business for employees to do the work of a Primary School Business Manager at Fir Bank Primary School had ceased or diminished or were expected to cease or diminish.)

    2.2 If so, did the respondent actreasonably or unreasonablyin treating that reason as sufficient to dismiss the claimant?

    2.3 If the dismissal is found to be unfair, the respondent will argue that the claimant's compensation should be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event. The parties agreed that this issue should be determined at the same time as the fairness or otherwise of the dismissal.

Age discrimination

3. **The claimant's case is that, because she was nearly 55 years old, the respondent treated her less favourably than it would have treated a comparable person who was not approaching her 55th birthday. The less favourable treatment was the refusal to restart the consultation process. That decision was communicated to the claimant on 26 June 2021 and again on 20 and31 August 2021.**

4. **The respondent accepts that the claim in respect of this alleged act of discrimination was presented within the statutory time limit.**

5. **It is common ground that the respondent refused to restart the consultation process. The question for the tribunal is, what is the reason for that refusal? Was it significantly influenced by the fact that the claimant was nearly 55**

6. **Neither party seeks to draw a distinction between the claimant's age (on the one hand) and the amount of her pension (on the other). Nor does the respondent seek to defend any alleged discrimination on the ground that refusal to restart the consultation process was a proportionate means of achieving a legitimate aim connected with public expenditure on pensions. The respondent's case, quite simply, is that the claimant's pension entitlement had no bearing at all on the question of whether to re-run the consultation process.**

Remedy

7. The claimant has provided a schedule of loss.

8. It was agreed that there should be a split hearing. If the claimant's discrimination complaint succeeds, the pension loss calculation is likely to be complicated.

9. There are likely to be issues about how the claimant's redundancy payment affects her remedy. These include:

9.1 The amount of any basic award will be reduced by the amount of the redundancy payment. It may well be that the basic award will be reduced to zero, as the claimant's redundancy payment may well have been more generous than her statutory entitlement was. In order to be sure of that, however, it may be necessary to calculate what the claimant's basic award would have been. This will necessitate resolving the dispute about the start of the claimant's continuous employment, applying section 218 of the Employment Rights Act 1996.

9.2 The respondent may also argue that the claimant was not entitled to a redundancy payment at all under the 1999 Order because she started work at a new school within 4 weeks of termination, and/or that she received a more generous redundancy payment than her entitlement. If that is the case, the amount of any windfall is likely to be deducted from any compensatory award for unfair dismissal.

5. We discussed these issues at the outset of the case. As may be inferred from the text reproduced above, Mrs Millar had received a redundancy payment at the end of her employment. This was a substantial payment, in excess of £20,000. We understand from the parties (although make no determination on this point) that two-thirds of that sum represented the Mrs Millar's statutory redundancy payment with a further one-third being an enhancement which she was entitled to under the terms of her contract.

6. In the course of this litigation, it came to the respondent's attention that Mrs Millar had seemingly started employment at a nursery school maintained by Lancashire County Council shortly after her redundancy. In those circumstances, the respondent asserted that the redundancy payment made was recoverable by virtue of the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999. The respondent did not seek to make any counter-claim in these proceedings for the recovery of the money and it seems unlikely that there would be jurisdiction for the Tribunal to determine such a counter-claim in any event. Nonetheless, as Employment Judge Horne envisaged, the claimant's entitlement (or otherwise) to that payment would be relevant in calculating her compensation if she was successful, particularly to the extent that it exceeded the basic award.

7. Very shortly before this hearing, I understand as a result of correspondence between the parties, the Millars took the decision to voluntarily repay the redundancy payment (without accepting that the respondent was entitled to such a repayment). This action, which appears to have been taken with a view to 'simplifying' the matters to be determined at this hearing unfortunately had the opposite effect.

8. We discussed at the start of the hearing the possibility that if Mrs Millar was unsuccessful in her claims of unfair dismissal and age discrimination that would conclude the case with no requirement for a remedy hearing. The parties would be left with no determination of the question of whether the 1999 Order applied and whether the money which had been returned to the respondent should, in fact, be repaid to Mrs Millar. Both agreed that they wanted that question determined as part of these proceedings. The respondent therefore consented to the claimant being permitted to amend her claim to include a claim for a statutory redundancy payment and a contractual claim in respect of the enhanced portion of the redundancy payment.

9. We then discussed whether those claims should be determined (as would usually be the case) as part of this liability hearing or at a second hearing (which would technically be a further liability hearing as well as, if needed, a remedy hearing in respect of the unfair dismissal and/or age discriminaton claims). Mr Millar made the point that the evidence of one of the claimant's witnesses, Mrs Holdsworth, went entirely to this point and Mrs Holdsworth had made arrangements to attend. He also emphasised how stressful the litigation had been to both Mrs Millar and himself and asked that as much be determined during this hearing as possible. Miss Kight, on the other hand, was concerned about the possibility of this matter being determined in this hearing. She pointed out that the respondent had understood that it would be determined at the Remedy Hearing in line with the list of issues. It was a complicated legal issue and she considered that she would be unable to take instructions on and prepare to argue that point, whilst in the course of the Tribunal hearing itself.

10. The panel determined that we would hear the evidence relevant to this issue during this hearing (which both parties were content for us to do) but would hear submissions on that evidence and make a determination of the claims at the next hearing.

Findings of Fact

Background

11. Mrs Millar started employment Fir Bank Primary School ("Fir Bank") in 2004. She had previously worked for Oldham College and, as a result of that, was deemed to have continuous service from 1996. At all material times for the purposes of this case, her role was School Business Manager which was a Grade 7 role within the relevant pay scale. The school also employed a School Administrator, which was a Grade 3 role. This role was occupied at the material time by Ms Sally Bunting.

12. The respondent Trust was formed in 2017. As noted above, there are three schools in the Trust: North Chadderton (a secondary school), Fir Bank and Thorp Primary School. Thorp Primary also employed a School Business Manager, who was Mrs Val Rutherford. Mrs Rutherford was employed at Grade 6. Like Mrs Millar, she was assisted by a Grade 3 School Administrator. We understand that Mrs Rutherford has less responsibility for strategic/budgetary decisions than Mrs Millar, hence the differentiation in their grading.

13. North Chadderton had a more complex administrative set up, reflecting its larger size, and employed more people in administrative roles. Following the formation of the Trust, an over-arching 'Trust' administration office was established. This was located on-site at North Chadderton, but in a separate building from the North Chadderton school administration.

14. Following its formation, the respondent began to centralise various functions, in line with the expectation that the formation of multi-academy Trusts should lead to efficiencies. In particular, strategic finance and business decision-making was centralised, along with procurement of services such as payroll and HR, ICT support, premises maintenance and health and safety.

15. The relevant witnesses all agreed that the School Business Manager roles at Fir Bank and Thorp changed as a result of these broader changes. There was some disagreement as to the balance of the responsibilities within the role as it had existed before the formation of the Trust and as it existed as at the start of 2021, but broadly it is clear that the strategic and executive elements of the role had declined, particularly for Mrs Millar who had done more of that work than Ms Rutherford. Although the workload itself was still significant, the role had become a more administrative one, involving liaising with the Trust office at North Chadderton more than engaging with a range of external providers. There was an increased amount of overlap between the day-to-day work carried out by the School Administrators (including staffing the school office to respond to parent or pupil issues and completing lower level-administrative tasks) and that carried out by the School Business Managers.

16. In a Trust board meeting on 10 February 2021 Mrs Hindle brought forward a proposal for "*a thorough review of the business and operations activities across the Trust…including the role of the schools' Business Managers, to see if any financial savings can be identified*". It was agreed that Mrs Hindle would carry out such a review and report to the next meeting on 24 March 2021. It was further stated that "*members of the central team would meet with all the Headteachers after half term and then gather evidence of all those involved, including a review of job descriptions*." We note here that Mrs Hindle's background was in schools' HR with the local authority. She had joined North Chadderton in 2001 as Executive Director of Business and HR and retained that role with the Trust. That was the role she held in February 2021, although she was soon after appointed to Co-CEO of the Trust.

Redunancy Proposal

17. Mrs Hindle duly produced a report setting out her proposals ("the Proposal"). This is undated and it is not clear whether it was presented to the Board meeting on the 24 March (it appears that that meeting did take place as it was in that meeting that the Board confirmed the appointment of Mrs Hindle as Co-CEO). The Proposal was, in any event, presented and approved at a Board meeting on 28 April 2021.

18. The Proposal proposes the deletion of both Business Manager posts, along with a (then vacant) Finance Assistant post in the central team and states

that this will result in a total annual saving to the Trust of £85,624. The report identifies that there will be one-off termination costs to be charged to individual school budgets, but these are not specified.

19. We heard evidence that, in addition to redundancy and notice payments, there would be, in respect of Mrs Rutherford, a "strain" payment due from the school to the Local Government Pension Scheme (LGPS). As a member who had reached the age of 55, if she was made redundant Mrs Rutherford was entitled to take her pension immediately following redundancy without actuarial deduction for early receipt. The employer effecting the redundancy would be liable to compensate the scheme by making a one-off payment, dependent on the employee's age and earnings level. We heard evidence that the 'strain' payment for Mrs Rutherford, who was around 60, was about £18,000. Under the timetable included in the proposal, there would be no strain payment associated with Mrs Millar, as she was to be dismissed on 31 August, and turned 55 on 18 September. She would therefore have no enhanced pension entitlement. (These findings reflect the agreed position of the parties, the Tribunal has not been taken to the rules of the scheme nor asked to make any determination of these points). Mr Scott, who conducted the appeal, agreed that he had received information as to what strain payment would apply if Mrs Millar's dismissal was delayed, and remembered it as being around £25,000, Mrs Hindle's evidence was that it may have been about double that of Mrs Rutherford, so although we do not have an exact figure we find that it was in the region of £25-32,000.

20. Given the size of the potential payment and the proximity of Mrs Millar's birthday to the proposed dismissal date, we find it highly unlikely that an experienced expert in schools HR such as Mrs Hindle would have overlooked this point in putting together her proposal. Although the strain payments were not specifically mentioned in the proposal, we find that they would have been very much on Mrs Hindle's mind and that the urgency of completing the process in order not to incur a large avoidable additional cost related to Mrs Millar was at the forefront of her mind throughout the process. Of course, there is nothing wrong with that in itself, provided that a commendable desire towards prudence regarding public funds does not influence the process so as to breach the employee's right not to be dismissed unfairly and not to be discriminated against.

21. There was no suggestion in the Proposal of any broader restructure or any additional staffing being required to cover the remaining responsibilities of the School Business Managers.

22. Mrs Hindle gave evidence that, in formulating the Proposal, she spoke to the headteachers of the primary schools and reviewed the relevant job descriptions. Neither of the head teachers gave evidence and there was no evidence (documentary or otherwise) as to what they had said or whether they were in agreement that the posts should be deleted. Mrs Hindle did not speak to Mrs Millar, Mrs Rutherford, or the two School Administrators about how the roles worked in practice and how the remaining work could be managed following the proposed redundancies. In particular, as identified to us during the hearing, whether the deletion of the posts would leave sufficient cover to staff the respective school offices, especially during times of absence for the School Administrators, including short absences when

their duties required them to be away from the office in another part of the school for some reason.

23. The Proposal included the following comments under the heading "*Measures to avoid redundancy*":

> *As per the policy, all measures will be taken to avoid compulsory redundancy. The Trustees will make every effort to reduce the potential for compulsory redundancy by considering and implementing the following measures:*
>
> - *Natural turnover*
> - *Voluntary options*
> - *Redeployment*
> - *Flexible retirement in line with pension schemes*
> - *Offers of suitable alternative employment*

24. Appendix B of the Proposal was headed "Managing Change Timetable". That timetable is worth setting out in full:

28 April 2021	Meeting of the Trust Board to approve the Statement of Change.
4 May 2021	Meet with Professional Association School/Branch representatives on the staffing changes. Invite any proposed amendments/comments from the unions. Meet with affected staff and Professional Associations on the proposed structure and staffing changes offer individual meetings with affected staff if requested. Letters to all affected employees. There is a minimum of 10 working days for consultation.
19 May 2021	Deadline for Consultation.
20 May 2021	Significant Change Committee meets to consider any written responses from staff and Professional Associations and to respond to those comments in writing. Write to all affected staff and trade unions of the outcome of the meeting
W/C 24 May 2021	Individual meetings with staff identified as compulsory redundant to discuss employment termination details. Letter to employees confirming meeting and offering right of appeal against termination of employment.
To be confirmed	Appeal hearings against termination of employment.

31st August 2021 Implementation

25. The respondent has a "Managing Change" policy which includes redundancies. That policy requires that the Statement of Change (i.e. the Proposal document) is made available to affected employees and union representatives and that 10 days' notice is given for a trade union consultation meeting or an employee consultation meeting.

26. It will be seen, therefore, that even at the outset the timetable proposed by Mrs Hindle was in breach of the respondent's policy as it did not provide for the requisite period between the proposal being confirmed and notice being given of the meeting on 4 May 2021. It was said by the respondent that this was agreed in consultation with the branch officials for UNISON (Tracey Delaney) and the GMB (Paul Hindle) who were expected to be in attendance, although there was no explanation as to why a date could not have been settled on in accordance with their availability which still gave the requisite 10 days' minimum notice. It is the experience of the members of the Panel that timetables such as this are a helpful 'roadmap' often employed in redundancy exercises. However, they are generally not set in stone and will often be aspirational, in the sense that the exercise will never be completed earlier than suggested by the timetable but there will very often (for a variety of reasons) be some slippage, meaning that the exercise is completed later, and sometimes significantly later, than originally envisaged.

27. On Friday 23 April Mrs Hindle emailed Mrs Rutherford to invite her to the meeting on 4 May. An identically-worded email was sent to Mrs Millar on Monday 26 April (reflecting their different working days). Neither email attached the proposal document, nor stated expressly that their roles were at risk. The evidence of Mrs Millar and Mrs Rutherford, which we accept, is that they appreciated there had been a change to the duties they were performing and expected that some sort of restructure would be proposed (including, possibly, that one or both of them might be asked to move to the North Chadderton site) but that they did not expect to be made redundant.

28. Both emails stated that "*I have invited your trade union representative – Tracey Delaney who can be in attendance*". This is, in our experience, an unusual practice. More commonly an employer will invite the employee to a meeting and inform them that they are entitled to bring a colleague or trade union representative. In fact, Mrs Millar had left UNISON a few months earlier. She later made enquires as to whether she could revive her membership to gain representation but was unable to do so. The statement was also incorrect in relation to Mrs Rutherford, who was in fact a GMB member, so also not entitled to be represented by Ms Delaney.

29. These emails pre-empted the decision of the Trust Board to approve the Proposal document on 28 May 2021. The confidential notes of that meeting show that governors questioned Mrs Hindle on aspects of the proposal, including whether the 62 working hours each week that would be lost could be successfully absorbed elsewhere. Mrs Hindle responded that a significant amount of those responsibilities had already been absorbed by the Trust and that it was not anticipated that more support would be needed,

unless the Trust expanded to take on more schools. Whilst the notes are clearly only a summary of what was discussed, it seems that this response focusses on the impact to the central team and omits any consideration of the impact of the proposal within the primary schools themselves.

30. Following the meeting, on Thursday 29 April 2021, Mrs Millar and Ms Rutherford were sent a further letter enclosing the Statement of Change and the Managing Change Policy. Monday 3 May was a bank holiday, so this left only one working day to consider the proposals or discuss them with union representatives (if relevant). This was the first time that Mrs Millar and Ms Rutherford understood that the proposal was not for a restructure, but for their posts to be made redundant. Both were shocked and upset. Mrs Millar was going away for the long weekend with friends and this added to her sense of having no time to give proper thought to the proposal in advance of the meeting.

4 May Meeting

31. As was common in the circumstances prevailing at the time the meeting was conducted by Teams and we find that was entirely appropriate. In attendance was Miss Clark, as CEO of the Trust, Mrs Hindle, Mrs Rutherford, Ms Delaney (UNISON) and Mr Paul Hindle (GMB).

32. The respondent insists that Mrs Millar was also "in" the meeting. Mrs Hindle and Mrs Clark both gave evidence that they heard her voice as she connected (although they could not confirm what she said) and the camera then shot up so all that could be seen was a tiled ceiling.

33. Mrs Millar gave evidence that she was unable to connect to the call, and the question of whether she was "in" the meeting was a major point of contention between the parties. Mrs Millar had gone home to join in privacy and had taken a laptop from school, but had difficulties connecting to the network. She believes when a connection was established she opened the call remotely on her desktop – hence the tiled school office ceiling being viewed from 'her' camera. She sought advice from the Trust's ICT officer, who eventually managed to assist her, but by that time the short meeting was over.

34. Mrs Rutherford recorded the meeting. However, her recording did not start as the meeting started so does not assist with whether Mrs Millar's voice was heard at the start. Ms Clark gave a prepared statement setting out some of the information from the Proposal and the agreed transcript of the recording starts part way through this. Ms Clark asked if there were questions or queries and Mrs Rutherford stated that she would just like to read the proposal again. Mrs Clark said that if either Mrs Rutherford or Mrs Millar would like a one-to-one meeting that could be arranged with Mrs Hindle, or they could put queries in writing. She then proposed that she and Mrs Hindle would leave so the employees and union representatives could have a discussion amongst themselves. Mrs Rutherford then raised an issue about Mrs Millar, informing Ms Clark "*I think Suzanne might have an issue… I don't think she's just left her mic off, I think she's got an issue…*". There was a little further discussion during which Ms Clark noted that she could see "*a classroom roof*" before asking Ms Delaney to "*liaise with*

Suzanne and update her on what I've said if she has been unable to hear me".

35. In cross-examination, the respondent adopted what seemed to be a critical or sceptical tone in relation to the fact that Mrs Rutherford raised the issue only at the end of the meeting. Given that the meeting was only a few minutes long, most of which was taken up by Mrs Clark's statement and given that Mrs Rutherford's focus would undoubtedly be on her own circumstances we considered this criticism to be misplaced.

36. Later the same day Mrs Millar emailed Mrs Hindle. She commenced by saying "*Apologies regarding the meeting today, technical issues, Ben eventually managed to sort me out. I have spoken to Val and she has updated me*".

37. Given that this was not a large-scale redundancy exercise, the panel find it surprising that Mrs Clark seemingly did not take time at the outset to ensure that both of the two people whom the Trust was proposing to make redundant were connected to the meeting and could see and hear and be seen and heard. Having not done so, however, it is conceivable that she genuinely believed that Mrs Millar was on the call whilst she was laying out the information she wished to give. We find it much harder to understand why she did not seek to establish the position when Mrs Rutherford raised her query.

38. We find that Mrs Millar was not "in" the meeting as she was unable to successfully connect (notwithstanding that the electronic data associated for the meeting showed that her account was signed in). Having regard to Mrs Rutherford's intervention, as well as the general etiquette of online meetings to which we have all had to become speedily accustomed, we consider that a respondent acting reasonably would have established that she was not "in" the meeting when the point was raised (perhaps, for example, by calling her if she was unresponsive to greetings or questions in the meeting) and taken steps to re-start the meeting, or convey the information over the telephone, or otherwise ensure that Mrs Millar did not miss out.

39. We also note that, leaving aside the issue of Mrs Millar's absence, this meeting could fulfill only a very limited role in the consultation process. Having regard to the short period of time that the employees had had the proposals, as well as the structure and set-up of the meeting it was clearly not envisaged that there would be any meaningful discussion between the parties on this occasion. There is nothing wrong with having a 'kick off' meeting to share information relating to proposals – that is a common and often helpful approach – but it does not go far, if at all, to discharge the employer's obligation to engage in consultation. Generally, where such an approach is adopted there will be further meeting(s) timetabled to afford employees opportunities to engage in consultation having digested the proposals.

Events between 4 May and 20 May

40. At 15.54 on 4 May, Mrs Millar sent a one-line email to Mrs Hindle requesting a one-to-one meeting, as envisaged by the Proposal document. She requested that Tracey Delaney be present. It appeared to be suggested by the respondent that this request was somehow a cynical attempt to introduce confusion or delay in circumstances where Mrs Millar knew she was not entitled to union representation. We reject this suggestion. Firstly, if Mrs Millar wanted to introduce delay she would not have acted so quickly in requesting the meeting. Secondly, it was the school who had introduced the union representatives into the process, and informed Mrs Millar, in respect of the first meeting, that Ms Delaney would be there as her representative. It was not unreasonable for Mrs Millar to suppose that they might do so again.

41. A few minutes later Mrs Millar sent another email. As referred to above, this mentioned the technical issues in relation to the teams call and then went on to ask four questions. All of these related to the arrangements for the proposed redundancy termination and included questions about notice period, the amount of redundancy pay, a cycle loan scheme Mrs Millar was participating in, and her pension. On the latter, Mrs Millar asked "*I am 55 on the 18th September and would like the early pension option without reduction in my benefits. As I am 17 days out can the Trust consider this?*"

42. The respondent made the point that none of the questions raised were about proposals to avoid redundancy. Whilst this is true, we accept Mrs Millar's evidence that, in her mind, this was one stage of the process. She wanted to understand exactly what she would be entitled to in the event of redundancy as well as having a conversation about what alternatives to redundancy might look like.

43. Mrs Hindle provided answers to the questions on 6 May. In respect of two points (the redundancy calculation and cycle to work query) this was a holding response as she was waiting for the answer to be confirmed. On the pension point she stated: "*As you are not 55 on 31st August, the trust are unable to release your pension early."*

44. The next day, 7 May, Mrs Hindle responded to Mrs Millar's request to have a meeting. She informed Mrs Millar she was in touch with Ms Delaney to arrange a convenient time next week and would be in contact when she had a date. 7 May was a Friday, so the meeting was expected to take place during the week commencing 10 May and there is another email in the bundle from Mrs Hindle to Ms Delaney proposing various possible time slots in that week.

45. It appears that Ms Delaney delayed in getting back to Mrs Hindle. We have no evidence about the reason for this delay. In any event, no date was agreed upon and there was no follow-up email to Mrs Millar offering a date for a meeting.

46. Mrs Millar was off sick from 10 May, with her certificate citing "stress at work".

47. On 11 May the Trust's Senior Director of Finance wrote to Mrs Millar with details regarding the cycle to work scheme and, in a separate letter, with

details of the redundancy payment she would be entitled to. It later transpired that this calculation was wrong by a significant amount, as it failed to take account of Mrs Millar's previous service at Oldham College.

Change Committee meeting on 20 May

48. On 20 May 2021 the Trust's "Change Committee" comprising four Trustees met in accordance with the timetable set out in the Change Statement.

49. In the meeting, Mrs Hindle told the Committee that she had met with both of the individuals affected (i.e. Mrs Millar and Mrs Rutherford) during the consultation process. In view of the chronology set out above, we consider that was a seriously misleading statement. She also omitted to tell the committee that Mrs Millar had made a request for a one-to-one meeting which remained outstanding.

50. The Change Committee approved the decision to proceed with the redundancies and Mrs Millar was sent a letter giving notice of termination of her employment on grounds of redundancy on the same day. The termination date was 31 August 2021, aligning with the academic year and giving a notice period slightly in excess of the 12 weeks that Mrs Millar was entitled to. The letter drew Mrs Millar's attention to the Redundancy Modification Order and the possibility of losing her entitlement to a redundancy payment if she took up employment with another employer "covered by" the Order within four weeks of termination. The redundancy payment (which remained incorrect) was set out.

51. The penultimate paragraph of the letter included the following: "*I would like to offer you a one to one meeting with Gillian Hindle on Tuesday 25th May, at 1:30pm… This meeting will be an opportunity to discuss the contents of this letter and to identify any support we can provide in terms of seeking alternative employment.*"

52. In a letter to Ms Clark, on 24 May, Mrs Millar stated her belief that the respondent had failed to comply with its own policy and timetable. She indicated that she would be submitting an appeal in accordance with the timeline set out in the letter of dismissal. She also declined the offer of a one-to-one meeting, describing it as "*a little late and inappropriate at this time*."

53. There was further correspondence in which the offer of a one-to-one meeting was reiterated and Mrs Millar continued to decline. She also continued to submit sickness certificates during this period.

Appeal

54. Mrs Millar submitted a three-page appeal letter dated 7 June. In the letter she stated that she was "unable to accept" the notice of redundancy and requested that it be "formally withdrawn". The focus of the appeal letter was the argument that the respondent had made errors in its process and, in particular, the failure to offer a one-to-one meeting before the dismissal had been confirmed. Mrs Millar stated "*I welcomed this opportunity to attend a one to one meeting to ask questions and explore more proactive and*

positive outcomes for the benefit of the staff involved and for the betterment of Fir Bank School." The panel finds that this is a genuine expression of Mrs Millar's position. She was open-minded about the possibility of changes to her role and wanted to engage in a discussion about that. It may have been, of course, that no mutually acceptable solution would have been found and the redundancy would have proceeded, but that cannot be assumed. The respondent appeared to suggest that as Mrs Millar did not put forward substantive proposals in this letter (or in any of her correspondence) that she did not have any to make. We consider that to be unjustified. Mrs Millar wanted to have a two-way discussion to understand the respondent's position and look at alternatives. That is the essence of consultation. Towards the end of the letter, Mrs Millar proposed that the consultation process be recommenced and set out a proposed timetable for this.

55. The letter was treated as an appeal against dismissal and an appeal meeting was set up for 17 June. Mrs Millar was informed of this in an email dated 9 June, which also told her about a Grade 4 Administration Role which had come up within the central administration team based at North Chadderton. Ultimately, Mrs Millar did not pursue this role. An accompanying formal invitation letter noted that Mrs Millar was currently absent due to sickness and informed her that she could present her case to the appeal panel in person, in a written document or via a representative. Mrs Millar submitted written representations on 16 June.

56. The document presented was seven pages long and amounted to an expanded version of the letter of appeal. Mrs Millar set out her comments and concerns about the process to date in some detail. In the circumstances we have described above, we consider most of those concerns were well-founded and legitimate. Mrs Millar expressly stated that she had "*not had the opportunity to comment on the actual Proposal to Make a Staffing change or explore other options*" and that she was not addressing those issues in the appeal. Instead, she repeated her request that the consultation process be re-started. We find that in proceeding this way, Mrs Millar was motivated by considerations around the pension enhancement. She is open in her letter that she wanted that to be an option which was open for her to consider as part of the re-started process. Just as there was nothing fundamentally wrong with Mrs Hindle having an eye to that deadline, we consider there was nothing wrong with Mrs Millar having an eye to it. However, we reject the respondent's suggestion that this was, in effect, the only thing Mrs Millar was concerned about. As we have noted above, we find she was genuinely shocked by the redundancy Proposal and wanted the opportunity to discuss it and explore alternatives.

57. One issue raised by Mrs Millar's appeal letter was the fact that a Facebook advertisement for a catering manager role at North Chadderton had been drawn to her attention by a friend who had seen it on Mrs Hindle's Facebook page on 28 May. Mrs Millar pointed out that part of her role had been to organize the catering service at Fir Bank and she considered that the new role should have been discussed with her as part of consultation. It was a Grade 7 role, whereas the alternative employment which had been offered was a much lower Grade 4 role.

58. By email dated 17 June, Mrs Clark invited Mrs Millar to contact Mrs Hindle by 21 June if she wished to apply for the catering manager role as an alternative to redundancy. There was further correspondence about this. Ultimately, the respondent offered a trial period from 28 June to 23 July 2021 i.e. the period running into the summer break. This appeared to be offered on the basis that the appeal process would be stopped if the trial period commenced. Mrs Millar considered that the trial period should follow on from her notice period and the termination of her existing role. She communicated this in a letter dated 22 June 2021 noting ACAS guidance to that effect. She also noted that she did not wish to abandon her appeal and her current sickness absence, caused by anxiety. In those circumstances she declined to commence the trial.

59. The appeal meeting was re-scheduled to 23 June 2021. Mrs Millar did not attend and was not represented.

60. The appeal panel comprised Mr Maurice Scott (who chaired the panel and gave evidence to us), Dr Paul Nutter and Mrs Ali Cheetham. The response to the appeal was presented to the panel by Mrs Brierley, who had been part of the panel which made the decision to dismiss and Mrs Clark. Mrs Hindle also attended the meeting, as did Mr David Challen, who was the clerk.

61. The meeting was structured around the points raised in Mrs Millar's letter, with Mrs Brierley provided a response to each point. We consider that the responses provided were not balanced and fair. In particular, it was maintained that Mrs Millar "*did not take up the offer of a one-to-one meeting with Mrs Hindle*" when, as we have said, it was Mrs Hindle who had failed to arrange a meeting prior to the dismissal. The point is repeatedly made, in very critical terms, that Mrs Millar is seeking to delay the process to give her early access to her pension. Conversely, whilst it is acknowledged that the respondent has accelerated the process (for example by not giving 10 days' notice of the original meeting) it is said that this has resulted in "no detriment" to Mrs Millar. The respondent's admissions during this hearing that aspects of the process were less than ideal are not reflected in what appears to have been a very bullish presentation to the appeal panel.

62. Paragraphs 3.56 to 3.58 deal specifically with the request to have early retirement and the proposal to restart the consultation process. The merit setting out in full:

    Point 18 - the request to have early retirement on the grounds of efficiency

    This was discussed with the Chair of the Trust Board on the 5th May 2021. SM was not eligible for the release of her pension as she wasn't 55. To extend her notice period to her 55th birthday was not a financially viable option due to the significant additional expenditure the Trust would have to pay to the pension scheme. As guardians of the public purse the Trust has a responsibility to spend public money in the best interests of all stakeholders and this would not have constituted best interest. The Trust cannot adjust its timelines to suit the needs of individual employees.

Point 19 - proposal and requests to restart the process

SM has not disputed any of the process nor offered any comments/representations to the proposals from the 26th April to the 7th June 2021. It now appears that on realisation that the timing of the notice does not allow for her pensions be released, she has presented a revised processed, which is for her own self-gain.

This would not be in the public interest and would be a failure of the exercising of the trust responsibility as guardians of the public purse. If the Trust accedes to SM's proposal it was highly likely that it would be criticised by the external auditors and subsequently by the ESFA.

63. The notes conclude that Mrs Brierley and Ms Clark, but not Mrs Hindle, withdrew from the meeting whilst the panel reached their decision. The notes then record that the appeal is rejected and that Mrs Hindle is to write to Mrs Millar to communicate the outcome. The words "Mrs Hindle" have been scribbled out by hand and replaced with "Mr Scott". There is no evidence in the notes of any of the panel members questioning or challenging the Trust's case. When giving evidence Mr Scott appeared disinterested and confused by some of the detail of the case. We consider that this appeal panel of voluntary Trustees allowed themselves to be led entirely by those presenting the case to them and did not apply any sort of critical analysis to the arguments put forward. Further, we consider it is evident from the minutes that the fact that a delay in the process would most likely 'unlock' Mrs Millar's pension enhancement was front and centre of the reasoning of the presenting officers, and therefore the panel, as to why the consultation process should not be re-started as Mrs Millar had requested.

64. The appeal outcome letter was duly sent to Mrs Millar on 29 June 2021. This letter was a detailed summary of the points presented in the meeting, and included the conclusion that consultation had been "proper and meaningful" as well as the observation that "*the Trust would be failing in its duty as a guardian of the public purse if they manipulated a timeline for your financial self-gain."* Mrs Millar's contract terminated on 31 August 2021.

Subsequent events

65. We heard evidence from Mrs Millar and Ms Holdsworth as to the circumstances in which she, shortly afterwards, came to be working at Hillside Nursery School. There are mixed questions of fact and law which arise from that evidence, and which will be relevant to the question of whether the respondent was entitled to reclaim the Mrs Millar's redundancy payment. In particular, whether, and when, there was an "offer made" to the claimant of employment at the nursery. As discussed with the parties, we will hear submissions on that point at the reconvened hearing which will draw on the evidence we have already heard. We make no further findings of fact arising out of those events at this stage.

66. There was a significant volume of further correspondence between the parties which we do not need to elaborate on, save for one point. Mrs Millar and Mrs Rutherford both registered with an agency called Bury ACES, which we understand to be a council-run temporary worker supply agency

for school support staff. They gave the names of the head teachers in their respective schools as referees. On 11 August 2021, Bury ACES approached Mr Walker, of Fir Bank, for a reference for Mrs Millar. This took the form of a template with various questions to be completed. It was suggested by Mrs Hindle in her evidence that Mr Walker was 'uncomfortable' giving such a reference. This seems odd, as it was Mr Walker who recommended Mrs Millar to Hillside nursery (Ms Holdsworth being Mr Walker's wife). Bury ACES sent Mr Walker a reminder on 3 September 2021 and Mrs Millar also prompted him, at their request. On 13 September 2021 Mrs Hindle sent an email confirming dates of employment and reason for termination and stating that Mr Walker "will not be providing a reference".

67. Emma Dunn, the headteacher of Thorp Primary School, did complete the Bury Aces form submitted in respect of Mrs Rutherford, and Mrs Rutherford subsequently took up some work through the agency.

68. Mr Millar, in cross-examining Mrs Hindle, suggested that she had told Mr Walker not to complete references for Mrs Millar. We make no finding in respect of that, as we had no direct evidence from Mr Walker. However, we do note that it appears very odd that a different approach would be taken to references in respect of two employees dismissed for redundancy from the same organisation at the same time. There is, however, no specific claim made in respect of how the respondent dealt with the reference request.

69. A further matter concerns what happened to the primary school administration after the redundancies. It is agreed that Sally Bunting resigned her employment in summer 2021 and that the respondent decided to recruit a Primary School Administration Officer at Grade 4. (Ms Bunting's own role had been Grade 3). Mrs Millar says Ms Bunting resigned because she was being asked to take over aspects of Ms Millar's role that she was not happy to do. Mrs Hindle disputed that, although the respondent did not put forward any alternative reason.

70. An equivalent change was also made at Thorp, with Mrs Rutherford's assistant stepping up from Grade 3 to Grade 4. This coincided with the appointment of business administration apprentices. Mrs Millar was under the impression that the apprentices effectively acted as office junior in each of the primary schools. Mrs Hindle's evidence was that the apprentices moved around the Trust. Whilst that may well be the case for the individual apprentices, we find that the use of apprentices has enabled the respondent to cover the office duties in the primary schools in a way which was not envisaged by Mrs Hindle's original proposal.

71. The role of Primary School Administration Officer was not offered to Mrs Millar, who had left employment by this point.

Relevant Legal Principles

Unfair dismissal

1. The unfair dismissal claim is brought under Part X of the Employment Rights Act 1996.

2. Section 98 ERA provides (so far as relevant) as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … is that the employee was redundant …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

3. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

> **"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **(a) …**
>
> **(b) the fact that the requirements of that business –**
>
> **(i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish".**

4. The section 98(4) fairness test has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

5. The reason for the dismissal is the set of facts known to, or beliefs held by, the employer, which cause it to dismiss the employee. See **Abernethy v Mott Hay and Anderson [1974] ICR 323**.

6. A historical conflict between the 'contract' and 'function' tests for determining whether a redundancy situation was established was resolved by the EAT in **Safeway Stores plc v Burrell [1997] ICR 523**, later approved by the House of Lords in **Murray v Foyle Meats Ltd [1999] ICR 827**. Both those cases emphasise that the question of whether there is a diminution in the employer's requirement for employees to carry out work of a particular

kind is distinct from the subsequent question of whether the dismissal of the claimant employee was wholly or mainly attributable to that diminution.

7. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

8. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant … when he said:
'Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation".

9. The employer's duty to look for alternative employment is not to be conflated with the statutory provisions around suitable alternative employment which may, in some circumstances, disentitle an employee from a redundancy payment if they turn down an alternative role deemed to be suitable. In order to fairly dismiss, the employer has a much broader obligation to bring the employee's attention to opportunities within the organisation.

10. Where a dismissal is found to be unfair, the Tribunal must consider what would have happened absent the unfairness identified and must, where appropriate, reflect this in the compensation awarded in respect of financial loss. (**Polkey**).

Discrimination on Grounds of Age

11. Section 5 Equality Act 2010 (EqA) provides as follows:

Age

(1) In relation to the protected characteristic of age—
(a) a reference to a person who has a particular protected characteristic is reference to a person of a particular age group;

(b)a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

12. Section 13 EqA provides:

Direct discrimination

(1) 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportion proportionate means of achieving a legitimate aim.

13. S.39(2) EA provides that an employer must not discriminate against an employee by dismissing her or by subjecting her to any other detriment.

14. In considering the question of whether unfavourable treatment was 'because of' the claimant's age the Tribunal must examine the respondent's grounds for treating the claimant in a particular way. Her age need not be the only reason, but it must have played a part. Further, it can be a conscious or unconscious motivation.

15. Section 136 EA contains the burden of proof provisions namely that if there are facts from which a Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Tribunal must hold that the contravention occurred.

16. In **Igen Ltd V Wong 2005 ICR 931 CA** the Court of Appeal considered and amended the guidance contained in **Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332** on how to the previous similar provisions concerning the burden of proof should be applied:

16.1 It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful .These are referred to as " such facts"

16.2 If the claimant does not prove such facts the claim fails.

16.3 It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

16.4 In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the tribunal.

16.5 It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to reply to a questionnaire or to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

> **16.6 Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.**
>
> **16.7 To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.**
>
> **16.8 Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a tribunal will normally expect cogent evidence to discharge that burden of proof. In particular a tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any relevant code of practice.**

17. The guidance has been approved in subsequent cases including, significantly, **Hewage v Grampian Health Board [2012] IRLR 870, SC** and **Royal Mail Group v Efobi 2021 ICR 1263, SC**. The case law makes it clear that the tribunal is not expected to split its hearing into two parts, but instead conducts the two-stage exercise during its deliberations, having heard all of the evidence. Secondly, in conducting this exercise the Tribunal may take account of all relevant evidence at stage 1, without artificially excluding evidence which comes from the respondent at this stage of the decision-making process.

18. The '**Polkey** principle' which applies to assessing financial losses in unfair dismissal cases does not directly apply to discrimination claims. However, as compensation is assessed on a 'just and equitable basis' Tribunals will make reductions for loss of a chance in a similar way in appropriate cases (see **Abbey National plc v Chaggar, CA, [2010] ICR 397**).

Submissions

19. Both parties produced detailed and careful written closing submissions which were of assistance to the tribunal. We were grateful for their efforts.

20. In her submissions on behalf of the respondent, Ms Kight outlined the established principles in relation to redundancy dismissals and age discrimination.

21. She also noted the case of **Dudson v Deepdene School, EAT 674/97**, although no copy of the case was provided and we were unable to locate one. It is, however, referred to in the IDS Handbook on redundancy in terms which accord with Miss Kight's submissions. It appears the case concerned a teacher who was made redundant following a very short consultation period but given seven months' notice of dismissal, during which they declined to apply for suitable alternative posts. The EAT noted that "*where there is ample opportunity for consideration after a decision as to redundancy but before its actual implementation, the weight attached to the absence of prior consultation may obviously be reduced*".

22. Addressing the facts of this case, Ms Kight submitted that there was a genuine redundancy situation. In terms of process, she acknowledged 'procedural mishaps' and submitted that Mrs Hindle and Ms Clark deserved credit for accepting these when giving evidence. Broadly, she submitted that

the process had been fair when looked at overall and that the procedural failings identified did not detract from that. She also submitted that Mrs Millar had failed to take advantage of opportunities to engage with the process at a later stage, so the lack of consultation could not be fully laid at the door of the respondent.

23. In relation to age discrimination, Ms Kight asserted that the claimant's age did not have a significant influence on the respondent's decision not to accede to her request to restart the consultation process. Instead, it was submitted that the respondent refused to re-start the process because there was no need to do so as Mrs Millar had had ample opportunity to engage but had chosen not to do so.

24. Finally, Ms Kight submitted that if there were errors which rendered the process unfair and/or discriminatory, then they could have been rectified within the original timescale, or with a short delay, and had not caused any loss to Mrs Millar.

25. Mr Millar's submission focused on the facts in the case and emphasised points which have been set out in our findings of fact above. I will not repeat them here. He submitted that the dismissal was both unfair and discriminatory and invited us to find that the respondent would have re-started its process to rectify the defects if Mrs Millar had been aged 50 i.e. if the deadline had not been approaching for her access to her enhanced pension.

Discussion and conclusions

Preliminary point

26. We were satisfied that both parties were operating with a very keen eye on that deadline of Mrs Millar's 55th birthay, from very early on if not from the outset. We also find that neither willing to admit that.

27. Against that backdrop, we record a finding that we found none of the main witnesses in this case to be entirely straightforward and credible in their evidence. Each was prepared at least to some extent to give evidence which served their case, even where it stretched credibility. We have therefore relied heavily on the contemporaneous documentary evidence in our findings.

28. We proceeded to determine the issues in the case as clarified in the List of Issues set out above. We have simplified the wording of the issues for purposes of brevity and clarity, but had regard to the full formulation of the relevant issues in reaching out decision.

Unfair dismissal

Was the sole or principal reason for dismissal that the claimant was redundant?

29. Our answer to this question is "yes". We have no difficulty in concluding that a genuine redundancy has been established. The evidence from both

parties was that Mrs Millar's role had changed following Fir Bank's accession into Oak Trust. In particular, various financial and other strategic elements of the role had been moved into the Trust's centralised administrative set up. Whilst there was some dispute about the volume of this work within Mrs Millar's overall workload prior to the accession, there was broad agreement that change had happened. We accept that this was the situation which prompted Mrs Hindle's review and, ultimately, led to Mrs Millar's dismissal, as well as that of Mrs Rutherford. In the language of the statute, the respondent's requirement for employees to carry out administrative work at a senior level within the primary schools had diminished and was expected to cease entirely.

Did the respondent act reasonably or unreasonably as treating that as sufficient reason for dismissal?

30. This question incorporates both procedural and substantive fairness. We remind ourselves that it is not for us to step into the shoes of the employer, but to decide if what they did was within the band of reasonable responses available to employers in this situation.

31. In redundancy cases, the Tribunal will examine whether there was sufficient warnings of redundancies, the selection process, the consultation process and whether the respondent made appropriate efforts to find suitable alternative employment. We note the obligation is on the employer to take these steps in order to conduct a process which is fair. There may be cases where the employer is limited in the steps it can take, for example because an employee repeatedly refuses to attend meetings, but it remains for the employer to ensure that it is acts in a reasonable way given the circumstances it faces. It is not a shared responsibility in the sense, for example, that Mrs Millar had an obligation to inform the respondent that she did not have union representation or to chase Mrs Hindle to consult with her.

32. We accept that Mrs Millar had sufficient warning of her dismissal. In relation to selection, there was no selection pool. Mrs Millar did not advance (or at least not with any force) any argument that she should have been pooled for selection with other employees and there was no evidence before us which would support a conclusion that some different approach out to have been taken as regards selection.

33. Turning to the question of consultation, in contrast, there are significant criticisms which can, and must, be made of the consultation process. Many of these points will be evident from our findings of fact.

34. The criticism we make falls into two broad categories. Firstly, even if the process had run as it was envisaged to run, we consider that it was not a process which provided for meaningful consultation. Secondly, this defective process was made worse by the elements which went wrong in the way that it was actually applied to Mrs Millar.

35. Considering first the way the process was intended to run, we find the following matters are significant:

35.1 Mrs Hindle's report was written without seeking input from the people affected. There were many potential options to address the situation which had arisen – Mrs Millar and Mrs Rutherford expected a restructure. That is not to say that redundancy wasn't a legitimate option, or even the best option, but without discussion it was impossible to know. A simple example is the point made by Mrs Millar that you need two people in the school office to ensure there is cover when one is absent or otherwise engaged. This now appears to have been recognised by the use of the business apprentices, but it isn't covered in Mrs Hindle's proposal because she wasn't having those conversations when the proposals were at a formative stage. We note our findings in paragraph 28 above that Trustees on the board had questioned Mrs Hindle at the outset about how the responsibilities of the redundant employees would be absorbed and she had focused on the responsibilities that would be absorbed by the central team rather than those which would need to be absorbed in the primary schools. A process which involved discussion with those doing the job may well have brought this issue to light.

35.2 That also meant that the respondent was unable to explore possibilities such as natural wastage – there were no conversations had with office staff to identify what their plans or aspirations were to feed into the report. It is worth remember that we are talking about four long-serving members of staff, not a restructure involving hundreds of people where that would be impracticable. There is a good chance that such conversations would have brought to light Sally Bunting's potential willingness to leave the organisation, which might then have resulted in a restructure with the Primary School Administration Officer role being available to be offered to Mrs Millar before her dismissal took affect. This failure occurred despite the commitment in the report, set out at paragraph 22 above, to make "every effort" to reduce compulsory redundancy. The Tribunal is left with the impression that that section of the report was simply boilerplate wording which was completely at odds with the approach actually taken by the respondent in this case.

35.3 Turning to timetable set out in the Managing Change Proposal, we note that the plan included an erosion of 10-day notice period from the outset. The Tribunal rejects the idea that union diaries would be a driving factor in setting the timetable before the proposal was even put before the Trust's management committee. The proposed timetable shows that the procedural safeguards of the respondent's own policy were to be jettisoned in favour of an accelerated process. The respondent has provided no convincing explanation of why this was needed and, when considered alongside the other evidence in the case, the panel is driven to conclude that the respondent was, from the outset, pursuing an accelerated timetable in order to avoid any risk of triggering the enhanced pension entitlement and, therefore, a liability to make a strain payment for Mrs Millar.

35.4 The Proposal also makes clear that the respondent was only going to offer one-to-one consultation meetings with the affected staff if requested. In the experience of the panel that is highly unusual. Redundancy processes almost inevitably involve affected employees being invited to a consultation meeting. Of course, some employees

might not take up that invitation, but the onus is not on them to request the meeting.

35.5 Finally, the process as envisaged means that employees were not given the chance to attend the Change Committee meeting (and therefore to meet directly with the ultimate decision makers). Instead, they were invited to put their points across in writing. We consider that this of itself does not necessarily render the dismissal unfair, but makes it important that the Committee and those presenting to them are scrupulous. Sadly, in this case, that was not the case. We can understand how Mrs Millar was left extremely frustrated by, for example, the comments in the notes of that meeting where Mrs Hindle said she had met with both affected employees, as well as by comments in later correspondence saying that she had been given the opportunity to attend the Change Committee meeting when she had not.

36. The following issues arising from how the process was actually carried out caused us further concern:

36.1 Ms Clark in the initial meeting completely failed to address the fact that Mrs Millar had not managed to successfully connect, event when this was brought to her attention by Mrs Rutherford. Remedial action could have been something quite simple, such as Ms Clark picking up the phone to Mrs Millar later on that day, but nothing was done. Again, the impression given is that anything which might jeopardise the respondent's ability to simply press on with the timetable is to be dealt with by ostrich-like denial.

36.2 Mrs Hindle's failure to arrange a one-to-one meeting when this had been expressly requested by Mrs Millar. The panel rejects the suggestion put to Mrs Millar that it was somehow her responsibility to pursue this. Whilst there was some confusion around the position regarding union representation, the worst that should have happened was a delay whilst the meeting was arranged with an invitation direct to Mrs Millar, informing of her right to bring a work colleague. It is hard to explain why the respondent did not take that simple step, and we conclude that the most probable explanation is because the respondent, and particularly Mrs Hindle, were acting on the basis that the 20 May meeting had to go ahead and nothing could be allowed to derail that date.

36.3 As alluded to above, there was no evidence that the respondent did anything to pursue measures to avoid redundancy as indicated in paragraph 7 of the Managing Change report. For example, asking for redundancy volunteers may have brought to light the fact that Sally Bunting was considering leaving at a much earlier date, and possibly therefore avoided the need for redundancies.

37. Broadly, the respondent suggests that any procedural defects were rectified either by the later offer of a one-to-one meeting with Mrs Hindle (post dismissal) or by the appeal. We reject both of these arguments for the following reasons.

38. The offer of the one-to-one meeting contained in the dismissal letter was expressed as an opportunity to discuss the contents of that letter and any support that the respondent could provide in relation to suitable alternative

employment. That is very different from a consultation meeting at which the redundancy proposal could be discussed and alternatives explored and considered. The panel consider that the fact Mrs Millar did not take up that offer does her no particular credit, but we can understand that she had formed the view that the respondent was not approaching the process in a fair way, and she had become both entrenched in that position and unwell. Further, we find that she was right to form the view that the respondent would not consider options with an open mind because they were wedded to their own timeline and fixed on effecting the termination of her employment. We find that Mrs Hindle had become very focussed on the idea that the claimant was trying to 'game' the process to get to the birthday date and, as a result, lost sight of her own obligation to ensure that the process was fair. This was not, therefore, a genuine offer to consult on the underlying redundancy situation.

39. Whilst we acknowledge the case law cited by the respondent in this regard (**Dudson**), every case turns on its own facts. On the facts of this case, the offer of a one-to-one meeting after the notice of dismissal had been given, when claimant was off sick, and with a limited agenda, did not address the earlier failings.

40. Turning to the appeal, we find that the parties were effectively operating at cross-purposes by this point. The claimant's letter of appeal and the later written submissions which built on that letter did not put forward substantive alternative proposals to redundancy not because she didn't have any, but because she considered she was appealing about the conduct of the process and, if the appeal was successful, she would then be given the opportunity she had been denied of being consulted in a meaningful way about the proposals. Although it was not particularly helpful for the claimant to approach the appeal in this way, we reject the suggestion that she had nothing to discuss. We find that she was not putting forward substantive proposals because the respondent had, by its actions, indicated that it had no interest in hearing them.

41. We do not consider the appeal panel were independent-minded, nor that they offered an objective review of the decision to dismiss. It is clear that they allowed themselves to be led by Mrs Brierley, Ms Clark and Mrs Hindle, and did not challenge those presenting the case for the dismissal and test the points raised by the claimant in her letter. For example, there was a complaint in the appeal about differential treatment and it was clear from Mr Scott's evidence that he had simply failed to grasp the point being put forward (irrespective of whether or not it was a good one).

42. As we have said above, we also find that the appeal notes show that the appeal panel had the question of pension entitlement at the forefront of its mind. Mrs Millar had very valid and legitimate concerns about the dismissal process but the panel were blind to those concerns because they accepted the portrayal being given to them of Mrs Millar as someone who was looking to manipulate the process for self-gain.

43. Having regard to all of these points, we find on the issue of consultation alone that the respondent's actions were outside the band of reasonable responses and that the dismissal was therefore unfair.

44. We turn finally to the issue of suitable alternative employment. The fact that a data administrator role was offered on 9 June 2021 demonstrates that the respondent was aware of its obligation to draw Mrs Millar's attention to possible alternative roles and capable of doing so.

45. We find it inexplicable, in those circumstances, that the catering manager role was not brought to her attention despite it being a Grade 7 role and given her experiencing of managing the provision of the catering service at Fir Bank. It may well have been that the role did not appeal, but it would have taken no effort at all to send an email about it. Again, in our view this shows that the respondent was wedded to a fixed timetable and did not want to introduce complexity or doubt by drawing a realistic alternative to Mrs Millar's attention.

46. Once Mrs Millar had identified the role herself, we do find it reasonable (not withstanding the ACAS guidance identified by Mrs Millar) for the respondent to propose the trial period when they did. We accept it was important to have the role filled for the start of the new academic year, so they needed to know whether Mrs Millar would want to pursue it. Further, the experience of the panel is that it is common for trial periods to take place during a redundant employee's notice period, rather than afterwards, so we cannot say that this approach was outside the band of reasonableness.

47. Having said that, we do have a concern about what was to happen in relation to Mrs Millar's appeal. The fact that an employee is prepared to consider an alternative role doesn't mean that they agree with the redundancy in their existing role, or that the redundancy has been properly handled. The proposal to withdraw the claimant's appeal if she commenced the trial period is problematic.

48. In relation to the role of Primary School Administration Officer (PSAO), we accept that there was no PSAO post before Mrs Bunting resigned at start of September. In our view this is a consultation point, addressed above, and not a suitable alternative employment point.

49. Overall, we have concerns about the genuineness of the respondent's efforts to explore suitable alternative employment which are probably related to the respondent's focus on the tight timescale for redundancy. However, those concerns alone would not be sufficient take the dismissal outside the band of reasonableness. They do, however, add something further to the much more fundamental concerns we have identified in relation to consultation.

Polkey

50. We then must go on to consider what would have happened if the respondent had acted reasonably. That will affect the calculation of losses due to the claimant as a result of the unfair dismissal we have found.

51. The respondent's case is that the same outcome would have been reached; the procedural defects made no difference to the end result. We cannot agree with that conclusion. The whole point of meaningful consultation at a

stage where proposals are formative is that an employer cannot second guess what would come out of it. If this respondent had sought to consult with Mrs Miller in that way, then we find it likely that she would have engaged with that, rather than retreating into a battle of procedure. This is not the sort of case where we can give the easy answer that it would have made no difference; instead, we have to engage in assessing what might have happened in a hypothetical scenario. This is necessarily a speculative exercise. It is speculation which we must embark on carefully, doing the best we can with the evidence available.

52. The first question we have asked ourselves is how long would it have taken the respondent to conduct a fair procedure, acting reasonably. Of course, this question assumes much more significance in the present case than in most. We consider that the respondent would, firstly, have followed their own process, so a reasonable timetable would have included 10 working days' notice of the first meeting after the Proposal had been given to employees – so this would likely have taken place on Friday 14th May, rather than Tuesday 4th May.

53. The experience of the panel is that timetables such as the one contained in the proposal documents are aspirational and not 'set in stone'. Simple cases, such as where an employee is content to accept redundancy, might be concluded within that period, but more often than not delays occur for various reasons.

54. The usual reaction to problems such as the Teams meeting connection issue is to the delay the process, rather than to adopt an ostrich-like attitude and push on. The fact that the claimant was off sick would have led to delays, as would the confusion around her representation, as would the availability of people involved at different stages.

55. Further, we find that if Mrs Millar had been invited to a genuine consultation meeting before dismissal, she would have raised questions and proposals around the redundancy which the respondent, acting reasonably, would have had to take time to consider.

56. We take particular notice of the fact that the dismissal decision had to be taken at a Managing Change Committee meeting. The meeting could not, realistically, have taken place on 20 May if the respondent had delayed the 'kick off' meeting with the employees to 14 May, and afforded the opportunity for one-to-one meetings and genuine consultation to take place between the two. The committee is staffed by Trustees, and reconvening it on a delayed date once an appropriate consultation process had taken place would itself inevitably have been subject to delays due to the availability of the various individuals involved. Given all these points, we feel satisfied that if the respondent's focus had been on offering a fair and genuine process, and not on meeting the artificial deadline, there would have been a significant extension to the process involving the claimant, and that the act of giving her notice of dismissal would have been delayed by, on our best estimate, around six weeks. A delay of that length would, on the case as put forward by both parties, have unlocked her entitlement to enhanced pension and caused the respondent to have to make a 'strain' payment to the pension scheme to fund the same.

57. Beyond that six-week period we do not consider that redundancy was inevitable – we accept that the claimant did have a genuine desire to discuss options and that some of her options may ultimately have been acceptable. There is also the possibility that fuller consultation process would have brought to light Ms Bunting's intention to leave which would have put a different slant on things and perhaps made a restructure involving Mrs Millar an attractive option to both sides. We do, however, recoginse that even a full and meaningful process might have concluded that redundancy was the only realistic option. Further, even if there were other options, we find there is a real possibility that Mrs Millar would not have taken them. We take account of her commitment to the school, and relatively young age for retirement, but also a poor relationship with the management of the Trust. In the hypothetical scenario where she was entitled to retire with an enhanced pension and a substantial redundancy payment, it is by no means certain that she would have found the prospect of staying on attractive. Given both these uncertainties, overall we find the prospect of her staying beyond the time it would have taken to complete a fair process is low. We consider there is only a 10% chance of her employment continuing in some form and that any loss of earnings flowing from the unfair dismissal must be adjusted accordingly. Conversely, the pension loss may arguably have to be adjusted to account for the fact that she would not have been entitled to the enhancement had she not ultimately been made redundant (although she would be entitled to the enhancement in the event of any future redundancy).

Age discrimination

58. We are satisfied that the fact that claimant was fast approaching the cut off for entitlement to pension enhancement was a significant motivator for how the respondent conducted this process.

59. The respondent has not sought to draw any distinction between access to pension entitlement and age for the purposes of this claim. Mrs Millar's 55th birthday was the key moment, had she already reached that milestone or had she been comfortably younger than it, we are satisfied that many of the errors in this process would have been avoided or corrected.

60. In particular, we find that the original timetable would have been compliant with policy, that the respondent would have done something to rectify the Teams meeting issue and that it would have ensure that Mrs Millar's redundancy was not confirmed without the one-to-one meeting she had requested having taken place. Assuming the respondent was acting reasonably, they would also have given proper consideration to the points which would have been raised in that meeting.

61. The way the case was pleaded was by way of an allegation that the respondent "*would have been more proactive to rectify their maladministration and re-started the redundancy process to avoid claims for unfair dismissal*". It is difficult to separate out the failure to do the process correctly in the first place with the refusal to restart the process. In our experience it is unusual for employers to re-start such a process from scratch; it is more common that extra consultation meetings are added in,

and perhaps additional steps e.g. time for queries to be made about different roles or other measures to avoid redundancies.

62. However, we do not think that the fact that another respondent may have offered a different solution to that proposed by Mrs Millar defeats the claim. The question is whether Mrs Millar's age played any part in the respondent's decision to reject her request to re-start and we find that it did. We are able to do so without resorting the burden of proof, we consider it is clear on the face of the evidence, despite the respondent's submission to the contrary.

63. It is not suggested that the respondent should have re-started the process of its own volition. The request was put to the respondent expressly by Mrs Millar on several occasions. The best we can do to pick apart the reasoning for the refusal is to look at the notes of the appeal meeting where this point is raised in express terms. Those notes reference the claimant's failure to make any substantive criticism of the redundancy. However, the point which takes much more prominence is the argument that the claimant wishes to restart the process for her own gain and that the Trust would not be acting as guardians of the public purse in allowing her to do so.

64. The respondent's main concern was therefore to avoid paying the strain payment and to avoid the claimant obtaining what it saw as a windfall. That is evident from the notes in the appeal meeting as well as from the broader context of the respondent's actions. That is a concern which is inextricable from the claimant's age. We find that the failure to re-start the process was an act of discrimination on the grounds of age.

65. Uniquely amongst the protected characteristics, a justification defence is available for direct discrimination on grounds of age. However, such a defence was not pleaded, and Ms Kight confirmed at the outset of this hearing that the respondent does not rely on it. The claim of direct age discrimination in respect of the respondent's failure to re-start the consultation process therefore succeeds.

66. Careful consideration will have to be given as to the calculation of the financial losses which flow from that discriminatory act. We repeat our findings above as to the likelihood of the claimant continuing in employment with the respondent.

Next Steps

67. A remedy hearing was listed and case management orders were made with the consent of the parties.

Employment Judge Dunlop

Date: 7 March 2023

WRITTEN REASONS SENT TO THE PARTIES ON

22 March 2023

FOR EMPLOYMENT TRIBUNALS