EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Hughes**

Respondent: **Burton and South Derbyshire College**

Heard at: Nottingham

On: 17 December 2020

Before: Employment Judge Smith (sitting alone)

Representation
Claimant: In person
Respondent: Miss M Crowther (Counsel)

JUDGMENT

The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Background

1. By an ET1 claim form presented on 28 May 2020 the Claimant presented a claim of unfair dismissal to the Employment Tribunal. That claim was fully defended by the Respondent in its ET3 response form dated 2 July 2020. The matter was the subject of case management by Employment Judge Butler at a Preliminary Hearing held on 5 October 2020, and the nature of the Claimant's claim was substantially clarified.

Issues

2. One potential issue in this case had been in relation to the reason for the Claimant's dismissal. In the Claimant's claim form she had contended that a reason for her dismissal was her *"union work"*. From the case management summary of 5 October 2020 it was not apparent that this remained a live issue, although there was a suggestion in the Claimant's supplementary witness statement that she intended to contend that her Trade Union activities had been a *"significant contributing factor"* to her dismissal. In an unfair dismissal case the reason for dismissal is generally the first issue to be determined, because in a case where the employee had more than two years' continuous service (as the Claimant had) it is for the employer to prove a potentially fair reason for dismissing the employee (**s.98(1) Employment Rights Act 1996**) before a Tribunal considers matters relating to the actual fairness of the dismissal.

3. At the outset of the hearing I therefore asked the Claimant whether she was seeking to challenge the Respondent's given reason for dismissal, namely the potentially fair reason of redundancy (**s.98(2)(c)**). Having explained the requirements of **s.98(1)** to the Claimant and given her the opportunity to consider her position, the Claimant confirmed that she was not seeking to challenge the Respondent's given reason for dismissal. She confirmed that she accepted that redundancy was the sole, or principal, reason for her dismissal. Ultimately, she asked the Respondent's witnesses no questions about her Trade Union activities.

4. Such confirmation having been given, the following points of dispute were agreed between the parties as being the definitive list of issues I was being asked to determine at this hearing:

    (1) The principal reason for dismissal having been accepted as being the potentially fair reason of redundancy, was the Claimant's dismissal actually fair? The specific points of unfairness contended for by the Claimant were:

        (a) That the pool of employees to be selected for redundancy was inappropriate;

        (b) That the Respondent acted inappropriately by failing to "bump" (i.e. dismiss) a newly-appointed employee instead of the Claimant; and,

        (c) That there was a lack of meaningful consultation on the part of the Respondent.

    (2) If the Claimant was unfairly dismissed, was there a chance that she would have been dismissed in any event (the principle expressed in **Polkey v A E Dayton Services Ltd [1987] 3 All ER 974** House of Lords)?

5. The Tribunal proceeded on this basis. I was presented with a bundle amounting to 51 pages. This was added to during the hearing at the request of the Claimant, who brought documents to the hearing which had not been disclosed to the Respondent despite the earlier case management orders. Miss Crowther, for the Respondent, was content that I could see these documents

6. I heard live evidence from the Claimant herself, as well as from Ms Sarah Drew (Assistant Principal) and Ms Angela O'Neill (Head of People and Performance) on behalf of the Respondent. All three witnesses had produced original and supplemental witness statements for the purposes of this hearing.

Findings of Fact

7. The Claimant commenced employment with the Respondent on 1 March 2007, initially as an Administrator. With effect from 1 August 2011 the Claimant's role changed to that of Contracts Administrator. She was employed by the Respondent in the Contracts Administrator role from that time until the termination of her employment, which both parties agree was effective on 31 March 2020.

8. Prior to November 2019 the Respondent had a sub-contractual relationship with City College Nottingham (CCN), along with a number of other education providers. Such contracts, I was told by Ms Drew, exist in order to widen participation in further education (FE). I accept Ms Drew's evidence that this is a common kind of arrangement within the FE sector. Owing to an Ofsted inspection which resulted in CCN receiving an "inadequate" assessment in November 2019, the Respondent terminated its contract with CCN.

9. From around 2011 the Claimant was assigned, in part, to support the CCN contract. Her tasks included the filing, processing, and review of largely paper documents connected to the registration and certification of learners, together with collection, collation and maintenance of registers, in relation to the CCN contract. While both parties agreed that the Claimant undertook tasks in relation to the Respondent's other sub-contractual relationships, there was a dispute as to the extent the Claimant's role was devoted to the CCN relationship. Ms Drew's original witness statement (paragraph 12) referred to the CCN contract consuming the *"majority"* of the Claimant's time at work. At paragraph 14 Ms Drew approximated this to mean 80% of the Claimant's work. For her part, Ms O'Neill in her original witness statement stated that the Claimant was in fact the only person in an administrative role who carried out work in relation to the CCN contract.

10. In her cross-examination of the Respondent's witnesses the Claimant suggested that the reality was that only 20% of her role involved work in relation to the CCN contract. Ms Drew denied this and told me that because of the way the CCN contract worked, it was more *"admin heavy"* than the other contracts. This, she said, was principally because the CCN contract involved *"physical community outreach"* learning as opposed to distance learning, in addition to the administration tasks taking significantly longer because it was proportionately more paper-based than electronic. The CCN contract was, in Ms Drew's words*, "by far the most intensive and costly to the College".*

11. I found the Claimant's suggestion to the Respondent's witnesses surprising. She had made no mention of the 80%/20% factor in either of her witness statements produced for the purposes of the hearing. Furthermore, I was surprised that whilst the Claimant's supplementary witness statement responded directly to some of the paragraphs in Ms Drew's original statement, it contained no response to the sections concerning the proportion of time the Claimant spent supporting the CCN

contract. If she had disagreed with paragraphs 12 and 14 (for example) she could have done so explicitly, as she did with paragraph 22.

12. Most surprising of all was the evidence the Claimant had in fact given, on this issue, in her original witness statement. At paragraph 18 the Claimant stated that even if it was not the biggest, CCN was nevertheless *"one of the college's biggest partners".* In the same paragraph she recalled a conversation in November 2019 in which the Claimant herself expressed that *"I was concerned, then, I was not going to be as busy".* Finally, at paragraph 27, the Claimant stated that *"I knew things were happening with sub-contracting in November as I had seen something on FE Week, so that I really wasn't surprised that something was going to happen at some time in the future".* That passage would make no sense unless the Claimant had appreciated that the termination of the CCN contract in November 2019 would likely have a serious impact upon her work.

13. For these reasons, I had little hesitation in preferring the evidence of Ms Drew to that of the Claimant on this issue. My finding is that Ms Drew's estimation that around 80% of the Claimant's work was devoted to the CCN contract was accurate for the reasons she described in her written and oral evidence.

14. In addition, I find that the Claimant was the only administrator working on the CCN contract. She accepted in cross-examination that the subcontracting team included herself and her line manager, Kirsty Freeman, only. She accepted that Ms Freeman was responsible for preparing the contracts and that her role was to provide administrative support to Ms Freeman in relation to those contracts.

15. Around the same time as the Respondent's contract with CCN coming to an end, it advertised a vacancy for the role of MIS Administrator (page 20). "MIS" is the acronym for the Respondent's Management Information Services team, which was a separate team to that of which the Claimant was a member. It is not clear which of those events came first in time, but the deadline for applications for the MIS Administrator post was 17 November 2019. The Claimant was aware of the vacancy at the time: in her original witness statement she told me that the manager of the MIS team had made her aware and gave her some words of encouragement that she might wish apply for the role.

16. The Claimant declined to apply for the MIS Administrator role, saying she preferred to wait and see whether the workload in her own role might *"pick up".* Ms O'Neill's evidence went further than this, stating in her supplementary witness statement (paragraph 5) that the Claimant informed the MIS team manager that she expressly did not want the role because she hated data entry. It is clear from the person specification that the person appointed to the role had to have the ability to complete *"fast and accurate data entry".* I found Ms O'Neill to be a compelling witness who carefully avoided speculation and gave a plain and unembellished account of her involvement in the Claimant's case. The accuracy of paragraph 5 was not challenged by the Claimant in her cross-examination of Ms O'Neill. On this issue I therefore accepted the evidence of Ms O'Neill and my finding is that in November 2019 the Claimant did tell the MIS team manager that she was certain that she did not want the MIS Administrator role because she hated data entry.

17. The advertised MIS Administrator role was ultimately filled by Ms Chloe Clarke, in January 2020. Whilst this was not a role for which a degree was a pre-requisite, Ms O'Neill informed me that Ms Clarke has excellent mathematical skills and a B.Sc. degree and it was (at least in part) for these reasons that she was appointed. This evidence I also accepted and it was not challenged by the Claimant.

18. The Claimant's evidence was that from November 2019 she was underutilised at work. She stated in cross-examination that she remained partly underutilised by February 2020, and at that point she was doing mostly marketing work and helping out colleagues with tasks such as photocopying. I find that the Claimant's description of her being *"partly"* underutilised in February 2020 was an instance of her being generous to herself and the position she truly faced at that time. Being *"partly"* underutilised was not how the situation was described in her written evidence: at paragraph 21 of her original statement the Claimant stated that her manager and Ms Drew "knew I was struggling for work". I did not accept *"partly underutilised"* as an accurate statement of the position come February 2020. In my judgment, the loss of the CCN contract had not been replaced by anywhere near an equivalent amount of contract-related administrative work. The reduction in work available to the Claimant to perform had, in reality, been drastically reduced by the loss of the CCN work. The Claimant's hope that things would *"pick up"* did not materialise in the months that followed November 2019.

19. Whilst the precise date has not been ascertained, at some point in February 2020 Ms Drew composed a proposal to remove the Contracts Administrator role from the Respondent's structure (page 26). This proposal was accepted by an unnamed senior executive on behalf of the Respondent, following Ms O'Neill's review of the reasons put forward by Ms Drew. Those reasons are reproduced as follows:

> *"As the College expands distance learning provision and re-directs the spend of AEB, we are also streamlining processes and spend via sub-contracted provision. In recent years we have reduced the number of external partners and brought contracted out spend of AEB to a sustainable level balanced against the increased risk and strategic management requirements imposed by ESFA. More recently, the ESFA launched a Government consultation into proposed reforms to subcontracting education in the post 16 space and this is set to limit the way providers subcontract in the future.*
>
> *Efficiencies in administrative and operational processes to be gained through greater automation and direct access to systems by partners for aspects such as register marking will also allow us to continue to re-evaluate management fees, in line with ESFA expectation, offering increased value to partner organisations but reduced retention of associated gross AEB funds for the College.*
>
> *These directional changes necessitate a review of the requirement for dedicated administrative support for this area within a Corporate Relationships Directorate."*

20. Her proposal having been approved, Ms Drew gave some thought to the question of which employees undertook similar roles to the Claimant and might be included within a pool for selection for redundancy. She told me that she initially considered

how many employees were on the same grading Band as the Claimant (Band 3) and identified that whilst the Claimant was the sole employee on that Band in her team, there were two other employees employed in Band 3 roles in the wider department. Their job title was Business Development Administrator. Ms Drew was not challenged by the Claimant as to factual accuracy of the situation regarding Band 3 employees in her department, and I accepted that evidence.

21. Ms Drew's evidence was that whilst there was an element of commonality between the Claimant's Contracts Administrator role and the role of Business Development Administrator in the sense that they were both (generally speaking) administrative roles, there were some fundamental differences. She explained that she considered the Business Development Administrator role to be a more customer-facing role which involved the use of telemarketing and presentational skills as well as one which involved direct contact with employers on matters of some complexity, including specialist technical and practical support. The Claimant challenged this evidence in cross-examination and Ms Drew stated that there was a *"big leap"* between the administrative tasks performed in one area (i.e. by the Business Development Administrators) and in another area (i.e. by the Claimant, as a Contracts Administrator). Given the cogency of the explanation given by Ms Drew, I accepted her evidence on this issue. There were clear and significant differences between the two roles even if they shared an administrative root.

22. Ms Drew decided that the differences between the Business Development Administrator and Contracts Administrator role meant that it was not proper to include them within the pool for selection for redundancy.

23. In cross-examination of the Respondent's witnesses the Claimant suggested that the pool for selection was inappropriately decided for a second reason, namely because it did not include the members of the MIS team involved in administrative tasks, such as the MIS Administrator post. At paragraph 26 of her original witness statement Ms Drew stated that she decided against including these individuals within the pool, and set out the reasons why she made that decision. Whilst they were also Band 3 roles, the MIS roles were data-focused and dealt not only with administrative tasks like data entry but included an additional degree of complexity in the analysis and manipulation of data. Under challenge on this issue by the Claimant, Ms O'Neill added to Ms Drew's evidence and said that she understood the skillset of the MIS Administrators to be different and that the Claimant's role to be discrete. I accepted this evidence as an accurate description of the MIS Administrator role.

24. Ultimately Ms Drew decided that the differences between the MIS Administrator role and the Contracts Administrator role meant that it was not proper to include the former within the pool for selection for redundancy. These and the Business Development Administrator roles having been discounted from the pool, Ms Drew decided on a pool of one. The one role in the pool was the Contracts Administrator role, which was of course occupied by the Claimant.

25. On 11 February 2020 the Claimant met with Ms Drew and Ms O'Neill, at the latter's invitation. There are no notes of that meeting. The Claimant stated in her original witness statement that in this meeting they told the Claimant that they had wanted to speak to her face-to-face and that they thought it would not be fair for the

Claimant to simply receive a letter on her doorstep about the matters they were there to discuss. I accepted the Claimant's evidence about this because it was consistent with the considerate manner in which Ms Drew and Ms O'Neill conducted themselves when giving evidence. Whilst I accept the Respondent's evidence that this was not a meeting at which the Claimant was informed she was formally at risk of redundancy, I find that the conversation did involve Ms Drew and Ms O'Neill advising the Claimant of the proposed deletion of the Contracts Administrator role and the need for her to obtain assistance from her Trade Union with regard to a procedure that would likely follow. That concession was fairly made by Ms O'Neill under challenge from the Claimant.

26. On 27 February 2020 the Claimant met with Ms Drew and Ms O'Neill again. The notes of this meeting appeared at page 21. In advance of the meeting the Claimant had arranged to be accompanied to this meeting by Mr Adrian Watts, an official of her Trade Union (Unison), and he attended with her. At the start of this meeting the Claimant was informed by Ms Drew, once again, of the proposal to remove the Contracts Administrator role and the fact that a 30-day period of redundancy consultation had commenced from that date.

27. Mr Watts, on the Claimant's behalf, asked how many other employees of the Respondent were on the same pay grade as the Claimant. As the contrary had not been suggested, my understanding is that the phrase *"same pay grade"* used by Mr Watts equated to what I have already referred to in this judgment as Band 3, within the Respondent's structure, at which the Claimant's role was graded. Ms O'Neill stated that she would check payroll and provide that information. This she duly did, in a follow-up email to the Claimant and Mr Watts dated 6 March 2020 (page 37). The answer that came forth was that sixteen other members of the Respondent's staff were employed on Band 3.

28. At no time in the meeting of 27 February 2020 or following the 6 March 2020 email was it ever suggested – either by the Claimant or by a Trade Union official on her behalf – that any of the other fifteen Band 3 employees ought to be in the pool for selection for redundancy. Equally, on neither occasion did anyone on the Claimant's side suggest that the pool for selection had been inappropriately decided or that it ought to have included the Business Development Administrators or anyone on the MIS team.

29. At paragraph 32 of her original statement the Claimant stated her belief that the pool should have included all sixteen individuals. I am mindful that this passage refers to this belief in the present tense and does not state that this was in fact her belief as at 27 February 2020. In her evidence and her conduct of the hearing the Claimant projected the impression that she is a person who would have no qualm in raising a matter if she perceived there to be an injustice. Her holding such a belief at the time would, I find, have resulted in her acting upon it. The fact she did not is significant, and for that reason I find that the issue of pooling simply did not enter into the Claimant's mind at that time. It may have been in Mr Watts' mind, but he was not called to give evidence and the information provided to him in the email at page 37 was not taken any further. Ms Drew and Ms O'Neill could reasonably have reached the view that the pool for selection was simply not an issue for the Claimant.

30. Furthermore, the Claimant did not mention the position of Ms Clarke, the new MIS Administrator who had started her role the previous month, nor indeed the possibility that the Respondent might dismiss Ms Clarke and install the Claimant into her MIS Administrator role as a way of avoiding the Claimant's redundancy (described by the Claimant as "bumping"). The Claimant accepted in evidence that this idea had not in fact occurred to her until after her dismissal. It was in fact never raised with the Respondent until the Claimant presented her claim to the Employment Tribunal. It was agreed by Ms Drew and Ms O'Neill that "bumping" was not something that they were asked to consider, nor did it occur to them independently that it was an option they could have explored. It does not feature in a list of options presented in the Respondent's Redundancy Policy, at page 16.

31. I explored the possible practical realities of the "bumping" idea with the Claimant. Her evidence was that she recognised that it would involve unfairness – in the non-legal sense – towards Ms Clarke but that dismissing Ms Clarke and installing the Claimant in the MIS Administrator role would, in essence, be the lesser of two evils when compared with the unfairness – again in the non-legal sense – of the Claimant being dismissed. I accepted that that was the Claimant's likely view of matters. However, the Claimant also told me that had "bumping" happened in the way the Claimant envisaged it ought to have happened, Ms Clarke *"may not have been that worried"* at the prospect of being dismissed because the Claimant knew her personal plans. I found the Claimant's evidence on this point unconvincing given the rather obvious unfairness that would have been caused to Ms Clarke and the fact that she had been recruited into a permanent post less than two months previously. This element of her evidence I did not accept as reflecting a genuine expression of the Claimant's belief.

32. The reality is that the meeting of 27 February 2020 was short. The only input into it from the Claimant herself was her request to be provided with *"figures"*, meaning a breakdown of what payment(s) she would receive in connection with being dismissed by reason of redundancy. The same afternoon Ms O'Neill provided such a breakdown to the Claimant, via email, copying in Mr Watts (pages 22 and 23). At this meeting the Claimant did not register any disagreement with the rationale for the redundancy situation as explained to her by Ms Drew.

33. The meeting concluded with Ms O'Neill informing the Claimant that both she and Ms Drew would make themselves available to meet her at any point during the 30-day consultation period should she require, and that the Claimant would be sent a copy of the redundancy proposal and any vacancies that arose during that time. The proposal document was duly sent to the Claimant by Ms O'Neill via email that very afternoon (page 24).

34. True to her word, on 6 March 2020 Ms O'Neill sent the Claimant information relating to the two vacancies the Respondent had available at that time. The Claimant was not interested in these vacancies and did not apply. In fact, in the Claimant's original witness statement (paragraph 37) she told me that at some point in March she instructed Ms O'Neill not to send her any vacancies unless they were within the Claimant's skill set. No further vacancies were sent to the Claimant as a consequence but Ms O'Neill told me, and I accepted, that she continued to monitor the situation regarding vacancies that might have been available to the Claimant

at all material times up to and including the time the Claimant's notice period (if not curtailed by a payment in lieu) would have expired.

35. A second consultation meeting took place on 11 March 2020. This was attended by the same individuals who attended the meeting of 27 February 2020, and the notes appeared at page 38. It was even shorter than the previous meeting. Mr Watts asked when the consultation period would end, and Ms O'Neill's reply was 27 March 2020. The Claimant asked for an explanation of the *"figures"* obtained in relation to the payments she might receive upon termination. A brief but sufficient explanation was provided by Ms O'Neill. There was no mention of the pool for selection or any error the Claimant may have detected in relation to it. The issue of "bumping" was, naturally, not mentioned as it had not occurred to the Claimant at that time. There is no evidence the Claimant registered any protest or disquiet about the process adopted by the Respondent, the reasons for the apparent redundancy situation, or her situation generally at this meeting. The Claimant's focus remained very much on the monies she would receive, as had been her focus at the meeting of 27 February 2020.

36. On 13 March 2020 the Claimant met with Ms O'Neill. The subject of their discussion was the calculation of her accrued but untaken holiday pay entitlement in the event her employment would be terminated. Ms O'Neill provided an explanation and no other matters were discussed. The Claimant's focus, once again, was exclusively on financial matters.

37. On 26 March 2020 the Claimant wrote a detailed letter to Ms O'Neill (page 39). In it she notified the Respondent that she wished to bring a formal grievance because she had "since digested the content of the proposal having read over it numerous times". The letter itself set out no specifics of what her grievance complaint was about. The Claimant mentions this letter in her original witness statement but only in passing; no specifics have been provided to me about the substance of the apparent grievance complaint. The Claimant has advanced no complaint to the Tribunal that this letter gives rise to a ground of unfairness in relation to her dismissal. The letter itself and its contents were not referred to by either party in evidence at the hearing. As a result, I was not in a position to make any finding as to the substance of her grievance complaint. It is seemingly of no significance in this case.

38. That said, it is clear from the face of the letter that the Claimant had five questions she wished the Respondent to answer. These were factual questions and the Claimant made it clear that an answer in writing would suffice, without the need for a formal meeting. The first question concerned *"AEB"* (referred to above at paragraph 19; page 39) and what Ms Drew had meant by *"AEB funds".* The second asked who made the decision to make the Claimant's post redundant. The third asked when that decision was made. The fourth sought clarification of an answer given to a question asked by Mr Watts, presumably in a previous meeting.

39. The fifth question stated, *"As both Sarah* [Drew] *and Kirsty* [Freeman, the Claimant's line manager] *were aware that have been under utilized* (sic) *for several months, why I was not asked or encouraged to apply for the MIS administrator role back in November/December when Subcontracting in FE was being looked at well prior to November 19."* This question I found to be disingenuous because the

Claimant had, on her own evidence, been informed about the MIS Administrator vacancy in November 2019 and it had been suggested to her by the MIS manager that she should apply. She declined because she hated data entry.

40. On 27 March 2020 the Claimant attended her final consultation meeting, which took the form of a conference call with Ms O'Neill. She was accompanied by a different Trade Union official, Ms Marguerita Brown. The agreed notes appear at pages 40 to 42. In that call, the Claimant's five questions were put to Ms O'Neill and comprehensive answers were given. The Claimant confirmed that her letter of the previous day was not, in fact, a grievance after all. She had no further questions for Ms O'Neill regarding the redundancy consultation process and made no mention of inappropriate pooling or "bumping".

41. As this was the final day of the Claimant's 30-day consultation period, towards the end of the meeting Ms O'Neill informed the Claimant that the decision had been taken by the Respondent to make the Contracts Administrator role redundant because no alternatives to redundancy had been found. Ms Drew confirmed in evidence that she specifically considered the potential alternative routes as set out in the Respondent's Redundancy Policy (at page 16) but that none of them were available in the circumstances. As a consequence, Ms O'Neill informed the Claimant that her employment would be terminated on the grounds of redundancy. The Claimant was informed of her right to appeal against her dismissal, and she was also informed that if any suitable vacancies arose during her notice period she would be informed of them and guaranteed an interview if the minimum requirements were met.

42. The decision to dismiss the Claimant was confirmed in writing by Ms O'Neill, in a letter of the same date (page 43). That letter included mention of the right to appeal and the formalities for doing so. The letter informed the Claimant of her redundancy payment and that she would, in addition, be paid her 13 weeks' notice pay entitlement in lieu and that her last day of work would be 31 March 2020.

43. The Claimant did not appeal her dismissal, despite the oral and written notification to her of her right to do so.

44. True to her word once again, on 27 May 2020 Ms O'Neill informed the Claimant of a vacancy that had arisen during what would have been her notice period. The role in question was that of Customer Experience Enquiries Assistant (page 46). This was a part-time role with an annual salary of £8,144. The Claimant declined to apply because, she said, the salary would not cover her direct debits. She said she needed a full time role, but thanked Ms O'Neill for sending her information relating to the vacancy (page 45).

The Law

45. A claim of unfair dismissal is a statutory claim. **Section 94 Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their employer, subject to the qualification (under **s.108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two

years' continuous service is not required, but the Claimant's case is not one of them.

46. In a claim where the employee has the necessary two years' service (as the Claimant does), **s.98(1) Employment Rights Act 1996** places the burden of proof on the employer to show the sole or principal reason for dismissal and that that reason is a potentially fair reason falling into one of the categories set out in **s.98(2)** or some other substantial reason justifying dismissal. One of the potentially fair reasons as set out in **s.98(2)** is the reason of redundancy (**s.98(2)(c)**).

47. "Redundancy" in this context also has a statutory meaning. **Section 139 Employment Rights Act 1996** states that *"an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to… the fact that the requirements of that business for employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish"* (**s.139(1)(b(i)**). What work amounts to *"work of a particular kind"* is a factual matter for the Tribunal to determine (**Murray v Foyle Meats Ltd [1999] IRLR 562**, House of Lords) and it should refer to the tasks to be performed rather than on the nature of the job itself (**Johnson v Nottinghamshire Combined Police Authority (1973) 8 ITR 411**, NIRC).

48. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one and, in the case of redundancy, that the statutory definition is met, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **s.98(4) Employment Rights Act 1996**. The burden of proof is neutral but the Tribunal must determine the fairness of the dismissal, having regard to the employer's reason, depending *"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 *"in accordance with equity and the substantial merits of the case"*.

49. In redundancy cases there is a considerable bank of settled authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **s.98(4)**. The leading case remains **Williams v Compair Maxam Ltd [1982] IRLR 83** (EAT). **Williams** was referred to by the Claimant in submissions and she was correct to rely upon it as it sets out a number of salient principles, some or all of which are likely to be relevant in a redundancy-based unfair dismissal case. It is now a relatively old case from a time in which there was a more unionised workforce, but the general principles of fairness it espouses are equally applicable to individual redundancies irrespective of whether there is a Trade Union presence in a particular workplace. I reproduce the **Williams** principles thus:

> *"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

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

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

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

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

50. The second limb of **Williams** may concern the pool for selection. On this issue there is also authority, principally **Capita Hartshead Ltd v Byard [2012] IRLR 814** (EAT) a case of which I was already aware but to which my attention was nevertheless rightly drawn by the Claimant. That case referred to an earlier case called **Taymech Ltd v Ryan (EAT/663/94)**, 15 November 1994, unreported), to which I drew the parties' attention. The essence of the **Byard** and **Ryan** cases is that:

"(a) 'It is not the function of the Employment Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne-Wilkinson J in **Williams v Compair Maxam Ltd [1982] IRLR 83** [18]*);*

(b) "[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in **Hendy Banks City Print Ltd v Fairbrother [2005] All ER (D) 142 (May)***);*

(c) "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. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in **Taymech Ltd v Ryan [1994] EAT/663/94**, *15 November 1994, unreported);*

(d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

51. As to "bumping", there is authority touching upon this issue. In **Mirab v Mentor Graphics (UK) Ltd UKEAT/0172/17/DA** (EAT, 4 January 2018, unreported) it was determined that an employer's failure, in a redundancy situation, to consider the "bumping" dismissal of a more junior employee to make way for a more senior employee may make the dismissal of the senior employee unfair, depending upon the circumstances of the case. The principle set out in that case, concerning the concept of "bumping" in general, is summarised at paragraph 44 where HHJ Eady QC (as she then was) stated that,

"In a redundancy case, considerations of alternatives to the redundant employee being dismissed will generally involve looking for other potential roles that are vacant at the relevant time. There may, however, be cases where it might be reasonable to look for a vacancy that might be created, possibly at the expense of another employee - "bumping", see per Bean J (as he then was) in **Lionel Leventhal Ltd v North UKEAT/0265/04** *and paragraph 30 of* **Fulcrum Pharma (Europe) Ltd v Bonassera UKEAT/0198/10**. *There is, however, no rule that an employer must always consider bumping in order to dismiss fairly in a redundancy case, not least as, where this might involve the employee in question being moved into a subordinate and less well paid role, that might not be seen as something that the employer should reasonably be expected to initiate; see* **Barratt Construction Ltd v Dalrymple [1984] IRLR 385** *and* **Whittle v Parity Training & Anor UKEAT/0573/02**. *The question will always be for the ET to determine, on the particular facts of the case, whether what the employer did fell within the range of reasonable responses."*

52. Further, as it was put by Burton P in **Byrne v Arvin Meritor LUS (UK) Ltd UKEAT/0239/02**:

"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"

53. The **Lionel Leventhal** case cited by HHJ Eady QC in **Mirab** provides helpful, non-exhaustive guidance as to what factors an Employment Tribunal may consider where "bumping" is an issue (paragraph 12):

"Whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal. It depends as we see it on factors such as (1) whether or not there is a vacancy (2) how different the two jobs are (3) the difference in remuneration between them (4) the relative length of service of the two employees (5) the qualifications of the employee in danger of redundancy; and no doubt there are other factors which may apply in a particular case."

54. As to consultation generally, **Williams** is instructive. The importance of consultation cannot be overstated (**Dyke v Hereford and Worcester County Council [1989] ICR 800**, EAT), and the key principles applicable to disputes about consultation were set out in the case of **Mugford v Midland Bank [1997] IRLR 208** (EAT):

> *"(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the Employment Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.*
>
> *(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.*
>
> *(3) It will be a question of fact and degree for the Employment Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."*

55. I also mindful that I must not substitute my own decision for what the employer actually did. In applying **s.98(4)**, I must at all times be cognisant of determining according to an objective standard whether what this employer did was within the a range of things that could have been done by a reasonable employer, acting reasonably. That is, almost without fail, a consistent thread running through all of the leading authorities mentioned above.

56. In submissions the Claimant also directed my attention to two other authorities, namely **Junk v Kühnel [2005] IRLR 310** (Court of Justice of the European Union) and **Middlesbrough Borough Council v Transport and General Workers Union & another [2002] IRLR 332** (EAT). These are cases concerning collective redundancies. Whilst I recognised that there are, in general, principles of fairness and natural justice that apply to both individual and to collective redundancies, I did not find these authorities of particular assistance in this case. **Junk**, for example, concerned the definition of "redundancy" and some of the legislative requirements for collective consultation set out in the European **Collective Redundancies Directive (98/59)**. **Article 1(a)** set out that the scope of the **Directive** was to cover situations involving multiple redundancies rather than an individual redundancy. The **TGWU** case concerned the domestic legislation and its requirements regarding collective consultation (**s.188 Trade Union and Labour Relations (Consolidation) Act 1992** *et al*). Then, as now, **s.188(1)** makes it plain that those requirements apply when an employer is proposing to dismiss twenty or more employees for redundancy. This twenty-employee threshold was one of the options available for Member States (as the United Kingdom then was) to provide for under the **Directive**. That is not a situation which either party contended applied in the Claimant's case. Hers was a purely individual redundancy to which neither the **Directive** nor **s.188** would have applied. Standards of fairness of course did

apply to the Claimant's situation, just not those put on the formal statutory footing originally required of the **Directive** as transposed into domestic law by the **1992 Act**.

57. If I find that the Claimant's dismissal is unfair it is necessary for me to consider whether there was a chance that she would have been dismissed in any event (the principle expressed in **Polkey**). The task for the Tribunal has been explained by the EAT (in **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274**) in the following terms:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."*

58. **Polkey** deductions are not limited merely to procedural unfairness. They may be made in cases of substantive unfairness as well (**Gove v Propertycare Limited [2006] ICR 1073**, Court of Appeal).

Conclusions

Reason for dismissal

59. It was not in dispute that the principal reason for the dismissal was one which related to redundancy. In a case where the employee had more than two years' continuous service (as the Claimant had) it is for the employer to prove a potentially fair reason for dismissing the employee (**s.98(1) Employment Rights Act 1996**), and in my judgment it has done so. Redundancy is a potentially fair reason for dismissal, as set out in **s.98(2)(c)**.

60. In addition, I have considered the statutory definition of "redundancy" as set out in **s.139**. Applying this section and the principles in **Murray** and **Johnson**, the "work of a particular kind" in the context of this case was the Claimant's tasks relating to the Respondent's contract with CCN. In line with my findings of fact at paragraph 9, this amounted to the filing, processing, and review of largely paper documents connected to the registration and certification of learners, together with collection, collation and maintenance of registers, in relation to the Respondent's CCN contract. It is clear that with the termination of the CCN contract, this work ceased. The requirements of **s.139** are, in my judgment, met on the facts of this case.

Fairness

61. I shall now turn to the arguments put by the Claimant in support of her contention that her dismissal was unfair under **s.98(4)**.

(1) Appropriateness of the pool for selection

62. The essence of **Byard**, **Ryan** and **Williams** is that it is not the role of the Employment Tribunal to substitute its own view for what the employer did. I must consider what the Respondent did and whether the pool for selection it decided upon was a decision open to a reasonable employer acting reasonably. As the Employment Appeal Tribunal stated in **Byard**, *"The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem"*. This is a relatively low threshold for an employer to meet.

63. In my judgment, the pool for selection chosen by Ms Drew was one which was open to a reasonable employer, acting reasonably, to reach. Despite there being some natural commonality between administrative roles, the Claimant was employed in a unique role and one whose responsibilities were heavily devoted to a particular contract, the CCN contract. She had a separate line manager and with her line manager was part of a unique team. Her duties as regards the CCN contract were, because of the nature of that contract, distinctive from other administrative roles in the factual ways I found at paragraphs 9 and 10, above.

64. Furthermore, it is abundantly clear from the evidence I heard that the pool for selection was not decided by happenstance. Ms Drew did genuinely apply her mind to the question of which roles should be in the pool for selection. She properly considered other Band 3 roles such as the Business Development Administrators and the MIS Administrators, and for reasons which were reasonably open to her to reach, she discounted those roles from the pool. Paragraphs 20 to 24 of my findings of fact (above) amply set out her rationale for doing so, and in my judgment those reasons fell squarely within the range of options open to a reasonable employer acting reasonably.

65. For these reasons, I reject the Claimant's contentions that the pool for selection decided upon by Ms Drew was inappropriate and that it rendered her dismissal unfair.

(2) "Bumping"

66. As the EAT observed in **Mirab** and **Byrne**, there is no obligation on an employer to "bump" or even to consider "bumping", or more accurately, the dismissal of one employee to preserve the employment of another at risk of redundancy. It is common ground in this case that the Respondent did not consider "bumping" in the case of the Claimant. The question in this regard is whether this Respondent acted reasonably in doing what it actually did. The role the Claimant contends she ought to have been "bumped" into was the role Ms Clarke had recently been appointed to: that of MIS Administrator.

67. In reaching my conclusion on this issue I have had particular regard to each of the points of guidance as set out in the **Lionel Leventhal** case. My observations are set out as follows:

    (1) It is in the first instance clear that in February 2020 there was no vacancy for an MIS Administrator. The vacancy there had been for that role in late 2019 had been filled in January 2020 and neither party suggested that another MIS Administrator role had become available after that time.

    (2) Secondly, whilst I accept that they shared what I have described as an administrative root, the roles of Contracts Administrator and MIS Administrator were markedly different roles. I am confirmed in this view as a result of the findings I made about the nature of the Claimant's role (paragraphs 9 and 10) and upon comparing them with those I made in relation to the MIS Administrator role (paragraph 23). I did not attach much significance to the fact that these roles occupied the same pay band. What was important was the nature of those roles and the tasks required to be performed by each of them. Of particular significance was the analytical, data manipulation and marketing requirements of the MIS Administrator role; these factors in my judgment particularly distinguished that role from the Claimant's role, in which there were no such requirements. Also, the fact the Claimant may have helped out with the Respondent's marketing exercises from time to time did not dilute the distinction. In terms of the comparative complexity of tasks and responsibilities, the Contracts Administrator role was junior to that of MIS Administrator.

    (3) It was common ground that there was no difference in pay banding between the Contracts Administrator and MIS Administrator roles. Both occupied Band 3 on the Respondent's pay scale and one was not subordinate to the other in remunerative terms.

    (4) It was also common ground that the difference in length of service was of significance. In February 2020 the Claimant was approaching 13 years' service. Ms Clarke had been in-post for a matter of weeks.

    (5) Whilst it was also common ground that a degree was not an essential condition of appointment to the MIS Administrator role, there was a significant difference between Ms Clarke and the Claimant with regard to their respective qualifications. As I found at paragraph 17, at least part of the reason behind Ms Clarke being appointed was her proficiency in maths and the fact she also held a B.Sc. degree. These were skills the Respondent would naturally wish to retain. The Claimant does not have a degree and, whilst she gave no evidence about her proficiency in maths (and thus I made no finding about it), I have found that she expressed a hatred of data entry (paragraphs 16 and 39). As I have also found, this was the reason the Claimant declined to apply for the MIS Administrator role in November 2019 despite its availability being drawn to her attention. It is clear from page 20 and from the evidence of Ms Drew that data entry was a key component of the MIS Administrator role, and on the basis of my findings of fact I have concluded that Ms Clarke was far better suited to that role by virtue of her qualifications and skills than the Claimant would have been.

68. Adopting the above analysis, it is clear to me that whilst the comparative length of service was a factor which favoured the Claimant's argument, on each of the other factors (save pay, which was neutral) the balance weighed heavily in favour of "bumping" not being an appropriate course of action for a reasonable employer, on the facts of this case. On the basis of my **Lionel Leventhal** analysis, the Claimant essentially invites me to conclude that a reasonable employer, acting reasonably, would have "bumped" her upwards, into a superior role. That prospect is not what the authorities concerning "bumping" have typically considered.

69. As the EAT in **Lionel Leventhal** recognised, there may in any particular case be other factors of relevance. **Byrne** reminds me that there is no legal presumption that the Respondent ought to have considered "bumping", irrespective of the fact that the Claimant did not mention the possibility at any point during the consultation process. Whilst to place an obligation on the Claimant to do so would be a step too far, it is in my judgment significant that she did not raise it during the consultation process. Doing so might have had an impact on what a reasonable employer could then have done. The Claimant had knowledge of the MIS Administrator role and the fact that it had been very recently filled. She was herself an experienced Trade Union shop steward and had the benefit of Trade Union representation throughout the consultation period. This "bumping" point may have been the impetus behind Mr Watts' original request for information about the number of employees on the same Band as the Claimant, but if it was it was never pursued or indeed made explicit. On the facts, this is not a case where the employer had been put on notice of a potential step it could have taken to avoid the Claimant's redundancy and then failed to explore it.

70. The truth is, "bumping" was simply never mentioned. But if it had been, "bumping" in the manner the Claimant suggested would have inevitably resulted in unfairness to Ms Clarke, as the Claimant herself recognised in evidence. It would have also had the unhappy consequence of the Claimant being installed into a role in which she hated the principal task and for that reason had declined to apply for the role in the very first place. It would not have been suitable alternative employment for her even if the Respondent had considered "bumping".

71. Finally, in addition to these factors I must of course look at what the Respondent did do in terms of taking steps to identify alternative employment for the Claimant (cf. **Williams** and **Mirab**). "Bumping" is in reality a sub-species of the alternative employment point. Based on my findings at paragraphs 33, 34 and 41, throughout the consultation period and all the way up to the end of what would have been the Claimant's notice period, Ms O'Neill continued to monitor the situation in terms of what vacancies the Respondent had and would have. Initially she sent the Claimant details of all posts which were available but, in adherence to the Claimant's instruction from sometime in March 2020, she then agreed to send the Claimant details of vacancies for which the Claimant's skills were suited. One such role became available and the details duly sent, on 27 May 2020. Ms Drew considered the points in the Respondent's Redundancy Policy (page 16) and decided that none were available as alternatives to dismissal.

72. In my judgment, for the reasons expressed above, the actions the Respondent took in looking for alternative employment for the Claimant were actions which a

reasonable employer acting reasonably could have taken. Its failure to consider "bumping" did not put their conduct outside that band.

(3) Lack of meaningful consultation

73. It was unclear to me what the Claimant meant by her allegation that the Respondent failed to engage in "meaningful consultation". In submissions the Claimant suggested that the Respondent had failed to properly consult because the consultation meetings were short. I have accepted as a fact that they were indeed short, mainly because the focus for the Claimant was not on the substance of the redundancy situation or any alternatives that the Respondent ought to have explored in order to avoid her dismissal, but because the Claimant's focus was on what monies she would receive as a consequence of her being dismissed by reason of redundancy.

74. Turning to the consultation guidance set out in **Williams**, it is clear from my finding at paragraph 25 that Ms Drew and Ms O'Neill advised the Claimant, in a courteous and considerate manner, of the proposed deletion of the Contracts Administrator role and the need for her to obtain assistance from her Trade Union on 11 February 2020. That was more or less the same time as the proposal had been approved by the Respondent, and was more than two weeks before the start of any formal consultation process. In my judgment, this plainly satisfies first strand of **Williams**, as to employers giving employees as much notice as possible.

75. Upon the commencement of the formal process on 27 February 2020, Ms Drew fully explained the redundancy proposal, and the reasons, to the Claimant from the earliest time. This was a pool-of-one redundancy situation so the need to identify or agree a selection pool, together with identifying any selection criteria to be applied, was rendered unnecessary as the Claimant's situation was not being compared to anyone else's. It was of course necessary to properly identify the pool for selection and consult with the Claimant about that, and I have already found (in paragraphs 61 to 64) that the Respondent acted reasonably in identifying the pool.

76. Going further, it is clear that the Respondent's rationale behind the pool of one was fully explained to the Claimant and, in the multiple meetings Ms Drew and Ms O'Neill held with her over the course of a thirty-day consultation period, it was never challenged as a contentious area. In these circumstances I consider that the Respondent's actions satisfied the second, third and fourth strands of **Williams** (insofar as they could be said to apply in a pool-of-one case like this one), and in consulting with the Claimant on the pool and matters of selection in general, it acted within the band of reasonable responses.

77. The fifth and final strand of **Williams** concerns the taking of reasonable steps to identify alternative employment. This issue I have dealt with in relation to "bumping", at paragraphs 65 to 71. My conclusion is that in doing what it did and in not considering "bumping", the Respondent nevertheless acted as a reasonable employer acting reasonably could have done.

78. **Mugford** reminds me to consider the "overall picture" when looking at consultation and whether, for **s.98(4)** purposes, a dismissal by reason of redundancy was actually fair. Considering the overall picture in this case, I am satisfied that the

Respondent adopted and followed a consultation procedure that a reasonable employer acting reasonably could have adopted and followed. In summary, before, during and after the formal thirty-day consultation process the Respondent provided sufficient opportunities for the Claimant to be informed of developments, to facilitate challenges to its proposal should the Claimant have been minded to pursue points of challenge, to discuss the situation generally, and to explore alternatives whether of either side's own motion or indeed specifically the points at page 16, the Redundancy Policy. The Claimant was also afforded the opportunity to appeal against her dismissal.

79. For these reasons I also reject the Claimant's argument that there was a lack of meaningful consultation in her case.

Conclusion on fairness

80. For all of the above reasons, my conclusion is that the Claimant's claim of unfair dismissal is not well-founded and is dismissed.

Polkey

81. If I am wrong in my conclusions as to the fairness of the Claimant's dismissal I have nevertheless reached the conclusion that the Claimant would inevitably have been fairly dismissed at the same time as she was actually dismissed (31 March 2020). Her role of Contracts Administrator was a unique one and it was that role alone which the Respondent proposed to delete. The happened because the overwhelming majority of the tasks undertaken within that role had been linked to the Respondent's CCN contract. For this reason, even if Ms Drew had not genuinely applied her mind to the question (and I have found that she had) the Respondent's pool for selection would inevitably have only included the Contracts Administrator role.

82. Going further, even if the Respondent had considered "bumping" as an alternative to dismissal, the inevitable consequence is that the Claimant would not have been "bumped" into Ms Clarke's role at her expense. As I have already mentioned, the Claimant's case must properly be characterised as "upwards bumping", into a superior role. Such a prospect would appear to be a very rare beast, if it could be properly described as "bumping" in the traditional sense of the case law at all.

83. Finally, if "upwards bumping" had been offered, the Claimant would have rejected it because she hated data entry. This was the principal focus of the MIS Administrator role and was the very reason the Claimant declined to apply for that role in November 2019. Even if the Claimant would not have excluded the possibility of taking the MIS Administrator role as an alternative to dismissal it is clear to me that the Respondent would, at the point of having to decide, have discounted "bumping" and would have preferred to retain Ms Clarke over the Claimant on account of her proficiency with maths and her degree-level qualification.

84. For these reasons, in the event that my conclusions as to the fairness of the Claimant's dismissal are in error, I would have reduced her compensatory award

by a factor of 100% to reflect the inevitability of a fair dismissal, under the rule in **Polkey**.

Employment Judge Smith

Date: 25 January 2021

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