EMPLOYMENT TRIBUNALS

Claimant: Miss J Abbott

Respondent: National Car Parks Limited

HELD AT: Remotely by CVP **ON:** 15 February 2021

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr K Taylor, Representative
Respondent: Ms J Hale, Solicitor

RESERVED JUDGMENT ON APPLICATION TO STRIKE OUT THE CLAIMS OR FOR A DEPOSIT ORDER

It is the judgment of the Tribunal that :

1.The respondent's application that the claim of unfair dismissal be struck out as having no reasonable prospects of success, or for a deposit order, is dismissed.

2.The respondent's application that the claim of victimisation be struck out as having no reasonable prospects of success, or for a deposit order, is dismissed.

3. The parties are to inform the Tribunal by **23 April 2021** whether a further preliminary hearing for case management is required, or whether the parties wish to propose agreed case management orders, provide an estimated length of hearing, and dates to avoid for a final hearing to be listed.

REASONS

1. By a claim form presented on 16 June 2020 the claimant made claims for unfair dismissal, victimisation and failure to provide written particulars . This last claim is not pursued. The claimant was employed as an HR administrator later transferring to become an HR co-ordinator. The unfair dismissal relates to redundancy and the

process of the claimant' s selection for redundancy. The claim in respect of victimisation relates to an email sent by the claimant on 28 February 2020. The respondent accepts that the sending of the email with the contents therein amounted to a protected act. The real issue relates to whether the claimant was subjected to any detriment (as set out in the List of Issues) and whether there is any causal link between the email and the treatment of the claimant and the process of redundancy.

2. A preliminary hearing was held on 13 January 2021, at which this preliminary hearing in public was listed , the issues to be determined at the hearing being:

1. whether the Tribunal should strike out any of the claimant's claims;

2. whether the Tribunal should make a deposit order referable to any or all of the claimant's claims taking into consideration the claimant's means;

and any consequent Case Management Orders required following the determination of the above questions to include listing a final hearing if required.

3. It was agreed that this preliminary hearing be held by CVP**,** and the code V in the header relates to this**.** The issues in the claims were defined and set out in the Annexe to the Case Management Summary. They are (omitting the ancillary claim relating to s.4 of the ERA) :

1. What was the reason or principal reason for dismissal? The respondent will say that it was redundancy.

2. Was the reason for dismissal one of the fair reasons for dismissal set out in the section 95 of the Employment Rights Act 1996 (ERA)? The respondent will say it was redundancy.

3. Was the dismissal fair or unfair having regard to section 98 ERA and ***Polkey v A E Dayton Services Ltd [1987] IRLR 503*** *which is the leading case on reasonableness in redundancy situations, which held that an employer will not normally be acting reasonably unless it:*

(a) Warns and consults employees about the proposed redundancy;

(b) Adopts a fair basis on which to select for redundancy;

(c) Considers suitable alternative employment?

Victimisation

4. Did the e-mail of 28 February 2020 amount to a protected act under s.27(2) of the Equality Act 2010?

5. If so, did the respondent subject the claimant to a detriment by:

(a) Threatening to withdraw her ability to bring a chosen representative to a consultation meeting;

(b) Rachel Cass being allowed to accompany the consultation manger to the consultation meeting;

(c) Brian Devonshire being allowed to hear her appeal when she considered him not to be independent;

(d) Not being referred to Occupational Health when she had been diagnosed with bereavement reaction;

(e) persistent communication over a weekend from Rachel Cass;

(f) refusing to allow the consultation meeting to be adjourned;

(g) the involvement of the HR team in her consultation meetings;

(h) the failure to deal with a grievance about Rachel Cass?

6. If so, were these detriments because of the claimant's protected act of 28 February 2020, when she sent an email of complaint to the respondent (per s.27(1) of the Equality Act 2010)?

The application.

4. The respondent's application was made in an email dated 8 January 2021 from the respondent's representative to the Tribunal. The claimant's representative responded by interposing comments (in red when viewed on screen or colour printed) upon the grounds for the application on in an undated document received by the Tribunal, and copied to the respondent, on 1 February 2021. Subsequent to the hearing , Mr Taylor provided the Tribunal by email of 17 February 2021 , brief details of the claimant's means for consideration in the event that any deposit may be ordered by the Tribunal .

5. There was an agreed bundle before the Tribunal, and references to page numbers are to that bundle. Ms Hale appeared for respondent, and Mr Taylor for the claimant.

The background and non – contentious facts.

6.From the pleadings, the following facts are not in contention. The claimant was employed as an HR Co-ordinator , based at the respondent's office at NML House, High Street, Manchester. She had been employed by the respondent since 2017.

7.On 10 February 2020, with , it is agreed, no prior warning, the claimant and her colleague in HR at Manchester were invited to a meeting in which the Head of Shared Services, Kevin Gaskin, informed the claimant and her colleague , that their roles were at risk of redundancy. Ania Lesniak, the Chief People Officer joined the meeting by telephone.

8.The claimant and her colleague were told that they need not attend work , and she left the building , not being required to work during the consultation period, to put it neutrally. Her pass and other equipment were taken off her, and she never returned

to her office. The claimant was given a letter inviting her to an initial consultation meeting on 13 February 2020 (page 55 of the bundle). That was, however, changed to 18 February 2020, and the claimant had her first consultation meeting on that day. There are notes of the meeting at pages 57 and 58 of the bundle. The claimant was told that the consultation period was expected to complete by 28 February 2020.

9.The claimant was then off work sick from 18 February 2020 . She was invited on 21 February 2020 to a further consultation meeting on 27 February 2020 (page 62 of the bundle) . That did not take place.

10.The claimant sent an email on 28 February 2020 to Andrew Moody, then Head o HR Operations, in which she alleged that she had been discriminated against because of her gender, and that there had been a "catalogue of discriminatory behaviour" towards her over the previous 12 months. She made other claims of gender bias in the HR team, and sought that these complaints be treated as a grievance. The email is at pages 67 to 68 of the bundle.

11.The claimant was then invited to a final consultation meeting on 2 March 2020, but due to non – availability of representation , this was adjourned until 16 March 2020.

12. On 9 March 2020 the claimant raised a formal grievance (pages 78 to 79 of the bundle) in which she complained that she had been informed that her previous grievance of 28 February 2020 would not be the subject of a separate grievance hearing, and the scheduled meeting would be only a redundancy consultation. She alleged that this was victimisation.

13.The claimant's final consultation meeting was held on 16 March 2020 (the notes are at pages 80 to 85 of the bundle) . The claimant was dismissed by letter of 18 March 2020 (pages 86 to 89 of the bundle) with effect from 16 March 2020, as she was told in the meeting that her employment was ending. She was given a right of appeal, which she exercised by email of 27 March 2020 (pages 90 to 91 of the bundle).

14. The claimant's appeal was held on 8 April 2020, by Brian Devonshire , Head of Operations Leased Services, and the outcome notified to the claimant by letter of 15 April 2020 (pages 94 to 97 of the bundle) .

The claimant's case.

(i)Unfair dismissal.

15. The claimant contends that she was unfairly dismissed. The reasons she says she was unfairly dismissed , as summarised by Ms Hale, are:

The restructuring was communicated at an unannounced meeting where she was told that she was at risk of redundancy

That she was escorted from the building after the consultation meeting

That the redundancy was because she is female

The business case for relocating the HR support positions from Manchester to Birmingham was flawed

The dismissing manager did not adjourn the meeting before dismissing her

She had raised concerns that were not investigated before her dismissal

The respondent had failed to consult her

The respondent had failed to consider alternatives to redundancy

The respondent had not included other HR team members in the pool when they should have

The respondent had failed to appoint an independent manager to hear her appeal

To that list could be added, from the claimant's attachment to the claim form, that the decision to dismiss her as redundant had been taken before the consultation process was commenced, and it was really a sham.

(ii)Victimisation.

16. The claimant's case that she was victimised for raising a complaint about being discriminated against on the grounds of her sex is, again as summarised by Ms Hale, that she has suffered the following less favourable treatment:

Her right to be accompanied by a trade union representative at the consultation meetings was threatened with withdrawal

Persistent communication over a weekend from Rachel Cass

Refusing to allow the consultation meeting to be adjourned

The involvement of the HR team in her consultation meetings

The failure to deal with a grievance about Rachel Cass

Failure to provide an independent manager to hear the appeal

Failure to obtain advice from occupational health when she submitted a sick note for bereavement reaction

The respondent's case and grounds for the application.

(i)The unfair dismissal claim.

17. The respondent submits that the claimant has no reasonable prospects of challenging the decision to make redundancies. She was one of two HR Coordinators based in Manchester, which were being removed and replaced by HR support roles based in Birmingham. Work of a particular kind at the location where the claimant worked was ceasing or diminishing, a classic redundancy situation . At that time, there were no other changes within the HR department. The roles that the

claimant says should have been in the selection pool that were based in London, and were unaffected The law does not interfere with the employer's freedom to make business decisions, even if the claimant disagrees with them .

18. The respondent considered the relevant pool and concluded it was the positions of HR Coordinator based in Manchester that were affected only. The claimant and the one other HR Coordinator were at risk or redundancy and both were redundant. Both were told that they did not need to work during the consultation period. There is nothing unusual about this approach. However the removal of the claimant and her colleague was carried out, that can have no bearing on the fairness of the ensuing dismissal.

19. Whilst it was accepted that the claimant suffered a family bereavement during the consultation process that in of itself did not mean that the respondent should delay or postpone the restructuring exercise as there were other people affected by the respondent's plans .There will always be stresses and anxieties as a result of formal redundancy consultation processes which the respondent would have been unable to mitigate completely but it had offered the claimant access to the employee assistance line and had offered her the opportunity to bring a family member or friend to the consultation meetings .

20. The claimant has argued that the dismissing manager should have adjourned before making the decision to dismiss. But consultation was ongoing, the dismissing manager knew that the claimant's job was disappearing, that she was not applying for any alternative roles, so the only option available was dismissal on the grounds of redundancy. An adjournment was not necessary to reach this conclusion

21. The claimant argues that an independent manager should have heard her appeal. But one did, Brian Devonshire had had no previous involvement in the initial redundancy and consultation.

22. ***Polkey v A E Dayton Services Ltd [1987] IRLR 503*** is the leading case on reasonableness in redundancy situations, held that an employer will not normally be acting reasonably unless it:

Warns and consults employees about the proposed redundancy.

Ms Abbot attended the meeting announcing the restructuring on 10th February 2020 and follow up consultation meetings on 18th February 2020 and 16th March 2020.

The Acas Code of practice on discipline and grievance does not apply to redundancy processes. And there is no statutory right to be accompanied by a trade union representative or work colleague to redundancy consultation meetings

Adopts a fair basis on which to select for redundancy.

An employer must identify an appropriate pool from which to select potentially redundant employees and must select against criteria. There was no selection procedure required. Both the HR Coordinators based in Manchester were at risk. It was accepted that Ms Abbott considers others should have been considered in the pool. There are no fixed rules about how the pool should be defined and the

employer has a wide measure of flexibility in this regard. The singling out of the HR Coordinators in Manchester, on the basis that that was the role affected is an entirely reasonable approach to take.

Considers suitable alternative employment.

An employer must search for and, if it is available, offer suitable alternative employment within its organisation. Ms Abbott was offered the opportunity to be considered for roles with the organisation but declined.

23. The claimant says that the redundancy must have been because she was female. But she offers no explanation about why. Simply being female is insufficient. There needs to be something more. And the claimant has direct knowledge of a previous redundancy exercise within the HR department where a male colleague was selected for redundancy.

(ii)The victimisation claim.

24. The claimant claims that her e-mail of 28th February 2020 amounts to a protected act, and this is conceded. There is one element in the e-mail which states '… and I feel unfortunately this is a result of my gender.' But the claimant offers no explanation why it is because of her gender .

25. Once the claimant had raised complaints on 28th February 2020 it was confirmed that Ania Lesniak, the Chief People Officer and Kevin Gaskin, the Head of Shared Services who had made the initial announcement to the claimant and her colleague would no longer be involved in the consultation meetings and Andrew Moody, a Head of HR, who had been providing HR support to the consultation meetings would also no longer be involved. Rob England, Chief Operations Officer, was assigned to conduct the consultation supported by Rachel Cass, a new Employee Relations Specialist. The manager chosen to hear the appeal, Brian Devonshire, Head of Operations, Leased Services, had no prior involvement in the consultation exercise.

26. Rachel Cass did e-mail the clamant on Sunday 8th March 2020 at 16.08 but that was in response to an e-mail exchange between her and the claimant on Saturday 7th March 2020. It was two e-mails in total from Rachel Cass, which cannot be considered 'persistent'. As a result of that communication the consultation meeting was postponed.

27. The claimant was given the option of a trade union representative or work colleague to accompany her to the consultation meetings. This is not a legal right as the claimant described. It was only because it was getting difficult to find a date to meet with the claimant and her chosen representative, that the company explained that it might proceed without the representative being available. In any event, a suitable date for all parties was found in the end.

28. Whilst the claimant had requested that no one from HR be involved in the consultation meetings involving her, that was not a reasonable request as managers are entitled to be provided HR support. In the end a relatively new member of the HR team was asked to support the consultation manager and the appeal manager

29. In terms of the specific detriments relied upon, the respondent queries whether they are truly detriments. Going through them:

(a)Threatening to withdraw her ability to bring a chosen representative to a consultation meeting;

To the extent that this refers to the email exchange between the claimant and Rachel Cass between pages 69 and 76 of the bundle, this was not any threat, and in the end Rachel Cass did re-arrange the meeting for 16 March 2020, when the claimant's trade union representative could attend.

(b)Rachel Cass being allowed to accompany the consultation manger to the consultation meeting;

This was not any form of detriment to the claimant as such.

(c)Brian Devonshire being allowed to hear her appeal when she considered him not to be independent;

This was not any form of detriment to the claimant as such, and he was independent from the process.

(d) Not being referred to Occupational Health when she had been diagnosed with bereavement reaction;

The respondent was not obliged to refer the claimant to Occupational Health, the claimant did not suggest that she was not fit to carry out the consultation process.

(e) Persistent communication over a weekend from Rachel Cass;

This was two emails over a weekend, and not "persistent". The claimant had herself sent one email on a Saturday.

(f) Refusing to allow the consultation meeting to be adjourned;

The respondent did allow the adjournment in the end.

(g) The involvement of the HR team in her consultation meetings;

This was not, in itself, a detriment.

(h) The failure to deal with a grievance about Rachel Cass.

The claimant's grievance was dealt with in the consultation, and it was correct for the respondent to do so.

30. In all cases, however, the respondent's submission is that there was no connection to the fact that the claimant had raised a grievance alleging sex discrimination.

31. In conclusion, overall, the tribunal should have in mind:

Whether the claimant disagrees with the business proposal to relocate the HR support posts from Manchester to Birmingham is irrelevant. The business is entitled to make that decision.

32. It is not unusual for the first meeting regarding restructuring proposals to happen without announcement and/or formal invitation .The respondent was restructuring a lot of its head office functions because of the need to reduce costs and create efficiencies in light of the reduced trading and turnover . The claimant is female, as is her HR Coordinator colleague. But being a female is not enough to satisfy the prima facie case of discrimination. There needs to be something more and the claimant has failed to identify this.

33. The role of the manager at the final consultation meeting is to determine if there are ways in which the redundancy can be avoided. If it cannot, the manager is entitled to confirm dismissal. No adjournment is required if there are no options available that would avoid the redundancy .There is no obligation on the respondent to seek an opinion from occupational health when the claimant submitted a sick note with bereavement reaction

The Law.

34. The relevant provisions are those of rule 37 of the 2013 rules of procedure, which provide:

"37 Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

In respect of deposit orders, rule 39 provides:

39 Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

35. Where there is an application to strike out under Para (1)(a) on the basis of 'no reasonable prospects of success', the draconian nature of such an order must be kept in mind, along with the requirement of no such prospects, not just that success is thought unlikely: ***Balls v Downham Market High School [2011] IRLR 217***, cited by Mr Taylor. The proper approach is to take the allegations in the claimant's case (from the claim form) at their highest; if there remain disputed facts, there should not be a strike-out unless the allegations can be conclusively disproved as demonstratively untrue: ***Ukegheson v Haringey London Borough Council [2015] ICR 1285*** . In doing so the tribunal should not conduct a 'mini-trial': ***Mechkarov v Citibank NA [2016] ICR 1121***, cited by Ms Hale .

36. Additionally, as cited by Mr Taylor, and accepted by Ms Hale, as a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case in which preliminary questions of law—res judicata and statutory construction (Race Relations Act 1976 s 33(1))—had occupied the tribunals and courts on four occasions, Lord Steyn put forward the proposition against striking out in terms almost amounting to public policy, when he stated (at para 24):

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

37. Whilst (at para 39) Lord Hope of Craighead noted that '[t]he time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail, he also stated (at para 37):

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

38. In relation to deposit orders, where there remain significant conflicts of fact, it may be preferable for the Tribunal to proceed to a merits hearing rather than conduct a mini-trial at preliminary stage to determine whether to make a deposit order (which might frustrate the point of the rule (to avoid delay and expense)): ***Hemdan v Ishmail [2017] IRLR 228***, cited by Mr Taylor.

(i)The unfair dismissal claim.

39. The Tribunal does take very much on board the respondent's contentions that a claimant ordinarily will face an uphill struggle in challenging the decision to make redundancies. The decision to make redundancies is one that is classically a management prerogative, and if genuinely the reason for the dismissal , it is not open to the Tribunal to go behind that decision. It is not open to an employee, or this Tribunal, to second guess the decision to make redundancies. It may be a good , bad or indifferent decision, but if it is a genuine decision, the Tribunal cannot interfere with it (see ***Moon v Homeworthy Furniture (Northern) Ltd. [1976] IRLR 298*** , an EAT authority, and ***James W Cook & Co (Wivenhoe) Ltd. v Tipper [1990] IRLR 386***, a Court of Appeal decision).

40. That said, the claimant does make the point that the respondent's explanations for the decision to make the claimant's post redundant have been inconsistent. Whilst it had been claimed that all HR roles would be based at the Birmingham HR hub, the claimant's case is she was told that not all HR roles would

be based there, as there were two HR Support roles which were not based there. The claimant makes the point that she is not challenging the business decision, she is challenging whether it was a genuine decision, or a façade. Whilst that is unusual, it is her entitlement to do so, and the absence, thus far, of any internal documentary material or evidence addressing these issues in any detail , the Tribunal cannot say that she has no reasonable prospects of success on this issue.

41. As to the selection of the pool, if the Tribunal is satisfied that the respondent did address its mind to the issue, then, as the caselaw makes clear , it will be very rare that a Tribunal will be entitled to find that the decision it took was outside the range of reasonable responses, the test applicable to this issue. Mummery J in ***Taymech v Ryan EAT/663/94*** said '…the question of how the pool should be defined is primarily a matter for the employer to determine'. and: “It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem”. That has been interpreted as meaning that (a) the tribunal does have the power and right to consider the genuineness requirement and (b) ruling against the employer's choice of pool may be difficult but not impossible.

42. Again, however, if there is an issue as to whether the respondent was truly and genuinely carrying out a redundancy exercise , the claimant may be able also to challenge the choice of pool as well.

43. On these two issues, the Tribunal cannot go so far at this stage as saying that the claimant has no , or little, reasonable prospects of success, although she may well face difficulties if the Tribunal finds that the exercise, even if flawed, was genuine.

44. Moving on to consider the other elements of fairness , if there was a redundancy situation, the Tribunal then has to be satisfied that this was indeed the reason for the claimant’s dismissal. If so, the next issue, however, upon which the burden is neutral, is whether the decision to dismiss the claimant was fair in all the circumstances. The leading case on the approach to fairness of redundancy dismissals is ***Williams v Compair Maxam Ltd [1982] IRLR 83,*** where the EAT set out the standards which should guide Tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

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.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

46. In relation to warning and consultation , in the House of Lords in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***, Lord Bridge said this:

"… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative"

47. Ms Hale's submissions refer to this case, which is clearly a leading authority. The decision of the EAT (Judge DM Levy QC presiding) in ***Rowell v Hubbard Group Services Ltd [1995] IRLR 195*** also strongly emphasises the importance of consultation. In that case the employees had been warned of impending redundancies, and were informed in their letters of dismissal that any relevant matters could be discussed. The Tribunal held that the dismissals were fair but the EAT overturned this decision and substituted a finding of unfair dismissal. The EAT stressed that the obligation to consult is distinct from the obligation to warn, and that there were no justifiable reasons for not consulting in this case. Moreover, whilst accepting that there were no invariable rules as to what consultation involved, the Tribunal stated that so far as possible it should comply with the following guidance given by Glidewell LJ in the case of ***R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72,*** *at para 24*:

'24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body

*whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in **R v Gwent County Council ex parte Bryant**, reported, as far as I know, only at **[1988] Crown Office Digest p 19**, when he said:*

'Fair consultation means:

(a) consultation when the proposals are still at a formative stage;

(b) adequate information on which to respond;

(c) adequate time in which to respond;

(d) conscientious consideration by an authority of the response to consultation."

48. These words were quoted with approval, in the context of stipulating what was involved in consulting a trade union, by the Inner House of the Court of Session in ***King v Eaton Ltd [1996] IRLR 199.***

49. It is upon the issue of consultation that the Tribunal considers the respondent has particularly failed to demonstrate that the claimant has no, or even little, reasonable prospects of success. In fact the converse may be the case. There is nothing in its disclosure thus far which reveals the genesis and progress of the proposals that lead to the initiation of the redundancy process. The caselaw makes it clear that (generally, for there may always be exceptions) consultation, to be meaningful, must begin when the proposals are still at a formative stage, and with sufficient information for the affected employees to be able to make informed representations.

50. The strong impression from the pleadings and what evidence has thus far been disclosed by the respondent is that the claimant (and her colleague) was not consulted when the proposals were still at a formative stage. There is evidence from which a Tribunal could reasonably conclude that the decision to restructure the HR function had been taken before any consultation commenced. Para.5 of the Statement for the response document (page 32 of the bundle) rather supports such a conclusion as it states “The business had decided to restructure the Human Resources Department. It created two Heads of Human Resources (to support the new business areas that had been introduced…).” This, and the ensuing content of this paragraph, suggests that this was a decision that had been taken without any consultation with the claimant or her colleague. That is rather reinforced by the fact that what is described as the first consultation meeting on 10 February 2020 was the first that the claimant knew of this “proposal”, if such it can be described.

51. To call that meeting a “consultation” meeting is arguably a misnomer, as it was in that meeting that the announcement of the restructure was made. The claimant can hardly be expected to have been able to respond to proposals that she was only learning of that meeting.

52. There is at present (disclosure, of course, has not yet been ordered) a complete lack of any internal documentation from the respondent showing how and

when these proposals were first made, and who, if anyone, was consulted when they were still at a formative stage.

53. Whilst the manner of the claimant's removal from her office pending the consultation period is not a matter that the Tribunal can compensate the claimant for, even if her claims succeed, the fact that the respondent had decided that it could suddenly manage the work that the claimant and her colleague had been doing without them (they were not asked to work remotely, they were to do no work) is open to the interpretation that the decision to remove their posts in Manchester was one that had already been taken, and there was nothing that the claimant could have said in the so – called consultation process which would have been considered as an alternative to the restructure that the respondent had determined upon. Further, there is the evidence , on the claimant's case, that having been through a redundancy exercise only in September 2018 , where she was at risk, she was not then required to leave work during the consultation exercise, so why was she on this occasion ? Whilst appreciating the respondent's case on this aspect, it clearly raises triable issues.

54. Further issues arise out of the claimant's case (page 9 of Mr Taylor's submissions in response on the document setting out the application, and paras. 34 and 35 of the claimant's attachment to the ET1) that as recently as December 2019 the claimant had applied for, but been unsuccessful in applying for the role of HR Advisor. It appears to have come out in the course of an Interim Relief application by another claimant that the claimant and her colleague were being considered for such a role, but then external candidates were appointed. The timing of this, and the timing of the proposal to have an HR hub at Birmingham, and to make the claimant and her colleague redundant, when still recruiting externally some 6 or so weeks before the announcement on 10 February 2020 are all matters which will doubtless be clarified upon the respondent providing disclosure. Indeed the claimant contends (see her email of 28 February 2020, page 67 of the bundle) that it was only two weeks after she had been told she was unsuccessful that she was then sent home on 10 February 2020, something acknowledged by Rob England in his termination letter (pages 87 to 88 of the bundle).

55. These issues reinforce how there are clearly questions to be answered, and how the respondent's case on the fairness of the redundancy exercise, and indeed, possibly even its genuineness, is less clear cut that Mr Hale submitted that it is.

56. That the consultation period , from start to finish, was to be 18 days is another factor that may give rise to issues of how meaningful the consultation process was. Nothing in what the Tribunal has seen thus far explains what was so crushingly urgent that this major restructure had to be rushed through so quickly.

57. For those reasons alone (and there are others) , the Tribunal considers that the claimant does not have no reasonable , or only little, reasonable prospects of success in her unfair dismissal claim, and will not strike it out, or order any deposit be paid by her. As ever with redundancy dismissals, of course, there may well be issues as to what difference fair consultation would have made, and the other aspects of ***Polkey*** in terms of remedy are likely to be highly pertinent. Those,

however, go to remedy, and there is no basis for making any orders in respect of the unfair dismissal claim.

(ii) The victimisation claims.

58. The only sex discrimination claims that the claimant has brought are of victimisation. It is important to keep this in mind, because , whilst in the protected act that it is conceded she did, her email of 28 February 2020 , she alleged that she had been selected for redundancy because she was a woman, no direct discrimination claims are made, and she has not claimed in these proceedings that her dismissal was an act of direct sex discrimination. Thus , given that it is conceded that the claimant did the protected act, the only live issue before the Tribunal will be that of causation – i.e was she subjected to any of the 8 acts of unfavourable treatment set out above because she had done the protected act?

59. The respondent submits that the claimant has no reasonable prospect of showing that causal connection, and these claims should be struck out, or, deposits ordered.

60. The starting point has to be the burden of proof. Section 136 of the Equality Act 2010, which provides that the reversal of burden of proof applies 'to any proceedings relating to a contravention of this Act'. It is expressly set out in the explanatory notes to the Act that in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation, point to a breach having occurred, in the absence of any other explanation, the burden shifts onto the respondent to show that he or she did not breach the provisions of the Act. The Court of Appeal in ***Greater Manchester Police v Bailey [2017] EWCA Civ 425*** held that 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see ***Madarassy v Nomura International [2007] ICR 867*** per Mummery LJ at paras. 54-56 (pp. 878-9).'

61. In terms of what the 'something more' needs to be , Sedley LJ in the judgment of the Court of Appeal in ***Mr S Deman v The Commission for Equality and Human Rights [2010] EWCA Civ 1279*** at para. 19 said this:

"We agree with both counsel that the "more" which is required to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non – response, or an evasive or untruthful answer , to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

62. Thus, it is not sufficient for the claimant to contend that she had done a protected act, and then suffered unfavourable treatment. She has to show, as Ms Hale has submitted, "something more" to raise a prima facie case that the latter was because of the former. Whilst no comparator is necessary for a victimisation claim, it is nonetheless often instructive to examine whether there is any evidence to suggest

that, had the protected act not been of the nature that it was (i.e. was not a complaint of sex discrimination) , the claimant would have been treated any differently.

63. The Tribunal has considered the claimant's claims of victimisation, and whether they have any reasonable prospects of success, and, if not, whether they have little reasonable prospects of success.

64. The point is rightly made on behalf of the claimant the terms of the claimant's email of 28 February 2020 are not as limited as Ms Hale suggests in her submissions. The claimant is clearly complaining not only of being selected for redundancy because of her gender, but also of a history of discriminatory conduct in general. She points out how her manager, a male, is able to keep his job.

65. It is worth recapping the allegedly unfavourable treatment relied upon by the claimant. It comprises of:

(a) Threatening to withdraw her ability to bring a chosen representative to a consultation meeting;

(b) Rachel Cass being allowed to accompany the consultation manager to the consultation meeting;

(c) Brian Devonshire being allowed to hear her appeal when she considered him not to be independent;

(d) Not being referred to Occupational Health when she had been diagnosed with bereavement reaction;

(e) persistent communication over a weekend from Rachel Cass;

(f) refusing to allow the consultation meeting to be adjourned;

(g) the involvement of the HR team in her consultation meetings;

(h) the failure to deal with a grievance about Rachel Cass?

66. Whilst Mr Taylor has referred , as he did during a consultation meeting to an Employment Tribunal judgment that the respondent victimised another employee wo had raised a grievance raising race and disability discrimination complaints, the Tribunal cannot see how this is directly relevant. The essence of the claimant's argument appears to be that as that Tribunal found that the failure to properly investigate , and the requirement to accept the outcome, was unfavourable treatment amounting to victimisation for doing the protected act, so the Tribunal in the claimant's case could, and should find that she was subjected to similar detriment for doing a protected act. The claimant's case is that the respondent did not investigate her grievance with an independent person, but "lumped it together" with her redundancy consultation.

67. The Tribunal is prepared to accept, for the purposes of this determination, that this, and some, if not all, of the other above acts are capable of amounting to unfavourable treatment for the purposes of s.27. Some are a little tenuous –(b) and (g) , for instance are difficult to see as treatment of the claimant, even if she thinks

they should not have happened. They all, however, as far as the Tribunal can tell, post – date the doing of the protected act on 28 February 2020.

68. The question arises, however, of whether the claimant has any prospect of showing that she has a prima facie case, so as to reverse the burden of proof under. s.136 of the Equality Act 2010. What is, or could be, the "something more" that the caselaw shows has to be established?

69. The claimant has not, with respect to Mr Taylor, really addressed this issue in her submissions. Whilst a comparator is not necessary, if there is one, that can be instructive. If, for example, a colleague raised a similar, but non – discrimination claiming, grievance at the same time, but was treated better, that would clearly be something more. There is, however, no such comparator.

70. The problem for the claimant is that her treatment throughout this process has, she contends , been unfair right from 10 February 2020. That is 18 days before her protected act. This is not, then , a case where there is a change in treatment, the treatment before the protected act was, the claimant would say, unfair and unreasonable. What, then is there, from which the Tribunal can be invited to conclude that any of the treatment after 28 February 2020 was because of the protected act?

71. The claimant has not produced anything specific which shows that had her grievance been about anything else , she would have been dealt with differently. There is , however, doubtless a Grievance Procedure , and there is obviously a Handbook of Employment , as it is referred to in the claimant's Offer of Employment/Statement of Main Terms (pages 48 to 53 of the bundle). Whatever its provisions, it does appear that the claimant's grievance of 28 February 2020 was not dealt with by what one expect in such procedures , the appointment of an independent grievance officer to investigate and hear (with perhaps delegation of the first element) the grievance, by interviewing the claimant , and those about whom she was grieving.

72. The claimant does make the point that her grievance was , instead, dealt with in the consultation process, as it related to the redundancy process, so it was considered appropriate to deal with it in that context and as part of the same process.

73. That decision may have been correct or incorrect, but was it influenced by the subject matter of the grievance, and not the context in which it arose ? On examination, though , the grievance was not actually confined to the decision to select the claimant for redundancy, it actually referred to a "catalogue" of discriminatory behaviour over the previous 12 months. The respondent showed no inclination to find out what these other incidents of alleged discrimination were, but focussed solely on the redundancy issue.

74. The claimant in her email of 9 March 2020 (page 70 of the bundle) made the point that she could not see how this did not fall within the remit of a grievance hearing. She had earlier that day sent an email to the HR Helpdesk (pages 78 to 79 of the bundle) raising, in fact, a further grievance about Rachel Cass, in respect of these issues.

75. That grievance too was not dealt with. The claimant referred to that, and her previous grievance in her appeal grounds (pages 90 and 91of the bundle). At one

point Rachel Cass was to have accompanied the Appeal Officer. The respondent's response to this in the appeal outcome letter (pages 94 to 97 of the bundle) where Brian Devonshire refers to the claimant's non – participation in the appeal meeting, and expresses regret that these issues , and those she had also raised in relation to Rob England's failure to investigate her original grievance , could not be further discussed.

76. The respondent's unwillingness to deal with not one, but two grievances, the one being about the other, and the original one clearly raising allegations of ongoing sex discrimination which are not solely confined to the redundancy process itself is of some potential evidential weight. As observed above, the "something else" required to shift the burden of proof may not be very much, and the respondent's probable (for it is not yet established) departure from its usual grievance procedure processes, failure to appoint a grievance officer, and to carry out its usual procedure may give rise to an inference that the reason that the claimant's grievances were not so dealt with was their subject matter. (It will be interesting, for example, to learn if the respondent has ever or since investigated , or continued to investigate , grievances after the employee's employment has ended)

77. Further, whilst not yet detailed other than in passing in the grievance itself, the alleged "catalogue" of prior discrimination may also be background facts from which the Tribunal can be asked to find the "something else". If the claimant is to seek to rely upon this, however, she will need to specify what these allegedly discriminatory incidents were, even if she is not making any claims based upon them.

78. Thus, whilst the victimisation claims may ultimately be unsuccessful, and the claimant may not actually establish the necessary "something else", or the respondent may, if the burden of proof is shifted, be able to discharge it, the Tribunal is not prepared to say at this stage that these claims have no, or little, reasonable prospects of success. Finally, that they are discrimination claims would also militate against any such orders being made, but as the Tribunal has not found grounds upon which to consider making such orders, that is rather academic. They will not be struck out, and no deposit orders will be made.

Case Management.

79. As this application was pending, the Tribunal at the preliminary hearing on 13 January 2021 made no case management orders, and did not list a final hearing. That now needs to be done. It is noted that a Schedule of Loss has been served, and that the period of the claimant's loss is limited to 22 June 2020 , and thus it is unlikely that any updated Schedule will be required. It is also to be noted that the period of loss is a rather brief one, and, subject to any potential award for injury to feelings, which is unlikely , one would think, to be outside the lowest band of ***Vento***, the value of the claims is relatively modest, a matter both parties will hopefully bear in mind as matters proceed and costs are incurred.

80. Given that both parties are represented, a further preliminary hearing for case management should not be necessary, and if the parties are able to agree dates for disclosure, preparation of and responsibility for the hearing bundle, exchange of witness statements (which the Tribunal will expect to occur soon after completion of the bundle, and not by reference to some far distant hearing date) , and an estimated length of hearing, the Tribunal should be able to make the necessary case management orders, and list the final hearing. Dates to avoid will be required, which

are best provided up to the end of 2022. It is presumed a Manchester Listing will be required. In the event that the Tribunal is to list the final hearing for three days or more, if judicial mediation is sought by both parties, an application can also be made at the same time.

Employment Judge Holmes

Date: 24 March 2021

RESERVED JUDGMENT SENT
TO THE PARTIES ON

29 March 2021

FOR THE TRIBUNAL OFFICE