Case Number: 2200621/2018

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms L West	**Workplace Options Ltd**

Heard at: London Central

On: 7, 8 and 10 January 2020
In chambers: 9 January 2020

Before: Employment Judge Lewis
Ms S Campbell
Mr D Carter

Representation

For the Claimant: Mr J. Neckles, trade union representative

For the Respondent: Miss M Polimac, Counsel

JUDGMENT

The unanimous decision of the tribunal is that:

1. The claimant was unfairly dismissed.
2. There is no chance that the claimant would have been appointed to the position of HR Partner & Talent Acquisition Specialist. There is therefore a 100% deduction from the compensatory award.
3. As the claimant was paid statutory redundancy pay, this is set off against the basic award which would otherwise have been payable. No compensation is therefore awarded for the unfair dismissal.
4. The claims for sex discrimination are not upheld.

REASONS

Claims and issues

1. The claimant brings claims for unfair dismissal and sex discrimination. Her claims for breach of contract and race discrimination have already been dismissed on withdrawal.

2. The outstanding issues were confirmed at the start of the hearing and are as follows:

Unfair dismissal

2.1. Has the respondent shown the reason for the dismissal? The respondent says the reason is redundancy.

2.2. Was the dismissal fair or unfair, applying the band of reasonable responses? In particular, did the respondent operate an unfair selection procedure in that:

2.2.1. The redundancy situation arose long before consultation with the claimant was started
2.2.2. The respondent did not create an appropriate pool based on the global nature of the restructure, especially with Lisbon and Dublin
2.2.3. The respondent embarked on consultation with the claimant with a closed mind.

2.3. If the dismissal was unfair on procedural grounds, what is the chance that the respondent would have fairly dismissed the claimant even if it had followed fair procedures and on what date?

Sex discrimination

2.4. Was the claimant subjected to direct sex discrimination by:

2.4.1. Pre-motivated (pre-designation) of the claimant for redundancy dismissal
2.4.2. Failing to pool the claimant with her male comparator (Mr Donnelly) including for all available vacancies. By this, the claimant is referring to the HR vacancy which her comparator was given.
2.4.3. Dismissing her with immediate effect for raising a grievance regarding the denial of her benefits during the notice period.

Remedy

2.5. If the claimant wins any of the above claims, remedy.

Procedure

3. The tribunal heard from the claimant and, for the respondents, from Jessica Morgan. There was an agreed trial bundle of broadly 256 pages.

4. We reassured the claimant's representative that he could have a break whenever he wished if necessary for his diabetes and that he should let us know if he had difficulty hearing what anyone said.

5. The respondent's representative suggested that it might be clearer for the respondent as employer to give evidence first. However, the tribunal decided it was best to stick to the more conventional order of the claimant giving evidence first in a discrimination claim, as the claimant's representative had prepared on that basis.

6. There was some discussion as to whether the proper name of the respondent was Workplace Options Ltd or Employee Advisory Resource Limited. According to Mrs Morgan, Workplace Options Ltd is registered in the US and Employee Advisory Resource Limited is registered in the UK**.** However, the claimant's contract states it is with Workplace Options Ltd and it was that company which paid the claimant's notice pay and redundancy pay. We therefore agreed with the claimant that the correct respondent is Workplace Options Ltd as stated on the ET1.

Fact findings

7. The respondent company provides employee well-being services through contracts with employers. The services include counselling support, managing stress, critical incident management, career coaching, and legal and financial advice. The services tend to be provided over the telephone in a call-centre type service, and managing the length of the 'queues' of callers is an important aspect.

8. The UK company is part of a global group of companies with headquarters in Raleigh, North Carolina. There are offices around the world, including in Ireland (Dublin), Portugal (Lisbon) and India.

<u>The claimant's job</u>

9. The claimant started her employment with the respondent company on 21 June 2010, initially as Clinical Team Leader. On 22 September 2016, she was promoted to 'Director of Service Delivery UK'. She remained in this position until her redundancy dismissal. Her annual salary was £47,000.

10. The claimant initially suggested in her evidence that she was Director for the Service Centre in the UK. However in cross-examination, she accepted her job title was 'Director of Service Delivery UK'. This is also the title which she used on her electronic email signatures.

11. The claimant was the most senior employee in the London office's Clinical Services department. The department divided into two teams – Counselling

and Worklife. The Worklife team was managed by Ms Wood, Director of Global Work-Life Operations, who was based in the US. The Counselling team was managed by the claimant.

12. In the Counselling team, Ms Iacovella, the Clinical Team Lead, reported to the claimant. In addition, all Team Leads in Clinical and Worklife departments globally reported to Mr Thigpen, the Director of Global Clinical Services, based in the UK. The Clinical team in London was the only place in the global company where a Team Lead reported to a Director in the same office.

13. Once clinical packages had been agreed with clients, they would be referred to the claimant for implementation. Her role entailed talking to the clients, managing and training the teams. As Team Lead, Ms Iacovella was responsible for the hands-on day-to-day management of the queues and ensuring the team was answering calls.

14. The claimant's line manager was Jessica Morgan. Mrs Morgan was Vice President of Global Service Delivery.

The four Directors

15. The claimant considers herself to have been one of four Directors of Service Centres, the others being Mr Donnelly, the Director of the Ireland Service Centre, and the female Directors of the Portuguese and Indian Service Centres. In fact, only Mr Donnelly and Ms Costa in Lisbon held the title 'Director of Service Centre'. The claimant job title was 'Director of Service Delivery UK'. Ms Kurlan was Director of Service Delivery in India.

16. In Dublin and Lisbon, the role of the Director of Service Centre was to run the entire office. This involved managing the admin and the teams, eg managing vendors such as taxi service and food delivery providers, managing petty cash, dealing with building leaks etc and dealing with staff conflict.

17. The India and London offices did not have a separate Director of Service Centre role. In London, these administrative tasks were carried out by a full-time Office Manager. In India they were carried out between Ms Kurlan and HR. The claimant did not carry out any of these duties.

18. The four offices had different profiles. The Dublin office was the smallest. It had a clinical team comprising the telephone counsellors and a global infrastructure team. The Lisbon office had a clinical team, quality team, product development team and Network Advantage team. The Indian office was the largest and has since expanded further. In London, as well as the clinical team, there was a sales and account management team and a few others. The claimant only managed the clinical team.

Start of redundancy process

19. The respondent's evidence on the redundancy process and time-scales was extremely vague. It appears that at the start of 2017, the executive team

identified the need to reduce operating costs and trim down the company by way of a restructure. The various department heads were tasked with identifying where cuts could be made. It took several months of discussions. Mr Shipley, Mrs Morgan's line manager, informed Mrs Morgan prior to March 2017 that the company was looking for global cuts. Mr Shipley was Senior Vice President Global Service Delivery. Mr Shipley spoke to Mrs Morgan and other senior Directors to see what roles in their areas could be removed or absorbed. The possibility of deleting the claimant's role and her duties being absorbed by other staff was suggested by Mrs Morgan to Mr Shipley around March 2017. The decision to put the claimant formally at risk was ultimately made by the senior executive team and communicated to Mrs Morgan in July 2017.

20. At Mr Shipley's request, on 27 July 2017, Ms Weaver (Vice President, Global Human Resources) sent Mr King, the President and Chief Operating Officer, 'a list of all of the completed cuts with personnel and pay details'. The list included Ms Costa and the claimant. The status of each person was noted as 'complete' except for the claimant and a Mr Issa, who were 'on hold'. Mr Donnelly and Ms Kurlan were not on the list.

21. By 18 August 2017, Ms Weaver had compiled a list of all company employees globally, which highlighted names of those whom the executive teamhad decided were at risk. The claimant is highlighted with the comments 'If Lorraine stays we can look at another TL'. 'TL' meant Team Leader. Ms Kurlan was highlighted Mr Donnelly was highlighted with the comment 'move to HR'. This list also shows in a handful of other cases that decisions were not final eg for one person, 'Can't lose her and Monique unless really is over quality' and on another 'would need to check with Jon'. We therefore accept the respondent's contention that the position as regards the claimant was still fluid as at 18 August and not set in stone.

Notification to claimant

22. The first the claimant knew of the proposed redundancies and that her job was at risk was the Operations Announcement meeting on 1 September 2017 at 2 pm. Ms Weaver, Ms Dosanjh, Human Resources Manager UK, and Mrs Morgan attended. Mrs Morgan read out a pre-scripted announcement. It said that WCO needed to reduce costs globally and would be starting a formal consultation process for those whose roles would be affected by the restructure. The claimant was told the role of Director of Service Delivery UK would no longer exist in the revised structure. Mrs Morgan said the consultation process would take place over the next few weeks and should be concluded by middle/end September. The claimant was told there would be at least three meetings before any decisions were made.

23. At 3.24 pm on the same day, an email was sent by Ms Dosanjh to Ms Williams in Global Payroll. It was accidentally copied to all staff in the UK office. The email chain showed that Ms Williams had asked for details of starters and leavers for August and September. Ms Dosanjh's reply of 1 September 2017 listed 10 leavers. Two of these, Ms McGill and the claimant,

were noted down under date of leaving as '14.9.17 [tbc]'. The others' leaving dates were not followed by 'tbc'.

24. At about 3.30 pm, the claimant tried to forward the email to Ms Weaver and Mrs Morgan to find out why she was on the list before her consultation had even started. However, she was unable to do so because the senior executive team had already instructed IT to take it down.

25. At about 4.45 pm, Ms Brown, Vice President for Clinical Quality, telephoned the claimant and asked whether she had seen the email. When the claimant said yes, Ms Brown said that Ms Weaver needed to speak to her. Ms Weaver told the claimant that the email had been sent in error to the entire UK office staff and she apologised. The claimant was very unhappy. She did not accept the apology.

26. On 5 September 2017, Ms Weaver sent the claimant an email with a 'consultation information pack' and inviting her to a telephone consultation meeting the next day. The pack said that the job role of Director of Service Delivery UK, the role which the claimant currently held, was at risk and 'WPO will not be replacing this role'. The information stated that consultation was required by law. The company would be disclosing the reason for the proposed change and would 'look at options available to you, ie suitable redeployment opportunities'. The information said this would be the claimant's opportunity to provide feedback 'as this is your opportunity to provide your view on the proposed changes and offer any alternatives to present to the Company. No decisions are made regarding the proposal until we have concluded consulting with you.'

27. Meanwhile Ms Weaver was sending members of the executive committee updated lists on the redundancy process. On 30 August 2017, the claimant was in the 'scheduled layoff' list, to be notified of redundancy on 1 September. Mr Donnelly was in the list 'pending layoff decision'. On 5 September 2017, the claimant was in the 'scheduled layoff' list with 'redundancy in process' noted. Mr Donnelly no longer appeared on the list at all.

28. The claimant sent Ms Weaver an email on 6 September 2017 raising a formal grievance that the email had stated her leaving date was 14 September 2017 when the consultation process had not even commenced.

29. Later on 6 September 2017, the claimant attended the pre-arranged telephone consultation meeting with Ms Weaver and Mrs Morgan. The claimant was permitted to bring a colleague to accompany her, Ms Bleasdille. The meeting lasted 13 minutes.

30. The claimant started by saying how uncomfortable she was with the process and that she felt it was biased and unfair, since the email stated her leaving date at a time when the consultation had not even started. She said she had put in a grievance about this. The claimant was asked for her

thoughts, but she did not put forward any suggestions as she felt the consultation was a cosmetic exercise.

31. On 8 September 2017, the claimant attended another telephone consultation meeting with Ms Weaver, Mrs Morgan and Ms Bleasdille. This meeting lasted about 8 minutes. Ms Weaver asked the claimant whether she had given any further thoughts to alternative positions. The claimant made no suggestions. She said that while her grievance was being reviewed, she found the process pointless. She said a decision had clearly been made by the senior executive team and this was a cosmetic exercise.

32. The scheduled consultation meeting for 12 September 2017 was postponed because Ms Weaver was considering the grievance. On 22 September 2017, Ms Weaver replied to the claimant's grievance email. She said she had investigated and the grievance was upheld. She apologised for the email that was sent out. 'This was done in error and is in no way a reflection of any view held by the company in relation to your continuing employment.' Ms Weaver said the redundancy consultation would therefore start afresh with the first consultation on the claimant's return from sick leave. The claimant replied on 2 October 2017 saying the 'so-called error' had caused her tremendous distress and compromised her feeling comfortable at work. She said she suspected the decision to finish her employment on 14 September had been a direction from the senior management team some time back.

33. The claimant attended the first consultation meeting under the fresh process on 2 October 2017. The claimant was accompanied by Mr Toplin, a colleague who was a solicitor. Ms Weaver provided a list of alternative vacancies globally, but no vacancies were suitable. Ms Weaver referred to a clinical vacancy in the Singapore office. The claimant said she was not interested in relocating.

34. On 27 October 2017, Ms Weaver emailed the claimant to confirm the discussion. She said the review had concluded there were too many levels of management within the organisation and the claimant's role could effectively be managed by Team Leaders. The email said the claimant had been consulted about any alternative suggestions to reduce the levels of management, but she had had none. She had also confirmed none of the vacancies were suitable. The claimant was invited to a 'final' consultation meeting later on 27 October after which a decision would be made.

35. The consultation meeting took place on 27 October 2017. The claimant asked why this was a final meeting when the process was supposed to be restarted. The meeting was very brief and a further final meeting was set up for 30 October 2017.

36. Another brief meeting took place on 30 October 2017. Ms Weaver said there were no UK vacancies. Mr Toplin asked about global vacancies. Ms Weaver said these would all require relocation and could not be carried out remotely. The claimant said that was a decision for her and she would like to

see the global vacancies. These were emailed to the claimant the next day, but, having looked at them, the claimant confirmed none were suitable.

37. The final meeting took place on 6 November 2017. The claimant was told she was redundant with immediate effect. Ms Weaver said she would email the redundancy pay-out figure immediately, which she did. The claimant was paid statutory redundancy pay, pay in lieu of notice and outstanding holiday pay.

The Ireland office

38. The claimant's comparator, Mr Donnelly, worked at the Dublin office. On 16 November 2016, he was promoted to 'Director Ireland Service Centre Operations'. Mrs Morgan was also his line manager.

39. The office in Dublin was small and it had no Team Leads. Also, unlike the London office, it had no Office Manager.

40. The claimant's role included managing the clinical team in the Ireland office. Mr Donnelly was not in the clinical team. The claimant went to Dublin once/month, although after Ms Iacovella was promoted to Team Leader, she started going to the Dublin office on an alternating basis with the claimant.

41. Mr Donnelly took on Office Manager responsibilities in the Dublin office. For example, organising office supplies and procedures, assigning and monitoring clerical functions and dealing with staff queries about office maintenance. The claimant did not have these duties at either the London or the Dublin office. Mr Donnelly's only service delivery management was to ensure calls were answered. This took about one hour/week of his time.

42. In addition to this, Mr Donnelly spent three days/week helping to investigate service delivery complaints received by the Network Advantage team. He had worked on that team prior to his promotion to Director in 2016. This was not an HR function. The claimant had similarly been involved in investigating service delivery complaints.

43. From fairly early on as a Director, Mr Donnelly had also helped the HR function informally on two days/week specifically with recruitment to the India office. He liaised with the recruitment agency in India. Mr Donnelly reported to Ms McGraw on this. She was Global Human Resources Manager based in Raleigh. His contract was not formally amended.

44. There was a high turnover of clinical staff in the London and Dublin offices and Mr Donnelly would both work on recruitment. Mr Donnelly would go out and find potential new hires. The claimant did not do this. Mr Donnelly or the claimant would then telephone them, check they had the right qualifications and call them for interview. The claimant would then carry out the interview with another colleague. In Ireland, she would do the interview with Mr Donnelly. The claimant's role in recruitment was essentially that which any manager might undertake as part of their managerial role.

45. By email dated 25 September 2017, it was announced that Mr Donnelly 'will be joining the HR team as HR Partner-Talent Acquisition'. It said he 'will be working with the HR team to interview, select, place, and onboard top candidates. He will also work with hiring managers to identify and define specific new hire requirements'.

46. This vacancy was not advertised. Mr Donnelly was simply slotted into it.

47. The respondent's equal opportunities policy states 'Recruitment methods, documentation and all associated material will be open and transparent and will encourage applications from as wide a field of candidates as possible. All job selection methods, whether by interview or other means will be designed in such a way as to afford all candidates an equal opportunity of success …. This policy governs all aspects of employment, including selection, job assignment, compensation, discipline, termination, and access to benefits and training'

48. The respondent's job-posting procedure states, 'Job posting is a way to inform employees of openings and to identify qualified and interested applicants who might not otherwise be known to the hiring manager. In general, notices of all regular, full-time job openings are posted, although WPO reserves its discretionary right to not post a particular opening.' This exception is not consistent with the equal opportunities policy.

49. The procedure also says regarding eligibility, 'To be eligible to apply for a posted job, employees must have performed competently for a minimum of six months in their current position. … Eligible employees can only apply for those posted jobs for which they possess the required skills, competencies, and qualifications'.

50. Mrs Morgan was unable to tell the tribunal when the HR Partner Talent-Acquisition vacancy arose or who decided that Mr Donnelly should be slotted in without it needing to be advertised. She thought that may have been Ms McGraw together with Mr Shipley.

51. Mrs Morgan says there would have been an offer letter to Mr Donnelly and an acceptance letter from him. On 19 November 2019 in case preparation, the claimant's representative had asked for disclosure, of the job advert, essential job criteria, job description, job offer letter and acceptance letter. The respondent's representatives disclosed the job description and added, 'There are no other documents to disclose'. The tribunal suggested to the respondent that it may wish to make urgent enquiries since we would have expected these documents to be disclosed as clearly relevant, since Mrs Morgan said they existed. The respondent never did produce these documents.

52. As a result of the respondent's non-disclosure and vagueness on this point, the tribunal is unable to say exactly when the post became available or was offered. However, Mrs Morgan did accept – and we find – that at the time

the post became available and Mr Donnelly was slotted in, she knew the claimant was at risk of redundancy. However, the claimant did not know this vacancy existed.

53. The job description for 'HR Partner & Talent Acquisition Specialist' says the position is responsible for full global candidate recruitment and sourcing strategy development for all offices. The position was responsible for can source as well as the recruitment process, creating talent pipelines, and planning recruitment events and monitoring recruitment trends. It required, amongst other things, a degree, 3 or more years of related work experience and a minimum 3 years full life cycle recruiting experience.

54. The job was likely to involve a lot of work with India because that was the area of greatest expansion.

55. The role is virtual and could be carried out from any base. Mr Donnelly has carried it out from Ireland.

56. Mr Donnelly had a postgraduate diploma in Human Resource Management in 2013 and an MA in Human Resource Management in 2015, both from the National College of Ireland.

57. Prior to becoming Director in 2016, Mr Donnelly was Team Leader of the Network Advantage team. Much of that role involved recruiting affiliates worldwide. From not long after becoming Director, he had assisted Ms McGraw for two days/week with recruitment in India.

58. Mr Donnelly had made it clear to Mrs Morgan from the outset in his weekly meetings with her that his ambitions lay in HR as that was his educational background. Mrs Morgan had spoken to Mr Shipley a few times about moving the claimant to HR permanently because his skillset was underutilised in his position. No vacancy had previously arisen.

59. Mrs Morgan accepts she did not at the time consider whether the claimant might be suitable for the post. Looking at the criteria now, she points out that the claimant did not for example have the required '3 years full cycle recruiting experience'.

60. The Director of Service Centre, Ireland, post was deleted when Mr Donnelly was moved to his new post.

61. In summary, the four Director posts were identified at early stages as potentially redundant. Two were Directors of Service Centres (Mr Donnelly and Ms Costa in Portugal). Two were Directors of particular services (the claimant and Ms Kurlan in India). On further exploration, Ms Kurlan's post was removed from consideration because of the rapid expansion of the India office. Her post still exists. Ms Kurlan was never put through the redundancy consultation process for this reason. Mr Donnelly was not put through the redundancy consultation process because he was slotted into the HR vacancy. His former Director of Service Centre post was then deleted. The

claimant and Ms Costa were both put through the redundancy consultation process and were both made redundant. We were not given much detail of the process involving Ms Costa.

Law

Unfair dismissal

62. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

63. Redundancy is a potentially fair reason under s98(2). Under s139(1)(b)(i) an employee is taken to be dismissed for redundancy if his dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

64. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

65. A selection pool of one can potentially be reasonable. It depends on the facts. The respondent referred to Halpin v Sandpiper Books Ltd, where a pool of one was fair on closure of an overseas office with only one employee from the UK. According to the EAT in Wrexham Golf Co Ltd v Ingham EAT/0190/12, '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.'

66. Under s123 of the Employment Rights Act 1996, the amount of the compensatory award is such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to the employer's actions. The tribunal must consider what would have happened if the employer had acted fairly and if appropriate, make a deduction to reflect the chance that the claimant would have been dismissed in any event. A degree of uncertainty is an inevitable part of the exercise, although there comes a point where one cannot sensibly reconstruct what might have happened, in which case, no deduction of compensation should be made.

Sex discrimination

67. Under s13(1) of the Equality Act 2010 read with s11, direct discrimination takes place where a person treats the claimant less favourably because of sex than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

68. Under s136, if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A can show that A did not contravene the provision.

69. The tribunal must follow the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975).

70. The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination. (Madarassy v Nomura International plc [2007] IRLR 246, CA.)

71. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of the protected characteristic.

Conclusions

72. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Unfair dismissal

73. The first question is whether the respondent has shown the reason for the claimant's dismissal. We find that it has. The claimant was dismissed by reason of redundancy. This was not disputed by the claimant. The respondent had decided to cut costs by reducing jobs globally. The claimant's post was deleted and its duties absorbed by other staff. There was no suitable alternative employment.

74. The next question is whether the dismissal was fair or unfair, applying the band of reasonable responses.

Selection pool

75. The claimant says, given the global nature of the restructure, the respondent should have formed a selection pool comprising the four at-risk Directors, ie herself, Mr Donnelly, Ms Costa and Ms Kurlan. Alternatively she argues that the respondent should have formed a selection pool of herself and Mr Donnelly. The respondent argues that it was appropriate to look at each office separately. Each office was different in profile and the four Director posts were different from each other. In particular, the claimant and Mr Donnelly did different jobs.

76. We find a reasonable employer could choose to handle the matter in the way that the respondent did and not pool the four Directors together nor pool the claimant and Mr Donnelly together. The four posts were not the same or interchangeable. They were located in different countries in offices of varying characters. The job titles were not the same either. The claimant and Mr Donnelly had different job titles.

77. It was reasonable for the respondent to look at each of the offices separately and ask the relevant senior managers at each location to identify which posts in those offices could be absorbed.

78. Having said that, there is a separate issue regarding whether Mr Donnelly should have been slotted into a new vacancy at a time when both his and the claimant's jobs were potentially at risk and indeed at a time when the claimant's job had been positively identified for deletion. We address this below.

Consultation

79. The claimant also says the dismissal was unfair because consultation was not started with her until long after the redundancy situation arose. She says there is a further, separate and related unfairness, in that the respondent embarked on consultation with her with a closed mind. She says the prime evidence of this is Ms Dosanjh's email accidentally sent on 1 September 2017.

80. We find that a reasonable employer could start the consultation with the claimant at the point when the respondent started it. An employer needs first to consider the possibilities before entering discussions. Although Mrs Morgan suggested to Mr Shipley in March 2017 the possibility of deleting the claimant's post, a provisional decision that the post was at risk was not made by the executive board until July 2017. During the intervening months, the board and senior managers were having conversations to and fro across the global business and certain posts were deleted as they went along, eg Ms Costa who left on 26 June 2017. Mrs Morgan was not told the decision to put the claimant's post was at risk until July 2017. As at 18 August 2017, the position regarding the claimant's post was still fluid in the respondent's mind – Ms Weaver's list noted by the claimant's name, 'If Lorraine stays, we can look

at another TL'. The claimant was then told shortly afterwards, on 1 September 2017.

81. The respondent was clear with the claimant on 1 September 2017 that its proposal was to delete her post. They invited her comments on that as well as suggestions for any alternative employment or other ideas. The claimant made no suggestions.

82. We understand why the claimant felt upset when she saw the email of 1 September 2017. However, we do not believe the email meant a decision had already been made. The operations announcement had already said the consultation process would be concluded by mid/end September 2017. The 1 September 2017 email was simply a heads-up to payroll regarding possible leavers. The important point is that '[tbc]' was noted by the claimant's name.

83. We do not find that the consultation process was a sham. The consultation information pack said 'this is your opportunity to provide your view on the proposed changes and offer any alternatives to present to the Company. No decisions are made regarding the proposal until we have concluded consulting with you.' There is no reason to believe the respondent would not have been open to discuss any suggestions the claimant made for creating a new role or for alternative employment or as to why her post should not be deleted. The claimant never made any such suggestions.

<u>HR post given to Mr Donnelly</u>

84. The final decision to give the HR Partner & Talent Acquisition Specialist post to Mr Donnelly appears to have been taken around the start of September 2017. The respondent had it in mind at 18 August 2017 since the spreadsheet says by his name 'move to HR'. The formal announcement was made 25 September 2017 but on the 5 September 2017 list, Mr Donnelly was no longer placed under the heading 'pending lay-off decision', having been in that category the previous week.

85. The decision was made to slot Mr Donnelly in without any open advertisement and without informing the claimant of the vacancy at the very moment when her consultation started. At that point, Mr Donnelly's post was also to be deleted (like the claimant's), and indeed others were potentially redundant.

86. Even if the decision to slot in Mr Donnelly was made a little earlier than the start of September, it was still at a point when the possibility of the claimant's job being deleted was seriously contemplated.

87. The failure to advertise was contrary to the equal opportunities policy. It was also contrary to the general position under the job-posting procedure, although that procedure allowed for slotting in in undefined circumstances. Mrs Morgan says the claimant would not have been eligible anyway because she did not have the minimum 3 years' experience. However, Mrs Morgan admits she did not even consider the possibility. In her mind, it was obvious

that the job should go to Mr Donnelly. She had been discussing with Mr Donnelly his aspirations to move into HR and hoping an HR opportunity would come up for him for some time, long before the redundancy process began.

88. We find the claimant's dismissal was unfair because of the respondent's failure to give her the opportunity to apply for this alternative employment.

89. We now have to consider the chance that the claimant would have been appointed to the post had she been able to apply. The claimant's representative argued that this was too speculative an exercise and we should therefore award full compensation.

90. There is always some element of speculation in such exercises, but we find the facts are sufficiently clear for us to reach a firm conclusion. We believe there is no chance at all that the claimant would have been appointed to the post had she been able to apply and had she been considered fairly.

91. The claimant did not even meet the minimum criteria for the post. She did not have 'three years full life cycle recruiting experience'. All she had done was interview individuals already identified by Mr Donnelly. This had sometimes included preliminary telephone suitability interviews. This is something many managers do as part of their job. It is clear from the job description that the new post was strategic. The first item on the job description said the position was responsible for full global candidate recruitment and sourcing strategy development for all offices. The claimant did not have that kind of experience.

92. Moreover, even if the claimant had been offered an interview, Mr Donnelly would clearly have been selected. He had qualifications in HR. He had been working on recruitment in India for two days/week since he became a Director. He had also carried out recruitment of affiliates previously. The claimant did not have any HR qualifications and she did not have the practical experience beyond carrying out interviews.

<u>Sex discrimination</u>

93. We considered first the failure to pool the claimant with Mr Donnelly for the HR Partner & Talent Acquisition Specialist vacancy. We asked ourselves whether the burden of proof shifted. In favour of that, a man (Mr Donnelly) was slotted into the post, whereas a woman (the claimant was not). The woman was in a comparable position to the extent that both her post and the man's were to be deleted at roughly the same time as part of the same global redundancy process. The post was not advertised even though the equal opportunities policy suggests that it should have been. Moreover, the job offer and acceptance letter was not disclosed although Mrs Morgan said it existed. The only man of the four 'Directors' was not made redundant. If all this was unexplained, could the tribunal find sex discrimination? We find that it could not.

94. There were four Directors at risk of redundancy initially. One man and one woman were kept on. Two women were made redundant. This is not a

striking disparity. In addition, the four were in different offices around the world, each with their own character. There was no other evidence given to us of sex discrimination in the company. The fact that some of the senior decision-makers were men does not mean their decisions were sex discrimination. In any case, Mrs Morgan and Ms McGraw were also involved in key decisions.

95. It is also hard to ignore at stage 1 of the burden of proof what was put forward as the explanation. Only one suitable vacancy arose and Mr Donnelly was an extremely obvious candidate. He had HR qualifications. The claimant did not. He had been working for HR on recruitment in India for Ms McGraw for two days/week. India was the area of greatest expansion of staff. He had been expressing an interest in HR work to his manager from the outset.

96. Even if we thought the burden of proof had shifted, the respondent satisfied us that not giving the claimant the chance to apply for the job was in no sense whatsoever to do with sex. The reasons are as we have set out. It may not have been fair, but that does not mean the respondent's reason is not credible.

97. We do not find the failure to pool the claimant with Mr Donnelly for redundancy selection purposes in any other way was sex discrimination. Mr Donnelly's post was also deleted as we have said. The real issue was the alternative post and we have dealt with that.

98. As explained above in the context of unfair dismissal, we do not consider that the claimant's redundancy was pre-motivated or pre-designed. Therefore no question of sex discrimination arises.

99. To the extent that Mr Donnelly was not put through the consultation process because the HR post had already been identified for him, we have explained why we do not consider this to be sex discrimination. Ms Kurlan also was not put through the consultation process after initially having been identified as possibly at risk, in her case, because of the volume of work in India.

100. Finally, the claimant suggests that she was dismissed with immediate effect for raising a grievance regarding the denial of her benefits during the notice period. We understand this to refer to the grievance about the 1 September 2017 email. The respondent's managers did not show any sign that they resented the claimant for raising this matter. They upheld her grievance, apologised, and started the consultation process again. There is no evidence at all to suggest that the claimant was dismissed or dismissed with immediate effect because she raised such a grievance. There is no evidence whatsoever to suggest that a man who raised a similar grievance would not have been treated the same way.

<u>Compensation for unfair dismissal</u>

101. As the claimant was paid statutory redundancy pay, this is set off against the basic award which would otherwise have been payable.

102. 100% deduction has been made from the compensatory award under the Polkey principle as explained above.

103. No compensation is therefore awarded for the unfair dismissal.

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Employment Judge Lewis

Dated: 10 January 2020

Judgment and Reasons sent to the parties on:

14 January 2020

For the Tribunal Office