RESERVED JUDGMENT

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **CLAIMANT** | | **RESPONDENT** |
|---|---|---|
| **KAREN HUGHES** | **V** | **LIFE SCIENCES HUB WALES LIMITED** |

# JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT:** **CARDIFF** **ON:** **28, 29 & 31 OCTOBER 2024**

**BEFORE:** **EMPLOYMENT JUDGE S POVEY**

**REPRESENTATION:**
**FOR THE CLAIMANT:** **IN PERSON**
**FOR THE RESPONDENT:** **MR OGUNSHAKIN (COUNSEL)**

## RESERVED JUDGMENT

The Claimant was unfairly dismissed by the Respondent, contrary to section 94 of the Employment Rights Act 1996.

## REASONS

1. This is a claim brought by Karen Hughes ('the Claimant') against her former employer, Life Sciences Hub Wales Limited ('the Respondent'). The Claimant was employed as a Finance & Accounts Assistant from 2 December 2019 until her dismissal on 2 May 2024.

**Background**

2. By way of a brief, neutral background to the claim:

    2.1 The Claimant commenced a period of ill-health absence on 8 November 2023, returning to work on 8 April 2024. On 7 February

2024, and whilst still absent from work, the Respondent informed the Claimant that her role was at risk of redundancy. She was placed in a selection pool of one.

2.2 The Respondent held consultation meetings with the Claimant on 20 March 2024, 10 April 2024, 23 April 2024 and 1 May 2024.

2.3 By a letter dated 2 May 2024, the Claimant was informed that her employment was terminating by reason of redundancy. She was offered a right of appeal against the decision, which she did not exercise. The Respondent paid the Claimant a statutory redundancy payment, a payment in lieu of contractual notice and her accrued but untaken holiday entitlement.

2.4 The Claimant commenced ACAS Early Conciliation on 3 June 2024, which ended on 19 June 2024. She presented her claim to the Tribunal on 24 June 2024.

2.5 The Claimant says that her dismissal was unfair, due in particular to a lack of meaningful consultation and failure by the Respondent to consider options short of dismissal. The Respondent denies the claim, maintains that there was a genuine redundancy situation and the decision to dismiss the Claimant was , in all the circumstances, fair.

2.6 By a Case Management Order of Employment Judge Moore on 14 October 2024, the following were agreed as the issues to be determined regarding liability:

2.6.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.

2.6.2 If the reason was redundancy, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

2.6.2.1 The Respondent adequately warned and consulted the Claimant;

2.6.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.6.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

2.6.2.4 Dismissal was within the range of reasonable responses.

**The Hearing**

3. At the hearing, I heard oral evidence from the Claimant. For the Respondent, I heard from the following employees:

   3.1. Cari-Anne Quinn (Chief Executive)

   3.2. Miriam Lambert (Director of Finance & Resources)

   3.3. Natalie Perrin (Head of HR & Wellbeing)

4. Each witness provided and adopted their written witness statements. I was also provided with a file of documents ('the Bundle'), which was redacted, by agreement, to remove sensitive financial information about other employees. I also received oral and written submissions for the Claimant and from Mr Ogunshakin for the Respondent. The parties confirmed that the issues to be determined were as per the Case Management Order of 14 October 2024.

5. Due to lack of time I reserved my decision.

**The Law**

6. By reason of section 94 of the Employment Rights Act 1996 ('ERA 1996'), an employee has the right not to be unfairly dismissed.

7. Section 98(1) of the ERA 1996 requires that in deciding whether a dismissal was unfair, it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within section 98(2) of which 98(2)(c) states:

   *A reason falls within this subsection if it –*
   *…*
   *(b) is that the employee was redundant…*

8. Section 139 of the ERA 1996 contains the statutory definition of redundancy. It includes, at section 139(1)(b), the situation where a dismissal is wholly or mainly attributable to the requirements of the business for employees to carry out work of a particular kind having ceased or diminished or expected to cease or diminish.

9. The Tribunal has no jurisdiction to take account of the economic or commercial reason for redundancy itself. It is not for the Tribunal to assess or comment upon how an employer runs its business. We are only

concerned with whether the reason for dismissal was redundancy and whether a genuine redundancy situation (as defined by section 139 ERA 1996) existed (per James W Cook and Co (Wivenhoe) Ltd v Tipper 1990 ICR 716, CA).

10. Section 98(4) of the ERA 1996 also requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in section 98(2). On the issue of fairness in a redundancy dismissal, the Employment Appeals Tribunal ('EAT') gave guidance in Williams v Compare Maxam Ltd [1982] IRLR 83, summarised as follows:

    10.1. Was there a genuine redundancy situation;

    10.2. Did the employer properly consult;

    10.3. Was the employee fairly selected for redundancy; and

    10.4. Did the employer explore and consider alternative employment?

11. A review of the case law authorities on fair redundancy procedures was undertaken in Haycocks v ADP RPO UK [2023] EAT 129, recently approved by the Court of Appeal [2024] EWCA Civ 1291, at [40] – [41]:

> 40. At paras. 13-22 the EAT addresses the applicable law. It sets out section 98 (4) of the Employment Rights Act 1996 and then conducts a review of the authorities relating to the requirements of a fair consultation procedure. Its conclusion appears at paras. 21-22 and is in the following terms:
>
> "21. What emerges from the above authorities is that the statute is always the keystone to ET decision making. That being the keystone, the guidance provided by various authorities in respect of specific circumstances is just that, guidance; it does not create a stricture on ET decision making. If, despite the guidance, the process adopted by the employer falls within the band of reasonableness an ET must find so. However, the purpose of guidance from the appeal courts is to inform the question of reasonableness and if the guidance does not apply, ETs would be expected to explain why it did not in the particular case.
>
> 22. The authorities set out the following guiding principles:
>
> a. The employer will normally warn and consult either the employees affected or their representative; *Polkey v A.E. Dayton Services Ltd* [1988] AC 344.
>
> b. A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious

consideration being given to the response; *R v British Coal Corporation ex p Price* [1994] IRLR 72.

c. Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact; *Freud v Bentalls Ltd* [1983] ICR 77.

d. A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable; *Lloyd v Taylor Woodrow Construction* [1999] IRLR 782.

e. The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss; *Taylor v OCS Group Ltd* [2006] ICR 1602.

f. It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; *Mugford v Midland Bank plc* [1997] ICR 399.

g. Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process; *Camelot Group plc v Hogg* UKEATS/0019/10.

h. The use of a scoring system does not make a process fair automatically; *British Aerospace plc v Green* [1995] ICR 1006.

i. The relevance or otherwise of individual scores will relate to the specific complaints raised in the case; *British Aerospace v Green*."

41. I broadly agree with what the EAT says in para. 21, save that the final sentence should not be treated as stating a rule of law. I also agree that the various propositions in para. 22 reflect the effect of the authorities cited so far as relevant to this case, though they are of course in very summary form.

12. On the issue of consultation and deciding pools of employees, the headnote in Mogane v Bradford [2022] EAT 139 is as follows (emphasis retained):

> The ET had overlooked aspects of the issue of consultation in its deliberations, conflating consultation on alternative employment with the broader consultation required in a redundancy situation. Consultation is a fundamental aspect of a fair procedure see **Williams v Compare Maxam Ltd** [1982] ICR 156 and **Polkey v A E Dayton Services** [1987] IRLR 503; [1988] ICR 142 (HL). This aspect applies equally, with appropriate adaptation, to redundancy situations where there is no collective representation see **Freud v Bentalls Ltd** [1982] IRLR 443. In order that consultation is "genuine and meaningful" a fair procedure requires that

consultation takes place at a stage when an employee or employee representative can still, potentially, influence the outcome. In circumstances, as here, where the choice of criteria adopted to select for redundancy has the practical result that the selection is made by that decision itself, consultation should take place prior to that decision being made.

It is not within the band of reasonable responses, in the absence of consultation, to adopt one criterion which simultaneously decides the pool of employees and which employee is to be dismissed. The implied term of trust and confidence requires that employers will not act arbitrarily towards employees in the methods of selection for redundancy. Whilst a pool of one can be fair in appropriate circumstances, it should not be considered, without prior consultation, where there is more than one employee.

13. The stage at which consultation should take place was also considered by Underhill LJ in Haycocks v ADP RPO UK Ltd [2024] EWCA Civ 1291, at [59] – [61]:

> 59. I turn to what the EAT says about the stage at which consultation should take place, which arises even if there is no requirement of general workforce consultation.
>
> 60. In the well-known case of *R v British Coal Corporation ex p Price* [1994] IRLR 72 Glidewell LJ said, at para. 24 of his judgment, that fair consultation means "consultation when the proposals are at a formative stage". Although that decision was concerned with consultation in a rather different context, his observation has been adopted in the context of the non-statutory obligation on an employer to consult about proposed redundancies, and I have no difficulty with it. However, it is important to appreciate what is meant by "formative". Ms Ashiru submitted that what it means is "at a stage where it can make a difference to outcomes" and that it does not necessarily equate to "early consultation" in a temporal sense (which she said was how the EAT appeared to have understood it): what matters is that the employer still has an open mind and not, as such, how soon after the proposal was first formulated the consultation occurs. Mr Jones's submission was to essentially the same effect – that it meant that consultation should occur "at a point at which the employee can realistically still influence the decision". I agree with those submissions. No doubt the later in the process the consultation occurs the greater the risk that the decision-maker will have closed their mind; but whether that is so in a particular case is a matter for the factual assessment of the tribunal. And of course in an appropriate case an employer may not be held to have made a final decision until after the conclusion of an internal appeal: see para. 74 below.
>
> 61. I have noted above that the EAT in this case attached importance to the decision in *Mogane*. At paras. 22-24 of its judgment there is a discussion of the stage at which consultation should take place where there is no requirement of collective consultation. It points out at para. 22 that in "collective redundancy cases" the case-law following *Williams* has established that consultation should take place at

> a formative stage, and at para. 24 it says that that should be the case in all redundancy situations, not just those involving collective redundancies". It continues:
>
> > "It seems to us that the formative stage of a redundancy process is where consultation ought to take place according to the principles in *Williams* and the cases developed from it. The reason for consultation to take place at a formative stage is because that means that a consultation can be meaningful and genuine. That must mean that consultation, for a process to be fair, should occur at a stage when what an employee advances at that consultation can be considered and has the potential to affect the outcome."
>
> That seems to me entirely consistent with the position as I have stated it. On the facts of *Mogane* itself the EAT held that consultation had commenced only after a crucial element in the selection process had been definitively decided; but the situation was very different from that in the present case, and no useful comparisons can be drawn.

14. The Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the redundancy situation within which one employer might reasonably take one view whilst another quite reasonably takes a different view. The function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

15. Section 98(4) also requires a consideration of whether the procedure by which an employer dismissed an employee is fair. If an unfair procedure has been followed the Tribunal is not allowed to ask itself, in determining whether a dismissal was fair, whether the same outcome (i.e. dismissal) would have resulted anyway even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL).

16. However, an adjustment can be made to any compensatory award following a finding of unfair dismissal to reflect the likelihood that the employee would have been dismissed anyway, even if the employer had acted fairly. Further guidance on how to assess such an adjustment was provided in Software 2000 Ltd v Andrews [2007] IRLR 568 (at [54], so far as relevant):

> (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

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(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

…

(6) The [unfair dismissal] and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

## Findings of Fact

17. The Respondent is a private limited company by guarantee and an arm's length body of the Welsh Government, which provides its funding on an annual basis. The Respondent employs in the region of 40 staff.

18. Each year, the Respondent prepares and approves an annual business plan and financial forecast, which is sent to Welsh Government for its approval in or around the December before the start of the following financial year.

<u>The Redundancy Process</u>

19. In the course of preparing its business plan for 2024/25, the Respondent was informed by Welsh Government that funding was likely to remain at the same levels as it had been for 2023/24. That was confirmed to the

Respondent on 4 December 2023 and resulted in a £0.32m funding deficit in the proposed 2024/25 business plan. As a result, the Respondent began work on addressing the shortfall and balancing its 2024/25 budget.

20. As part of that process and in anticipation of the likely funding gap, the Respondent proposed (and its board accepted) reducing people costs in its operations team, as detailed in Ms Lambert's witness statement as follows (at Paragraph 18):

> The Operations team proposals were to change the following:
>
> a. 0.8FTE Finance Assistant -> move to an outsourced flexible service provision (averaging 7-10 hours per week, costing up to £10k pa)
>
> b. 1FTE HR admin assistant -> 0.5FTE HR admin and business support, and
>
> c. 1FTE receptionist administrator role -> 0.5FTE Business admin support.

21. The Claimant was employed in the Finance Assistant post. Since the Covid pandemic, she worked entirely from home.

22. The proposals were contained within a report by Ms Quinn, Ms Lambert and Ms Perrin, dated 27 November 2023 (at [63] – [68] of the Bundle). Those proposals were subsequently approved by the Respondent's board and the Welsh Government. Arrangements were made to inform those at risk of redundancy, which included the Claimant.

23. The Respondent operated a Redundancy Policy (at [32] – [37] of the Bundle). Part of the policy dealt with selection for redundancy, including the following in respect of selection criteria (at [34]):

> The selection criteria to be used in the case of redundancy will change from time to time to reflect the needs of the company. The criteria to be used will be fair and robust in application. If compulsory redundancies are required, employees will be involved and consulted on the selection criteria and be given opportunities to put forward their own views. Employees will be given the opportunity to discuss the selection criteria drawn up.
>
> …
>
> The criteria used to select those employees who will potentially be made redundant will be objective, transparent and fair and based on the skills required to meet existing and anticipated business needs.
>
> [The Respondent] will then consult individually with those employees who have been provisionally selected for redundancy.

24. The decision was taken to place the Claimant in a selection pool of one, on the basis that she was the only person occupying the Finance Assistant

post and there was only one such post within the organisation (a similar logic was applied to the other posts and postholders at risk).

25. The consultation process began on 7 February 2024. Ms Lambert and Ms Parrin held a Ms Teams meeting with the Claimant, wherein they informed her that her post was at risk of redundancy. That was confirmed to the Claimant in writing, by a letter dated 8 February 2024 (at [101] – [102] of the Bundle).

26. Also on 8 February 2024, the Respondent shared with the Claimant four vacancies which were due to advertised internally and externally. The Claimant was invited to express any interest she had in the roles by 12 February 2024 and informed that the Respondent would "*provide priority to you if you are interested in or wish to explore or apply for any of these roles or any further new roles during the consultation process, ahead of other internal or external candidates"* (at [100] of the Bundle).

27. The first individual consultation meeting with the Claimant was scheduled for the week of 12 February 2024 but, at the Claimant's request, it was rearranged to 20 March 2024 (see, for example, the Respondent's letter of 8 March 2024, at [119] – 120] of the Bundle).

28. On 19 March 2024, Ms Perrin shared two further vacancies with the Claimant, which again were being advertised both internally and externally (at [134] of the Bundle).

29. The Claimant did not apply for any of the vacancies brought to her attention in February and March 2024. It was not in dispute that, at that time, she remained off work due to ill-health. In her evidence, the Claimant also explained that the following factors impacted on her decision not to express interest in those vacancies:

    29.1. The Claimant was made aware of the vacancies at the start of the consultation process, when she was not in a position to know whether she needed to apply for another job and did not know why her post or her employment generally was at risk. As she stated in her oral evidence, "*I wanted to save my job."*

    29.2. The posts being advertised were office-based and the Claimant worked from home.

30. The first consultation meeting with the Claimant took place via MS Teams on 20 March 2024. Ms Lambert and Ms Perrin attended for the Respondent. In the meeting, Ms Lambert summarised the proposed business changes in respect of the Claimant's role, as follows (per the minutes of the meeting, at [135] – [136] of the Bundle):

> [Ms Lambert] explained that due to reduced transactional levels of financial processing, the wind-down of the Accelerate project and better opportunities to automate systems including Finance, HR and Payroll, that there was a proposed plan to carry out the tasks linked to [the Claimant's] role differently and also to better utilise payroll processes and to review how we provide financial Projects support
>
> As a result, [Ms Lambert] shared that the Finance activities had been reviewed and it was proposed that they could be carried out differently; creating efficiencies and savings.
>
> [Ms Lambert] explained that the suggested changes included a proposal to outsource the main elements of [the Claimant's] role, but also some elements would be absorbed by improving other working practices and processes; overall this could be a more appropriate use of resources reducing the need for permanent role.

31. The Claimant returned to work from sickness absence on 8 April 2024. The second consultation meeting took place on 10 April 2024. It was again attended by the Claimant, Ms Lambert and Ms Perrin. The Claimant raised a number of questions about how decisions had been taken to select her role for redundancy and place her at risk of redundancy (per the minutes of the meeting, at [176] – [181] of the Bundle). Those questions were answered, in part, during the meeting and then more fully in a letter of 18 April 2024 to the Claimant from Ms Lambert (at [219] – [223] of the Bundle). There was a further exchange of emails between Ms Lambert and the Claimant on 19 April 2024 (at [224] – [226]).

32. Part of those answers of 18 April 2024 concerned questions posed by the Claimant about the availability of voluntary redundancy, as follows (at [231] of the Bundle):

> Q: Has voluntary redundancy had been considered or were roles just pinpointed.
>
> A: The organisation does not currently offer voluntary redundancy and therefore this had not been available to share as an option.
>
> Q: Why wasn't voluntary redundancy available if it had been asked for by other colleagues, to save others?
>
> A: At the moment, voluntary redundancy is not available within the [Respondent's] policies, so even if requested, could not be offered at this time. In this instance it would also not be relevant to this organisational review, which has focused on looking at specific activities to potentially create efficiencies – therefore a general request for volunteers would not work as the roles performed by such volunteers could remain necessary in the proposed new structure.

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33. The third consultation meeting was held on 23 April 2024, via MS Teams. It was again attended by the Claimant, Ms Lambert and Ms Perrin (per the minutes at [253] – [256] of the Bundle). The Claimant again posed a number of questions, to which responses were provided after the meeting. It was anticipated by Ms Lambert that this would be the final consultation meeting.

34. On 25 April 2024, the Respondent provided the Claimant with it's responses to the questions she had raised at the meeting on 23 April 2024 (at [261] – [263] of the Bundle).

35. In fact, a final consultation meeting took place on 1 May 2024, attended by the Claimant, Ms Lambert and Ms Perrin (the minutes of which were at [287] – [289] of the Bundle).

36. By a letter dated 2 May 2024, Ms Lambert informed the Claimant that her post of Finance Assistant was being made redundant and her employment was being terminated with immediate effect (with payment in lieu of contractual notice and accrued holiday entitlement). It also confirmed the amount of the Claimant's statutory redundancy payment and informed the Claimant that she had a right to appeal to Ms Quinn against the decision (at [304] – [305] of the Bundle). The Claimant did not exercise her right of appeal.

37. In her evidence, the Claimant explained that she did consider whether to appeal against the decision but concluded that she had raised everything she felt she could during the consultation meetings and, in her mind, it had made no difference. In addition, the right of appeal was to Ms Quinn, who the Claimant felt was "*part and parcel of this decision making process"* (per the Claimant's oral evidence).

38. Following her dismissal, the Claimant became more aware of the circumstances of a fellow employee, Michaela Virgill. Ms Virgill was employed as an Operations Administrator and was on long-term sick leave at the time of the redundancy process. Based on the evidence seen and heard, the following was not materially in issue:

    38.1. Ms Virgill was exploring how to exit the business and made enquiries of the Respondent about voluntary redundancy but was told that voluntary redundancy was not available.

    38.2. Ms Virgill did not thereafter make a formal application for voluntary redundancy.

    38.3. During her absence, Ms Virgill's post was covered under a temporary contract, which ended at the end of March 2024. From April 2024, the post remained uncovered.

38.4. Ms Virgill never returned to work and left the Respondent's employment in or around August 2024. Her vacant post was advertised at the beginning of September 2024.

The Grievance Process

39. On 13 March 2024, and separate from the redundancy process, the Claimant raised a grievance regarding the level of contact during her sickness absence.

40. So far as relevant to the issues in this case, the following conclusion was reached by Dr Philip Barnes, the Respondent's Head of Sector Intelligence, in his grievance outcome letter to the Claimant of 30 April 2024 (at [273] of the Bundle):

> …I agree that you were quite reasonably expecting that call [of 7 February 2024] to concern wellbeing rather than redundancy. It is deeply regrettable that you were blindsided in this way and thus this aspect of your grievance is partially upheld.
>
> You told me that you were completely unaware that [the Respondent] was experiencing budget restraints, considering redundancies or had placed a freeze on recruitment, until being advised on the 7th February that my job had already been selected as at risk.
>
> I have considered this aspect of your grievance very carefully and I conclude that [you] would have been extremely unlikely to know of this information due to your sickness absence. This is because information regarding budget pressures on arm's length bodies such as [the Respondent] was mostly communicated verbally, typically at business update meetings, rather than formally by email. Consequently, this aspect of your grievance is upheld.

**Analysis & Conclusions**

Reason for Dismissal

41. It is for the Respondent to show, on balance, that the reason for dismissing the Claimant was a potentially fair one. In this case, the Respondent says that there was a genuine redundancy situation and that was the reason for ending the Claimant's employment.

42. As detailed above, the Respondent was dependent on funding from Welsh Government and was made aware that, due to the funding arrangements for 2024/25, it would have a budget deficit of £0.32m. It was a matter for the Respondent how it managed its business and its budgets. It needed to managed the shortfall in its funding and chose to do so by reducing its staff costs. That was a decision which was open to it and properly a matter for it to decide upon.

43. As such, at the time relevant to the Claimant's dismissal, there was a genuine redundancy situation, as defined by section 139 of the ERA 1996. In particular, the facts above led me to conclude that section 139(b) of the ERA 1996 was pertinent.

44. It was not suggested that any other reason existed for the Claimant's dismissal. The only issue to determine was whether there was a genuine redundancy situation. As I have concluded, from the evidence, that there was, I was also able to find that the Claimant's dismissal was by reason of a genuine redundancy situation.

45. The Claimant was dismissed for a potentially fair reason. I therefore went on to determine whether, in all the circumstances, the dismissal was fair.

Fairness of the Dismissal

46. In considering the fairness of the Claimant's dismissal, I considered three distinct issues – the selection pool, consultation and alternatives to redundancy.

47. The Respondent did not consult with the Claimant on the selection criteria nor was she given an opportunity to put forward her own views or discuss the selection criteria that was drawn up. The reason for that was explained in Ms Parrin's statement (at Paragraph 26):

> I noted that the 3 posts identified on this basis were all stand-alone roles, therefore the need to engage with affected colleagues to share and agree a set of proposed selection criteria for colleagues within the same at risk pool, was not appropriate as each of the selected posts were held by singular postholders, so this guidance within our Redundancy Policy was not relevant to these particular circumstances…

48. Save for the fact that three posts had been identified as at risk, occupied by three individuals, there was no other evidence of the Respondent applying its mind to which employees should be included in the pools of those at risk of redundancy. In respect of the proposals pertaining to the Claimant's post, there was only ever one person who was at risk of redundancy, the Claimant.

49. Whilst it is a matter for an employer to determine which posts and which employees are at risk in a redundancy situation, there are specific features which require consideration when a pool of one is adopted:

    49.1. A reasonable employer would be expected to have applied its mind to whether there were other employees within its organisation who should be pooled with the post-holder, in order to ensure fairness. That was not done by the Respondent. From the written and oral evidence, it was clear that the Respondent's view was, in effect,

that the Finance Assistant post was at risk and so the pool for selecting which employee was made redundant was limited to the post-holder. In contrast, a reasonable employer would have at least applied its mind to whether the pool should have been wider.

49.2. The Respondent should have consulted with the Claimant before deciding on a pool of one. Whilst a pool of one can be fair in appropriate circumstances, there is always the risk that deciding on the pool effectively determines who is being selected for redundancy. In those circumstances, it is incumbent on an employer, under the obligation to ensure that consultation is genuine and meaningful, to consult before deciding on the appropriateness a pool of one. The failure in this case by the Respondent rendered the decision on pooling unfair (since a reasonable employer would have consulted in advance of deciding on the pool).

50. A reasonable employer would have applied its mind to whether to include other employees with the Claimant in the selection pool. A reasonable employer would have either included other employees in the pool or provided reasons at the time for why it was limiting to the pool to only the postholder. The Respondent failed to do either.

51. A reasonable employer would have consulted in advance of deciding on a pool of one and, had it then decided on such a limited pool, would have done so having given the affected employee an opportunity to engage in genuine and meaningful consultation. The Respondent failed to consult in advance of the decision on pooling and failed to afford the Claimant an opportunity to put forward alternatives and suggestions in resect of pooling.

52. The consequences of the decision to adopt a pool of one was stark. If the Respondent decided to proceed with its plan to make the Finance Assistant post redundant, the Claimant, and only the Claimant, would lose her job. All that was left to consult on was whether or not the post would be lost and, if it was, whether the Claimant could secure alternative employment with the Respondent.

53. For those reasons, the decision to place the Claimant in a pool of one was unfair.

54. As can also be seen, that decision had a material, adverse impact on the fairness of the consultation process. An important aspect of the redundancy process had, in effect, been removed from consultation, namely that only the Claimant would be at risk of losing her employment because of the decision to make her post redundant.

55. As such, the focus of the consultation was largely on redeployment, as an alternative to the Claimant being made redundant.

56. The Respondent's redundancy policy detailed some of the options available to it avoid have to make compulsory redundancies. These included (at [33] of the Bundle):

    ▪ Restriction of external recruitment;

    …

    ▪ 'Ring-fenced' internal recruitment and redeployment to alternative work;

    …

    ▪ Voluntary redundancy; and

    ▪ Redundancy 'bumping'.

57. The Respondent alerted the Claimant to six vacancies during February and March 2024. These were advertised externally as well as internally. The Claimant was informed that, if she expressed an interest, she would be given priority over other applicants (at least in respect of the four vacancies advertised in February 2024).

58. Much was made of the fact that the Claimant did not apply for any of the vacant posts shared with her in February and March 2024. However, I found force in the Claimant's explanations that, at the time, she was still absent from work for health reasons and was more intent of trying to save her existing job. At that stage of the process, the Claimant was being informed that she was at risk but no final decisions had been taken. She had yet to have her first consultation meeting. She had been unaware that the Respondent was facing any financial difficulties until being told that her post was at risk of redundancy on 7 February 2024 (per the grievance outcome findings). As such, it was reasonable, so early in the consultation process, for the Claiamnt to first explore what could be done to maintain her existing post.

59. A reasonable employer would have applied its mind to freezing those recruitment exercises altogether, pending the outcome of the consultation process. It was reasonably foreseeable in February and March 2024 that there could be a need to explore redeployment in the very near future. It remained open to the Respondent, after giving due consideration, to decide to press on the with recruitment exercises as planned but a reasonable employer would have at least paused and considered whether pressing on was the most effective way of balancing the needs of the business with the obligation to avoid, so far as possible, mandatory redundancies.

60. I also noted that, in respect of the four vacancies shared with the Claimant on 8 February 2024, she was only given four days to express any interest in them. A reasonable employer would have considered giving the Claimant more time to consider the posts, in circumstances where the Claimant had only just leaned of the Respondent's financial challenges, had only just been informed that her post was at risk of redundancy and remained absent by reason of ill-health.

61. As noted above, the Claimant had asked about voluntary redundancies with a view to savings being made elsewhere in the organisation, such that mandatory redundancies could be avoided. She was informed, erroneously, that voluntary redundancy was not part of the Respondent's redundancy policy (it was, as reproduced above). She was also informed that it was not being offered.

62. In respect of voluntary redundancies, the Respondent's policy stated as follows (at [33] of the Bundle):

> In all cases the acceptance of a volunteer for redundancy will be a matter of [the Respondent's] discretion and the company reserve the right not to offer voluntary redundancy terms or to refuse an application where it is not in the interests of the company to do so.

63. It was entirely a matter for the Respondent whether or not to offer or accept voluntary redundancies. However, a reasonable employer operating the policy which the Respondent had in force at the time would have, at the very least, considered whether to offer voluntary redundancies and, having done so, have reasons for why it was choosing not to. The Respondent did not apply its mind to the issue of voluntary redundancies, in part because it appeared to be operating under the misapprehension that such an option was not available to it under its own policy.

64. In the alternative, if the Respondent did apply its mind to voluntary redundancies, it failed to provide any meaningful explanation as to how it had concluded that, for the purposes of this redundancy process, it was not to be offered.

65. It was noteworthy that at this time another employee, undertaking an administrative role, was enquiring about voluntary redundancy (Ms Virgill) and was also being told that it was not available. Again, that was a decision for the Respondent but a reasonable employer would have at least applied its mind to the possibility that acceding to her request and making Ms Virgill redundant might have contributed to the savings which needed to be found and avoided the need to make others redundant.

66. Ms Virgill was actively seeking to exit the Respondent's business. The Claimant as actively seeking to remain in the Respondent's business. They both undertook roles which involved a degree of administrative work.

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Up to the end of March 2024, Ms Virgill's role was being covered by way of a temporary postholder. It was a post which was not at risk of redundancy.

67. A reasonable employer, aware of Ms Virgill's desire to exit the business and the Claimant's desire to remain in the business, would have considered making Ms Virgill redundant and offering her post to the Claimant, by way of bumping. That seemed all the more so if, like here, bumping was explicitly referenced in the redundancy policy as something that could be considered to avoid mandatory redundancies.

68. Again, the criticism of the Respondent is not that they failed to make Ms Virgill redundant and offer her post to the Claimant. It is that they failed to give the option any thought.

69. Those failures were compounded by the fact that from April 2024, there was no one covering Ms Virgill's post. The temporary contract had ended and Ms Virgill remained on long-term sick leave. A reasonable employer would have considered whether that state of affairs could be utilised to avoid mandatory redundancies. No consideration appeared to have been given to offering that post, even on a temporary basis, to the Claimant. Instead, the post was not covered again until Ms Virgill left her employment in August 2024, at which point the Respondent sought to fill the vacancy by way of open recruitment.

70. The cumulative effect of those various flaws in the redundancy process led me to conclude that the decision to dismiss the Claimant by reason of redundancy fell outside of the range of responses open to a reasonable employer.

71. For all those reasons, the decision to dismiss the Claimant by reason of redundancy was unfair, contrary to section 94 of the ERA 1996.

Polkey & contributory conduct

72. I received submissions on both Polkey and contributory conduct. Whilst these are matters which go to remedy, not liability, it can be of assistance to parties for findings to made at this stage on those discrete issues, in order to assist any discussion which follow receipt of this judgment as to settlement.

73. On behalf of the Respondent, Mr Ogunshakin submitted that, even if there were procedural flaws in the redundancy process, the Respondent would have been entitled to reach the same conclusion even if the process had been fair (and also if the Claimant had exercised her right of appeal). As per the case law, that submission does not save the Respondent from a finding that the dismissal was unfair under the ERA 1996 but can have an impact upon the level of any compensatory award which follows.

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74. I had some difficulties with the Respondent's suggestion that the procedural flaws effectively made no difference to the eventual outcome, since, as detailed above, there were a number of important lines of enquiry which were never explored by the Respondent. Had the Respondent acted reasonably, it was conceivable that:

    74.1. The Claimant would not have been in a pool of one.

    74.2. There would have been a moratorium on external recruitment and/or the vacant posts available would have been offered to those at risk later in the consultation process (for example, when informing the Claimant that there was no alternative to her post being lost).

    74.3. Ms Virgill would have been made redundant (voluntary or mandatory) and the Claimant offered her vacant post.

    74.4. The Claimant would have covered Ms Virgill's vacant post from April 2024 and then been in a prime position to apply for the post on a permanent basis, when Ms Virgill left the business in August 2024.

75. In my judgment, this was a case where what might have happened is "*so riddled with uncertainty that no sensible prediction…can properly be made"* (per Software 2000 v Andrews, at [54]). For those reasons, it is not appropriate to make any adjustment to reflect the likelihood of the Claimant being dismissed by reason of redundancy in any event.

76. It is important to remember that, unlike a Polkey adjustment, contributory conduct can be relied upon to seek reductions to both the basic and compensatory awards for unfair dismissal. However, the test differs between each element of any award, as follows:

    76.1. The basic award may be reduced where the tribunal '*considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...*' (per section122(2) of the ERA 1996).

    76.2. The compensatory award may be reduced '*where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...*' (per section 123(6) of the ERA 1996).

77. As to any reduction for contributory conduct, Mr Ogunshakin relied upon the Claimant's decision not to express any interest in the six vacant posts brought to her attention during February and March 2024. That, in terms, was the relevant conduct relied upon by the Respondent.

78. Thereafter, consideration needed to be given to whether the conduct was culpable or blameworthy (when assessed objectively) and whether it caused or contributed to the Claimant's dismissal (per Steen v ASP Packaging Ltd UKEAT/0023/13/1707).

79. As found above, the vacancies relied upon were brought to the Claimant's attention at the beginning of the consultation process and before her first consultation meeting. The Claimant was on sick leave at the time and, as found in her grievance, she had been unaware that the Respondent was facing any financial difficulties until informed that her post was at risk on 7 February 2024. Four of the vacancies were brought to her attention on 8 February 2024 and the Respondent only gave the Claimant four days to express an interest.

80. The vacancies were advertised internally and externally, with the Claimant being informed that she would be given priority in any recruitment exercise.

81. At that time, it was reasonable and understandable that the Claimant wanted to explore consultation and understand what, if anything, could be done to avoid the loss of her existing role. A reasonable employer would have considered ring-fencing or pausing recruitment until the consultation process was more advanced. It was premature at that stage of the process to criticise the Claimant for not expressing an interest in other posts. In contrast, if suitable vacant posts had been circulated toward the end of the consultation process or once a decision had been made to make the Claimant's post redundant and the Claimant failed to apply, there would have been more force in the Respondent's arguments on contributory conduct.

82. As it was, in my judgment, there was nothing blameworthy or culpable in the Claimant's decision not to express an interest in those vacancies in February and March 2024.

83. For the same reason, the Claimant's failure to apply for any of those vacancies did not cause or contribute to her dismissal. In addition, and as detailed above, there were numerous other variables which could have avoided dismissal, over and above the Respondent's failure to consider pausing or deferring the recruitment process.

84. It follows that it is not appropriate to make an adjustment to any subsequent awards (basic and compensatory) by reason of contributory conduct.

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## Next Steps

85. In light of the finding that the Claimant was unfairly dismissed, the case will be listed for a further hearing to determine remedy. Further directions will be issued to prepare for that hearing.

**EMPLOYMENT JUDGE S POVEY**

**Dated: 11 December 2024**

Order posted to the parties on

03 January 2025

Katie Dickson

For Secretary of the Tribunals

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