



EMPLOYMENT TRIBUNALS

By CVP

Claimant
Ms. F. Saffari

Respondent
United Colleges Group

v

Heard at: Watford

On: 9- 11 December 2020
(18 December 2020 in chambers)

Before: Employment Judge Heal
Ms S. Johnstone
Ms N. Kendrick

Appearances:

For the Claimant: Ms S. Sleeman, counsel
For the Respondent: Mr J. Green, counsel

RESERVED JUDGMENT

The complaints of unfair dismissal and race discrimination are not well founded and are dismissed.

REASONS

1. By a claim form presented on 11 March 2019 the claimant made complaints of unfair dismissal, race and age discrimination.
2. We have had the benefit of an agreed bundle running initially to 243 pages. The respondent supplied a further document, page numbered 244 to 274. Initially the claimant objected to the document being admitted in evidence because it was late, and its relevance was not clear. After discussion however, Ms Sleeman for the claimant did not pursue her objection.

3. We have heard oral evidence from the following witnesses in this order:

Mr Stephen Davies, Principal,
Mr Keith Cowell, Chief Executive Officer and
Ms Fereshtah Saffari, the claimant.

4. Each of those witnesses gave evidence by means of a prepared typed witness statement which we read before the witness was called to give evidence. Each witness was then cross examined and re-examined in the usual way.

5. The parties supplied an agreed list of issues to Employment Judge Tuck for a preliminary hearing on 14 January 2020. EJ Tuck ordered the parties to provide a final list of issues on or before 20 January 2020, however no further list of issues was produced. A final list of issues has been produced before us which simply supplements the earlier list by adding the names of comparators. Issue 6.5 below was amended by consent at the outset of the hearing.

6. Those issues are:

Unfair dismissal

6.1 It is not in dispute that the claimant qualified to claim unfair dismissal, that she presented this claim in time or that she was dismissed.

6.2 Was the reason for dismissal potentially fair within the meaning of section 98 of the Employment Rights Act 1996? The respondent's case is that the reason for dismissal was redundancy, or, in the alternative, a business reorganisation carried out in the interests of economy and efficiency that rendered it fair for some other substantial reason within the meaning of the 1996 Act. The claimant's case is that there was no genuine redundancy situation.

6.3 Did the respondent act reasonably in all the circumstances in dismissing the claimant for redundancy, alternatively, some other substantial reason?

6.4 Did the respondent failed to offer a suitable alternative vacancy?

6.5 Should the respondent have offered a trial period in respect of Head of Faculty for Digital Technology, Care and Hair and Beauty or any other position?

Direct Age Discrimination

6.6 Are there facts from which the tribunal could properly infer that the following treatment of the claimant by the respondent was because of the claimant's age (62 years):

- (a) A failure to appoint the claimant to the role of Head of Faculty for Digital Technology, Care and Hair and Beauty;
- (b) A failure offer her a suitable alternative vacancy; and/or
- (c) Dismissing the claimant?

6.7 In doing the above, did the respondent treat the claimant less favourably than it would have treated a comparator, actual or hypothetical, who was younger than the claimant but whose circumstances were otherwise not materially different? The actual comparators the claimant relies on are Vito Martino (early 40s), Alison Eaglestone (early 40s) and/or Mark Stacey (early-mid 50s).

6.8 If so, has the respondent shown that its treatment of the claimant was in no sense because of the claimant's age?

6.9 [The respondent has withdrawn its reliance on the defence of justification].

Direct Race Discrimination

6.10 Are there facts from which the tribunal could properly infer that the following treatment of the claimant by the respondent was because of the claimant's race/ethnicity namely Iranian:

- (a) A failure to appoint the claimant to the role of Head of Faculty for Digital Technology, Care and Hair and Beauty;
- (b) A failure offer her a suitable alternative vacancy; and/or
- (c) Dismissing the claimant?

6.11 In doing the above, did the respondent treat the claimant less favourably than it would have treated a comparator, actual or hypothetical, who did not share the claimant's race/ethnicity but whose circumstances were otherwise not materially different? The actual comparators the claimant relies on are Vito Martino (white European), Alison Eaglestone (white English) and/or Mark Stacey (white English).

6.12 If so, has the respondent shown that its treatment of the claimant was in no sense because of the claimant's race/ethnicity?

Concise statement of the law

Unfair dismissal: redundancy

7. An employer will normally not act reasonably unless it warns and consults with any employees affected and/or their representatives, adopts and applies a fair process by which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within its own organisation. *Williams v Compair Maxam Ltd* [1982] IRLR 83, *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, [1987] ICR 142. In *Langston v Cranfield University* [1998] IRLR 172 the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case. Accordingly, even if not raised specifically by the claimant, the employment tribunal will be expected to consider them. Moreover, the employer will be expected to lead evidence on each of these issues. The only exception will be where there is a contrary agreement between the parties.

8. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely

to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas *Williams*-type selection will involve consultation and meeting, appointment to a new role is likely to involve an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion: *Morgan v Welsh Rugby Union* [2011] IRLR 376, EAT.

9. To the mind of the EAT in *Morgan*, a tribunal considering this particular question must apply s.98(4) of the 1996 Act. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled to consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4).

Discrimination

10. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258. On this occasion it seems appropriate to set them out in full:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts

before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

11. Expanding on that, it is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race or age. What then, is that initial level that the claimant must prove?

12. In answering that we remind ourselves that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases, the discrimination will not be ill-

intentioned but merely based on an assumption that “he or she would not have fitted in”.

13. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly* infer discrimination.

14. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the '*same, or not materially different*' as those of the claimant.

15. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove that the facts on which she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

16. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

17. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding '*the reason why*'. Some cases arise (See *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Facts

Credit.

18. Both representatives have made submissions before us about the credit of the witnesses. We have found occasions where we have had reason to rely on the evidence of individual witnesses but equally times when there have been reasons not to rely on the evidence of the same witnesses. This is not one of those cases in which we can say that we prefer entirely the evidence of one side or the other. Instead, we

prefer to work through the chronology point by point deciding, where there are disputes of fact, what is more likely to have happened than not.

The balance of probability

19. We have made our findings of fact on the balance of probability. We do not possess a fool-proof method of discovering absolute truth. Instead, we listen to the evidence and read the evidence placed before us by the parties and on that evidence, we decide what is more likely to have happened than not.

Background

20. In January 2000 the claimant began employment as an hourly paid lecturer with the College of North West London.

21. In September 2001 the claimant was appointed Curriculum Manager ICT Skills and Development.

22. In August 2014 the claimant was appointed Head of Department, ICT Skills, Computing and Digital Media.

23. Although both sides have accepted before us that the College of North West London was failing as a college, the claimant's own appraisals carried out by Grethe Woodward, in June 2015 and May 2017 show us that as head of department the claimant was regarded as a strong member of the team.

24. In August 2017 the College of North West London merged with the City of Westminster College to form the respondent, the United Colleges Group. The combined colleges provide further education to students aged 16 to 18 and also 19 +.

25. By letter dated 17 November 2017 Jo Taylor of HR wrote to confirm an offer to the claimant of the post of Interim Deputy Director of Curriculum for the Directorate of Digital Creative Science and Service Industries. This was in addition to the claimant's substantive post as Head of Department-Computing.

26. Mr Stephen Davies joined the respondent as Principal on 3 April 2018. He reported to Mr Keith Cowell the Chief Executive.

Mr Davies' comments

27. During his early days as Principal, Mr Davies had a number of one-to-one meetings with, amongst others, his heads of department. The claimant's one-to-one meeting was scheduled initially for the 26 April but then cancelled twice so that it eventually took place on 4 May 2018.

28. We prefer the claimant's account of the one-to-one meetings as set out in her witness statement to that which we heard from her in the oral evidence. That is, we find that, because her one-to-one meeting was cancelled twice, she had an opportunity to speak to the other heads of department and curriculum managers to find out what topics were discussed during their one-to-one meetings. She did this *before* her own

meeting. We do not accept she carried out questioning of her colleagues after her meeting because this appeared to us to be an afterthought during cross examination.

29. The claimant's one-to-one meeting with Mr Davies took place on 4 May 2018. At that meeting he asked her a number of questions about herself including where she had been on holiday and also whether she considered herself to be Persian or Iranian, whether the claimant went to Iran and whether it was a safe place to visit. We find that his intention in asking these questions was to show a friendly interest in his member of staff and also because he had a genuine interest in travel. We find, at the time, the claimant accepted the questions in the spirit of friendliness intended by Mr Davies. We find this because she made no complaint formal or informal at the time and she did not rely upon this matter at her appeal when she had union representation.

30. Although Mr Davies did not have a template or script for the one-to-one meetings, we accept that he asked similar 'getting to know you' questions of the claimant's head of department colleagues, including about family. Given the passage of time and the fact that we have not heard from those witnesses we do not make precise findings about what he asked them.

31. Aswady Bose reported to the claimant that Mr Davies had made a comment in her one-to-one meeting about the college needing 'new blood'. Mr Davies accepted that he may have said this or something like it, but he did not remember. We accept on balance that the remark was made. However, we have not heard from Ms Bose and do not know the context of the remark. We cannot make any conclusive findings from these bare facts about whether Mr Davies meant that the college needed younger employees as opposed to new members of staff.

The restructure process.

32. Given that the college was already struggling in terms of performance, it quickly became clear to Mr Davies that he would need to make changes, including in the leadership structure.

33. Mr Davies drew up a new structure in which he planned to remove the existing seven head of department roles (of which the claimant's role was one) and to create instead five new head of faculty roles covering both the previous colleges.

34. Mr Green for the respondent cross examined the claimant in meticulous detail about the differences between the head of faculty and head of department roles. The claimant accepted in cross examination that the new role of head of faculty was a 'step up' and on the evidence that we have heard, we find that the head of faculty role was set at a higher level in the organisational structure. A head of faculty would sit on the senior management team which was not where a head of department sat. The head of department role was in management, but the head of faculty role was a strategic role. Therefore, we have found that there were significant differences in terms of seniority and responsibility between the two roles.

35. By letter dated 15 May 2018 Anna Openshaw-Lawrence of human resources wrote to staff generally, including the claimant, giving notice pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 to advise them that

the respondent proposed to dismiss by reason of redundancy a number of staff who were employed as managers, lecturers and support staff. The letter set out details as required by section 188 including the proposed method of selecting the employees who may be dismissed. This was via interview process against the person specifications for the posts in question. The letter said that the respondent would wish to consult with staff about the proposed selection criteria and looked forward to receiving their views. It was anticipated that notices of dismissal would be issued by the end of June, the termination date being at the end of the relevant notice period. It was proposed to consult the union about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals.

36. On the same day, 15 May 2018, the claimant was called into a meeting and informed that the head of department posts were to be removed from the staff structure and would be replaced by head of faculty posts. She was told that all the heads of department were ring fenced for interview (as opposed to being ring-fenced for slotting in) and she was invited to apply for a head of faculty post.

37. By letter written specifically to the claimant on 15 May 2018 Ms Openshaw-Lawrence confirmed to the claimant that her post had been identified as being affected as a result of the group restructuring. Therefore, she informed the claimant that this meant that she was at risk of redundancy. The period of formal redundancy consultation with the trade unions began that day, 15 May 2018, and would continue until 13 June 2018. The letter assured the claimant that although there would be consultation with the trade union, there would also be individual consultation with her. This was, said the letter, important because the respondent genuinely wished to hear and consider any comments and suggestions that the claimant might wish to put forward to avoid or mitigate redundancies.

38. By email dated 25 May 2018 to the claimant and the other heads of department, Jo Taylor said that the application for the head of faculty posts would take the form of the applicant providing an expression of interest, which should be a written statement no longer than two sides of A4 in which the applicant should indicate how they considered their skills, knowledge and experience matched the role or roles of head of faculty and also the impact they believed they could make within this role. The heads of department were told to indicate which roles they were particularly interested in.

39. At the end, Ms Taylor said,

'Should you be unsuccessful in your application for this post, then you may wish to be considered for one or more of the Curriculum Leader roles. Please do indicate this clearly on your expression of interest, if this is the case-and your role preferences.

Please do not hesitate to Joseline, Jaishree or me, if we can be of any assistance to you at all.'

40. The claimant attended an individual consultation meeting by Stephen Davies on 25 May 2018. She was accompanied by Mark Hughes, and Joseline Porter from HR was present. At the meeting, Mr Davies gave the claimant an opportunity to explore

her options, discuss any suggestions she might want to put forward to mitigate the need for potential redundancy and to clarify any questions she might have about the process. The claimant asked when would be the last day of employment and whether there was any chance of voluntary redundancy. She asked about the differential between the vice principal and head of faculty roles. She noted that the job description had not mentioned teaching and was told that that was an omission. (Although the note of this interview records the claimant asking about voluntary redundancy and the last day of employment, it was not explored in cross examination whether this was something which the claimant really wanted, and we make no findings about that possibility.)

41. Two or three days before the claimant's interview she and the other heads of department were told that two out of the seven had taken voluntary redundancy. There were then five heads of departments left competing for five head of faculty posts. Therefore, it appeared to the heads of department, including the claimant, that the interviews would be to decide who would be given which post, however the claimant accepted in cross examination - and we find that Jo Taylor also told her - that the interview was also to decide whether any of the heads of department were to be appointed to the head of faculty post at all. (It was at this stage of cross-examination that the claimant also accepted that the head of faculty role was a 'step up' from both of her previous roles.)

42. By email dated 8 June 2018 the claimant sent her expression of interest to HR. She expressed interest in the role of Head of Faculty of Digital Technology, Care and Hair and Beauty. She set out two pages of text about her approach to the role of head of department. She did not express interest in a curriculum leader position.

43. By email dated 8 June the claimant was invited to an interview on 13 June. She was told the interview was likely to last for around an hour and that there would be a panel of three interviewing her. If she had any questions, she was told to contact Ms Porter, Ms Taylor or 'Jaishree'.

The interview

44. We have been shown the manuscript (and subsequent typed version) notes taken by the three members of the panel who interviewed the claimant. So, we have notes from Mr Stephen Davies, Ms Jo Taylor, and Ms Grethe Woodward. We have not been shown their notes from the other candidates' interviews. After the interview Ms Porter collected Mr Davies' notes from him. He told us that he did not know what happened to the notes of the other candidates' interviews thereafter. We have not been given evidence about what became of those notes or had a precise explanation as to why we have not been shown them. Nor however had they been sought in disclosure by the claimant.

45. Ms Woodward was herself 'Asian/mixed race'. In this same restructuring, she was appointed to the Vice Principal role. In May 2017 she had carried out the performance appraisal for the claimant which described the claimant's performance as exemplary and praised her for inspiring and challenging her teams. Ms Woodward was the claimant's manager at the time when the claimant was invited to perform the role of deputy director of curriculum on an interim basis.

46. Having weighed up the evidence of the witnesses we have heard, Jo Taylor's manuscript notes and what was said by the panel members at the appeal, on the balance of probability we find that the panel asked the claimant at the end of the interview whether she was interested in any other roles. Ms Taylor's notes confirm this. The panel did not ask her at the beginning only whether she was interested in a curriculum leader role. We find that the claimant said that she was not interested in any other roles.

47. So far as the interview is concerned, we find that we prefer the evidence of Mr Davies together with the contemporaneous notes of Ms Taylor and Ms Woodward, to the account given of the interview by the claimant at our hearing. That is not say we think the claimant had attempted to mislead, there may be many reasons for the difference in accounts of the interview, however we do find the respondent's evidence before us is on balance more reliable, consistent as it is with notes taken at the time.

48. We find that the panel approached the interviews by applying the criteria provided by the person specification and looking for evidence that the candidate met those criteria. Therefore, they looked for and asked about examples and used questions of the type, 'tell us about a time when...'; and they looked for precise examples in the answers that they were given.

49. The notes show us at although on occasions the claimant gave examples, on the whole, her answers were generic. We find that the panel did do some probing of the claimant to give them examples. The emphasis of the claimant's case before us (and at the appeal) was not so much on the basis of examples she had given that she said had not been recorded in the notes, and nor did she say that she had performed well at the interview. Instead, in her case before us, she focussed on procedural matters such as the lack of a model answer and the failure to record scores.

50. We accept that a model answer would not be the best approach for such a senior position. There is unlikely to be only one correct answer to the questions being asked. We do not consider that the template used was particularly helpful for this exercise and this issue has exposed Mr Davies to some uncomfortable cross examination (we have noted that Mr Davies was unclear on whether the other candidates were not scored, or only the claimant), however we accept that the panel took and used their notes as an aide memoire to assist their own discussions and they did not score the claimant in any event because her performance was such that they considered that they could not appoint her.

51. On the balance of probability, we find that the claimant did not perform well at the interview and that the panel genuinely believed that she did not perform well. We see that Grethe Woodward, who was plainly a supporter of the claimant in the past, considered that the claimant had not performed well. At appeal she (Ms Woodward) said that she was surprised and that the claimant's performance at interview was not as competent as she would have expected. She saw a lack of depth and breadth in the claimant's answers to questions. We think that this view is borne out by the notes of the claimant's answers. Because the panel considered that they could not appoint the claimant at all, a trial period as head of faculty would not have been appropriate.

Her interview performance was not good enough to justify consideration of that approach.

52. The claimant was told later the same day that she had not been successful in her application for the head of faculty position.

Applications for alternative roles.

53. By letter dated 26 June 2018 Ms Openshaw-Lawrence wrote to the claimant confirming that the formal redundancy consultation period had concluded and that it had not been possible to identify any alternatives to making the claimant's role redundant or any suitable alternative positions for her within the group. Therefore, it was confirmed that the claimant's role was redundant, and her employment would be terminated with effect from 31 October 2018.

54. On 20 July 2018, the claimant received one bulletin about alternative posts in the respondent. As a result, she applied for a position as Head of Faculty Creative Industries (secondment), however she was unsuccessful at interview.

55. The claimant also applied for Head of Faculty ICT (secondment) - which was not on the bulletin - and was not successful in that application either. The claimant was expressly invited to apply for this role by email dated 14 September. The claimant's witness statement suggests that she expected to be offered or ring fenced for a position rather than to have to apply.

The appeal.

56. By letter dated 29 June 2018 the claimant appealed the decision to terminate her employment. She gave as reasons for her appeal:

1. That she had been employed by the respondent for 17 years had been Head of Department for four years and her performance had been extremely good.
2. That there had been five new positions for head of faculty and only five people applied for those posts. She said that she was the only person unsuccessful in obtaining a new post in the new organisational structure. She said that she was made redundant although there was a suitable vacant post for her.
3. She therefore believed that she had been treated unfairly and that the respondent failed to ensure that compulsory redundancies were reduced to a minimum.

57. On 2 July 2018, a number of the claimant's colleagues presented a petition on her behalf saying that she had always been an efficient, approachable, caring, helpful, problem solving and compassionate manager at the college. We have no doubt that the claimant was well liked by her colleagues.

58. The claimant's appeal was heard by Mr Cowell on 4 September 2018. It was represented by Mark Hughes, her union representative. Mr Davies, Ms Taylor and Ms Porter all gave evidence to the appeal.

59. Mr Hughes presented the case for the claimant. He said that the decision made was perverse and:

'our argument is having gone through a voluntary redundancy process and the pool is reduced to a group of five, and there are five vacancies, and if those people all have the same skills, knowledge and experience and have long service, we could not see the justification for going to an interview process.'

60. Mr Hughes said that there was no justification for the redundancy. He felt that there was evidence of bias as people on temporary or yearly contracts were still working for the respondent. He reminded Mr Cowell that the claimant was a deputy interim director and had taken a step down for an interim role.

61. The claimant did not at the appeal stage make allegations of age or race discrimination and did not refer to the two incidents about Mr Davies which we have set out above. Initially, the claimant said this was because she was hoping to secure another role within the respondent and then later, she said that this was because her union representative advised her not to do so. She also said that she was not well at the time. We have not heard evidence from the union representative. We do not feel confident in relying on the claimant's reasons for not raising these matters. We note that she was able to prepare an extensive appeal pack and to write a cogent and clear appeal letter.

62. Mr Davis, Ms Taylor and Ms Woodward gave evidence to the appeal that the claimant had not performed well at the interview. They had used objective criteria, and found that she did not meet the criteria in the person specification. The claimant only gave an overview of information. She was given an opportunity at the end of the interview to express an interest in other roles. The claimant did not assert at the appeal that she had performed well at the interview: her case was that she should not have had to interview for the role at all.

63. Having heard the evidence at the appeal Mr Carroll decided to reject the appeal. He had heard consistently from the interview panel members that they had been rather shocked by the claimant's lack of depth at interview and they considered that she had not demonstrated that she had the necessary skills or experience to carry out the head of faculty role. Given how struck the panel had been about the gap in her skills and experience and the need for a successful candidate to 'hit the ground running' he was also satisfied that a trial period would not have been appropriate. Although the claimant had performed well as a head of department that did not mean that she would have an ability to perform well as a head of faculty.

64. Mr Cowell confirmed this to the claimant by letter dated 7 September 2018.

65. Having been unsuccessful on appeal and unsuccessful in applying for alternative positions, the claimant's contract was terminated on 31 October 2018.

Analysis

Unfair dismissal.

Redundancy situation.

66. The claimant accepted before us that there was a genuine redundancy situation until the point at which the two heads of department accepted voluntary redundancy. From that point on the claimant said that she was not redundant because she should have been given the head of faculty position.

67. We find that the claimant was genuinely redundant throughout the whole period of time that we have been hearing about. The head of department role was a management role, and the head of faculty role was a significantly more senior position with a strategic function. We find that the requirement of the respondent's business for employees to carry out work of a particular kind, that is as heads of department, had ceased or diminished. There were no heads of department remaining in the respondent's new structure.

68. The respondent gave the claimant reasonable warning of impending redundancy on 25 May 2018. She therefore in fact had 10 days warning before her first consultation interview on 25 May, from 25 May to 13 June to prepare for her interview, and five full months from the first warning to the termination of her employment.

69. This case has not been about any failure of consultation and the claimant has not made complaints about failure of consultation; however we have seen that there has been both individual consultation and consultation with the union which we consider was within the reasonable range of responses.

70. We have found that the head of faculty role was a significantly different and more senior role to that of head of department, therefore we consider that the respondent did not have to carry out a selection exercise between heads of department. All the heads of department roles were being made redundant.

71. What therefore the respondent was doing in interviewing the claimant and her colleagues for the roles of head of faculty was carrying out an exercise in seeking alternative employment for them. The interview was not a redundancy selection exercise as conventionally understood.

72. Bearing in mind the principles set out by the EAT in *Morgan*, we apply section 98(4) and consider that it is within the range of reasonable responses for this respondent to carry out an interview selection process for the more senior and strategic head of faculty position. It was reasonable, especially given the concerns the respondent had about its own performance, to test the candidates for the more senior position to make sure that they had and could show that they had the necessary strategic skills be able to carry out that role.

73. We have found as a fact that the respondent's interviewing panel genuinely believed that the claimant had not shown that she had the necessary skills and abilities to carry out ahead of faculty role. We have found that they had reasonable grounds for holding that belief. They acted within the reasonable range of responses in performing an evidence - based exercise: seeking specific examples of times when the claimant had shown the skills they were seeking. However, the claimant gave generic answers, not the specific examples and evidence they were looking for.

74. The interview for the head of faculty role itself was an exercise in seeking alternative employment for the claimant. The respondent also did explore with the claimant whether she was interested in more junior roles, but the claimant did not express such an interest. The claimant told the respondent at interview that she was not interested in other roles. That being the case there is a limit to the steps that would be reasonable in seeking alternative employment for her. Nonetheless, she was sent the bulletin of alternative roles in July 2018 and sent a targeted email about a particular role. Taking all these matters together, we consider that the respondent did take such steps as were reasonable to seek alternative employment for the claimant.

Discrimination.

75. We have found as a fact that the respondent did not appoint the claimant to the role of Head of Faculty for Digital Technology. Care and Hair and Beauty. The respondent did not offer the claimant an alternative vacancy and it did dismiss the claimant. The claimant has proved that the treatment she alleges did take place.

76. The claimant's actual comparators were appointed to equivalent head of faculty positions. Each of the comparators was of a different race (not Iranian/ White British). They were agreed to be the following ages:

Vito Martino: date of birth 27.2.79 so aged 39,
Alison Eaglestone: date of birth 10.7.64 so aged 53,
Mark Stacey: date of birth 25.11.62 so aged 56.

77. Therefore, there was a difference in treatment and a difference of race/age in each case. We consider that at age 62 the claimant was in a different age group to the comparators.

78. We have considered with great care whether a tribunal *could properly* conclude on the basis of the comment by Mr Davies about 'new blood' that the respondent's treatment of the claimant was discriminatory because of her age. We have been concerned as to whether it is *proper* so to conclude, given that we do not know the context in which the expression was used and given the ambiguity of the expression which could mean needing new people and could mean needing young people. However, we have found that a tribunal *could* properly conclude that the treatment was because of age in the basis of that remark. Although ambiguous, the remark *could* mean that Mr Davies was wishing to bring in younger staff and that was the reason why the claimant – the oldest of the interview group- was not offered a role.

79. Therefore, the burden of proof passes to the respondent to show on the balance of probability that there was no discrimination whatsoever.

80. We have accepted the respondent's explanation as to why it did not appoint the claimant to a head of faculty role and why it therefore dismissed her. That is, because of her interview performance, the interview panel genuinely took the view that it could not appoint her to that more senior position. We have found this despite some concern at the lack of interview notes of the other candidates. We note however that the claimant has not made applications for disclosure of those notes, did not even at the appeal stage compare her own performance with that of the other candidates, and has not asserted that she performed well in comparison to those candidates.

81. Although we have not met or heard evidence from Ms Woodward, we note that she was a panel member who had been positive about the claimant in the past and we note that she too formed the view that the claimant's performance at interview was not sufficiently good to secure the new role.

82. The claimant was not offered alternative vacancies in part because she expressed the wish not to be considered for other vacancies. When she did express that wish subsequently and made applications, she was turned down for those roles and she has expressly not impugned those decisions.

Race discrimination

83. We consider that Mr Davies' remarks at the one-to-one meeting about the claimant's origin are such that a tribunal *could* properly conclude that his treatment of her was on the grounds of her race. We do so having found that he himself asked those questions out of genuine interest in her and out of his own interest in global travel. However, in asking the questions and in explaining himself to us we think he showed a lack of experience or lack of reflection about how someone of non-British origin might experience those questions. Such questioning, as tribunals are sometimes told, has the capacity to make the recipient feel that they do not belong in Britain and to make them feel uncomfortable. It is Mr Davies' apparent lack of awareness of that sensitivity that makes us consider that a tribunal *could* properly find that his treatment of the claimant was because of her race.

84. Therefore, the burden of proof passes to the respondent to prove that its treatment on the balance of probability contained no discrimination because of race whatsoever. As above, we have accepted on the balance of probability the respondent's explanation. That is, that it did not appoint the claimant to the head of faculty role and therefore ultimately dismissed her because of her poor performance at the interview.

85. As above, the claimant was not considered for other vacancies because she did not express an interest in them and subsequently when she made applications for alternative roles she was turned down for those roles and she has expressly said those decisions were not discriminatory.

86. For those reasons therefore complaints of unfair dismissal and race and age are not well founded and are dismissed.

Employment Judge Heal

Date:27/01/2021.....

Sent to the parties on: ...27/01/2021.....

.....S.Kent.....

For the Tribunal Office