



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Debra Gilbert

**Respondent:** Slough Borough Council

**Heard at:** Reading **On: 31 January and 1 February 2023**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Ms F Potter and Ms B Osborne

## Appearances

**For the Claimant:** Mr A Ross, counsel  
**For the Respondent:** Mr S Harding Counsel

## RESERVED JUDGMENT

1. The claimant was unfairly dismissed.
2. The claimant's complaints about age discrimination are not well founded and are dismissed.

## REASONS

1. In a claim form presented on 4 August 2021 the claimant made complaints of unfair dismissal, direct discrimination on the grounds of age and indirect discrimination. The respondent defends the claim.
2. The issues that the Tribunal has to consider were set out in the Case Summary in the Record of Preliminary Hearing on 2 September 2021.
3. The claimant gave evidence in support of her own case, the respondent relied on the evidence of Ms Surjit Nagra and Mr Richard West. The witnesses all produced statements which were taken as their evidence in chief. We were also provided with a trial bundle containing 575 pages of documents. From these sources we made the findings of fact that we considered necessary to determine the issues in this case.

4. The claimant was employed by the respondent council, latterly as Arrears and Investigations Manager, from 5 June 2002 to 5 May 2021. The claimant was born on 30 May 1966. The claimant's 55<sup>th</sup> birthday was on 30 May 2021.
5. In June 2019, the respondent undertook a restructure programme. Phase I of the transformation was focused on the Senior Leadership and took place between June 2020 and August 2020.
6. From November 2020 the respondent entered into Phase II which focused on restructure on the rest of the organisation. In a letter dated 4 November 2020 the claimant was informed that her role was to be deleted and it did not match any of the new roles in the proposed restructure. The claimant was therefore at risk of redundancy. The claimant was informed that the consultation period was to be between 4 November 2020 and 21 December 2020.
7. The respondent's procedure provided that in addition to the group consultation meetings employees who are at risk of redundancy should be consulted with on an individual basis. Employees have the right to be accompanied by a trade union representative to discuss their own circumstances. The employee is entitled to at least one consultation meeting, further consultation will be arranged "to address any issues / alterations as a result of earlier discussions."
8. During the notice period the respondent's procedure provides that "the council will continue to seek available alternative employment for the employee." The procedure provides for an appeal against selection for redundancy, "the Appeals against redundancy will be heard by a panel of 3". The procedure provides for the composition of the panel.
9. The claimant was informed in the letter of 4 November 2020 that "during the consultation period you are required to have a one-to-one meeting where you will have an opportunity to discuss your options, raise concerns that you may have and request any specific support during this period." The claimant was also informed that if at the end of the consultation period the claimant is advised that there is no role for the employee she will "receive formal notice and with immediate effect be placed on the Redeployment Register".
10. On 17 November 2020 in an email to line managers entitled, "additional support to managers for 1:1's with team members during Phase II consultation period", it is stated that "as a line manager, it is essential that you carry out such consultations 1:1 meetings with all members of your team to discuss specifically the implications of the consultation".
11. On 4 December 2020 the claimant enquired about the role of Property Licensing Co-Ordinator, the claimant was informed that the post had been placed on the vacancy list in error and there was no vacant post.
12. On 7 December 2020 the claimant met with Mr West, the claimant says, "we had virtual discussion, it was my first meeting with Mr West as my line manager. He wanted to understand the nature of the service and to have a bit of a chat."

13. It was put to the claimant that during this meeting she did not ask for a 1:1 meeting. The claimant rejected this and insisted that she did want a 1:1 and that was part of her conversation with Mr West. The claimant explained how she sent Mr West the email communication from Ms Nagra dated 17 November 2020 which set out that line managers were required to carry out 1:1 with their team members.

14. In the email of 17 December 2020, the claimant said:

“Please can I confirm that I do not wish to offer any opposition to the proposal to delete my current post. I can confirm that I have reviewed the list of available posts and do not wish to express an interest in any roles. The only post that I considered was that of the Property Licensing Coordinator (Fixed Term Contract). But on making enquires, I was advised that the post was no longer available.

I do not wish to be considered for redeployment. I would like to make way for younger officers to have the opportunity to progress through the organisation.

I will be 55 on 30/5/2020 I would like to request that my service end no earlier than the 30/5/2020 in order that I will be able to access my pension.

I understand consultation period does not end until 21/12/2020 and you may not be able to confirm the position until after that date.

I have met with my Executive Director, Richard West and advised him of my position”.

15. The Tribunal consider it is likely that what the claimant told Mr West on 7 December was much the same as what is said in the email. We note there is no mention of consultation in the email. However, at this point there was a purpose to a consultation meeting namely to discuss her wish to retire and receive her pension without any actuarial reduction on reaching the age of 55. In our view there is no inconsistency in the claimant’s wish to have a consultation meeting as required by the procedure and her desire to take early retirement.

16. Ms Nagra informed the claimant that as her employment was going to end before she reached the age of 55 she would not be entitled to take her pension without an actuarial reduction. Ms Nagra was able to give such a response to the claimant because the respondent’s timetable, in December 2020, anticipated employees being given notice from the week commence 11 January 2021. Ms Nagra also explained to the claimant that it would not be possible for the respondent to extend her notice, once the consultation responses are finalised notice will be served on her.

17. On the 18 January 2021 Mr West and the claimant spoke about a matter concerning the Rent Recovery Service. This was not a consultation for the purposes of the redundancy exercise. During the conversation Mr West mentioned the possible role of Development Manager. Mr West agreed to provide the claimant with further information about the role.

18. Despite the claimant subsequently reminding him and requesting that Mr West provide her with information about the role, Mr West never did. It is in our view clear that by 18 January 2021 that Mr West was aware the claimant was interested in securing a role in the redundancy exercise.
19. On the 22 January 2021, the outcome of the Phase II consultation was published, the position of the Housing Review and Temporary Accommodation Service was inconclusive. The Housing Demand Manager, JR, was assigned to take responsibility for Temporary Accommodation from April 2021 when the new structure would be in place. JR would in fact be resistant to the idea of taking on the service up until the claimant's employment came to an end.
20. The claimant attended a formal notice meeting on 9 February 2021. The respondent was represented by Ms Nagra and Ms Varuni Rajapaksa. The claimant was accompanied by her union representative. The claimant was informed that she would be served notice and that her employment would end on 5 May 2021. This was 17 days before the claimant's 55 birthday. The claimant again mentioned interest in the Development Manager, the role she had discussed with Mr West.
21. One of the respondent's employees was KL. She was a level 9 Manager within the same Directorate as the claimant. The consultation for KL's role concluded on the same day as the claimant's consultation. The claimant was served her redundancy notice on 9 February whereas KL was served by her redundancy notice on 14 May 2021.
22. The claimant and KL were both 54 years of old on 9 February 2021, however, because KL was over 55 on the date of termination of her employment she was entitled to take her pension without any actuarial reduction.
23. During the consultation period and the notice period the respondent's HR did not actively seek out roles for the claimant. Ms Nagra stated that due to the large numbers involved in the redundancy it was incumbent on the employees to seek out roles from the vacancy list which were published on a regular basis.
24. On 10 February 2021 the claimant requested that his notice period is extended to 8 June 2021 this would mean she was 55 years old at the date of termination and therefore able to take her pension without any actuarial reduction. On 23 February 2021 the claimant was informed that her request was refused.
25. On 23 February 2021 the claimant submitted an appeal against the dismissal. In her appeal she asked that her notice period be extended so that her "service expire after 30/5/2021 to enable me to access my pension". The claimant was notified that her appeal would be considered by Joe Carter, Executive Director of Transformation.
26. On the 1 March 2021 the respondent wrote to the claimant and asked whether she wished to be placed on the redeployment register. The claimant completed a Skill's Match Form and returned it to Varuni Rajapaksa as requested. The

skills match form, under the respondent's, procedure is completed so that the employee can be added to the register.

27. The claimant was informed that her appeal had been scheduled for 15 March 2021 and that she would be sent an invite to the appeal hearing by Joe Carter's PA. The claimant chased up the appeal invite however she was not given an appeal on the appointed date. On 17 March the claimant was told that the respondent would not be proceeding with her appeal.
28. On 19 March 2021 the claimant expressed an interest in the role of Community Learning and Skill Lead. The claimant was not successful in her application because the post requires "a considerable amount of experience, knowledge and qualifications in an adult learning environment."
29. On 29 March 2021 the claimant expressed an interest in the role of Principal Housing and Accommodation with Care Professional. On 12 April 2021 Joe Carter wrote to the claimant explaining the reasons why the respondent decided not to progress her appeal. This information was sent to the claimant 7 weeks into a 12 week notice period.
30. The claimant submitted a grievance on 14 April 2021. In her grievance the claimant highlighted the respondent failing to arrange a 1:1 consultation meeting, the predetermined judgment on her pension entitlement, redeployment opportunities not adequately explained, the abandoned appeal process and failure to implement the consultation outcome or implement the consultation outcome or review the date for the end of the claimant's notice.
31. The respondent never considered the claimant's grievance under the respondent's grievance procedure. When the claimant chased up the grievance she was told by Mr Ian Blake, the new Group Manager that he was told by HR that her grievance had already been dealt with by Joe Carter and that the matters the claimant raised were not grievance related matters but were more related to organisational change.
32. In the last week of her employment the claimant expressed an interest in the role of Business Services Lead, the claimant was interviewed for the role on her last day of Service, 5 May 2021.
33. On 10 May 2021 Ms Nagra called the claimant to offer her the role. The claimant declined the role because by this time she had lost faith in the respondent.
34. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed.
35. Section 98 ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as

to justify the dismissal of an employee holding the position which the employee held. Redundancy is a reason falls within subsection (2).

36. Where the employer has shown a potentially fair reason, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer), 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 shall be determined in accordance with equity and the substantial merits of the case.
37. A fair redundancy dismissal requires consultation, a fair basis of selection and taking such steps as are reasonable to avoid or minimise redundancy by redeployment. Fair consultation involves giving the person consulted a fair and proper opportunity to understand fully the matters about which she is being consulted, and to express her views on those subjects, with the consultor thereafter considering those views properly and genuinely. An employer must take such steps as are reasonable, based on what it knows at the point of dismissal, to secure alternative employment for an employee at risk of redundancy. In assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.
38. An employer must not discriminate against an employee by dismissing her or subjecting him to any other detriment. An employer discriminates against an employee if because of her age he treats the employee less favourably than he treats or would treat others. An employer does not discriminate against an employee if the employer can show the employer's treatment of the employee to be a proportionate means of achieving a legitimate aim. If an employer seeks to justify direct age discrimination, the aims of the measure must be social policy objectives of a public interest nature, distinguishable from individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness.
39. Where the employee seeks to compare her treatment with that of another employee there must be no material difference between the circumstances relating to each case.
40. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.
41. In addition to oral submissions, the claimant has provided the Tribunal with a note on the law. The document is uncontroversial between the parties. We have taken the contents of that document into account in reaching our conclusions. The respondent answered the claimant's oral submissions and

also provided with written submissions which we have also taken into account in arriving at our decisions.

### Conclusions

42. Has the respondent proved its principal reason for dismissal was redundancy? We have not understood this to be in dispute, or to the extent that it is disputed such a disputation is made very lightly. We are satisfied that the claimant was dismissed because of redundancy. The claimant accepts that her role was made redundant in phase II of the restructure.
43. We have come to the conclusion that the dismissal was unfair in accordance with section 98(4). In reaching this conclusion we bear in mind that there is no burden of proof either way.
44. The respondent does not present a confected defence attempting to argue against reason that the respondent followed its own procedure or indeed that it followed a procedure that was a model. It is accepted that the procedure followed was flawed and that there was no formal 1:1 meeting with the claimant under the procedure with the claimant in December 2020.
45. The respondent says that an unfair dismissal case is not a tick box exercise, and that Tribunal must look at the overall surrounding facts of the case and ask is the underlying decision to make the claimant redundant unfair.
46. The respondent says that in a redundancy dismissal there are two phases the decision to delete the post and the redeployment stage. In this case it is said that the claimant did not challenge the deletion of the post the claimant agreed to it. In respect of redeployment at the meeting with Mr West on 7 December 2020 the claimant did not ask for redeployment she was interested in taking her pension. The claimant did not ask for a formal 1:1, she is an experienced local authority employee, if she wanted a 1:1 consultation she would have asked for it.
47. The respondent says that it had to do this redundancy because it was under very significant financial pressure that meant it had to cut many jobs. The respondent asks that we stand back from the policy documents and ask whether strict compliance with the policy would have made any difference.
48. The respondent points to the fact that the claimant did seek redeployment into a number of posts just because she was unsuccessful, it is said, this is not any proof of unfairness.
49. The respondent says that an appeal would have made no difference in this case as the claimant's grounds of appeal were concerned with the question of the pension. The respondent says that it is not open to the claimant to rely on the grievance as though it was part of the appeal, the claimant should have raised the matters set out in the grievance in the appeal.

50. In respect of one post that the claimant was unsuccessful for she received feedback that she lacked experience in a relevant area, it is said that the claimant cannot properly complain about this as the lack of experience justified the rejection of the claimant for the role notwithstanding that it is allegedly against the philosophy of the restructure, you cannot run a service with people who have no experience of it.
51. The respondent states that the claimant's argument that the suggestion that the date of the 9 February was manipulated by provision of notice being brought forward is wrong, there is no evidence that this happened. There was some evidence that there was a delay and in any event in respect of the chronology the date that the notice meeting took place is in line with events. That it was specifically the 9 February is merely as a result of the way that the bureaucracy worked and not by design it was simply luck.
52. The claimant criticises the evidence of Ms Nagra and Mr West. The claimant says that Ms Nagra's evidence was misleading in a material way by representing the claimant as uninterested in continuing employment with the respondent. Mr West, they say, was keen to insert evidence not in his witness statement and in maintaining that his Teams/ virtual meeting with the claimant was a sort of consultation meeting. By contrast it is said the claimant was frank and candid in her evidence.
53. The claimant was initially interested in early retirement and not redeployment but when it was clear that was not an option, though not losing an interest in early retirement, it was clear that she was interested in potential roles. The claimant makes reference to the Property Licensing position which was advertised in error.
54. The claimant says that the respondent failed in respect of significant elements of its own policy on consultation and the requirement of fair redundancy. There was no individual consultation, there was a failure to take any steps to avoid dismissal, the procedure followed was unfair, the claimant was denied an appeal and her grievance which raised issues setting criticisms of the process followed by the respondent was not considered by the respondent.
55. The claimant says that even though by the time the claimant's notice meeting took place, 9 February 2021, things had moved on and she was clearly interested in redeployment: in breach of the policy the claimant was not immediately placed on the redeployment list but in fact it was only on 1 March 2021 that she was placed on the list. It is pointed out that the claimant was not directed to a single vacancy by HR, and that in relation to the roles that the claimant pursued there is no explanation for the claimant's failure to obtain a role during her notice period. In respect of the one role where the claimant was provided with an explanation, namely that the claimant lacked subject matter experience, the claimant says that this runs counter to the philosophy of the reorganisation where specific subject experience was subordinate to general experience. In respect of the role that was offered to the claimant, after her dismissal, the claimant says that by that time "I had lost all faith".



56. To the extent that the respondent relies on the fact that the claimant had said that she did not object to the redundancy of her post, the claimant says that there is to be made a distinction between deletion of the post (not objected to) and her dismissal (objected to). Even if the claimant did not object to the deletion of her role there was no reason why she should not be redeployed.
57. The claimant also relied on what was suggested as being the chaotic nature of the restructure in that there was no conclusion as to what was to happen to parts of her role, the claimant suggesting that at the point of dismissal it was not reasonable to dismiss the claimant on the grounds of redundancy.
58. The claimant argues that the failure to explain the rationale of giving her notice on the specific date of the 9 February is to be criticised in the context of this case and should have been accompanied with an explanation for why the decision to give the claimant notice at that specific time was made. In this case it was alleged by the claimant at an early stage that the decision to dismiss the claimant was speeded up or advanced by the respondent.
59. The claimant says that the way the appeal was dealt with was unfair: there was no hearing before a panel and when the claimant went on to make a grievance which effectively set a fuller set of grounds for appealing her dismissal and addressing various aspects of the process the respondent did not consider the claimant's grievance.
60. The conclusion of the Tribunal is that the failure to follow its own procedure in the claimant's case was so poor that it is not possible to credibly say that notwithstanding the failure to consult and the failure to consider the claimant's appeal in accordance with the procedure it was not unfair. We are of the view that the process followed by the respondent made the dismissal unfair.
61. Mr West in our view either did not care that the procedure was not followed or alternatively was very poorly briefed as to the procedure he should follow in the claimant's case. The claimant's account that she sent Mr West the process after her meeting with him on 7 December, something that is not contested, supports her contention that she did want a consultation meeting in accordance with the procedure.
62. In its submissions the respondent seemed to imply that the onus is on the claimant to ensure that the respondent followed the procedure by asking for a consultation meeting we do not agree. The respondent's instruction on the application of the procedure provided that a 1:1 consultation meeting is essential. This was the instruction to line managers. So even if the claimant did not want a consultation meeting the respondent's procedure required one to take place, it is referred to as essential.
63. However, it is our view that the claimant did want a consultation meeting, this is illustrated by the fact that the claimant sent Mr West the instruction to line managers. We accept the claimant's evidence that she did want a consultation and that this was part of her conversation with Mr West on the 7 December 2020.

64. We do not accept the respondent's suggestion that the meeting that did take place with Mr West was a form of consultation. It was not a forum in which the claimant was able to discuss how her redundancy might be avoided. If it was the case that the claimant did not want redeployment then the meeting, while still not capable of being a consultation meeting, might have been able to justify the absence of a consultation meeting but that was not the case.
65. The position is that the claimant initially was primarily interested in pension and early retirement, when this was not available it was made clear by her that she did want redeployment. The fact that she did not give up on pension is not the same as the claimant not being interested in redeployment, she was entitled to continue to argue for a pension and be treated fairly in respect of redeployment.
66. Further the claimant's dismissal was unfair as the respondent failed to deal with her appeal and then compounded that by failing to deal with her grievance. The fact that the claimant raised the grievance in the terms in which she did shows that the way that the respondent dealt with her appeal was unfair.
67. The respondent's procedure refers to an appeal before a panel, that did not take place, Joe Carter simply declined the claimant an appeal because of the nature of her grounds of appeal. Had an appeal taken place the claimant could have raised the issues set out in the grievance. In our view it is no answer to the failure to hold an appeal to merely look at the grounds of the appeal say they were misconceived or lack merit. It is unfair to deny an appeal because the grounds of appeal are considered misconceived, in circumstances where the appellant is not given an opportunity to present the grounds in accordance with the set procedure for an appeal. Where the appellant has presented their appeal in accordance with the procedure, and it has been considered in accordance with the procedure it may be fairly rejected for that reason but not before.
68. By not considering the claimant's grievance it was not possible for the claimant to present the very issues it would appear that the respondent considered to be missing from the appeal. The unfairness is in our view compounded by the fact that in refusing to consider the grievance the respondent appeared to rely on the fact that the matters set out in the grievance had been considered in the appeal when in fact that was not the case at all.
69. The respondent states that there should be a Polkey reduction in this case because even if there had been a fair consideration of the claimant's case she would have been dismissed in any event. We reject that contention. The evidence cannot support such a conclusion. This is a case where the claimant was offered a role after her employment ended. It appears to the Tribunal that had there been proper consultation with the claimant then her employment would almost certainly have continued. There is in our view a high likelihood that the claimant would have been found a role before her dismissal if the respondent had followed its own procedure. By failing to follow the proper process in her case the respondent destroyed the claimant's faith in the organisation, had the proper process been followed the claimant's attitude to

the respondent would have been different and in our view it is more likely that not that she would have accepted the role and her employment continued whether the offer was made before or shortly after her termination date.

70. The claim for direct discrimination in our view is not well founded and is dismissed. There is in our view no evidence at all that the claimant's age played any part in the way that the decision to dismiss the claimant for redundancy was dealt with by the respondent. The claimant relies on a number of matters which she says allow the Tribunal to say that there are facts from which we could conclude, in the absence of any other explanation, that the respondent has discriminated against the claimant because of her age.
71. The claimant relies on the suggestion that there are 34 out of 120 people who were dismissed as redundant who are 54 years old. This was a large-scale redundancy with the respondent aiming to make around a 1000 people redundant. We have not been given evidence that allows us to understand how the figures that we have sit in the context of the 1000 so that we can answer the question whether age was a relevant factor in the decision making.
72. The claimant also relies on the way that the respondent dealt with KL. In our view this is not supportive of a conclusion that the claimant's age was a factor in the decision making. KL was also 54, and if she had been given notice on the same day as the claimant, we understand that the position with her would have been the same she would have been able to take her pension. KL's date of birth was 3 May 1966. If the claimant's notice is given later, she might have been in a position where her notice expires after her 55<sup>th</sup> birthday and be able to take her pension.
73. The claimant says that there is no explanation provided by the respondent for the timing of the decision to give the claimant notice. We agree. However, the mere absence of evidence of a reason does not point to age being the reason there simply is no reason given. We have considered whether we can draw an inference that it is age from the fact that the claimant says that the timing of the giving of notice was "speeded up". We do not consider that there is any evidence to support this proposition. The notice meeting took place on a date which was in accordance with the published timetable. There were very many people having such meetings and so it is likely that chance played a part in the timing of the meeting when an employee is given notice. There is no evidence of any particular consideration at all.
74. The conclusion of the Tribunal is that the claimant has not shown that there are facts from which we could conclude that age was a factor in the timing of the decision to give the claimant notice.
75. The claimant's complaint of indirect discrimination is not well founded. The claimant relies on the PCP of "not considering redundancy cases on their individual merits." The evidence in this case is that Mr West did not hold a consultation meeting with the claimant and therefore there was a failure on his part, in her case, to fail to consider the claimant's case on its individual merits.

76. The evidence is however clear that the respondent's line managers were supposed to deal with the redundancy cases in a way that would have included giving them individual consideration. There is no evidence of how any other persons were dealt with in terms of individual consultation, there is no evidence of how Mr West dealt with anyone else, only the claimant. The case presented fails to establish an evidential basis for concluding that the relevant PCP was applied by the respondent.
77. The claimant was unfairly dismissed by the respondent. The claimant's complaints about age discrimination are not well founded and are dismissed.

### **Remedy**

78. The case has been listed for a remedy hearing on **24 May 2023** and a further hearing date has been set aside on **19 October 2023** for this case if it is required. The hearings will take place in person at the Reading Tribunal, 30/31 Friar Street, Reading RG1 1DX starting at 10 am.
79. The claimant must provide to the respondent a schedule of loss within 21 days of the date on which this judgment and reasons is sent to the parties.
80. The respondent must provide any counter schedule of loss within 42 days of the date on which this judgment and reasons is sent to the parties.

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Employment Judge Gumbiti-Zimuto

Date: 6 February 2023

Sent to the parties on: 9/2/2023

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For the Tribunals Office

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