EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lisa Moy Thomas**

Respondent: **Life Build Solutions Limited**

Heard at: **Watford (by CVP)** **On: 3,4 and 5 May 2022**
Before: **EJ Price, Mr D Sutton, Mr S Bury**

Representation
Claimant: In person
Respondent: Mr Proffitt, Counsel

JUDGMENT

1. The Claimant's claim for discrimination and victimisation is dismissed.

2. The Claimant's claim for unfair dismissal is well founded.

3. The Respondent is not ordered to pay any compensation to the Claimant.

REASONS

The Claim

1. This is claim for unfair dismissal, victimisation and disability discrimination arising out of the Claimant's furlough and subsequent dismissal. The Claimant's employment commenced with the Respondent on 12 January 2009 and terminated on 25 November 2020.

Introduction and issues

2. By a claim form presented on 18 February 2021 the Claimant brings a complaint for discrimination, victimisation and unfair dismissal. ACAS were

notified under the early conciliation procedure on 30 November 2020 and a certificate was issued on 13 January 2021. The ET3 was received by the tribunal on 19 March 2021.

3. The issues were agreed at a case management hearing and were set out in an order dated 9 September 2021. These were clarified at the outset of the hearing in that the protected disclosure for the purpose of the claim for victimsation was mentioning discrimination in the appeal she lodged against her redundancy. The Respondent conceded this was a protected act for the purpose of the claim for victimisation.

Procedure, documents, and evidence heard

4. This was a remote CVP hearing which had not been objected to by the parties. The form of remote hearing was video. A full face-to-face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

5. We were assisted by an agreed bundle of documents of 349 pages and a bundle of witness statements.

6. The Claimant provided a witness statement and gave oral evidence. Ms Catherine Jefferies and Ms Hannah Hoban also provided statement and gave evidence on behalf of the Claimant. Mr Ken Adams and Mr Mike Wilde provided witness statements and gave oral evidence on behalf of the Respondent.

7. We heard and took account of oral submissions from Mr Proffitt and the Claimant.

Findings of fact

8. This is a claim arising out of the Claimant's employment with the Respondent. The Claimant worked for the Respondent for 11 continuous years. As the company grew her role grew. At the time of her dismissal she was employed as the head of the administrative department and undertook HR management and sale and marketing responsibilities as well.

9 The Claimant's employment ended in November 2020 and she has subsequently brought a claim for unfair dismissal, disability discrimination and victimisation. Although these allegations are contested, there is much however that is not in dispute as to the facts of the claim.

10 The first undisputed issue is that the Claimant suffers hypothyroidism and as such meets the definition of disability set out in section 6 of the EqA. It is not disputed that this is a disability for the purpose of this claim. We have had sight of a GP's letter that discusses the condition and its impact. We accepted the GP's view that one of the potential consequences of this condition is weight gain and we also accept their view that an individual's weight was one of the risk factors in relation to the impact of Covid-19.

11 Moving on then to the chronology of events.

12 It is well known recent history that in March 2020, the country was hit with the Covid-19 pandemic, and it was not disputed that the impact of this on the building industry was to create turmoil and the Government announced for people to work from home. It was agreed that this had a negative impact on the Respondent's business and their sales and output fell as a consequence as orders were lots or projects put on hold. We were told in evidence and accepted that the Respondent's sales dropped by 21% from £34million to £27million and they were therefore forecast to barely make a profit in 2020. This had an impact on certain areas of the business, where the workload shrunk as certain activities were no longer viable.

13 At this same time, and by what we understand is somewhat of a coincidence the Claimant was signed off work with stress. It was not in dispute that this was a result of some difficult communication she had with the Respondent's directors about their legacy planning, in which the Claimant felt she wanted to have been more involved.

14 In addition, and understandably, the Claimant was anxious about covid 19 and her risk of getting it and also simultaneously had a chest infection which proved difficult to some degree to recover from. When she was fit to return to work on 25 March 2020, the country had entered lock down and the employees were all working from home as per the government's mandate. A conversation took place on 8 April 2020, in which it was agreed the Claimant was asked by Mr Adams to go into the office to undertake some tasks that could not be done remotely. Such as changing the back-up tape for the IT system. The Claimant refused. It was agreed she expressed her anxiety about covid 19 at this point, although there was no evidence that at this point she told Mr Adams that she had been told she was at a heightened risk due to her weight or disability.

15 Mr Adams wrote to the Claimant shortly after this on 9 April 2020. In this email he stated that as she was highly anxious about covid 19 and as she hadn't been well and her workload was being covered by other people, she was being offered a variation in her contract to accept a period of furlough. The Claimant duly accepted this. During the following period the Claimant was therefore at

home and not required to work. She told the tribunal that she did not consider this to be a detriment as she had to home school her 9-year-old son who had some additional learning needs.

16 The Claimant was not the only employee put on furlough. Two other members of the admin team were put on furlough as well, and it was not disputed that this also applied to other members of the company more widely. The final member of the admin team, the administrative assistant was not put on furlough and continued to work. Mr Adams explained in his evidence that this was because the work done by this role did not decrease as it was mainly to do with after sales and resolving defects which continued for over a year post project and was therefore unaffected in the immediate by the downturn in new projects and work.

17 The Claimant did not make a complaint about this at the time.

18 On the same day the Claimant was sent a letter saying that there was no work available for her at the current time due to the downsize in work due to the pandemic and that instead of redundancy the Claimant was being put on the furlough scheme for an initial period of three months, but that the scheme may be extended.

19 In June 2020, the Respondent sought external advice from an HR consultant as to how to conduct a redundancy process. It also drafted a table of the responsibilities and tasks of the administrative job roles. It was clear that consideration was given at this point by the Respondent to a potentially necessary redundancy process.

20 We had sight of some emails between the Respondent and a HR consultant. The advice from the HR consultant included an instruction that '*if the others in admin who are at risk say they can do that job (referring to the admin assist role) you must say it is not vacant*'. In these emails, Mr Adams expressed his plan and sought advice on it. The Claimant considered that this demonstrated that a decision had been made to delete her post at this point. The Respondent's position was that although that was the proposed plan, it was open during its consultation to any ideas about how to save the Claimant's employment. Part of the redundancy process is the need to formulate an initial proposal or plan upon which to consult. We did not find that these emails demonstrated a closed mind, rather they set out the plan upon which the consultation was to be based. It would be both surprising and indeed likely to create great confusion if there was no plan at the outset of a redundancy process.

21 On 30 July 2020, the Claimant was sent a letter notifying her that her position was at risk of redundancy. She was invited to a consultation meeting on 5 August and offered the opportunity to be accompanied. The Claimant duly was accompanied by a work colleague. The notes of the meeting. During this meeting the Claimant expressed a concern that the administrative assistant's role was not at risk. However, she did not express a desire to do the role and nor according to the notes was suggested to her, she was not asked about this. She did say she would consider part time working or a lesser salary as alternatives to redundancy.

22 On 10 August 2020, the Claimant wrote to the Respondent with some suggestions of how costs could be saved across the business. There was then a second consultation meeting on 17 August 2020.

23 All three of these former employees gave evidence that they had understood they were in a pool and were competing for a continuing role. Both Ms Jefferies and the Claimant said this understanding was based on an assumption. It is clear from the agreed notes of the consultation that the Claimant was not told that she was competing in a pool of employees for an on-going role. And it was also clear that she was aware that the admin assist role that was not 'at risk'. The Respondent decided not to create a pool of employees from whom to select the remaining admin role that was not going to be deleted. The Respondent instead decided to treat each job in the department (there were 4) as separate with discreet tasks and that they should not therefore be pooled together. We accepted the Respondent's evidence that this was because (a) there were different roles (b) there were not interchangeable and (c) they were of a very different level of seniority and responsibility.

24 The Respondent made a decision to dismiss the Claimant and she was notified of this at a meeting on 9 September. At this meeting according to the notes the Claimant asked to come into the workplace to collect her personal belongings and she was asked to return company property.

25 The Claimant was obviously deeply upset about this issue and decided to appeal the matter. This was heard by the other director of the company Mr Wilde. The Claimant accepted in her evidence that the appeal was as independent as it could be in a company of this size. The appeal was rejected and the Claimant's employment therefore terminated on 25 November 2020. Two other members of the admin team who were also furloughed were also dismissed for redundancy at this time.

26 During the Claimant's notice period, on 14 September 2020, the Claimant was allowed to enter the Respondent's workplace in order to pick up her personal effects. She spent four hours in the office. Mr Adams told us he was suspicious

of the time this took and so investigated what the Claimant had done when she left the office. He discovered that she had used the photocopier which kept a record of its activity and he thought at the time she had used it to scan documents. The Claimant accepted that she had used some of her time in the office to read Mr Adams emails in order to see what if anything was discussed about her redundancy. She did not consider his dishonest as she had been given access to his emails as part of her work. Although she said in hindsight she may not do this again. Mr Adams spoke to the Claimant later that same day. We find that he was both upset and annoyed during this conversation due to his suspicions that the Claimant had acted inappropriately.

27 Mr Adams then sent a letter to the Claimant on 18 September 2020. In this the Claimant was asked to return all company property on the following Monday when she was to be granted further access to the office to collect her remaining personal data.

28 With that factual background as context we turn to the issues the tribunal had to decide.

The law

Discrimination

29 The claim for disability discrimination is governed by the relevant provisions of the **Equality Act 2010**.

30 **Section 6** defines what is a disability. It provides;

(1) A person (P) has a disability if
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

31 **Section 15** defines 'Discrimination arising from disability'. It provides;

(1) A person (A) discriminates against a disabled person (B) if--
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

32 **Section 136** Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

33 Section 15 deals with what is commonly known as "discrimination arising from disability". It is for the claimant to establish three things:-
(i) unfavourable treatment;
(ii) that the treatment was because of "something"
(iii) that the "something" arises in consequence of the claimant's disability.
If so, then the respondent must show that the treatment was a proportionate means of achieving a legitimate aim.

34 The claimant need only establish that they have been treated unfavourably – the test is not "less favourable treatment". Accordingly, no comparator is required. There is a relatively low threshold of "disadvantage", which is sufficient to trigger the requirement for the respondent to justify the treatment.

35 The unfavourable treatment must be because of the relevant something, which must itself arise in consequence of the disability. This is not a question of whether the claimant was treated less favourably because of his disability [**Basildon and Thurrock NHS Foundation Trust v Weerasinghe** – 2016 ICR305]

36 The Employment Appeal Tribunal has provided guidance on the correct approach to Section 15 cases in **Pnasier v NHS England** – UKEAT/0137/15.

(a) The Tribunal must first identify whether there was unfavourable treatment and by whom. In other words, it must ask whether A treated B unfavourably in the respects relied upon by B. No question of comparison arises.

(b) The Tribunal must determine the cause of the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the contentious or uncontentious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so

too there may be more than one reason in a Section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant or more than trivial influence on the unfavourable treatment and so must amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause (or if more than one) a reason or cause, is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of Section 15 of the Act, the statutory purpose which appears from the wording of Section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact, assessed robustly in each case, whether the something can properly be said to arise in consequence of disability.

(e) However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) It does not matter precisely in which order these questions are addressed. Depending upon the facts, the Tribunal might ask why A treated the claimant in the unfavourable way alleged, in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment

<u>Unfair dismissal</u>

37 Under **section 98 (1)** of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within section 98(2).

38 **Section 139(1)(b)(i)** of the Employment Rights Act 1996 provides 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 the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

39 In **Murray v Foyle Meats Ltd** [1999] ICR 827, Lord Irvine approved of the ruling in **Safeway Stores plc v Burrell** [1997] ICR 523 and held that **section 139** of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

40 It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation. See **McCrea v Cullen and Davison Ltd** [1988] IRLR 30. Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

41 There is no requirement for an employer to show an economic justification for the decision to make redundancies; see **Polyflor Ltd v Old** EAT 0482/02

42 Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, section 98(4) states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.

43 In **Williams v Compair Maxam Ltd** [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected
to consider in making redundancy dismissals:

a. Whether the employees were given as much warning as possible and consulted about the redundancy;
b. Whether, if there was a union, the union's view was sought;

c. Whether any alternative work was available.

44 However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in **Williams v Compair Maxam** will not necessarily
lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

45 Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In **Thomas & Betts Manufacturing Ltd v Harding** [1980] IRLR 255 it was held that Employers need only show that they have applied their minds to the problem and acted from genuine motives. As was said in **Capita Hartshead Ltd v Byard** [2012] IRLR 814, provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

46 If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: **Virgin Media Ltd v Seddington and** Eland UKEAT/0539/08/DM.

47 In **Fulcrum Pharma (Europe) Ltd v Bonassera** UKEAT/0198/10/DM, the EAT considerered the extent to which an employer should determine whether subordinate employees should be brought into the pool for selection for redundancy.

'Is there any guidance as to factors that an employer should consider when determining whether subordinate employees should be brought into a pool? In **Lionel Leventhal Limited v North** UKEAT/0265/04, Bean J said this at paragraph 12:

"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. Here the Tribunal concluded that the Applicant was not given the opportunity to say whether he would have accepted Mr Palmer's position. Mr Palmer was not approached to see whether he was interested in voluntary redundancy. The Tribunal found that this was unfair and it seems to us that it is a finding with which this Appeal Tribunal cannot interfere. There is no rule of law which leads us to the conclusion that this finding of the Employment Tribunal was wrong in law. Paragraph 50 can be fairly be said to be somewhat compressed reasoning but nevertheless we find it a sufficient basis to uphold the finding that the dismissal, albeit for redundancy, was unfair." [29].

We agree with that approach and would only add that a starting off point may be to determine within the consultation process whether the more senior employee would be prepared to consider the more junior role at the reduced salary.' [30]

Conclusions

48 We started by considering the section 15 claim.

Furlough decision (section 15 claim)

49 There is no dispute that the Claimant was put on furlough in April 2020.

50 We accepted the Claimant's evidence that she was at higher risk of covid 19 effecting This was her understanding based on advice given to her by her GP. She understood this was because of her disability and that it was this at least in part why she objected to working in the office.

51 Mr Adams contacted the Claimant on 8 April 2020 to ask her if she would attend the office once a day to collect the post and to change the IT back up tapes, a task that would take approximately 30 minutes. The Claimant refused, citing her anxiety of covid 19. We did not find at this point the Claimant told Mr Adams that her anxiety was linked to her disability or that she had been told she was at heightened risk as there was no evidence of the same. Although we accept that the Claimant was very anxious and that she may have already been told by her GP by this time that she was at greater risk.

52 We find that the decision taken to put the Claimant on Furlough was primarily the reduction in workload and requirement for the type of tasks she had previously been doing. This conclusion is supported by the letter of 9 April

2020 from R states reason for furlough is to avoid redundancies due to drop in workload caused by pandemic of covid-19 and government response. We also form this view on the basis that the other administrative staff were furloughed as well, save for the administrative assistant, who continued on a full-time basis. And finally, we took account of the fact the Claimant in evidence accepted that a lot of her tasks were taken on and done by other members of staff for themselves during the period of lockdown.

53 We also accepted Mr Adam's explanation and his email of the same date that he also considered her anxiety about covid 19 as another reason why he should furlough the Claimant. In his view this would reduce her stress and broadly put increase her wellbeing.

54 However, we did not consider that this was the same as putting her on furlough because she had objected to working in the office. Although related we did not consider that they amounted to the same thing. Mr Adams decision was not because the Claimant would not work from the office, as he stated in writing at the time it was because of her anxiety about covid.

55 Irrespective of our conclusion on this, we did not consider this to be unfavourable treatment given the context of the pandemic. The Claimant accepted in evidence that furlough in her mind was not a detriment, as she was having to home school her nine-year-old son. The Claimant's role was no longer needed in the same way as it was previously conducted, as the business activity was much reduced and the office was closed, had the Claimant not been put on furlough she may have been dismissed at an earlier stage. Furthermore it meant she could home school her son who was 9 and assist him. Without furlough she would have been in the position of many parents who were trying to work whilst also home schooling. For these reasons we do not find that the treatment was unfavourable.

56 In addition, although the Respondent did not expand greatly in submissions as to the justification defence on this element of the claim, we consider that there was a legitimate aim being pursued in that the Respondent was attempting to maintain financially viability and retain the Claimant's employment. And we consider that the use of the furlough scheme was a proportionate method of doing this, as it allowed the company to share a large part of the cost with the government. Short of dismissing the Claimant, there did not appear to be any other actions open to the Respondent at this stage.

<u>Dismiss/redundancy (section 15 claim)</u>

57 The Claimant held one of four roles which conducted administrative work for the Respondent. Three of these roles were made redundant. There was no dispute that this was due to a drop in workload caused by. The Claimant

accepted in her evidence that the business was in difficulty and needed to take cost saving steps. She also accepted that her role was carved up and given to various people across the company. We therefore find that there was a genuine redundancy situation, the Claimant's post was being deleted as there was no longer a need for her work load to be done as a separate and distinct role. On balance, we further find that it was this that led to her dismissal, rather than the fact that she had said she didn't want to work from the office in April 2020. In forming this conclusion we took account of the fact there was no evidence to support the contention that Mr Adam's decision to dismiss was effected by the Claimant's earlier expression of anxiety and her desire to work from home.

58 The circumstances surrounding the Claimant's dismissal included a sharp business downturn, that all staff in the office were all working from home (as this was mandated by the government) and other employees in her team were furloughed, who had not expressed any particular concerns re Covid – 19. In these circumstances, we do not consider on the balance of probabilities that the refusal of the Claimant to attend the office in early April 2020 was likely to have impacted the later decision to dismiss. This element of the section 15 claim therefore is not proven and is dismissed.

Victimisation

59 This claim is focused on whether the Claimant's act of raising discrimination in the appeal led to the her being asked to hand back company property at an earlier stage than she otherwise would have been. The Respondent concedes that the appeal was a protected act.

60 The Claimant was originally asked to return company property in her dismissal meeting this was obviously prior to her dismissal.

61 The Claimant was not asked to work during her notice period. We agree with the Respondent's submission that there was no reason for her to need company property during this period. We also accepted Mr Adam's evidence that he was not happy with the fact she read the emails in his inbox concerning her redundancy. The Claimant's evidence supported this as she described the conversation they had later on the 14 September 2020 as being one in which Mr Adams was hostile towards her. In the circumstances we concluded that, on balance, the reason the Claimant was asked to hand back her keys and office property was because Mr Adams felt suspicious of the Claimant after she had been in the office for four hours on 14 September. We concluded that this was the reason why the Claimant was asked to return her property and not the protected act. This conclusion was supported by the fact the Claimant

did not allege or suggest in her evidence at any point that there was a change in Mr Adam's attitude occurred prior to the 14 September 2020.

62 We also concluded that being asked to return the company property was not a detriment. There was no need for the Claimant to have it. Her employment was coming to an end and the request was therefore entirely in line with expected practise and indeed we heard was also made to other employees who were also made redundant.

63 For these reasons the victimisation claim is not proven and is dismissed.

Unfair dismissal

64 We now turn to the claim for unfair dismissal.

Redundancy

65 As already set out we have concluded that there was a genuine redundancy situation, for the reasons already given. In addition this did not appear to be disputed by the Claimant in her evidence. Further we accepted the Respondent's evidence that this was the reason for the Claimant's dismissal. Mr Adams was in our view a candid witness and we accepted that this was the reason why he had dismissed the Claimant.

66 The Respondent obtained HR advice from a consultant as to how to go about the redundancy process. It did this in part as it had not gone through a redundancy process before. The Respondent decided not to pool the three administrative roles, or the administrative assistant role, as they were separate jobs. We accepted that the Respondent did not consider them to be wholly interchangeable as they were done by people of a different level of experience, had different seniority and different responsibilities. Therefore, the Claimant's role was in effect simply being deleted and was to the extent it was even in a pool, it was a pool of one. There were therefore no selection criteria applied. We consider that this decision was not one that was so unreasonable to fall outside the range of what could be considered to be an action by a reasonable employer.

67 We consider it was not outside the reasonable range of decisions for the Respondent to decide not to pool the Claimant's role with the administrative assistant's role. In coming to this conclusion, we have considered that a. the assistant's role was not vacant and so a different course of action would have required making another employee redundant, so-called bumping, b. that the two jobs were significantly different in seniority and c. the difference in renumeration was substantial, as the junior role took home less than 50% of the Claimant's salary.

68 The Claimant assumed that there was a selection process and thought she was in her words '*fighting for her job'*. The process was not clear to the Claimant. We accept that she was greatly upset at the end of the process and she felt that it had been a sham and she was made '*fight for a job that didn't exist'*. We did not however accept that the Respondent had a closed mind during the consultation process. As with any redundancy exercise there is a provisional decision made that a post may be deleted. This is the nature of the redundancy exercise. The employee was then consulted. In any redundancy exercise as a result of consultation an alterative path may be taken, or the original proposal upheld. In this case it was upheld. We do not find that the Respondent did anything other than make a proposal, and then after consultation confirm it, as is the usual and expected procedure.

69 We then considered the content of the consultation more widely. The Claimant was clearly confused about the process. However, this appears to be based on the fact she made an assumption that there was a role going forward that she was arguing to keep. Although matters may have been better explained to the Claimant we consider that sufficient information was given to her to mean that this aspect of the consultation was not outside the reasonable range.

70 However, we did consider that the consultation fell short in another regard. We found that the Respondent considered whether or not to include the administrative assistant's role in a pool with the Claimant's role and concluded it did not want to. However, we also found that this was not discussed with the Claimant in the consultation in any meaningful sense. Although the Claimant said she would accept less pay and a change of hours, taking on the assistant's role was not discussed with her. According to the notes of the consultation meetings when the Claimant asked about this, she was simply told that this role was not at risk. Therefore we concluded there was no consultation on whether or not the Claimant's role should be pooled with the administrative assistants role.

71 It was clear from both Mr Adams and Mr Wilde's evidence that they both considered that the Claimant would not have taken such a significant drop in role and that they did not want to make the administrative assistant's role redundant, and so the matter was not given any further consideration through the consultation process. We consider that it should have been, at least to the extent that the Claimant should have been consulted about whether she would have taken this role if offered it. In particular because it was accepted by the Respondent that this was a role the Claimant was capable of doing and therefore qualified to do, because she had asked about it in the consultation process and because of her length of service which was over a decade. We

find that the failure to do this resulted in the consultation falling outside of the reasonable range.

72 We did not consider the redundancy unfair in any other way. In particular we note that an appeal process was available to the Claimant and she exercised this right. Nor is it understood that the Claimant suggests there was any other element of unfairness to the decision or process other than the ones we have considered in our reasoning.

The Polkey issue

73 We went on to consider whether the procedural fairness we have found would have made any difference to the decision to dismiss the Claimant. We do not think it would have. We concluded that even if the Claimant had been consulted about the issue of pooling or bumping into the administrative assistant's role, we have concluded that on balance she is likely to have been dismissed at the same point in time in any event as she the Respondent considered that she was too senior to fulfil that role and that the pay difference was too significant to make it a suitable alternative for her. Therefore, we consider that had a fair process had occurred, it would not have affected when the Claimant would have been dismissed. She would have been dismissed at the same time in any event. Therefore, the percentage chance that a fair process would still have resulted in the Claimant's dismissal is 100%.

Remedy

74 The Claimant confirmed at the outset of the hearing she was not seeking reinstatement or re-engagement.

75 We then moved on to consider remedy. We have dismissed the discrimination claim. So no issues of remedy arise in respect of that.

76 We have found that there is a procedural unfair dismissal, however given our finding on the consequence of this in terms of the timing of the dismissal, it was agreed by both parties that this means the compensatory award is nil.

77 We considered whether or not to award a basic award. We were aware that we are required to set off any redundancy pay against a basic award. Ms Moy Thomas confirmed that she had received a redundancy payment which was in excess of the amount that would have been owing as a basic award. Having accepted her account, we therefore concluded there was nil award to make for the basic award.

78 Therefore, no award of compensation was made.

Employment Judge Price

15 June 2022

Sent to the parties on:

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For the Tribunal Office:

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