THE EMPLOYMENT TRIBUNAL

HEARD AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE H WILLIAMS QC**
MRS R BAILEY
MS J BIRD

BETWEEN:

MAGGIE WARRAN **Claimant**

AND

BUPA INSURANCE SERVICES LIMITED **Respondent**

ON: **23 & 24 October 2017**

REPRESENTATION:
Claimant: **Mr M Palmer (Counsel)**

Respondent: **Mr T Brown (Counsel)**

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant's claims for unfair dismissal and for age discrimination are dismissed.

REASONS

(*Provided pursuant to the Claimant's request at the conclusion of the hearing on 24 October 2017; summary reasons having been given orally at the time*)

Issues

1. The Claimant was employed by the Respondent as a Medical Support Adviser ("MSA") from 10 April 2007 until 7 April 2016. At the time of her dismissal she

was 67 years old. The Claimant contends that the decision to dismiss her and/or not to offer her one of the new Claims Management Specialist ("CMS") roles constituted indirect age discrimination. She also claims that she was unfairly dismissed, both because redundancy was not the genuine reason for her dismissal and because a fair process was not followed.

2. The issues in dispute between the parties had been discussed and formulated at an earlier Preliminary Hearing on 7 September 2016 and were further discussed at the outset of the hearing before us. Mr Palmer confirmed to us that there was no direct age discrimination claim and that in so far as there was a difference in formulation between the indirect age discrimination claim in the order made following the Preliminary Hearing and in the Particulars of Claim, he relied upon the way it was set out in the pleading. Following our discussion, it was agreed that the issues requiring our resolution were as follows:

Unfair dismissal:

2.1 Was the Claimant dismissed by reason of redundancy, as the Respondent asserted?

2.2 If so, was her dismissal fair in all the circumstances and in particular did the Respondent follow a fair procedure as regards the matters set out at paragraphs 18(a) – (m) of the Particulars of Claim? (We clarified that the reference to suitable alternative employment in sub-paragraph 18(j) related to the Medical Policy Adviser role).

2.3 If the Claimant was dismissed unfairly, did she contribute to her dismissal and if so, in what percentage? (The contributory conduct relied on was the Claimant's handling of the redundancy process, particularly an alleged failure to make use of a right of appeal.)

2.4 If the Claimant was unfairly dismissed, what were the prospects that she would have been fairly dismissed had a fair procedure been followed?

Age discrimination:

2.5 Did the Respondent apply to the Claimant a provision criterion or practice ("PCP") of allowing Juliette Huberman to undertake a trial position supporting the Claims Department (a precursor to the CMS role)?

2.6 If so, was the PCP applied to those who did not share the Claimant's protected characteristic in relation to age (namely, being above the statutory retirement age)?

2.7 If so, did it put people with whom the Claimant shared the protected characteristic at a particular disadvantage, when compared with people who did not share the characteristic?

2.8 If so, was the Claimant placed at that disadvantage in not being selected for one of the CMS roles and/or in being made redundant?

2.9 If so, has the Respondent shown that it was a proportionate means of achieving a legitimate aim.

3. We agreed with the parties that we would hear the evidence relevant to the these issues first of all and that if we found for the Claimant in relation to all or any of her claims, after giving our decision along with a summary of our reasons, we would then proceed to consider remedy, including hearing submissions and any additional evidence required.

Evidence

4. We heard evidence from the Claimant and then from Harriet Kenyon, the Respondent's Head of People and Christopher Hand, Head of Claims Management. Their respective witness statements constituted their evidence in chief.

5. We also considered documentation from an agreed bundle of document. Cross references given below in square brackets in relation to various documents are to the pagination of this bundle.

Facts Found

The MSA role

6. The Respondent provides medical insurance services. The Claimant was employed at its Brighton office as a MSA from 2007. Her background is in nursing and the role was one that required clinical expertise. At the time of the events we are concerned with the Claimant was 67 years old.

7. By late 2015 there were three MSAs. In addition to the Claimant, there was Juliette Huberman (51 years old) and Catherine Baker (43 years old). A fourth MSA, Cate Van Wyk resigned in November 2015 and was not replaced. The MSAs reported to a Clinical Lead. From 1 December 2015 this was Maggie McDow, who no longer works for the Respondent (and was not called as a witness). Her predecessor, from Spring 2015 to the end of November 2015, was Martina Wright. The Clinical Lead reported, in turn, to the Medical Director, Armit Sethi.

8. Prior to the structural changes that we come on to describe, the central part of the MSA role involved providing clinical advice to the Customer Services Department ("CSD") to enable them to decide whether to pre-authorise treatment. In short, the MSAs provided the clinical input and the Medical Policy Team advised the CSD as to whether a particular condition / treatment was covered by the relevant insurance policy (though there was a degree of informality in terms of whose advice was sought first). Other aspects of the MSA role entailed managing complex cases, usually one or two a month for each MSA; providing training to the CSD; and undertaking claims analysis. The extent of the latter work varied over time, but we accept that it was always a fairly small part of the MSA role.

9. The MSA was therefore largely a reactive role, responding to requests from the CSD, the Medical Policy Team and the larger clinical team based in Copenhagen.

Events: September – December 2015

10. From 1 September 2015 Dr Sethi and Mr Hand, the Head of Claims Management, decided to try a new arrangement which involved Ms Huberman physically moving to sit with the Claims Department employees, to provide them with clinical support. As Dr Sethi later referred to in an email sent on 5 November 2015 the aim was to provide more proactive input from the clinical team into the review of claims [p.89a]. Ms Huberman did not work on Thursdays and she took three weeks annual leave in November 2015. During her leave period and on some of the Thursdays (depending upon the Claims Department's needs) the Claimant worked from Ms Huberman's desk within the Claims Department, covering her temporary role.

11. In the email sent on 5 November 2015 (referred to in the previous paragraph) Dr Sethi also noted the relative lack of clinical queries, observing that most of the queries coming through the in-box system now in use were policy-related. He said he considered the clinical work could be managed remotely by himself and the medical staff in Copenhagen.

12. The Claimant accepts that the contemporaneous documentation shows that a significant financial saving was obtained as a result of having a MSA in the Claims Department; figures of £34,503.26 and £75,490.98 for September and October 2015 respectively were identified [p.89b].

13. The Respondent had a system of annual appraisals, known as Performance Planning Reviews ("PPR"), which were conducted at the end of the year, with a mid-year review also undertaken as part of the process. The document that was generated was based on input from both employee and their manager. The manager scored the employee an overall grade from 1 – 5 (5 being the highest score). In earlier years the Claimant had scored a 3 or a 4.

14. The Claimant's end of year PPR for 2015 was held slightly earlier than usual on 23 November 2015 because Ms Wright was leaving. Ms Wright told the Claimant that she would be scored 2 out of 5. This was the Claimant's lowest score in the time she had worked for the Respondent. The Claimant was upset and felt this was not fair; she had not received negative feedback during the year of a kind that could justify a low score and she had not received a mid-year PPR that year.

15. After 23 November 2015 there were a number of meetings and communications about the Claimant's score. Ms Wright declined to change her score, setting out her reasons in an email to Dr Sethi sent on 5 December 2015 [p.95c]. The Claimant did not see this document at the time and does not accept that the contents are accurate. On 5 January 2016 following a meeting with the Claimant, Dr Sethi agreed to raise her score to a 3 out of 5. The email containing this decision does not provide his reasons for this [p.105].

16. On 1 December 2015, Ms McDow held a 1:1 meeting with the Claimant because she was upset about the grade from Ms Wright. Her email summarising this meeting, referred to the Claimant's concerns about the extent of her workload and that Ms McDow's had given her some thoughts on prioritising aspects of her work [ps 95a - 95b].

The Respondent's plans and the new CMS role

17. On 6 January 2016 the three MSAs were given a presentation by Dr Sethi, Ms McDow and Ms Kenyon as to the Respondent's plans for re-structuring. The documentation from the presentation was also provided, along with a letter summarising the position [ps 106 – 113]. In short, and in particular as a result of the financial savings that had resulted from the recent initiative of Ms Huberman being based with the Claims Department, the Respondent indicated that two new CMS roles were to be created. This was a new position. The focus of the role was to be on analysing claims data, with a view to cases being handled more efficiently. The plan was for fifty high-value claims a month to be proactively analysed by the CMSs, with a view to making projected savings for the business in the region of £50,000 - £300,000 per month. Analysing the selected claims involved the CMS proactively investigating the claim, including making any necessary medical inquiries and then preparing a summary report and forming a preliminary view on the policy before passing the case to a claims handler. A secondary aspect of the role involved supporting the implementation of new systems and processes, to provide a more standardised management of claims.

18. Whilst clinical knowledge would be required for the new CMS role, the position did not relate to giving pre-authorisation clinical advice. In the new proposed structure the CSA roles were to disappear. Aspects of the reduced need for pre-authorisation clinical advice was to move to a new Medical Policy Adviser role within the Medical Policy Team and the complex case management element was to move to the clinical team in Copenhagen.

19. The Claimant accepts that the proposals were part of a broader "Growth for Change" initiative that was taking place within the Respondent at the time. The three MSA posts were the only roles that disappeared in the proposed re-structuring.

20. Based on the contemporaneous documentation and the evidence that we heard, we accept that the proposed restructuring, if implemented, genuinely involved the deletion of the three MSA posts, with the duties undertaken by those post-holders re-organised as set out above. We also accept that the proposed CMS roles were not in effect the MSA roles by a different name (as the Claimant contended). We have described how the duties were different, in particular that the CMS role involved a considerably greater element of data analysis and also pro-active investigation. Further, a sound business case for the new role had been shown by the savings generated by the temporary role undertaken by Ms Huberman since the beginning of September 2015. The new CMS roles were not identical to that role, but they represented an evolution from that initially informal arrangement.

21. The MSA's were informed that there was a 30 day consultation period. On the same day (6 January 2016) the Claimant also had an individual meeting with Ms Kenyon. We accept that the Claimant was given a genuine opportunity to provide thoughts and ideas both then and over the following 30 days; we reject the proposition that the offer to consult was a sham.

Selection process for the new CMS roles

22. By email sent on 8 January 2016, Ms Kenyon advised the Claimant as to the selection process for the two new CMS roles [p.118]. She indicated that it would be a two stage process, with a written exercise under timed conditions testing the candidate's ability to analyse large amounts of data and to develop action plans; and a competency based interview using the Bupa Global Core Capabilities Framework. A copy of the job description for the CMS role was attached [p.119]. The job description emphasised that the post holder "*must be capable of working under their own initiative with a high degree of autonomy and independent objective decision making capability*". Under the "Accountabilities" section, the first bullet point referred to undertaking "*utilisation analysis and deep dive analysis of claims, both yet to be processed and retrospectively processed, to drive reduced claim spend post treatment and to proactively manage pre auth claims expenditure*". The bullet points that followed made reference to: providing support to the Claims Management team with relevant clinical queries; working with the Medical Policy Team to ensure claims were reviewed with the appropriate benefit entitlement; providing regular data analysis to key stakeholders, based on monthly work output, summarising savings, trends and other key highlights; and supporting the implementation of systems and/or processes that provided standardised medical care management guidelines.

23. On 21 January 2016 Ms McDow emailed the three MSAs with some further information about applying for the new roles [p.121]. She said that it was not necessary to submit an application form, since they were known to the business and the selection process did not require the interviewers to have access to a current CV. She also provided some additional detail about the two-stage process envisaged.

24. On 20 January 2016 the Claimant was invited to attend an interview on 27 January 2016 for the CMS roles. She was told that the desk top exercise would then take place on 29 January [p.122]. The Respondent's Core Capability Framework was attached to the email [p.124].

25. On 27 January Ms Kenyon emailed the Claimant to advise her of a change to the selection process [p.125]. She apologised for the short notice, but explained that it arose from one of the other MSAs, Ms Baker (who was pregnant), still being absent from work. She said that in the circumstances, suitability for the new roles would be assessed by using the candidates' CVs, previous PPRs and feedback from their line manager, to review the fit against the role. She said that this exercise would be undertaken at the end of the following week by Mr Hand, Ms McDow and Ms Coleman (a Resourcing Consultant). She added that ideally they would ask Ms Wright to participate too, but that she needed to confirm this. She added that "*it would be useful if*

you were able to forward an up to date CV to Dominique [Coleman] by Wednesday next week (if possible)".

26. By a reply dated 29 January 2016, the Claimant objected to Ms Wright being on the panel. The Respondent accepted this.

27. The Claimant submitted her CV [ps 53 – 55]. It set out her experience and attributes, but did not specifically focus upon how she met the Core Competencies or the elements of the Job Description that she had been sent. We note in particular that there was limited reference to data analysis within her CV.

28. By email sent on 5 February 2016, Ms Kenyon advised the Claimant that the 30 day period for consultation was now at an end and that no proposals had been received to change the original thinking, nor alternative suggestions made in relation to the proposed organisation structure [p.129]. Ms Kenyon indicated that in the circumstances, it was expected the Claimant's role would be made redundant, but that she would be formally informed at the same time as she was given the result of her application for the CMS role. As the CMS recruitment process was now due to take place on 9 February, the consultation period would be extended and formal information provided on 10 February 2016.

29. On 9 February 2016 Ms McDow and Mr Hand undertook the selection exercise for the new CMS roles. The criteria against which they were to score the candidates had been drawn up in advance by the two of them, along with Ms Coleman. It reflected what they considered to be the key attributes of the role, along with three more general attributes drawn from the Core Competencies document we referred to earlier. We accept that this was a genuine attempt at distilling the attributes most needed for the new role and that whilst their list may not have been perfect, the criteria selected were a reasonable attempt at this identified in good faith.

30. Scoring was on a scale of 1 – 5 (with 5 being the highest mark), for each of the criteria. All three of the MSAs had applied for the two CMS roles. The selection process had not been opened up to other internal or external candidates; preference being given to the MSAs because of their impending redundancies. Because of the differences between the roles, the Respondent did not regard the CSM jobs as suitable alternative employment for the MSAs. (Had they done so, they would have been obliged to offer one of the roles to Ms Baker, given she was pregnant at the time.)

31. We now set out the 11 criteria that were used, showing the Claimant's scores in respect of each [p.147]:
    - Clinical judgement 5
    - Techniques (up to date) 3
    - Breadth of knowledge (clinical issues) 5
    - Ability to make decisions quickly 2
    - Ability to cope under pressure 2

- Analytical experience 2
- Ability to challenge others 2
- Ability to work on issues simultaneously 2
- Competency – working effectively 2
- Competency – knowing our business 2
- Competency – loved by customers 3

32. Thus the Claimant achieved a total score of 30 points. Ms Huberman was scored 48 points and Ms Baker 31 points [p.227]. A benchmark score of 33 for appointment to the new posts had been set, since this represented an average mark of at least 3 points for each of the criteria.

33. Where the Claimant scored less than 3 a comment was included by way of explanation. Those comments included reference to: her being very thorough, which could hamper her ability to make decisions quickly; her being less focused and struggling to cope in pressurised situations (her reaction to her 2015 PPR score was instanced); her having been quite vocal about work pressures; that no skill set in relation to data analysis had been observed from her CV; that she had some difficultly when issues needed to be addressed simultaneously; and that she had been observed to have a lack of awareness of the business strategy in a case presentation at which Mr Hand was also present.

34. In relation to Ms Huberman and Ms Baker, the documents bundle includes an email from Ms Coleman to Ms McDow and Mr Hand showing, at least in part, the documents they were provided with to undertake the scoring exercise. (We say, in part because in Ms Baker's case, the email only attached her CV, whereas the evidence from Mr Hand, which we accept, was that her PPR documentation was also looked at.)

35. The bundle does not include an equivalent email in relation to the Claimant, which is less than satisfactory. We were told that one could not be located. Mr Hand did not recall specifically the documentation provided, although he was confident it included at least some PPR materials. From the evidence of Mr Hand and the documented comments made in the Claimant's assessment, we are satisfied that the selectors had her CV and her PPR documentation. Mr Palmer observed that it was unclear whether they had the half-year PPR [p. 176 onwards] or the year end PPR for 2015 [p. 79 onwards]. He said the former would be unfair as it was largely uncompleted and the latter would be unfair because the score was later changed. We consider it likely that it was the latter, particularly given the detailed comments included in the Claimant's assessment. As regards her scoring, Mr Hand fairly accepted that they did not have Dr Sethi's letter amending her score to a 3. However, as McDow had been quite closely involved in those events and was one of the two selectors, we consider that inevitably she would have made Mr Hand aware of this. We also accept, as Mr Hand told us, that some at least of the 360 degree feedback obtained in relation to the Claimant was also made available, albeit this tended to focus on her training and guidance abilities and did not relate to where she was perceived to be weaker.

36. Overall, we are satisfied from having heard Mr Hand's evidence and from considering the contemporaneous documentation that a fair and genuine assessment made. The Claimant's scoring ranged as we have set out above. This acknowledged both her known strengths, particularly her clinical knowledge and her weaker areas, including coping with a large workload under pressure (see paragraph 16 above) and her relative lack of documented data analysis experience (see paragraph 27 above). In addition, Mr Hand was entitled to draw on his own experience of the Claimant in assessing her knowledge of the business.

37. In light of the scoring only Ms Huberman was appointed. The second CMS role was advertised and the vacancy was later filled by an external candidate.

Events: 11 February – 7 April 2016

38. On 11 February 2016 the Claimant was called to a meeting at which she was informed she had been unsuccessful in her application for the CMS roles. She was also provided with a formal letter indicating that she would be made redundant with effect from 7 April 2016. The letter advised her of her right to appeal in respect of the redundancy decision [p.130].

39. At a meeting on 16 February 2016 with Ms McDow and Mr Hand, the Claimant was given some verbal feedback as to why she had not been selected for one of the CMS roles. Although the Claimant disputed this in the evidence she gave in re-examination, we accept that she was told her scores at this meeting. Such a proposition is consistent with the email that she sent to herself on 6 March 2016 raising some questions and issues about her scoring and assessment [p.140] and also with the contents of paragraph 43 of her witness statement (which she confirmed at the outset of her evidence to us).

40. On 8 March 2016 the Claimant sent the contents of that 6 March email to Ms McDow saying "*as discussed*" [ps.150-151]. The text made reference to requesting a copy of the scores / the details and indicating that she wished to challenge aspects of the scoring that were then referred to.

41. On 29 March 2016 Ms McDow emailed the Claimant a chart showing her scoring and the related comments where she had scored less than 3 points [ps 146 – 147].

42. On 5 April 2016 the Claimant had a further meeting with Mr Hand and Ms McDow at which her scoring was discussed.

43. The Claimant did not institute an appeal against the decision to make her redundant and her employment came to an end on 7 April 2016.

Relevant Law

Unfair dismissal

44. Where an employee is dismissed and claims unfair dismissal, it is incumbent upon a Respondent to establish a potentially fair reason for the dismissal from the exhaustive statutory list set out in section 98(1)and (2) of the Employment Rights Act 1996 (ERA). 'Redundancy' is one of the reasons there listed.

45. If the Respondent establishes a potentially fair reason for the dismissal, the Tribunal must assess whether the decision to dismiss was fair or unfair which in light of the reason identified "*depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably treating it as a sufficient reason for dismissing the employee*": section 98(4) ERA. This entails the Tribunal applying the well known band of reasonable responses test; that is to say the Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's decision fell outside the range of reasonable responses open to it in the circumstances.

46. In ***Williams & Ors v Compair Maxam Ltd*** (1982) ICR 156 the EAT laid down guidelines as to what a reasonable employer might be expected to do in a redundancy situation, namely: adopting selection criteria that were chosen objectively and then fairly applied; giving employees fair warning and opportunities for consultation; and taking steps to see if alternative work was available.

47. A significant body of case-law has since developed in respect of the extent of an employer's responsibilities in identifying a 'pool' of those at risk of redundancy and then making fair selections for redundancy from within that pool. The EAT has distinguished between that situation and one where redundancy arises in consequence of a re-organisation in which jobs disappear and there are new, different roles to be filled. In ***Morgan v Welsh Rugby Union*** [2011] IRLR 376 the EAT held that the factors set out in *Williams* do not seek to address the process by which appointments are made to such new roles. In this situation, the employer's decision is necessarily a forward looking one, likely to centre on the ability of the individual/s to perform that new role. A Tribunal is entitled to consider how far the assessment process was objective and whether it was made capriciously or through favouritism, but should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgement and that the employer is entitled at the end of the process to appoint a candidate/s it considers able to fulfil the role. The EAT also indicated that a Tribunal considering the fairness of the process must apply section 98(4) ERA. The latter aspect was emphasised by the EAT in ***Green v London Borough of Barking & Dagenham*** (2017) UKEAT/0157/16/DM, where it was stressed that the range of reasonable responses test must be applied to each stage of the Respondent's decision making process and that the analysis in *Morgan*, in so far as it goes beyond this, should not be elevated to a proposition of law.

Age discrimination

48. Section 5(1)(a) Equality Act 2010 provides that in relation to the protected characteristic of age, "*a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group*" and a reference to "*persons who share a protected characteristic is a reference to persons of the same age group*". Section 5(2) indicates that an age group may relate to a particular age or to a range of ages.

49. Indirect discrimination is defined by section 19 of the Act. It provides that A discriminates against B "*if A applies to B a provision, criterion or practice*" and

> "(a) *A applies it or would apply it to persons with whom B does not share the characteristic;*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;*
>
> *(c) it puts, or would put, B at that disadvantage; and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim*."

<u>Conclusions</u>

Age discrimination

50. Even taking the Claimant's claim at its highest in the sense of assuming in her favour that the Respondent's actions in predominantly allocating Ms Huberman to the trial role with the Claims Department in the period September 2015 – February 2016 amounted to a "practice" and that this was a PCP applied to both the Claimant and to those who were not in her age group; we do not see how this operated to cause a particular disadvantage to those who were over the statutory retiring age like the Claimant. If it did cause disadvantage when it came to the CMS selection assessment, then logically it caused disadvantage to anyone who was not Ms Huberman and it caused just as much disadvantage to those younger candidates, as it did to those in the Claimant's age group. Indeed, the concrete example of this is Ms Baker, the youngest of the three candidates. (Indeed, arguably, she suffered more disadvantage than the Claimant, since, unlike the Claimant, she had not undertaken this role at all).

51. When pressed during closing submissions to explain how a particular disadvantage to those in the Claimant's age group arose from this alleged PCP, Mr Palmer said that it "*perhaps increased any assumption that may be made regarding the challenges for an older person fitting into that role*". This "perhaps" scenario was not established or indeed even advanced on the evidence and thus was entirely speculative. Furthermore, to show its existence would involve the Respondent's decision makers applying an

assumption as to older people fitting into the new role that would itself be a potential form of direct discrimination. We have already explained that Mr Palmer confirmed at the outset of the hearing that no allegation of direct discrimination was made (and none was pleaded, nor advanced during the questioning of the Respondent's witnesses).

52. Accordingly, we reject the proposition that the alleged practice caused particular disadvantage to those in the Claimant's age group. The indirect discrimination claim therefore fails.

Unfair dismissal

Reason for the dismissal

53. The Claimant's dismissal was for the potentially fair reason of redundancy. We have already explained at paragraph 20 above why we accept that this was a genuine redundancy situation, in which the three MSA posts disappeared.

Fairness of the procedure

54. As set out in our earlier list of issues, the Claimant relied upon the matters set out in paragraph 18 of the Particulars of Claims in contending that the decision to dismiss her was not a fair and reasonable one in all the circumstances.

55. However, by the conclusion of the evidence, some of those contentions had fallen away. It was accepted / not seriously challenged by Mr Palmer that there was no pool from which the employees to be made redundant were selected, as all three MSA roles disappeared (if we accepted it was a genuine redundancy situation). Accordingly, the points at sub-paragraph 18(a) and (b) relating to an alleged lack of consultation in relation to the pool did not arise in the circumstances. Further, as regards sub-paragraph 18(j), it was accepted that the Medical Policy Adviser role was not suitable alternative employment. It was a more junior role paid at about half the rate of the Claimant's salary and she confirmed during her evidence that she did not regard it as a suitable role for her and that she would not have wanted to undertake it. Mr Palmer also agreed that an appeal had been offered against the redundancy decision. We now turn to the issues that remained in dispute.

56. We have already indicated our conclusion that the Claimant was offered a genuine opportunity to consult on the proposed changes (paragraph 21 above).

57. The heart of the Claimant's case concerned her non-recruitment to the new CMS roles. A number of points were raised in relation to this, which we now address in turn.

58. Mr Palmer submitted that the Claimant should have been consulted about the selection arrangements for this role and, in particular, that she should have been consulted when those arrangements changed at short notice in late January 2016. However, an applicant for a new position (whether an existing employee or an external candidate) does not usually have the opportunity to be consulted over the selection arrangements for the role that they are applying for. Consistent with the case law that we have referred to in paragraph 47 above, there is no obligation upon an employer to consult in respect of such arrangements. Accordingly, we do not consider that the fact the Respondent did not do so was unreasonable; it was a legitimate course to take. It was of course unfortunate that the arrangements were changed at short notice, but this was understandable in light of Ms Baker's sudden unavailability and the pregnancy discrimination claim that she could have brought had the selection proceeded by way of interview and test at that juncture, as previously planned.

59. We have earlier indicated our conclusion that the criteria against which the applicants were scored for the new roles, were reasonable and arrived at in good faith (paragraph 29). The criteria were distilled from the job description for the CMS role and from the Core Competencies for the business, which was an entirely reasonable approach. That being so, whether or not the Tribunal, if charged with drawing up the criteria, would have taken the same approach, is not in point. In so far as there was a complaint made about the inclusion of selection criteria being used that were marked "n/a" (paragraph 18(d), Particulars of Claim), there is no merit in this point. The "n/a" marking was used in relation to two elements of the scoring chart. The first appeared at the beginning of the chart ("what we would expect to see from a candidate") and the second was the first of the four Core Competencies ("Competency - leading"). The former was simply a general heading that was not scored; the latter was not scored because no leading was involved in the CMS role. All candidates were treated in the same way in relation to this.

60. As regards the criteria that was scored, Mr Palmer criticised the exercise as being backwards looking rather than forwards looking (sub-paragraphs 18 (h) and (i) of the Claimant's grounds). We do not consider that this was a fair or accurate criticism. As we have explained the criteria was drawn up by reference to the new role and the selectors assessed the suitability of the candidates against that criteria. Inevitably in so doing they had regard to past evaluations of their work and past examples of their work where these bore on those criteria. We consider that this was an entirely reasonable process. In so far as an element of subjectivity was involved, this is not objectionable in itself (see paragraph 47 above).

61. Moreover, the selection process did entail objective assessment, involving reference to the relevant skills and experience shown in the candidates' CVs; Mr Hands and Ms McDow's own knowledge and experience of the candidates' strengths and weaknesses; and the PPR documentation. We have concluded that Ms McDow would have explained the Claimant's amended score in relation to the latter document to Mr Hands (paragraph 36 above). In this regard we note that the Claimant attained a range of scores in

respect of the various criteria and reject – if the same is suggested at paragraph 18(e) – that because the Claimant's overall PPR score had been raised to a 3, she should have been scored no lower than this in relation to each and every criteria. In our paragraph 36 we have also noted examples of where the Claimant's scores were referable to particular material that was before the selectors. Overall, we consider that the scoring of the Claimant was drawn from the range of information and material available in a manner that was fair and reasonable. Again, the fact that it could have been done differently is not in point.

62. There was some delay in providing the Claimant with written confirmation of her scoring in the CMS assessment, as set out at our paragraphs 38 – 41 above. It would have been better practice if this had been provided earlier. However, the Claimant had been made aware that her position was confirmed as redundant on 11 February 2016 and she had been told her scores verbally at the meeting on 16 February 2016. In the circumstances the Claimant could have initiated an appeal (and done so even if she had added to it later). The Respondent's policy, which the Claimant had been provided with, indicated that the right of appeal was to be exercised within five working days of receipt of the redundancy confirmation letter [p.51]. The Claimant did not do this.

63. Accordingly, we find that the decision to dismiss the Claimant was a fair and reasonable one in all the circumstances. The claim for unfair dismissal therefore fails and the issues identified at paragraphs 2.3 and 2.4 above do not arise for our decision.

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Employment Judge Williams
Date: 7 November 2017