



EMPLOYMENT TRIBUNALS

Claimant: Ms S Firat

Respondent: hVIVO Limited

Heard at: East London Hearing Centre

On: 3- 4 November 2022, 12- 13 January 2023 and 17 February 2023

Before: Employment Judge L Muir-Wilson

Representation

For the Claimant: Mr Profitt (Counsel)

For the Respondent: Mr Withers (Counsel)

JUDGMENT having been given to the parties orally on 17 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By her ET1 the Claimant, Ms Firat, claims she was unfairly dismissed by the Respondent.
2. The Claimant was first employed by the Respondent, hVIVO Limited, on 2 April 2013 until she was dismissed on 22 July 2021. Initially, she was employed as a clinical support staff, (CSS). Since 2015 she had been promoted and worked as a senior clinical support staff, (SCSS). This being described as the CSS role with additional responsibilities and having been created originally for the Claimant. The Claimant was the only person at the Respondent who occupied this particular role.
3. The Claimant received a redundancy payment and a payment in lieu of her contractual notice on dismissal.
4. The reason given by the Respondent for the Claimant's dismissal was redundancy. In the alternative, the Respondent says there was some other substantial reason for dismissal, here a restructure.

5. The Claimant contacted ACAS on 19 August 2021 for the purposes of early conciliation and received a certificate on 17 September 2021. She claims to have been unfairly dismissed contrary to Section 94 of the Employment Rights Act 1996. In summary she claims the redundancy was a sham, there was no genuine redundancy situation, and she was not fairly selected.

The hearing

6. The hearing took place by CVP. All of the parties and witnesses accessed the video platform without any major difficulties. Where there were problems, I ensured the hearing did not proceed until parties were present and able to access the platform effectively.
7. The final hearing started on 3 November 2022. On 4 November 2022 and following the Claimant having given her evidence, it was discovered that the Claimant was overseas. The final hearing resumed on 12 and 13 January 2023. In due course a cost application arising from the Claimant being overseas was made.
8. When the claim resumed it was agreed that the Claimant could adopt what she had said previously. I confirmed I was satisfied I had a good note of what had been said previously and Counsel for the parties confirmed they were in a similar position. The Claimant answered further questions, and further oral evidence was heard.
9. Additional material was provided. An application to read a statement provided in January 2023 by the Claimant's father was opposed, he was not available to answer questions. Having heard submissions, the application was refused, and I provided my reasons.
10. On 17 February 2023 we resumed the hearing and I went on to provide my oral judgment. Having done so the Claimant requested written reasons through her Counsel as is her right.
11. At the hearing before me the parties had agreed a bundle and the admission of additional material. I was provided with copies of authorities and written submissions. I have read such pages as the parties referred me to, both in their witness statements and in their questioning of the witnesses, but I have not read the entirety of the bundle.
12. During the hearing I heard from:
 - (a) Ms Firat, the Claimant, who gave evidence on her own behalf;
 - (b) Ms Magwaza for the Claimant and who used to work with the Claimant;
 - (c) Ms Barton, a representative from the Human Resources department;
 - (d) Mr Appiah the decision maker and line manager of the Claimant.
13. Considerable time was spent by both parties in providing detailed evidence and conducting detailed cross-examination. In addition to submissions on the evidence and law, there was an agreed list of issues.

14. I am not going to repeat the submissions made (orally and in writing) but I will deal with the main points in my discussion and conclusions below.

Facts

15. Under this heading I set out my findings of fact. I shall not set out the entirety of the evidence that I heard but shall highlight the parts of the evidence necessary for me to make a decision and which seemed to me the most important. Just because I do not mention some piece of evidence it should not be assumed that I did not take it into account.
16. The Claimant started to work for the Respondent in April 2013. Her service was continuous until her dismissal in July 2021. She received a new contract in or around December 2015. This was when her role started as SCSS. This role was created as a promotion opportunity for this Claimant. She was the only person with this role at the Respondent. The Respondent's work involved clinical research and the Claimant was involved in various elements of this work and also line managed some of CSS'. The remainder of the CSS' were line managed by qualified nursing staff.
17. In December 2020 there was an incident involving one of the clinical research storage facilities. This incident involved the delivery of an Investigational Medicinal Product (IMP). This led to an informal and then formal internal investigation which included but was not limited to looking at what role the Claimant had played in the incident and whether she had been at fault.
18. The Claimant claims John Sheridan (variously described as the Chief Operating Officer and Vice-President) was someone who did not like her and who she claims was the main force behind her dismissal. She claims that he told her informally in January 2021 and prior to the formal investigation, she was at fault and there needed to be changes as a lesson for her.
19. Around the middle of January 2021, the Claimant tested positive for Covid and was then off work for an extended period (put at around eight weeks) due to ill-health, returning in March 2021.
20. In early April 2021 the Claimant was invited to a meeting as part of the formal investigation into the December 2020 incident. This meeting took place on 27 April 2021. The outcome of the investigation was provided to the Claimant on 6 May 2021 and there were no findings of culpability, and no action was taken against her.
21. The Claimant claims the findings of this investigation would have not been what John Sheridan expected and claims this led to further actions against her interests by the Respondent.
22. On 23 April 2021 the Claimant had a meeting with Mr Appiah, who was then the Claimant's line manager. Also present was a representative from the Respondent's Human Resources team. The Respondent referred the Claimant for an Occupational Health assessment and report as she was said to have exceeded the threshold for absence during the previous 12 months with reference to her Bradford Factor score. The referral contained various matters to be addressed.

23. On 29 April 2021 the Claimant had her Occupational Health assessment via telephone. The report was provided on 7 May 2021.
24. There were no recommendations made and the report concluded that the Claimant had simply experienced "*bad luck*" when it came to several different sickness and health problems during the last year.
25. The Claimant expressed concern in evidence that following the provision of the Occupational Health report, the Respondent did not arrange a follow-up meeting to discuss the report. She said a meeting had been arranged for 26 May 2021 after she had chased the Respondent, but this did not happen. It was cancelled on the day and a second date for this meeting was also cancelled.
26. It was suggested on behalf of the Respondent that the events that followed overtook matters and made it difficult to arrange a meeting and, in any event, no meeting was needed given the report concluded there were no recommendations for anything to be put in place or done. I accept this rationale from the Respondent.
27. In June 2021 the Claimant experienced a family bereavement and had some authorised time away from work. This was put at around 10 days.
28. In giving evidence, the Claimant agreed an Occupational Health report was part of the normal process and that it would not have been appropriate to have a meeting about the report when she was off work on compassionate leave.
29. The Claimant claims that the referral to Occupational Health was a further attempt to force her out of work, and she suggests that the conclusions of the report were not those expected by the Respondent, and in particular John Sheridan.
30. In any event the Claimant says it cannot be any coincidence that this report and the formal investigation took place so close in time to her dismissal and this goes to demonstrate it was a sham redundancy.
31. I do not accept this. I found the timing of the events to be coincidental and not contrived. Each arose for a good and compelling reason and were dealt with fairly on their own merits and did not feed into the chronological consequential event or outcome.
32. On Friday 9 July 2021 the Claimant was told her role was at risk of redundancy. The Claimant was provided with a letter about a first consultation meeting. There was a lack of certainty on the part of the Claimant and Respondent as to when and how a letter about this (dated 7 July 2021) was provided to the Claimant. There was no meaningful dispute that the Claimant received it on 9 July 2021.
33. A first meeting took place on Tuesday 13 July 2021 when the Claimant was told her role was at risk of redundancy. The Claimant was told she could look on the Respondent's website for any vacancies. There was a discussion about the Claimant moving to the lower pay grade of CSS (which she offered to do) but she was told this was not possible and that the Respondent was not recruiting for CSS at the time.
34. The Respondent was reducing CSS at the time and had several people finishing fixed-term contracts around that time or in the coming months and was reducing the CSS bank staff used.

35. It was later in the day after this first meeting that the representative from Human Resources contacted the Claimant by email to propose a final consultation meeting on Friday 16 July 2021. The Claimant asked for the meeting to be the following week.
36. The Respondent agreed to hold the second meeting the next week. There was reference in the email from the Respondent to the fact the second meeting will be a "*short meeting*". I accept what was said by the Respondent that this was not motivated by any ill-intention, albeit it does demonstrate to me that it was more likely than not that thinking by the Respondent on the outcome of this meeting was already well developed.
37. The second consultation meeting where the Claimant was told her role was made redundant and that there was no other suitable role available took place on 22 July 2021.
38. Following this the Claimant wrote to the Respondent. The letter set out her dissatisfaction but stated she was not appealing. The Claimant says she did not appeal as by this stage she did not want to return to the employment.
39. The Claimant agreed she had been paid her statutory redundancy notice and had been paid in lieu of notice. She said she had not cashed in her share plan as it had lost value.
40. The Claimant said she had been unable to secure employment despite seeking other roles and she was now in debt. The Respondent said that the Claimant had failed to mitigate her loss and that the Claimant had only evidenced eight job applications in 15 months and that it was well-known and well reported that the health care sector had a significant need for care workers.
41. The Claimant said she had not known she needed to provide evidence on this and thought she had applied for more jobs.
42. I found the Respondent's submissions on this persuasive and conclude the Claimant was not actively seeking employment to the extent she suggested. In any event she was out of the country for a significant period and the Claimant did not suggest she was seeking work during this time. I did not find the Claimant had made significantly more applications.
43. The Claimant initially claimed to have provided all of her bank statements. On being asked about her financial information and being taken to entries that suggested there was a further account (held with Monzo), the Claimant agreed and said this was her only other account and she had forgotten about it. I did not find the Claimant's evidence on her financial information credible when it came to suggesting she had forgotten she held this account, nor what she said about a further account and her explanation on why this information had not been provided and why her evidence changed.
44. The Claimant told the Respondent in questioning in November 2022 that she had an account she shared with her brother, (information on this account had not been provided but there had been a payment reference on the face of her other financial information). She said this was a joint savings account into which they both paid. In January 2023 the Claimant said that this account was in her sole name and that she

had accessed funds from the account but needed to pay them back. As she accepted in evidence, she could also have provided information on this account prior to the start of the final hearing.

45. The Claimant said she owed money to her family and on her credit card. The Claimant felt she must have applied for social care roles but could not find anything to prove this. The Claimant accepted she had spent some time out of the UK in 2022 but had been in the UK from July 2021 until May 2022.
46. In questioning about her tax information, the Claimant in January 2023 accepted her tax code reflected additional self-employed work. This was described variously by her as “*odd jobs*”, “*babysitting*”, “*nutrition*” and other care work. She clarified the babysitting involved spending time with an elderly lady. She said she was paying tax for the period 2020-2021.
47. I did not find the Claimant was forthcoming when it came to disclosing her full financial position or employment. She was reluctant to provide information on her self-employed work, which she had not disclosed prior to the resumed final hearing in January 2023. These were findings I return to when considering whether the Claimant mitigated her loss.
48. I remind myself that from early March 2020 and continuing through to 2021 concerns about Covid 19 increased and continued. This had a significant impact on work coming into the Respondent and future potential contracts and projects. Whilst there was some recovery this was not linear or consistent and there were fluctuations and real uncertainty around future work. In particular the end of 2020 to the early part of 2021 was busy with some work, but there had been a lull from around the middle of 2021 until the end of 2021. Given the nature of the work of the Respondent and the changes in the senior management team this was not surprising.
49. There was some uncertainty and disagreement about the precise numbers of permanent and fixed term CSS roles at the relevant time. The numbers were generally agreed to be around 5 permanent CSS roles and 4 fixed term CSS roles.
50. There had been a change in management when the Respondent business was taken over in 2020 and a process of restructuring was undertaken. The Respondent provided evidence as to the various individual roles that were made redundant in around the 12-month period from January 2021. There were at least 13 redundancies in addition to fixed term contracts concluding. I am also told that various consultations took place before and after the Claimant was dismissed. This reflected the financial challenges being faced at the time.
51. Mr Appiah, the Claimant's line manager at the time of her dismissal, said he had been brought in as Clinical Operations Manager for Respondent in January 2021 to advise and streamline the operations and facilitate the objectives of management as well as manage. He said his instructions to improve and restructure the organisation had been verbal and he did not consider this unusual. It was said that roles and business needs were being considered widely. I found it surprising that the scope of Mr Appiah's work and role was not documented but accepted his evidence was a fair summary of what was involved.

52. If someone senior wanted a person to go, then Mr Appiah thought his role might have meant he explored how this might be achieved but it might also involve challenging the thinking.
53. On behalf of the Respondent, it was denied that the Claimant was considered responsible for the December 2020 incident, but that it was an element investigated as part of the wider formal investigation. Mr Appiah denied this or the Occupational Health referral had any link to the Claimant's dismissal. His role had been to look at efficiencies and make proposals about this to senior management, who he suggested at one point would make the final decision. He said he had done this with the support of the Human Resources department.
54. In respect of the Claimant, he identified that the SCSS role was at risk as he considered the way the role worked when it came to management and reporting was not efficient and was causing confusion and a duplication of work and was not needed. He thought the decision to put this role at risk of redundancy had been made at the end of June or early in July 2021.
55. He struggled to recall if there had been emails about the consultation process. In his opinion the letters sent to the Claimant were the formal part of the redundancy process.
56. Prior to the first consultation meeting with the Claimant Mr Appiah said there had been discussions about who ought to be in the pool and this had involved a consideration of where roles overlapped.
57. Mr Appiah said he was the decision maker. The final decision on any role being made redundant would be considered by Human Resources and Senior Management.
58. Ms Barton (part of the Respondent's Human Resources department) gave evidence that the senior management team at the time consisted of two individuals (one being John Sheridan). Their decision had been to restructure in response to a significant downturn in work which did not show any sign of improving and to improve efficiency and performance. Ms Barton claimed not to have been directly involved but said she was aware that Human Resources had been asked to support Mr Appiah in the redundancy consultation with the Claimant. The relevant Human Resources colleague who had been involved no longer worked for the Respondent. Having heard from the Respondent's witnesses I found Ms Barton was more likely than not more aware of what had been happening at the time and more involved in discussions with colleagues than she suggested, but it was right to say she was not directly involved to the extent she did not conduct the meetings with the Claimant or make the decision on dismissal.
59. Ms Barton's evidence was that in early discussions a wider organisational redundancy calculation was carried out. No documentary material was provided in respect of any preliminary consideration on the potential redundancy of the SCSS role.
60. Whilst the Claimant had said in the first consultation meeting she would take the role of CSS, Mr Appiah did not think this was a feasible possibility when she said this. He had reached his own thinking by this time that the SCSS was a peculiar role that did not fit the structure. I found that Mr Appiah was genuine in his belief on this and his

knowledge that CSS' were being let go. When asked to say more about this he talked about fixed-term contracts coming to an end, and this had meant there was no need for any CSS to be made redundant.

61. Mr Appiah was asked about whether the concept of 'bumping' had been considered. I ensured this concept was fully explained to Mr Appiah and how it was said this might apply to this Claimant given that his initial answers appeared to demonstrate a lack of understanding. Counsel for both parties agreed on the explanations provided.
62. Mr Appiah agreed there was at least one CSS with less than two years' service and he thought this person had only recently passed probation. Mr Appiah did not think the SCSS and CSS roles were like for like. There was a difference in pay and responsibility. I accept this as accurate. Mr Appiah agreed the Claimant had previously worked as a CSS and been promoted to the SCSS role. Mr Appiah could not comment about how well she had done the CSS role as he had not been there, but it might be concluded reasonably that since she was given a role with additional responsibilities that she had performed the CSS role well.
63. Mr Appiah said that a consideration of CSS', and the Claimant being willing to accept the CSS role did not change the redundancy decision on the role of SCSS. Mr Appiah considered any possibility of the Claimant taking the CSS role could only be hypothetical and as the Claimant was a line manager he would not put a line manager into a pool with those she managed.
64. Time was spent with Mr Appiah on this. He was insistent he was only looking at a unique role and did not accept it was right to consider whether there could have been a consideration of the Claimant taking the CSS role and another CSS being 'bumped'. He agreed the Claimant was capable of the CSS role and it was likely she was the most experienced and her role had involved her training CSS' and nurses and others.
65. Mr Appiah did not demonstrate he found it straightforward to perceive a distinction between the SCSS as an entity and the Claimant as an employee when it came to considering employment alternatives within a range of reasonable responses.
66. Mr Appiah consulted with the Human Resources representative after the first meeting with the Claimant and following her suggestion to take a CSS role. He said he had told the representative why he did not think this was the right approach. Mr Appiah agreed he had already told the Claimant in the first consultation meeting that it was not possible for her to take a CSS role but said that because she suggested in the meeting, he had considered it. I did not find that Mr Appiah's description of considering this suggestion of the Claimant had involved a meaningful consideration, albeit Mr Appiah genuinely believed he had done so.
67. He concluded it was hypothetical to suggest the Claimant would have come in the top five of the six in a pool of CSS'. He said that someone new to the organisation might still be skilled and have experience. Just because someone was new to the organisation did not mean they did not have ability or experience. Until a criteria was applied to a pool the outcome could not be known. This evidence was cogent and coherent. I further accept that at the time in June and July 2021 the future and extent of the CSS position and the Respondent's need had been uncertain.

68. Mr Appiah confirmed the Claimant had been told she could look into any existing vacancies they might have had she might fit. The newer 'Lead CSS role', which did not exist at the time, did not incorporate the whole of the SCSS role but there was some overlap.
69. Ms Barton did not recall if the redundancy decision had been reached through conversations or emails or a combination of both. Ms Barton thought there had been an email from a colleague in Human Resources about the consultation process to be used for the Claimant. It had been this colleague who had been supporting Mr Appiah and who attended the consultation meetings with the Claimant. Ms Barton did not know if this email or any had been disclosed.
70. I didn't find Ms Barton's evidence that she had not been asked to provide any emails or documents or communications persuasive, given her role and experience and attendance at an earlier case management hearing of this claim. However, I did not find this of determinative significance in my thinking on the issues to be decided.
71. Ms Barton said a pool of one had been determined before the Claimant was consulted with and I accept this was accurate. She and Mr Appiah and her Human Resources colleague had spoken about a potential wider pool to include the whole clinical team, (the nurses, the CSS (who were grade 3) and the Claimant (grade 4)). She thought this had taken place in the middle to the end of June.
72. The nurses were discounted due to their qualifications. The CSS role had been considered for the pool. But there was still a need for the CSS role whilst the SCSS role was not considered to be meeting the needs of the business or effective. It was not just that it involved an additional cost, but the reporting structure and nature of the role was causing confusion and a duplication of work and tasks with the nurses. The addition of the CSS role into the pool was discounted prior to meeting with the Claimant.
73. Ms Barton accepted the potential feasibility of a competitive exercise involving all CSS' and the Claimant, even if just the SCSS role was to be made redundant. Whilst both she and Mr Appiah repeated a number of times that the CSS role was not just a role which involved a lower salary to the SCSS role, it was a different role with different responsibilities, I did not consider this was an issue in this claim.
74. I heard the suggestion put that the two new roles that now exist ('Lead CSS') are the same as the previous SCSS role. I didn't find this persuasive. The Lead CSS role is Grade 3 and not Grade 4 and whilst there is some salary increase compared to the CSS role, it is not to the level paid to the Claimant in the SCSS role. The new Lead CSS role only started around July 2022 and is more of a mentoring role and does not involve the responsibility or management duties that came with the SCSS role.
75. It was not suggested to me there had been any appropriate internal vacancies available at the time.
76. Mr Appiah was the relevant decision maker. Whilst there was a suggestion, particularly on his part, that in addition to his decision, there was a collective decision taken by the Respondent through its managers and executed through Mr Appiah, I am satisfied he was the primary decision maker in respect of the individual dismissal of the Claimant.

77. Both parties complained of each other that there were failures in disclosure and issues in respect of credibility. I heard evidence from witnesses on the nature of material each party considered might have been disclosed in addition to submissions on these matters. I did not find any failures prevented me having a sufficient understanding of the events and issues in this claim and reaching my decision.

Unfair dismissal, the relevant law

78. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. It is a right available only to those who have been continuously employed for at least two years or those dismissed for what are generally referred to as automatically unfair reasons. Where, as here, there is no dispute that an employee with more than two years continuous service was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

General.

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it –*
- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
 - (b) *relates to the conduct of the employee,*
 - (c) *is that the employee was redundant, or*
 - (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
- (3) *...*
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

- (b) *shall be determined in accordance with equity and the substantial merits of the case.*

79. The first part of the test focuses on reason for the dismissal. The burden of proof is upon the Respondent to show that the dismissal was for a potentially fair reason. Where there is more than one reason for dismissal it is necessary for the Respondent to show that the principal reason was potentially fair.
80. In this case the Respondent says that the principal reason for the dismissal was 'redundancy'. Or, in the alternative, there was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
81. A dismissal will not be by reason of redundancy unless the statutory definition of redundancy is met. Redundancy is defined in section 139 of the Employment Rights 1996. The material parts of that section read as follows:

139 Redundancy.

- (1) *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

- (a) *the fact that his employer has ceased or intends to cease –*

- (i) *to carry on the business for the purposes of which the employee was employed by him, or*
- (ii) *to carry on that business in the place where the employee was so employed, or*

- (b) *the fact that the requirements of that business –*

- (i) *for employees to carry out work of a particular kind, or*
- (ii) *for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*

have ceased or diminished or are expected to cease or diminish.

(2) - (5)....

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

82. The relevant law and precedent is summarized as follows:

1. Sub-section 139(1)(b) of the Employment Rights Act 1996 focuses on the employer's "requirements". Once an employer decides to reduce staff for a genuine business reason, the tribunal cannot question the wisdom of that decision (*James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386). However, the tribunal may examine whether the employer genuinely believed

in the facts underpinning the redundancy and whether that belief was based on reasonable information reasonably acquired (*Orr v Vaughan* [1981] IRLR 63).

2. *Safeway Stores plc v Burrell* [1997] IRLR 200 identifies three core questions: (i) Has the employee been dismissed? (ii) Has the employer's requirement for employees to do work of a particular kind ceased or diminished? (iii) Was the dismissal caused wholly or mainly by that state of affairs? These questions form the foundation for determining redundancy.
3. The mere existence of circumstances suggesting a genuine need for redundancies does not automatically mean the dismissal was for redundancy. The tribunal must decide as a matter of fact and causation whether redundancy was the principal reason for dismissal (*Manchester College of Arts and Technology v Smith* [2007] UKEAT 0460/06).
4. If the employer cannot show a potentially fair reason for dismissal, it will be unfair. If that burden is met, the tribunal applies the fairness test under section 98(4) of the Employment Rights Act 1996. The correct test is whether the employer acted reasonably, not whether the tribunal would have reached the same decision (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).
5. The "range of reasonable responses" principle means that different employers may reasonably reach different decisions in similar circumstances. Provided the employer's decision falls within that range, the dismissal will be fair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).
6. *Williams v Compair Maxam Ltd* [1982] IRLR 83 provides general guidance for fair redundancy dismissals. It emphasises early warning of redundancies, consultation with unions, objective selection criteria, fair application of those criteria, and consideration of alternative employment. These principles aim to mitigate hardship and ensure fairness, though they are not rigid rules and may vary with circumstances.
7. When selecting employees for redundancy, employers often identify a "pool". There is no requirement that the pool be confined to employees doing identical work (*Taymech v Ryan* [1994] EAT/663/94). The key question is whether the employer genuinely considered the pool and whether its decision fell within a reasonable range (*Capita Hartshead Ltd v Byard* [2012] IRLR 814).
8. Consultation remains critical. *Mugford v Midland Bank plc* [1997] ICR 399 stresses that absence of consultation will normally render dismissal unfair unless consultation would have been utterly futile. Consultation with unions does not absolve the employer from consulting individuals. The adequacy of consultation is assessed in the round up to termination.
9. Objective criteria are desirable but not mandatory. *Samsung Electronics (UK) Ltd v Monte d'Cruz* (UKEAT/0039/11/DM) confirms that some subjectivity is inevitable in assessing performance or value. Employers are not obliged to use criteria capable of purely objective measurement, provided the system is reasonable.

10. Where an employer adopts a reasonable selection system and applies it fairly, tribunals should not scrutinise individual scores absent evidence of unfairness (*British Aerospace plc v Green* [1995] ICR 1006). Employers should also take reasonable steps to secure alternative employment for displaced employees, including providing information on terms and prospects (*Fisher v Hoopoe Finance Ltd* EAT0043/05).

Discussion and conclusions

83. Applying those legal principles to the facts of this case, the first question I have to ask myself is whether the reason or principal reason for the dismissal of the Claimant was redundancy.
84. There is no disagreement, the Claimant was dismissed. Mr Appiah was the relevant decision maker. I am further satisfied that the reason for the dismissal was redundancy.
85. The Respondent had a situation where there had been a change in ownership and a review of the organisation and structure that coincided with the impact of the Covid 19 pandemic. I accept the evidence given by the Respondent that, at the time, there was not just uncertainty about work and future projects and some turbulence, but there had also been a downturn in work and future work, and given the nature of the work of the Respondent, none of this is surprising.
86. The Claimant's unique role of SCSS (created for her previously and only ever occupied by her) involved management and other work otherwise being done by the qualified nurses. I accept the evidence of the Respondent that the view had been genuinely reached that the way the Claimant's role and responsibilities worked was leading to duplicated work and confusion.
87. Overall and given the circumstances, the requirement of the Respondent for the role of SCSS had ceased or diminished and might reasonably be expected to continue do so. I accept that at the same time there was also a genuine and wider focus on restructuring, efficiency and streamlining, but in respect of this claim, the primary reason for the Claimant's dismissal was redundancy.
88. The burden here is on the Respondent to show a potentially fair reason for the dismissal and where the employer, here the Respondent has taken that decision to reduce the number of employees for genuine business reasons, it is not open to the tribunal to investigate whether such a decision was sensible. Here I accept the Respondent held a genuine belief to conclude that the employee situation needed to be made as in reduced and particular here, this employee needed to be made redundant. There was volatility in the sector at the time and there was a diminished need. For completeness I remind myself this can be a permanent or a temporary need, such as to satisfy the requirements.
89. It is open to an employer to organise its affairs so that its requirement for employees to carry out particular work diminishes. If that occurs, the motive of the employer is irrelevant to the question of whether the redundancy situation exists. **Jackson and Berkeley catering Limited UKEAT/0074/20/LA(V)**.

90. I am not concerned with whether the Respondent is right or wrong about those projections, simply with the question whether the decision that it no longer needed the SCSS role was a genuine reason based on reasonable information reasonably acquired - **Orr v Vaughan** . I conclude that it is more likely than not, that it was a genuine reason reached on information obtained as part of the usual work of a line manager as well as the usual review of ongoing projects and the market. I accept the Respondent evidence on this and that as part of its considerations at the time, had concluded that due to various CSS fixed-terms coming to an end, nothing needed to be done about reducing CSS roles at the time. I accept the Respondent, including through Mr Appiah was reviewing the business needs at the time and this included a review of a number of roles. In reaching my thinking on this I took note of the fact that the Respondent made a number of other roles redundant during the relevant period.
91. I have concluded that the reasons for the dismissal were that the Respondent's requirements for workers to carry out work of a particular kind, the work done by the SCSS had diminished. That is a reason falling within Section 139(1)(b) and Section 98(2)(c) of the Employment Rights Act 1996.
92. In the present case it seems to me that there was an overlap of matters relevant to the question of whether there was a redundancy situation, and matters relevant to the potential further question of whether redundancy was the reason for dismissal and perhaps the question of whether the employer in all the circumstances acted reasonably. Applying **Safeway Stores v Burrell**, here the qualified nurses absorbed the work of the Claimant. There was therefore a diminution in the requirement of the business for the SCSS role to carry out work of that kind and accordingly a redundancy situation.
93. Of course, that does not mean that the Respondent's motive and its conduct towards the individual employee are not relevant to the claim for unfair dismissal. First, even where a redundancy situation exists, it does not necessarily follow that the redundancy was the reason for the dismissal. See, for example, **Timex Corporation v Thomson [1981] IRLR 522 EAT**, where it was held that an actual redundancy situation was or could have been a mere pretext for getting rid of an employee whom the employer wished to dismiss, as was argued unsuccessfully here. Secondly, even if the employer proves that the reason was a potentially fair reason such as redundancy, section 98(4) ERA requires the tribunal to decide "whether in the circumstances ... the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee". A claim may succeed on the basis of substantive and/or procedural unfairness as I find it does here.
94. Having found the Respondent dismissed the Claimant by reason of redundancy which is a potentially fair reason. I need to address the question of whether the dismissal was fair or unfair applying the test set out in sub-section 98(4) of the Employment Rights Act 1996 and whether the Respondent acted reasonably here.
95. It is clear to me that the Claimant genuinely feels she had a poor relationship with John Sheridan and that he felt antipathy towards her. As such I accept she perceived in particular that the events that took place during the first half of 2021 (the informal and formal investigations into the December 2020 incident, how she felt her sickness absence was addressed and the referral to Occupational Health) felt personal. This is the basis on which she claims the redundancy was a sham exercise designed to manoeuvre her out of her employment.

96. I am satisfied these events did not motivate or form part of the decision to dismiss. They did not play any role in the decision such as to make the Claimant's dismissal unfair. Ultimately there is nothing that suggests to me there were any negative findings reached against the Claimant in respect of these historic matters. Given the circumstances of the incident in December 2020 and the potential for a reputational and economic impact on the Respondent, it was inevitable that a formal investigation would be conducted. There was nothing that persuaded me this investigation was designed to look solely at the Claimant and her potential role in the incident or otherwise. The investigation was designed to review why the incident occurred and no doubt take any action required as well as review future operations and procedures. I found that the Respondent accepted that once the formal investigation was concluded, the Claimant was not involved in the responsibility for the incident and this was sufficiently communicated to her. In reaching my thinking on this I found the evidence of Mr Appiah persuasive as well as the documentary material available from the time.
97. The Claimant accepted the main thrust of her health history, as set out in the Occupational Health report. This confirmed a number of absences relating to health and there had been a number during the previous 12 months and I was satisfied the Claimant's absences had met the required level for the Respondent to appropriately seek such a report. I also accept there was a genuine intention in the referral for the input of Occupational Health to seek assistance on the Claimant's circumstances to consider whether the Respondent could or ought to be doing anything.
98. The Claimant agrees the referral to Occupational Health for an assessment is the usual approach where there is absence at a certain level and there was no suggestion there ought not to have been such a referral. I didn't find the Respondent failed to accept the findings of the report that the Claimant had simply experienced an unfortunate period of ill-health.
99. Given the contents of the report, there was no immediate or pressing need to discuss the report and it would not have been appropriate to prioritise an unnecessary discussion, over the bereavement leave that the Respondent agreed for the Claimant.
100. I conclude that the timing of all of these events, whilst close together, was coincidental rather than contrived.
101. When it came to the process and approach adopted by the Respondent, I do not consider a fair procedure was followed. In reaching this finding, I remind myself of the general guidance given in *Williams and Compair Maxam Limited*.
102. In particular, I consider that there was insufficient warning, insufficient consultation and insufficient consideration of alternative employment, (including sufficient understanding on the part of the Respondent of what might be considered). I reach this thinking having heard from Mr Appiah and his explanation of how he approached and understood the redundancy process when it came to the SCSS role.
103. In particular, I am not persuaded the Respondent genuinely applied its mind to these factors as it ought to have done, but this did not mean the dismissal was not for a genuine reason.

104. The manner in which the Respondent, and in particular Mr Appiah, prepared for and approached the two meetings does not leave the impression of a well organised or well administered approach. I conclude it is not within the range of reasonable processes not to have documented anything about the consultation or dismissal beyond the letters to the Claimant and emails to her that have been drawn to my attention. Particularly given what was said about when and how the exercise was first commenced (prior to the formal consultation period) and who was said to be involved in this consultation and the decision making by the Respondent's witnesses, and when looking at what took place at the first meeting.
105. My attention was drawn to what was said in **Rowell v Hubbard Group Services Ltd [1995] IRLR 195**. I don't find the Respondent completed a fair consultation and I remind myself in particular that here the Respondent failed to consult whilst proposals were still at a formative stage.
106. Whilst I am surprised, given the evidence of Mr Appiah, that he did not try to meet with the Claimant at an earlier stage in the process and before it appears his thinking was already well-defined, there was a proximity to the Claimant's absence from work due to bereavement.
107. The logical conclusion on the Respondent's evidence was that the decision to make the SCSS role redundant and to dismiss the Claimant had been pre-determined and made prior to the consultation meetings. In reaching this finding I have particularly taken account of the Respondent's evidence about what was said in these meetings, (that the Claimant could not take a CSS role), the short period of time between meetings (only extended beyond the week at the request of the Claimant) and what was said about the length of time for the second meeting in advance.
108. However, such pre-determination did not mean here the redundancy was a sham. In particular I am in no doubt there was a genuine need and belief on the part of the Respondent behind the decision to make the SCSS role redundant. However, Mr Appiah's thinking demonstrated a pre-determination on his part that by making the role redundant meant the Claimant would need to be dismissed. This was not due to any malevolent or improper intent to contrive to have the Claimant removed as an employee, but due to his failure to appreciate the range of reasonable responses.
109. In addition, the Respondent did not persuade me that it understood what was reasonably required in completing a fair procedure.
110. It would have been a simple task to produce information in writing for the Claimant. It is good practice to bear in mind that somebody facing a meeting to consult about losing their job may be assisted by having something in writing to take away and consider and I consider the Respondent's practice and what was provided in this particular aspect was also poor.
111. Given the failures by the Respondent when it came to completing a fair process on these elements, I considered whether this meant or undermined the evidence and my findings on the genuine reason for the dismissal being redundancy. On balance, I do not.

112. I am persuaded by the Respondent that genuine consideration had been undertaken and a genuine conclusion reached on the need for the SCSS role. I don't consider my findings that the Respondent failed to consult with the Claimant as early in the process as it ought to have done, undermines this. Nor that Mr Appiah's consideration and thinking that the Respondent's need for the SCSS role had diminished having been well-formed but poorly documented by the time of the first meeting with the Claimant, means the decision itself was not genuine. I don't think Mr Appiah's thinking or poor administration was motivated by a sham reason or contrived determination to dismiss the Claimant.
113. I have also needed to consider whether reasonable steps were taken to consider alternative employment.
114. I accept the Claimant was alerted to looking to the Respondent's website for available vacancies. I remind myself that an employer is not required to create roles, simply to offer what is available, and in this case, I find that this aspect was done fairly.
115. Here it is agreed the Claimant expressed an interest in the CSS role, which she had previously carried out. I am not persuaded the Respondent, and in particular the decision maker, Mr Appiah, fully understood or properly and fairly considered the question of an alternative pool in advance, nor once the Claimant requested to accept a CSS role. In particular he did not understand and therefore consider how the concept of 'bumping' might have been applied here.
116. As such insufficient consideration was made of the alternatives and options that are within the range of reasonable responses available to the Respondent in the circumstances. The Respondent, having not understood them, did not consider a pool involving the CSS' as an alternative, and so there was no chance the option could be adopted. As such, the Respondent did not reasonably seek to consider whether instead of dismissing the Claimant, it could offer her alternative employment, and I am not persuaded there was good reason shown here to justify departure from the expected principles.
117. Here the Respondent's consultation falls short of demonstrating conscientious consideration by an authority of the response to consultation- **Rowell v Hubbard Group Services**. I considered whether there was enough to conclude that even if the decision maker failed to consciously consider, (which he did fail to do), the representative from Human Resources met this requirement. However, there was no direct evidence from the relevant individual on this, and although I have taken into account the contemporaneous documents and evidence from other sources, I am not persuaded there was a conscientious consideration of the Claimant's response, as set out in her first meeting.
118. This does not mean I find the Respondent was required to include more junior employees in the pool. That would be to stray beyond my function. However, the Respondent fails to satisfy me that it genuinely applied its mind to the question of the pool of employees (for redundancy) within a band of reasonable options. The Respondent failed to understand or consider a well-established option, consistent with the suggestion made by the Claimant in her first consultation meeting, I consider this is conduct which mars the fairness of the scheme, whereby otherwise the Respondent would have acted reasonably - **British Aerospace plc v Green and ors 1995 ICR 1006, CA**. here the Respondent alighted upon a pool of one and its

mind was closed to other options, mainly here it appears, as it did not fully understand or contemplate potential and reasonable options. They were not dismissed; they were not considered.

119. However, it is too speculative to conclude that had there been a pool of the CSS' who were not bank staff or coming to the end of their contracts and the Claimant, the Claimant would have definitely secured the role. I heard evidence and submissions on this issue. Whilst the Claimant had relevant experience and her history tends to suggest she performed well as a CSS, I am not in a position to compare her to the other potential pool members, or to conclude the only conclusion that could have been reached by the Respondent was that the Claimant would have been selected for a CSS role at the cost of a serving CSS. I have considered the likelihood of the Claimant securing the CSS had she been included in a pool as above, based on the evidence, and this informs my finding below on the reduction to be made as I consider *Polkey* applies and given the number of other members of the pool.
120. The Claimant questioned through her Counsel whether furlough had been considered (this not having been recorded as something considered or discussed during the process). This arose against the background of the Government offering support to employers through the Coronavirus Job Retention Scheme. This was not a point that was pressed to me, evidence having been provided that furlough was not being used by the Respondent at all at the time. I do not find a failure to consider furlough to be unreasonable here, given the genuine reason behind the Respondent's conclusion as to the diminution in the need for the SCSS role.
121. Finally, I have asked myself whether the failure to hold an appeal was unreasonable. I consider that some employers in receipt of the Claimant's e-mail sent following her dismissal might have treated that email as an appeal in itself. However, the Claimant specifically stated she was not appealing and continues to accept this was her intention. The Respondent had made the Claimant sufficiently aware that a right of appeal was available. That was an option not taken up by the Claimant. The failure to hold an appeal was not unreasonable.
122. Submissions have been made in respect of the new roles of 'Lead CSS' created more recently and that this can be said to demonstrate a failure by the Respondent to have shown the need for the Claimant's duties had never diminished. I do not agree. Given my findings on the uncertainty of the work and future projects at the time and the nature of the work provided by the Claimant, I am satisfied there is sufficient and significant distance in time between the dismissal and the creation of the new roles (which do not sufficiently replicate the Claimant's role in any event), that the new roles ought not to be perceived as sufficiently similar, nor in the way as was submitted. I accept there was at least 12 months between the Claimant's dismissal and the new Lead CSS role.
123. Having made some criticisms of the Respondent particularly in respect of the process and some flaws in the thinking, the test for me is whether the dismissal both procedurally and substantively fell within a range of reasonable responses. When considering what was done by the Respondent, I accept that other employers might have acted differently but that is not determinative. I find that in the particular circumstances of this case this employer acted reasonably in treating the redundancy situation as a sufficient reason to dismiss the claimant.

124. Whilst I have found the reason for dismissal to be genuine the process followed fell outside of the range of reasonable responses and in reaching this finding, I remind myself of the general guidance given in *Williams and Compair Maxam Limited* and I do not consider a fair procedure was followed here. In particular, I consider that there was insufficient warning, insufficient consultation and insufficient consideration of alternative employment. In particular, I am not persuaded the Respondent genuinely applied its mind to those particular factors.
125. As a consequence of this, I have gone on to consider whether a compensatory award need to be made. It is agreed ground the basic award has been met through the redundancy payment. I have gone on to consider s.123 of the Act and whether there is any loss sustained by the Claimant as a consequence of the dismissal in so far as that is attributable to action taken by the Respondent.
126. The relevant weekly figure here is £556.40. There was a financial loss and as a starting point, the 52 weeks and the 12-month cap is agreed to be in the sum of £28,932.
127. I have then needed to consider, given the issues raised, whether the Claimant has taken reasonable steps to mitigate her loss.
128. The Claimant has taken some steps to look for another job, but these have been limited and a number of these job applications were made more recently. I accept the submissions made on behalf of the Respondent that the Claimant has not done enough to mitigate her loss. As such, I am adjusting the award as the Claimant has not acted reasonably when it comes to mitigating her loss.
129. I accept the Claimant made some applications prior to the hearing in November 2022 but I am not persuaded that there were many other applications made by the Claimant which were not recorded, and which she cannot now remember and that she did not know she ought to provide information on these. I take account that the Claimant was out of the country for an extended time, and I have not found she was actively seeking work during those particular times. I also take into account the Claimant has been professionally represented throughout when it comes to understanding matters.
130. The Claimant failed to disclose she had also received self-employed income and also failed to disclose some financial information prior to when she purported to give evidence in November 2022. Some information on this came to be identified by the Respondent and was accepted in early 2023, and some information was provided around the same time by the Claimant, but ultimately whether deliberately or not, the Claimant did not provide full details on her financial position as might reasonably be expected where loss is in issue. The Respondent discharged its burden on this, and I consider it reasonable to cap the compensatory award to six months. Thus, a sum of £14,466.40.
131. I then come to consider whether *Polkey* applies and whether any reduction should be applied. I consider it is more likely than not based on the evidence that is before me that the Claimant would have been fairly dismissed if a fair procedure had been followed and for this reason, I reduce the compensatory award by 80%. In other words, by £11,573.12 (this being 80%).

132. Therefore, the overall compensatory award is the sum of £2,893.30.
133. I was invited by Counsel to consider whether there needs to be any adjustment in relation to failures to follow the ACAS codes and both parties pointed to failures. This was not a sham redundancy and I do not need to consider what's said about failures and the ACAS code. I am aware that there is no recoupment to be applied in this particular case.

Additional matters

134. I have also been required to reach findings in respect of an application for costs. An application having been made by the Respondent for costs as a result of the Claimant being overseas in November last year. I accept having looked at the test I must apply that the Claimant's presence overseas amounted to unreasonable conduct, but that is on the basis in accepting that she must accept responsibility also for her professional representatives.
135. When I consider whether I ought to exercise my discretion here, I specifically take account of a fact there was limited impact. Whilst there was some additional time involved, it was not, in my opinion significant.
136. I also consider that this was not a deliberate nor intentional act to disrupt proceedings or try to give evidence knowing she was precluded from doing so by reason of her geographic location. This was evidenced to me by the way in which the information that the Claimant was overseas came out and was provided to Counsel in November 2022.
137. I also take into account that the employment tribunal is not a costs driven arena and therefore I do not intend to make any award in respect of costs.
138. I apologise to the parties for the extended delay in providing these written reasons. This has been due to personal circumstances and a significant period of time where I have not been working. This has involved bereavement and serious health problems.

Employment Judge L Muir Wilson
Dated: 30 December 2025