Appeal Nos. UKEATPAS/0034/17/JW, UKEATS/0017/17/JW

Full Hearing at the Tribunal
On 16th March 2018
At 10.30 am

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

Before

THE HONOURABLE LADY WISE

(Sitting alone)

Mr. David Colquhoun — APPELLANT

Independent Living Support Limited — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Present but not represented
For the Respondent	Mr. J. Anderson of Counsel Barrister Solicitors: LHS Solicitors LLP Corinthian House 17 Lansdowne Road CROYDON CR0 2BX

SUMMARY

UNFAIR DISMISSAL - Redundancy

On a claim for unfair dismissal, the Tribunal found that the claimant was dismissed by reason of redundancy.

On appeal the claimant contended that the Tribunal had failed to take into account any available alternative employment that might have prevented his redundancy.

Held: Reading the Judgment as a whole, it could easily be inferred that the Tribunal had accepted that no other suitable employment was available at the material time. New staff had already been employed by the date on which the decision was taken and there was no obligation to dismiss them in favour of the claimant.

Appeal dismissed.

THE HONOURABLE LADY WISE

Introduction

1. The claimant was employed by the respondent as an IT Support Worker between 9th July 2009 and 20th June 2016. Throughout that period the work of the respondent, a registered charity, was assisting the homeless and those at risk of losing their homes. In addition, the charity works with vulnerable young people relating to confidence building and access to training. On 18th May 2016 the Respondent sent a Notice of Termination to the claimant, dismissing him on the basis that his post was redundant. The claimant raised proceedings before the Employment Tribunal claiming unfair dismissal. His claim was unsuccessful. In a Judgment dated 22nd May and sent to parties 26th May, both 2017, the Employment Tribunal (Employment Judge C. Lucas sitting alone) decided that the reason for the claimant's dismissal was redundancy. While the respondent had conceded procedural unfairness at the Tribunal hearing, the dismissal was found to be fair in all the circumstances.

2. The claimant has represented himself both before the Tribunal and on appeal. Mr. J. Anderson of Counsel has represented the respondent on both occasions. I will continue to refer to the parties as claimant and respondent as they were in the Tribunal below.

Grounds of Appeal

It may be helpful to clarify at the outset that there were initially two grounds of appeal advanced by the claimant. These were limited to the following discrete issues:

(1) Whether the Tribunal failed to take into account any available alternative employment that might have prevented the claimant's redundancy, and;

(2) Whether the Tribunal erred in relation to the date of dismissal and consequently the issue of whether the claimant's length of service was 7 years or more.

During the course of submissions at the appeal hearing the claimant accepted that his second ground of appeal raised a new issue that he had not put forward previously: in particular, his ET1 states clearly that he regards his employment as having started on 9th July 2009 and ended on 29th June 2016. That is the position recorded by the Tribunal at paragraph 4 of the Judgment. While the claimant had initially intended making an argument that his notice should run from the date he received the Notice of Termination rather than the date of the letter of posting, he accepted that, on the dates he had himself put forward to the Tribunal as the dates of employment, the argument could not succeed. Accordingly, he indicated that he would wish to withdraw that ground of appeal. The hearing proceeded on the basis only of the first of the two grounds narrated above.

The Tribunal's Findings and Reasoning

3. Insofar as relevant to this restricted appeal, the Tribunal made the following findings:

> **30. The Respondent's policy decisions are made on its behalf by Trustees.**
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> **35. As a charity, the Respondent relies on financial support from third party sources as its means of funding the services that it provides for the homeless, for people at risk of losing their homes and for vulnerable young people in need of support with confidence building and with the obtaining of access to training.**
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> **36. In respect of its work assisting the homeless and those at risk of losing their homes, the Respondent's primary source of funding is Dumfries and Galloway Council. In providing that service the Respondent is effectively acting as the outsourced provider of a service that would otherwise require to be provided directly by that Council.**
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> **45. The Claimant's contract, narrated that it was "an ongoing contract in relation to providing IT Support", set out that the Claimant's employment with the Respondent had begun on 6 July 2009 and specified the Claimant's job title as being "IT Support".**

54. On 15 January 2016 – (again without the Claimant knowing anything about it at any time prior to the effective date of termination) - Mr Bryce, acting in his capacity as one of the Respondent's Trustees, sent an e-mail to Mr Walden which contained the advice that "I would suggest that would have to mean independent advice in relation to either a redundancy dismissal or dismissal for gross misconduct on account of his recent e-mail reading activities". The Respondent accepts that that reference to someone being dismissed because of redundancy or because of gross misconduct was reference to the Claimant.

55. On 18 January 2016 Ms Murphy, her co-Trustee Mr Fielding, "Graeme A" and a Mr David Russell met. Mr Brown was not present at that meeting and the fact and detail of what was discussed at that meeting was not known to the Claimant until after the effective date of termination. Minutes of that 18 January meeting record that the Respondent's Trustees discussed that:-

> **"With regard to the outsourcing of IT, it would cost roughly £300 to facilitate this. DW will make OF aware of the background information in relation to this issue".**

And: -

> **"OF stated if a possible breach of confidentiality has been made, then steps have to be taken in accordance with the policy and procedures. Advice may be sought from a legal perspective."**

56. On or about 15 March 2016 the Respondent's Trustees considered an updated version of a draft business plan for 2016 – 2019. It was a draft business plan prepared for the Respondent's Trustees by Mr Walden. Under the heading, "Operational Developments", that draft business plan stated: -

> **"During 2015 the ILS IT systems has been upgraded, however, during 2016 ILS will outsource our IT support facility. This will be provided by an external organisation and provide savings that can be re-invested to enhance our service delivery. With the increased workforce further investment in Information Technology will be required so that all staff have a workstation encompassing a computer."**

On the one hand, the draft business plan was recommending future outsourcing of the IT support which was, at that time, being provided by the Claimant as an in-house IT specialist. But on the other hand it was talking about further investment in IT being required by the Respondent."

Discussion

4. This appeal is now narrowed to one single discrete issue. That is whether the Tribunal failed to take into account the existence of any available alternative employment that might

have prevented the claimant's redundancy. The argument in support of that relies on perceived tension between certain passages in the Tribunal Judgment (paragraphs 68 and 78) that appear to state that there were other front-line jobs the claimant could have done and another (paragraph 78) that the respondent's Trustee had known of the recruitment of three front-line staff around the material time and so the statement to the claimant in May 2016 that there were no other available vacancies was misleading.

5. The Tribunal's conclusion that consultation on redundancy would have made no difference and so that the dismissal was fair, is dependent in part on whether there was a need to recruit more staff for work that the claimant was capable of undertaking. If no consideration was given to the existence of that potentially available alternative employment in reaching the decision on redundancy, that decision is open to challenge.

6. The chronology of events is, both sides accept, central to the argument. The claimant points to the findings at paragraph 54 to 56 (and supporting material) that illustrates that his possible redundancy was mentioned as early as January 2016. The respondent points to the minutes of the Trustees' meeting of May 2016 which records a likely impact on the organisation of Dumfries and Galloway Council's need to make savings. An issue that was live before the Tribunal was that the respondent contended that it was only on 16th May 2016 that the funding issue that created the redundancy situation crystallised, albeit that there had been discussions about outsourcing IT prior to that date. The respondent's case before the Tribunal was that 16th May 2016 was the point at which the Trustees knew they had to cut costs and that in a way that they had already contemplated, namely by outsourcing their IT work. The way in which the Tribunal's Judgment records the chronology is not, with respect, particularly clear. However, it is apparent that the Tribunal accepted the respondent's contention that the date of the meeting in May 2016 and subsequent Notice of Termination was the time at which the issue

of alternative employment required to be considered. Having set out the Notice of Termination in full (paragraph 73) the Tribunal was then critical of the respondent for the contentious nature of the statement in the Notice that there were "no other vacancies available within ILS to which we could consider transferring you." It is in that context that the Tribunal notes that the three staff had been taken on in April 2016. The Tribunal records that recruitment as being "at or about the time of the Notice of Termination" but it was clear that over a month had in fact passed between that recruitment and the date of the Trustees' meeting.

> **"57. The Respondent's Trustees met at a Trustee Meeting on 6 April 2016. Mr Walden and one of the Respondent's Team Leaders, "April" were present at that meeting. The minutes of that 6 April 2016 meeting disclose that so far as the draft business plan was concerned "this issue was not fully discussed as all of the Trustees were not present at the meeting therefore it was decided to set this aside for a future meeting" and record that "outsourcing of our IT function was discussed at length and it was felt we should now push on with this at the earliest opportunity."**
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> **58. The Respondent's Trustees met on 16 May 2016. The minutes of that 16 May meeting record that the Trustees considered that:-**
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> > **"The outsourcing of our IT Facility would provide a substantial saving to the organisation and allow the Outreach Housing Support provision to be largely unaffected", that "this position occupied by David Colquhoun is a singleton post and would no longer exist after the Outsourcing was complete, there are no alternative employment opportunities within ILS, and if as indicated the funding cuts will have an impact on ILS. It is likely there won't be any recruitment for some time to come."**
>
> **And: -**
>
> > **"Therefor the Board agreed that the It Facility would be outsourced and that David Colquhoun would be made redundant."**
>
> **And that: -**
>
> > **"It was agreed that Russell would take this forward in consultation with Alasdair and send a letter of Redundancy to David Colquhoun."**
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> **59. Throughout the period which began in January 2016 and ended with the Respondent's receipt of an 18 July 2016 letter from Dumfries and Galloway Council the Respondent had sought to obtain clarification from Dumfries and Galloway Council as to whether there were to be substantial reductions in funding and if so what those reductions would be. But every attempt to obtain that specification from Dumfries and Galloway Council failed until, eventually, the 18 July letter was received.**

60. As one of the Respondent's Trustees Mr Brown was aware that the attitude of Dumfries and Galloway Council was that at a time of austerity, when the Council was having to make cuts in outsourced services and in funds provided to external service providers such as the Respondent, the Council, was looking to the Respondent to make savings within its own overall operational costs. The Respondent's Trustees felt that they had a duty to listen to what was being said to them by Dumfries and Galloway Council
and to act upon it in order to try to maintain an acceptable level of operations so far as its end users were concerned.

62. The Respondent's Trustees looked at the whole of the Respondent's operations in order to identify where savings might be met but the only aspect of its operations in respect of which it could identify possible 15 significant savings was that of in-house IT support, Mr Brown describing that as being "the only aspect of the business where a reasonable saving could be made" and the Trustees deciding that even if the expected cuts in funding did not arise, and even if the Respondent somehow obtained unexpectedly high numbers of referrals from Dumfries and Galloway Council, their aim as the Respondent's Trustees should still be to reduce operational costs.

64. Mr Brown insists that it was the Respondent's Trustees who identified the possibility of saving monies by outsourcing IT support and that as part of that process the Trustees identified the Claimant as being the sole member of that stand-alone IT support position within the Respondent's business. 65. Mr Brown insists that the decision to terminate the Claimant's employment on the ground of redundancy was a decision taken by the Respondent's Trustees.

66. Mr Brown insists that the Trustees took the view that "we were carrying a post that a small charity like ours could not afford", i.e. an in-house IT support person, and that that was one of the reasons why nothing that the Claimant could have said or done would have altered either the perceived need to make financial savings by altering what IT support was provided or the Trustees' decision to achieve that change by, amongst other things, making the Claimant redundant.

67. As one of the Respondent's Trustees Mr Brown had continued to hope that even although the Claimant's post and therefore the Claimant's job was redundant and the Claimant would be made redundant he might somehow be offered alternative work within the Respondent's business, perhaps as a front-line member of its staff, but any such possibility was predicated on additional referrals being made by Dumfries and Galloway Council.

68. Mr Brown accepts that front-line work would have been work that the Claimant was capable of doing and would certainly have been an option provided the Claimant met the required criteria. Mr Brown believed that the Claimant would meet those criteria.

71. The Respondent's Trustees consensus at the time of the Notice of Termination being issued was that the Respondent could not continue to justify the expense of full-time in-house IT support and that obtaining what IT support was required could be significantly achieved by using external, outsourced, IT support providers.

73. The Notice of Termination stated:-

> **"I regret to advise you that as a Board of Trustees we have had to make a number of difficult decisions regarding the running of ILS as a charitable body and to ensure that we are best able to meet our obligations to our service users and funding partners. We have against that background secured a contract to outsource the maintenance of ILS computer systems and as a result your post is redundant as your job description relates solely to maintaining and servicing out IT system. Sadly there are no other vacancies available within ILS to which we could consider transferring you and accordingly, on behalf of the Trustees, I must advise that your employment with ILS will now have to be terminated with effect from today.**
>
> **I have attached a statement detailing your statutory redundancy pay and notice pay entitlements. These payments will be made to you in the course of the next salary payment run and it is proposed that your notice period be served on gardening leave from ILS such that your last day of employment with us will effectively be 29 June 2016. I appreciate that this may be upsetting for you but would wish to take the opportunity to thank you for your service to ILS. Given that the effect of this notice is to end your employment I confirm that may appeal against that decision and that should you wish to do so any ground of appeal should be submitted to me in writing within the next five working days."**

78. The reference in the Notice of Termination to there being "no other vacancies available within ILS to which we could consider transferring you" was, at best, misleading. At or about the time of the Notice of Termination being sent to the Claimant the Respondent's manager, Mr Walden, had recruited three new front-line members of staff. Mr Brown had not known that those additional members of staff had been recruited or were being in course of being recruited. Mr Brown now confirms that the Respondent did take on three additional front-line staff in April 2016 and that the Claimant was not considered for any of those posts but even now he insists that at the time the Trustees were not aware that any new staff were being employed.

95. At the stage of deciding to dismiss the Claimant on the ground of redundancy and because of the Claimant's comment that he had had the ability to access otherwise confidential e-mails the Trustees consciously decided that to give him any advance warning of likely termination of his employment would be to expose the Respondent - (and therefore the Respondent's end users) - to the risk of breaches of confidentiality.

96. The Respondent's Trustees consciously chose to minimise that risk, to do away with it altogether so far as they were concerned, by not consulting

with the Claimant at any stage prior to the Notice of Termination being served and by immediately putting him on garden leave.

98. On 18 July 2016, some three weeks after the effective date of termination, the Respondent received a letter – (hereinafter, "the D & G C July letter") - from Dumfries and Galloway Council which included the statements that: -

> **"…The Outreach Housing Support Contract between Dumfries and Galloway Council and Independent Living Support… is changed as set out in this letter."**

And: -

> **"The annual Contract payment of £433,199.00 in respect of the Outreach Housing Support Contract is reduced by £119,496.00 to £313,703.00 with effect from 1 November 2016. The contracted hours will reduce at this same date from 470 hours per week to 345 hours per week."**

111. Mr Brown is certain that if there had been consultation with the Claimant about redundancy, or if the Claimant's Appeal has resulted in an appeal hearing being held, there would have been absolutely no chance that the outcome – (the Respondent's decision to terminate the Claimant's employment on the ground of redundancy) - would change and that no matter what the Claimant might have said at any consultation meeting, and no matter what the Claimant might have said at an appeal hearing, the Respondent would have dismissed the Claimant on the ground of redundancy."

7. The Tribunal's reasoning begins at paragraph 130 of the Judgment. Having found (at paragraph's 137 to 142) that Mr. Brown, the Trustee of the respondent who gave evidence was a "totally credible witness" and that the claimant was evasive and at times argumentative, the Tribunal confirmed that where there were discrepancies between the evidence of those two witnesses it would prefer the evidence given by Mr. Brown.

8. The issues before the Tribunal related primarily to whether the claimant's position was in fact redundant and about the lack of consultation before terminating his employment. Again, insofar relevant to the issues in this appeal, the Tribunal's decision and associated reasoning is in the following terms:

"168. Having taken all of the evidence that it heard into account the Tribunal was left in no doubt that the Claimant's dismissal was wholly or mainly attributable to the fact that the requirements of the Respondent's business for employees to carry out work of the particular kind carried out by him for it had diminished and were reasonably expected to diminish further or to cease altogether, in which case the Tribunal was satisfied that the reason for the Claimant's dismissal had been that he was redundant and therefore that in terms of Section 98 of ERA 1996 the reason for the Claimant's dismissal was a reason falling within Subsection (2) of that Section 98.

176. In that context, the Tribunal wishes to add comment, albeit on an *obiter* basis, that if it had found that, overall, the Claimant's dismissal had been unfair, and if it had then gone on to consider the whole question of compensation and the issues of whether, but for procedural fairness, the Claimant would or might have been dismissed anyway, it would have reached the view that had the Respondent followed proper procedure the dismissal would have occurred in any event only a very few days after the date on which he was actually dismissed. It would have been the Tribunal's remit in such a circumstance to consider not a hypothetical fair employer or what a hypothetical fair employer might have done but to assess the actions of what the actual employer, in this case the Respondent, did or would have done. It is the Tribunal's view that what the employer in this case, the Respondent, would have done even within that very few days after the Notice of Termination had been served would have been to dismiss the Claimant on the ground of redundancy and that given the circumstances of the present case dismissal a few days at most, after the Notice of Termination was served was not only possible but certain. In which case, the issue for the Tribunal would have been how to calculate any financial awards which it would have been inclined to make in favour of the Claimant and to what extent any such awards would have had to have been reduced, given the circumstances of the present case, in order to comply with the guidance given by the House of Lords in the case of Polkey v A E Dayton Services Limited.

186. In the view of the Tribunal nothing that the Claimant could have said as part of any consultation process about cessation or diminution of the work that he was employed to carry out for the Respondent – (and actually did for the Respondent) - could have influenced that decision by the Respondent's Trustees that there had been, or was expected to be, such a cessation or diminution of the Respondent's requirements for an employee carrying out the work that the Claimant did to carry out that work for it.

189. In the view of the Tribunal the Respondent did properly consider who should be in the pool, identified the Claimant as being not only employed to do only the work of an, in-house, IT support expert but as being the only person employed by the Respondent who actually did that work on an in-house basis. In the view of the Tribunal any consultation with the Claimant about selection for redundancy would have made no difference to the outcome, to the Respondent's decision that the Claimant was the person, in the circumstances the only person, who fell within the pool or employees who should properly be considered for such redundancy.

190. In view of the Tribunal neither consultation at any stage prior to the Notice of Termination being served nor the holding of an appeal hearing would have made - (or even could have made) - any difference to the fact that the Respondent was facing a very substantial drop of in referrals from Dumfries and Galloway Council and a very significant actual and percentage reduction in funding from Dumfries and Galloway Council. How best to deal with those anticipated reductions was a decision for the Respondent's Trustees to make.

191. And, peculiar to the circumstances of the present case, there was an additional reason why the Respondent felt that it was inappropriate to consult with the Claimant – (whether in respect of a possible redundancy or in respect of his selection for redundancy) - prior to the Notice of Termination being sent. And in the view of the Tribunal that was a significant reason. The nature of the Claimant's business is such that confidentiality is of the utmost importance. The Respondent believes that it owes that degree of absolute confidentiality to its end users, all of whom are vulnerable people and some of whom are vulnerable young people. Since late 2015 the Respondent had had great concern about a comment that the Claimant had made to it about being able to access the Respondent's Trustees and the Respondent's staff members' e-mails. It was clear from Mr Brown's evidence that the Respondents viewed what the Claimant had said as being a threat even although the Claimant himself insisted that the remark attributed to him – (and not denied by him) – had been an off-hand or flippant remark rather than ever being intended as a threat. The Respondent had never fully investigated whether the Claimant had actually accessed Trustees or staff members' e-mails and certainly no disciplinary proceedings had ensued. Nevertheless, it was clear from Mr Brown's evidence that the Respondent's Trustees still had grave concerns. It was also clear from Mr Brown's evidence, too, that at the stage of deciding to dismiss the Claimant on the ground of redundancy and because of the Claimant's comment that he had had the ability to access otherwise confidential e-mails the Trustees consciously decided that to give him any advance warning of likely termination of his employment would be to expose the Respondent- (and therefore the Respondent's end users) - to the risk of breaches of confidentiality.

192. It was clear from Mr Brown's evidence that the Respondent's Trustees consciously chose to minimise risk, to do away with it altogether so far as they were concerned, by not consulting with the Claimant at any stage prior to the Notice of Termination being served and by immediately putting him on garden leave. It is a matter of fact that the Claimant did not, as had been feared by the Respondents, take any steps to "trash the system" or to breach confidentiality owed to the Respondent's end users. But in the view of the Tribunal that does not detract from the decision taken by the Respondent's Trustees as a precaution guarding against, minimising or obviating any risk.

193. The Tribunal was satisfied that given the particular circumstances of the Claimant's employment and the Respondent's Trustees concerns at the remark made by him that was not an unreasonable decision for the Respondent's Trustees to take.

197. Having weighed the nature of the Respondent's failures in application of proper procedure against the "utterly useless" or "futile" arguments, the Tribunal was satisfied that the present case is one of those where the circumstances facing the Respondent were exceptional enough to excuse it from following fair procedures, specifically fair procedures in respect of consultation and selection for redundancy."

Arguments on Appeal

9. At the appeal hearing the claimant contended that the respondent had contemplated his redundancy throughout the period January to May 2016. During that period there had been a shortage of front-line staff as illustrated by the recruitment of three new personnel in front-line work in April 2016. He acknowledged that on the respondent's account, which was that the relevant chronology starts at May 2016, a question relative to whether there were available employment opportunities for the claimant within the organisation had to be answered in the negative. However, he contended that the redundancy situation did not arise as far back as 16th May 2016. He pointed to the first mention of a possible redundancy being as far back as 15th January 2016 in an email of 15th January that is referred to in paragraph 54 of the Judgment. The outsourcing of IT was discussed at a Trustee meeting on 18th January and the draft Business Plan of the respondent dated March 2016 states in terms that there was an intention to outsource IT support and, also, a reference to an increased workforce. Against that background the Tribunal made findings in fact that the Respondent did recruit three new staff who began work in April 2016 at the same time, according to the agreement, as the respondent was preparing for a redundancy situation. Mr. Colquhoun submitted that if the admitted absence of consultation on redundancy was looked at in this context that the result would be different from that reached by the Tribunal.

10. He referred to paragraphs 67 and 68 of the Tribunal Judgment and the stated hope of the Trustee, Mr. Brown, that the claimant could be redeployed against a background of the claimant being capable of undertaking front-line work. The claimant argued that by failing to consult at

the time that that resulted in redundancy being inevitable later. As part of that, by failing to consider alternative employment within the organisation for the claimant, the Respondent acted unfairly.

11. In response Mr. Anderson, for the respondent, acknowledged that the Tribunal is obliged to look at the issue of suitable alternative work. This was done in a different context in this case because of the focus by the claimant on the unfairness of the decision on redundancy and the absence of consultation. Paragraphs 55 to 58 of the Judgment illustrated that the Tribunal was aware of all the matters raised by the claimant and so had dealt with them. He indicated that the crux of the Respondent's case was that it was not until May 2016 that there was any crystallisation of the funding issue. It is clear from paragraph 59 of the Judgment that the respondent had by then been seeking clarification from Dumfries and Galloway Council as to whether there were to be substantial reductions in funding and, if so, what those reductions would be. He acknowledges that the Tribunal Judgment does not make clear in that context the importance of the Trustees' meeting of 16th May 2016 when the Trustees were informed that a representative of the Council had that day indicated that the Council required to make very significant additional savings and that these were likely to have an impact on the respondent as well as another organisation. The specific reduction in funding for the respondent was not known until 18th July when a letter was received from the Council confirming a very substantial reduction.

12. Mr. Anderson submitted that by the time consultation with the claimant should have started that there were no available jobs within the respondent's organisation. By then three employees had been taken on and there was no obligation to "bump" those employees in favour of the claimant – ***Samuels* v *University of Creative Arts* [2012] EWCA Civ. 1152 at paragraph 31.**

13. Counsel submitted that it was important to read paragraph 68 of the Judgment together with paragraph 67 and in doing so was clear that Mr. Brown's views could only refer to the time of the Notice of Termination being issued in May 2016 (or thereafter) but not to a time before that. Paragraph 78 of the Judgment made clear that Mr. Brown had been unaware of the recruitment of new employees when they were taken on in April.

14. Mr. Anderson further contended that as all the documents now relied on by the claimant in relation to the position pre-May 2016 had been before the Tribunal and the subject of findings in fact that there could be no issue of alternative employment as it was clear from paragraph 78 that it had. In making its decision that consultation would have made no difference, the Tribunal had already found that three members of staff had been taken on in April 2016. He accepted that the Tribunal's consideration of the point was not direct, but that it was a result of the lack of any claim by the claimant before the Tribunal that the unfairness of the dismissal arose from a failure to consider alternatives to potential redundancy. In those circumstances, at best for the claimant, the argument would have to be characterised as one of perversity. The claimant could not overcome the high hurdle imposed by ***Yeboah* v *Crofton* [2002] IRLR 634.**

15. In the event of success, the claimant wished the matter to go before a fresh Tribunal. Counsel for the respondent contended that if the appeal succeeded on the single discrete point now argued that any remit could only be on consideration of suitable alternative work as the vast majority of the Tribunal's Judgment was not impugned by this ground of appeal.

16. The perceived tension between paragraphs 68 and 78 can be resolved once it is understood that Mr. Brown's hope (paragraph 67) that the claimant might be offered alternative work is one that can only relate to the period around May 2016 and thereafter. The Tribunal accepted that Mr. Brown did not know that new staff were being taken on in April 2016. By 16th May it was too late to consider the claimant for those jobs as they were taken, but Mr. Brown appears to have continued to hope that something would become available that would avoid the claimant's redundancy. Absent the departure of a member of front-line staff, however, there was no obligation on the respondent to dismiss other staff in order to prevent the claimant's redundancy - ***Samuels* v *University of Creative Arts* [2012] EWCA Civ. 1152 at paragraph 31.**

17. The Tribunal gave full reasons for its decision that consultation on proposed redundancy would have been "utterly useless" or "futile". It is clear from paragraph 190 of the Judgment that the Tribunal accepted that the claimant's redundancy took place when the respondent was facing a very substantial drop-off in referrals from the Council and a very significant reduction in funding. The minute of the Trustees' meeting of 16th May 2016 provided support for the respondent's contention that it was on that date that the Trustees determined that they had to take action and implement a cost-reduction plan. Consideration of alternative employment for the claimant at that date would have yielded no successful outcome as any front-line post had already been filled. Accordingly, the reference in the Notice of Termination of employment to there being no other vacancies available within ILS was accurate as of 18th May 2016. It was misleading in the sense that it did not explain that employees had been taken on the previous month and that, had information about future funding been known earlier, redeployment of the claimant could easily have been considered.

18. Although the issue of suitable alternative employment was not raised by the claimant, or focused on in his ET1, it is a matter that required to be considered by the Tribunal to the extent that, had an alternative position been available at the date of the redundancy situation being established, the dismissal may have been unfair. However, reading the Judgment as a whole, and, despite the apparent criticism of the respondent at paragraph 78 of the Judgment, it can easily be inferred that the Tribunal accepted that no other suitable employment was in fact available at the material time. That is why the various failures in procedure, including lack of consultation and denial of an internal appeal process, made no difference. The reasons in support of that conclusion are set out in some detail in paragraphs 186 to 193 and I have recorded those in full. These passages in the Judgment contain reference to a background of confidentiality issues involving the claimant and respondent which do not require to be addressed here but were an important part of the factual matrix upon which the Tribunal made its finding. I take into account also that the Tribunal findings on credibility and reliability are not under challenge.

Disposal

19. In the circumstances outlined, the appeal must fail and falls to be dismissed. I would add, however, that it is impossible not to have sympathy with the claimant's frustration at the way in which these proceedings were conducted by the respondent at the early stages. It was extremely unhelpful and confusing to him as a party litigant to prepare the case on the basis that the respondent was contending both that there had been consultation and that an internal appeal had been available only to discover that these contentions were incorrect and so not insisted on. While the change in position was no doubt the result of instructions to Counsel, (following advice tendered), and to Mr. Anderson's carrying-out of his professional obligations, the lateness of such changes in position, particularly where the applicant is a litigant in person, is to be discouraged.