EMPLOYMENT TRIBUNALS

Claimant: Mrs K Sartain

Respondent: Birkdale High School

HELD AT: Liverpool **ON:** 7 February 2017

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr Sartain, Headmaster and Husband
Respondents: Ms G Hilsch, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed and her claim for unfair dismissal is not well founded and is dismissed.

REASONS

Preamble

1. By a claim form received 16th October 2016 following the issue of an early conciliation certificate by ACAS on 1st October 2016 the claimant, who is employed by the respondent as a Laboratory Technician, claimed unfair dismissal. In its grounds of resistance the respondent denied the claimant had been unfairly dismissed, maintaining she was dismissed due to redundancy.

2. The issues were discussed with the parties. On behalf of the claimant it was conceded a genuine redundancy situation existed. Paraphrasing the claimant her allegations appeared to be as follows –

2.1 Did the respondents seek to agree the criteria to be applied in selecting the claimant to be made redundant with the union or the claimant? The matrix was changed three times; did the respondent consult with the claimant and/or the union concerning the changes? With reference to the redundancy process, did the respondent follow good practice when it amended the matrix three times?

2.2 Was the claimant's selection fair? In particular, was the matrix criteria aimed at ensuring the claimant scored a "zero" and her colleague Mr Lease, a "three" with the result that the claimant was selected for redundancy?

2.3 Was the scoring of the matrix and the claimant's colleague in relation to the "three" reasonable? Was the claimant's colleague retained in accordance with the selection criteria i.e. should he have scored a "zero" because he does not hold a specialist qualification/post? Should the claimant have scored higher or at least equal to her colleague? If the claimant should have scored equal, should a last in first out policy apply according to the respondent's procedure? It is not denied by the respondent that last in first out is the applicable procedure when employees score the same under the matrix.

2.4 Did the Head Teacher take part in the representation hearing, and if so, did he fail to leave the room for twenty five minutes under Appendix A of the respondent's procedure?

2.5 Was the redundancy procedure unfair for the reason of an alleged breach of confidentiality as clearly indicated to the claimant she was aware of the redundancy on the day the claimant had been made redundant?

2.6 Was Mr Lease, the claimant's colleague, aware he was not to be made redundant before the claimant was informed she had been selected for redundancy, and if so, does this indicate the claimant's redundancy was pre-judged?

2.7 Did communication of the redundancy risk take place at an "optional" meeting and if so, did this give rise to unfairness within the redundancy process?

2.8 Did consultation with the claimant take place in public? If so, did this give rise to unfairness within the process?

2.9 In the meeting between the Head Teacher and the claimant prior to the claimant's appeal hearing was it proposed the claimant's redundancy should be included in a newsletter, and if so, did this reveal the decision on appeal was predetermined? Was the Head Master's attitude towards the claimant intimidatory and if so, did this give rise to an unfairness within the process.

Issues

3 Taking into account the above allegations the issues are as follows:

3.1 What was the reason for dismissal? Was the claimant was dismissed by reason of redundancy, a potentially fair reason within the meaning of Section 98(1) ERA?

3.2 Was the claimant's dismissal fair having regard to the principles set out in Section 98(4) ERA? Did the decision to dismiss the claimant on the grounds of redundancy fall within the band of reasonable responses open to a reasonable employer?

3.3 If the dismissal is found to have been unfair, in accordance with the Polkey "no difference rule" would the claimant still have been dismissed by reason of redundancy in the event of a procedural unfairness resulting in an unfair dismissal?

Alleged unlawful deduction of wages and alleged shortfall in the statutory redundancy payment

4 On behalf of the claimant claims relating to incorrectly quantified statutory redundancy payment was raised together with an unlawful deduction of wages. The statutory redundancy payment has allegedly been underpaid by £37.89; the alleged unlawful deduction of wages totals £11.40. Neither claim have been pleaded previously, and there is no evidence before the Tribunal as the claimant's pay slips have not been produced from which any calculation could be made.

5 There was no application before the Tribunal to amend the claimant's claim and had there been, such an application would be refused taking into account the balance between the parties, the fact that we are at a Liability Hearing and there is no satisfactory evidence of the nominal amounts being claimed. It was agreed the claimant would provide the respondent with copies of twelve weeks wage slips and a detailed calculation as to how she perceived the under payments to have arisen, whereupon the respondent will seek the advice of its payroll provider and if there is a shortfall, this will be paid. This is now a matter between the parties and not one within the jurisdiction of the Tribunal.

Evidence

6 The Tribunal heard evidence from the claimant on her own behalf and found it to be credible with the exception of her allegation that Gil Bourgade had allegedly intimidated her of which there was no evidence whatsoever, and the claimant was found to have been less than credible in this regard. It also heard evidence on behalf of Gil Bourgade; the Principal of the respondent, and Christopher Tait, Governor, both gave credible evidence supported by contemporaneous documentation.

7 The Tribunal was referred to two bundles of documents, one an agreed bundle, the other the claimant's bundle as the claimant had prepared on that basis and not

had sight of the final bundle until the weekend before the hearing. It was just and equitable taking into account the balance between the parties and the fact that Mr Sartain had no legal experience, to allow him to run the claimant's case on the basis of the bundle with which he was acquainted. The Tribunal has also considered the witness statements and oral submissions, which it does not intend to repeat, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Findings of Fact

8 The respondent is an Academy School teaching 665 pupils between the ages 11 to 16 years. The Principal of the respondent is Gil Bourgade, who has been instrumental in preparing a redundancy policy including a matrix since 2014, when he took up the position as Principal. The respondent has been dogged with funding problems, and a number of staff, including teachers, have taken voluntary redundancy in accordance to the respondent's redundancy procedure.

The Redundancy Policy dated June 2014 ("the Policy")

9 The redundancy policy dated June 2014 sets out the relevant procedure. At paragraph 6.3 titled "Selection" it provided "in considering selection for redundancy a fundamental basis is that the ongoing needs and requirements of the Academy are of primary consideration…the draft proposals, if any, established by the Head Teacher and senior team may identify specific posts as a result of, say, a management re-organisation and/or use a range of criteria spread across the affected groups of staff… the Head Teacher and senior team will consult overdraft criteria and establish a scoring formula for the criteria. Unless the proposals to staffing reduction are self-selecting, the Head Teacher and senior team will use criteria which are weighted according to importance. When a person has been identified as "at risk" either through the application of the selection criteria…a letter will be sent confirming they are at risk and they will be informed of their right to make representations and their right of appeal. Representations must be made in writing in five working days…to the Head Teacher and senior team and enable an individual to present against their selection…"

10 Paragraph 6.4 referred to the representation hearing and sets out the right of individuals to be accompanied confirming "realistically unless there can be demonstrated to be a legal or procedural error in the process, it is unlikely the Head Teacher and senior team will overturn the decision. The simple fact that the person does not like the outcome will not be a good reason to overturn the decision".

11 Under paragraph 6.5 titled "Dismissal" it is clear if the Head Teacher and senior team uphold the decision to dismiss at a representation hearing a redundancy notice will be issued and the claimant's interpretation of the head teacher not taking part in the entire representative hearing, including the decision making process, is not supported by a straightforward reading of the relevant sections found within the Policy and appendices..

12 Paragraph 6.6 sets out the provisions of appeal, which is to be heard by an Appeals Committee, presentation to the appeals committee by the Head Teacher

explaining "what they have done and why". Attached to the procedure is an Appendix A entitled "representation and appeal hearings". There is a dispute between the parties as to the interpretation of Appendix A, and it is the Tribunal's view that Appendix A numbered 1 to 10 is referable to appeal hearings only and not to representation hearings, it is illogical that the Head Teacher be required to leave the room at a representation hearing in order that a decision could be made given that the decision was that of the Head Teacher and senior team. The representation hearing procedure at 6.4 and 6.5 made it clear the representation hearing will be made by the Head Teacher and senior team who could overturn the decision.

13 Appendix A is limited to appeal hearings only. There is a reference at point 5 to the Chair of Appeals Committee and at point 6 to the Appeal Committee members with at point 7, the claimant's summing up if so wish. It is at point 9 the Head Teacher and employee are to leave the room in order that the appeals committee will make their decision, and this is provided for at point 9 and10.

14 In a separate paragraph marked "Representation Hearings" set out within Appendix A it is provided "if the Head Teacher decides to confirm the original decision the individual be advised of their right of appeal" and the Tribunal finds that is the only reference within Appendix A to representation hearings, the remaining provisions applicable only to appeal hearings.

15 Appendix B set out a timetable that included preparation and planning for up to 6 weeks, consultation 5 weeks and selection up to 3 weeks prior to the dismissal procedure taking place. Specific reference was made to meeting with trade unions.

The claimant's employment

16 The claimant was a highly trained Science Laboratory Technician with considerable experience of 35 years months off retirement. She was employed as a Science Technician at St Wilfred's High School from 1st September 1981 and commenced her employment with the respondent on 1st January 1984, although the date of continuous service set out in the contract of employment dated 1st December 2012 confirmed the date of 5th January 1981.

17 The claimant was one of two Science Technicians, Brian Lease was the other, both were highly experienced Laboratory Assistants and had worked many years for the respondents, in the case of Brian Lease 25 years. Brian Lease was not as well qualified as the claimant on paper, however, he like the claimant performed the role well without any problems or issues. Both technicians were well respected by their teacher colleagues.

The redundancy

18 In February 2016 the Governors of the respondent were presented with a projected in year deficit of £280,000 and there was an urgent requirement to reduce staffing costs. A number of posts were identified as being at risk of redundancy, including teaching posts and the two full time Science Laboratory Technicians. It was decided that the science curriculum would be delivered with just one full time

Science Technician and the claimant together with Brian Lease were placed into a selection pool.

19 In an email sent to staff, including the claimant and union representatives the subject being "extraordinary staff meeting" there was an invite to a "brief staff meeting" on 19th April 2016 to "discuss school budget and its potential implications. Attendance is not compulsory and if you cannot attend I would be more than happy to meet with individual staff on the following days to go over the content of the presentation". The claimant has criticised the fact that the initial communication of the redundancy risk took place at an "optional" meeting and this gave rise to unfairness within the redundancy process. The Tribunal did not agree. The claimant attended the meeting on 19th April 2016 at which the financial situation was explained, and a draft consultation paper circulated. She was not disadvantaged in any way by the fact the meeting was "optional" and this did not affect the consultation with her that followed.

20 The consultation paper included restructuring proposals which were to be discussed by Governors on 26th April 2016 as part of the meeting convened to discuss a recovery plan. With reference to technical support staff it was set out that; "but with the reduction in numbers over the next few years (Particularly at Key S 4) support for specific subject areas will most likely need to be reduced…the school will seek in the first instance to achieve these reductions through voluntary measures including voluntary redundancy."

21 It is clear from the contents of the consultation paper nothing had been decided pending the Governor's meeting on 26th April. Attached to the consultation paper was a document marked "Restructuring and Staffing Reductions produced by the senior leadership team and the Head Teacher. It included a reference to the following; "from a pool of two, reduced to one full time equivalent Technician in Science". Attached to the proposal was two sets of selection criteria, one for teaching staff the other for support staff. Both worked on a pass/fail basis i.e. a score of 0 or 1, but were weighted to a particular number of points. The selection criteria for support staff that is an issue in this case is "contributions to the wider life of the academy (last two years)." The definition of contributions to the wider life of the school was "taking part in or organising activities that supports students learning and development away from the subject area and/or promotes the academy in the community. The matrix provided in the event of employees in the pool scoring equal points, the school will apply last in/first out for the selection purposes. It is not disputed as the claimant had been employed by the respondent longer than Brian Lease, had they scored equal points she would have been retained and Brian Lease dismissed by reason of redundancy under the respondent's procedure.

22 The claimant was provided with copies of the draft consultation paper together with attachments including the draft matrix early on in the consultation process.

23 On 26th April 2016 Gill Bourgade attended an extraordinary meeting of the resources committee that was minuted. The resources committee agreed the consultation document including the selection criteria. A sub-committee of the Governing Body was formed to be the first redundancy committee, who would make decisions regarding process along with the Head Teacher. The minutes record the

Governors being asked whether they agreed with the criteria and their weighting. It had been explained by Gil Bourgade "they had not been used and had come from last year's documents as suggested by Strictly Education. The unions were also being consulted on the criteria". The credibility of Gill Bourgade's response was questioned on behalf of the claimant, and the Tribunal accepted his clear evidence concerning how the criteria was agreed, finding on balance the criteria had not been prepared with the sole aim of selecting the claimant for redundancy and ensuring her colleague Brian Lease remained in post.

24 On 27th April 2016 the consultation document was presented to staff including the claimant. In an email dated 27th April 2016 the consultation paper was attached and there was a reference to the following proviso; "please note that every aspect of these papers is open to consultation". The claimant did not have any queries at that stage of the process.

25 A consultation meeting was held with the recognised trade unions on 3rd May 2016 which was minuted. It is recorded UNISON referred to "some of the legacy issues the school had to deal with and were continuing to manage and referred to the criteria, asking this to be reworded". Gil Bourgade agreed to re-word to avoid any ambiguity. The unions queried the criteria relating to the "Wider life of the Academy "suggesting it could be indirectly discriminatory as women tend to be more likely to having caring responsibilities, the suggestion being as a result women were less likely to take part in the wide life of the academy beyond school core hours".

26 The union representative emailed Gil Bourgade on 4th May 2016 as follows "as far as the science techs are concerned they have really serious concerns about the department will be unable to deliver the teaching and learning required if their roles are cut. They inform me of the extensive practical tasks they do and do not believe it is feasible that these can be delivered in the future". There was no follow up on the suggestion made earlier that the "wider life of the academy" criteria was indirectly discriminatory to women.

27 The Tribunal accepts there was a general concern by the union, the science teachers and the Science Technicians about reducing two Science Technicians into one, but this is not a matter which the Tribunal can take into account when considering an unfair dismissal complaint by reason of redundancy. It is for the respondent to manage its own business and the Tribunal is not in a position to indicate whether it required one or two Science Technicians. It does however accept that a requirement for the respondents business for employees to carry out the work of Laboratory Assistants had reduced as a result of the reduction in numbers and the shortfall in the budget.

28 On 5th May 2016 the senior leadership team meeting took place, which was minuted. It was agreed the unions had made a good point about the criteria relating to the contribution to the wider life of the Academy and the minutes record the following was agreed; "sustained contribution to the wider life of the school to be clarified to be within the school day, so as not to discriminate against staff unable to participate in activities outside the school day. The statement sought to distinguish between participating in the wide life of the school and the organisation of activities that support the wider life of the school. The senior management team including Gill

Bourgade took the view that there was a difference between taking part in wider learning opportunities and pro-actively organising them e.g. clubs, visits and lunch time activities. The Tribunal accepted Gil Bourgade's evidence as credible that the criteria relating to organising learning opportunities was given a weighting of three to recognise its importance to the respondent as it attracted students in addition to the academic side of the school. Gil Bourgade was cross-examined on the school's values, and was questioned why the academic element had a weighting of three, and organising learning opportunities a similar weighting, the suggestion being as far as the claimant was concerned the former should have had greater weight than the latter. The Tribunal accepted Gil Bourgade's evidence that both were crucial to the respondent's continued existence; combined they attracted pupils which were falling in numbers.

29 A meeting with the Governors first redundancy committee took place on 5th May 2016, which was minuted and a decision was made to reduce to one Science Technician. The change made to the selection criteria was also agreed, with reference being made to representations having been put forward by various parties including members of staff and union officials. On the balance of probabilities the Tribunal is satisfied the respondent had properly consulted on the selection criteria and matrix, and the fact thei9r were spelling errors that necessitated further amendments did not undermine this.

30 In a letter dated 6th May 2016 the respondent wrote to all staff at risk, including the claimant confirming following the redundancy committee of the Governing Body's meeting a post had been identified as being redundant. The claimant was informed her post was one of a pool of two, and that the selection process would start on Monday 9th May 2016 by use of agreed criteria "which had been rated according to importance". A copy of the amended criteria was attached. The Tribunal accepts Gil Bourgade's evidence that the claimant was provided with the criteria matrix in blank form which included "participation in wider learning opportunities within school hours (from September 2013) at a weighting of one and "organisation of wider learning opportunities within school hours (from September 2013) at a weighting of three. She was informed that she would be asked to complete the matrix at a meeting with her direct line manager Head of Science and a Middle Leader who would be "present in order to ensure fairness and transparency". It was explained the selection would be conducted anonymously i.e. no names included on any selection paper that was to be considered by the Head Teacher and senior team.

31 The claimant raised a query in a letter dated 8th May 2016 concerning the redundancy, paragraph six referred to the criteria "participating in wider learning opportunities within school hours" maintaining that this "is during directed time and as a result the line manager has responsibility for the breakdown of work carried out by each technician and as a consequence is not determined by the technician". With reference to the criteria "organisation of wider opportunities within school hours" the claimant also made an identical point to the effect that the responsibility was with the line manager and not determined by the technician. It was clear to the Tribunal by 8th May 2016 the claimant was aware of the criteria, and in the respondent's response dated 11th May 2016 it was explained to her at paragraph 4 "when selecting criteria the important factor is the relevance of these skills and experience to the needs of the Academy…during the consultation it was agreed that using out of

hours activities would be potentially inappropriate due to some staff's inability to work these hours for a range of valid reasons. Activities provided during school hours, however, were deemed acceptable as they occurred during contracted hours and simply rely on the willingness of staff to work flexibly, take on new challenges and bring a great deal of benefits to the students and the Academy. They may have been undertaken originally at the request of a line manager but in many cases came of the initiative of staff and…represent important skills and expertise which any school would value and should therefore be recognised". The claimant was informed that the process had not been completed, that the matrices needed to be filled in by 12th May 2016 and there was an opportunity to have a one to one meeting prior to the first committee meeting of Governors scheduled on 25th May 2016.

Completion and scoring of the matrix

32 It is not disputed that the claimant completed the scoring matrix with her Head of Department Mr Carsleke, and second in department, Mr Woolley. The scores were agreed with her and in relation to participation in wider learning opportunities within the school hours from September 2013 the claimant scored 1. For organisation of wider learning opportunities within school hours from September 2013 the claimant scored 0, and the Tribunal finds these scores as agreed with the claimant, properly reflect the reality of the situation. The claimant's agreed total scores amounted to 15.

33 In contrast Mr Lease scored one for participation in wider learning opportunities within the school hours from September 2013 and 3 for organisation of wider learning opportunities within school hours, and his scores totalled 16. The forms were anonymised by the clerk to Governors, and added up. The last in and first out Policy applied by the respondent was not relevant to the claimant as she had scored one less than her colleague.

34 Gil Bourgade met with the claimant on 13th May 2016 to inform her that her role had been selected for redundancy, and she was handed a letter of the same date attaching a copy of the selection for criteria and informing her of the right to make representations concerning the committee's recommendation to the redundancy committee. The claimant was invited to meet with Mr Bourgade both in that letter and a further letter dated 16th May 2016, to discuss calculation of entitlement if appropriate and explore further options to avoid redundancy.

35 The claimant in an email sent 16th May 2016 requested a completed matrix showing her scores as did the claimant's union representative on 18th May 2016. The claimant's scores were provided on the same date.

Breach of confidentiality allegation

36 In a letter dated 18th May 2016 the claimant complained of a breach of confidentiality regarding the redundancy process when she was "consoled" by a cleaner for losing her job, the cleaner having been made aware by the cleaning supervisor on 13th May and she considered that informing the cleaning supervisor of her redundancy indicated it was pre-determined prior to any subsequent consultation meetings. The Tribunal accepted on balance the evidence of Gil Bourgade that he

had not breached the claimant's confidentiality, and a letter dated 19th May 2016 was sent to the claimant confirming her redundancy had been discussed with no one apart from the claimant's union representative and her line manager. There was a reference to the following; "you were offered the possibility of going home on Friday 13th May. However, you did speak at length in the caretaker's room and with science staff that day, and I can only assume that without formally being told staff made assumptions". The Tribunal was of the view that a cleaner “consoling” the claimant is not satisfactory evidence, without something more, that the respondent breached confidentiality given he likelihood that the ongoing selection process involving the claimant was likely to be common knowledge between teachers and other members of staff.

37 A meeting took place with the claimant on 19th May 2016 to discuss options to avoid redundancies, there were no vacancies and the claimant requested a hearing before the redundancy committee submitting representations in a letter dated 23rd May 2016 which ran to over three pages. In the representation reference was made to the fact the matrix had been changed on three occasions and she alleged the third matrix was "clearly biased to Mr Lease and discriminatory to myself". The claimant did not accept there should be a difference between participation and organisation. The claimant alleged that Mr Lease was pre-selected when she was not made aware of events and gave an example of a Human Biology trip to Liverpool and she maintained that as she was responsible for four laboratories compared to Mr Lease's three laboratories she had an increased workload in comparison to Mr Lease who covered "twenty nine periods less than I do" which enabled him to be "frequently out of the department". The claimant also questioned Mr Lease's qualifications.

38 The Governors first redundancy committee meeting took place on 26th May 2016, the claimant was accompanied by her union representative. She maintained the criteria was unfair because she did not have time to organise clubs, and although she helped with one club she did not organise it, and felt the criteria had been deliberately changed in order to benefit the other technician within the same pool. She argued her workload was much greater than Mr Lease and this was why she could not have organised other activities. The panel decided to defer the decision until further information had been gathered about the claimant's workload so as to ensure a fair process. The claimant and Mr Lease were asked to provide evidence of the work they did, which was duly provided which the Tribunal does not intend to set out in detail. The Head of Department who had been aware of both the claimant and Mr Lease's performance responsibilities, was asked to prepare an assessment answering the points raised by the claimant.

39 Much was made on behalf of the claimant concerning the responses by Head of Science to a number of questions raised and there was a suggestion the answers had been provided in tandem with Mr Lease. There was no satisfactory evidence before the Tribunal to this effect, and the Tribunal did not accept on balance that Mr Lease had been encouraged by his Head of Department to put before the first redundancy committee meeting copious documents showing his responsibilities for clubs/visits that he had organised or taken part in direct contrast to the claimant who had not thought to put before the Committee evidence of all her responsibilities.

40 On behalf of the claimant the qualifications of Mr Lease were questioned, on the basis that Mr Lease should not have scored one for recognised qualification and/or training relevant to the area of work with the result that both he and the claimant would be on equal points and subject to the last in first out provision. There is no dispute that the claimant, on paper, was better qualified than Mr Lease. He received training during his employment with the respondent, including a HLTA Science Enhancement Course at JMU University and was licensed to drive the mini bus which he did, unlike the claimant. The fact the claimant had enhanced qualifications was reflected in the matrix scores, when she scored a 1 in response to the criteria "any other professional qualifications" and Mr Lease 0.

41 In a second letter dated 26th May 2016 dealing with the claimant's allegation of breach of confidentiality, Gil Bourgade reiterated that neither himself nor the senior leadership team, or her union representative had discussed or disclosed confidential matters but "staff around the staff may have well have made assumptions based on their own observations".

42 It was entirely reasonable for the first redundancy committee, which re-convened on 16th June 2016, to take into account the views of the Science Head of Department in matters such as workload and whether or not the claimant's work load was comparable with that of Mr Lease. The conclusion in the document dated 15th June 2016 was that their workloads were comparable despite the fact the claimant had one more lab to cover as Mr Lease had other responsibilities. It was confirmed the claimant had declined trips and there was only one trip he was aware of that Mr Lease had gone on which was not offered to the claimant for other reasons than being able to drive a minibus. He confirmed there had been no invitation or direction to either Technician to run clubs, and that Brian Lease had started his clubs on his own which enhanced the "interest and enjoyment of science and this translates into the lessons" He confirmed the claimant had expressed no interest to him in ever running clubs, and she had recently declined the opportunity to go on a trip or Science Field Work trip. He also confirmed that the fact the claimant had one lab more than Brian Lease was not an issue she had previously raised maintaining Brian Lease provided class support in terms of making bespoke equipment to the demands of his teachers on request. Within these proceedings, the claimant disputed this fact, alleging she also produced bespoke equipment. However, it was Brian Lease who produced photographs of the equipment he made and not the claimant who could have clarified the position when given the opportunity to do so, and provide some evidence that she had taken part in making some of the bespoke equipment via photographs.

43 The Tribunal took the view that the first redundancy committee was entitled to take into account the evidence before them and had the claimant deemed it important for her to refer to and produce evidence of making bespoke equipment, she should have ensured that it had been put before the first redundancy committee in addition to her qualifications and other information put forward. The claimant did not, and it was not outside of the band of reasonable responses for the committee to determine she should be given formal notice of termination of employment on the grounds of redundancy, taking into account the documentation provided to them by the claimant and Mr Lease and the views of the Head of Department, Philip Carsleke's.

Notice of termination and the appeal

44 The claimant was sent a formal notice of termination of employment in a letter dated 22nd June 2016, the effective date of service being 31st August 2016, she was informed of her right to appeal. The claimant appealed and following a postponement, the appeal hearing took place on 15th July 2016.

45 Prior to the appeal hearing the claimant was offered a four week trial period to work on reception as a vacancy had arisen, the claimant's suggestion that the receptionist role remain vacant and the money saved used to pay for a Science Technician was rejected on the basis that redundancies had already been made within the administration team and there was no scope for further cut backs.

46 In a letter dated 28th June 2016 the claimant set out ten grounds for her appeal. Prior to the appeal being heard a conversation took place between the claimant and Gil Bourgade concerning whether or not she wanted to be mentioned in the school letter with other members of staff who were leaving at the end of the term, to which the claimant responded that she did not. This conversation took place at the same time as the offer to the claimant of redeployment, training and a four week trial period and there was no evidence before the Tribunal that Gil Bourgade (who was not the decision maker at the appeal hearing) pre-judged the claimant's appeal against her redundancy dismissal. It was left that Gil Bourgade asked the claimant to think about the redeployment.

47 The claimant complained about the behaviour of Gil Bourgade at the 13th July 2016 meeting asking her if she wanted to be printed in the end of term newsletter confirming she was leaving at the end of the Academic Year, which she considered to be inappropriate, intimidatory and an indication the result of the appeals meeting was pre-determined. For the avoidance of doubt, there was no evidence whatsoever before the Tribunal that Gil Bourgade had acted in an intimidatory manner towards the claimant at that meeting, or indeed at any other time, and the Tribunal finds this was not the case.

48 Within the claimant's complaints she referred to having been made a verbal offer of the receptionist job, before the appeal meeting being re-arranged at the claimant's request and to minutes of the appeal meeting having not been provided. The document is undated, however the Tribunal have gleaned by reference to paragraph six of the note, and it should have been dated 31st July 2016. In addition to grounds of appeal, the claimant submitted a lengthy document setting out her grounds in detail, which the Tribunal does not intend to repeat, but has taken into account.

The appeal hearing

49 The appeal was heard by a panel of governors referred to as the redundancy appeal committee chaired by Mr A Kennaugh. The other governors were Mr Tate (who gave evidence before this Tribunal) and Ms Pickett. The governors were supported by HR. Minutes were taken, and record the claimant brought further information for consideration. The Tribunal accepted the oral evidence of Christopher Tate as credible, which is that the redundancy appeal committee considered all of

the information produced by the claimant. At the appeal hearing Gil Bourgade presented the respondent's case and addressed the grounds of appeal provided by the claimant. He referred to the matrix confirming the split between the two Sites Technicians was based on skill set only and did not take into account matters such as gender. He acknowledged that "redundancy is a difficult process that measures a need to address the financial deficit" and the fact that it was a last resort. The Tribunal accepts the oral evidence given by Gil Bourgade who regretted the necessity of making one of the two Science Technicians redundant, it was a difficult decision and not the "ideal solution" and this sympathetic approach as apparent in the contemporaneous documents.

50 On behalf of the claimant, her union representative acknowledged the respondent's need to make savings arguing that the process was unfair due to the changes in the criteria to include organisation wide learning which was not in the original criteria. He acknowledged UNISON perceived out of hours contribution as discriminatory and this had been agreed and changed. He complained there had been no consultation meeting over the new criteria with the change wording and change scoring from two to three and "looking at the criteria for both candidates it was obvious that looking at Mrs Sartain's experience and qualifications, she would gain on the swings (she scored a 2 and Mr Lease scored 0) but it was also obvious that a lack of experience in organising clubs (Mrs Sartain advised that she is too busy preparing lessons) that she would lose on the roundabout. Mr Lease had experience of clubs so he gained on the roundabout and the increase in scores from a 2 to 3 gave him one point advantage". It is notable that neither the claimant nor her union representative disputed Mr Lease's experience of clubs and the claimant's lack of experience.

51 The claimant's union representative made it clear he was not accusing the respondent of "chicanery" but "from an outsider looking in, the change in scoring from a 2 to 3 gave Mr Lease a one point advantage and put Mrs Sartain's job at risk of redundancy". The claimant also confirmed that she had known of the change in the matrix and knew at that point "it would target her as she does not do clubs". The claimant made it clear that she had "32 years experience…and will do anything for the boys" it was acknowledged by the panel the value of work undertaken by the claimant and her dedication to the school and so the Tribunal finds.

52 The claimant's appeal was dismissed after an adjournment during which the redundancy appeal committee considered the documentation produced by the claimant, not all of which it deemed relevant. The committee took the view the claimant had been sincere, and they would not have any problems with her continuing as an employee, but concluded the decision to dismiss on the basis of redundancy had been arrived at following a fair process, and the outcome was in accordance with that process. The committee was satisfied the set criteria, which had been changed following input from the unions during consultation, had not discriminated against the claimant, and she had not been unfairly targeted.

53 A meeting took place on 19th July 2016 (prior to the letter from the redundancy appeal committee confirming the claimant's dismissal had been sent) with the claimant and Gil Bourgade as the latter wanted personally to inform the claimant of their decision. Gil Bourgade explained the claimant had not been targeted, and the

same criteria had been used for all support staff which the Tribunal accepted was indeed the case. The claimant raised an issue concerning the lack of Mr Lease's formal qualifications pointing out that she was better qualified than he. Gil Bourgade confirmed the claimant had more qualifications, but the job could still be done without qualifications and a weighing of 4 was given to the qualifications and training in recognition of this. During the liability hearing Gil Bourgade explained Mr Lease was a long term employee (as was the claimant) and there were no issues concerning his ability or qualifications and this was not disputed by the claimant.

54 In a letter dated 19th July 2016 the claimant's grounds were set out and dealt with individually and her appeal was rejected. The panel did not accept the claimant had been discriminated against on the grounds of personality and it found the redundancy criteria had been interpreted correctly. It held "the criteria had gone through a consultation period with staff in UNISON. Following representations at the first meeting of the redundancy committee clarification was sought and this was re-visited at the second meeting. Criteria are not just about formal training and includes accredited on the job training."

55 With reference to the alleged breach of confidentiality, the appeals panel found the Headmaster had not breached confidentiality from any of the staff involved in the redundancy process, and it "seems likely that individuals have reached their own conclusions in regard to the situation".

56 Finally, the Tribunal were referred to a letter dated 15th November 2016 from UNISON clarifying the criteria adopted by the respondent was not with the agreement of the trade union and "this is totally wrong, the criteria remains in the ownership of the school and it is theirs alone. The Trade Unions are consulted over the criteria and can make suggestions and recommendations. However the school can make amendments in line with these suggestions or ignore them. At the end of this process the trade union note the criteria only, they never agreed to suggest otherwise is wholly wrong".

57 In a letter dated 31st August 2016 from Gill Bourgade to the claimant, termination of her employment by reason of redundancy with effect from 31st August 2016 was confirmed, the effective date of termination being 31 August 2016.

Law

58 Section 139(1)(b) of the1996 Act provides that 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... (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.

59 There is a three-stage process, namely: "(1) Was the employee dismissed? If so, (2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so, (3) was the dismissal of the employee...caused wholly or mainly by

the state of affairs identified at stage (2)?": see Safeway Stores plc v Burrell [1997] ICR 523; IRLR 200 endorsed by the House of Lords in Murray & anor v Foyle Meats Ltd [1999] ICR 827; IRLR 562 per Lord Irvine of Lairg LC.

60 Redundancy (as defined in Section 139 above) is a prima facie fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996 ("the 1996 Act"). Section 98(4) provides that:-

> "*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".

61 It is for the employer to show the reason or reasons for the dismissal and that it is a reason falling within Section 98(2) of the 1996 Act and Section 98(4) provides that-

> *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".*

62 The question for the Tribunal is that the reasonableness of the decision to dismiss and the circumstances of the case, having regard to equity and the substantial merits, and the Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to the employer. It is necessary to apply the objective standards of the reasonable employer – the band of reasonable responses test – to all aspects of the question of whether the employee had been fairly dismissed by reason of redundancy, was reasonable in all the circumstances of the case.

63 The fundamental approach for assessing fairness in the context of redundancy dismissals was established in the Employment Appeal Tribunal well-known case of Williams v. Compare Maxam Ltd [1982] ICR 156. The EAT held that a reasonable employer would seek to act in accordance with five principals, which are as follows:

1. The employer will seek to give as much warning as possible of impending

Redundancies so as to enable employees, who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult with the employee as to the best means by which the desired management results can be achieved fairly, in particular, the employer will seek to agree the criteria to be applied in selecting the employees to be made redundant and when a selection has been made the employer will consider with the employee whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union and/or employer.

4. The employer will seek to ensure that selection is made fairly in accordance with these criteria and will consider any representations the union/employer may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

64 The EAT stressed that not all of the five factors will be present in every case, but the basic approach expected is that as much "as reasonably possible should be done to mitigate the impact on the workforce and to satisfy them that the selection has been made fairly and not on the basis of a personal whim". In considering these principals, the Tribunal must not put itself into the shoes of the employer and exercise its own judgment as to who should have been made redundant or offered alternative employment and the consideration to be adopted by the Tribunal is set out by the Court of Appeal in British Aerospace v. Green [1995] ICR 106, 109E which is that the Tribunal's function is not to decide whether they would have thought it fairer to act in some other way, the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

Conclusion applying the law to the facts

65 With reference to issue 3.1, namely what was the reason for dismissal the Tribunal finds the claimant was dismissed by reason of redundancy, a potentially fair reason within the meaning of Section 98(1) ERA.

66 With reference to issue 3.2, namely was the claimant's dismissal fair having regard to the principles set out in Section 98(4) ERA, the Tribunal found that it was, the decision to dismiss the claimant on the grounds of redundancy fell within the band of reasonable responses open to a reasonable employer.

67 It is not disputed the requirements of the respondent to employ two Technicians ceased as a result of the adverse financial position the respondent had found itself in. The Tribunal is satisfied that the dismissal of the claimant was caused wholly by this and taking into account assessing fairness within the context of this redundancy dismissal as established in Williams -v- Compair Maxam Limited cited above, the

Tribunal found the respondent had given to the claimant (and other employees) as much warning as possible, it consulted with the claimant (and other employees) and she was provided with various copies of the criteria as and when they were amended during the process. It is not for the Tribunal to put itself into the shoes of the respondent and determine whether the claimant or her colleague should have been made redundant, it is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted, and the Tribunal held that it could, taking into account the desired management result of retaining one Science Technician in that role who was capable of also organising and taking part in clubs with the extra curriculum activities. It is unfortunate the matrix was changed three times, throughout this process the claimant was consulted throughout, and the original change had arisen as a result of union input. The final draft of the matrix was not agreed with the claimant or her union, but this does not give rise to unfairness in the process, taking into account Gil Bourgade's compelling evidence regarding why the matrix was changed and the relevance of the criteria. It was a matter for the respondent to give weight to those employees who organised extra curriculum activities as opposed to participate in them, and the Tribunal accepted as credible his evidence that the extra curriculum activities organised by Mr Lease was important to the school and attracted pupils in addition to the respondent's academic excellence.

68 The Tribunal also accepted the evidence that there had been a reduction in pupil numbers, and this in part had contributed towards the poor financial position. The respondent can be criticised for the typographical errors in the matrix, which resulted in the number of changes, however this did not give rise to unfairness as no inference of dishonesty or bad faith could be reached. The Headmaster was in a difficult situation. Cost savings were necessary as a matter of urgency failing which the school would close down. He together with the governors were responsible for selecting a matrix and criteria which could fairly be applied to staff across the board, including loyal hardworking employees such as the claimant and Mr Lease who had been employed for a considerable number of years. There is no doubt the claimant worked hard for the respondent, and was well regarded by her Head Teacher, colleagues and pupils, which made the redundancy process even more distressing for both the claimant and Gil Bourgade who would have preferred to retain the claimant and Mr Lease. The Tribunal found the claimant was not picked out for redundancy by Gil Bourgade as a matter of course, and her selection had not been pre-judged. Both she and Mr Lease were important to the school, but savings needed to be made and Gil Bourgade was in a difficult position as to how those savings could be achieved. Mr Sartain who represented the claimant, is a Headmaster himself and he is best placed to understand the difficult decisions that have to be made by Heads for the good of the school, even if they caused his staff pain and distress.

69 The Tribunal accepted the respondent's evidence that the matrix and its scoring of the criteria best allowed the school to flourish and attract pupils, and this was within the band of reasonable responses open to a reasonable employer tasked with ensuring the continuance of the school and employment of other teachers/administrative staff and Technicians.

70 On behalf of the claimant there was a reference to her being invited into a meeting at short notice, which she refused to do and as a consequence the Tribunal accepts she was not placed at a disadvantage.

71 The Tribunal did not accept the claimant's evidence that formal consultation took place in a corridor, but it accepted that a discussion took place between the claimant and Gil Bourgade which continued when both of them entered a vacant classroom. The Tribunal accepted the evidence of Gill Bourgade that he had recognised the claimant's anxiety, and sought to go that “extra mile”. The Tribunal find that a consultation which commenced in a corridor that proceeded to a vacant room does not render the redundancy process unfair given the particular facts of the claimant’s case.

72 With reference to the scoring of the matrix, the Tribunal notes the claimant agreed with the scores at the scoring meeting and she cannot now complain that her colleague Mr Lease achieved a higher score for criteria which he fulfilled and she did not. It is not for the Tribunal to confirm whether or not the scoring of the matrix and Mr Lease's scoring of 3 was reasonable. It is clear from the evidence before the appeal committee Mr Lease had other attributes over and above those of the claimant in relation to extra curriculum activities which he organised, and this was borne out by the evidence Mr Lease submitted and by the Head of Department. It was not unreasonable for the claimant to have been dismissed on the grounds of redundancy on this basis.

73 With reference to the representation hearing, it is the Tribunal's view as indicated above the claimant has misunderstood Appendix A, and on a common sense interpretation there was no requirement for a Head Teacher to leave the representation hearing.

74 With reference to the alleged breach of confidentiality, the Tribunal was of the view this did not make the redundancy unfair and was not an indication the Headmaster had pre-judged the appeal. It is notable during this period the claimant was offered alternative employment, and at the appeal hearing her grounds of appeal were taken into account and properly considered objectively and without any preconception. The criteria applied to all employees, they set down principles for the future and there was no satisfactory evidence before the Tribunal they were amended with the specific object of retaining Mr Lease and dismissing the claimant. There was also no evidence Mr Lease was aware he was not to be made redundant before the claimant was informed she had been selected for redundancy. Further, the communication of the redundancy risk at an "optional meeting" attended by the claimant did not give rise to an unfairness within the redundancy process. It can be seen from the findings of fact above the respondent carried out a fair consultation over a period of time and the claimant was provided with sufficient notice of the meetings she attended.

75 The Tribunal has considerable doubt over the claimant's allegations concerning the alleged intimidatory act of Gil Bourgade, on which it found there was no evidence apart from the claimant's assertion concluding she had exaggerated in order to bolster up the claim and in this regard the claimant was not credible or believable. It considered the contemperaneous notes of the meeting in which there was no

suggestion of intimidation. Intimidation cannot be inferred by the fact that the claimant was invited to record in an end of term notification to staff and pupils her impending redundancy prior to appeal.

76 Having found the claimant was fairly dismissed by reason of redundancy, there is no requirement for the Tribunal to consider the rule under Polkey. The Tribunal finds however, had the claimant been procedurally unfairly dismissed she would still have been dismissed by reason of redundancy for the reasons set out above.

Employment Judge Shotter
07.03.2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 March 2017

FOR THE SECRETARY OF THE TRIBUNALS