EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4104150/2016

Held at Dumfries on 2 and 3 May 2017

Employment Judge: Mr C Lucas (sitting alone)

Mr David Colquhoun	**Claimant** **Present but Not Represented**
Independent Living Support Limited	**Respondent** **Represented by:-** **Mr J Anderson – Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is in three parts namely,-

(Firstly) That the reason for the termination of the Claimant's employment by the Respondent on 29 June 2016 was that he was redundant, a reason falling within sub-section (2) of Section 98 of the Employment Rights Act 1996.

(Secondly) That in the circumstances, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably in treating the fact that the Claimant was redundant as a sufficient reason for dismissing him and that, in accordance with equity and the substantial merits of the case, the termination of the Claimant's employment by the Respondent on the ground of redundancy on 29 June 2016 was fair.

(Thirdly) That the Claimant's complaint that he had been unfairly dismissed has not been upheld by the Tribunal and is dismissed.

REASONS

Background

1. In a form ET1 presented to the Tribunal office by or on behalf of the Claimant on 4 August 2016 – (hereinafter, "the ET1") – it was alleged that on 29 June 2016 the Claimant had been unfairly dismissed by an employer named by him as "Independent Living Support".

2. The only claim explicitly made within the ET1 was that the Claimant had been unfairly dismissed, the "background and details" section of the ET1, Section 8.2, consistently referring to procedures relating to – (and the fact of) - the Claimant's employment having been terminated because of redundancy.

3. In a form ET3 received by the Tribunal on 12 September 2016 – [a form ET3 initially identified as having apparently been submitted out of time but later accepted by an Employment Judge in terms of Rule 20 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013] – (which form ET3 is hereinafter referred to as "the ET3") – the company or organisation acknowledged to have been the Claimant's employer as at 29 June 2016 was disclosed as being "Independent Living Support".

4. During preliminary discussion at commencement of the Final Hearing of the Claimant's claim it was established – (and accepted by both the Respondent's representative and the Claimant) - that throughout a period of employment which had begun on 9 July 2009 and had continued, without break, until and including 29 June 2016 the Claimant's employer had in fact been Independent Living Support Limited, i.e. the Respondent, and the Claimant's claim has proceeded on the basis that throughout the period

which had begun on 9 July 2009 and had ended on 29 June 2016 his employer had been the Respondent.

5. It was admitted within the ET3 that the Claimant had been dismissed but it was alleged that "the Claimant was dismissed for the potentially fair reason of redundancy and/or genuine organisational restructuring, and that his dismissal was fair and reasonable in all the circumstances."

6. The ET3 contained a statement that, "Having identified the Claimant's role as potentially at risk of redundancy, the Respondent then engaged with him in meaningful consultation over the removal of his role and consideration of any alternatives to potential redundancy."

7. The ET3 contained the statement that, "…having consulted with him on the proposal to make his role redundant, and in the absence of any viable alternative roles or suggestions from the Claimant, the Respondent was left with no alternative but to notify him that his role was to be made redundant under the new structure, in circumstances where no suitable alternative employment existed with which to offer him to avoid redundancy."

8. The ET3 contained the statement that, "The Claimant was offered the right of appeal; however he elected not to avail himself of this opportunity".

9. The ET3 contained a statement that, "The Respondent denies having failed to undertake meaningful consultation with the Claimant…"

10. The ET3 contained a statement that, "The Respondent denies… that it failed to conduct a fair selection process, or to apply its mind to a fair pool for selection…".

11. A paper apart annexed to – (but deemed by the Tribunal to form part of) – the ET3 contained a statement, effectively a submission, that "… in the event that the Tribunal concludes that the Claimant was unfairly dismissed on the basis that the Respondent adopted an unfair procedure (which is

denied), the Respondent will invoke the principle set out in the *Polkey* case and say that the Claimant would have been dismissed in any event."

12. The Tribunal office scheduled a Final Hearing of the Claimant's claim to take place at Dumfries on 2, 3 and 4 May 2017.

13. At no time prior to 2 May 2017 did either party seek to alter any aspect of, as the case may be, the Claimant's claim as made in the ET1 or the Respondent's response as set out in the ET3.

14. The Final Hearing of the Claimant's claim took place at Dumfries on 2 and 3 May 2017. There was no need for the Tribunal to sit on the third scheduled day.

15. On the first day of the Final Hearing of the Claimant's claim, at a stage prior to any evidence being led and when preliminary discussions were taking place among the Claimant, the Respondent's representative and the Employment Judge, it was confirmed by the Claimant that his sole claim was that he had been unfairly dismissed by the Respondent.

16. Still at a stage prior to any evidence being led on the first day of the Final Hearing of the Claimant's claim and when preliminary discussions were taking place among the Respondent's representative, the Claimant and the Employment Judge the Respondent's representative asked the Tribunal to note that he anticipated that during the course of the Final Hearing he was likely to refer to relevancy of productions on which the Claimant was apparently intent to rely and the relevancy of evidence which the Claimant apparently sought to obtain from witnesses called by him. During the course of those discussions the Respondent's representative invited the Tribunal to take steps, before any evidence was heard, to identify what the Issues to be determined during the course of the Final Hearing were. The Tribunal saw merit in that suggestion and after full discussion it was agreed by all concerned, including the Claimant, that the Issues which were

relevant to the Claimant's complaint that he had been unfairly dismissed were: -

- What the reason – (or, if more than one, the principal reason) – for the Claimant's dismissal had been.

- If the Tribunal was satisfied that there was a potentially fair reason for the Claimant's dismissal, whether – (given that reason and in the circumstances, including the size and administrative resources of the Respondent's undertaking) - the Respondent had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, a question which requires to be determined in accordance with equity and the substantial merits of the case.

- If the Claimant's dismissal had been unfair, what remedy should be awarded.

- If any remedy to be awarded included a compensatory award what the amount of such compensatory award should be, a question which would require the Tribunal to consider what is just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss was attributable to action taken by the Respondent.

- What steps the Claimant had taken to mitigate any loss which was sustained by him in consequence of the dismissal in so far as that loss had been attributable to action taken by the Respondent and whether the Claimant's attempts at mitigation had been such that they either justified or did not justify any restriction so far as any compensation in respect of "future" loss was concerned.

- Whether – (and, if so, to what extent) - there should be a *Polkey* reduction applied to the compensatory award.

17. Still prior to any evidence being led, discussion took place on the first day of the Final Hearing among the Claimant, the Employment Judge and the Respondent's representative about documents which the Claimant produced and wished to belatedly lodge as productions which might be referred to in evidence. After such discussion certain of those documents were accepted as additions to the previously-agreed joint bundle of productions but – (for reasons specified by the Employment Judge and accepted both by the Claimant and by the Respondent's representative) - certain other documents were not permitted. *(Note: During the course of the Final Hearing, whether at the invitation of the Employment Judge or at the request of the Respondent's representative, other documents provided by the Claimant or by the Respondent were accepted by the Tribunal as additions to that previously-agreed joint bundle, those "as-the-Hearing-continued" additional productions significantly including a version of the Claimant's schedule of alleged loss, some mitigation documentation and, from the Respondent, some counter-mitigation-argument documentation).*

18. Preliminary matters having been dealt with prior to leading of any evidence on the first day of the Final Hearing of the Claimant's claim the evidential part of that Hearing began.

19. Throughout its first day and for part of the second day, and with references frequently being made to the Issues identified and agreed earlier on the first day, the Final Hearing proceeded on the bases set out above. But during the course of the morning of the second day of the Final Hearing, at a stage after all of the Respondent's evidence had been obtained and the Respondent's representative had made it clear that the evidential part of the Respondent's case had been completed, the Claimant spontaneously – (and out-with the framework of what had been alleged in the ET1 as being the basis of his claim and in apparent disregard of what had been agreed on the first day as being the Issues to be determined by the Tribunal) - made statements from which it was immediately clear to the Tribunal that he was intent on alleging within the open forum that was the Final Hearing – (and in presence of both observers and a representative of the Press) - that on

occasions during the period of his employment with it the Respondent, had conducted itself in a way which, if found by the Tribunal to be true, might have left the Tribunal with little option other than to refer the matters which the Claimant was clearly intent on raising to the Procurator Fiscal.

20. It was apparent to the Tribunal that the allegations that the Claimant was intent on making within the open forum that was the Final Hearing of his claim were allegations which had not been made in the ET1 and were out-with the ambit of the Issues that had been agreed early on the first day of the Final Hearing.

21. At this stage during the morning of the second day the Final Hearing, as such, was adjourned, the Tribunal room was cleared of observers and the Press representative and a lengthy discussion ensued on a (closed) preliminary hearing basis. The specific purpose of that interposed (closed) preliminary hearing was to determine whether the Claimant was intent on making – (and sought to rely on) - the allegations that he had started to make prior to the Final Hearing being adjourned and, if he was so intent, whether the nature of such allegations was such as to require the Tribunal, either on its own initiative or on application being made by the Claimant, to make a case management order either accepting any amendment to the Claimant's claim or refusing any amendment to the Claimant's claim.

22. For his part, the Respondent's representative made reference to the series of authorities beginning with the case of **Selkent Bus Company Limited v Moore** and continuing up to and including the case of **Abercrombie and Others v Aga Rangemaster Limited** and argued that the very fact of adjournment which might be required to enable the Claimant to make application to amend his claim or/and the Respondent to amend its response would in itself be prejudicial to the Respondent, especially so given that the Respondent's evidential case has been completed. The Respondent's representative contended that it was difficult to envisage circumstances where, as a matter of law, it would be correct to grant any application made by the Claimant to amend his claim at this stage in the

proceedings and argued that in the whole circumstances it was appropriate for the Tribunal to make a determination at this, interposed-closed-preliminary-hearing, stage as to whether the Claimant should or should not be allowed to continue with evidence which might alter his claim so as to include an allegation that as his employer the Respondent had breached Section 47B of the Employment Rights Act 1996 by subjecting him to a detriment on the ground that he had made a protected disclosure as envisaged in Part IVA of that Act and bring it, his claim, within the ambit of the automatically unfair dismissal provisions of Section 47B of the Employment Rights Act 1996.

23. After lengthy discussion, and with the Claimant being given every opportunity to express his point of view and to do so with guidance being objectively given to him by the Employment Judge – (as is appropriate where a party is unrepresented) – , the Claimant eventually intimated that he was content not to pursue any "protected disclosure" or "whistleblowing" allegations as part of the claim made by him against the Respondent, that he would proceed on the bases of the claim expressed in the ET1 and the Issues agreed early on the first day of the Final Hearing and, generally, that he would seek to give and lead only such evidence as might contradict or cast doubt on the evidence given by the Respondent's sole witness earlier in the Final Hearing.

24. That intimation having been given by the Claimant the Employment Judge ordered that the previously-adjourned Final Hearing of the Claimant's claim would resume and that the foregoing Note explaining why the Final Hearing had been temporarily adjourned, why there had been an interposed (closed) preliminary hearing and what had taken place at that interposed preliminary hearing would, as a form of interlocutory Note or Order resulting from the interposed Closed Preliminary Hearing, be contained within and form an integral part of this Judgment.

25. The Final Hearing proceeded on that basis, with the Claimant's evidence and the evidence of three witnesses called by him being obtained by the

Tribunal and closing submissions being made by the Respondent's representative. Having taken guidance from the Employment Judge – (guidance which the Employment Judge intended to be an assurance to the Claimant that the Tribunal would not take the view that any lack of closing submissions from him would prejudice his claim) – the Claimant made it clear that he preferred not to make any closing submissions but to rely on the Tribunal referring to its own notes of evidence and its understanding of the underlying law before deciding whether or not he, the Claimant, had been unfairly dismissed and, if so, what remedy should be ordered.

26. During the course of his closing submissions the Respondent's representative invited the Tribunal to take into account the decisions in the cases of:-

- Selkent Bus Company Limited v Moore
- Abercrombie and Others v Aga Rangemaster Limited
- Polkey v A E Dayton Services Limited, [1988] ICR 142, HL
- Capita Hartshead Limited v Byard [2012] IRLR 814
- Hill v Governing Body of Great Tey primary School [2013] IRLR 274

as well as the provisions of the Employment Rights Act 1996.

The Tribunal did so prior to reaching its determination and prior to issuing this fully reasoned Judgment.

Findings in Fact

27. Having heard evidence on behalf of the Respondent and from and on behalf of the Claimant, and having considered documentary evidence provided by the parties to which reference was made in evidence, the Tribunal found the

following facts, all relevant to the Claimant's claim as set out in the ET1 and to the Issues identified on the first day of the Final Hearing of the Claimant's claim as being matters to be determined by the Tribunal, to be admitted or proved.

28. The Respondent is a registered charity the legal persona of which is a company limited by guarantee.

29. As a registered charity the Respondent provides outreach housing support. Its purpose is to help and support the homeless and those at risk of losing their homes. Separately – (at least so far as funding is concerned) – it provides help and support to young people who need assistance with confidence building and in obtaining access to training.

30. The Respondent's policy decisions are made on its behalf by Trustees.

31. As at 29 June 2016 – (a date which, where the context permits, is hereinafter referred to as "the effective date of termination") - the Respondent's Trustees – (hereinafter, "the Respondent's Trustees") – were four in number, namely Mr Russell Brown, Mr Alasdair Bryce, Mr Owen Fielding and Ms Sandra Murphy.

32. Mr Brown was first appointed as one of the Respondent's Trustees in 2015, was appointed as Chair of the Respondent's Trustees "around April/May" 2016 and was the Chairman of the Respondent's Trustees as at the effective date of termination.

33. Mr Brown's belief is that the job of the Respondent's Trustees "is not about micro managing". Day-to-day operational management of the Respondent's business is entrusted by the Respondent's Trustees to one or more employed managers.

34. The Respondent provides its services throughout Dumfries and Galloway, including in Nithsdale, Dumfries and the Stranraer area.

35. As a charity, the Respondent relies on financial support from third party sources as its means of funding the services that it provides for the homeless, for people at risk of losing their homes and for vulnerable young people in need of support with confidence building and with the obtaining of access to training.

36. In respect of its work assisting the homeless and those at risk of losing their homes, the Respondent's primary source of funding is Dumfries and Galloway Council. In providing that service the Respondent is effectively acting as the outsourced provider of a service that would otherwise require to be provided directly by that Council.

37. In respect of its work with vulnerable young people, the primary source of the Respondent's funding is an organisation known as "the Holywood Trust".

38. As one of the Respondent's Trustees, Mr Brown estimates that during the Respondent's financial year ended 31 March 2016 its turnover – (calculated in terms of funding obtained from Dumfries and Galloway Council, from the Holywood Trust and from other sources) - was in excess of £500,000. He estimates that of that global figure donations from individuals or organisations other than Dumfries and Galloway Council and the Holywood Trust amounted to about £30,000, that the Respondent received funding in the region of £50,000 to £60,000 from the Holywood Trust in respect of its support of vulnerable young people – (funding that the Respondent, whether from other sources or from its own funds, had to Pound-for-Pound match as a precondition of the Holywood Trust's support) – and funding in excess of £400,000 from the Dumfries and Galloway Council in respect of its outreach housing support work but insists that the Respondent's Trustees believed that that Council funding would be substantially cut whenever Dumfries and Galloway Council completed its budget calculations in respect of the year ending 31 March 2017.

39. The Claimant had been employed by the Respondent throughout the period which had begun on 9 July 2009 and had ended on the effective date of termination.

40. As at the effective date of termination the Respondent operated from more than one premise in Scotland. The Manager of one of those, its Dumfries premise where the Claimant was based, was Mr David Walden and throughout a period ending with the effective date of termination Mr Walden had been the Claimant's line manager.

41. During the period which had begun on 6 July 2009 and had continued to 31 March 2015 the Claimant had been employed as a "Fuel Advice Project Worker and IT Administrator" in respect of which he was required, on an annualised basis, to work the equivalent of six hours per week providing IT support to the Respondent "at a time causing the least disruption to the everyday running of" the Respondent's "office staff" and, on an annualised basis, the equivalent of thirty hours per week "providing Fuel Advice".

42. Over the period which had begun on 6 July 2009 and continued to 31 March 2015 the Claimant's responsibilities and duties as a member of the Respondent's staff based at its Dumfries premise had evolved.

43. On 1 April 2015, in anticipation by the Respondent of being tasked to provide a higher volume of services to its end users and the changes that would be required so as to enable it to meet the expectations of Dumfries and Galloway Council, its primary provider of referrals, the Respondent amended the terms of the Claimant's employment and embodied those amended terms in a statement which bore to be dated 1 April 2015 and which set out "the main terms and conditions of employment which formed part of the contract of employment between" the Respondent and the Claimant.

44. Where the context permits that 1 April 2015 statement is hereinafter referred to as "the Claimant's Contract."

45. The Claimant's Contract narrated that it was "an ongoing contract in relation to providing IT Support", set out that the Claimant's employment with the Respondent had begun on 6 July 2009 and specified the Claimant's job title as being "IT Support".

46. Under the heading, "**Hours of Work**", the Claimant's Contract stated:-

> "Your hours of work will vary according to negotiation between ILS and yourself consisting of an annualised contract for 1,820 hours.
>
> - 35 hours per week for IT Support. This will be at a time causing the least disruption to the everyday running of ILS office staff.
>
> The actual hours worked should be kept under review and any predictable shortfall in hours due to family circumstances would trigger an adjustment in salary in accordance with a new set of annualised hours."

The references to the Claimant's hours of work being identified on an "annualised" basis and to "any predictable shortfall in hours due to family circumstances" alluded to the fact that as at 1 April 2015 the Claimant had children who lived in Switzerland and who he visited six to ten times each year.

47. When the Claimant was not at the Respondent's business premise he could access the Respondent's IT facility remotely and was able to provide a degree of IT support to the Respondent remotely. This facility applied even when, for example, he was in Switzerland visiting his children.

48. Mr Brown believed that after the Claimant's Contract was entered into and throughout the period which began on 1 January 2016 and ended on the effective date of termination, the Claimant's duties were to ensure that all of the Respondent's staff had access to IT equipment which was, at all times, in good working order and to rectify any problems that should arise with the IT equipment.

49. As one of the Respondent's Trustees Mr Brown accepts that the cost of employing the Claimant was never specifically funded by Dumfries and Galloway Council or the Holywood Trust or any other funds provider but his understanding of how the Claimant's salary was funded is vague.

50. The nature of the Claimant's business is such that confidentiality is of the utmost importance. The Respondent believes that it owes that degree of absolute confidentiality to its end users, all of whom are vulnerable people and some of whom are vulnerable young people.

51. Since late 2015 the Respondent had had great concern about a comment that the Claimant had made to it about being able to access the Respondent's Trustees and the Respondent's staff members' e-mails and the Respondents viewed what the Claimant had said – (and has never denied saying) - as being a threat.

52. The Respondent had never fully investigated whether the Claimant had actually accessed Trustees or staff members' e-mails and certainly no disciplinary proceedings had ensued but throughout the period which began with the making of the comment in question and continued until the Claimant's employment ended the Respondent's Trustees still had grave concerns.

53. Unbeknownst to the Claimant at any time before the effective date of termination, there had been a meeting among Mr Brown, Ms Murphy, Mr Bryce – (all of three of whom were Trustees) – Mr Walden and a person identified in minutes as being "Graeme A" on 12 January 2016 at which

minutes were taken by a minute taker identified as being "April W". The minutes of that meeting record that: -

> "RB has huge concerns as do the other Trustees regarding the reading of people's e-mails in the Housing Support team by the IT Manager. This breaches confidentiality as permission had not been sought from the individuals involved. The IT Manager himself told the Team Meeting last month that he does read other people's e-mails. This will be looked into by the Manager and the Trustees as how to proceed with this allegation."

The "RB" referred to was Mr Brown. The "IT Manager" referred to was the Claimant.

54. On 15 January 2016 – (again without the Claimant knowing anything about it at any time prior to the effective date of termination) - Mr Bryce, acting in his capacity as one of the Respondent's Trustees, sent an e-mail to Mr Walden which contained the advice that "I would suggest that would have to mean independent advice in relation to either a redundancy dismissal or dismissal for gross misconduct on account of his recent e-mail reading activities". The Respondent accepts that that reference to someone being dismissed because of redundancy or because of gross misconduct was reference to the Claimant.

55. On 18 January 2016 Ms Murphy, her co-Trustee Mr Fielding, "Graeme A" and a Mr David Russell met. Mr Brown was not present at that meeting and the fact and detail of what was discussed at that meeting was not known to the Claimant until after the effective date of termination. Minutes of that 18 January meeting record that the Respondent's Trustees discussed that:-

> "With regard to the outsourcing of IT, it would cost roughly £300 to facilitate this. DW will make OF aware of the background information in relation to this issue".

And: -

> "OF stated if a possible breach of confidentiality has been made, then steps have to be taken in accordance with the policy and procedures. Advice may be sought from a legal perspective."

56. On or about 15 March 2016 the Respondent's Trustees considered an updated version of a draft business plan for 2016 – 2019. It was a draft business plan prepared for the Respondent's Trustees by Mr Walden. Under the heading, "Operational Developments", that draft business plan stated: -

> "During 2015 the ILS IT systems has been upgraded, however, during 2016 ILS will outsource our IT support facility. This will be provided by an external organisation and provide savings that can be re-invested to enhance our service delivery. With the increased workforce further investment in Information Technology will be required so that all staff have a workstation encompassing a computer."

On the one hand, the draft business plan was recommending future outsourcing of the IT support which was, at that time, being provided by the Claimant as an in-house IT specialist. But on the other hand it was talking about further investment in IT being required by the Respondent.

57. The Respondent's Trustees met at a Trustee Meeting on 6 April 2016. Mr Walden and one of the Respondent's Team Leaders, "April" were present at that meeting. The minutes of that 6 April 2016 meeting disclose that so far as the draft business plan was concerned "this issue was not fully discussed as all of the Trustees were not present at the meeting therefore it was decided to set this aside for a future meeting" and record that "outsourcing of our IT function was discussed at length and it was felt we should now push on with this at the earliest opportunity."

58. The Respondent's Trustees met on 16 May 2016. The minutes of that 16 May meeting record that the Trustees considered that:-

> "The outsourcing of our IT Facility would provide a substantial saving to the organisation and allow the Outreach Housing Support provision to be largely unaffected", that "this position occupied by David Colquhoun is a singleton post and would no longer exist after the Outsourcing was complete, there are no alternative employment opportunities within ILS, and if as indicated the funding cuts will have an impact on ILS. It is likely there won't be any recruitment for some time to come."

And: -

> "Therefor the Board agreed that the It Facility would be outsourced and that David Colquhoun would be made redundant."

And that: -

> "It was agreed that Russell would take this forward in consultation with Alasdair and send a letter of Redundancy to David Colquhoun."

59. Throughout the period which began in January 2016 and ended with the Respondent's receipt of an 18 July 2016 letter from Dumfries and Galloway Council the Respondent had sought to obtain clarification from Dumfries and Galloway Council as to whether there were to be substantial reductions in funding and if so what those reductions would be. But every attempt to obtain that specification from Dumfries and Galloway Council failed until, eventually, the 18 July letter was received.

60. As one of the Respondent's Trustees Mr Brown was aware that the attitude of Dumfries and Galloway Council was that at a time of austerity, when the Council was having to make cuts in outsourced services and in funds provided to external service providers such as the Respondent, the Council,

was looking to the Respondent to make savings within its own overall operational costs. The Respondent's Trustees felt that they had a duty to listen to what was being said to them by Dumfries and Galloway Council and to act upon it in order to try to maintain an acceptable level of operations so far as its end users were concerned.

61. The Claimant is not surprised to learn now that the Respondent had identified that it had a funding problem and he accepts that during the first part of 2016 the Respondent's Trustees had ongoing concerns about how its front-line activities would be funded.

62. The Respondent's Trustees looked at the whole of the Respondent's operations in order to identify where savings might be met but the only aspect of its operations in respect of which it could identify possible significant savings was that of in-house IT support, Mr Brown describing that as being "the only aspect of the business where a reasonable saving could be made" and the Trustees deciding that even if the expected cuts in funding did not arise, and even if the Respondent somehow obtained unexpectedly high numbers of referrals from Dumfries and Galloway Council, their aim as the Respondent's Trustees should still be to reduce operational costs.

63. The Respondent's Trustees had taken the view that if they had made cuts in their front-line Housing Support Worker's team then the service that the Respondent provided to its end users would "diminish". They were anxious to ensure that that did not happen.

64. Mr Brown insists that it was the Respondent's Trustees who identified the possibility of saving monies by outsourcing IT support and that as part of that process the Trustees identified the Claimant as being the sole member of that stand-alone IT support position within the Respondent's business.

65. Mr Brown insists that the decision to terminate the Claimant's employment on the ground of redundancy was a decision taken by the Respondent's Trustees.

66. Mr Brown insists that the Trustees took the view that "we were carrying a post that a small charity like ours could not afford", i.e. an in-house IT support person, and that that was one of the reasons why nothing that the Claimant could have said or done would have altered either the perceived need to make financial savings by altering what IT support was provided or the Trustees' decision to achieve that change by, amongst other things, making the Claimant redundant.

67. As one of the Respondent's Trustees Mr Brown had continued to hope that even although the Claimant's post and therefore the Claimant's job was redundant and the Claimant would be made redundant he might somehow be offered alternative work within the Respondent's business, perhaps as a front-line member of its staff, but any such possibility was predicated on additional referrals being made by Dumfries and Galloway Council.

68. Mr Brown accepts that front-line work would have been work that the Claimant was capable of doing and would certainly have been an option provided the Claimant met the required criteria. Mr Brown believed that the Claimant would meet those criteria.

69. On 18 May 2016 Mr Brown, in his capacity as Chairman of the Respondent's Trustees, wrote to the Claimant. That letter was headed "Redundancy", was sent to the Claimant by post and, where the context permits, is hereinafter referred to as "the Notice of Termination."

70. Although dated 18 May 2016 the Notice of Termination was received by the Claimant in an envelope which was postmarked 24 May 2016 and would not therefore have been received by the Claimant until on or about 26 May 2016.

71. The Respondent's Trustees consensus at the time of the Notice of Termination being issued was that the Respondent could not continue to justify the expense of full-time in-house IT support and that obtaining what IT support was required could be significantly achieved by using external, outsourced, IT support providers.

72. The Respondent's Trustees had calculated that by making the Claimant redundant and by obtaining outsourced IT support only on an as-and-when-required basis savings of approximately £20,000 per annum could be made, thereby enabling the Respondent to have £20,000 per annum more to spend on front-line operational work.

73. The Notice of Termination stated:-

> "I regret to advise you that as a Board of Trustees we have had to make a number of difficult decisions regarding the running of ILS as a charitable body and to ensure that we are best able to meet our obligations to our service users and funding partners.
>
> We have against that background secured a contract to outsource the maintenance of ILS computer systems and as a result your post is redundant as your job description relates solely to maintaining and servicing out IT system.
>
> Sadly there are no other vacancies available within ILS to which we could consider transferring you and accordingly, on behalf of the Trustees, I must advise that your employment with ILS will now have to be terminated with effect from today.
>
> I have attached a statement detailing your statutory redundancy pay and notice pay entitlements. These payments will be made to you in the course of the next salary payment run and it is proposed that your notice period be served on gardening leave from ILS such that your last day of employment with us will effectively be 29 June 2016.

> I appreciate that this may be upsetting for you but would wish to take the opportunity to thank you for your service to ILS. Given that the effect of this notice is to end your employment I confirm that may appeal against that decision and that should you wish to do so any ground of appeal should be submitted to me in writing within the next five working days."

74. The "statement detailing your statutory redundancy pay and notice pay entitlements" referred to in the Notice of Termination quantified the statutory redundancy pay which the Respondent considered the Claimant was entitled to as £4,311.00. No notice pay was specified in that statement and no period of notice was specified in that statement, the only reference to the "notice" other than in the heading to that statement being "Notice Period will be worked and paid during gardening leave."

75. Under the heading, "Notice", the Claimant's Contract stated "Initially employment will be probationary for 6 months with 1 week's notice either way" and "when employment is confirmed, notice each way is 2 weeks, rising after 1 year's work to 4 weeks" but the reference otherwise contained within the Claimant's Contract to his employment being conditional on completion of a probationary period had been deleted and the Claimant's Contract made it clear that his period of continuous employment was backdated to 6 July 2009. That being the case, the Claimant had accrued 6 continuous years of employment with the Respondent by the effective date of termination and was entitled by statute, and in terms of the Claimant's Contract, to 6 weeks' notice.

76. The Notice of Termination was the first intimation ever given by the Respondent to the Claimant that he had been at risk of being made redundant and its wording was such that it was presented to the Claimant as a *fait accompli*.

77. The reference in the second paragraph of the Notice of Termination to the Respondent having "secured a contract to outsource the maintenance of

ILS computer systems" was untrue. No such contract had been secured by 18 May 2016. No such contract had been secured before or as at the effective date of termination and no such contract was secured before, as at the earliest, 10 November 2016.

78. The reference in the Notice of Termination to there being "no other vacancies available within ILS to which we could consider transferring you" was, at best, misleading. At or about the time of the Notice of Termination being sent to the Claimant the Respondent's manager, Mr Walden, had recruited three new front-line members of staff. Mr Brown had not known that those additional members of staff had been recruited or were being in course of being recruited. Mr Brown now confirms that the Respondent did take on three additional front-line staff in April 2016 and that the Claimant was not considered for any of those posts but even now he insists that at the time the Trustees were not aware that any new staff were being employed.

79. The Claimant had not been consulted about any proposed redundancies within the Respondent's business. He had not been alerted to the fact that he was at risk of being made redundant. He had not been told what the selection pool for redundancy was and what criteria had been applied by the Respondent before it chose which member or members of its staff would be made redundant.

80. The statement in the ET3 that "having identified the Claimant's role as potentially at risk of redundancy, the Respondent then engaged with him in meaningful consultation over the removal of his role and consideration of any alternatives to potential redundancy" was untrue.

81. The statement in the ET3 that although the Claimant was offered the right of appeal "… he elected not to avail himself of this opportunity" was untrue. The Claimant had written to the Respondent on 10 June 2016. That letter was a letter of appeal and where the context permits is hereinafter referred to as "the Claimant's Appeal."

82. The Claimant's Appeal stated: -

"Dr Mr Brown,

I wish to appeal against my dismissal. Although this is outwith the time frame that you stipulated I believe that it is still reasonable that you should consider it. Indeed, as you know, I did not even personally receive your letter until the 27th May. This was already past the date set by you. I was then forced to return to London to clarify matters over my son's papers, he is a Swiss citizen.

The basis for my appeal are as follows and I shall expand upon those points at a hearing:-

1. It is my belief that I was unfairly chosen for redundancy rather than considered for other work.

2. In choosing me instead of anyone else you unfairly discriminated against me.

3. The timing of my redundancy clearly links it to my insistence that you address the complaint that Jon Massenet made against me.

4. You were in breach of my contract when you failed to deal with the serious allegations in that complaint in accordance with our clearly laid out complaints/grievance procedure.

5. I further believe that I was chosen for redundancy because of the questions I had raised over client confidentiality and the possibility of whistleblowing.

6. Further, your use of 'gardening leave' when there is no specific provision in my contract places you in breach of that contract.

7. I also believe that the issues surrounding your outsourcing of my work may be covered by the TUPE regulations."

83. Mr Brown read the Claimant's Appeal and considered it with his fellow Trustees.

84. Mr Brown agrees that from time to time there had been disagreement between Mr Walden and the Claimant, Mr Brown stating that "I am aware that there was conflict in the office over a sustained period of time", that "we had some real issues we needed to resolve" and that "those difficulties continued into 2016" leaving the Trustees with "a very difficult situation", but he does not accept that either the Respondent's Trustees or Mr Walden regarded the Claimant as being "a trouble maker" and insists that the Respondent's Trustees' decision to make the Claimant redundant "wasn't about people bearing grudges".

85. The Claimant accepts that even if he had problems with Mr Walden as his line manager those problems did not apply with or to the Respondent's Trustees with whom, he admits, he had had no issue at any time during the period of his employment.

86. On 13 June 2016 Mr Walden wrote to the Claimant referring to the Claimant's Appeal. That letter acknowledged that the Claimant's Appeal had been handed to Mr Brown but stated: -

"In the meantime I would ask you to arrange for the following items to be returned to ILS, these are as follows:-

1. ILS Identity Card.

2. Set of Keys

3. ILS company Laptop and access code.

It would also be helpful if you could provide the following information:-

1. Administration Username and Password for Office 365.

2. Administration Username and Password for CJSM secure Email.

3. Information relating to the domain holder of ILS-Dumfries.co.uk."

87. Also on 13 June 2016 – (but without making any reference to Mr Walden's 13 June letter to the Claimant) - Mr Brown, in his capacity as Chair of the Respondent's Trustees, wrote to the Claimant referring to the Claimant's Appeal. In that 13 June letter Mr Brown told the Claimant that "the Trustees held one of our regular meetings earlier this afternoon and your letter had been placed on the agenda" and that "at this time, I am acknowledging receipt of your letter and a fuller response will be sent in due course when the various issues that you have raised have been more fully considered."

88. No further or fuller response was ever sent by the Respondent to the Claimant and no appeal hearing ever took place. The Respondent's Trustees deliberately chose not to respond in any more detail to the Claimant's Appeal and not to afford the Claimant the opportunity of presenting his appeal at an appeal hearing.

89. Mr Brown's recollection is that the decision not to provide the Claimant with a more detailed response to the Claimant's Appeal and not to afford him the opportunity of presenting his point of view at an appeal hearing was taken

because the Respondent knew that the Claimant was by then intent on raising an Employment Tribunal claim claiming unfair dismissal.

90. Mr Brown seeks to justify both explains the Respondent's Trustees decision to send the Notice of Termination without having given the Claimant any warning that he was to be made redundant and the Trustee's decision to immediately place the Claimant on garden leave as being the result of there being deliberate desire on the part of the Trustees to "protect our system", a system which they were concerned "he could have trashed" if still working within the Respondent's premise.

91. The nature of the Claimant's business is such that confidentiality is of the utmost importance. The Respondent believes that it owes that degree of absolute confidentiality to its end users, all of whom are vulnerable people and some of whom are vulnerable young people.

92. Since late 2015 the Respondent had had great concern about a comment that the Claimant had made to it about being able to access the Respondent's Trustees and the Respondent's staff members' e-mails.

93. The Respondents viewed what the Claimant had said about being able to access the Respondent's Trustees and the Respondent's staff members' e-mails as being a threat.

94. The Respondent had never fully investigated whether the Claimant had actually accessed Trustees or staff members' e-mails and no disciplinary proceedings had ensued. Nevertheless, it the comment had caused the Respondent's Trustees to have grave and lingering concerns.

95. At the stage of deciding to dismiss the Claimant on the ground of redundancy and because of the Claimant's comment that he had had the ability to access otherwise confidential e-mails the Trustees consciously decided that to give him any advance warning of likely termination of his

employment would be to expose the Respondent - (and therefore the Respondent's end users) - to the risk of breaches of confidentiality.

96. The Respondent's Trustees consciously chose to minimise that risk, to do away with it altogether so far as they were concerned, by not consulting with the Claimant at any stage prior to the Notice of Termination being served and by immediately putting him on garden leave.

97. The Claimant did not, as had been feared by the Respondents, take any steps to "trash the system" or to breach confidentiality owed to the Respondent's end users.

98. On 18 July 2016, some three weeks after the effective date of termination, the Respondent received a letter – (hereinafter, "the D & G C July letter") - from Dumfries and Galloway Council which included the statements that: -

> "…The Outreach Housing Support Contract between Dumfries and Galloway Council and Independent Living Support… is changed as set out in this letter."

And: -

> "The annual Contract payment of £433,199.00 in respect of the Outreach Housing Support Contract is reduced by £119,496.00 to £313,703.00 with effect from 1 November 2016. The contracted hours will reduce at this same date from 470 hours per week to 345 hours per week."

And: –

> "This letter effectively makes the changes under the provision contained under Part 2 Clause 17.2 of the Contract. In all other respects the contract remains unaltered."

99. Mr Brown confirms that after the effective date of termination the Respondent took no direct action to enter into any contract with an outsourced IT support provider until November 2016 but he insists that between the effective date of termination and the appointment of that outsourced provider "an external company" visited the Respondent "to check on the system to ensure that it was working efficiently" and was "robust enough going forward".

100. On 10 November 2016, some four and a half months after the effective date of termination, the Respondent entered into an outsourced IT support contract with a supplier identified as being Whitmee Communications. Notwithstanding references in minutes of meetings previously referred to IT support contracts having already been agreed this was the first outsourced support contract entered into between the Respondent and any third-party supplier since the Claimant's Contract was issued in 2015.

101. The Claimant accepts that when employed by the Respondent as its in-house IT support specialist "probably 80%" of his time was spent developing and maintaining the Respondent's database.

102. The Claimant accepts that the outsourced IT-support organisation has not undertaken any database development or web design or the design of marketing materials and that no-one in-house has done so since the effective date of termination. In short, he believes that "it is not being done" at the moment.

103. Mrs Joanne McCaig, one of the Claimant's former work colleagues and a Service Co-ordinator/Team Leader, is based at the Respondent's Stranraer premise. She described difficulties in retrieving information because the Respondent's database is not being developed or maintained but she also described other means being used by the Respondent since the effective date of termination – (i.e. means more laborious than using a maintained database) - of obtaining that required information.

104. Mrs McCaig confirms that after the effective date of termination the accumulation by the Respondent of data on the database that the Claimant had developed and maintained "came to a stop", that "things planned" between the Claimant and her "to be done" simply "didn't get done" and that the reason why there have been changes to the system operated by the Respondent was because it had chosen to make the Claimant redundant.

105. Ms Yvonne Renwick, one of the Respondent's Youth Support workers, no longer uses the database that the Claimant had developed and maintained. She explained, as fact, that the Respondent has not been keeping the database up to date since the effective date of termination and she believes that the reason why the IT system operated by the Respondent now is not as good as it was before the effective date of termination is that the Respondent has deliberately chosen not to do things that the Claimant previously did or, to put it the other way round, that when he was there the Claimant did things that the Respondent has chosen not to do now.

106. Ms Elaine Colquhoun, the Claimant's former wife, is employed by the Respondent as an administrative assistant with financial responsibility for budgets and as a Youth Co-ordinator. She has confirmed that since the effective date of termination IT support has been "very ad hoc", that "it took ages for a new person to get up and running" and that the Respondent has chosen to allow development of "a new system" which she described as being "not nearly as good" as that which the Claimant had maintained and supported.

107. Ms Colquhoun admits that "there has been a huge change", that the Claimant-developed-and-maintained database had fully recorded time and mileage but that since the effective date of termination the Respondent has chosen to record all such data manually.

108. Ms Colquhoun explained that even information needed by her, as a finance administrator, re wages, time off in lieu, holidays, staff details, keyholder's details and bank details, information which was previously "all on the

database", now have to be "worked out manually" under the system presently being imposed by the Respondent.

109. The Claimant accepts that the outsourced provider of IT support services has not replicated or replaced what he did when employed as an in-house IT support specialist. To the contrary, in his words, "only part of" what he did is now being done.

110. As one of the Respondent's Trustees Mr Brown believes that since the effective date of termination there has been a significant saving to the Respondent so far as what it has had to pay for IT support is concerned, that the Respondent is receiving adequate IT support from the third-party outsourced provider and that the IT support that the Respondent now needs is being provided.

111. Mr Brown is certain that if there had been consultation with the Claimant about redundancy, or if the Claimant's Appeal has resulted in an appeal hearing being held, there would have been absolutely no chance that the outcome – (the Respondent's decision to terminate the Claimant's employment on the ground of redundancy) - would change and that no matter what the Claimant might have said at any consultation meeting, and no matter what the Claimant might have said at an appeal hearing, the Respondent would have dismissed the Claimant on the ground of redundancy.

112. As at the effective date of termination the Claimant's gross pay was £25,433.63 per annum, an annual salary equivalent to approximately £489.11 per week. According to a Schedule of Loss eventually provided by the Claimant to the Tribunal his net weekly basic pay was £366.46.

113. In addition to his salary the Claimant received an employer's contribution of £11 per month from the Respondent into his pension scheme.

114. If the Claimant had continued to be employed by the Respondent he would have received a pay rise of £0.50 per hour, backdated to 1 April 2016, a figure which he estimates would have resulted in his income from the Respondent, after PAYE deduction and employee NIC deduction, being increased by approximately £60 per month.

115. The Claimant received £4,311.00 redundancy pay from the Respondent and received his full salary for the period ended on the effective date of termination.

116. After the effective date of termination the Claimant registered as a Jobseeker. As a Jobseeker the Claimant received £67 per week Jobseeker's Allowance but he did so for only three weeks.

117. Approximately four weeks after the effective date of termination the Claimant began work with an organisation referred to as "Kate's Kitchen".

118. Prior to starting work with Kate's Kitchen the Claimant made some attempts to find alternative work but his evidence in this regard is, at best, sketchy.

119. The Claimant alleges that in respect of his employment with Kate's Kitchen he earns £10 per hour for an 18 hour week, plus overtime. *[Note: Because of confused evidence from the Claimant, the lack of any relevant vouchers and the Claimant's apparent reluctance to give specific detail about his earnings from Kate's Kitchen the Tribunal is unable to determine what in any given week or what over the period since his employment with Kate's Kitchen began the Claimant's income from Kate's Kitchen has been.]*

120. The Tribunal was unable to determine what, if any, PAYE tax the Claimant is paying in respect of his Kate's Kitchen income, the Claimant having failed to provide any vouchers in this regard despite being called upon to fully vouch his loss.

121. The Claimant admits that he has no satisfactory explanation for failing to provide the Tribunal with vouchers in respect of any attempts made by him to mitigate his loss and that the Respondent's representative's proposition that he has not taken sufficient steps to find alternative work and by doing so to mitigate his loss "is probably right".

122. The Claimant's employment with Kate's Kitchen is on a fixed term contract basis and is due to expire sometime in June 2017.

123. The Claimant insists that the consequence of his being dismissed by the Respondent has been that he has been left "destitute", but when pressed on how he is maintaining himself he admits to supplementing his Kate's Kitchen income – (whatever it might be) – and his web designer work income – (whatever that might be) – with his post office pension and stated "I am good at photography".

124. The Claimant does not accept that if he had been consulted about the possibility of being made redundant that consultation would have made no difference. He argues that he "might" have been prepared to revert to "just maintaining the server and doing what I had done before 2015" even if that meant spending only 6 hours per week doing IT support work and he speculates that if he had agreed to reduce his hours from 35 hours per week to 6 hours per week he "would have done self-employed work alongside it, work as a web designer". Since the effective date of termination he has been actively engaged in work as a web designer but when asked questions in cross-examination or by the Tribunal about income being received by him in respect of such self-employed work he was evasive and clearly preferred not to answer those questions.

125. The Claimant accepts that he could "probably" do jobs which are currently being advertised for IT specialists in the Dumfries and Galloway area but he admits that after he began work with Kate's Kitchen his attempts to find other work ceased.

126. The Claimant professes not to have pursued his claim against the Respondent with any hope or intention of obtaining financial recompense, the Claimant's position being that "I didn't come here to get money".

127. As at the effective date of termination the Claimant was 59 years of age and had accrued a period of more than 6, but less 7, years' continuous service as an employee of the Respondent.

The Issues

128. The Tribunal identified the issues which it considered to be relevant to the Claimant's complaint that he had been unfairly dismissed contrary to the provisions of the Employment Rights Act 1996 as being: -

- What the reason – (or, if more than one, the principal reason) – for the Claimant's dismissal had been.

- If the reason was redundancy, whether there had been adequate consultation with the Claimant, whether there had been the application of a fair selection process and whether the Respondent had considered the possibility of alternative employment being offered to the Claimant as an alternative to the Claimant's employment being terminated by reason of redundancy.

- If the Tribunal was satisfied that there was a potentially fair reason for the Claimant's dismissal, whether – (given that reason and in the circumstances, including the size and administrative resources of the Respondent's undertaking) - the Respondent had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, a question which requires to be determined in accordance with equity and the substantial merits of the case.

- If the Claimant's dismissal had been unfair, what remedy should be awarded.

- If any remedy to be awarded included a compensatory award what the amount of such compensatory award should be, a question which would require the Tribunal to consider what is just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss was attributable to action taken by the Respondent.

- What steps the Claimant had taken to mitigate any loss which was sustained by him in consequence of the dismissal in so far as that loss had been attributable to action taken by the Respondent and whether the Claimant's attempts at mitigation had been such that they either justified or did not justify any restriction so far as any compensation in respect of "future" loss was concerned.

- Whether – (and, if so, to what extent) - there should be a *Polkey* reduction applied to the compensatory award.

The Relevant Law

129. The Law:-

(a) Legislation

- The Employment Rights Act 1996, particularly Sections 94, 95, 98 and 139.

- The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, particularly Rules 29, 34, 41, 61, 62 and 64.

(b) Case Law

- Selkent Bus Company Limited v Moore [1996] ICR 836, EAT.

- Abercrombie and Others v Aga Rangemaster Limited [2013] IRLR 953, CA.

- Kingwell and Others v Elizabeth Bradley Designs Limited, EAT 0661/02.

- Murray and Another v Foyle Meats Limited [1999] ICR 827, HL.

- Corus and Regal Hotels Plc v Wilkinson, EAT 0102/03.

- Polyflor Limited v Old, EAT 0482/02.

- Polkey v A E Dayton Services Limited [1988] ICR 142, HL.

- Robertson v Magnet Limited (Retail Division) [1993] IRLR 512.

- Duffy v Yeomans and Partners Limited [1995] ICR 1, CA.

- Capita Hartshead Limited v Byard [2012] IRLR 814.

- Usdaw v Burns, EAT0557/12.

- HCL Safety Limited v Mr Brian Flaherty, UKEATS/0021/13/BI.

- Hill v Governing Body of Great Tey Primary School [2013] IRLR 274.

Discussion

130. The Tribunal considers that it is neither necessary to paraphrase or summarise within this Judgment all of the evidence that it heard nor appropriate to refer, in detail, to all of the documents to which the witnesses spoke when giving evidence. But lest it might be considered to have

overlooked evidence on which the Claimant placed reliance it wishes to record that there were aspects of the evidence given by the Claimant and/or which he sought to obtain by examination or cross-examination of other witnesses that it, the Tribunal, considered to have so little bearing on the case before it that, looked at after the close of the Final Hearing, the arguments developed by the Claimant with regard to such evidence might, with the benefit of hindsight, be viewed as arguments which did no more than confuse the main issue, an issue expressed by the Claimant in the ET1 as being that he had been unfairly dismissed by the Respondent when he was made redundant.

131. The Claimant's claim as expressed in the ET1 was not a claim that he had been subjected to any detriment by any act, or any deliberate failure to act, by the Respondent which had been done, or not done, because he had made a protected disclosure. No reference had been made in the ET1 to the detail or substance of any of Sections 43A – G of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") – or to Section 47B of ERA 1996. The ET1 had not alleged that the Claimant's dismissal had been automatically unfair.

132. Nor had the ET1 set out in any detail that the Claimant's allegation was that the real reason for his dismissal had been that his line manager, Mr Walden, bore a grudge against him and had procured his dismissal as a way of satisfying that grudge held by him. And, as was pointed out by the Respondent's representative in his closing submissions, even if there were differences of opinion between the Claimant and Mr Walden, even if Mr Walden bore grudges against the Claimant, these facts could hardly have influenced Dumfries and Galloway Council's decision to cut back its referrals to the Respondent and could hardly have influenced Dumfries and Galloway Council's decision to substantially cut funding.

133. The Tribunal stresses that it does not wish to infer that the Claimant was guilty of obfuscation or that he deliberately sought to mislead the Tribunal either when giving evidence or when, as a self-represented party, cross-

examining the Respondent's witness or examining the witnesses who he had called to give evidence in support of his claim. But in the view of the Tribunal a great deal of the evidence led was not relevant to the determination of the claim made by the Claimant in the ET1. The fact remains, too, that the way in which the Claimant sought to give evidence on the second day of the Final Hearing of his claim and the necessity – (in its view) - for the Tribunal to adjourn the Final Hearing for a considerable period whilst an interposed (closed) preliminary hearing took place was a consequence of the Claimant's obvious intent to express, within the public forum which was the Final Hearing of his claim, views which were not relevant to the claim made in the ET1.

134. In the view of the Tribunal the Claimant was not alone in conducting himself in a way which was beyond reproach. It felt that at a different stage in the proceedings, the stage which ended only with commencement of the Final Hearing, the Respondent's lack of accuracy – (to put it at its best) – so far as what was contained in the ET3 was concerned was nothing short of careless– (again, to put it at its best). As has been recorded earlier in this Judgment many of the allegations and/or denials made by the Respondent in the ET3 were untrue or misleading. Had it not been for the concession made by the Respondent's representative shortly after commencement of the Final Hearing of the Claimant's claim, the concession that the Respondent accepted that the Claimant's dismissal had been "procedurally unfair" in that the Respondent had not followed proper procedure when dismissing the Claimant, a great deal of Tribunal time would have been wasted on consideration of procedural matters.

135. During the course of the Final Hearing the Claimant, apparently frustrated at being challenged about his intent to present evidence in support of a previously-unannounced argument that his dismissal was a detriment suffered by him because he had made a protected disclosure, sought to insist that the concession made on behalf of the Respondent at commencement of the Final Hearing was a tactic designed, as he put it, to "gag" him. But the Tribunal was satisfied, and expressed itself as being

satisfied, that what the Respondent's representative had actually done on behalf of the Respondent had been done, quite appropriately and correctly and in accordance with the overriding objective, in order to assist the Tribunal and to save Tribunal time.

136. Looking at the question of credibility of witnesses, at the sometimes very thorny issue of who to believe if there are conflicting versions of evidence.

137. The Tribunal was satisfied that Mr Brown was a totally credible witness and saw no reason to doubt the evidence given by him as the Respondent's sole witness.

138. Other than his own evidence and the information obtained from Mr Brown under cross-examination, the Claimant sought to rely on evidence obtained from Mrs McCaig, from Ms Renwick and from Ms Colquhoun.

139. The only adverse comment that the Tribunal would make in respect of any of these witnesses is that it appeared to it that Ms Colquhoun was very keen indeed to give whatever support she could to someone who was not only her former work colleague but who is her former husband and with whom, from her own evidence, she still had a very good relationship and fairly constant contact – (including frequent contact during the period after the effective date of termination).

140. Otherwise, the Tribunal found that the evidence given by each of Mrs McCaig, Ms Renwick and Ms Colquhoun was credible but, as was pointed out by the Respondent's representative in his closing submissions, was evidence which was more helpful to the Respondent's case than it was supportive of the Claimant's claim.

141. So far as the evidence given by the Claimant himself was concerned, the Tribunal found him to be evasive, at times argumentative and to give only evidence which he seemed to think would put a positive spin on his claim. Taking these matters into account, and bearing in mind the frequently

differing accounts that he gave in respect of pertinent matters, the Tribunal did not feel as confident about the credibility of the Claimant's evidence as it did about evidence given by any of Mr Brown, Mrs McCaig, Ms Renwick or Ms Colquhoun.

142. Overall, where there was any discrepancy between the evidence given by, in particular, Mr Brown and the evidence given by the Claimant the Tribunal preferred the evidence given by Mr Brown and took the view that the evidence from Mrs McCaig, Ms Renwick and Ms Colquhoun harmed rather than assisted the Claimant's claim.

143. The Tribunal considers that it is appropriate to add some explanation to the findings in fact set out in detail earlier in this Judgment by making reference to some of the oral evidence, to some of the productions that were referred to in evidence and to some of the closing submissions made by the Respondent's representative and, by doing so, to put the findings in fact relevant to the Claimant's claim into context when applying the relevant law to that claim as expressed in the ET1.

144. Section 94(1) of ERA 1996 states that "an employee has the right not to be unfairly dismissed by his employer".

145. Section 98 of ERA 1996 states: -

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to

justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[(ba) . . .]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[(2A) . . .]

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[(3A) . . .]

(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.

(5) . . .

(6) [Subsection (4)] [is] subject to –

(a) sections [98A] to 107 of this Act, and

(b) sections 152, 153[, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."

146. Section 139 of ERA 1996 defines redundancy by stating that: -

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

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

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

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

(i) for employees to carry out work of a particular kind, or

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

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

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a [local authority] with respect to the schools maintained by it, and the activities carried on by the [governing bodies] of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where –

(a) the contract under which a person is employed is treated by Section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment, he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

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

[(7) In subsection (3) "local authority" has the meaning given by Section 579(1) of the Education Act 1996.]"

147. That definition of redundancy applies not only to claims for redundancy payments but also, and in this case significantly, to unfair dismissal claims. The statutory words used in Section 139(1)(b) of ERA 1996, namely that: -

"(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."

are of particular significance to the circumstances of the Claimant's claim.

148. In terms of ERA 1996 it is for the employer to show the reason for dismissal, a reason which should be one of the potentially fair reasons set out in Section 98 of that Act, but it is for the Tribunal to determine whether any such reason has been established by the employer – (in this case, by the Respondent) – and, if so, which of those potentially fair reasons as set out in Section 98(2) of ERA 1996 had been the reason - (or, if more than one, the principal reason) -for the dismissal.

149. The ET3 had made reference to the Claimant being dismissed "for the potentially fair reason of redundancy and/or genuine organisational restructuring". But in his closing submissions the Respondent's representative made it clear that the Respondent relied on redundancy – (as defined in Section 139 of ERA 1996) – as being the reason for the Claimant's dismissal and reminded the Tribunal that in terms of Section 98 of ERA 1996 dismissal of an employee because that employee was redundant is a potentially fair reason for dismissal.

150. The broad definition contained within Section 139 of ERA 1996 has been described as covering a myriad of situations. In the case of **Kingwell and Others v Elizabeth Bradley Designs Limited** the Employment Appeal Tribunal gave the guidance that: -

> "…. there is a fundamental misunderstanding about the question of redundancy. Redundancy does not only arise where there is a poor financial situation at the employer's …. It does not only arise where there is a diminution of work in the hands of an employer … It can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is overstaffed. Thus, even with the same amount of work and the same amount of income, the decision is taken that a lesser number of employees are required to perform the same functions. That too is a redundancy situation."

151. As was stated by Lord Irvine in **Murray and Another v Foyle Meats Limited** Section 139(1) of ERA 1996 asks two questions of fact, namely whether one or other of various states of economic affairs exists and whether the dismissal is attributable, wholly or mainly, to that state of affairs.

152. The Tribunal has borne it in mind that confusion can arise as to the difference between a "redundancy" and a "reorganisation" but that "redundancy" and "reorganisation" are not necessarily mutually exclusive and that in any given case the question of whether a business reorganisation has resulted in a redundancy situation has to be decided on its own particular facts. Guidance to that effect was given by the Employment Appeal Tribunal in the case of **Corus and Regal Hotels Plc v Wilkinson**.

153. The Tribunal has borne it in mind, too, that although business restructurings are often precipitated by financial crises and economic downturns not all amount to redundancy and that what is crucial is whether the restructuring essentially entails a reduction in the number of employees doing work of a particular kind as opposed to a mere re-patterning or re-distribution of the same work among different employees whose numbers nonetheless remain the same.

154. Mr Brown described in detail the reasons why the Respondent believed that by the time the Notice of Termination was served there had already been a diminution of the Respondent's requirements for employees to carry out work of the particular kind that the Claimant carried out for it and why the Respondent's Trustees believed that that diminution would escalate or that there would be a cessation of any such requirement once referrals from Dumfries and Galloway Council had been effected and reductions in funding from Dumfries and Galloway Council had been experienced – (both of which were reasonably anticipated eventualities so far as the Respondent's Trustees were concerned and both of which turned out to be the case).

155. The Tribunal was satisfied from that evidence – (evidence which was not disputed by the Claimant either in cross-examination of Mr Brown or when giving his own evidence) - that there had indeed been substantial reductions in referrals and that the Respondent had every reason to believe that there would within the then-foreseeable future be further and substantial cut backs both in the work being referred to it by Dumfries and Galloway Council and in the funding made available to it to carry out its front-line work, the work for which the Respondent, as a registered charity, existed. Its *raison d'être.*

156. The Tribunal was also satisfied that by the time the Notice of Termination was served on the Claimant there had already been a diminution in the Respondent's business requirements for in-house IT support – (which was the job that the Claimant was required by the Claimant's Contract to do and, more importantly, was the work which he actually did for the Respondent) – and that because of cuts in the amount of work being referred to the Respondent by Dumfries and Galloway Council and because of very substantial funding reductions coming from Dumfries and Galloway Council that diminution, that requirement of the Respondent for in-house IT support, the work of the particular kind carried out by the Claimant for it, was expected to diminish to an even greater extent or even to cease altogether.

157. The Claimant admitted under cross-examination that some 80% of the work that he had been carrying out for the Respondent during the months leading up to the Notice of Termination being served was in respect of development and Maintenance of the Respondent's database. As was pointed out by the Respondent's representative in his closing submissions, comparing pre-effective date of determination and post-effective date of determination development, maintenance and even use of that database there was obvious, and very substantial, diminution and the Claimant himself added weight to what the witnesses called by him said so far as that database no longer being maintained or even used – (and certainly not being developed) - after the effective date of termination was concerned.

158. It is relevant to repeat that subsection (6) of Section 139 of ERA 1996 makes it clear that "'cease' and 'diminish' mean case and diminish either permanently or temporarily and for whatever reason".

159. The Tribunal bore it in mind the guidance given by the Employment Appeal Tribunal in the case of **Polyflor Limited v Old** to the effect that an employer is not required to show a business case for its decision to effect redundancy dismissal unless it is alleged that the redundancy was a sham and that there was another "real" reason for dismissal and that, pertinent to the circumstances of the present case, the very fact that an employer considers that it can no longer afford to maintain an in-house post is, on the face of it, evidence, persuasive evidence, that a redundancy situation was perceived by an employer, in this case the Respondent, to exist.

160. It was clear from the evidence that even although its workload and funding was reducing the Respondent did still need a degree of IT support. But the Tribunal was satisfied that the diminution of the work had been such, and was reasonably expected by the Respondent to escalate to such a degree, that it, the Respondent, had made a value judgment that it could achieve the IT support that it felt it needed by dispensing with its in-house IT support and outsourcing on an as-and-when-required basis to an independent contractor.

161. As was pointed out by the Respondent's representative in his closing submissions, when seeking to determine what the reason for the Claimant's dismissal had been there is no need for the Tribunal to analyse the extent of the diminution in, or the expected diminution in, the Respondent's need for in-house IT support and the Tribunal is not entitled to make a value Judgment – (such as made by the Claimant and the witnesses called by the Claimant) – as to whether, by making the Claimant redundant and outsourcing IT support, the Respondent made a good business decision.

162. In the view of the Tribunal the Respondent's Trustees were entitled to make a value judgment as to how best to manage its IT system. As a corollary, in the view of the Tribunal it would not have been correct for it, the Tribunal, to embark on any exercise of deciding how best the Respondent should have managed its IT system.

163. The value judgment was one for the Respondent's Trustees to make. Effectively, the decision facing them was whether to cut its front-line services – (services which were the *raison d'êtr*e of the Respondent's business) – or to cut "core", non-front-line, services such as in-house IT support. In the view of the Tribunal these were value judgments to be made by the Respondent's Trustees not for the Tribunal to make as part of its deliberation process. Those value decisions were decisions that were properly within the domain of the Respondent's Trustees and the Respondent's Trustees only.

164. The Tribunal was satisfied that the Respondent had its reasons to believe that its need for employees to carry out work of the particular kind carried out by the Claimant had diminished and was expected to diminish to an even greater extent or to cease altogether.

165. In the view of the Tribunal the Claimant's arguments that the IT support now being obtained by the Respondent is simply not good enough, not fit for purpose, and that that fact had had and was still having repercussions so far

as the efficiency of the Respondent's post-effective-date-of-termination business is concerned, are irrelevant.

166. The Tribunal was satisfied that the decision taken by the Respondent's Trustees to dismiss the Claimant on the ground of redundancy was "attributable" to a – (by then, already existing) - diminution of the Respondent's requirements for it to have an in-house employed IT expert and to that reasonably expected further escalation in diminution of the Respondent's requirements for it to have an in-house, employee, IT expert.

167. The Tribunal was satisfied, too, that since the effective date of termination, indeed right up to the last day of the Final Hearing of the Claimant's claim, the work carried out by the outsourced IT support specialists has been no more than a pale shadow of the work that the Claimant had previously carried out.

168. Having taken all of the evidence that it heard into account the Tribunal was left in no doubt that the Claimant's dismissal was wholly or mainly attributable to the fact that the requirements of the Respondent's business for employees to carry out work of the particular kind carried out by him for it had diminished and were reasonably expected to diminish further or to cease altogether, in which case the Tribunal was satisfied that the reason for the Claimant's dismissal had been that he was redundant and therefore that in terms of Section 98 of ERA 1996 the reason for the Claimant's dismissal was a reason falling within Subsection (2) of that Section 98.

169. The Tribunal has determined that the Claimant had been dismissed for a potentially fair reason.

170. Having made that determination the Tribunal had no need to consider whether the principal reason for the Claimant's dismissal had been "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" namely, as pled on an *esto* basis in the ET3, "genuine organisational restructuring".

171. Subsection (4) of Section 98 of ERA 1996 reminds Tribunals that once an employer, in this case the Respondent, has satisfied the Tribunal that the reason for dismissal was a reason falling within subsection (2) of Section 98 of that Act: -

> "… 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."

172. The Respondent's representative has made it clear to the Tribunal that the Respondent (albeit belatedly) now accepts that its dismissal of the Claimant "was procedurally unfair". Clearly, it was. There had been no consultation. The decision embodied in the Notice of Termination was precisely that, a decision, i.e. a *fait accompli.* The Claimant was denied an appeal hearing. All of this quite apart from the questions of whether an appropriate pool of candidates for redundancy had been chosen – (but it being the Respondent's expressed position that the Claimant was in, was that pool, "a pool of one") - and of whether there had been a fair selection process.

173. Having determined that the reason for the Claimant's dismissal was that he was redundant and therefore a potentially fair reason for dismissal, and having taken into account the Respondent's admission that the procedure followed by it when dismissing the Claimant was procedurally unfair the Tribunal reverted to considering whether, having regard to the reason for it, taking into account the circumstances including the size and administrative resources of the Respondent's undertaking, looking at the substantial merits of the case and applying equity, the dismissal had, overall, been fair.

174. In the view of the Tribunal the circumstances of the present case are such that there was a risk of it jumping to the conclusion - (and perhaps acting intuitively when doing so) – that, given what the Respondent did not do so far as following any recognised proper procedure was concerned and given the Respondent's belated concession that there had been procedural unfairness, the Claimant's dismissal must have been unfair.

175. For the reasons discussed below the Tribunal resisted that temptation to act intuitively and to reach that conclusion, instead reaching the – (perhaps counter-intuitive) – conclusion explained later in this Discussion section of this Judgment but it, the Tribunal, feels that it is appropriate to explain, primarily for the benefit of the Claimant, what consequences might have followed on from a finding that, overall, the Claimant's dismissal had been unfair.

176. In that context, the Tribunal wishes to add comment, albeit on an *obiter* basis, that if it had found that, overall, the Claimant's dismissal had been unfair, and if it had then gone on to consider the whole question of compensation and the issues of whether, but for procedural fairness, the Claimant would or might have been dismissed anyway, it would have reached the view that had the Respondent followed proper procedure the dismissal would have occurred in any event only a very few days after the date on which he was actually dismissed. It would have been the Tribunal's remit in such a circumstance to consider not a hypothetical fair employer or what a hypothetical fair employer might have done but to assess the actions of what the actual employer, in this case the Respondent, did or would have done. It is the Tribunal's view that what the employer in this case, the Respondent, would have done even within that very few days after the Notice of Termination had been served would have been to dismiss the Claimant on the ground of redundancy and that given the circumstances of the present case dismissal a few days at most, after the Notice of Termination was served was not only possible but certain. In which case, the issue for the Tribunal would have been how to calculate any financial awards which it would have been inclined to make in favour of the Claimant

and to what extent any such awards would have had to have been reduced, given the circumstances of the present case, in order to comply with the guidance given by the House of Lords in the case of **Polkey v A E Dayton Services Limited.**

177. The Tribunal also wishes to comment, also on an *obiter* basis, that if it had found that the Claimant's dismissal had been unfair and had had to embark on a calculation of what compensatory award would have been just and equitable in all the circumstances, having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss was attributable to action taken by the Respondent was concerned, it would have found it impossible to assess or even reasonably estimate what loss, if any, had been sustained by the Claimant. The Respondent's representative suggested in his closing submissions that the Claimant's position with regard to losses was "unacceptable" and reminded the Tribunal that although the Respondent bears a positive burden to prove failure by the Claimant to mitigate his loss it is up to the Claimant to prove what his loss has been. In this case, even at the Final Hearing of his claim, the Claimant has sought to refer to different and differing schedules of loss. He clearly – (and, in the view of the Tribunal, blatantly) - sought to evade questions about when he started with Kate's Kitchen and what his earnings from that employment had been. He failed to provide any documentary evidence in respect of earnings from Kate's Kitchen. He gave differing accounts of income from a self-employed business or self-employed businesses carried out by him since the effective date of termination. In the view of the Tribunal, the Claimant's evidence so far as mitigation of loss was concerned was so conflicted and so confusing that the Tribunal would have found it difficult to assess any loss in respect of any period later than four weeks after the effective date of termination and even if attempting to assess loss during that initial four weeks' period it would have been faced with lack of information about what income the Claimant had generated from his self-employed business or self-employed businesses during that period.

178. But, as explained above, and for the reasons discussed below, the Tribunal resisted the temptation to act intuitively and to reach the conclusion that, looked at on an overall basis, the Claimant's dismissal had been unfair.

179. When considering the question of whether or not, even given the Respondent's representative's concession that the Claimant's dismissal was procedurally unfair, the dismissal had, overall, been fair or unfair, the Tribunal has borne in mind the guidance given by Lord Mackay in the case of **Polkey v A E Dayton Services Limited**, guidance which refers to the question of whether an employer must make a conscious decision that consultation would be futile in order to act reasonably.

180. In that case of **Polkey v A E Dayton Services Limited** Lord Mackay expressed the view that if the employer could reasonably have concluded in the light of the circumstances known to it at the time that consultation would be utterly useless it might well be acting reasonably in failing to consult.

181. Weighed against that guidance from Lord Mackay the Tribunal has considered the guidance given by Lord Bridge in the same case of **Polkey v A E Dayton Services Limited** to the effect that a dismissal might be fair despite the lack of proper procedure if "the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile", guidance which seems to suggest that an employer must have made a deliberate decision not to consult the employee and to have taken that decision on reasonable grounds.

182. In the case of **Robertson v Magnet Limited (Retail Division** the Employment Appeal Tribunal took the view that the exception envisaged by Lord Bridge in the case of **Polkey v A E Dayton Services Limited** would normally apply only where an employer had considered and rejected the possibility of consultation but in the case of **Duffy v Yeomans and Partners Limited** the Court of Appeal suggested that an Employment Tribunal must judge what the employer did and not what it, the Tribunal, might have done

and that it was what a reasonable employer could have done which had to be tested in order to determine whether an employer, acting reasonably, could have failed to consult in given circumstances.

183. The Tribunal has taken all of these authorities into account when assessing whether, overall, and notwithstanding the admitted procedural unfairness, the Respondent had acted reasonably or unreasonably in dismissing the Claimant on the ground that he was redundant and it has recognised that the guidance referred to requires an Employment Tribunal to consider what a reasonable employer might have done in the circumstances.

184. The Tribunal has identified that the Respondent had failed to consult with the Claimant before deciding that he was redundant, had failed to meet with the Claimant before deciding to terminate his employment on the ground of redundancy and had failed to afford the Claimant an opportunity of expressing his point of view at an appeal hearing. Looking, in turn, at the Respondent's explanation for these failures.

185. It is a fact – (and has never been denied by the Claimant) - that throughout the period which began, at the latest, on 1 April 2015 and continued to the date of service of the Notice of Termination the Claimant was the only member of the Respondent's employed staff who provided it, the Respondent, with in-house IT support. Nor is it disputed that throughout the period which began, at the latest, on 1 April 2015 that work, "IT support" was the only work that the Claimant actually did for the Respondent. In the finding of the Tribunal, from the moment that the Respondent's Trustees decided that the level of in-house IT support that the Claimant provided to it was a level that it no longer required – (or, to put it the other way round, that the level that it did require could be satisfied by occasional use of an outsourced IT-support specialist) - there had been awareness on the part of the Respondent's Trustees that the Respondent's requirements for employees – (or, in this case more specifically an employee) – to carry out work of the particular kind carried out by the Claimant had ceased or diminished or were expected to cease or diminish.

186. In the view of the Tribunal nothing that the Claimant could have said as part of any consultation process about cessation or diminution of the work that he was employed to carry out for the Respondent – (and actually did for the Respondent) - could have influenced that decision by the Respondent's Trustees that there had been, or was expected to be, such a cessation or diminution of the Respondent's requirements for an employee carrying out the work that the Claimant did to carry out that work for it.

187. So far as identification of the Claimant as being an employee who carried out the work of that particular kind for the Respondent and who might be selected for redundancy was concerned, the Tribunal was satisfied from the evidence that it heard – (evidence not disputed by the Claimant) - that he was the only member of the Respondent's staff who carried out the work that he did. He was in a pool of one. In the view of the Tribunal this is a situation of the type discussed in the case of **Capita Hartshead Limited v Byard** to which the Respondent's representative drew the Tribunal's attention.

188. In that case of **Capita Hartshead Limited v Byard** – (which was decided against the employer and in favour of the employee but which nevertheless discussed the general law applicable to such circumstances) – the Employment Appeal Tribunal gave guidance that the starting point for considering how a redundancy pool should be defined is Section 98(4) of ERA 1996 and that the question is whether dismissal lay within the range of conduct which a reasonable employer could have adopted. The Employment Appeal Tribunal explained that that reasonable response test is applicable to the selection of the pool and that although there is no legal requirement that a pool should be limited to employees doing the same or similar work the question of how the pool should be defined is primarily a matter for the employer to determine. Indeed, the Employment Appeal Tribunal went further by suggesting that where an employer has genuinely applied its mind to the problem it is difficult for an employee to challenge the employer's conduct and that when faced with such a circumstance – (a circumstance such as applies in the present case) - a Tribunal is entitled, if

not obliged, to consider with care, and scrutinise carefully, the reasoning of the employer as a precursor to determining whether it, the employer, has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy.

189. In the view of the Tribunal the Respondent did properly consider who should be in the pool, identified the Claimant as being not only employed to do only the work of an, in-house, IT support expert but as being the only person employed by the Respondent who actually did that work on an in-house basis. In the view of the Tribunal any consultation with the Claimant about selection for redundancy would have made no difference to the outcome, to the Respondent's decision that the Claimant was the person, in the circumstances the only person, who fell within the pool or employees who should properly be considered for such redundancy.

190. In view of the Tribunal neither consultation at any stage prior to the Notice of Termination being served nor the holding of an appeal hearing would have made - (or even could have made) - any difference to the fact that the Respondent was facing a very substantial drop of in referrals from Dumfries and Galloway Council and a very significant actual and percentage reduction in funding from Dumfries and Galloway Council. How best to deal with those anticipated reductions was a decision for the Respondent's Trustees to make.

191. And, peculiar to the circumstances of the present case, there was an additional reason why the Respondent felt that it was inappropriate to consult with the Claimant – (whether in respect of a possible redundancy or in respect of his selection for redundancy) - prior to the Notice of Termination being sent. And in the view of the Tribunal that was a significant reason. The nature of the Claimant's business is such that confidentiality is of the utmost importance. The Respondent believes that it owes that degree of absolute confidentiality to its end users, all of whom are vulnerable people and some of whom are vulnerable young people. Since late 2015 the Respondent had had great concern about a comment that the

Claimant had made to it about being able to access the Respondent's Trustees and the Respondent's staff members' e-mails. It was clear from Mr Brown's evidence that the Respondents viewed what the Claimant had said as being a threat even although the Claimant himself insisted that the remark attributed to him – (and not denied by him) – had been an off-hand or flippant remark rather than ever being intended as a threat. The Respondent had never fully investigated whether the Claimant had actually accessed Trustees or staff members' e-mails and certainly no disciplinary proceedings had ensued. Nevertheless, it was clear from Mr Brown's evidence that the Respondent's Trustees still had grave concerns. It was also clear from Mr Brown's evidence, too, that at the stage of deciding to dismiss the Claimant on the ground of redundancy and because of the Claimant's comment that he had had the ability to access otherwise confidential e-mails the Trustees consciously decided that to give him any advance warning of likely termination of his employment would be to expose the Respondent- (and therefore the Respondent's end users) - to the risk of breaches of confidentiality.

192. It was clear from Mr Brown's evidence that the Respondent's Trustees consciously chose to minimise risk, to do away with it altogether so far as they were concerned, by not consulting with the Claimant at any stage prior to the Notice of Termination being served and by immediately putting him on garden leave. It is a matter of fact that the Claimant did not, as had been feared by the Respondents, take any steps to "trash the system" or to breach confidentiality owed to the Respondent's end users. But in the view of the Tribunal that does not detract from the decision taken by the Respondent's Trustees as a precaution guarding against, minimising or obviating any risk.

193. The Tribunal was satisfied that given the particular circumstances of the Claimant's employment and the Respondent's Trustees concerns at the remark made by him that was not an unreasonable decision for the Respondent's Trustees to take.

194. The Tribunal took all of these factors into account when seeking to apply the guidance given by the House of Lords in the case of **Polkey v A E Dayton Services Limited** about procedural fairness being an integral part of the reasonableness test under Section 98(4) of ERA 1996 and it recognised that not every procedural defect will render a dismissal unfair and that it is important to bear in mind that Section 98(4) of ERA 1996 poses one unitary question, the question of whether the dismissal was fair or unfair having regard to the reason shown by the employer. In that context, the Employment Appeal Tribunal gave guidance in the case of **Usdaw v Burns** that a Tribunal must not treat the reasonableness of the decision to dismiss and the reasonableness of the procedure as if they are two separate questions, each of which must be answered in the employer's favour before the dismissal can be considered fair – (albeit that it is not an error of law for a Tribunal to deal with the substantive and procedural elements of the decision to dismiss separately provided that its approach leads to an overall determination as to the fairness or unfairness of the dismissal).

195. When undertaking its consideration of the law and its applicability and application to the circumstances of the present case the Tribunal also took into account the guidance given by the Employment Appeal Tribunal in Scotland in the case of **HCL Safety Limited v Mr Brian Flaherty**, a case in which the Honourable Lady Stacey reminded Tribunals that there can be cases where there is nothing that a Claimant could have said during the stages leading up to a dismissal which would have made any difference and therefore that any procedural defects made no difference to the outcome. Extrapolation of that guidance to the circumstances of the present case has led the Tribunal to form the view that even if the Respondent had consulted with the Claimant, even if there had been any form of meeting between the Respondent and the Claimant at which dismissal on the ground of redundancy was decided and even if there had been any form of appeal hearing, dismissal was certain to ensue. In the view of the Tribunal that would have been the inevitable outcome. Not because the Respondent had approached the question of possible redundancy and the fact of actual redundancy dismissal "with closed minds" but, to the contrary, because of

the facts that it knew and the suspicion that it reasonably had with regard to diminution of the requirements of its business for employees to carry out work of the particular kind carried out by the Claimant for it or/and the likely – (as the Respondent saw it, inevitable) – escalation of such diminution at the stage after the expected cut backs of referrals and of funding from Dumfries and Galloway Council were implemented or imposed on it.

196. The Tribunal bore it in mind that when assessing whether, in the present case, the Respondent adopted a reasonable procedure the test that the Tribunal should apply is the range of reasonable responses test that applies to substantive unfair dismissal claims but that when applying that range of reasonable responses test it, the Tribunal, must not treat the reasonableness of the dismissal and the reasonableness of the procedure as two separate questions, each of which has to be answered in favour of the employer before the dismissal can be considered fair. The Tribunal also took account of the guidance given by the case of **Polkey v A E Dayton Services Limited** by bearing it in mind that if an employer – (in this case, the Respondent) - could reasonably have concluded that a proper procedure would be "utterly useless" or "futile" it is open to it, the Tribunal, to determine that the employer – (in this case, the Respondent) - might well have acted reasonably in not putting one in place, this being a matter for an Employment Tribunal to consider in the light of the circumstances known to the employer in the particular case at the time of that particular dismissal, and that albeit that such cases might be exceptional there are cases where circumstances may be "exceptional enough" to excuse an employer from following the proper disciplinary procedure.

197. Having weighed the nature of the Respondent's failures in application of proper procedure against the "utterly useless" or "futile" arguments, the Tribunal was satisfied that the present case is one of those where the circumstances facing the Respondent were exceptional enough to excuse it from following fair procedures, specifically fair procedures in respect of consultation and selection for redundancy.

198. The Tribunal has determined that given that the reason for the Claimant's dismissal was that he was redundant – [a reason falling within Subsection (2) of Section 98 of ERA 1996] - and in the circumstances - (including the size and administrative resources of the Respondent's undertaking) - it, the Respondent, did act reasonably in treating the fact that the employee was redundant as a sufficient reason for dismissing him.

199. That determination having been made by the Tribunal after full consideration of the substantial merits of the case and in accordance with equity there is no need for it, the Tribunal, to go on to consider other implications arising from the House of Lords ruling in the case of **Polkey v A E Dayton Services Limited** or, generally, the line of authorities which began with that ruling and continued to the guidance given by the Employment Appeal Tribunal in the case of **Hill v Governing Body of Great Tey Primary School** to which the Respondent's representative referred the Tribunal when making his closing submissions.

200. For the reasons given, the Claimant's claim that the Respondent unfairly dismissed him has failed and is dismissed.

Employment Judge: Chris Lucas
Date of Judgment: 22 May 2017
Entered in register: 26 May 2017
and copied to parties