EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER BY CVP**

CLAIMANTS **MS. I. NIKOLOPOULOU (1)**
MR I OKORODUDU (2)
RESPONDENT **INSTITUTE OF PHYSICS**

ON: **11-14 SEPTEMBER 2023**

Appearances:
For the Claimant: Mr. B Moore, friend
For the Respondent: Mr. Watson, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1) The Claimants were not unfairly dismissed.
2) The First Claimant's claims of direct disability discrimination do not succeed.
3) The claims are dismissed.

REASONS

1. The Claimant's were employed by the Respondent in its digital team (DevOps). The First Claimant was engaged as the Digital Delivery Manager. She managed the Second Claimant. The Second Claimant was engaged as a Full Stack Developer. Both Claimants were dismissed as redundant on 1 July 2022 and received pay in lieu of notice and an enhanced redundancy payment.

2. The Claimants presented a claim form to the Tribunal on 3 September 2022. Both Claimants allege unfair dismissal. The First Claimant also claims direct disability discrimination. (The Second Claimant's claim for discrimination by association has been dismissed following non-payment of a deposit.)

3. The issues in these proceedings were set out in an order of Employment Judge Goodman (65). In a subsequent judgment the Tribunal determined that the First Claimant was a disabled person at the material times, that she has multiple sclerosis and was diagnosed around January/May 2021 with an onset of the disease from early 2020.

4. In essence the issues before us were:

    a. to determine the principal reason for the dismissal of each Claimant and, if the reason for dismissal was redundancy, whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss them; and

    b. to determine if the Respondent treated the First Claimant less favourably, because of disability, than the Respondent would have treated a non-disabled comparator when (i) she was dismissed and (ii) when she was informed that three out of four alternative vacancies were unsuitable for her.

Evidence

5. The Tribunal heard evidence from both Claimants. For the Respondent we heard evidence from Ms Liz North, who managed the Digital Team until October 2021, from Mr Taj Panesor, who took over responsibility of that team when Ms North left and who implemented the restructure and from Mr Alex Ferguson of HR. We had a bundle of documents extending to some 540 pages.

Relevant facts

6. The First Claimant worked in the Respondent's Digital DevOps Team. She was on a salary of £48,000 per year. She worked from home. The First Claimant managed the Second Claimant, who was on a salary of £65,000 a year.

7. From August 2019 until she left in October 2021 Ms North managed the Digital Function. At that time the structure of the team (210) was for a team of five underneath Ms North; the First Claimant, as Digital Delivery Manager, managing four further individuals, including the Second Claimant, who were essentially developers. However, by the time Ms North left there were only two members of the DevOps team, namely the First and Second Claimants, and reliance was placed on a number of external contractors.

8. During the time that the DevOps team was led by Ms North, discussions took place as to how the Digital Function should be structured. Ms North prepared a number of papers for discussion about the restructuring of the function. By February 2021 (181) Ms North proposed to change the Respondent's operating model from an in-house development team to

project management approach. "*The new model would see an in-house digital project management team who would work with our technical lead and a range of agencies, partners and specialists while still controlling the quality, user experience and overall technical ownership of our digital products."* (181). By then sha also envisaged that the five posts in the Digital DevOps team would be deleted, and four new roles would be created. By April (207) the proposal was for three new roles (Digital Programme Manager, Digital Project Manager and Junior Developer (Maintenance). There would also be an additional post to sit in IT. She noted that two current permanent DevOps staff members would be at risk of redundancy. It is apparent from documents in the bundle (210 and 216) that the final structure of the new team had not yet been determined.

9. It was a significant part of the Claimant's case that the documents detailing the reorganisation which appeared in the bundle were not authentic and had been fabricated. In particular Mr Moore suggested that pages 153 – 163 and 174 – 176 had been altered in order to mislead and, in particular, that the sentence referring to the fact that the two current DevOps staff would be at risk of redundancy had been inserted after Ms North had left in order to suggest (falsely) that the restructure had been planned for some time.

10. Mr Moore also referred to the fact that there had been a change in the colour of the type between documents which appeared in our bundle (214) compared with documents which had been available at the Preliminary Hearing which had typeface in blue. Although the wording was the same in both documents the different colours showed, in Mr Moore's submission, that the documents had been fabricated.

11. The Tribunal does not accept those submissions. Ms North gave clear evidence she was the author of the disputed documents and that she had included the sentence about the two permanent DevOps staff being at risk of redundancy in her drafts. She explained that there would be numerous versions of the same strategy proposal that she had written. Different versions would develop as different people commented and provided input into the documents. As to the colour, Ms North said that sometimes she worked from home and sometimes at work and that the layout/colour might be the result of a different computer or printer. In any event different versions would be prepared for different recipients. Moreover the Tribunal could see no particular benefit to the Respondent in changing the colour of a typeface in circumstances where the wording itself had not changed.

12. We are satisfied that the documents which appear in the bundle were drafted by Ms North at the time and that they have not been altered as alleged.

13. In February 2020 the First Claimant took some sick leave because she had numbness in her feet and legs. In August 2020 she informed Ms North that further tests were being undertaken to confirm whether she had the early stages of MS or another autoimmune condition causing inflammation,

MS. In October she told Ms North that she had been diagnosed with suspected early-stage MS, but that it didn't necessarily mean she would go on to develop MS.

14. Mr Ferguson of HR was also aware. In October 2020 the First Claimant told Mr Ferguson that she had been diagnosed with a condition called Clinically Isolated Syndrome which was the first stages to MS. Mr Ferguson informed Mr Panesor and advised that she might be a disabled person under the Equality Act 2010. Mr Panesor was therefore aware that the Claimant had something which was a precursor to MS, although we accept that the First Claimant never told Mr Panesor that her CIS had, in fact, developed into MS. The First Claimant's sickness absence record remained good.

15. Mr Panesor took over the Digital team (on an interim basis) in September. He began reviewing the structure and the proposals put forward by Ms North. When Ms North left, the Executive Board had approved the general direction of travel but not the particulars of any restructure proposal.

16. Mr Panesor decided that his first priority would be to recruit a Digital Programme Manager to lead the DevOps team. This new role had been envisaged by Ms North (216) in earlier proposals. While Mr Panesor had leadership and management skills, he needed someone with a strong grasp of digital development and infrastructure to help him to determine whether and what kind of a wider restructure was needed.

17. The new role was approved, and job evaluated. The salary being offered was £45,000, i.e. less than the Claimant's salary. Mr Panesor approached both the First Claimant and another employee (who had been seconded to the Digital team as a project manager), Manchi Chung. He explained to the First Claimant that this role would lead the Digital Team and would gradually take over the full responsibilities of the contract Digital Programme Manager. The Claimant was told that changes were coming but Mr Panesor made no reference to any potential restructuring Programme.

18. The Claimant decided not to apply for the role (270). She told Mr Panesor that it was for personal reasons. In evidence she said that, having just started recovering from a severe health relapse, she was being presented with an unrealistic increase in workload, disguised a promotion, which she was expected to do for less money. She encouraged Ms Chung to apply.

19. Ms Chung applied and was appointed. Thereafter the First Claimant reported to her. Ms Chung then worked with Mr Panesor assisting him to devise the restructured team.

20. Mr Panesor determined a restructure in which the roles of Digital Delivery Manager and Full Stack Developer were deleted; four new roles were established within the digital team, with a fifth role within the IT team. We

accept that the new roles had been job evaluated into pay bands. The new posts were:

a. Digital data analyst, Grade B
b. Digital project manager, Grade B
c. Digital operations and QA analyst, Grade C; and
d. Technical Lead, Grade C.

21. On 25th May 2022 the Claimants were asked to attend a Digital Team Meeting to be held on MS Teams. The Claimants were told about the restructure and that their roles were at risk of redundancy. They were told that it was proposed to create four new posts. The broad outlines of those posts were set out (308) but not the detail. The Claimants were told that there would be separate and individual consultation meetings the first of which would be on 31st May 2022. Formal letters informing them that their roles were at risk of redundancy were sent to them by email on 26th May.

22. The Claimants attended their individual consultation meetings on 31 May 2022. Although by then the four new posts had been job evaluated and the salary band set, the Claimants were not given either the job descriptions or the salary bands for those roles. Unsurprisingly, the Claimants wanted further details, but the Claimants were told that the Job Descriptions would be sent to them after the meeting.

23. The Second Claimant in particular wanted to know about whether the salaries would be the same as he was getting now and was told that it "would not be more" and that, if less, the Respondent might honour the salaries for 12 calendar months.

24. The First Claimant enquired about the difference between the new role of Digital Project Manager and her own role as Digital Delivery Manager. Mr Panesor told her to wait until she had seen the job descriptions but, when pressed, told her that he did not think that she had the relevant experience for the Technical Lead or Digital Project Manager role nor for the Digital Data Analyst role; and that he believed she was better mapped to the Digital Operations and QA Analyst role.

25. In the absence of the job descriptions and salaries, the first consultation was effectively meaningless. The Claimants were not given sufficient information to be able to provide any informed input into the Respondent's proposals.

26. The Claimants were sent the job descriptions immediately after the first consultation meeting (372). Six days later on 6 June they were sent the salary ranges for those jobs. They were as follows:

a. Digital Project Manager – £33,626 – £35,307
b. Technical Lead £33,6 26 – £35,307
c. Digital Operations and QA Analyst £26,173 – £27,481
d. Digital Data Analyst £26,173 – £27,481

All the salaries were very significantly below what both Claimants were earning.

27. A second consultation meeting was scheduled for 13th June. On 8 June Mr Panesor received notice that the First Claimant had declined the consultation meeting scheduled for 13th June (401).

28. On Friday 10 June 2022 the Claimants sent identical letters to Mr Panesor. The letters said that they had received "professional legal and employment law advice" that they believed that the "selection criteria" for redundancy were unfair and appealed against the decision. They asked for a copy of the appeals process and for the consultation meeting scheduled for Monday 13th June to be postponed and rescheduled until after they had had copies of the appeals process..

29. Mr Panesor responded immediately to say that the appeals process was contained on the intranet but that, as yet no decision had been made as they were "consulting and exploring options to mitigate the risk of redundancy". He said they would continue with the consultation and the meeting scheduled for Monday.

30. The First Claimant responded later that day (427) complaining that, by the time of the first meeting on 25th May, she and the Second Claimant had already been "selected" for redundancy and that the presentation should be run again, given the procedural irregularity. She said that they would not continue the process or attend the meeting scheduled for Monday as the appeal should be addressed in the first instance (427).

31. Neither Claimant attended the second consultation meeting scheduled for 13th June.

32. On 15th June Mr Ferguson wrote to both Claimants rescheduling the second consultation meeting for 21st June. (410 – 414). He responded in more detail to their emails of 9 and 10 June in which they had referred to the selection criteria and explaining that, as the roles were disappearing selection was not in issue. He also responded in detail to the various procedural points taken by the Claimants and urged them to attend the rescheduled meeting in which they could "continue discussions about the proposal that the Digital Delivery Manager/Full Stack Developer role will become redundant", consider the roles being proposed and whether they would be interested in exploring them further.

33. Both Claimants declined the invitation to meet with the Respondent on 21st June.

34. Mr Ferguson wrote to the Claimants again on 20th June. The Claimants were told that, because they had declined a consultation meeting a second time the Respondent would not reschedule the meeting again. They were urged to attend the scheduled meeting on 21st June to provide any further

feedback. If, however they did not attend Mr Panesor would proceed to make decisions and they would have lost the opportunity to input. If preferred they could provide suggestions or feedback in writing by 12 noon on 22nd June. In particular the Claimant's were asked to indicate by noon on 22nd June whether they want to be considered for any of the new roles.

35. Neither Claimant attended the meeting on 21 June. Both Claimants told the Tribunal that the salaries were unacceptable. The Second Claimant said that he did not attend the second consultation meeting because "there was no point" and because the salaries proposed were insulting.

36. On the evening of 21 June 2022 both Claimants sent a lengthy emails, in near identical form, to Mr Ferguson copied to Mr Panesor making numerous procedural points about the redundancy process, and stating (amongst other things) that, given the salaries proposed, they were concerned that the redundancy "may be a sham redundancy". The First Claimant also said in her email that when she had been invited to apply for the role of Digital Programme Manager Mr Panesor had told her that it might be up for negotiation. However she was not aware at the time that her current role would be at risk of redundancy. She was not confident that the Respondent would address her issues at the next consultation meeting, but that she would attend another consultation meeting provided that her legal adviser could be present.

37. Neither Claimant expressed an interest in any of the proposed new jobs.

38. On 23rd June Mr Ferguson wrote to both Claimants noting that they had not attended the proposed meeting on 21st June, that their emails had been taken into account when considering the restructure proposal and that, as no alternatives had been suggested by them, the Respondent had decided to restructure the team as outlined. Their current roles were therefore redundant and that, if they were interested any the future new roles in the digital team, or any other vacancies, they should make their interests known by noon on 29th June.

39. On 1 July both Claimants were sent notice of redundancy and informed that their employment would end with effect from that day. They were paid an enhanced redundancy payment and pay in lieu of notice.

40. After the Claimant had left the Respondent took no immediate steps to recruit to new roles. (Mr Panesor said that this was because it took some time for Ms Chung to get to a position where she was ready; she wanted to do some further market analysis and take advice as to how and where to advertise).

41. In November the Respondent advertised the Digital Operations and QA Analyst role (internally) and December (externally) at a salary for "up to £30,000" but were unsuccessful. They tweaked the role and readvertised

it as a Digital Project Officer. The role was eventually filled at a salary of 30,000.

42. The Digital Project Manager role was first (unsuccessfully) advertised in December. It was readvertised in January and February 2023 and filled at a higher salary of £40,000.

43. The Technical Lead Role was not advertised at all until late February, early March 2023. The Tribunal was told that this was because HR was still running market analysis to benchmark the salary that was being offered against market rates. In the end the Respondent advertised the role at "up to £65,000 per annum". In order to achieve that the Digital Data Analyst role was deleted. Eventually having been unable to find another candidate the Respondent recruited their previous contractor on an FTE salary of £75,000 but on a three-day week (i.e. paying £45,000). All the salaries were higher than those which had been posited with the Claimants .

The Law

44. Section 139(1)(b)(i) of the ERA provides that:-
"An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to "… the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish."

45. By virtue of section 98 of the ERA, it is for the Respondent to show the reason for the dismissal and that it is a potentially fair reason for dismissal within the terms of section 98(1)(b). A dismissal for redundancy is a potentially fair reason for dismissal within the terms of that section.

46. Once an employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason "… depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case." (Section 98(4) of the ERA).

47. In cases of redundancy, it is well-established law that an employer will not normally be deemed to have acted reasonably unless he warns and consults any employees affected, (where relevant) adopts objective criteria on which to select for redundancy, and takes such steps as may be reasonable to minimise the effect of redundancy by redeployment. If an employer fails to warn or consult, a dismissal will be unfair unless the employer could have concluded, in the light of circumstances known to him at the time of dismissal, that consultation or warning would be utterly useless. Whether an employer has adequately consulted their employees is a question of fact and degree for the tribunal to decide,

48. Where there are employees doing the same or similar work, or where there are employees whose work is interchangeable, an employer may need to identify the group or "pool" of employees from which those who are to be made redundant will be drawn. However "there is no rule that there must be a pool; and employer, if he has a good reason for doing so, may consider a single employee for redundancy." (Wrexham Golf Co-Ltd the Ingham EA T0190/12).

49. Discrimination. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment.

50. Section 13 defines direct discrimination as follows:-

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.
>
> Disability is a protected characteristic.
>
> Section 13 focuses on "less favourable" treatment. A claimant must compare his or her treatment with that of another actual or hypothetical person who does not share the same protected characteristic in comparing whether the employee has been treated less favourably than another. Section 23 of the Equality Act provides that "on a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case." Is not necessary for all the circumstances to be the same provided that the circumstances are materially similar. In other words for the comparison to be valid like must be compared with like.

51. The treatment must be "because of" disability. This requires an examination of the motives (whether conscious or subconscious) of the alleged discriminator. Nor is it necessary for the discrimination to be the whole reason for the treatment. It is enough that disability was a material influence in the decision.

52. Proving and finding discrimination is difficult. It involves making a finding about a person's state of mind and why he or she has acted in a certain way towards another, in circumstances where they may not even be conscious of the underlying reason, and will in any event be determined to explain their motives or reasons in a way which does not involve discrimination. It is for this reason that there is said to be a shifting burden of proof. As reaffirmed by the Supreme Court in **Royal Mail Group Limited v Efobi 2021 ICR 1263** it is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination has been committed. If that burden is not discharged, the claim fails. If such facts were proved, the burden moved to the employer to explain the reasons for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic played no part in those reasons.

53. However, it is important not to make too much of the role of the burden of proof provisions. As Lord Hope said in **Hewage v Grampian Health Board 2012 ICR 105**4 "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

Submissions

54. For the Respondent Mr Watson submitted that the reason for the Claimant's dismissal was that her role as Digital Delivery Manager was deleted and she was redundant. There was no evidence that Mr Panesor did or would want to dismiss her because she had Multiple Sclerosis (MS). Secondly Mr Panesor did not in fact know that the Claimant had MS. Accordingly it cannot have been the reason that he dismissed her. Even if Mr Panesor ought reasonably to have known that the Claimant had MS this was not relevant to the direct discrimination claim.

55. As to the redundancy the principal reason for the dismissal of both Claimants was that their roles had been deleted; and they were redundant. The Respondent had engaged in reasonable consultation. There was no requirement to place the Claimant in a pool for selection with any other individuals. The Respondent also took reasonable steps to find the Claimants alternative employment. Although the Claimants complained that the alternative roles were paid less money, there was no evidence that the salary bands for the new roles were wrong.

56. For the Claimants Mr Moore submitted that the advice from ACAS was that "if you think your redundancy was unfair your employer should provide you with the opportunity to appeal." The advice did not say that you have been made redundant before you could appeal. The Respondent had not allowed the Claimants an appeal.

57. Mr Moore also submitted that the various documents provided by the Respondent setting out the proposals by Ms North to restructure the team were not authentic; and that the phrase about the deletion of the two posts had been inserted after the fact. Those documents could not be relied on for these proceedings. Ms North was lying when she said that she wrote those lines.

58. He submitted that that the Respondent had failed to answer the Claimants' questions about the new jobs in their consultation meeting. He had told the First Claimant that she was not able to do three out of the four new roles and that the only post that Mr Panesor considered suitable for the First Claimant had a salary of £27,000. He had a closed mind to the Claimants' suitability for the jobs. Mr Moore also submitted that the Respondent had deliberately made the new roles unattractive to prevent the Claimants from applying.

59. Mr Moore submitted that having encouraged the Claimant to apply for the Digital Programme Manager role in December 21 six months later Mr Panesor no longer appeared to value the First Claimant's skills. The Claimant's disability was part of the reason for her dismissal.

60. The Respondent should have told the Claimant about the proposals to restructure the team at a much earlier stage in the process. The Claimants were good workers and were being led by an individual who didn't understand how the department ran best,

Conclusions
Direct Disability Discrimination.

61. Did Mr Panesor treat the Claimant less favourably than he would have done a non-disabled individual because of her disability?

62. Mr Watson submits that as Mr Panesor never knew that the Claimant had MS it cannot have been the reason that he dismissed her. Although he knew that she had CIS – this was not the pleaded disability. This tribunal would not wish to rely on a pleading point of this kind. A person can be subject to discrimination because of disability in circumstances in which it is thought that it is likely that disability would arise at a later date, or that she might be disabled. Mr Panesor was aware that the Claimant's CIS might be a precursor to MS and that she might be disabled. In the Tribunal's view this is enough.

63. However, the point is academic. There was no evidence before this tribunal that any part of the reason for the deletion of the Claimant's role was influenced by the fact that she was, or might be, disabled. The deletion of the Claimant's role was envisaged by Ms North as part of a wider restructuring of the DevOps team. We are satisfied that Mr Panesor valued the Claimant's work. He encouraged her to apply for the Programme Manager role at a time when he was already aware that the Claimant might be disabled. The Claimant has not explained why Mr Panesor might have been influenced by her disability in May/June 2022, when he was not so influenced in December 2021. In evidence the Claimant suggested that Mr Panesor put her forward for the Digital Programme Manager role in December 2021 "*not because he valued me, but because he viewed my disability as a weakness and thought I valued myself so little as to accept a role with less money, simply because of an inflated title. When I declined, I spoiled his plans. So he put in motion the plan to have me thrown off the department. And Ireto would follow."*

64. We do not accept that. The First Claimant, in her email of 21 June 2022 (419) noted that although the Digital Programme Manager post paid less than her current salary, Mr Panesor had suggested to her that it was *"up for negotiation subject to my application."* She said she was in *"no doubt whatsoever that [Mr Panesor] wanted me to apply for the position as he was confident that I would be successful."* This is wholly at odds with the statement in her witness statement that the reason that he asked her to

apply for the Digital Programme Manager role was because he viewed her disability as a weakness.

65. The restructuring of the DevOps team had been a long time in the making. We accept the Respondent's evidence that this was wholly about the roles that were required by the Respondent and not about the individuals who were in those roles.

66. As to informing the Claimant that she was not suitable for three out of the four new roles, there has been no evidence before this Tribunal to challenge, on the balance of probabilities, that this was Mr Panesor's genuine opinion at the time, or that his opinion was influenced by her disability. The Claimant has accepted that the new roles were different to her current role. We accept that this may have been discouraging to the Claimant at the time, but Mr Panesor made it clear to the Claimant that his view was based on his assessment of her previous experience and that, once she had seen the job descriptions, she would have an opportunity to argue differently. She herself agreed that she was not suitable for two out of the four roles.

Unfair dismissal

67. We are satisfied that the principal reason for the dismissal of both Claimants was redundancy in that their roles were no longer required at the Respondent. As we have said we do not accept that the 2021 documents provided to the Tribunal are fabricated or that they were added to, in order to provide false information.

68. We do not accept that the roles of Technical Lead and Delivery Project Manager which the Respondent advertised in March 23 were the same roles as the Claimants' previous roles of Digital Delivery Manager or the Full Stack Developer roles, such that the redundancy was a sham, as alleged. (The Tribunal was however critical of the Respondent's failure to provide documentary evidence of the changes made by Mr Panesor to Ms North's original proposals, and consider that this should have been provided to the Claimants in disclosure.)

69. This was not a perfect process. The Tribunal considers that the Respondent should have made the salaries and the job descriptions for the new roles available to the Claimants before the first individual consultation meetings. That would have enabled a much more productive dialogue. As it was the Claimants were unable to comment at that stage either on the restructure itself or on their suitability for the new roles. Had this been the only opportunity for the Claimants to comment, there would have been inadequate consultation.

70. However, this was not the case. The Respondent made it clear that the Claimants would have an opportunity to be consulted about those matters at the next consultation meeting which had been scheduled for 10th June.

By that stage the Claimants had been given both the full job descriptions and the salary ranges.

71. The Respondent made it clear that the Claimants would have the opportunity to put their case forward and to discuss both the deletion of their jobs and their capability for the new job roles at the next consultation meeting. The Claimants chose not to attend those meetings. If that choice was on advice, it was bad advice.

72. It was apparent from the evidence which we have heard that the reason the Claimants chose not to attend was because the new roles offered significantly lower salaries. The Second Claimant said, in answers to questions from the Tribunal, that it was clear that the salary being offered for the Technical Lead (the job that he felt more most closely aligned to his existing role) was significantly below market value. He said that one only had to type "technical lead" into a search engine to establish that. However, as he accepted, he chose not to attend the next consultation meeting to make that point and argue his corner. Nor was it a point he made in his witness statement. Equally, if the First Claimant believed that she had experience of the work of the Digital Project Manager it was open to her to have attended the second consultation meeting. She did not do so because of the salary offered for the job was significantly below her current salary. That was a reasonable choice and open to her to make, but it does not make the dismissal unfair.

73. We do not accept that the Respondent had deliberately made the salaries low in order to prevent the Claimants from applying. The Respondent's evidence was that the grades and broad salary bands for the four roles had been assessed though job evaluation (and that where the job sat within that broad salary band was determined by HR in line with market rates). This was not challenged. Although it subsequently became apparent that the salary offered for the Technical Lead was far too low, we cannot infer or conclude from that alone that the salaries offered for the new roles were set deliberately low in order to ensure that the Claimants did not apply. In any event, although the salaries eventually offered for the Digital Project Manager and Digital Operations and QA Analyst roles were higher than that originally put to the Claimants, they were still significantly below the First Claimant's existing salary.

74. As to selection, as the roles had been deleted, there was no "pool" of employees from which to select for redundancy. Mr Moore suggested in submissions (though this was not in the witness statements nor put to Mr Panesor in cross examination) that Mr Panesor and Ms Chung should have been in the pool for selection. While Ms Chung was part of the DevOps team, we do not consider that it was unreasonable not to include her in a pool of employees at risk. The role that she undertook, as the First Claimant accepted, was part of the restructure. It was different to the First Claimant's job. It was even more different from the Second Claimant's job as a developer. Mr Panesor was Head of Membership and only had only

taken interim responsibility for leading the Digital team, which was to be led by Ms Chung.

75. It was also the Claimant's case that the meeting inviting them to the initial meeting on 25th May should not have been called a Digital Team Meeting and that Ms Chung should have been present. While we consider that Ms Chung's presence would have been desirable, her absence does not make the consultation unfair. As it was Mr Panesor who was making the ultimate decision, it was appropriate that he should conduct the consultation meetings. The issue was whether there was the opportunity for genuine consultation, and we find that there was, even if the Claimants chose not to take advantage of it.

76. Mr Moore has quoted from the ACAS advice as to the desirability of providing an appeal against redundancy. However, as the Respondent said at the time, the time to appeal would be once a decision had been taken. At the time the Claimants sought to appeal, the Claimants were only "at risk" of redundancy, and the Respondent was still seeking to consult with them. Neither sought to appeal once they had received the letter of 23rd June identifying that a final decision had been taken to delete their jobs.

77. We considered whether the Respondent should have informed the Claimants that a restructure was in the pipeline in December 2021. Ms North had envisaged a single restructure whereby the creation of the Digital Programme Manager role was part of a wider whole. Mr Panesor had instead implemented the restructure in two stages. At the time the Claimant was invited to apply for the Digital Programme Manager Role she was not aware that was part of a wider restructure.

78. Having heard Mr Panesor in evidence we accept that, at the stage that Mr Panesor was recruiting to the Digital Programme Manager post, he had not yet reached any conclusions as to whether a wider restructure was needed, and that as a manager new to the Digital team, he needed a senior member of the team who had a strong grasp of digital development and infrastructure work in order to assist him and give him counsel as to the new structure. Ms North had envisaged two posts under the Digital Programme Manager (a digital project manager and a junior developer – 216). What eventually emerged, after Mr Panesor's input, were four posts sitting underneath the Digital Programme Manager. We accept therefore his evidence at that stage matters were still very much in the air.

79. For the above reasons we find that the Claimants were not unfairly dismissed.

Employment Judge Spencer
18/09/23 London Central

JUDGMENT SENT TO THE PARTIES ON

18/09/2023

FOR THE TRIBUNAL OFFICE