EMPLOYMENT TRIBUNALS

Claimant: Mrs M Farrow

Respondent: Woodway UK Limited

HEARD AT: Huntingdon ET **ON**: 25th & 26th January 2017

BEFORE: **Employment Judge G P Sigsworth**

REPRESENTATION

For the Claimant: Miss G Cullen (Counsel)

For the Respondents: Mr J Demelza-Wilkinson (Consultant)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed by the Respondent.

2. The Claimant did not fail to mitigate her loss.

3. If the Respondent had followed a proper redundancy process/procedure there is a 20% chance that the Claimant could have been fairly dismissed.

4. Unless the parties can agree the appropriate figure for the compensatory award, a further short Remedy Hearing will be listed (see Reasons below).

RESERVED REASONS

1. The Claimant's claim is for unfair dismissal. The dismissal is admitted by the Respondent, and the reason given for it is redundancy, a

potentially fair reason. Unfair dismissal is denied and remedy issues are also in dispute.

2. The Tribunal heard oral evidence from the Claimant. There were three witnesses called to give oral evidence on behalf of the Respondent. They were Mr Martin Inwood and Mr Jason Inwood, joint managing directors; and Mr Rob Robinson, group commercial manager. There was an agreed bundle of documents containing some 300 pages to which the Tribunal was referred as was appropriate. At the end of the evidence, the Claimant's counsel provided written submissions and made oral submissions. The Respondent's representative made oral submissions.

3. The Claimant has provided a schedule of loss. Although remedy evidence from the Claimant was heard, particularly on the issue of mitigation of loss, no reference was made to the schedule of loss by the parties' representatives. In particular, it is not known to the Employment Judge whether the Respondent contests the figures for healthcare cover, bonus figures and pension contributions. Further, it is not clear whether the figures for gross and net salary are agreed (arithmetically). On the one hand, there are no documents in the bundle in support of the Claimant's claims in respect of (in particular) health care, and whether she was provided with a certain level of health care by the Respondent, and whether a true replacement cover cost is set out in the schedule. On the other hand, the Respondent did not challenge the Claimant in cross examination on these figures. Further, the Claimant has not given credit in the schedule for her earnings from temporary employment. In the circumstances, the Judge has decided that he will list a short remedy Hearing to deal with these matters if the parties cannot agree a figure for the compensatory award.

Findings of Fact

4. The Employment Tribunal has made the following relevant findings of fact.

   4.1 The Claimant was employed as the Respondent's financial controller from 6th January 2006 until her dismissal on notice on 1st July 2016, allegedly for redundancy. Her gross salary as at date of dismissal was £48,000 per annum. The Respondent is a family business, run at the material time by joint managing directors, Martin and Jason Inwood. It is a bespoke furniture distribution business with premises at Earls Barton, Northamptonshire. The business has a second location, operated as a separate cost centre, in Hayes, Middlesex. In the second half of 2015 the business was growing fast in terms of turnover (20% plus per annum), with head count increasing from 59 to 69 employees. It was decided to employ a commercial manager, Mr Robinson, to develop departmental budgeting, cash flow and

departmental KPIs – in order to improve effectiveness and efficiency. Mr Robinson joined the business in 2015. As part of his key accountabilities, Mr Robinson had overall control of all financial transactions and accountancy matters including audit systems, and he was expected to lead and manage the finance team. Within that overall responsibility he was expected to prepare budgets and forecasts for all departments, review accounts, deal with quarterly VAT returns and customer rebate calculations, take charge of payroll and prepare annual accounts. His accountability also involved further and wider company responsibilities of a commercial and financial nature.

4.2 However, I find that the basic day to day financial work was done by the Claimant and her finance team, which consisted of four administrators and one credit controller. The Claimant had a dotted line management responsibility for this team, and before Mr Robinson arrived reported to Mr Martin Inwood. The Claimant did not have a job description. Her functions and tasks grew and expanded as the business grew and required them. For the purpose of the so-called redundancy process, the Claimant drew up a job description of what she was doing – a list of duties and responsibilities. She had general responsibilities for payroll, pensions, employee benefits and a substantial and wide-ranging list of daily, monthly and quarterly tasks, as well as annual tasks in the context of annual returns, audit and insurances. She prepared the annual accounts for the three group companies, quarterly VAT returns, payroll, PAYE returns, P11D reporting balance sheet, reconciliations, sales budgets and variance analysis, inter-company reconciliations and recharges, managed annual audit and processing audit adjustments and fee management including insurances and claims management.

4.3 At some point, probably in early 2016, Mr Robinson and the directors decided to restructure the finance department. The five lower level jobs would remain. The Claimant's role would cease to exist and a finance manager would be appointed at a salary of £32,000 per annum, with, according to Mr Robinson, reduced duties and responsibilities. Those that were taken away from the Claimant would be done in the main by Mr Robinson, although the finance manager would be expected to deal with the remaining matters. However, Mr Robinson agreed in cross examination that, even before April 2016, when the so-called consultation with the Claimant began, not only had the re-structure been decided upon without any discussion with the Claimant, but Mr Robinson had already removed several important roles from her without prior discussion with her. These included dealing with company cars, meetings with banks and accountants, accounts accruals and ordering supplies. Mr Robinson said that he had concerns about the Claimant's performance and that she was not doing all the jobs that they expected her to do, such as budgeting and KPIs.

He decided not to speak to her about her performance, or take her down any performance management process, but rather do his best to mentor her. However, he ultimately took away a number of her roles, such as dealing with the banks, insurances, claims management, customer rebates, stock reconciliation, bad debt and foreign currency and tax matters, and audit and annual returns resposibilities. Another reason Mr Robinson gave for removing roles from the Claimant, both before and during the consultation process with her, was that he felt that these roles should be done at a more strategic level, and then the remaining roles would go to a new role of finance manager at a lower level than the finance controller. There was a view that efficiencies could be made in the department. No training was offered to the Claimant to remedy any perceived performance issues. Mr Robinson's view was that the majority of tasks that had gone unfinished previously were the Claimant's, so the majority of the change was focussed round her, and also only her role was subject to significant change which would warrant the need for a redundancy process. That was Mr Robinson's reason for not widening the pool for selection for redundancy, either to include himself or to include other members of the finance team.

4.4 The Claimant had not had any systematic appraisal process applied to her, and any such process had been ad hoc and certainly not on an annual basis. The Tribunal accepted the Claimant's evidence that Mr Robinson was not really trained or indeed employed to do financial and management accounts, for example, and the Claimant believed that the finance manager would end up doing many of the tasks Mr Robinson said he would have taken over which were clearly not of a strategic nature, such as employee benefits, VAT returns, monthly management accounts and so on. Although Mr Robinson conceded that the Claimant would assist him in many such tasks, the Claimant said that this meant it would be her or the finance manager doing the actual task with Mr Robinson having overall responsibility and perhaps checking it. She emphasised that many of these tasks were a one person job, and they had no need for an assistant. She also emphasised that she was the "go to" person for the other team members and that was likely to remain so with the finance manager role, a dotted line report.

4.5 Mr Robinson and the directors agreed in their evidence that they had finalised the structure of the finance team or department that they wanted before starting any consultation process with the Claimant. The consultation with the Claimant began on 13th April and a meeting was held with her. I find that the Respondent made the decision about the Claimant's role (that it was to disappear) prior to any consultation with her and without even investigating or understanding properly what she did as there was no job description. If the Respondent had looked at what the

Claimant actually did, then they would have been in a much better position to understand her role in the context of the finance department overall and, in particular, to see whether she was overloaded with work, as that may have been the case. Mr Robinson also conceded that he himself would need training on some of the tasks that the Claimant had undertaken formerly and that he was going to take over. There followed a series of so-called consultation meetings – on 20th April, 29th April, 6th May, 13th May and 18th May. There was discussion of the new finance manager role, and a job specification was drawn up. That JS is nothing like as complete as the Claimant's job description drawn up by her (save in respect of payroll), and the Claimant said this to Mr Robinson. Mr Robinson conceded that it might not be correct and could require expansion. However, an alternative finance manager role profile was not drawn up thereafter. Mr Robinson made it clear to the Claimant that he wanted her to take the finance manager role at a salary that was £16,000 less than her current salary. Two other jobs were discussed because they were available. A sales role at a similar salary was available, but the Claimant spoke to the sales manager and he told her that she did not have the right skill set for that role. The second role was in customer service at a much lower level and was not suitable. Some time at some of these meetings was spent on recapping of the minutes from previous meetings, for example on the meetings of 6th and 13th May. At the meeting of 13th May the Claimant confirmed that she was unable to accept the role of finance manager because of the lower job specification and the significant decrease in pay.

4.6 At the final consultation meeting on 18th May, the Claimant told Mr Robinson that she would not accept the alternative roles offered as they were not suitable for her. She had no further proposals, believing (as she told the Tribunal) that the decision to dismiss her had been predetermined. Mr Robinson told her that formal notice of her redundancy would be issued. She would be given three months notice to 18th August 2016, but not required to work it and would be put on garden leave.

4.7 The Claimant appealed that decision, giving three grounds. First, that it was a sham redundancy situation as she was the only one in the pool and it was not based on legitimate business need. Second, the decision was unfair as there was no actual diminishment of her role. Third, it was an attempt to remove her from her role in an unfair and dishonest manner. The appeal was heard on 2nd June by Mr Jason Inwood, the meeting lasting about 1¼ hours. The Claimant was accompanied. Following the meeting, Mr Jason Inwood met with Mr Robinson on 7th June and asked him about the Claimant's concerns that her role had not diminished. Mr Robinson told Mr Inwood that he had taken over many of the Claimant's tasks and the management of the finance

department and was putting in new processes. He said that these tasks that he had taken over needed to sit with the person in charge. He told Mr Inwood that the restructure was designed to avoid duplication and confusion of roles. The appeal meeting was then reconvened on 23rd June, during which Mr Jason Inwood conceded that the arrival of Mr Robinson had impacted on the Claimant's role and that her role had been diminished. He seemed not to be aware that Mr Robinson had taken parts of the role away from the Claimant without discussion, even before the consultation process began. On 30th June Mr Inwood wrote to the Claimant with the appeal outcome. He purported to go through each of the Claimant's grounds of appeal. He said there was no sham redundancy because the tasks the Claimant had been doing were now transferred to Mr Robinson and therefore her role had diminished. He found that the process had been conducted fairly and honestly. The appeal was not upheld. However, the termination date of the Claimant's employment was brought forward to 1st July 2016, at the Claimant's request.

4.8 It is clear from documents in the bundle that the Claimant has applied for a large number of posts since her dismissal. She has struggled, however, to find permanent employment although she currently has temporary employment. She has suffered with depression as a result of being made redundant and believes that her age (52) is against her. She has registered with several employment agencies and searched for work in an area within 25 to 30 thirty miles radius of where she lives. She has made applications on line and has had interviews and indeed second interviews, but the feedback is that there are better candidates. She has looked for finance work in other areas, such as operations and the charity sector. Again, she has been told that she does not have the relevant experience compared with others and is more expensive than they are. The temporary job that she has at present will not last more than 3 months. She felt that she could not take the finance manager role with the Respondent as she had been badly treated and that the trust had gone. There was also a very significant difference in salary and she had believed when she was made redundant that she would be able to find a finance role relatively easily. However, it appears that Brexit has affected the recruitment of such employees or employers are taking on qualified accountants for roles at £28,000 and upwards – credit control, purchase ledger and so on. Other employers do not want to employ over-qualified people.

The Law

5. By section 139(1)(b)(i) of Employment Rights Act 1996, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work

of a particular kind have ceased or diminished or are expected to cease or diminish.

In an unfair dismissal case, we are concerned with sections 94, 95 and 98 of Employment Rights Act 1996.

By section 94(1), an employee has the right not to be unfairly dismissed by his employer.

By section 95(1)(a), for the purposes of this Part (of the Act) an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).

By section 98(1) & (2), in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that (in the circumstances of this case) that the employee was redundant.

By section 98(4), where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

The Tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well known case law in this area: namely, *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, EAT; and *Foley v Post Office; HSBC Bank v Madden* [2000] IRLR 827, CA. The band of reasonable responses test applies equally to the procedural aspects of the dismissal, in this case the warning (or lack of it), consultation and various meetings, as it does to the substantive decision to dismiss – see *Sainsburys Supermarkets v Hitt* [2003] IRLR 23, CA.

6. It is well recognised that a reorganisation or restructure of a business can involve redundancies if they fulfil the definition of redundancy. There may be no redundancy where, for example, work is redistributed more efficiently without the need for a reduction of the number of employees doing a particular kind of work. What is crucial is whether the restructuring essentially entails the reduction of the number of employees doing work of a particular kind as opposed to a mere re-

patterning or redistribution of the same work among different employees whose numbers nonetheless remain the same. In contrast, where the purpose of a reorganisation is to reduce the size of the workforce overall as a reflection of the diminished business need for particular kinds of work, this will constitute redundancy.

The Claimant relies upon the leading case of *Murray v Foyle Meats Ltd* [2000] ICR, 1AC 51, HL. Counsel quotes from the Judgment of Lord Irvine –

> "The language of section 139(1)(b) is, in my view, simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exist. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."

Thus, according to that leading case it is not the diminishment of the work of a particular individual (such as the Claimant here), it is the work of a particular kind on which the focus must be placed. If there was no diminishment in the work of a particular kind (the work of the finance department as a whole), then (it is argued) the Claimant's dismissal cannot be attributable to that state of affairs and there can be no redundancy.

However, in *Murphy v Epsom College* [1985] ICR 80, CA, the Claimant was one of two plumbers but he also did some engineering work. Later he declined to perform engineering tasks and the college decided to dismiss him and employ an engineer who would also undertake some plumbing. The evidence suggested that the college still needed two employees, one plumber and one who would do both plumbing and engineering work. On the "requirements of the business" test, therefore, it appeared there was no redundancy situation. However, both the EAT and the Court of Appeal held that the Claimant's dismissal was for redundancy. Whereas previously the business required a plumber who would do some engineering, now it required an engineer who could do some plumbing. The college no longer required an employee to carry out work of a particular kind done by the Claimant and he was, therefore, redundant. The Court of Appeal upheld the EAT, saying that a reorganisation creating a substantial change in the kind of work required by the employer can result in redundancies, even though the employer's overall requirements for employees remain the same.

That case was followed in *BBC v Farnworth* [1997], EAT. The Claimant, a radio producer, was replaced by a more experienced producer. The EAT upheld the Tribunal's decision that the dismissal was for redundancy, stating that an employee is redundant when his or her particular specialism is no longer required, even if the employee is replaced by an employee with a different specialism so that the overall requirements of the business for employees have not diminished. As in the *Murphy* case, a plumber who could do the work of a heating engineer was replaced by a heating engineer who could do plumbing, so in *Farnworth,* the post of mark 1 producer had been replaced by that of mark 2 producer.

I was also referred to the case *of Shawkat v Nottingham City Hospital NHS Trust (No2)* [2002] ICR 7, CA. There, although the effect of the Trust's reorganisation of the cardiac and thoracic departments changed the work that the employees in the thoracic department were required to carry out, since the Trust still needed the same amount of thoracic surgery to be carried out, the Claimant was not redundant, despite being asked to reduce the amount of thoracic surgery he himself performed (as he was required to carry out both thoracic and cardiac surgery). In the judgement in that case, the Court of Appeal cited *Murphy* – "Every case of reorganisation must depend ultimately on its particular facts. In each case it must be for the individual Tribunal to decide whether the reorganisation and reallocation of functions within the staff is such to change the particular kind of work which a particular employee is or may be required to carry out, and whether such change has had any, and if so what, effect on the employer's requirement for the employee to carry out a particular kind of work."

7. In *Williams v Compare Maxam Limited* [1982] IRLR 83, EAT, it was held that where dismissal is for redundancy, the Tribunal must be satisfied that it was reasonable to dismiss the Claimant before it on grounds of redundancy. It is not enough to show that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy as a sufficient reason for dismissing the employee". Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the Claimant was selected to be the employee to be dismissed, and the reasonableness of the steps taken by the employer to choose the Claimant, rather than some other employee, for dismissal.

   In *Polkey v AE Dayton Services Limited* [1987] IRLR 503, HL, it was held that, in the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected, adopts a fair process on which to select for redundancy, and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.

8. Other case law was cited by the parties. In *James W Cook & Co v Tipper* [1990] IRLR 386, CA, the Court of Appeal reminded Tribunals that it is not open to them to investigate the commercial and economic reasons which prompted the reorganisation or restructure. In *Capita Hartshead Ltd v Byard* [2012] ICR 1256, EAT, it was held that employers must genuinely apply their mind to the problem of who is placed in the pool for selection and the Tribunal is required to scrutinise with care whether an employer has genuinely applied its mind to this issue.

   In *Fulcrum Pharrma Europe Limited v Bonassera* [2010] EAT, it was held that the employer had erred in automatically assuming that, because an employee's role was at risk, the pool should include that employee alone without further consideration or consultation of the issue of the appropriate pool.

   In *King v Eaton Limited* [1996] IRLR 111, CS, it was held that although consultation was required of an employer before dismissing on the grounds of redundancy, such consultation must be fair and proper. The Court adopted the definition set out by the Court of Appeal in *R v British Coal Corporation, ex parte Price*; namely that fair consultation means:

   (a) consultation when the proposals are still at a formative stage:
   (b) adequate information on which to respond;
   (c) adequate time in which to respond; and
   (d) conscientious consideration by an authority of the response to consultation.

   In *Rowell v Hubbard Group Services Limited* [1995] IRLR, 195, EAT, emphasis was placed on a fair and genuine consultation procedure, in the way suggested in the *ex parte Price* case – by giving those consulted a fair and proper opportunity to understand fully the matters about which they are being consulted and to express their views on those subjects, and thereafter considering those views properly and genuinely. The obligation to consult is separate to the obligation to warn.

9. Section 123(1) of the Act provides that the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

10. Section 123(4) provides that the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.

    In *Savoia v Chiltern Herb Farms Limited* [1981] IRLR 65, EAT, it was confirmed that the duty to mitigate loss does not arise until after the dismissal.

In *Polkey v AE Dayton Services* (see above), it was held that,
in considering whether an employee would still have been dismissed if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the compensation by a percentage representing the chance that the employee would still have lost his employment.

In *Red Bank Manufacturing Co Ltd v Meadows* [1992] IRLR 209, EAT, it was held that where a redundancy dismissal is unfair because of a failure to follow a fair procedure, the *Polkey* principle requires the Tribunal to ask the following two-stage question when calculating the compensation to be awarded: If the proper procedure had been followed, would it have resulted in an offer of employment? If so, what would that employment have been and what wage/salary would have been paid in respect of it? That is a fundamental question which the Tribunal should expressly address.

Conclusions

11. Having regard to the findings of relevant fact, applying the appropriate law, and taking into the account the submissions of the parties, I have reached the following conclusions:

    11.1 The first issue is whether there was or was not a redundancy situation in accordance with the definition of redundancy. The Claimant's case is that the situation was deliberately engineered by Mr Robinson and the directors, in order to reduce the requirements of the Claimant's role, by transferring large parts of that role to Mr Robinson and trying to make it look as if there was a redundancy situation. The Claimant says that this was done in order to justify a pay cut/demotion, and/or as an alternative to a proper capability process which would have taken time. Although the amount of work required by the finance department had not reduced, and indeed it was perhaps increasing overall, here there was a reorganisation of that work. Mr Robinson did take on a more strategic and higher level role than that which the Claimant had hitherto carried out. However, he also took over tangible parts of the lower level work that the Claimant had done. He nevertheless left enough for a new finance manager to do, and it may have been as much as 70% of the Claimant's role along with her dotted line management responsibilities as before. The rest of the team carried on as they had previously. On the face of it, it could be a *Murray v Foyle Meats* situation, and therefore no redundancy arises. On the other hand, it might be a *BBC v Farnworth* situation, where the Claimant was mark 1 finance manager/finance controller but what was required by the Respondent was a mark 2 senior

finance manager, and so a redundancy situation may have arisen.

11.2 However, I accept the Claimant's case that the redundancy situation was engineered and pre-determined so that her role was the only one at risk of redundancy. As was possibly not the case in *Farnworth*, the Respondent had other options, including a wider restructure of the finance department. It is difficult to avoid the conclusion that the Respondent was simply seeking to avoid a capability process and/or to make a cost saving (the Claimant's salary). It is likely that the finance manager role would be doing much the same work as the Claimant (minus the strategic elements), but at a much lower salary. I am therefore not satisfied that a genuine redundancy situation arose with regard to the management of the finance department. The statutory definition of redundancy has not been made out.

11.3 However, resolving that issue is not the end of the matter. Even if a redundancy situation arises, I have to consider the manner in which the dismissal was carried out and the process that was followed. The first problem for the Respondent is that they had in mind the wrong test for redundancy. It is not that there is a reduced need for the Claimant or any particular employee to carry out work of a particular kind, but a reduced need for employees generally to carry out work of a particular kind. The effect of what the Respondent did was to take away large parts of the Claimant's role and to give them to Mr Robinson, even before any formal consultation began and without any discussion with the Claimant. In other words, there was no consultation with her when the proposals for restructure were at a formative stage. There was no warning to her at this stage that her role was at risk of redundancy. She was not consulted at all about the proposed restructure and therefore not able to give her thoughts on it, or on the way it could be carried out generally or by specific reference to her role. When the so-called consultation process began, there was nothing left to discuss. The restructure was a fait accompli, either completely concluded or well on its way to being so.

11.4 Further, the Respondent did not turn its mind to a fair selection process. It had decided at the outset that the Claimant's role in its current form was to go. A reasonable employer would have looked at the finance department as a whole and considered whether to pool others in that process with the Claimant and possibly with Mr Robinson himself, or they may have decided to have a pool of just the Claimant and Mr Robinson, although it is accepted that Mr Robinson had a more company wide and strategic role at a higher level, not confined to the finance department. Thus, no alternative to the redundancy of the Claimant's role was properly considered by the Respondent. If

there were performance issues, they could not possibly be an excuse for dismissing the Claimant by way of redundancy, and a capability process should have been followed. Alternatively, she should have been offered training to carry out those parts of her tasks which the Respondent felt that she was not carrying out properly or at all.

11.5 Although there were a number of so-called consultation meetings with the Claimant, two of them were simply recapping on earlier meeting minutes, and generally Mr Robinson did not consider properly the Claimant's comments. He had no job description for her, there were no appraisals and he had no real knowledge of what she could or could not do. He had closed his mind before the consultation began to doing anything other than dismissing the Claimant, as the restructure had already been carried out. There was therefore no conscientious consideration of the Claimant's response to consultation. Mr Robinson was arguably not the right person, anyway, to make the decision, as he directly benefitted from the restructure and the Claimant's dismissal. The decision should have been made by, perhaps, Mr Martin Inwood, to give it more independent thought and neutrality.

11.6 The fact is that the new role of finance manager was very similar to the Claimant's old role, with perhaps as much as 70% of the work being the same. I accept the Claimant's evidence that the finance manager would be the 'go to' person for others in the department, as indeed the Claimant had been as finance controller, and the reality was that the more routine tasks taken by Mr Robinson would be delegated to the finance manager, as they are a one person task and did not require assistance and did not require to be done at Mr Robinson's strategic level. This would include tasks such as the VAT returns and the management accounts etc. With those delegated tasks in addition there was an even closer similarity between the two roles (finance controller and finance manager).

11.7 The Claimant's grounds of appeal were not fully considered by Mr Jason Inwood; for example, her comments about the pool of one, and there was little or no investigation by Mr Inwood of the Claimant's concern that aspects of her role had been removed without warning or discussion with her and prior to the so-called consultation process. Mr Inwood did not address the question of the Claimant's job description with her, and what she did, could do or had done etc.

11.8 For all these reasons, I conclude that the redundancy process was not a genuine one. The Claimant's dismissal had been pre-determined and consultation with her was not going to make any difference to that. There was no warning or consultation at the

formative stage, there was no fair selection process by a pool or otherwise, and there was no conscientious consideration of the Claimant's comments or a fair dealing with her points that she raised. The appeal did nothing to correct the earlier errors by Mr Robinson. If there was a redundancy situation, the dismissal process was clearly unfair, from the automatic selection of the Claimant for redundancy onwards.

11.9 I conclude that the Claimant has mitigated her loss to date and the Respondent has not shown that she has not done so. She has worked hard to obtain alternative employment, but her age, the market place etc. are against her. The case law clearly indicates that she cannot fail to mitigate her loss in respect of the finance manager role offered to her before she was dismissed. That role was on the table and offered to her up until the final consultation meeting on 18th May but not thereafter. The Claimant's employment ended on 1st July 2016. The duty to mitigate her loss only arose after her employment terminated. The Respondent did not offer her the finance manager role after 1st July. Therefore, her decision not to take that role cannot be a failure to mitigate her loss. However, the Claimant must give credit for the earning received from the temporary work that she has obtained. Further, I make the assumption that the Claimant will be able to continue to mitigate her loss with more temporary work when her current job ends. Say another four months work to 2 November 2017, being paid at her current rate from the temporary job she has at the present time.

11.10 I turn to the question of any *Polkey* reduction. Given my earlier conclusions, the basis for assessment of compensation must be the assumption that the Claimant would probably have remained in her finance controller role, or something very like it, and on her existing salary. A proper and fair re-structure of the finance department would probably have resulted in this. However, I cannot ignore the possibility that a restructure properly carried out could still have resulted in the Claimant's role being redundant, even after a proper redundancy exercise had been conducted. However, this was only one of a number of possibilities. As best I can, I assess the risk to the Claimant of losing her job through a fair redundancy process as 20%. Accordingly, her compensation should be reduced by that percentage.

11.11 As referred to above, it is not possible to assess compensation in the light of an absence of evidence about certain aspects of the schedule of loss, and the failure to give credit for earnings from temporary employment. If the parties cannot settle on the amount of the compensatory award, then a short remedy Hearing will be listed. The Claimant is entitled to be paid her Tribunal fees by the Respondent and I would make that order.

Employment Judge G P Sigsworth, Huntingdon

Date: 10 March 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS