THE INDUSTRIAL TRIBUNALS

CASE REF: 2106/16IT

CLAIMANT: **Janet Blades**

RESPONDENT: **Harvey Norman Trading (Irl)**

DECISION

The unanimous decision of the tribunal is that the claimant was unfairly dismissed on the grounds of redundancy and that her dismissal was also automatically unfair due to the failure by the respondent to comply with the statutory dismissal procedure. The tribunal awards the claimant £34,700.09 in compensation.

Constitution of Tribunal:

Employment Judge: **Employment Judge Wimpress**

Members: **Mr C McIlwaine**
Mrs M J McReynolds

Appearances:

The claimant was represented by Mr Philip Boomer.

The respondent was represented by Mr Einde O'Donnell of Purdy Fitzgerald Solicitors.

SOURCES OF EVIDENCE

1. The tribunal received witness statements from the claimant, Mr Robbie Auckram and Mr Philip Boomer. The claimant and Mr Auckram gave oral evidence and the tribunal received a bundle of documents from each party together with several additional documents which were produced during the course of the hearing.

THE ISSUES

2. The main factual and legal issues were helpfully set out following a Case Management Discussion which took place on 16 January 2017. The main legal issues were recorded as follows:

(1) Did the respondent unfairly dismiss the claimant by reason of redundancy contrary to Article 130 of the Employment Rights (Northern Ireland) Order 1996?

(2) Did the respondent discriminate against the claimant on grounds of her sex contrary to the Sex Discrimination (Northern Ireland) Order 1976 by unfairly selecting her for redundancy?

(3) Did the respondent treat the claimant less favourably than the Furniture Manager (Mark McAllister) on the ground of her sex by dismissing her?

(4) Is the claimant entitled to pursue compensation for dismissal under both the Employment Rights (Northern Ireland) Order 1996 and the Sex Discrimination (Northern Ireland) Order 1976?

(5) Did the respondent breach the claimant's contract of employment?

(6) Subject to the above, what (if any) compensation is the claimant entitled to receive?

The Record of Proceedings also noted that that the claimant accepted that she was dismissed because of redundancy and that she now complains only of her dismissal which she says was both unfair and a gender discriminatory dismissal. A further refinement of the sex discrimination issues was noted as follows:

(a) Was the fact that the claimant is a woman a significant reason for the employer's choice of her as the person to be dismissed?

(b) Was the fact that the furniture manager is a man a significant reason for the employer's choice of the claimant as the person (from among the two-person pool of redundancy candidates) to be dismissed?

Seventeen separate factual issues were identified which it is not necessary to set out here. Whilst we have found these helpful some did not require to be addressed by the tribunal on the case as presented by the parties.

In the course of a further Case Management Discussion on 16 March 2017 the same Employment Judge considered whether to require the respondent to provide the matrix associated with Mr Mark McAllister. On 4 April 2017 the Employment Judge gave a written ruling requiring this matrix to be produced and indicated that the main tribunal should permit the claimant to adduce oral evidence in chief to address this document.

THE FACTS

3. The respondent is large retail furniture and bedding business. The claimant commenced employment with the respondent as an Assistant Manager on 28 March 2008 in the Furniture and Bedding Division. In anticipation of stores opening in Newtownabbey and Holywood the claimant relocated to Belfast in August 2008. Having worked initially as a training manager in the Furniture and Bedding Department in Holywood she was appointed as Bedding Manager in the Holywood store on 1 January 2009 when the furniture and bedding department was split into two separate departments. The claimant remained in this role until the termination of her employment on 27 September 2016. The claimant's gross pay at the material time

was £730.74 per week which equated to £580.07 net. These figures included monthly bonuses based on performance assessed against Key Performance Indicators. In theory the claimant was also eligible for additional payments as part of a profit sharing arrangement but the claimant never benefitted from this as the respondent was making a loss at all material times. The claimant's employment terminated on 27 September 2016. She was not required to work a notice period.

4. The respondent decided to re-structure the business due to financial conditions and following a strategic review. This resulted in a reduction in the management structure at the Holywood site. The outworking of this decision was that the claimant was made redundant. The Furniture Manager, Mr McAllister, was given the new role of Store Manager and the separate Bedding Manager post was suppressed and subsumed into the Store Manager role.

5. The material provided by the respondent in the course of these proceedings included a pithy Redundancy Policy which read as follows:

> "Should it be necessary to reduce manpower every effort will be made to avoid job losses. The following are some of the measures that will be considered according to the circumstances prior to any redundancy/ies being effected:-
>
> - Recruitment freezes
> - Transfer to other work
> - Short term working
> - Lay off
>
> Notwithstanding the above it is recognized that circumstances may arise which leave the Company with no alternative to declare redundancy/ies. Where employees are made redundant, the prime consideration will be to protect the employment of as many people as possible, consistent with maintaining a fully efficient operation. Therefore, selection will be on the basis of retaining key employees required to maintain an efficient operation. The company may present and use a matrix against which employees will be measured and selection will occur. All else being equal, a policy of 'last-in, first-out' may apply. Should the need for redundancy arise, appropriate consultation will take place with staff involved."

6. On 8 June 2016 at 6.00 pm Mr Auckram the Bedding General Manager and Ms Dennis the Human Resources Manager met with the claimant. The meeting was the first stage in the redundancy process and the substance of the discussion is set out in a document entitled – "Individual Consultation Meeting". The purpose of the meeting was stated to be a formal and confidential discussion about the structure of the store management and what it meant to the claimant and her role. The document goes on to state that this was the first of a number of individual meetings to take place over the coming weeks and that its purpose is to ensure that she was clear about her options, including alternative roles or re-deployment within the planned new structure. The material portion of this document reads as follows:

> "The background to the changes is that the Holywood Bedding Department has the lowest turnover within the Bedding to the extent that we have identified that the business does not justify a Bedding Manager role. A similar format that we currently have in Boucher Road will now be introduced to the Holywood Store and this was identified during the company's annual strategic review. This store will now be managed by the Furniture Manager who will be

responsible for the day to day management of the current Team and will report to both Furniture & Bedding General Managers. As a result of this change, we are sorry to inform you that your role is at risk of redundancy."

The document went on to append a copy of the new organisation chart and to discuss the selection process for any alternative jobs that may be found. It further stated that a generous ex-gratia package would be offered in the event that the claimant did not wish to explore alternative jobs and that the respondent had decided to enhance the statutory redundancy package available.

7. On the same day and the same time the General Manager – Furniture, Mr Ryan Pheloung, met with the Furniture Manager, Mr McAllister for what was termed an "Individual Informative Meeting". It contained an identical description of the background but did not indicate that Mr McAllister was at risk of redundancy. As with the claimant's Individual Consultation Meeting Mr McAllister was informed that the store would now be managed by the Furniture Manager and that the Bedding Manager's role was at risk of redundancy. No mention was made of Mr McAllister's job being at risk of redundancy or alternative roles or re-deployment for him. It is therefore clear that at this point Mr McAllister was not considered by the respondent to be at risk of redundancy. Mr McAllister took up his new role shortly thereafter.

8. On 8 June 2017 the claimant sent an email to Ms Dennis in which she requested a copy of the redundancy selection criteria and posed a number of questions including how the restructuring selection criteria were applied to the two managers. The claimant also sought details of the enhanced statutory redundancy package.

9. On 17 June 2016 Mr Auckram responded to the email and explained why the Bedding Manager role could no longer be sustained. He stated that the Bedding Department at Holywood had the lowest turnover in the group and had suffered deep losses for many years. Mr Auckram went on to explain that in order to reduce costs it had been decided to no longer run bedding as a separate business unit and pointed out that the Boucher Road store operated without a dedicated bedding manager and had a similar management structure to the leaner one that they planned to implement at Holywood. Mr Auckram continued thus – "The selection for redundancy has therefore been made based on the role itself of bedding manager no longer being required for the store." Mr Auckram then referred to a list of other roles that had been provided to the claimant on 8 June 2016 and set out details of the enhancement to the statutory redundancy package.

10. On 20 June 2016 the claimant responded and asserted that the rationale provided in Mr Auckram's letter was significantly different from the explanation given at the consultation meeting and that the losses attributed to the bedding department were significantly lower than the losses sustained by the furniture department. The claimant went on to suggest that the consultation process was pointless as the Furniture Manager had been informed at his consultation meeting on 8 June 2016 that he had been appointed to the restructured manager post. The claimant suggested that Mr McAllister would therefore receive a financial benefit from her redundancy. The claimant further stated that that the currently available employment roles were not suitable as they involved unreasonable loss of status and remuneration and were based in a different jurisdiction. The claimant complained that she had been unfairly selected for redundancy and had been discriminated against on the ground of her sex by way of the process he had applied.

11. On 30 June 2016 Mr Auckram replied to the letter. He refuted the suggestion that different explanations had been given to the claimant and stated that the bedding department in Holywood had the highest percentage loss to sales in the company a figure which he put at 29.4% in the eleven months leading up to the end of May. He also stated that it had the lowest sales per square foot of all the units both north and south. The percentage loss of the furniture department in Holywood was 19.1% for the same period and the sales per square foot was 120.56 euros as compared with 103.76 euros for the bedding department which gave the furniture department a higher turnover. Mr Auckram also refuted the suggestion that the furniture manager would receive a financial benefit as a result of her redundancy. Mr Auckram sought to assure the claimant that the consultation period was not pointless and that they would consider all alternatives that she put forward. Mr Auckram advised that the consultation period was being extended to 19 July 2016 and invited the claimant to meet with him and Ms Dennis on that date to discuss any alternatives to redundancy that the claimant wished to put forward. There was no suggestion however that the decision to place the claimant at risk of redundancy would be changed or that Mr McAllister would be placed at risk of redundancy.

12. On 19 July 2016 the meeting took place as scheduled. Mr Boomer attended with the claimant. We have the benefit of two records of this meeting which provides a comprehensive picture of what occurred. In the course of the meeting an alternative role for the claimant, that of Floor Manager, was discussed. Mr Boomer indicated that it was not suitable as it would mean that the claimant would be working under employees whom she had trained and managed. According to Mr Boomer it would also involve a massive drop in pay. Mr Boomer stated that the claimant was preselected for redundancy and that all decisions were taken before consultation. The respective losses of the bedding and furniture departments were also discussed. The claimant and Mr Boomer asserted that the furniture department was making bigger losses than the Bedding Department. Mr Auckram replied that the Bedding Department's sales per square foot was less than any other bedding department. The claimant did not accept the validity of this comparison and stated that the Holywood Bedding Department had a larger floor area than any other bedding department. In addition, she contended that the bedding department in the north had no advertising or drive and a result comparison with stores in the South was pointless. According to the claimant this was Head Office's responsibility. There then followed a discussion about the impact of the claimant not having a second in command ("2IC") about which there was no meeting of minds. Mr Boomer maintained that that the redundancy process was seriously deficient with all decisions being made before the consultation. Mr Boomer suggested that the respondent needed to think about re-running the selection process. There was some further discussion about roles and pay rates. Mr Boomer also stated that there was a gender issue with a female being disadvantaged and a male being advantaged and that this constituted sex discrimination. The meeting then concluded.

13. On 2 August 2016 Ms Dennis wrote to the claimant and informed her that following the meeting she and Mr McAllister were scored "as per the attached matrix" and that she was not successful. The matrix referred to was divided into 12 categories but no scores were given in respect of either the claimant or Mr McAllister.

14. Ms Dennis advised that as a result she was writing to give the claimant formal notice of the respondent's decision to terminate her employment by reason of redundancy with effect from 27 September 2016. Ms Dennis advised that the notice period was to commence on 2 August 2016 but the claimant would only be required to work until 2 August 2016 with the remaining period being paid in lieu. The letter did not inform the

claimant that she had a right of appeal. Neither the claimant nor Mr Boomer raised any issue about the absence of an appeal. In his witness statement Mr Boomer described the meeting on 19 July 2016 as having been convened to allow the claimant to appeal the decision to declare her redundant but it is clear that it was nothing of the sort. As stated by both the claimant and Mr Auckram it was a consultation meeting.

15. The respective scorings on the matrix were not provided to the claimant until shortly before this claim was due to be heard. In a letter dated 16 March 2017 the respondent refused to provide Mr McAllister's scorings on the matrix on the basis that to do so would be in breach of the respondent's data protection obligations. At a Case Management Discussion on 16 March 2017 an Employment Judge ordered the respondent to provide the matrix completed in relation to the claimant. The Employment Judge also indicated that the respondent would be required to provide the matrix associated with Mr McAllister but only when the Tribunal Office had confirmed that particular direction in writing. In the event such confirmation was not provided until 4 April 2017 when the Record of Proceedings of the Case Management Discussion was issued. The claimant's matrix was provided by the respondent's solicitors in a letter dated 23 March 2017. The letter also responded to an Additional Information request made by the claimant's representative for details of when the alleged redundancy selection matrix was drafted and by whom. The response reads as follows:

> "The selection matrix was constructed by Mr Robbie Auckram and Mr Ryan Pheloung following a meeting on the 19th July 2016 wherein the Claimant and indeed her representative raised an issue with regard to the manner in which she had been selected for redundancy. On foot of the issue raised and in the interests of fairness the selection matrix was constructed and applied objectively. The matrix was constructed within a few days of the meeting on 19th July 2016."

In answer to a further question as to when the matrix was previously used the solicitors replied that it was used in 2014 at the respondent's store in Newtownabbey.

16. The information disclosed in the matrix in respect of each is set out below.

Metric	Mark McAllister	Janet Blades
Percentage of division sales LFY	8.1%	5.6%
Percentage of division GP LFY	8.7%	5.5%
Revenue Growth LFY	- 0.4%	11.1%
GP Growth LFY	7.9%	24.6%
Mystery shopping results LFY	87.7%	91.8%
Loss as percentage of sales LFY	20.0%	28.3%
Sales per square foot LFY	£97.13	£85.54
Profit Improvement LFY	£37,243	£48,733
Stocktake loss as percentage of sales LFY	-0.34%	-0.44%

Aged Stock 365 Days by Product	11.7%	9.1%
Daylight (most recent stocktake)	7.5%	8.4%
Wages as Percentage of Sales LFY	8.1%	10.2%
Metrics with better performance	8	4

17. As appears from these scores Mr McAllister was considered to have outperformed the claimant in 8 of the metrics and the claimant outperformed Mr McAllister in 4 of the metrics. In her evidence to the tribunal the claimant disagreed with the metrics in respect of which Mr McAllister was recorded as scoring higher than her.

18. With regard to possible alternative roles within the business it was a matter of contention as to whether a Furniture Manager post in Carrickmines, Dublin was available at the material time. The claimant gave evidence that this post had been vacant since May 2016 and was not filled until 28 June 2016 when Kevin McCrudden, an employee of the respondent in its Boucher Road store, was appointed to the position. The claimant contended that she ought to have been considered for this post as her Individual Consultation Meeting took place on 8 June 2016 which in terms of timing took place was half way between the post at Carrickmines being advertised and filled. The claimant did put forward alternative employment suggestions at the consultation meeting on 19 July 2016 but this took place approximately three weeks after the post in Carrickmines was filled.

RELEVANT LAW

Redundancy

19. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provides that:-

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
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> *(a) the reasons (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within Paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this paragraph if it –*
>
> *...*
>
> *(c) is that the employee was redundant,*
>
> *...*
>
> *(4) Where the employer has fulfilled the requirements of Paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

20. A redundancy is defined in Article 174 of the 1996 Order as follows:

174(1) for the purposes of this Order an employee who is dismissed shall be taken to be dismissed by reason of redundancy if a dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) *to carry on that business in the place where the employee was so employed, or*

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

21. The Employment Appeal Tribunal in ***Williams v Compair Maxam Ltd [1992] ICR 156*** listed the principles which, in general, reasonable employers adopt when dismissing for redundancy employees who are represented by independent trade unions. Those principles can be adapted where the employee is not represented by a recognised trade union. They are as follows:-

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for

selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

22. These guidelines were expressly approved in **Robinson v Carrickfergus Borough Council [1983] IRLR 122**, a decision of the Northern Ireland Court of Appeal.

23. In ***Langston v Cranfield University [1998] IRLR 172***, the Employment Appeal Tribunal held that, so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being an issue in every redundancy unfair dismissal case.

24. In the decision of the Employment Appeal Tribunal in the case of ***Halpin v Sandpiper Books Ltd [2012] UKEAT/0171/11***, it was confirmed that the correct approach to dealing with redundancies is set out in ***Williams v Compair Maxam Ltd [1982] IRLR 83***. It also confirmed that decisions as to pools and criteria are matters for management and rarely will it be for an employment tribunal to interfere with any such decisions.

25. In ***Taymech v Ryan [UKEAT/0663/94]***, Mummery J, as he then was, said on the issue of the basis of the pool for selection:-

"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how a pool should be defined is primarily a matter for the employee to determine. It would be difficult for the employee to challenge it, where the employer has genuinely applied his mind to the problem."

26. In ***Capita Hartshead Ltd v Byard [UKEAT/0445/12]*** it was held:-

"(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

27. A tribunal is not entitled to substitute its view for that of an employer, who has genuinely applied his mind to the said issue (see further ***Family Mosaic Housing Association v Badman [UKEAT/10042/13])***.

28. In ***Fulcrum Pharma (Europe) Ltd v Bonassera [UKEAT/0198/10]*** there was no criticism of the management decision to have a pool of two, the employer's failure related to the failure to consult on the size of the pool. Similarly, in ***Halpin v Sandpiper***

Books Ltd since the claimant was the only employee based in China, the respondent's decision to make the post redundant was correctly based 'on a pool of one'.

29. Where redundancy arises in consequence of a re-organisation and there are new roles to be filled, it is recognised (see *Tolley's Employment Law Handbook Paragraph 53.11*) that an employer's decision is likely to centre upon the assessment of the ability of the individual to perform in the new role – especially where appointment to a new role is likely to involve something more akin to an interview process than a traditional selection process. Although the tribunal is entitled to consider how far the process was objective, it should recognise that the decision as to which candidate will perform best in the new role will involve a substantial element of judgment (***Morgan v Welsh Rugby Union [2011] IRLR 376***). Similarly, when an employee is interviewed for an alternative role, the tribunal is entitled to consider how far the process was objective but should recognise that the decision as to which candidate will perform best in the new role will involve a substantial amount of judgment on the part of the employer and there is no obligation to always use objective criteria (***Samsung Electronics (UK) Ltd v Mote-D'Cruz [2012] UKEAT/0039/11***). The Employment Appeal Tribunal emphasised a finding of unfair dismissal in such a case should not turn upon the minutiae of good interview practice.

30. In ***Polkey v AE Dayton Services Ltd [1988] ICR 142*** the Court stated:-

> *"In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation ... it is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that in the exceptional circumstances of the particular case, procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."*

31. In ***Mugford v Midland Bank [1997] IRLR 208***, the EAT stated:-

> *"It will be a question of fact and degree for the tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee."*

32. In the case of ***Robinson v British Island Airways Ltd [1977] IRLR 477***, a new, higher level post was held to be 'in a different league' from the existing post and a redundancy situation was created. Thus a redundancy situation can arise where the upgrading of a post involves a change in the kind of work required and thereby creating a redundancy situation by reducing the need for 'lower level' work.

33. The Employment Appeal Tribunal in the case of ***Hakki v Instinctif Partners Ltd [2014] UKEAT/0112***, HH Judge Clarke has again emphasised, following ***Murray v Foyle Meats Ltd*** and ***Safeway Stores Ltd v Burrell***, -

> *"... the question is whether there is a reduction, actual or anticipated, in the employer's requirement for employees to do work of a particular kind". Here the Judge found as fact that the requirement for an employee to do the*

claimant's old job, was going to be replaced by two materially different jobs. In fact the work increased, as did the employees to do it. But there was nevertheless a state of affairs which rendered the role performed by the claimant redundant. Examples in the cases may be found in ***Robinson v British Island Airways Ltd*** *... and* ***Murphy v Epsom College****. In both cases, following a re-organisation, the new job differed from the old job. The requirement of the employer for an employee to do work of a particular kind, the claimant's old job had gone or was expected to go…"*

34. In **Rowell v Hubbard Group Services Ltd [1995] IRLR 195** Judge Levy QC in the context of the requirements of fair consultation emphasised that consultation with an employee in the context of dismissal for redundancy must be fair and genuine. Judge Levy QC also cited with approval a passage in Glidewell LJ's judgment in R v British Coal Corporation and Secretary of State For Trade and Industry ex parte Price and others,[1994] IRLR 72 as follows:

> "24 It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex-parte Bryant, reported, as far as I know, only at {1988} Crown Office Digest p.19, when he said:
>
> > `Fair consultation means:
> >
> > (a) consultation when the proposals are still at a formative stage;
> >
> > (b) adequate information on which to respond;
> >
> > (c) adequate time in which to respond;
> >
> > (d) conscientious consideration by an authority of the response to consultation.'
>
> 25 Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

35. Article 130A of the 1996 Order is concerned with the procedural fairness of dismissals. Employees are regarded as unfairly dismissed if the statutory dismissal procedure was not complied with and the failure to comply was attributable to the employer. By Article 130A (1) of the 1996 Order where the statutory dismissal procedure is applicable in any case and the employer is responsible for non-completion of that procedure, the dismissal is automatically unfair. A tribunal is required to consider whether the dismissal is automatically unfair under article 130A even where this issue has not been specifically raised by the claimant - see ***Venniri v Autodex Ltd (EAT 0436/07)****.*

36. When considering the termination of any employment the employer must follow the three-step procedure set out in Schedule 1 of the 2003 Order. Paraphrasing that schedule, the procedure for a redundancy dismissal is:-

"(i) The employer must set out in writing the circumstances which lead him to contemplate dismissing the employee as redundant, and must send a copy to the claimant and invite the employee to a meeting to discuss it.

(ii) There must be a meeting. The employee must be told of the decision and of his right to appeal.

(iii) If the employee wishes to appeal, there must be an appeal meeting and the employee must be told of the decision."

37. Article 17 of the Employment (Northern Ireland) Order 2003 ('the 2003 Order') provides for adjustment of awards made by industrial tribunals where the claim relates to any of the jurisdictions listed in Schedule 2 of that Order. Unfair dismissals are included in that Schedule. Where a tribunal finds that a failure to complete the statutory procedure is attributable to failure by the employer, it may increase any award it makes to the employee by between 10% to 50% if the tribunal considers it just and equitable in all the circumstances to do so unless there are exceptional circumstances which would make an increase of that percentage unjust or inequitable. This only applies to the compensatory award.

38. In **Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601** Mr Justice Elias set out the following principles in relation to compensation at paragraph 54:

"(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.

(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.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) 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.

(7) Having considered the evidence, the Tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

Sex Discrimination

39. The Sex Discrimination (Northern Ireland) Order 1976 ("the 1976 Order"), Article 3, provides as follows:-

"(2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if –

(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man."

Article 8 (2) of the 1976 Order provides as follows:-

"(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her –

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment."

Burden of Proof

40. Article 63 A of the 1976 Order states:-

"(2) Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that respondent –

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment against the complainant, the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, he is not to be treated as having committed that act."

The Court of Appeal in England and Wales in ***Igen v Wong [2005] IRLR 258*** considered the equivalent provisions to the Northern Ireland statutory provisions in a sex discrimination case and approved, with minor amendment, the guidelines set out in ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332***. The Northern Ireland Court of Appeal has given approval to ***Igen v Wong*** and the two-stage process, inter alia, in the case of ***Bridget McDonagh & Others v Samuel Thom t/a The Royal Hotel Dungannon [2007] NICA 3***. There, the Court of Appeal, in reference to this two-stage process stated:

"The first stage required the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination against the complainant. The second stage, (which only came into effect if the complainant had proved those facts) required the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld"

Igen v Wong has been the subject of a number of further decisions, including ***Madarassy v Nomura International Plc [2007] IRLR 246***, a decision of the Court of Appeal in England and Wales, and ***Laing v Manchester City Council [2006] IRLR 748***, both expressly approved by the Northern Ireland Court of Appeal in ***Arthur v Northern Ireland Housing Executive and SHL (UK) Ltd [2007] NICA 25***.

41. In ***Madarassy***, part of the judgement of the Court of Appeal, per Mummery LJ reads (at paragraphs 56, 57, 71 and 72) as follows:-

"56. *The court in* ***Igen v Wong*** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an*

unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. *"Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage…. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required ……. and available evidence of the reasons for the differential treatment.*

…

71. Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.

72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in ***Laing*** *(at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".*

42. Accordingly, matters normally involve a two-stage analysis of the evidence but this does not prevent the tribunal at the first stage from drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. It is not necessary in every case for the tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the ***Igen v Wong*** test.

43. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. Unreasonable treatment might be evidence of discrimination such as, if applicable, to engage stage two in ***Igen v Wong***. The mere fact that the claimant might have been treated unreasonably however does not of itself suffice to justify an inference of unlawful discrimination to satisfy stage one; per Lord Browne-Wilkinson in ***Zafar v Glasgow City Council [1997] IRLR 229***:-

> '*it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'*

44. Any inference is then drawn not from the unreasonable treatment of itself but rather from the failure to provide a non-discriminatory reason for it. If the employer does properly demonstrate that the reason for the less favourable treatment has nothing to do with the prohibited ground that discharges the burden at the second stage, however unreasonable the treatment.

SUBMISSIONS

45. Both parties provided helpful written and oral submissions. Their written submissions are appended to our decision.

Claimant's Submissions

Evidential Issues

46. On behalf of the claimant Mr Boomer alleged that the respondent's evidence was inconsistent, contradictory, evasive, incoherent and fabricated in significant respects. Mr Boomer also attacked the respondent's failure to call material witnesses namely Ms Dennis and Mr Pheloung. Mr Boomer submitted that the tribunal could draw adverse inferences from the failure to call them as witnesses.

Redundancy

47. Mr Boomer submitted that the respondent had failed at every stage of the redundancy process - consultation, selection and consideration of alternative employment. Mr Boomer emphasised that the approach was no different in a case involving a reorganisation and appointment to new positions.

48. Mr Boomer submitted that the best guidance was to be found in **Williams v Compair Maxim Ltd**. In relation to consultation Mr Boomer drew attention to **R v British Coal Corporation ex parte Price** in which the court held that fair consultation meant consultation whilst proposals were still at a formative stage, adequate information upon which employees can respond, adequate time in which to respond and conscientious consideration of the response to consultation. Mr Boomer drew attention to the Employment Appeal Tribunal's decision in **Morgan v Welsh Rugby Union** in which it distinguished **Williams** on the basis that the appointment to new roles after a re-organisation may involve a substantial element of judgement on the part of the employer. Mr Boomer went on however to refer the tribunal to the decision of the Employment Appeal Tribunal in **Green v London Borough of Barking & Dagenham** in which it was held that the approach adopted in **Morgan** must not be elevated to a rule of law and that employment tribunals must always direct themselves back to Article

130(4) unvarnished and review whether the decisions made and the process fell within the range of reasonable responses. Mr Boomer submitted that in the present case the respondent had failed in every respect of the three standard stages of a redundancy process namely consultation, selection and suitable alternative employment. Consultation must not mean simply going through the motions and there must be genuine engagement long before any final decision is made and a genuine consideration of any response. Mr Boomer submitted that in the present case there was no genuine consultation as the decision to dismiss the claimant and appoint Mr McAllister as store manager had been taken before the claimant was notified that she was potentially redundant on 8 June 2016. Mr Boomer submitted that the purported consultation process did not start until 17 June 2016 and was nothing more than the respondent going through the motions in order to garner a defence as was the appeal meeting on 19 July 2016.

49. Mr Boomer placed reliance on Mr Justice Silber's review of the authorities in **Capita Heartshead Ltd v Byard [2012] IRLR 814 EAT** in relation to the relevant pool for redundancy.

50. Mr Boomer submitted that Mr Auckram did not give genuine consideration as to who should be made redundant and admitted that the respondent had not applied a fair redundancy process and that using the matrix from the start would have been a better means of determining the redundancy. Mr Boomer went on to submit that Mr Auckram gave conflicting evidence about when and how the matrix came into being. He contrasted Mr Auckram's assertion that the matrix was constructed a few days after the meeting on 19 July 2016 with his evidence that it was constructed seven years previously and was used in a redundancy situation in the respondent's Dundalk store. This was not mentioned in Mr Auckram's witness statement or in the respondent's replies to the requests for discovery and additional information.

51. Mr Boomer also placed reliance on Mr Auckram's oral answer to a question posed by the tribunal that it was the company rule that in redundancy situations the larger size of the business takes over and that Mr McAllister was not considered for redundancy because he had a larger turnover and could deal with more customers. Mr Boomer criticised the respondent for not informing the claimant that this was the basis for placing her at risk of redundancy which was substantially different from the grounds set out in the correspondence notifying her of her redundancy. Nor is size mentioned in the respondent's Redundancy Policy. On this basis he submitted that the question arises as to why the matrix was necessary at all. Mr Boomer also drew attention to Mr Auckram's inability to explain why the matrix was not used initially at Holywood and he challenged the suggestion that it was used after 19 July 2016 on the basis that the claimant was not notified of this and at no time was Mr McAllister put at risk of redundancy. Mr Boomer submitted that both the claimant and Mr McAllister should have been placed in the redundancy pool as the Store Manager post was a new post.

52. Mr Boomer drew attention to the claimant's evidence that her performance was in fact better in the majority of the metrics contained in the matrix and submitted that in any event the matrix was a fabrication which was being used to justify a decision which was not taken on an objective basis.

53. Mr Boomer also criticised the respondent's failure to offer the claimant suitable alternative employment. He submitted that the only direct offer made, that of Floor Manager in the Bedding Department, was unsuitable and that the claimant should have been offered the vacant Furniture Store Manager post in Carrickmines. Alternatively

the respondent should have implemented a moratorium on recruitment as required by its own Redundancy Policy.

54. Overall and applying the relevant case law Mr Boomer contended that the respondent's actions did not fall within the range of reasonable responses open to the respondent. Additionally Mr Boomer submitted that the respondent had not called any evidence to show that the requirements of its business for employees to carry on work of a particular kind had ceased or diminished or was expected to cease or diminish given that the Bedding Department in Holywood continues to operate without any obvious change.

Compensation

55. With regard to compensation Mr Boomer submitted that the tribunal should award two years future loss in addition in addition to the financial cost incurred by the claimant up to the date of hearing. Mr Boomer further submitted that the tribunal should award compensation for loss of pension benefits, loss of profit share as well as bonuses/future bonuses and breach of contract. In respect of breach of contract Mr Boomer submitted that the tribunal should consider making a similar award to that made in **Kinnear v Marley Eternit t/a Marley Contract Services ETS/4105271/2016** namely £25,000 in light of the respondent's casual, slapdash and dismissive attitude towards the claimant's employment and her employment contract.

Discrimination

56. In relation to discrimination Mr Boomer submitted that the claimant was treated differently and less favourably than Mr McAllister and Mr Eamonn McFadden. Mr Boomer submitted that the claimant had proved facts from which the tribunal could properly conclude that the respondent had discriminated against her in the arrangements made for the redundancy of her post. Mr Boomer relied in particular on the admitted absence of investigation as to who should be put in the redundancy pool and the promotion of Mr McFadden to the Store Manager post in the new Boucher Road store following the closure of the Newtownabbey store without any redundancy exercise. Mr Boomer also relied on the respondent's refusal to offer the Store Manager post in Rathmines. Mr Boomer submitted that on the basis of these facts the tribunal could conclude that the respondent was guilty of sex discrimination in the absence of an adequate explanation by the respondent and that this was sufficient to pass the burden to the respondent to prove that it did not commit a discriminatory act. Mr Boomer correctly referred the tribunal to the relevant case law on this topic and the principles derived therefrom. Mr Boomer submitted that the respondent had failed to provide anything approaching a cogent or non-discriminatory explanation for the treatment afforded to the claimant. Mr Boomer characterised the respondent's defence in this regard as no more than an assertion that it would not discriminate because its CEO was female. Mr Boomer also described a statement purportedly made by the CEO as a fabrication and criticised the respondent's reliance on statistics which he claimed had no probative value. He also cast doubt on the validity and authenticity of the management reports produced by the respondent in support of its decision. Mr Boomer sought to contrast these with the "indisputably original" reports produced by the claimant. In terms of compensation for injury to feelings Mr Boomer submitted that the award should fall within the top band range of the **Vento** guidelines.

Respondent's Submissions

57. On behalf of the respondent Mr O'Donnell firstly addressed the submission that the tribunal should draw an adverse inference from the respondent's failure to call certain

witnesses. Mr O'Donnell submitted that in compliance with the Overriding Objectives he called only such evidence that was necessary and proportionate to a just determination of the issues and that the respondent therefore deemed it unnecessary to call a succession of witnesses to give the same evidence.

Redundancy

58. In relation to unfair dismissal Mr O'Donnell submitted that it was clear that a redundancy situation existed and that this was not disputed by the claimant or Mr Boomer who based their case on this. Mr O'Donnell placed reliance on the financial performance of the Bedding Department and the group wide organisational restructure which resulted in the respondent's other stores no longer having a dedicated Bedding Store manager. According to Mr O'Donnell the question for the tribunal was whether the respondent acted fairly and reasonably in effecting the redundancy which he submitted it did.

Selection Process

59. According to Mr O'Donnell the evidence clearly showed that the claimant was selected for redundancy for a number of reasons – (i) the financial performance of the Bedding Department, (ii) the overall group wide organisational structure in which Bedding Department managers were no longer employed and (iii) the relative size of the Bedding Department as compared with the Furniture Department. Mr O'Donnell submitted that a redundancy pool of one was sufficient as long as to do so was within the range of reasonable responses which he submitted it was and that the question of how a pool should be defined is primarily a matter for the employer to determine. Mr O'Donnell further submitted that it was difficult for an employee to challenge the pool where the employer had genuinely applied his mind to the issue which he submitted had been done and the decision to restrict the pool to the claimant was both within the range of reasonable responses and based on objective criteria and issues. Mr O'Donnell submitted that when the claimant then raised issues about the matter the pool was increased to two to include Mr McAllister and that the subsequent use of the matrix ameliorated any issue about the initial decision to place only the claimant at risk of redundancy. Mr O'Donnell submitted that the matrix was based on objective criteria and that these were applied in a fair and objective manner to the claimant and Mr McAllister. Mr O'Donnell refuted Mr Boomer's contention that the claimant scored higher than Mr McAllister in the majority of metrics and took issue with the suggestion that the respondent's documentary evidence was fabricated. Mr O'Donnell equated this with an allegation of fraudulent activity and drew attention to the need for clear evidence to prove such an allegation which he submitted was absent in the present case.

Consultation

60. Mr O'Donnell submitted that a consultation process was entered into with the claimant which commenced with the initial consultation meeting on 8 June 2016 and continued thereafter up to and including the final consultation meeting on 19 July 2016 in the course of which the claimant was given the opportunity to raise issues regarding the initial decision to place her at risk of redundancy which she did. These issues were taken on board by the respondent and led to the implementation of the redundancy selection matrix. Mr O'Donnell also addressed the claimant's contention that she should have been consulted about the content of the redundancy selection matrix and submitted that even if this was unfair it would not have made any difference as it was clear that these criteria were objective and were marked in a reasonable and fair

manner. Accordingly even if the consultation period was deemed insufficient or conducted in a different manner it would have made no difference to the outcome.

Compensation

61. In terms of future loss Mr O'Donnell submitted that any award should reflect that the claimant is likely to obtain an equivalent job in the near future. Mr O'Donnell further submitted that any award should reflect that the evidence established that even if the alleged procedural failings were proved the dismissal might have occurred in any event and that the tribunal should express its views in percentage terms. Mr O'Donnell also submitted that the claimant had failed to adduce evidence regarding her efforts to mitigate her loss.

Discrimination

62. Mr O'Donnell noted that during her oral evidence the claimant made no reference to being treated less favourably on the ground of her sex. In addition, she had failed to identify Mr McFadden as a comparator in her claim form and thus the issue was not properly before the tribunal and was out of time. Mr O'Donnell further submitted that there was no evidence to support the allegation of sex discrimination and that even if the tribunal was satisfied that the redundancy process was procedurally flawed it does not automatically follow that this was as a result of discrimination. It was not sufficient for the claimant simply to establish a difference in status and a difference in treatment. A mere possibility of sex discrimination was not sufficient to shift the burden of proof to the respondent. Mr O'Donnell drew attention to the clear evidence given as to the reasons why the claimant's role was placed at risk of redundancy – (i) the financial performance of the Bedding Department, (ii) the overall group wide organisational structure in which Bedding Department managers were no longer employed and (iii) the relative size of the Bedding Department as compared with the Furniture Department which he submitted were clearly objective and in no way related to the claimant's sex. In addition, the final decision to make the claimant redundant was based on the objective criteria contained in the matrix and that even if was held that the burden had shifted the respondent had clearly established a non-discriminatory explanation for its actions. Mr O'Donnell further submitted that statistics produced by the respondent to show that it employed persons of different characteristics was of evidential value. Finally, Mr O'Donnell pointed out that the claimant had given no evidence as to injury to feelings and accordingly no award could be made under this heading.

Conclusions

Unfair Dismissal

63. The issue in a nutshell is whether the claimant was unfairly selected for redundancy. A redundancy situation arose as in consequence of the respondent's decision to suppress the Bedding Manager post was and subsume it into the new Store Manager role. The parties were both in agreement that the claimant was dismissed on a potentially fair ground namely by reason of redundancy and we are satisfied that this was indeed the case.

64. On 8 June 2016 Mr McAllister was informed at an Individual Information Meeting that he was to be made Store Manager. It is clear from the contents of the script and the oral evidence of Mr Auckram that there was no threat to his job. On the same date the claimant was informed at an Individual Consultation Meeting that she was at risk of

redundancy. She was also told that Mr McAllister was to be the Store Manager. Mr Auckram made clear that her job was at risk and he provided her with a list of alternative roles. No explanation was given as to how this decision was arrived at. Nor was any mention made of the strategic review or the use of a matrix to make a selection for redundancy notwithstanding the reference to the possible use of such a matrix in the Redundancy Policy.

65. When Mr Auckram was subsequently challenged by the claimant and Mr Boomer about the use of the matrix he stated that the metrix exercise was undertaken in the interests of transparency and fairness. It is clear however that the process was very far advanced by that stage and we are not satisfied that this was a genuine attempt to re-run the process. Rather it seems to us that the aim of this exercise was not to reconsider its decision to appoint Mr McAllister and make the claimant redundant but rather to support it.

66. The claimant did not receive either her own scores or Mr McAllister's before her employment came to an end. The suggestion that the respondent was precluded from providing this material to the claimant due to data protection issues while possibly valid in respect of Mr McAllister should not have inhibited the respondent from giving the claimant her own scores.

67. Had the outcome the matrix exercise been different the respondent would have been placed in a difficult position having already appointed Mr McAllister to the Store Manager post. Mr Auckram rather unconvincingly sought to suggest that the decision making process would have to revisited. We do not believe that this would have occurred. We regard the whole process as a sham and the absence of the opportunity for the claimant to appeal the decision, which we will come to, reinforces this impression.

68. We heard a lot of evidence about the matrix much of which we have found difficult to assess. The Court of Appeal and the Employment Appeal Tribunal have sensibly discouraged tribunals from undertaking a close scrutiny of judgemental criteria (**Green Eaton Ltd v King [1995] IRLR 75, EAT**). The matrix scores were not however the basis on which the respondent selected the claimant for redundancy in the first place and we are satisfied that the respondent never genuinely engaged in the consultation process in an open minded manner. Evidence of this mind-set is the failure to either inform Mr McAllister that the process was being re-run or to notify him that he was at risk of redundancy. The plain fact of the matter was that he was never at risk. We are unable to accept or believe Mr Auckram's contention that this would have been the case if the matrix had worked out in favour of the claimant.

69. At the consultation meeting on 19 July 2016 the respondent's focus was on suitable alternative employment. Mr Boomer suggested that the selection process should have been re-run. In our view this is what a reasonable employer would have done. Instead what was essentially a checking exercise was undertaken. We do not regard Mr Auckram's assertion that Mr McAllister's job would have been under threat as credible. The situation could have been corrected by starting the matter afresh but this was not considered.

70. Following the meeting on 19 July Ms Dennis wrote to the claimant and gave her formal notice that her employment was being terminated by reason of redundancy with effect from 27 September 2016. The letter made no mention of the claimant's right to appeal the decision and this renders the dismissal procedurally unfair as the right to appeal is a fundamental aspect of a fair dismissal process.

71. The criticism of the respondent's alleged failure to offer the claimant suitable alternative employment is also well founded. The obligation is important and is an essential component of the required consultation. In fairness to the respondent it did offer the claimant a managerial role that of Floor Manager in the Bedding Department albeit that this was a lower status role with considerably less remuneration. However, this would have resulted in the claimant working under staff that she had trained and managed. It was therefore entirely understandable that the claimant rejected this role and we are satisfied that the claimant was justified in not accepting this role even on a trial basis as it could not be considered suitable alternative employment in view of the substantial reduction in pay, grade and status. In relation to the managerial post in Carrickmines, we are satisfied that it was not available at the relevant time.

72. As indicated above we consider that the consultation process was a sham and on this basis we conclude that the claimant was unfairly dismissed and is entitled to compensation. In so finding we have had regard to the proper approach to consultation as described by Judge Levy QC in **Rowell v Hubbard Group Services Ltd.** The dismissal was also procedurally unfair due to the failure to offer the claimant an appeal.

73. In view of our finding that the decision to dismiss the claimant was procedurally unfair due to the absence of an appeal it is clear that the respondent also failed to comply with the minimum three-step procedure set out in Schedule 1 of the 2003 Order. While the respondent complied with Step1 by setting out in writing the circumstances which led it to contemplate dismissing the claimant as redundant and invited her to a meeting to discuss it, it failed to comply with Step 2 because although the claimant was told of the respondent's decision she was not informed of her right to appeal the decision. As a result there was no appeal meeting as required by Step 3. The claimant's dismissal was therefore automatically unfair due to the failure of the respondent to adhere to the statutory procedure. The fact that neither the claimant nor her representative challenged this failing or sought to bring an appeal in any event does not detract from or minimise the seriousness of this breach of the statutory procedure.

74. We do not consider that a Polkey deduction is appropriate in this case as the process was so fundamentally flawed that it is impossible to assess what the outcome might have been had a fair procedure been adopted particularly in view of our finding that the process conducted by the respondent was a sham. This is most certainly not a case in which the tribunal can conclude that the same outcome would have resulted if a fair process had been undertaken.

Sex Discrimination

75. In ***Igen*** the Court of Appeal cautioned Tribunals, '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*'. In the present case we are not satisfied that the claimant has proved facts which would enable to tribunal to consider shifting the burden of proof. Mr McAllister is the obvious comparator having been chosen to fill the newly created General Manager role. Whilst it is clear that the claimant was treated less favourably than Mr McAllister there is no persuasive evidence that this was on the basis of a protected characteristic namely sex. The mere fact that the claimant is a female and Mr McAllister is a male who was more favourably treated is not in itself sufficient to discharge the burden. Nor are we prepared to infer from the failure to consult properly or the other matters that were drawn to our attention by Mr Boomer that the claimant was less favourably treated because of her sex. As Mr O'Donnell put it not all unreasonable behaviour is evidence of discrimination.

76. The claimant belatedly sought to introduce Mr McFadden as a comparator for the first time in her evidence to the tribunal. No mention was made of Mr McFadden as a potential comparator in the claim form, the correspondence, the discovery sought or particulars requested by the claimant. This is an unsatisfactory state of affairs. However, on the basis of the evidence that we have received and heard we are not satisfied that Mr McFadden is an appropriate comparator as he worked in a different store and in a different role to the claimant. We do not therefore consider that the claimant has established facts from which the tribunal could conclude that that she was treated less favourably than Mr McFadden on the basis of her sex and thus the burden does not pass to the respondent to prove that it did not discriminate against the claimant.

77. As we have noted the respondent submitted that in the event that the tribunal found that the claimant had been discriminated against on the ground of her sex no award should be made under this heading as no additional financial loss accrued as a result no evidence was given of injury to feelings. In view of our finding that the respondent did not discriminate against the claimant on the ground of her sex it is not strictly necessary to resolve this issue. Our inclination however would have been to make an award in favour of the claimant if she had succeeded in making out her sex discrimination claim notwithstanding the absence of evidence of injury to feelings. However, as injury to feelings did not feature in the claimant's written or oral evidence this would undoubtedly have served to confine any award to a modest amount.

SUMMARY

78. Dealing with the legal issues set out at paragraph 2 above our conclusions may be summarised as follows:

(1) The respondent unfairly dismissed the claimant by reason of redundancy contrary to Article 130 of the Employment Rights (Northern Ireland) Order 1996. The matrix process was a sham and the dismissal was procedurally unfair due to the failure to offer the claimant an appeal and no appeal therefore taking place.

(2) The respondent did not discriminate against the claimant on grounds of her sex contrary to the Sex Discrimination (Northern Ireland) Order 1976 by unfairly selecting her for redundancy.

(3) The respondent did not treat the claimant less favourably than the Furniture Manager (Mark McAllister) on the ground of her sex by dismissing her.

(4) The fact that the claimant is a woman was not a significant reason for the employer's choice of her as the person to be dismissed.

(5) The fact that the furniture manager is a man was not a significant reason for the employer's choice of the claimant as the person (from among the two-person pool of redundancy candidates) to be dismissed.

(6) As we have found that the respondent did not discriminate against the claimant on the grounds of her sex we do not need to determine whether she was entitled to pursue compensation for dismissal under both the Employment Rights (Northern Ireland) Order 1996 and the Sex Discrimination (Northern Ireland) Order 1976.

(7) We have not found that the respondent breached the claimant's contract of employment.

(8) The issue of what compensation the claimant is entitled to is addressed separately below.

Remedy

79. The claimant is 48 years of age and had more than 10 years of completed service with the respondent. The claimant's gross weekly pay was £730.74 and her net weekly pay was £580.07. At the time of the claimant's dismissal the statutory limit on a week's pay was £479.00. The claimant had a theoretical entitlement to 25% profit share and bonuses. The respondent had not operated at a profit for some time and therefore the question of a profit share does not arise. The bonus element is included in the claimant's weekly pay. The claimant received a redundancy payment of £5,250.00 and received welfare benefits of £143.00 per fortnight from the time of her dismissal. In terms of future loss the claimant made the case that she had difficulty in securing a new job because she was over qualified and had too much experience. Records of her engagement with the Job Centre clearly demonstrate that she has been actively seeking employment but without success. We are therefore satisfied that the claimant has done all that she could to mitigate her loss. The claimant presented as a very able person whom one would expect to secure employment in her field within a reasonably short period of time. The fact remains however that she has not managed to do so thus far but given at 48 she has plenty to offer prospective employers we consider that the appropriate period for future loss should be 12 months. In terms of compensation it is necessary to consider whether this period should be limited on the basis that the claimant would have been made redundant in any event had a fair procedure been followed. This inevitably requires a degree of speculation on the part of the tribunal. If one views the matrix scores as interpreted by the respondent as a reliable guide as to the outcome it would likely have been the case that the claimant would have been dismissed in and around the date on which her employment terminated. However, in view of our conclusion that the consultation process was a sham and the conflicting evidence about the legitimacy of the matrix exercise it is difficult to predict with any degree of confidence when or whether the claimant might have been fairly dismissed by reason of redundancy had a fair and genuine consultation taken place. Doing our best however we consider that future loss should be limited to 6 months on the basis that the dismissal might have occurred in any event. In doing so we have had regard to the helpful guidance offered by Elias J in the **Software 2000 Ltd** case.

80. In view of our finding that the claimant was also automatically unfairly dismissed we may increase the compensatory award by between 10% to 50% if we consider it just and equitable in all the circumstances to do so. We consider that it would be just and equitable to increase the compensatory award by no more than 10% as the respondent's failure while blameworthy did not attract any criticism or complaint by the claimant or her representative.

81. We do not accept Mr Boomer's submission that the tribunal should make a similar award to that made in **Kinnear v Marley Eternit t/a Marley Contract Services ETS/4105271/2016,** namely £25,000. That was a case in which a contract of apprenticeship was terminated early and as a result the apprentice's loss of earnings was almost at the maximum that the tribunal could award. Although it was treated as a redundancy situation its facts bear no relation to the case before us.

Pension

82. An issue in relation to pension loss arose in the latter part of the hearing. At that time both parties had limited information in relation to the claimant's pension entitlement, if any. At the hearing both parties' representatives appeared to be under the impression that the claimant did not have the benefit of a workplace pension and that instead the claimant had a Personal Retirement Savings Account which qualified for tax relief. The tribunal was not satisfied that this issue had been properly addressed and therefore requested the parties to look into the matter further and provide the necessary information to the tribunal. The tribunal thereafter received both information about the pension issue and brief written submissions which we summarise in the following paragraphs.

83. By letter of 7 July 2017 the respondent's solicitor provided details of the respondent's pension scheme. The respondent's solicitor very properly corrected his misapprehension about the matter in his letter and provided the tribunal with details of the respondent's pension scheme which came into operation in October 2014. The material provided included a letter to the claimant dated 24 October 2014 informing her that she was being enrolled into the respondent's workplace pension scheme on 31 October 2014. The pension provider was NEST. Payments into the pension scheme would comprise of a contribution by the employee of 1% of total pay which would be matched by a 1% payment in by the employer. The letter also dealt with future increases in contributions. From September 2017 the employer's contribution would go up to 2% and the employee's to 3%. From October 2018 3% would be paid by both employer and employee. The letter also enclosed a table setting out the exact contributions made by the claimant and the respondent from October 2014 to September 2016.

84. Armed with this information Mr Boomer set out his calculation of the claimant's pension loss in a letter to the respondent's solicitor dated 16 August 2017. The letter stated that the average yearly pension contributions made by the claimant and the respondent were £624.00 based on a monthly average of 52.02 during the period October 2014 to September 2016. Mr Boomer submitted that the claimant had a legitimate expectation of continuing her career with the respondent until her retirement at age 67 and as a result of her dismissal she lost the benefit of further pension contributions in the sum of £12,485.00 (on present figures) for the additional 20 years of service which would have been invested in her workplace pension. By letter of 22 August 2017 to the tribunal Mr Boomer drew attention to the Employment Appeal Tribunal's decision in **University of Sunderland v Drossou UKEAT/0341/16/RN** in which it was held that the calculation of a 'week's pay' under the Employment Rights Act 1996 should include employer pension contributions.

85. By letter of 23 August 2017 Mr O'Donnell set out the respondent's position in relation to compensation for loss of pension in the event that the overall claim was successful. Mr O'Donnell submitted that any entitlement under this heading should be limited to the employer's pension contributions as to include the claimant's would amount to double compensation. The respondent calculated the average employer contribution at 28.90 euros per month and that any payment under this heading could only be for a period commensurate with any potential award for loss of earnings up until when the tribunal deemed that she could reasonably have returned to work.

86. The tribunal accepts Mr O'Donnell's submission that the claimant's potential pension loss cannot extend beyond the period in respect of which she may be compensated for future loss. It would not therefore be appropriate to award compensation for

pension contributions up until retirement age as Mr Boomer contends for. In our view it is just and equitable to make an award which covers the employer's pension contributions for 26 weeks future loss. In addition, the claimant is entitled to compensation for pension contributions in respect of the period from her dismissal to the date of the tribunal hearing. We also consider that the monthly average employer contribution proposed by Mr O'Donnell is reasonable although it should be expressed in pounds sterling rather than euros.

87. **AWARD**

BASIC AWARD

£730.74 x 3 weeks	=	£2,192.22
£730.74 x 10.5 weeks	=	£7,672.77
SUB-TOTAL	=	£9,864.99

COMPENSATORY AWARD

£479.00 x 29 weeks	=	£13,891.00
SUB-TOTAL	=	£23,755.99
Less Redundancy Payment		£5,250.00
SUB-TOTAL		**£18,505.99**
10% increase for failure to follow the minimum statutory procedure		£1,850.60
Loss of Statutory Rights		£300.00

Future Loss

£479.00 x 26 weeks	=	£12,454.00

LOSS OF EMPLOYER'S PENSION CONTRIBUTIONS

To date of hearing	£28.90 x 29 weeks	=	£838.10
Future Loss	£28.90 x 26 weeks	=	£751.40
Total Pension Loss		=	£1,589.50
TOTAL AWARD		=	**£34,700.09**

88. The claimant was in receipt of Jobseeker's Allowance following her dismissal. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996 therefore apply in this case. Rule 4(3) requires that the tribunal set out:-

(a) the monetary award;

(b) the amount of the prescribed element, if any;

(c) the dates of the period to which the prescribed element is attributable; and

(d) the amount if any by which the monetary award exceeds the prescribed element.

89. For the purposes of the unfair dismissal proceedings the monetary award is £34,700.09. The prescribed element is the amount of compensation for loss of earnings up to the date of the hearing. The relevant dates are 27 September 2016 to 14 June 2017**.** The tribunal finds that the amount of the prescribed element is £23,753.16. The amount by which the monetary award exceeds the prescribed element in this case is £10,946.93.

90. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 11-13 April 2017 and 14 June 2017, Belfast.

Date decision recorded in register and issued to parties:

IN THE MATTER OF AN APPLICATION BEFORE THE INDUSTRIAL TRIBUNAL

Case No: 2106/16 IT

BETWEEN

JANET BLADES

Claimant

&

HARVEY NORMAN TRADING (IRL)

Respondent

SUBMISSIONS

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1. The Claimant asserts she was unfairly dismissed way of unfair selection for redundancy and by the Respondent's failure to apply and follow a proper redundancy procedure. She alleges also that the Respondent discriminated against her and treated her less favourably on grounds of sex in the arrangements made for her redundancy and the appointment of Mark McAllister to the new Store Manager post in the Holywood store. She further alleges the Respondent breached her contract of employment. The Respondent resisted the Claimant's claims and sought to rely primarily on an alleged redundancy selection matrix to defend the decision to dismiss the Claimant as redundant.

2. It is submitted that the clear, consistent and persuasive manner in which the Claimant gave her evidence throughout contrasted markedly with the inconsistent, contradictory, evasive and at times incoherent delivery of the evidence given by the Respondent's sole witness (Robbie Auckram). I submit further that his evidence was demonstrably fabricated in significant respects, lacked credibility and his main claim that a fair redundancy process had been applied was fatally destroyed by the admissions he made under cross examination. Moreover I submit the Respondent's failure to call material witnesses (Maureen Dennis and Ryan Pheloung) and to produce relevant documentation must be viewed sceptically at the very least by the Tribunal.

3. In my submission the Tribunal cannot ignore the Respondent's failure to call any witnesses to support the various claims made by its only witness who sought to give evidence on behalf of the absent witnesses and expected the Tribunal to simply accept his uncorroborated testimony because he swore an oath. This I submit is not a substitute for proof. The absence of Maureen Dennis and Ryan Pheloung as witnesses to support Robbie Auckram's many unsubstantiated claims is not insignificant. Even if the evidence of those witnesses would not have been given much weight it is open to the Tribunal to draw adverse inferences from the absence of their evidence. I submit the Tribunal should do so in this case and apply the established principle that adverse inferences can be drawn by a failure to call witnesses who could obviously give material evidence.

4. In ***Wisniewski v Central Manchester Health Authority [1998] PIQR P323*** which dealt with the failure of a party to call a material witness Brooke LJ cited Lord Lowry's comments in the case of ***R v IRC ex parte T. C. Coombs & Co [1991] 2 AC 28*** wherein he said that in our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified. From that line of authority Brooke LJ derived a number of principles that included:

   - In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
   - If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
   - There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

UNFAIR DISMISSAL

5. To establish that a dismissal is not unfair an employer must establish the reason for the dismissal and that it is one of the statutory reasons that can render a dismissal not unfair. If an employer establishes both of these requirements then whether the dismissal was fair or not depends on whether in all the circumstances the employer acted fairly and reasonably in treating the reason as a sufficient reason for dismissing the employee per Article 130 of The Employment Rights (Northern Ireland) Order 1996.

6. In the case of ***Green v London Borough of Barking & Dagenham*** the EAT held that the application of Article 130 (4) cannot be modified in a redundancy dismissal where employees compete for newly created posts following a restructure. The employment tribunal had held that this was not a case where it needed to determine the fairness of the Claimant's dismissal by applying the guidance laid down in ***Williams v Compair Maxam Ltd*** because the question was not why the Claimant had been selected for redundancy but why she had not been appointed to one of the remaining positions and as a result, the Claimant's case was more akin to ***Morgan v Welsh Rugby Union***. In Morgan, the EAT had distinguished ***Williams*** on the basis that appointment to new roles after a reorganisation may involve a substantial element of judgment on the part of the employer. The employment tribunal in the instant case had apparently considered this to mean that it was prevented from addressing many of the questions which obviously arise under Article 130 (4) such as the composition of the selection pool and the genuineness of any appeal

7. The EAT disagreed with the employment tribunal and held that it had wrongly elevated ***Morgan*** to a rule of law, when ***Morgan*** itself makes clear that it directs employment tribunals back to Article 130 (4) unvarnished and at all times, when employment tribunals consider dismissals, that Article is the touchstone. Tribunals must therefore review the

decisions made and the processes followed by the employer and determine whether each stage falls within the range of reasonable responses. In this submission the Respondent in this case fails in every respect in the three standard stages of a redundancy process, i.e. consultation, selection and suitable alternative employment.

8. The best guidance on the matter of redundancy selection is contained in the ***Williams v Compair Maxam Ltd*** case where the Court said that:

   - The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
   - The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
   - Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
   - The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
   - The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

9. There are a number of other legal authorities that are germane to the issues in the instant case. In ***Polkey v AD Dayton Services Ltd [1988] ICR 142***, Lord Bridge stated that in a case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis in which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. In the ***Langston v Cranfield University [1988] IRLR 172*** it was stated that where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer. The EAT in ***Mugford v Midland Bank [1997] IRLR 208*** held that it will be a question of fact and degree for the tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee.

10. Employers have a obligation to consult employees prior to redundancy. In the case of ***R v British Coal Corporation ex-parte Price*** the court said that fair consultation means consultation whilst the proposals are still at a formative stage, adequate information upon which the employees can respond, adequate time in which to respond and a conscientious consideration of the response to consultation. Consultation must not mean simply going

through the motions and there must be a genuine engagement long before any final decision is made and a genuine consideration of any response.

11. I submit it is plainly obvious in light of Robbie Auckram's evidence that there was no genuine consultation about the proposed redundancy of the Claimant's post or any consultation about any part of the process such as the content of the alleged redundancy selection matrix. It is an indisputable fact that the decision to dismiss the Claimant and to appoint Mark McAllister to the new Store Manager position in the Holywood store had already been taken before the Claimant was notified on 8th June 2016 that she was potentially redundant. The meeting on that day was not a consultation meeting and there is no reference anywhere in the prepared script read out to the Claimant that mentions consultation about the proposed restructuring and redundancy. At this meeting Robbie Auckram simply announced to the Claimant that she was to be made redundant and that Mark McAllister would be taking over her role.

12. The purported consultation process did not in my submission begin until 17th June 2016 (pages 65/65) and was nothing more than the Respondent going through the motions to garner a defence against a challenge to the redundancy. It was therefore a pointless exercise given that the crucial decisions had already been taken several weeks before and there was no indication at any time that these decisions were to be or were being reviewed. The appeal meeting on 19th July 2016 was equally pointless and was another example of the Respondent simply going through the motions. It is worth noting that the Respondent has not challenged or disputed the Claimant's record of that meeting or her view of Robbie Auckram's dismissive attitude to her concerns during the meeting on 19th July 2016.

13. Mr Justice Silber reviewed the authorities in relation to the pool for redundancy in ***Capita Heartshead Ltd v Byard [2012] IRLR 814 EAT.*** He stated that pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates for redundancy are that:-

- It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way; the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in ***Williams v Compair Maxam Ltd [1982] IRLR 83);***
- The courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in ***Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM)***;
- There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in ***Taymech v Ryan EAT/663/94);***
- The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy.
- Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it." (Paragraph 31).

14. Robbie Auckram's evidence about how the decision to make the Claimant redundant and appoint Mark McAllister to the new post was in my submission evasive, contradictory and unreliable and did not betray a scintilla of genuine or properly considered thought being given to the question of who should be made redundant. He initially claimed these decisions were taken at an annual strategic review meeting but when challenged changed this to say he had taken the decision a week or so after that meeting but then went on to claim that he and Ryan Pheolung collectively took these decisions. Such conflicting claims cannot be overlooked and cannot be explained away by Robbie Auckram's claim that he only has good recall when he is dealing with figures. However it is submitted that his evidence confirmed that the decision to dismiss the Claimant on redundancy grounds was not taken on a fair, objective and lawful basis.

15. Under cross examination Robbie Auckram admitted that the redundancy selection matrix was not used before the decision to make the Claimant redundant was taken. In fact he admitted that the Respondent had not applied a fair redundancy process and using the matrix at the start would have been a better means of determining the redundancy. I submit this admission per se is fatal to the Respondent's defence against the unfair dismissal claim and Robbie Auckram's claims about the construction of the matrix, its use in previous redundancy situations, the content of the matrix and the alleged re-running of the redundancy process are not just contradicted by the evidence but are plainly dishonest.

16. Robbie Auckram gave conflicting evidence about when and how the matrix came into being and his claim that he applied the redundancy selection matrix as an exercise in fairness after the Claimant raised objections during the appeal meeting on 19th July 3016 is unworthy of belief. In replies to additional information requests (Page 47) the Respondent asserted that Robbie Auckram and Maureen Dennis applied the matrix to the Claimant and Mark McAllister but at Page 52 the Respondent asserted that the matrix was constructed and, by inference at least, was applied by Robbie Auckram and Ryan Pheloung a few days after the meeting on 19th July 2016. However in his evidence to the Tribunal he stated that the matrix was constructed seven years previously and was used in a redundancy situation in the Dundalk store.

17. None of this evidence was given in Robbie Auckram's witness statement or replies to discovery/additional information and the only mention of the matrix being used previously was in relation to a redundancy in the Newtownabbey store which Robbie Auckram omitted to mention during his oral evidence. When challenged he was forced to concede that he had no evidence to support his claim about the use of the selection matrix in previous redundancy situations or proof about the creation of the matrix seven year ago or the alleged annual strategic review meeting. These inconsistencies are not minor matters and in my submission they are fatal to the reliability and credibility of Robbie Auckram's evidence.

18. Robbie Auckram's assertions about a fair redundancy process were further undermined when he changed the entire basis on which the Claimant was purportedly made redundant. In answer to questions put by the Judge he stated unambiguously that it was the company rule that in redundancy situations the larger size of the business takes over and Mark McAllister was not considered for redundancy because he had a larger turn over and could deal with more customers. The Claimant was not informed that this was the basis on which she was at risk of redundancy and it is substantially different from the

grounds set out in the correspondence notifying her of her redundancy. In addition the alleged Redundancy Policy (Page 113) makes no mention of redundancies being determined on grounds of size. In light of Robbie Auckram's changed evidence a further question arises as to why the redundancy selection matrix was necessary at all.

19. In his evidence Robbie Auckram conceded that a fair and objective process had not been applied, albeit he sought to ameliorate this concession by saying only at the start. He could not explain why the redundancy matrix had not been used in the Holywood redundancy when it had allegedly been used on two previous occasions. His claim that the redundancy process using the matrix was re-run after the meeting on 19th July 2016 is refuted in my submission by his admission that neither the Claimant nor Mark McAllister were notified that this was the case and by his further admission that Mark McAllister was not at any time put at risk of redundancy. The failure to show that Mark McAllister had been properly appointed also demonstrated in this submission the shabbiness and poorly considered process that was applied in this instance.

20. The Store Manager post in the Holywood store was a new post. The Claimant and Mark McAllister should have been in the selection pool for redundancy and should have been subject to a fair and objective procedure. On the evidence before the Tribunal I submit it is obvious that his did not happen. I submit the Tribunal heard sufficient evidence to condemn the Respondent's claims about applying a fair process and the provenance, bona fides, content and alleged use of the redundancy selection matrix. The plain and undisputed fact is that the redundancy selection matrix was only given to the Claimant as an enclosure (Page 78) - without an explanation or scores - with the letter dated 2nd August 2016 (Page 76/77) notifying her of her dismissal. The Claimant led concrete evidence to demonstrate that her performance was better in the majority of the metrics set out in the redundancy selection matrix and it is my submission that the matrix is a fabrication to justify a decision which was not taken on any objective or sustainable basis and was not subject to any review.

21. It is submitted that the unfairness of the process to which the Claimant was subjected was compounded by the Respondent's failure to offer the Claimant suitable alternative employment. The only direct offer of alternative employment was the Bedding Floor Manager post in the Holywood store. The Claimant did not accept this offer because it was unsuitable as it represented a substantial demotion in terms of both status and pay. The Respondent did not implement a moratorium on recruitment – as required by its own alleged Redundancy Policy (Page 112) - and refused to offer the vacant Furniture Store Manager post in the Carrickmines store which had been vacant from 8th May 2016. This post was available to be considered as suitable alternative employment for the Claimant while she was at risk of redundancy and was not filled until 28th June 2016. It is not insignificant that a male employee from the Boucher Road store was promoted to this vacant post.

22. The primary question for the Tribunal is whether the Respondent's decision to dismiss the Claimant fell within a band of reasonable responses. In this regard the Tribunal must consider the reasonableness of the Respondent's conduct as enunciated in the case of ***Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439***. Although the case of ***British Homes Stores Limited -v- Burchell [1978] IRLR 379 EAT*** generally refers to misconduct dismissals I submit it does establish the broad rules for reasonable conduct on the part of an employer, viz. reasonable grounds to sustain a belief that a dismissal is

warranted which have been established by having carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is submitted that the Respondent's actions in this case are outwith the band of reasonable responses and fall lamentably short of what is required for a fair dismissal.

23. An additional question which I submit the Tribunal should consider is whether the Respondent complied with Article 174 (b) of the 1996 Order. The Respondent did not call any evidence to show that the requirements of its business for employees to carry out work of a particular kind in the place where the employee was employed has ceased or diminished or was expected to cease or diminish. As the Bedding Department in the Holywood store continues to operate with all its operations being transferred without any obvious change the actual need for a redundancy must be in question...

COMPENSATION

24. The Claimant's Schedule of Loss (attached) is calculated in accordance with the customary practice on the immediate financial loss she incurred as a result of the Respondent's actions up to the date of the hearings. The Claimant is also seeking compensation for loss of pension benefits, loss of profit share as well as bonuses/future bonuses and breach of contract. Attached is a copy of the Claimant's P60 for the year ending April 2015 which shows that her yearly earnings overall (£45,176.04) exceed her basic earnings (£37,998.48 gross/£30,163.64 net) taking account of the additional emoluments.

25. I refer the Tribunal to the Remedy Decision in the case of ***Patricia Flanagan -v- Metropolitan College (Case Ref. No 1085/15)***. It is accepted that this case is not a legal authority per se but I submit it is persuasive in respect of the matter of compensation awards. The Tribunal in this case reviewed the relevant authorities, in particular the case of ***Wardle -v- Credit Agricole Corporate and Investment Bank [2011[IRLR 604*** and referred to the four headings under which compensation should be assessed as set by the National Industrial Relations Court in the ***Norton Tool Company Ltd. -v- Tewson[1973] 1 All ER 183***. The four headings were immediate loss of wages, manner of dismissal, future loss of wages and loss of protection in respect of unfair dismissal by reason of redundancy. The Tribunal in the ***Flanagan*** case determined that two years pay was the appropriate compensation award taking account of the Claimant's experience, expertise and availability of other employment opportunities.

26. In the present case the Claimant is an experienced manager with considerable expertise and knowledge in the retail field. After her dismissal she has made considerable efforts to secure other employment. She claimed Job Seekers Allowance and is required to demonstrate to the Jobs and Benefits Office on a weekly basis that she had made efforts to find employment. Attached are the records from the Newtownabbey Jobs and Benefits Office which show the Claimant's regular efforts to obtain employment. Unfortunately the Claimant's experience and expertise has deterred employers.

27. The Claimant has clearly made substantial efforts to mitigate her loss. In my submission the calculation for her future loss should be at least two years pay and should take full account of the grossly unfair manner in which the Claimant was treated by the Respondent. The remaining heads of compensation are a matter for the Tribunal to determine but I would draw the Tribunal's attention to the case of ***Kinnear -v- Marley***

Eternit Ltd t/a Marley Contract Services in which a tribunal awarded the maximum compensation for breach of contract (£25,000) to an apprentice whose apprenticeship was ended early due to a downtown in business. I submit the Tribunal should consider a similar award in this case in light of the Respondent's casual, slapdash and dismissive attitude towards the Claimant's employment and her employment contract.

DISCRIMINATION

28. In this submission it is beyond doubt that the Claimant was treated differently and less favourably than both Mark McAllister and Eamonn McFadden in the arrangements made for the redundancy of the Bedding Manager post in the Holywood store. The Claimant has proved facts from which this Tribunal can properly conclude that the Respondent discriminated against her in the arrangements made for the redundancy of her post. On the Respondent's own evidence and admissions the Claimant was automatically selected for redundancy without any proper investigation of who should be considered to be in the selection pool. Mark McAllister was not put at risk of redundancy and was never even considered as such at any stage of the redundancy process even after the Claimant raised objections to her proposed redundancy. Robbie Auckram conceded this was the case during his oral evidence.

29. Eamonn McFadden was promoted to a Store Manager post in the new Boucher Road store in December 2015 after the Newtownabbey store was closed due to poor performance. He was transferred automatically, immediately and without any redundancy process being applied. The Respondent refused to offer a comparable managerial post in the Carrickmines store – in spite of the statutory requirement to offer suitable alternative employment – that was available during the period of the redundancy process.

30. Article 63A of the Sex Discrimination Order 1976 states that where a complainant proves facts from which a tribunal could conclude in the absence of an adequate explanation from the Respondent the tribunal shall uphold the complaint unless the Respondent proves that he did not commit or is not to be treated as having committed the discriminatory act. Guidance on the interpretation of the statutory provisions on shifting the burden of proof in discrimination cases is set out in the Annex to the judgement in the ***Igen Ltd. -v- Wong[2005] 3 ALL ER 812*** and in extensive other case law. The courts normally adopt a two stage process, the first of which requires the claimant to establish a prima facie case of discrimination. If this hurdle is crossed the second stage is engaged and requires the employer to prove it did not commit the unlawful act of discrimination by providing a convincing, non-discriminatory explanation for the less favourable treatment. Relevant also in this regard is the Court of Appeal decision in the case of ***Dornan -v- Belfast City Council*** which held that a respondent must give a clear and specific answer to a complaint of discrimination.

31. The EAT in the ***Laing -v- Manchester City Council [2006] IRLR 748*** case, referring to the ***Igen –v Wong*** decision, noted that the shifting in the burden of proof simply recognises the fact there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race. At paragraph 24 of his judgement in the case of **Nelson -v- Newry and Mourne District Council [2005] NICA 24** states that the whole context of the surrounding evidence must be

considered in deciding whether the tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In the ***Igen*** case the Court of Appeal stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. It also stated that 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 be adduced to discharge the burden of proof.

32. In ***Maddarassy -v- Nomura International PLC [2007] IRLR 247*** the Court of Appeal stated that the burden of proof does not shift to the employer simply on a claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination and are not, without more, sufficient matter from which a tribunal could conclude on the balance of probabilities the respondent had committed an unlawful act of discrimination. However in the case of ***S Deman –v- Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279,*** in reference to the ***Madarassy*** ruling, stated that the 'more' which is needed to create a claim requiring an answer need not be a great deal and in some instances it will be forwarded by a non-response or evasive or untruthful answers.

33. Lord Nicholls in ***Nagarajan -v- London Regional Transport [1999] IRR 572,575*** held that the crucial question a tribunal has to determine in every case is the reason why the claimant was treated in way he was and he observed this may require some consideration of the alleged discriminator's conscious or sub-conscious mental process . Justice Elias in the case of London ***Borough of Islington –v- Ladele & Liberty (EAT) [2009] IRLR 154*** held that if a tribunal is satisfied that the prohibited ground is one of the reasons for the less favourable treatment that is sufficient to establish discrimination. It does not need to be the only or the main reason, it is sufficient that it is significant in the sense of being more than trivial.

34. It is submitted that the test for shifting the burden of proof in this case has been readily met as the Claimant did prove facts from which discrimination can be inferred and the Respondent failed deplorably to provide anything approaching a cogent or satisfactory non-discriminatory explanation in oral or written evidence for the treatment afforded to the Claimant. The defence offered by Robbie Auckram in his witness statement amounts to little more than a bare denial and assertion that the Respondent would not discriminate on grounds of gender because the Chief Executive Officer is a female. The document at page 136 of the Respondent's document bundle, purporting to be a statement from the CEO is clearly a fabrication in my submission. It is not signed by the CEO and there is no evidence that Katie Paige has endorsed or approved the document. The Respondent was challenged in the course of the interlocutory process to provide proof of the CEO's authority for that document but the Respondent failed to provide such proof.

35. The Respondent also seeks to rely on a number of statistics to refute the allegation of discrimination. I submit these alleged statistics have no probative value to the Tribunal and they should not be afforded either substance or statistics as the Respondent has not adduced any evidence to demonstrate the origin of these statistics, from where they have been extracted and proof of their authenticity.

36. In this submission, aside from Robbie Auckram's evasive and inconsistent oral evidence the Tribunal should closely scrutinise the quality of the Respondent's written evidence.

The Claimant relied on documents and reports which are indisputably original management reports used by the Respondent. The Respondent did not at any time question the validity of these reports and I submit the credentials of the reports was confirmed by the attempt by its representative at one point to prevent the Tribunal from considering these reports because I suggest the format of the complete, unmodified reports in the Claimant's document bundle contrast markedly with the format of the reports in the Respondent's document bundle and casts doubt on the authenticity of the reports on which the Respondent sought to rely. A prime example of the Respondent's attempt to mislead the Tribunal appears at pages 153/154 which – despite Robbie Auckram's assertion that reports cannot be changed – are clearly only partial extracts from full reports and which show that management reports can be manipulated.

37. In my submission the Claimant has unquestionably proved facts that allow the Tribunal to infer discrimination in the treatment afforded to her and the respondent has signally failed to show the reason for the less favourable treatment of the Claimant had nothing to do with the prohibited ground. In ascertaining injury to feelings compensation payable to the Claimant I submit the Tribunal must take account of the Respondent's overall approach to these proceedings overall and in particular its various attempts to mislead the Tribunal as well as the long term, continuing consequences of the Respondent's actions for the Claimant. I submit the award should fall within the top band range of the guidelines set by ***Vento v The Chief Constable of West Yorkshire Police (Number 2) [2003] IRLR 102 CA*** and updated in line with inflation by ***Da'Bell v NIPCC [2010] IRLR 19*** to £25,000 to £30,000.00. I submit further the Tribunal may consider including interest on the award in accordance with Regulation 3 Industrial Tribunals (Interest on awards in Sex and Disability Discrimination cases) Regulations (Northern Ireland) 1996 No.581)

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005

BETWEEN

JANET BLADES

Claimant

&

HARVEY NORMAN TRADING (IRL) LIMITED

Respondent

LEGAL SUBMISSION

Background

1. As you are aware, the Claimant has asserted that she was unfairly dismissed by way of unfair selection for redundancy and further, she alleges that she was discriminated against and treated less favourably on the grounds of her sex. It is the Respondent's submission that there is no basis for the claims made by the Claimant in this regard.

Preliminary Point

2. In her legal submission the Claimant has sought to criticise the Respondent for failing to call particular witnesses and has further sought to cast aspersions on the evidence which was proffered by Mr Auckram. There is absolutely no basis for any of the foregoing. The fact of the matter is that Mr Auckram was involved in the entire process from the beginning and thus was in a position to give evidence (and indeed did) on all relevant aspects of the issues which were in dispute. In these circumstances there is no basis whatsoever for any inferences to be drawn from the fact that the named employees were not called as witnesses. The fact is that the Respondent has adhered to the overall objective under Tribunal rules which is to call evidence only necessary and proportionate to the just determination of the issues. This is a matter for the Respondent who deemed inappropriate to call a succession of witnesses to repeat the same evidence.

   Furthermore, we clearly dispute the baseless allegations which are made in the Claimants legal submission regarding the evidence which was proffered by Mr Auckram.

Unfair Dismissal

3. In the first instance, it is clear that a redundancy situation as defined in Section 74 (1) (b) of the Employment Rights (Northern Ireland) Order 1996 existed. As you are aware, the aforementioned section states as follows:-

S. 174 *"For the purposes of this Order an employee who was dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or namely attributable to:-*

(b) *the fact that the requirements of that business—*

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

4. An initial point of importance in this regard is the fact that it has not been disputed in any proper manner by the Claimant or her representative that a redundancy situation existed. In this regard it is notable that in the first sentence of her Submission, the Claimant has set out her claim for unfair dismissal along the following lines:-

"She was unfairly dismissed by way of unfair selection for redundancy and by the Respondent's failure to apply and follow a proper redundancy procedure".

5. Therefore and following on from the above, as a starting point it is clear that a redundancy scenario as set out in Section 174 (1) (b) existed. The reason as to why a proper redundancy situation existed was clearly substantiated by figures which were furnished regarding the financial performance of the Bedding Department and indeed by evidence furnished in relation to the group wide organisational re-structure in Northern Ireland which resulted in the Respondent's other stores no longer having a dedicated manager for the Bedding Department.

6. It is set out in Section 130 (2) (c) of the Employment Rights (Northern Ireland) Order 1996 that redundancy is a statutory reason which can render a dismissal not unfair. As set out above, it is clear that in the circumstances a proper redundancy scenario existed and therefore the question which falls to be answered is whether in the circumstances the Respondent acted fairly and reasonably in effecting the said redundancy and whether in particular they complied with the provisions of Section 130 (4) of the Employment Rights (Northern Ireland) Order 1996. It is our submission that the Respondent did effect the redundancy which is the subject matter of the proceedings herein in a fair and reasonable manner. For the sake of clarity and in order to substantiate the foregoing, we will deal with each stage of the redundancy process.

Selection Process

7. In the first instance, it was set out by the Respondent in correspondence which issued to the Claimant, in the Witness Statement of Mr. Robbie Auckram and indeed during the evidence given by Mr. Auckram that the initial decision to place the Claimant's role at risk of redundancy was for a number of reasons including the financial performance of the Bedding Department, the overall group wide organisational structure which entailed that there were no longer Bedding Department managers employed at the Respondent's

other stores and further the relative size of the Bedding Department as compared to the Furniture Department. It is the Respondent's position that for these reasons a decision was reached to place the Claimant's position only at risk of redundancy. In this regard an important point to note is that there is no reason why there cannot be a pool of one as long as to do so is within the range of reasonable responses. The foregoing was set out in a number of cases including ***Taymech v Ryan (EAT/663/94)*** **and** ***Capita Hartshead Limited v. Byard [2012] IRLR 814.***

8. The Respondent submits that the decision to place the Claimant's position only at risk of redundancy was within the range of reasonable responses for the reasons as set out above, i.e. the financial performance of the Bedding Department, the group wide organisational re-structure in Northern Ireland and the relative size of the Bedding Department as compared to the Furniture Department at the store in Hollywood. As was set out in Capita ***Hartshead Limited v. Byard [2012] IRLR 814,*** the question of how a redundancy pool should be defined is primarily a matter for the employer to determine. Furthermore and as was set out by Browne-Wilkinson J in ***Williams v Compair Maxam Limited [1982] IRLR 83***) "*It is not the function of t he [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted*". In this regard it was further set out in the case of ***Taymech v. Ryan (EAT/663/94***) that it would be difficult for an employee to challenge the selection of a redundancy pool where the employer has genuinely applied his mind to the problem. It is submitted on behalf of the Respondent that it is clear from the documentation furnished to the Claimant and indeed clear from the evidence of Mr. Auckram that the Respondent did genuinely apply themselves to deciding who should be in the initial selection pool for redundancy. It is further submitted that the initial decision that it was only the Claimant's position which was at risk of redundancy was within the range of reasonable responses. The fact that the decision in this regard was based upon objective criteria and issues is pertinent.

9. Following on from the above, it is not disputed by either party that the Claimant and indeed her representative raised issues regarding the initial decision to place only the Claimant at risk of redundancy. In this regard and notwithstanding the fact that the Respondent was entitled to place only the Claimant at risk of redundancy, in circumstances where perceived issues were raised with regard the selection criteria a decision was reached to apply an entirely objective selection matrix to both the Claimant and Mr. McAllister. In other words the selection pool was increased to two in that it now encompassed the Claimant as well as Mr McAllister. Therefore, even if it is decided that the Respondent erred in initially deciding that it was only the Claimants role which was at risk of redundancy, the subsequent decision to apply the matrix is important as it ameliorates any perceived issue in this regard. In this regard it is of note that it has not been argued that the selection pool should have been larger than the Claimant and Mr McAllister.

10. The first point to note regarding the selection matrix is the fact that the criteria set out therein are objective in their nature. This is a crucial point in considering the matrix. In her Legal Submission the Claimant has sought to discredit the evidence of Mr. Auckram regarding the provenance of the matrix utilised. We submit that Mr. Auckram gave evidence on same and on previous occasions when the matrix had been utilised. However and notwithstanding the foregoing, the issue raised in this regard is somewhat of an aside as the crucial consideration is the fact that a selection matrix is clearly based on objective criteria.

11. Furthermore, the Respondent adduced documentation and evidence which clearly substantiated the fact that the selection matrix was applied in a fair and objective manner to both the Claimant and Mr. McAllister. In this regard the Claimant, in her Legal Submission, has sought to assert that she demonstrated "concrete" evidence that her performance was better in the majority of the metrics set out in the redundancy selection matrix. The foregoing is simply not the case. The fact of the matter is that t throughout the course of his evidence Mr. Auckram dealt in great detail with each and every one of the criteria set out in the selection matrix. In this regard he went through the various financial reports which established the manner in which the scores were allocated to both the Claimant and Mr. McAllister in great detail. In an effort to discredit the Respondent's position in this regard and indeed to discredit the documentation adduced by them the Claimant and indeed her representative made on a number of occasions (including in the legal submission) clear accusations that the evidence of the Respondent and indeed the aforementioned documentation had been fabricated. In essence, the Claimant accused the Respondent of fraudulent activity. This is a most serious and scurrilous accusation which is denied in the strongest terms by the Respondent. The fact of the matter is that there is absolutely no basis for the accusation in this regard. The Respondent adduced documentation and Mr. Auckram dealt with same in great detail through the course of his evidence. In this regard Mr. Auckram specified as to how each and every criteria as set out in the redundancy matrix was marked. Furthermore it must be considered that other than the Claimant and her representative's representations and assertions, there is nothing whatsoever to suggest fraudulent activity. As you are well aware, the burden of proof for such fraudulent activity is a very high and onerous one. In circumstances where there is absolutely no basis for the Claimant's allegations and thus clearly no evidence to substantiate same it is clear that the burden of proof necessary to establish fraudulent activity on the part of the Respondent has not been met by the Claimant.

Consultation

12. As is set out in ***Williams v. Compair Maxam Ltd [1982] IRLR 83*)** **and** ***Polkey v. AE Dayton Services Ltd [1987] IRLR 503,*** in general employers have an obligation to consult with employees prior to a redundancy being effected. It is the Respondent's position that a consultation process was entered into with the Claimant herein. In this regard and as set out in the Witness Statement of Mr. Robbie Auckram the Claimant was placed at risk of redundancy during a meeting on the 8th June 2016. As is further set out in the Witness Statement of Mr. Auckram, following the aforementioned meeting correspondence passed between the Respondent and the Claimant before a final consultation meeting was held on the 19th July 2016. In the course of the consultation process which was entered into the Claimant was given an opportunity to raise issues regarding the initial decision to place her at risk of redundancy and indeed she did so. In this regard the fact is that the alleged procedural issues raised in this regard were taken on board by the Respondent in that it led them to implementing the redundancy selection matrix which has been discussed above.

13. In the Legal Submission submitted on behalf of the Claimant particular criticism is levied at the Respondent for failing to consult the Claimant with regard the content of the redundancy selection matrix. A point which must be raised in this regard is that even if it is deemed the failure of the Respondent to consult with the Claimant on the content of the redundancy selection matrix was unfair, owing to the dicta of Lords Bridge and McKay in the ***Polkey v AD Dayton Services Ltd (1988)ICR 142*** and further

owing to the decision in ***Dunlop v. Farrell (1993) ICR 885/EAT*** thought must be given as to whether such consultation would have made any difference or whether same would have been "futile" or "useless". In this regard it is our submission that in circumstances where it cannot be denied but that the criteria set out in the redundancy selection matrix were objective and further where it has been established on the part of the Respondent that such criteria were marked in a reasonable and fair manner with documentation being adduced to substantiate such marking, then the fact is that consultation on the content of the redundancy selection matrix would not have made a difference. In essence, it is clear from the evidence that no different decision would have been reached if the Claimant had been consulted on the redundancy selection matrix.

14. Furthermore and notwithstanding and without prejudice to the position as set out above regarding the consultation process which was entered into after the meeting on 8th June 2016, the fact is that if such consultation period is deemed insufficient the, "Polkey Exception" comes into play in this regard also as the manner in which the redundancy selection matrix was applied means that any further consultation would not have made a difference. Again, it is clear from the evidence that no different decision would have been reached if the Claimant had been consulted in a different manner.

Alternative employment

15. In this regard it is not disputed but that the Respondent offered the Claimant the role of Bedding Floor Manager at its Holywood store. In these circumstances it is clear that consideration was given to alternative roles. For her own reasons the Claimant decided not to accept the alternative role (even on a trial basis) which had been offered. It is a matter for the Tribunal to assess whether her refusal of the alternative was reasonable and is germane to the question of compensation, should the question arise.

The issue raised with regard the position at the Respondents Carrickmines store was dealt with during the evidence of Mr Auckram.

Compensation

16. As you will be well aware, the key consideration in this regard is that any award of compensation must be "just and equitable" in all the circumstances. In this regard account must be taken of all relevant circumstances such as the age of the Claimant, their general employability, their personal circumstances, their health, local employment conditions and the current economic climate. By her own admission the Claimant is an experienced manager with considerable expertise in the knowledge of the retail field. In this regard we submit that any objective and reasonable judgement as to how long it will be before the Claimant obtains comparable employment would result in one concluding that the Claimant should be in a position to obtain such employment in the near future. We submit that any award made should reflect the foregoing and in particular the fact that the Claimant is likely to obtain an equivalent job.

17. Another issue which arises in this regard and which flows from the decision in ***Polkey v. AE Dayton Services Ltd,*** is the fact that given that it is clear in circumstances where the redundancy selection matrix clarifies that if the purported procedural issues raised

by the Claimant had not occurred that she would in any event have been made redundant. In this regard it is the case that the redundancy selection matrix was comprised of objective criteria which were applied on a fair basis and further which such application has been substantiated by the production of substantial documentation and indeed prolonged witness evidence being given on said documentation. Therefore, it is clear that the Claimant would have been made redundant even if the alleged procedural issues had not arisen. Any award made must reflect the foregoing. The Scottish EAT in ***Fisher v California Cake and Cookie Ltd [1997] IRLR 212*** (Lord Johnston presiding) took the view that at least where there is evidence supporting the view that dismissal might have occurred in any event, the Tribunal will err in law if it fails to address that issue. Furthermore, in considering the question it must reach its own view on the answer to the hypothetical question whether dismissal might have occurred in any event, and express its contribution in percentage terms. This approach is consistent with the earlier English EAT decision in ***Wolesley Centers Ltd v Simmons [1994] ICR 503***. The Respondent submits that in circumstances where the application of the redundancy selection matrix clarified that the Claimant would have been made redundant even in the event that the alleged procedural issues raised by her had not occurred, the Tribunal must conclude that the Claimant's redundancy would have occurred in any event.

18. An issue arises with regard the fact during her evidence the Claimant adduced no evidence regarding her efforts at mitigating her loss. There was an obligation on the Claimant to adduce such evidence.

Discrimination claim

19. In essence, in her Legal Submission the Claimant has alleged that she was treated less favourably than both Mark McAllister and Eamon McFadden and that this alleged less favourable treatment was as a result of her sex.

20. An initial point which must be noted in this regard is the fact that during the course of her evidence, no reference was made to the Plaintiff's allegations that she was treated less favourably on the ground of her sex.

21. Another initial point which must be noted is the fact that the purported issue in involving Mr. McFadden is not specified in the Claimant's initial claim form and thus is not a matter which is properly before you. Furthermore, this alleged issue is outside the statutory period provided for bringing a claim for sex discrimination.

22. It is our submission that the Claimant in the within case has not succeeded in reaching the burden of proof as set out by Article 63A of the Sex Discrimination Order 1976. In relation to the claim made with regard the purported difference in treatment between the Claimant and Mr. McAllister, the fact is that in order to support her case the Claimant has simply stated that the purported difference in treatment was as a result of her sex without giving any justification for her position in this regard. The dicta in ***The Law Society v. Bahl*** is of relevance in that it was stated in the aforementioned case that all unlawful discriminatory behaviour is always unreasonable, but not all unreasonable behaviour is necessarily unlawfully discriminatory. In other words, even if it is deemed that the manner in which the redundancy process was applied by the Respondent herein was procedurally flawed it does not automatically follow that this was as a result of discriminatory reasons. In ***Madarassy v. Nomura International plc (2007) IRLR 247*** the Court of Appeal stated that the burden of proof does not shift to the employer

simply on a Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination and are not, without more sufficient matter from which a Tribunal could conclude on the balance of probabilities that the Respondent had committed an unlawful act of discrimination.

23. Following on from the above, we say that the burden of proof as set out in Article 63A of the Sex Discrimination Order 1976 was not met in circumstances where there was clearly an adequate explanation for the purported difference in treatment. In this regard and as set out above, clear evidence was given as to the reasons why the Claimant's role was initially put at risk of redundancy. These reasons included the financial performance of the Bedding Department, the overall group wide organisational structure which entailed that there were no longer Bedding Department managers employed at the Respondent's other stores and further the relative size of the Bedding Department as compared to the Furniture Department. The reasons in this regard are clearly objective and were in no way related to the Claimant's sex.

24. Furthermore and as also set out above, the decision to finally make the Claimant redundant was based upon the redundancy selection matrix. It cannot be disputed but that the criteria contained in the aforementioned redundancy selection matrix were entirely objective in their nature and further the manner in which said redundancy selection matrix was scored was clarified by Mr. Auckram during his evidence and indeed was clarified by extensive documentation which was referred to at great length during the course of the hearing herein. To further expand upon the foregoing, the fact is that even if it is deemed that the initial burden as set out in Article 63A of the Sex Discrimination Order 1976 has been met by the Claimant, then for the reason set out the Respondent has clearly established a non discriminatory explanation for its actions.

25. In her Submission the Claimant has sought for statistics upon which the Respondent sought to rely upon to be disregarded. In this regard we refer to the case of ***Piperdy v. UEM Parker Glass (1982 ICR 132)*** wherein it is stated that the fact an employer employs persons of different characteristics is a relevant consideration of evidential value.

26. As you are aware, the Claimant's claim in respect of the purported sex discrimination is limited to an award for injury to feeling. In this regard the Claimant's representative set out that the award should fall within the top band range of the guideline set out in ***Vento v. the Chief Constable of West Yorkshire Police (2) (2003) IRLR 102 CA***. In the first instance and for the reason as set out above, we submit that there is no basis for any award to be made in this regard. Furthermore and notwithstanding and without prejudice to the foregoing, the fact is that in order for an award for injury to feeling to be to be made, the Tribunal must hear evidence as to how the discrimination affected the Claimant. In the within claim no evidence whatsoever was proffered by the Claimant as to how the purported act of discrimination had an effect on her either mentally or physically. Therefore, an award in this regard cannot be made.

End.