Neutral Citation Number: [2022] EAT 139

Case No: EA-2021-000633-JOJ

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 June 2022

**Before**:

**HIS HONOUR JUDGE BEARD**

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**Between:**

**MRS S MOGANE** **Appellant**

**- and -**

**1) BRADFORD TEACHING HOSPITALS NHS FOUNDATION TRUST**
**2) KAREN REGAN** **Respondents**

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**Adam Ohringer** (instructed by Direct Access Scheme) for the **Appellant**
**James Boyd** (instructed by DAC Beachcroft) for the **Respondent**

Hearing date: 10 June 2022

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# JUDGMENT

## SUMMARY

## UNFAIR DISMISSAL AND REDUNDANCY

The ET had overlooked aspects of the issue of consultation in its deliberations, conflating consultation on alternative employment with the broader consultation required in a redundancy situation. Consultation is a fundamental aspect of a fair procedure see **Williams v Compare Maxam Ltd** [1982] ICR 156 and **Polkey v A E Dayton Services** [1987] IRLR 503; [1988] ICR 142 (HL). This aspect applies equally, with appropriate adaptation, to redundancy situations where there is no collective representation see **Freud v Bentalls Ltd** [1982] IRLR 443. In order that consultation is "genuine and meaningful" a fair procedure requires that consultation takes place at a stage when an employee or employee representative can still, potentially, influence the outcome. In circumstances, as here, where the choice of criteria adopted to select for redundancy has the practical result that the selection is made by that decision itself, consultation should take place prior to that decision being made.

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

**HIS HONOUR JUDGE BEARD:**

1. The parties agreed that because of the unavailability of a further lay member that this tribunal should sit as a two member panel. I should begin by indicating that this is a unanimous decision and I should also make it clear, that the Judicial member of this panel has been particularly assisted in drawing conclusions by Mr Hammond, the Lay Member applying his industrial experience to our conclusions.

2. This is an appeal arising out of the judgment of Employment Judge Lancaster, sitting with Members Ms Norburn and Mr Webb following a six-day hearing in January 2021. The Grounds of Appeal were considered, at the sift stage, to be arguable by Mrs Justice Stacey. I shall refer to the Parties as they were below, as Claimant and Respondent. Mr Ohringer represents the Claimant; he did not appear at the Employment Tribunal ("Tribunal") hearing. Mr Boyd represents the Respondent and he was Counsel for the Respondent at the Tribunal hearing.

3. The claim before the Tribunal was wide ranging, however, the five Grounds of Appeal are all related to issues surrounding the claim of unfair dismissal by reason of redundancy. Those Grounds are in respect of the Tribunal's decisions: first, on the issue of consultation in a redundancy process; second, on the issue of the correct pool for selection; third, in respect of criteria for selection; fourth, that the use of one criterion for selection is one which, it is argued, could not be considered as properly within the bounds of reasonable responses; and, finally, that the reasons for the Tribunal's decisions were not Meek-compliant.

4. The relevant facts found by the Tribunal were: first, that there was a redundancy situation because of the financial circumstances of the research unit; second, that situation required a reduction in staff. The Claimant, a band 6 nurse, along with another Band 6, were employed on fixed term contracts. The second nurse had been appointed for the first time on a two-year contract which had, shortly before the redundancy process, been confirmed following the

successful completion of a probationary period. The Claimant had been employed since 2016 on a series of one-year contracts, the most recent of these was due to expire prior to the expiration of the second nurse's fixed term.

5. The internal Human Resources function of the Respondent had challenged the Respondent's decision-maker as to the rationale for the decision that the Claimant's contract would not be renewed. It was asked why that had been chosen as the process rather one which would select which nurse should be made redundant. The sole reason advanced by the decision maker was that the Claimant's contract was coming up for renewal. No other alternative processes were considered for deciding who should be made redundant. The Tribunal considered that, in its words:

> "10. ... In situations where all relevant employees are on short-term contracts it is within the band of reasonable responses to take a decision based upon which of those is due for renewal at the particular point where there are perceived to be economical difficulties and where there is a diminution in the requirement for employees at that Band 6 level."

6. On 21st March 2019, the Employment Tribunal found that the Claimant had been invited to a meeting at which she was told of the financial strictures faced by the Respondent. Shortly after that, the decision-maker concluded that the Claimant should be made redundant as her contract was the one that was due to be renewed soonest. A further meeting was intended for 8th May 2019; that meeting did not go ahead. On 13th May 2019, the Claimant was invited to a meeting to consider the renewal of her contract which was due to expire on 1st June 2019. A meeting was scheduled for 5th June 2019, after the expiry date of that contract. There was an extension of the contract to 1st September to facilitate consultation. The Claimant went off ill on 30th May 2019 and she never returned to work thereafter.

7. Instead of a meeting being held on 5th June, it was held on 12th June 2019. By that stage, on our reading of the Tribunal's Judgment, the decision-maker had already concluded that the Claimant would be redundant from her job within that department. The remainder of the process related to an attempt to find alternative employment. This meant that the Claimant's

contract of employment was further extended to 31st December 2019 and it was at that date it was terminated. The Claimant had been offered a Band 5 nurse position but she did not take that up because it was a lower band and because she did not have the particular qualification required for the post. The Tribunal decided that she was reasonable in not taking up that appointment.

8. Section 98(4) of **The Employment Rights Act** 1996 provides:

> "98
> …
> (4) Where the employer has fulfilled the requirements of subsection (1) [in this case, redundancy], 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."

We were referred by both Counsel to a number of authorities. On the issue of consultation, the first authority we turn to is that of **Williams v Compair Maxim Ltd** [1982] ICR 156 where five principles emerge which have been applied consistently to tribunal decisions on collective redundancies since. They are:

i) 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;

ii) 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;

iii) 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 on 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;

iv) 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;

v) the employer will seek to see whether, instead of dismissing the employee, it can offer him alternative employment.

9. **Polkey v A E Dayton Services Ltd** [1988] 1 ICR 142, a House of Lords decision, takes us to the speech of Lord Bridge in that case, in which he said this:

> "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy arid takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) [now section 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."

10. We then turned to the case of **Freud v Bentalls Ltd** [1982] IRLR 443 in which an individual rather than collective redundancy was involved; the judgment sets out this at para. 14:

> "In the particular sphere of redundancy, good industrial relations practice in the ordinary case requires consultation with the redundant employee so that the employer may find out whether the needs of the business can be met in some way other than by dismissal and, if not, what other steps the employer can take to ameliorate the blow to the employee. In some cases (though not this one) the employer may be able to suggest a reorganisation which will obviate the need for dismissal;"

And then this:

> "in virtually all cases the employer if he consults will find out what steps he can take to find the employee alternative employment either within the company or outside it."

In that case, not involving a collective redundancy consultation, again, was considered to be of significant importance.

11. We turn, then, to **De Grasse v Stockwell Tools Ltd** [1992] IRLR 269, para.12 of which is of particular significance, because it spells out that consultation is an essential element of a fair process:

> "In our judgment, while the size of the undertaking may affect the nature or formality of the consultation process, it cannot excuse the lack of any consultation at all. However informal the consultation may be, it should ordinarily take place."

12. In the case of **Rowell v Hubbard Group Services Ltd** [1995] IRLR 195, whilst referring to cases earlier decisions, draws attention in particular to the Divisional Court in the **Crown v British Coal Corporation Secretary of State for Industry ex parte Price & Others** and the judgment of Lord Justice Glidewell:

> "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 p19, 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.'
>
> Glidewell continued:
>
> "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 consulter thereafter considering those views properly and genuinely."

In the **Rowell** judgment, having referred to that qutation, Judge Levy QC went on to say this:

> "There are no invariable rules as to what is to be done in any given situation. Everything will depend on its particular facts. However, when the need for consultation exists, it must be fair and genuine and should, we suggest, be conducted so far as possible as the passage from Lord Justice Glidewell's judgment suggests."

13. In dealing with the question of the appropriate pool, we began by being referred to **Capita Hartshead Ltd v Byard** UKEAT/445/11 and, in particular, paras. 24 and 25. Para. 24 indicates:

> "24. It is appropriate at this stage to recall that the approach of appellate bodies, such as this appeal tribunal, to decisions of the employment tribunals is that in the words of Donaldson LJ in **Union of Construction, Allied Trades and Technicians v Brain**

> [1981] ICR 542, 551:
> "It would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given.""

Mr Boyd placed emphasis on that approach and the specifics set out in para. 25 to say that, when we, on appeal, examine the Tribunal's reasons, both on consultation and the pool, we shouldn't be descending into the kind of approach that is deprecated there.

> "25. Turning to this case, the employment tribunal considered that there were two stages that had to be considered after it has been decided that it was necessary to dismiss one or more employees because of redundancy. The first stage is to determine who should be in that pool of employees who are being considered as candidates for redundancy. The second stage is to decide which of the employees in the pool will in fact be dismissed for redundancy. It is common ground that this approach is correct and that this appeal is simply dealing with the way in which the employers approached the first stage. Also it is not relevant for this appeal tribunal to decide how it would have reached its conclusions."

14. We also considered **Wrexham Golf Co Ltd v Ingham** (UKEAT/0190/12) which, in paras. 20 *et seq*. and referring to paras. 24 and 25 in **Capita,** where Silber J set out the reasoning as four principles which apply to the identification of the appropriate pool:

> " ... First, it is settled law 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:__
>
> ...
>
> Second, this principle applies to the approach to be adopted by an employment tribunal to the manner of the selection of a pool from which employees are to be considered for redundancy. Thus Judge Reid QC explained when giving the judgment in this appeal tribunal in **Hendy Banks City Print Ltd v Fairbrother** … [[2002] All England Reports Digest 142], when he said, at para 9, in a passage which echoes the approach of Lord McDonald sitting in this appeal tribunal in **Green v A & I Fraser (Wholesale Fish Merchants) Ltd** [1985] IRLR 55:
>
> __the courts were recognising that the reasonable response test was applicable to the selection of the pool from which redundancies were to be drawn.__
>
> Third, the employment tribunal in determining how they perform their task of applying the statutory test are not bound by any rigid rules. Eveleigh LJ explained in **Thomas & Betts Manufacturing Ltd v Harding** [1980] IRLR 255, 257, in relation to a contention that there was a rule as to which employees should be selected for consideration for redundancy:
>
> __I myself deprecate the attempts that are made in these industrial relations cases to

> spell out a point of law developed upon precedent to create rules that have to be applied by the . . . tribunal in considering the straightforward question of fact which is provided for in [the predecessor of section 98(4) of the Employment Rights Act 1996] . . . That is the approach to the question that was required by the . . . tribunal, and that is the approach that the tribunal adopted. As I say, the attempt to erect rules of law in cases of this kind is to be deprecated . . .__
>
> Fourth, the employment tribunal is an industrial jury and it is important to bear in mind the following general remarks of Lord Denning MR in **Hollister v National Farmers Union** [1979] ICR 542, 552—553:
>
> __In these cases Parliament has expressly left the determination of all questions of fact to the [employment] tribunals themselves . . . It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go through the reasoning of these tribunals with a toothcomb to see if some error can be found here — there to see if one can find some little cryptic sentence."

15. In the **Wrexham Golf Co** case at paras. 24 and 25, His Honour Judge Richardson stated:

> "24. In this case we are conscious that the Tribunal has referred to section 98(4) and to the range of reasonable responses test. We have concluded, however, that the Tribunal did not apply that test to the question whether it was reasonable to focus upon the Club Steward as the person at risk of redundancy.
>
> 25. The Tribunal did not criticise the conclusion of the Club that the role of Club Steward should cease. Its reasoning seems to proceed from its finding that the Club did not consider developing a wider pool of employees. At this point the Tribunal needed to stop and ask: given the nature of the job of Club Steward, was it reasonable for the Respondent not to consider developing a wider pool of employees? Section 98(4) requires this question to be addressed and answered. On its face, it would seem to be within the range of reasonable responses to focus upon the holder of the role of Club Steward without also considering the other bar staff. The Tribunal does not say why it was unreasonable to do so. This may be because the Tribunal had in mind the words of Mummery J in **Taymech v Ryan** [1994] EAT/663/94 which we have quoted; but no judgment should be read as a statute. There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool. The question which we do not think the Tribunal really addressed was whether this was such a case."

16. We also were taken to **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601 at paras. 29 and 31, where it discusses reasons:

> "29 Failure by an employment tribunal to set out even a brief summary of the relevant law is a breach of rule 62(5) of the ET [Employment Tribunal] Rules (2013). But I do not think it is a profitable discussion to consider whether it is an error of law, nor whether there has been "substantial compliance" with rule 62(5). It is an error, but the real question in my view is whether the error is material. That is surely what Morison J meant when he said in **Kellaway**'s case that it does not "amount to an automatic ground of appeal".
> …

> 31 The point of rule 62, headed "Reasons", is to enable the parties to know why they have won or lost. In his classic judgment in **Meek v City of Birmingham District Council** [1987] IRLR 250, para 11 Bingham LJ cited with approval the following observations of Sir John Donaldson MR in an earlier case (**Martin v Glynwed Distribution Ltd** [1983] ICR 511, 520):
> "The duty of an industrial tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the industrial tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the industrial tribunal. ( … )""

17. Mr Ohringer for the Claimant argues that, in the absence of an ACAS Code of Practice on redundancy, the leading cases of **Williams** and **Polkey** provide a basic guide to normal expectations. He argues there are principles in case law which demonstrate the importance of fair consultation; that it should be genuine and, in its absence, a dismissal can be shown to be unfair. He contended that, on the facts here, there was no genuine consultation. The key issue, that of the selection of the Claimant for redundancy, was decided by that choice of pool. He argued that the Tribunal failed in concluding that the decision to select the Claimant was reasonable, to consider the issue of consultation about the pool which would equate to selection. His submission was that the lack of consultation feeds into the fact that, on his interpretation of the case, there appears to be no consideration given as to whether the other Band 6 nurse should have been within the redundancy pool. The argument he advanced today is that it cannot be reasonable that the sole criterion for selection for redundancy is related to the date of a fixed term contract ending; that reason would be entirely arbitrary. In what Mr Hammond and I considered a compelling simile, he described it is as 'a game of musical chairs' which an employer could exploit by deciding when to turn off the music.

18. Mr Ohringer further argues that, even if it was possible for the dismissal to be considered fair, the Tribunal's failed any to provide reasons for its conclusion that the pooling decision was reasonable. He argues that the Tribunal's failure to show this reason is all the more inexplicable because the list of issues before the tribunal demonstrates that these were matters that were specifically put in issue before the Employment Tribunal which included: if the

reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether: the Respondent adequately warned and consulted the Claimant; it adopted a reasonable selection decision, including its approach to selection pooling; it adopted reasonable steps to help the Claimant find reasonable alternative employment; that dismissal was within the range of reasonable responses; and did it act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

19. In response to those arguments, Mr Boyd states that the Tribunal's reasoning on consultation and pooling is sufficiently set out in para. 10 of the Judgment. Para. 10 reads as follows:

> "10. It is right that there were no other alternatives considered but we are quite satisfied that that decision fell within the band of reasonable responses open to a reasonable employer. In situations where all relevant employees are on short-term contracts it is within the band of reasonable responses to take a decision based upon which of those is due for renewal at the particular point where there are perceived to be economical difficulties and where there is a diminution in the requirement for employees at that Band 6 level."

In the course of oral argument, he expanded on that and said that, if other paragraphs were read in relation to the redundancy matter and, indeed, if the Judgment was read in the round, it was clear as to why the decision had been made. He contended that this decision was unassailable on the four principles set out by Silber J in **Capita** and he further takes comfort from **Wrexham Golf Co** decision where, in terms, he argues that the Claimant is, effectively, presuming a perversity argument by other means when it states that a larger pool should be considered and the consultation was not undertaken.

20. In respect of consultation, he argued that the employee must be consulted but there is no principle requiring that they be consulted at every stage of the redundancy process and there is no indication that they ought to be consulted at the beginning of that process. He argued that, within the Judgment, there are no findings that consultation took place after the decision to dismiss had been made – that is a point to which we will return.

21. Mr Boyd also contends that, if the Judgment is read in the round, there are the elements

required by Rule 62(5) of the **ET Rules** 2013 and the Tribunal does explain its reasoning. His point was made that the Tribunal was faced, in this case, by a herculean task as demonstrated by the list of jurisdictions and issues, which expanded far beyond those which we have referred to above and, indeed, the issues included time limits; protected disclosure; detriment for protected disclosure; remedy for protected disclosure detriment; direct discrimination on race; harassment related to race; and victimisation. He asks that, when we look at this Judgment, we approach it in a way that is consistent with the decision in **DPP Law v Greenberg** [2021] EWCA Civ 672 and not engage in hypercritical nit-picking when considering the Judgment.

22. In discussion between this tribunal and Counsel, both agreed that the question of when consultation should occur is key to the decision. In collective redundancy cases, it has been held that this should occur at a formative stag. This is shown through **Williams** and the development of case law from it. It provides for consultation at a stage of a process at which the employees representative might have an effect on the decision. Neither Counsel pointed to any authority on the question (as it applies to consultation where there is no collective redundancy situation) which specifically deals with the time at which consultation should commence other than making reference back to **Williams** and following cases.

23. Mr Boyd agreed with the judge that the principles that underpin the fairness of consultation and selection processes were set out to mitigate the impact of a redundancy situation. Further that they would indicate an approach which was not to act arbitrarily between employees. Mr Ohringer suggested that principles arising from the authorities on consultation overall as:

    i) a search to reduce the impact of redundancy.

    ii) how redundancies are to be achieved in terms of scoring;

    iii) testing that scoring; and

    iv) identifying who is to be dismissed.

24. In our judgement, the principles set out in **Williams**, as restated effectively by Lord Bridge in

**Polkey**, have withstood the 40 years since they were outlined unscathed; they stand the test of time as good industrial relations practice. Further, we conclude that, with appropriate adaptation, they should be applied to all redundancy situations, not just those involving collective redundancies. Of course, the words of the statute remain the basis of the law and a departure from those principles, as set out in or adapted from **Williams**, is possible where it is reasonable to do so. However, it is important that, where a Tribunal deviates or departs from those principles, the reasons for taking a different course are spelt out. It seems to us that the formative stage of a redundancy process is where consultation ought to take place according to the principles in **Williams** and the cases developed from it. The reason for consultation to take place at a formative stage is because that means that a consultation can be meaningful and genuine. That must mean that consultation, for a process to be fair, should occur at a stage when what an employee advances at that consultation can be considered and has the potential to affect the outcome.

25. In terms of appropriate pool of employees, in our view, the authorities show a tribunal cannot and should not easily interfere with an employer's decision as to the pool. However, the question that the tribunal must answer in terms of reasonable responses is not just, is there a rational explanation for this pool? But the question: is it a pool that a reasonable employer could adopt in all the circumstances?

26. In all contracts of employment there is the implied term of mutual trust and confidence. That must mean that an employer will not act arbitrarily between employees. That requirement, it seems to us impacts on a decision as to selection pool. This is in order that any decision is fair as between employees and not arbitrary. Returning to **Williams**, the approach taken should be fair between employees and reduce, as much as possible, any hardship.

27. In our judgment, we can take the Grounds of Appeal 1 to 4 together. This is because the decision made that the employee's whose contract was up for renewal should be the person dismissed relates to all aspects of our consideration. Once that decision had been made, it

immediately identified the Claimant as the person to be dismissed; it identified a pool of one and it made any consultation on the issue of dismissal from the existing role otiose from the time that decision was reached.

28. Considering the Tribunal Judgment overall, para. 5 shows a clear conclusion that the redundancy situation existed because a unit of the Respondent had run consistently at a loss. The Respondent had previously decided that the unit should be run on a self-sufficiency basis. In around April 2019, the decision was made, essentially, that the unit should stop running a deficit. In addition there was an indication that work in the pipeline was not at a level which would guarantee a sustained level of work. On that basis, staffing needed to be reduced and the Tribunal set out s136 of **The Employment Rights Act** that there was a diminution in the requirement for employees to carry out work of a particular kind. It is clear, therefore, that it addressed the law insofar as the redundancy situation existing and that there was a need for a diminution in employees. It then had to look at the fairness of selection.

29. The Tribunal Judgment shows that the decision made as to pool was made prior to any consultation with the Claimant. In para. 5 there is the reference to April 2019 where there is a decision to reduce the staff count. In para. 8 there is reference to the internal communication between Prof Saralaya and HR in which they challenge him as to his rationale for the decision and ask him to confirm why it was to be the Claimant; his response being that she was the person whose contract was coming up for renewal. In para. 10 (which we have indicated Mr Boyd relies on), it is stated that there were no alternatives considered. It seems to us, reading those paragraphs along with paras. 5 and 6, that in March-April 2019 the decision was made that the Claimant would be made redundant because para. 12 refers Prof Saralaya taking the decision "shortly after" a meeting in March 2019 with the Claimant. The only decision referred to earlier in the Judgment, was the decision to make the Claimant redundant. In para. 13, it is mentioned (and, again, Mr Boyd relied on this) that the meeting Prof Saralaya attended to explain his decision, which was final in so far as it related to staffing of the institute. Mr

Boyd asked us to conclude that should be read more broadly; that "the staffing of the institute" should be read as referring to other staff not just the Claimant. Having considered the section of the Tribunal judgment which begins at para. 5, the decision referred to, the references to the Claimant, and the way in which that Judgment is set out, it is clear to us that the facts (which I outlined and are to be found at the beginning of this Judgment) show that the Tribunal found that the decision to dismiss the Claimant was made sometime between 21st March and 8th May, before any level of consultation took place with the Claimant.

30. Therefore the decision on pool and as a consequence that the Claimant should be dismissed was complete long before any meetings took place about her selection or any consultations took place. This resulted, in our judgment, in an arbitrary choice; a choice related solely to the question of the ending of the fixed term (contract) and it also related, in that sense, directly to the Claimant.

31. The list of issues was clear, it was not addressed, and the reasoning of the Tribunal cannot, in our judgment, be properly understood as to why it was reasonable to make this decision without consultation. There was in this case a clear departure from the **Williams** standards as they would apply to individual cases. In terms, the consultation was not at the stage where the Claimant could influence or potentially affect the outcome. The Tribunal does not explain the reason why that decision, which prevented that consultation, was reasonable in these circumstances. The only explanations it gives are tautologous; in other words, the reason why the Claimant was selected was because of the need to renew her contract and the need to renew her contract was the reason why the Claimant was selected for redundancy. There was no specific explanation as to why it was reasonable to select that sole criterion, without any consultation. That sole criteria resulted in the fait accompli of the Claimant being dismissed from her role. This meant that if the consultation which did take place on redeployment was unsuccessful (as it turned out to be), it meant that the Claimant would be dismissed. On that basis the appeal succeeds on grounds 1 to 4.

32. As to ground 5 given the size and resources of that employer, an explanation was necessary for that approach to be taken. In deciding what was reasonable, the Tribunal should have been assessing that explanation. All of that is entirely missing from the Employment Tribunal's Judgment. Even reading the Judgment as benignly as possible, it is not possible to accede to Mr Boyd's suggestion that the Tribunal's reasoning for its decisions on the relevant issues is apparent for the reasons we have just explained. There is no clear, or even unclear, exposition of the law in terms of reasonableness as it relates to consultation and pooling, which were specific issues which the Tribunal were asked to address. There is no specific application of the law to the facts addressing those specific issues or even a tying-in of those issues to the facts and the law. I am sorry to say that, it appears, given its overall task with regard to the various claims (which was no doubt, as Mr Boyd portrayed it, a herculean one), the Tribunal lost sight of its specific task in respect of providing reasons on this aspect when considering whether the dismissal was fair or unfair. We fully understand the difficulty faced by Employment Tribunals when faced with claims which span multiple jurisdictions and where during the process of a hearing more emphasis is placed on particular aspects than others. The complexity of preparing a judgment in such a case should never be underestimated and we are entirely sympathetic to the difficult task the Tribunal below faced.

33. We have come to the conclusion that the factual circumstances described, which are (as we set out) that the Claimant was, effectively, chosen to be the employee dismissed before any consultation took place that this appeal must succeed and, further, that we can decide that this dismissal was unfair. The authorities which we have referred to from **Williams**, **Polkey**, **Rowell**, **Freud v Bentalls** and **De Grasse**, show that the absence of meaningful consultation at a stage when the employee had the potential to impact on the decision is indicative of an unfair process. Without an explanation as to why such a step would be reasonable in the particular circumstances the Tribunal has not provided sufficient reasons to explain its decision.

34. On that basis, this matter is one which must be remitted to an employment tribunal for a decision on remedy and the only question remaining in respect of that (which we will take submissions on), given the approach in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, whether it should be sent to the same tribunal to consider the facts or sent to a different tribunal.

35. [AFTER SUBMISSIONS MADE] Taking account of the matters in **Temperley** and the passage of time, more particularly, and because the factual circumstances are set out (as was said by Mr Ohringer), it will not be necessary, it seems to us, for the same panel to be involved and the matter can be remitted to a different employment tribunal panel.