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EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Jeffrey**

Respondent: **Medfac UK Ltd t/a Halo Medical**

Heard at: **East London Hearing Centre**

On: **12, 13 and 14 February 2019**

Before: **Employment Judge Brook (sitting alone)**

Representation:

Claimant: In Person

Respondent: Mr A Peters (Solicitor)

JUDGMENT

The Judgment of the Employment Tribunal is:-

(1) The claim in unfair dismissal is dismissed. The Claimant was lawfully dismissed by reason of redundancy;

(2) The claim in unlawful deduction from wages succeeds. The Respondent shall pay the Claimant her December 2017 subscription for the Chartered Management Institute in the sum of £170 to be paid forthwith.

REASONS

1 In this matter the Claimant, Mrs Pamela Jeffrey, appeared in person and the Respondent was represented by Mr Andrew Peters, solicitor. Mrs Jeffrey brought two claims to the Tribunal, the first that she was unfairly dismissed on the pretext of redundancy, and the second that the Respondent had declined to pay her annual subscription to the Chartered Management Institute, a payment practice that had been in place for some years. I am satisfied that Mrs Jeffrey was fairly dismissed by reason of redundancy and that she had a contractual entitlement to her annual CMI subscription being paid by the Respondent, this payment having become a term of her employment contract by established practice.

Evidence

2 I heard evidence from Mrs Jeffrey on her own behalf and from Mr Donaldson, the Respondent's CEO, and from Mr Isbister, a senior manager with whom Mrs Jeffrey had worked for many years until her dismissal. Mrs Jeffrey commenced employment with a predecessor of Medfac UK in January 2002 as Office Manager. In 2004 she was promoted to Business Development/Clinical Services Manager and, by way of a series of TUPE transfers, by late 2013 her employment contract was with the Respondent, Medfac UK Ltd t/a Halo Medical ("Halo"). Halo produce and supply orthotic medical devices to the NHS and generally provide specialist orthotic services in London and the Home Counties.

3 Mrs Jeffrey predominantly worked from home carrying out field work management and business development, and also had primary responsibility for resource scheduling and contract management of the various onsite Halo orthotic clinics. Qualified orthotic personnel undertook the clinical work though the Claimant was involved in their recruitment, maintained the statistical and financial records of field work activities, and would deal with customer queries as these arose. The foregoing is not an exhaustive list of Mrs Jeffrey's duties and it was common ground that well as her supervisory and "oversight" role she was directly involved in tendering for contracts with public bodies and the like. It was also common ground that she got on well with clients and staff and in particular with Mr Kenny Isbister, the Respondent's Director of Orthotics, with whom she had a good working relationship going back some years though evidently this relationship soured towards the end of her employment. As is so often the case working practices developed to suit individual skills and abilities and by 2015 a good deal of administrative and scheduling work was routinely channelled through the Claimant, for example the checking of expenses, which once checked by the Claimant were passed on to others for payment.

Size of Respondent Business

4 In 2015 the Respondent lost a major contract which resulted in the closure of its Mile End Office and put some financial pressure on the business. There were some redundancies and redeployment of staff which did not directly affect the Claimant though it did lead to the Respondent undertaking a review of its clinical services and working practices. Halo had once been a much larger organisation however, in the course of its various incarnations and TUPE transfers, by late 2015 it was a smaller "stand alone" business. Mr Donaldson had been part of the earlier larger organisation and in 2014 became the CEO and a minority shareholder of the Respondent. He was the prime mover in this review exercise, part of which involved Mr Donaldson and others in the senior management team having "face to face" meetings with each employee to discuss their respective roles, the services offered by Halo, the challenges each faced, what support was needed and how the business might be grown. As Mr Donaldson put it he "wanted to get an idea of what was happening on the ground".

5 These meetings took place in late 2015 and one such "face to face" was with Mrs Jeffrey. By all accounts Mrs Jeffrey did not give a particularly good account of herself in that meeting and Mr Donaldson got the impression that her role had become a series of basic administrative and supervisory functions which did not warrant, in his view, an annual salary of £42,000 and ancillary expenses including a motor car. His

evidence on this encounter was: “I slightly taken aback by her explanation of her role” and he formed the view that her role was mainly “basic administrative tasks, which may not always be necessary or required … (and it) was unclear how she filled her time throughout the week and how she could take the role forward.”

6 Mr Isbister was present at this interview and made it clear to Mr Donaldson that in his view the Claimant “was under selling her role” and that she added value to the business. The upshot of this meeting was that Mr Donaldson looked more closely at the Claimant’s role in the light of the pressing financial circumstances in which the Respondent company found itself. The unchallenged evidence was that Halo was not itself a profit-making business, its function being to generate work for other parts of the business and related companies, in particular the manufacture and supply of prosthetic limbs. The clinics operated on a fixed payment basis and Mr Donaldson envisaged a new business model whereby clinicians would personally generate further sales for these other parts of the business rather than the tender based approach in which the Claimant was involved that was no longer proving successful.

7 From her prospective Mrs Jeffrey felt threatened by this turn of events. Immediately after the face-to-face interview Mr Isbister spoke with her privately to the effect that: “you didn’t sell yourself well” to which the Claimant replied: “I didn’t know that I had to, I was not in an interview”, this at any rate was Mrs Jeffrey’s account and was not challenged by Mr Isbister. This evidently marked the beginning of what Mr Donaldson regarded as a more focused review of the Claimant’s role within the Company and which Mrs Jeffrey regarded as a desire on the part of Mr Donaldson to be rid of her from the Company come what may. In her written evidence Mrs Jeffrey remarked that: “In December 2015 I had already been identified for redundancy and they wanted to move fast. This was an unjustified exercise”.

Subsequent Events

8 In the event however matters did not move fast, or seemingly much at all in the months that followed. Mr Isbister was then a great supporter of the Claimant and over the years had come to rely on her as, in his own words, “adding value” to the business. Mr Donaldson had expressed his view to Mr Isbister that he could see no real purpose in the Claimant’s role, but instead could see how much of the supervisory role could be “evaporated”, and many of the tasks such as the preliminary checking of expenses were unnecessary and the residual tasks could be distributed amongst existing staff. As to the selling aspect, in particular the tendering for business which was part of the Claimant’s role, this was largely unsuccessful by reason of uncompetitive core prices, no fault of Mrs Jeffrey, and Mr Donaldson envisaged future growth coming from direct selling by onsite clinicians where price sensitivity would be less of an issue. Initially Mr Isbister was not persuaded by these arguments and, to coin the phrase used by Mr Donaldson, Mr Isbister “pushed back” on taking this route because he still saw ‘added value’ in the role occupied by the Claimant. It is also true to say that he liked and trusted the Claimant and to a great extent this was reciprocated. He was also concerned that the distribution of residual tasks would fall disproportionately on him, an unwelcome prospect but one which did not in fact come to pass.

9 In her evidence the Claimant highlighted certain parts of the work she undertook during 2016 and how she felt that her good personal contacts within NHS Trust worked to the advantage of the Respondent but how, nevertheless, inroads were made into her role. By way of example in March 2016 Mrs Jeffrey recounts a meeting with Mr Isbister and Mr Roberts, Operations Manager, as a result of which Mr Roberts took over direct management of two non-qualified staff. It was not, however, clear to me that Mrs Jeffrey ever had that management role though what was clear is that there were changes to her role throughout that year. By the end of April 2016 the unchallenged evidence of Mrs Jeffrey was that she continued to complete tender bids not least because, according to her, Mr Roberts lacked the necessary competence for this task.

10 Mrs Jeffrey cited a number of occasions which she felt illustrated her growing marginalisation within the business. In June 2016, along with a colleague, she conducted a preliminary interview for a prospective orthotist employee. All went well and Mrs Jeffrey sent a report to Mr Isbister which included her concern that the individual might not be eligible for UK employment as his passport contained restrictions to working in the UK. Apparently this caution was overlooked and resulted in Mr Isbister criticising Mrs Jeffrey when pre-employment checks were not carried out by the finance supervisor, Alison Wade. Mrs Jeffrey was not at fault. In August 2016, Mr Isbister had apparently again criticised Mrs Jeffrey for producing a "copy and paste" report which Mrs Jeffrey found both hurtful and untrue. She cites these two events as leaving her feeling "demoralised" and the reason for her seeking a meeting with Mr Isbister to discuss "ongoing operational matters". Her real intention was to sound out Mr Isbister as to her own future within the company.

11 On 22 September 2016, Mrs Jeffrey and Mr Isbister met in a coffee shop ostensibly to discuss operational matters though, as intended by Mrs Jeffrey, the conversation soon moved to her future within the Company. There is some dispute between Mr Isbister and Mrs Jeffrey as to what was said but suffice it to say that, at the very least, the possibility of redundancy was certainly touched upon. According to Mrs Jeffrey Mr Isbister had told her "the Company did not need a field based administrator" and that the decision regarding her redundancy would be made "fairly quickly" and in writing.

12 Mrs Jeffrey accepted in her evidence that in the event this "never transpired", though what did happen was that late that night she sent an email to a locum orthotist to let him know that she would not "now be responsible for his induction as my role in the organisation had been made redundant". Mrs Jeffrey copied Mr Isbister into this email and, in the early hours of the following morning 23 September 2016, he emailed Mrs Jeffrey that: "there was no need to tell the world yet please". There followed an exchange of emails in which, as Mrs Jeffrey put it, "I stupidly agreed not to discuss it further with anyone". By this stage Mrs Jeffrey felt not only was Mr Donaldson keen to terminate her employment but Mr Isbister had come to hold the same view. In some of his emails to Mr Isbister, Mr Donaldson would refer to the Claimant's role as 'Mrs Jeffrey's' which Mrs Jeffrey saw as evidence that Mr Donaldson was keen to be rid of her, not her role. Mr Donaldson told me this was "shorthand" for the role, he bore no ill-will towards Mrs Jeffrey but, coming as he did to the Respondent with "fresh eyes", he saw little justification for the Claimant's role as it had developed within the business. For him it was the role, supervisory and marketing of a type that was no longer required, not Mrs Jeffrey personally. So far as Mr Isbister was concerned he

valued Mrs Jeffrey's presence and regarded her, as no doubt was the case, as adding value by her approach to work, but even he eventually came to share Mr Donaldson's view that there was no business case for her role given that sales were now to be "clinician led", many of the tasks could be discontinued (initial checking of expenses and the like), and rostering and scheduling could be fragmented and passed on to existing staff as part of their existing duties.

13 In her evidence Mrs Jeffrey was unable to identify why it might be that Mr Donaldson had taken against her personally rather than being concerned at the continuance of the role she uniquely undertook. Whilst this did not mean that there was no such reason my impression was that Mr Donaldson took what might be called an unsentimental view of the business and had no personal feelings concerning Mrs Jeffrey one way or the other. The same could not be said of Mr Isbister who, doubtless because of the long working relationship he had hitherto enjoyed with Mrs Jeffrey, was troubled at the prospect of her departure even though he was eventually persuaded that there was no business case for the continuance of the role as it was then configured. He in fact tried to reconfigure the role in an attempt to retain Mrs Jeffrey. From late September to mid-October 2016, Mrs Jeffrey and Mr Isbister continued with their discussions as to her future and how she might continue to be employed within the business. On 29 September 2016 the Claimant received an email from Mr Isbister inviting her to "discuss my role within Halo Medical and try to jointly find a solution" and that a final decision concerning her role had not yet been made. The Claimant regarded this with some suspicion and in her evidence drew my attention to an email dated 19 February 2016 from Mr Donaldson to Mr Isbister to the effect that the Claimant's role was already, in his view, at "immediate risk" and that the matter was to be actioned as soon as possible.

14 The difficulty with linking Mr Donaldson's email of February 2016 with Mr Isbister's email of late September 2016 is that these are more than six months apart and it is apparent that the "immediate risk" of redundancy that Mr Donaldson wanted action "within days" in February had plainly not come to pass by the end of September 2016. The more natural reading is that whilst Mr Donaldson had formed the view concerning the continuance of the Claimant's role, Mr Isbister had not triggered a redundancy procedure and that it was sincere in his wish to "jointly find a solution". In her evidence Mrs Jeffrey also drew attention to the fact that in this period there had been three recent recruits, including Mr Roberts, who in her view were each doing menial administrative tasks. However, it emerged in evidence that these people were qualified clinicians appropriate to Mr Donaldson's strategy that future financial growth would be "clinician led". Mrs Jeffrey was particularly well qualified from a business point of view having graduate and post graduate qualifications relevant to business development but she had only minimal clinical expertise and did not meet the clinical criteria for orthotist work. The training for such work took some years and was not undertaken by the Respondent for any of its staff.

At Risk of Redundancy

15 On 3 October 2016 Mrs Jeffrey met with Mr Isbister. She was accompanied by a senior orthotist, Mr Johann Visser, who took notes of that meeting. Mr Isbister told Mrs Jeffrey that her position was at risk of redundancy, though as yet she was not redundant, and her administrative tasks to be absorbed. There was some discussion

as to the possibility of going part-time rather than being made redundant but this was not pursued as, according to Mrs Jeffrey, Mr Isbister said that this was not an option. Again, there is some dispute as to precisely what was said at this meeting. However, it was common ground that Mrs Jeffrey described her role as being 90% taken up with account management, managing orthotists, covering clinics, rosters and authorising invoices, whilst the other 10% of her time was spent dealing with the numerous manufacturing and process issues that "frequently arose through poor communication between Halo staff and the admin staff in the hospitals where Halo provided orthotic services". There was discussion about the use of the company car and it emerged that Mrs Jeffrey restricted her use of this vehicle to visiting Halo clients only where necessary. Mrs Jeffrey voiced her view that Halo needed six more orthotists to cover all the clinics, though the evidence was that that the cost of recruiting the same would have to be met out of fixed income which was not then commercially feasible. The hope that such persons would, utilising the "clinician led" model favoured by Mr Donaldson, in time generate additional income for the other parts of the business was sound but would take time. Mr Isbister asked Mrs Jeffrey whether she would consider a more business development role if "everything else got better", which prospect in principle appealed to Mrs Jeffrey should those circumstances come about but unfortunately they did not materialise.

16 My clear impression of the evidence of events at this stage from both Mr Isbister and Mrs Jeffrey was that these were meaningful consultation meetings with a view, certainly on Mr Isbister's part, to avoid making Mrs Jeffrey redundant if that was at all possible. Mrs Jeffrey took a different view of these meetings which she regarded as part of a systematic erosion of her role as some of her responsibilities were removed and others discontinued altogether. An example of this cited by Mrs Jeffrey was the 4 October 2016 email from Mr Isbister in which he indicated that he wanted her to consider devolving some of her admin tasks so that she could do more business development. At the same time Mrs Jeffrey noted that she was no longer required to attend all the Halo clinical management meetings though the Respondent's explanation for this was that where she was not required to attend it was because there was no business efficacy to her attendance. Mrs Jeffrey describes this "systematic erosion" as being done in "such a way that I was not able to (then) immediately point to any one example, however, on reflection, Mr Roberts (Operations Manager) was assigned as one of the two other people to do part of my job in the new job description."

17 There followed an exchange of emails between Mrs Jeffrey and Mr Isbister in which she expressed concern as to what was happening to her role and Mr Isbister replying that any changes were motivated by the need to make efficiencies and thereby enabling her to use her time to best advantage. By his email of 14 October 2016, Mr Isbister told Mrs Jeffrey that he thought her field role "added value" to the business, that the Company needed to improve the way in which it managed customers, and that he saw her as part of that exercise. It is, however, clear from the emails of that period that Mrs Jeffrey believed herself to now be under close scrutiny and in her evidence described this as a period of "constant micro management, indecisiveness and criticism of my work (which) made me feel undervalued, with negative thoughts about my ability to carry on, leading to my feeling acutely depressed." Shortly thereafter Mrs Jeffrey was signed off work with depression, prescribed antidepressants, and advised to attend cognitive behavioural therapy. She did not return to work until the first week in January 2017. Ironically, this period of sickness absence became something

of an unplanned test for Mr Donaldson's view that much of the administrative work undertaken by Mrs Jeffrey was either unnecessary and/or could be distributed amongst other existing employees.

Mrs Jeffrey's Ill Health Absence

18 The evidence of Mr Isbister concerning this period was that hitherto the rostering etc had all been channelled through Mrs Jeffrey and her sudden and unexpected absence initially led to some disruption, requiring Mr Isbister to become directly involved in both redesigning the rostering format and distributing certain functions to yet other employees. Mrs Jeffrey in her evidence pointed to this as the Respondent taking advantage of her absence to distribute these aspects of the role and that on her return to work this distribution "proved to be a permanent detrimental (to the Claimant) arrangement". In the ordinary way it would be unsurprising that such cover was not brought into effect in respect of any employee on long term sickness absence, but it serves to illustrate Mrs Jeffrey's growing distrust of the Respondent. Mr Isbister's evidence was that all this came at a particularly difficult time for him as his own health had deteriorated necessitating surgery and recuperation in hospital. Despite this he was able to reformat the rostering work to what he regarded as a simpler model requiring far less work than the method used by Mrs Jeffrey. He described this as a difficult time for him personally and that the unexpected absence of Mrs Jeffrey initially proved difficult to deal with. It did, however, bring into effect some of the changes envisaged by Mr Donaldson and, once the initial difficulties were overcome, it seemed to Mr Isbister that this provided a greater opportunity to refocus Mrs Jeffrey's duties to managing the clinics in the field. He therefore resolved to permanently remove certain administrative duties, including invoicing, from the Claimant and accordingly on her return to work it was to a revised job description focused on field based management rather than administrative tasks.

19 Mr Isbister's evidence was that by so doing he was trying to make best use of the Claimant's undoubted abilities so as to avoid being made redundant. The Claimant, however, regarded all this as part of a systematic erosion of her various duties and part of a plan to eventually terminate her employment. It seemed to me that had the Respondent, more particularly Mr Donaldson, wanted to terminate the Claimant's employment "come what may" then this would have been a convenient moment to have done so. She had by then been absent for some two months during which, as a matter of necessity if nothing else, the Respondent had redistributed various of her administrative tasks more or less in line with the model envisaged by Mr Donaldson. The Respondent's evidence was that far from "[taking] this opportunity" to redistribute administrative tasks it was necessitated by Mrs Jeffrey's unexpected and prolonged absence and, once having been distributed, it functioned at no additional cost or headcount to the Company.

Mrs Jeffrey's Return to Work

20 It might have been opened to Mrs Jeffrey to have then considered this variation in job description to constitute grounds for constructive dismissal, however this was not the course she took. Instead she accepted the revised job description whilst expressing her disquiet at the same. Over the next few months, and consistent with the revised job description, the Claimant devolved more of her de facto administrative

duties which included, by late March 2017, sharing the roster responsibility with Nadine Wilkinson. Mrs Jeffrey's evidence concerning this period is that she felt unsupported and that these various devolving of duties was simply a further "erosion" of her role. Mr Isbister's view of the same events was that the shedding of administrative functions would release Mrs Jeffrey to concentrate on field work duties and that there had been no additional cost incurred by reason of devolving those administrative duties yet there had been a commensurate freeing up of time for Mrs Jeffrey.

21 By early May 2017, Mr Isbister was taking an interest in Mrs Jeffrey's activity log, that is to say her day-to-day record of activities. Mrs Jeffrey regarded this as her being singled out for unwarranted close scrutiny and as a result she felt victimised. There followed some email discussion in which Mr Donaldson became involved, sending Mrs Jeffrey the format of an activity log with which he was familiar used to record customer sales calls as an example of what he was looking for as a record. He otherwise did not get directly involved in managing Mrs Jeffrey though it is true to say that he became frustrated at what he saw as a lack of decisive action on the part of Mr Isbister. I formed the impression that he was not persuaded by Mr Isbister's plan to refocus Mrs Jeffrey's role on fieldwork, particularly as his model was that sales and growth would be "clinician led" and, whilst Mrs Jeffrey had once been a State Registered Nurse, she did not have the orthotist qualifications and training to undertake a clinician role. Instead she was still involved in compiling tender bids for NHS hospitals and, according to Mr Isbister, had to some extent again become involved in administration matters against his wishes. It emerged in evidence that these tender bids were not successful, again by reason of uncompetitive prices.

Events of Late 2017

22 In October 2017, Mrs Jeffrey requested 22.5 hours as time off in lieu (TOIL). This request was refused by Mr Isbister some weeks later on the basis that TOIL "is not available to management positions unless away for weekends or exhibitions …, even then it is at management discretion" Mrs Jeffrey said that she felt victimised by this refusal though in fact she had never previously asked for TOIL and hitherto had understood her role to occasionally require working beyond her contractual hours, which she had done without seeking recompense. In her evidence Mrs Jeffrey also drew attention to her no longer being involved in arranging the annual dinner and training session planned for 7 and 8 December 2017. Her evidence was that as far back as 2010 Mr Isbister and she had successfully co-ordinated all the arrangements for this annual event but in that year it was arranged by the account supervisor, Alison Wade, and the operations manager, Mr Roberts. This Mrs Jeffrey regarded as another example of her being excluded. However I note that in late November and early December, when this event was organised, she was on her annual leave and this may have had a bearing on this. Be that as it may on her return to work in early December 2017 Mrs Jeffrey was invited to a meeting with Mr Isbister and Mr Donaldson at the Respondent's factory in Wellingborough. She was not told the purpose of this meeting which was scheduled to take place shortly before the annual company dinner which Mrs Jeffrey expected to be attending in the ordinary way. In the event this meeting was to advise Mrs Jeffrey that her role was again at risk of redundancy and it was strongly suggested to her that in the circumstances she might not wish to attend that evening's festivities.

23 The evidence of Mr Donaldson was that Mrs Jeffrey received this news with some equanimity though I do not accept this as an accurate of that meeting. Mrs Jeffrey said that she was surprised and shocked at this news which she had "no idea" was coming. Whilst I am quite prepared to accept the evidence of Mrs Jeffrey that she was shocked and surprised, the more so as it soon emerged that she was not in fact expected to attend that evening's dinner, I do not accept that she had no idea that her redundancy had not been in the offing for some time. Be that as it may the timing of this notice, and the manner in which it was delivered, without any formal notice as to what the meeting was to be about, was on any view clumsy and insensitive. What appears to have happened, as borne out by the evidence of both Mr Isbister and Mr Donaldson, was that Mr Donaldson had become frustrated at the lack of decisive action being taken in respect of Mrs Jeffrey's role. To a great extent, her administrative tasks had been distributed to other members of staff as a result of Mrs Jeffrey's two-month absence through illness some 12 months earlier. Mr Donaldson did not see a role for a non-clinician in expanding the business and yet despite this diminution in her role and her lack of relevant clinical qualification, Mrs Jeffrey still occupied a role which Mr Donaldson believed had no commercial, functional efficacy, or purpose. Again there is some dispute as to precisely who said what to whom at this meeting but the upshot was that Mrs Jeffrey did not attend that evening's dinner nor did she attend the following day's training. I am quite satisfied that she was upset by this turn of events. As to her not attending the dinner the evidence of Mr Isbister and Mr Donaldson was that on the previous occasion she had been put at risk of redundancy, by then some 14 months earlier, she had in fact spoken with a number of people about her situation and they wished to avoid a repetition of any such difficulties. In her evidence on this earlier event Mrs Jeffrey had only referred to a single email to a locum however she did not challenge this later evidence.

24 It seems to me that the easiest way of avoiding such difficulties and bolstering bad feeling would have been to have delayed this meeting until the New Year. It was plain from Mr Donaldson's evidence that he felt there had by then been many months of delay and he wanted the matter brought to a head. Mrs Jeffrey was placed on garden leave with immediate effect and within a few days had returned her laptop to the Respondent company for back-up purposes. There followed some email exchange to determine a mutually convenient date for a consultation meeting which eventually took place on 21 December 2017 between Mr Donaldson and Mrs Jeffrey, the Minutes of which were taken by Ms Lisa Crummy, and a copy of these appear in the Bundle. Mr Donaldson restated his reasons as to why the role of Business Development/Clinical Service Manager was no longer required by the Company, these essentially being those reasons he had advanced more than a year before. He had selected the pool of one as Mrs Jeffrey's role was unique and her devolved administrative tasks were too fragmented to bring those on whom they had fallen into the 'at risk' pool. The clinician roles were not open to her as she lacked the relevant qualifications and the Company did not 'train up' such staff. The notes to that meeting are not a verbatim record of what was said and Mrs Jeffrey disputes Mr Donaldson's suggestion that she was "unsurprised at the news that her role was to be made redundant". Be that as it may Mrs Jeffrey appealed the decision and on 9 February 2018 this appeal was heard by Mr Donaldson. It is indeed unfortunate that Mr Donaldson both made the decision to dismiss and then went on to hear the appeal, as in all the circumstances it was extremely unlikely that he would change his mind, nor did he. Mr Donaldson sought to explain this procedural anomaly as coming about

because Mr Isbister was "too close to Mrs Jeffrey" and found the process difficult and uncomfortable, and thus he was the only other senior person in the company who could conduct either hearing. In the event I am persuaded that even if different people had conducted each hearing the outcome would have been the same.

Suitable Alternative Employment

25 As to suitable alternative employment, Mr Donaldson had taken the view that as the available roles either required a level and degree of clinical expertise and qualification which Mrs Jeffrey did not have, or were factory based jobs which he (correctly) anticipated would not appeal to Mrs Jeffrey, he did not explore the possibility of alternative employment with her. He did not consider bumping nor did her consider a job share because he felt the drop in salary and status would not appeal to Mrs Jeffrey. These were not his decisions to make however Mrs Jeffrey did take the initiative and in response to her email regarding other employment opportunities within the Respondent company she was sent details of vacancies but, as anticipated by Mr Donaldson, she chose not to pursue them.

Claim for the CMI Subscription

26 At about the time of the appeal hearing a Ms Long of the Respondent queried Mrs Jeffrey's December 2017 expenses which had included her annual subscription of £170 to the Chartered Management Institute. This subscription was queried on the basis that Mrs Jeffrey had no express contractual entitlement to this, though this had been paid without question in previous years. Apparently further enquiries were made into Mrs Jeffrey's mileage claims but as I understand it these were paid, the subscription however was not paid and this payment forms a separate claim.

27 The Respondent's evidence of this non-payment was that there was no express contractual provision and that somehow payment in the previous years had "slipped below the radar". Mrs Jeffrey's evidence was that she openly made this claim every year and while she could not recall quite how it had begun she regarded it as a legitimate expectation amounting to a variation of her contractual entitlement. She regarded the belated questioning of this otherwise annual payment as yet further evidence of the personal animosity towards her of Mr Donaldson. I am not persuaded by the personal animosity argument. However, I am persuaded that the frequency and openness of this annual claim, there being no suggestion of deception on the part of Mrs Jeffrey nor in my view could that be seriously entertained, amount to a contractual variation to the terms and conditions of employment, at the very least it had become a legitimate expectation on her part. In the context of the overall claim it is a small matter, however I had no difficulty in resolving this in favour of Mrs Jeffrey.

Submissions on Unfair Dismissal

28 Both Mrs Jeffrey and Mr Peters made detailed submissions and each cited numerous decided authorities, some of which I found more useful than others. Suffice it to say that Mrs Jeffrey submitted that for reasons she was unable to identify, Mr Donaldson had taken against her personally at an early stage and had become set upon terminating her employment in any event and chose to do so by way of an ostensible redundancy. She did not believe that there was any basis for making her

role redundant and she argued that the very fact that the various component parts of her role had been distributed to other employees was evidence enough that these functions still existed and thus her role still existed. She argued that over a two year period her role had been stripped of its core functions, by way of the aforesaid distribution, and that this was intended to result in the termination of her employment "dressed up" as a lawful redundancy. She felt bitterly disappointed by what she regarded as shabby treatment of a long serving and loyal employee at the hands of the Respondent and pointed to what she regarded as a lack of a proper procedure, in particular the involvement of Mr Donaldson in the appeal, as in any event rendering her dismissal procedurally unfair.

29 Mrs Jeffrey submitted that whilst her role was unique within the Company she should not have been placed in a redundancy pool of one but rather that the pool should have encompassed those other persons who had each taken a proportion of her role. She further submitted that the Respondent should have considered the "bumping" procedure such that anyone of these people, in particular the most junior and least qualified, could have been lawfully dismissed with Mrs Jeffrey taking over that person's role. Though none of this emerged at the time of her redundancy, nor in her appeal, Mrs Jeffrey now states that given the opportunity she would have accepted such a "bumped" position. The Respondent had taken the view that as these roles were paid at circa half the salary of Mrs Jeffrey's role this would not appeal to her. Furthermore, no thought was given to a job share and she would also have considered this even though, had any of the other staff been prepared to enter into such an arrangement, Mrs Jeffrey's income would have dropped on a pro rata basis by circa two-thirds. In the circumstances, she considered that there was no proper procedure followed but that had it been, particularly if it incorporated a larger redundancy pool and bumping, then the outcome would have been different had it not been for the fact that the clear and settled intention of Mr Donaldson was that Mrs Jeffrey's employment was to be terminated come what may.

30 For the Respondent, Mr Peters submitted that this redundancy met the classic definition set out at Section 139(1)(b) of the Employment Rights Act 1996, that the selection pool of one reflected the unique role occupied by the Claimant, that there was no basis for job share and that this certainly had not been part of any discussions over the preceding two years in which the Claimant's redundancy had been in the "offing", that much the same applied to the suggestion of "bumping" and that in any event, there was no obligation on the Respondent to consider bumping. Mr Peters drew attention to the two year period in which the Claimant continued to work for the Respondent with no change in salary or benefits despite that period having begun with talk of her role being made redundant.

31 The purported "advantage" taken by the Respondent during the period of the Claimant's sickness absence was in fact born of necessity occasioned by Mrs Jeffrey's sudden and unexpected absence and, whilst it was ironic that this led to the permanent distribution and for some functions the cessation, of administrative aspects of the Claimant's role this had not been part of any intention to be rid of the Claimant. Nevertheless, it served to prove Mr Donaldson's proposition that the role was redundant and the administrative tasks could readily be simplified and/or redistributed amongst existing staff, or for some functions ceased altogether. That Mr Isbister made efforts to accommodate the continued employment of Mrs Jeffrey was to his credit and

did not, as contended for by Mrs Jeffrey, indicate a deliberate policy of slow decline in her role such that she would then be "ripe" for termination, ostensibly by reason of redundancy. Had that been the plan then this could have been brought into effect entirely lawfully at a much earlier stage. During this period there had been meaningful consultation as Mr Isbister tried to refashion the role to suit the changed circumstances.

32 As to suitable alternative employment, whilst it was true to say that Mr Donaldson had not touched upon this himself with Mrs Jeffrey, she was in fact made aware of available posts, all at much lower salaries and, as envisaged, these did not appeal to her. She would not, he submitted, have taken a menial admin role had bumping been offered and in any event there was no obligation on the Respondent to consider this. As to part time working, in what role? It could not be part time in her existing role as this had ceased to exist in its entirety. Part time working in a menial admin role he submitted would not have been acceptable to the Claimant, as indeed no had the roles she was offered.

33 It was unfortunate that Mr Donaldson both conducted the redundancy consultation and heard the appeal. However, by the time he came to take on this function he already had considerable feedback from Mr Isbister and the reallocation, simplification and in some cases cessation of the administrative aspects of the role had proved successful in being absorbed by existing staff with no additional hours required. What remained of the Claimant's role was not required in the new "clinician led" approach to growth nor was the Claimant qualified to take on a clinician role. This new approach was a legitimate decision for any company to make and it was not for the Tribunal to look behind that unless it bore the hallmarks of a sham or some ulterior motive. In all the circumstances, submitted Mr Peters, there were no such hallmarks and, rightly or wrongly, the Respondent was entitled to make commercial and organisational changes that led to redundancy. Here was a classic case of redundancy with the only unusual aspect being that it had not taken place sooner.

The Law

34 The definition of redundancy is found at Section 139(1) of the Employment Rights Act 1996 and the circumstances of this matter attract subsection (b)(i) and (ii). Those subsection reads as follows:

> Section 139(1)(b)
>
> [A redundancy arises where the requirement:]
>
> (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.

This is a broad definition that covers a myriad of situations. One of the most common misconceptions about redundancy is that it only arises where the employer is in financial trouble or struggling to provide work. In Kingwell and others v Elizabeth

Bradley Designs Ltd EAT ref: 0661/2002 Mr Justice Burton addressed this confusion thus:

> "It appears to us that there is a fundamental misunderstanding about the question of redundancy. Redundancy does not only arise where there is a poor financial situation at the employer's … it does not only arise where there is a diminution of work in the hands of an employer … but it can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is overstaffed. Thus, even with the same amount of work and the same amount of income, the decision can be taken that [a] lesser number of employees are required to perform the same functions. That too is a redundancy situation."

[See also Stephens v Franchill Ltd ET case number: 1304157/2015.]

35 Whilst not every business reorganisation will lead to redundancies, very frequently it is the refocusing or reorganisation within the business that is either motivated by the desire to reduce employee costs and/or reduce or redistribute particular functions amongst the reduced workforce. Confusion can arise as to the difference between a "redundancy" and a "reorganisation", however, these are not necessarily mutually exclusive. "Redundancy" is a technical legal definition (see above) whilst "reorganisation" simply means a change in working structures and has no specific legal meaning. Each case involving consideration of the question as to whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy nor, conversely, of an absence of redundancy. In Barot v London Borough of Brent EAT 0539/2011 the Employment Appeal Tribunal held that:

> "… every organisation of a business that involves simply reshuffling the workforce may not create a redundancy situation if the business requires just as much work of a particular kind in question and just as many employees to do it, even if individual jobs disappear as a result."

In that case, the Appeal Tribunal upheld an Employment Tribunal's decision at first instance that the significant restructuring of the Councils Children and Families Directorate entailed a reduction in the kind of work being done by the Claimant. This reorganisation involved a reduction in lower level "number crunching" tasks and an increase in capacity for more strategic work which the Tribunal was entitled to find met the statutory definition of redundancy. So where, for example, a senior employee is dismissed because his or her work is to be done in future by an employee of lower status, the reason for dismissal will sometimes not be characterised as a "redundancy" although it might still be lawful as being for: "some other substantial reason of a kind such as to justify the dismissal" within the meaning of Section 98(1)(b) ERA [Pillinger v Manchester Area Health Authority [1979] IRLR 430 EAT]. The distinction between these different types of reorganisation is often difficult to draw in practice. However, where the termination of employment can be said to fall under one or other of these categories, even if the precise categorisation on the facts is unclear, this can be a lawful dismissal subject to other considerations to which I shall now turn.

36 Plainly, if the redundancy is a mere sham entertained for the purpose, or principal purpose, of dispensing with a particular employee rather than a particular role then this will be an unfair dismissal. The classic case would be where a particularly troublesome employee is subjected to a selection criteria for redundancy which is uniquely designed to select that person regardless of whether the selection criteria has any commercial or other efficacy which that employer could reasonably adopt. As with all cases of unfair dismissal the evidential burden, if not the burden of proof, will inevitably fall upon the employer to explain the reasons for the Claimant's termination. In the case of redundancy it will entail whether there was adequate and meaningful consultation and, in the event of any procedural defects, whether it could be said that the Claimant would, had there been a proper procedure, have been dismissed in any event [Polkey v AE Dayton Services Ltd [1988] ICR 142 House of Lords].

37 It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant. If fewer employees are needed to do work of a particular kind, then there is a redundancy situation [see Hand Tools Ltd v Maleham EAT 110/1991]. Furthermore, the EAT has made it clear that there is no need under Section 139(1)(b) for an employer to show an economic justification, or indeed a business case, for the decision to make redundancies [Polyflor Ltd v Old EAT 0482/2002]. An employer's motives may become relevant if it is alleged, as in the case before me, that the redundancy is a sham and there is another reason for the dismissal. The classic case of a "dressed up" redundancy would be where the dismissed employee's role was taken over by another individual carrying out all of the former employee's functions. That, however, is to be contrasted with circumstances where the former employee's functions either diminished and/or were redistributed between existing employees such that each fragmented part of the original role amounted to only a modest increase in work for those to which the fragmented parts were distributed.

Pool for Selection

38 In carrying out a redundancy exercise an employer is expected to identify the group of employees from which those who are to be made redundant will be drawn. This "pool for selection" is usually composed of employees doing the same or similar work. The Tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances [Kvaerner Oil & Gas Ltd v Parker and others EAT 0444/2002] and the authorities are clear in their common injunction that Tribunals take care not to substitute their own view for that of the employer. That said the employer is required to address itself to the question of an appropriate pool and a failure to do so can render a subsequent dismissal unfair. If an employer has applied its mind then "how the pool should be defined is primarily a matter for the employer to determine" (see Taymech Ltd v Ryan EAT 663/1994]. In Halpin v Sandpiper Books Ltd EAT 0171/2011 the EAT concluded that in the circumstances of that case Mr Halpin had been "fairly selected insofar as he was in a pool of one given his unique position dealing solely with sales and based in China". In summary, if an employer advances a reasoned and objective explanation for selecting a pool of a particular size, even if that is a pool of one, then the Tribunal will rarely interfere with that decision [Mitchells of Lancaster (Brewers) Ltd v Tattersall EAT 0605/2011].

Bumping

39 As to “bumping”, whereby X whose job is redundant is redeployed to another job done by Y who is then actually dismissed, neither Statute nor the decided cases oblige an employer to consider bumping and it is a matter of fact for each Tribunal as to whether there was any requirement on the part of an employer to consider this process [Leventhal Ltd v North EAT 0265/2004]. Factors to be taken into account is whether or not there is a vacancy, how different the two jobs are, the difference in remuneration between them, and the relative length of service of the two employees in question. As to consultation this has to be “meaningful”, with a view to either avoiding or mitigating the effects of redundancy. Save In particular circumstances of collective redundancies, typically with the involvement of a trade union, there is no specifically required consultation procedure though there is ACAS best practice. It is whether there has been sufficient and adequate consultation and if not whether such consultation would have changed the outcome (see Polkey – supra).

Conclusion

40 This is an unusual case in the Mrs Jeffreys role, comprising as it did of disparate functions, grew over time to accommodate the needs of a much larger business than that taken over by Mr Donaldson, by which time business was much smaller and to some extent in relative decline. It was this decline that Mr Donaldson sought to address in his review of staff roles. I am satisfied that this was not intended to single out Mrs Jeffrey even though in the event it did identify her role as potentially redundant. His early view that this role was out of kilter with the needs of the now smaller business with a ‘clinician led’ approach to growth was objectively arrived at and, rightly or wrongly in commercial terms, was one he was entitled to reach. I am satisfied that a redundancy situation had arisen in respect of this unique role and that the redistribution and cessation of this role's administrative functions was part of that. There was no increase in headcount needed to absorb these functions which was the objective in the reorganisation. No doubt Mrs Jeffrey felt marginalized and 'singled out' in all of this but this reflected the lawful consequence of her role being identified as redundant and not animus towards her personally. There was no such personal animus though I can see how Mrs Jeffery came to believe this.

41 The redistribution and rationalisation of administrative tasks that had come to form part of her role lay at the heart of this redundancy. Ironically it was the length of time, put another way the delay, in Mr Isbister biting the bullet in the early stages that prolonged Mrs Jeffrey's sense of uncertainty, however there was nothing unlawful in this delay, indeed rather the contrary. During this period Mr Isbister was actively engaged in what amounted to a prolonged period of consultation, he tried his best to reshape the business development aspect of the role into something that fitted changed business priorities. Unfortunately this was read by Mrs Jeffries as a slow process of simply reducing her role, which to some extent was the case, though so far as Mr Isbister was concerned this enabled Mrs Jeffrey to focus on the business development aspects of the roll. Mr Isbister felt, doubtless correctly, that Mrs Jeffrey's presence added value in bringing a degree of professionalism that might otherwise be lost, but the issue was whether the Company still required this degree of administrative oversight and this type of business development, and it was entitled to conclude that it did not.

42 As to a selection pool of one, in the circumstances I find that this was reasonable. The fragmented parts of the administrative functions forming part of the role were not such as to create an obvious requirement that those who received these tasks should necessarily fall into the redundancy pool. The Respondent did not consider bumping as an alternative to making Mrs Jeffrey redundant but it had no obligation to consider this. I find as a fact that had it considered bumping, or job share, the latter of course requiring the agreement at least one other existing member of staff, Mrs Jeffrey would not have taken this up in any event. It would have meant a substantial reduction in income and status in the same way as the offered alternative employment which she declined to pursue.

43 It was procedurally most unsatisfactory that Mr Donaldson conducted the appeal having already made the decision that Mrs Jeffrey was to me made redundant. To say the least it was unlikely that he would change his mind and indeed he did not. Mr Donaldson's taking control of the process might well have been born out of his growing frustration but choosing to tell Mrs Jeffry that her role was at immediate risk of redundancy on the eve of Christmas party did not help the situation. Whilst there was no good time to break such news this was a time with the predictable consequence that Mrs Jeffry would see this as further evidence of personal animus towards her. However, in the circumstances, I find that the outcome of the procedure even if the appeal had been conducted by some other person would have been precisely the same. The Respondent's reasons for making this role redundant fell within the range of those lawfully open to a reasonable employer and did not 'mask' an intention to simply dispose of Mrs Jeffrey. The Respondent is a relatively small Company and I accept that, save for bumping or job sharing which I have already found not to have been a viable option, there was no other available positions for Mrs Jeffrey within the organisation save those she rejected. I have no doubt that Mrs Jeffrey did bring to the organisation a degree of professionalism but unfortunately that was not to the point, though it might well have been their loss.

44 For all these reasons I find that the dismissal was fair and by reason of redundancy and the claim in unfair dismissal is dismissed. For the reasons already stated the contractual subscription claim succeeds.

Employment Judge Brook

14 May 2019