EMPLOYMENT TRIBUNALS

Claimant: Ms A Malaj

Respondent: Swiss Cottage Community Association

Heard at: **London Central (remotely by CVP)**
On: **24 – 26 May 2021**

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

Representation
Claimant: Ms Laurene Veale (counsel)
Respondent: Mr Kuldeep Chahal (senior litigation consultant)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The tribunal does not make an order for reinstatement or re-engagement.
3. The respondent is ordered to pay to the claimant **£20,525.75,** made up as follows: -
    a. **£1,888.55** notice pay admitted to be owed;
    b. **£697.28** in respect of wages deducted in relation to 1 to 11 January 2020, and admitted to be owed;
    c. **£1050** in respect of a basic award for unfair dismissal
    d. **£16,889.92** in respect of compensatory award for unfair dismissal.
4. The claimant is not entitled to an uplift on her award under section 207A TULRCA.

REASONS

Introduction

1. The claimant was employed as a Nursery Manager at a nursery run by the respondent.

2. The claimant claims to have been unfairly dismissed by the respondent. She challenged the respondent's given reasons for dismissal, namely redundancy or alternatively some other substantial reason (business re-organisation), and she challenged the fairness of the process in the event that the tribunal accepted the reason for dismissal. If successful in her claim, claimant sought to be reinstated or re-engagement by the respondent.

The issues

3. By the time the matter came before me the issues had narrowed and the claimant was simply pursuing her unfair dismissal claim. However, the respondent made various concessions: -

    - The claimant has two years service;
    - She worked between 1 and 11 January 2020 and the respondent owed her wages for this.;
    - The claimant was not paid notice pay but is entitled to it; and
    - She is entitled to redundancy pay.

4. The outstanding list of issues was agreed between the parties as being as follows: –

    Unfair dismissal

    1. What was the reason for the dismissal? R relies on redundancy or SOSR, namely a restructure of the business. C disputes both those reasons.

    2. Was the reason for dismissal a potentially fair reason?

    3. In all the circumstances of the case, was it fair for R to treat this reason as a sufficient reason for dismissal?

    4. If the reason was redundancy,

        (a) Was sufficient warning of impending redundancy given?

        (b) Was a fair pool for selection adopted?

        (c) Was a fair selection process carried out?

        (d) Did R carry out adequate and meaningful consultation with C?

(e) Did R take reasonable steps to find and/or offer suitable alternative

employment?

Remedy

5. If she succeeds in her complaint of unfair dismissal, should the Tribunal order reinstatement (s.114 ERA)? C would like reinstatement as soon as practicable.

6. If reinstatement is not practicable, should the Tribunal make an order for re-engagement (s.115 ERA)? C seeks re-engagement in the role of Nursery Manager on the terms advertised upon her dismissal (and for which she unsuccessfully applied).

7. If re-employment is not awarded:

(a) What is the basic award? C claims £525 x 2 = £1,050.

(b) What is the compensatory award? C claims 52 x £567.31 = £29,500.

(c) Has R breached the ACAS Code? If so, what uplift is appropriate?

8. How much does R owe to C for:

(a) If applicable, redundancy pay. C says not applicable.

(b) Notice pay. Both parties agree: 1 month net pay = £1,888.55.

(c) Unpaid wages from 1 to 11 January 2020? C claims £87.16 x 8 = £697.28

9. How much interest on damages should be awarded? C claims 8% on compensatory award and damages for breach of contract.

Procedure

5. By an ET1 received on 20 May 2020 the claimant made claims of unfair dismissal, notice pay, unlawful deduction from wages and redundancy payment.
6. The respondent in its grounds the resistance initially asserted that the claimant did not have sufficient service to bring an unfair dismissal claim. It further denied her claims.
7. At a preliminary hearing before Employment Judge Norris case management orders were made and a list of issues was appended to the case management summary. At this stage the continuity of the claimant's service, deduction of from wages, notice pay, holiday pay, redundancy payment and unfair dismissal were all still considered to be at issue in the case.
8. As indicated above, the parties subsequently helpfully narrowed the issues.

9. At the outset of the hearing the claimant made an application for disclosure of a total of 15 documents. I decided to postpone consideration of this application until after I had read into the case. I took the first morning and some of the afternoon of the first day of the hearing as reading time. I asked Mr Chehal if he could take instructions on whether any of the documents could be provided were I to order their disclosure. In the afternoon of the first day of the hearing I considered the claimant's application for disclosure, and for reasons given orally, I ordered disclosure of some of the documents but not others. In short, the documents that I did not order to be disclosed related to the fine detail of a selection exercise relating to other candidates. I considered that it was not necessary for me to consider these documents when determining the issues in the case as pleaded.

10. I was provided with a bundle of 209 pages (I will refer to page numbers as follows [number]), an additional disclosure bundle (I will refer to page numbers as follows [CBnumber]), and a redacted statement of main terms of employment in respect of the claimant's "replacement". The claimant produced a witness statement and gave oral evidence, the respondent produced witness statements from Mr Counsell, the respondent's Director, and Ms Valentine-Hsuing, the respondent's board chair, who both gave oral evidence.

Facts

11. A number of issues were put before me, but I will only make findings of fact in relation to the issues I have to decide in order to determine the case brought by the claimant.

12. The claimant first worked at the Swiss Cottage Pre-school, a nursery within a community centre run by the respondent, between 2005 and April 2016, when she was made redundant. She was first employed as a Pre-school Assistant, before becoming a Deputy Leader and latterly a manager. She was made redundant when the respondent decided to open its own nursery.

13. On 27 November 2017, the claimant was interviewed for the post of Nursery Manager at the respondent's community centre, and was offered the job. She was the only person interviewed for the post. She was employed by the respondent as Nursery Manager based at the centre, working 35 hours per week 52 weeks per year with effect from 2 January 2018. The contractual notice provision set out that following her successful completion of her probationary period but less than five years' service she would be entitled to one month's notice from the employer. The claimant's line manager was Mr Counsell, who was director of the community centre in which the nursery was located. The nursery was only open to children for 38 weeks a year, corresponding with the school academic terms.

14. The parties are at odds as to quite how many people were permanently employed by the nursery at any one time (it appears that there were students and casual workers at various times), and for the purposes of resolving the issues in this case it is not been necessary for me to reach a determination on this point, though it appears to have been five when the claimant's contract of employment ended. When she was appointed, the claimant was one of two members of staff with a 52 week a year employment contract, the other being the Deputy Manager. On 17

September 2018 the Deputy Manager went on maternity leave, and on 8 July 2019 she informed Mr Counsell that she would not be returning on maternity leave. A colleague of the claimant's was promoted into this position on a temporary basis on a 38 week per year contract. The claimant was from then onwards the only worker on a 52 week per year contract.

15. In February 2018 the claimant put forward a business proposal which included reducing members of staff from seven to five, including the manager's post. In September 2018 two members of staff were made redundant, and one of the rooms used by the nursery was closed.

16. The claimant's father died just before the 2019 autumn term began. She spoke about this with Mr Counsell and there was a discussion about when the claimant might wish to take compassionate leave.

17. On 24 October 2019 the claimant sent Mr Counsell a text [72] asking why nursery personnel had not been invited to the respondent's AGM. She commented "*That's not nice at all*". I find that the claimant was not specifically excluded from the AGM, which was advertised by way of notices in, around or outside the nursery. I find Mr Counsell was not particularly put out, as suggested by the claimant, by this approach to him.

18. On 25 November 2019 Mr Counsell emailed the claimant asking her to attend the meeting in his office that Friday (29 November 2019) to discuss her contract [74]. Part of the background to this is that in January 2020 the respondent, for the first time in its history, would become liable to pay the full rent of the premises it occupied (£62,000 per annum) to Camden Council, the landlord. This meant that the respondent had to look at reducing expenditure, including by looking at staffing costs. The respondent considered also that there was no business case to retain one 52-week role within the nursery and that the claimant's role needed to be individually restructured.

19. The respondent did not have its own dedicated HR function and relied on an external consultant, Face2Face Peninsula, to assist with this function. It placed a significant degree of reliance on this consultant.

20. At this point, the claimant had under two year's continuous service, and valid written notice at this point would have terminated her contract of employment before she acquired the right not to be unfairly dismissed or receive a redundancy payment. I accept the evidence that Mr Counsell gave under cross-examination that the claimant had been the only person interviewed when they had appointed her to commence on 2 January 2018. Based on Mr Counsell's oral evidence and the claimant's appraisals ([45] and [48]), he viewed the claimant as a satisfactory, but not exceptional, employee.

21. On 26 November 2019, the claimant texted Mr Counsell to say "*Just to inform you that unfortunately I will not be able to attend work today and tomorrow. I will let you know if I cannot make it for the rest of the week. I will notify Abena too*" [72]. In her witness statement at paragraphs 23 and 24 the claimant asserts that Mr Counsell had previously told her that she did not need to explain herself when she wished to take compassionate leave, and said that Mr Counsell did not call her to find out why she was not

attending work on 26 November 2019 as he already knew that she was taking compassionate leave. The claimant did not, however, disclose or refer to messages in response to her text at [72] in which Mr Counsell said "*Please confirm the reason for your absence*" and the claimant responded "*Don't know why. I already miss the children and my team. I just don't feel like getting ready for work*" [77].

22. On 28 November 2019 the claimant came back to work to find there had been an IT problem that affected her access to her accounts (see [79]).

23. On 29 November 2019 claimant attended a meeting with Mr Counsell and Mr Pegg, a consultant working for the HR provider Face2Face Peninsula. The claimant was told that she was at risk of redundancy, and that it was just her role that was at risk. A transcript of this meeting is in the bundle [81-106]. A number of matters were covered in this meeting including: –

    - Mr Pegg raised there was no scope to remunerate the claimant for the role that she had for 52 weeks a year. A new role was being discussed and finalised which would be for 38 weeks per year. Mr Pegg said this role was "*just what's called an 'alternative employment'*". The claimant would not be obliged to take this new role.

    - Mr Pegg saying that the respondent was not looking to make the claimant redundant.

    - The respondent would initiate a consultation period.

    - The claimant said that 52 weeks is not enough considering the nature of the business. 38 weeks would put a lot of pressure on the nursery. She later said that she was not prepared to go down to below 44 weeks and that it was impossible to carry out the role on 38 weeks without impacting the quality of work. She repeated that she "*would never go for 38 weeks*".

    - The claimant hoped at one point that this was "*not a personal vendetta from*" Mr Counsell and questioned whether her challenging his authority had led to her being where she was today. At another point she said that she <u>did</u> take it as a personal vendetta relating to her having questioned his absences. She reiterated on two other occasions during this meeting that she thought Mr Counsell was pursuing a personal vendetta and on another saying that she felt pushed out because she dared to question Mr Counsell.

    - Mr Pegg explained that the claimant would be entitled to look at a job description for the 38-hour role, that she may well not be interested in it and that it was a role where applications would be required, and the claimant would not necessarily be the only party to apply.

    - Mr Pegg invited alternative suggestions from the claimant by the following Friday (6 December 2019), but that "*we are both boxing blind until we get the job description through*". Mr Pegg confirmed that he would send the transcript of the meeting and the job description to the claimant's personal email address, which he took.

24. Mr Pegg emailed the claimant's work email address on 2 December 2019 [112], reminding her to submit her alternative proposals to redundancy by 6 December 2019. Mr Pegg had agreed to send the email to the claimant's personal email address, and the claimant had had issues with IT at the end of November. Although I am puzzled as to how it was that Mr Pegg's email was not received at the claimant's work email address while other emails were, and as to why she chased him by telephone rather than email when she did not receive the job description (especially as, on her evidence, he did not answer the telephone), on balance, I accept that she did not receive the email with the job description.

25. Mr Counsell emailed the claimant a letter on 12 December 2019 [107-8] confirming that no alternative suggestions to redundancy had been received from the claimant and that it would be necessary to continue with the "*Redundancy Consultation process*". He told the claimant that a new role had been created which would be advertised internally and externally and that she had the opportunity to apply for the new post, which would be a term time role, by 17 December 2019. He also stated "*It is important to stress that this letter does not constitute formal notice of redundancy, however, you do need to bear in mind that your current role will be redundant on 31 December 2019 in accordance with the business case explained to you at the aforesaid meeting. This letter gives you due forewarning of that eventuality and if it is necessary to make you redundant your notice period will be in accordance with your contract.*"

26. This is a confusing letter in a number of respects. However, certainly at the point of drafting the respondents Grounds of Resistance, and later at the preliminary hearing, the respondent's case was that the claimant was dismissed by reason of redundancy on 31 December 2019.

27. On 13 December 2019 [107] the claimant emailed Mr Counsell (cc Ms Valentine-Hsuing) to say that she had not been provided with the new job description. Later that day she emailed Mr Counsell again, cc Ms Valentine-Hsuing and Mr Pegg [109] to say that she had received her job description and confirmed that nothing had changed from her existing duties, but that a few items had been added alongside expectations outlined for the role to be completed within 14 weeks less paid time per year. She also pointed out that she had not received the minutes of the meeting of 29 November. She indicated that she thought that this meant that the respondent had decided to "*rest the case. Given the irrationality behind Everton's sudden decision to attack/seize my role*". Mr Pegg responded [109-111] to say that 44 weeks was not acceptable on financial grounds and that the consultation process was reliant on the claimant to suggest viable alternatives which the business could consider to avoid the potential redundancy. Later that day the claimant emailed Mr Pegg [111] to say that she had not received his email of 2 December 2019, and had she done so she would have proposed an alternative of a 44-week role instead of the 38 week one. She asked him to send his previous email, and he did so on 16 December and told her that 44 weeks was not a viable alternative as financial overheads needed to be reduced. He indicated that the claimant needed to apply for the role, if she were interested, by 17 December 2019 [112-4].

28. The claimant's job description is at [46–7] and the proposed new job description is at [50–2]. There are the following changes: -

- Under the heading **Purpose of job** the old description has two elements. The new job description added the following as a third element "*The Nursery Manager will be expected to build good working relationships at every level. Working in partnership with parents, families and all SCCA staff is highly valued and the nursery manager must be approachable, friendly and able to communicate effectively and professionally at all times*." However, this is taken verbatim, adding the underlined words, from a section in the old job description headed **External**. Essentially, the text with minor additions was moved from one section of the job description to another.

- Almost all of the **Main responsibilities** were exactly the same in both job descriptions, except, to the responsibility in the old job description "*To be accountable and responsible for day-to-day financial systems directly relating to the Day Nursery provision*" was added "*All nursery expenses (except petty cash) require prior written approval from the director. The NM is also expected to work closely with the daytime Administrator who has bookkeeping responsibilities linked with the nursery provision*". In evidence Mr Counsell accepted that this addition was largely formalising what the claimant already did.

- Added as **Main Responsibilities** in the new job description were "*By 15th of each month to provide the Director with a written monthly update on nursery performance/progress including staff absences for payroll processing*" and "*To attend official meetings as requested by the director*".

- Under **Supervision/Management of People** management and appraisal of the Deputy Manager was taken out of the old job description, it was clarified in the new job description (and accepted by Mr Counsell in evidence) that supervision remained with the post. Additionally, the new job description clarifies reporting lines to the director.

- Under **Contacts and Relationships** the new job description added that working relationships with will include all staff employed by the Community Association rather than just the nursery provision.

29. At the Preliminary Hearing on 16th February 2021 the respondent's representative agreed that the new role "*was, in terms, the same role but on reduced hours*" (although it is fair to say that this was not the line taken by the respondent at the final hearing).

30. On 17 December 2019 the claimant applied for the new role.

31. 31 December 2019 was the day on which the respondent purported to terminate the claimant's employment by its letter of 12 December 2019. This letter was ineffective to terminate her employment and the claimant did not understand that her contract had been terminated. On 6 January 2020 the claimant texted Mr Counsell raising issues relating to the nursery [117]. On 11 January 2020 Mr Counsell wrote to the claimant to say "*Further to my letter of 12 December 2019 were aware that your previous role as Nursery Manager was made redundant on 31 December 2019. You have applied for*

the new role which will be considered and you will be notified of the outcome later this month. Until such notification please do not attend the nursery premises" [118].

32. On 24 January 2020 the claimant was interviewed for the new role. There had been six applications for the post and claimant was one of four who was interviewed. Although there was some delay in the template for the interview questions being provided to the claimant and tribunal during the hearing, I accept Ms Valentine-Hsuing's evidence that all candidates were asked the same questions as I find it inherently unlikely that they would be asked different questions. To the extent that the claimant asserts that she was not asked a number of the questions that appeared on the template, I find that she had misremembered this.

33. On 27 January 2020 the claimant emailed Ms Valentine-Hsuing to request an outcome of her interview as she had not heard anything. In this email she said "*I cannot help but think that everything was well orchestrated, and I wish no manager experiences what I'm experiencing right now – betrayal and injustice. All I have done is love that place and certainly did not work to deserve this…*

….. In end of the day it's not the place's fault that people cannot manage staff and I feel that I am paying the price for Everton [Counsell]'s negligence towards personnel and the centre. I enjoyed a lot from being called a "victim" during the process and allowing everyone to speculate about my dismissal".

34. On 27 January 2020 the claimant was sent a letter informing her that she had not been successful in her application [119]. The respondent appointed someone else to the role and I accept the evidence of Ms Valentine-Hsuing that the panel appointed the applicant that it felt performed best at interview on the day and who demonstrated skills and experience suitable for the role. It is likely the claimant received this letter on 28 January 2020 when she was also informed of her unsuccessful application by Ms Valentine-Hsuing. The salary of the new role was £23,827 gross per annum.

35. On 28 January 2020 the claimant raised a grievance against the decision not to appoint her, as she was not offered an appeal against her non-appointment. The grievance does not appear to be in the bundle. However, Mr Counsell's response to the claimant's email is at [121–2]. He offered her a grievance hearing with a consultant from Face2Face Peninsula. The claimant attended on that day represented by a trade union representative, and her grievance was heard by Ms Shepherd who prepared a report [124–156]. During the course of the grievance hearing, the following matters (among others) were raised:-

    - The claimant alleged that Mr Counsell had told her to stay out of politics and not to get involved in anything [133].

    - The claimant raised issues about not being invited to the AGM, and suggested that Mr Counsell had treated her differently after this and did not like her talking to Ms Valentine-Hsuing about it or getting involved with the board [135-6].

- The claimant wanted to be reinstated into her job as a grievance outcome [147].

36. Ms Shepherd set out her findings within the report. She dismissed the claimant's grievance about her redundancy, accepted that the termination of the employment had taken place on 31 December 2019 and that no redundancy payment is payable.

37. By letter dated 5 April 2020 the claimant was informed of the outcome of her grievance and given the right of appeal within five days [157]. She received this by email of 6 April 2020. On 7 April Mr Counsell wrote to her to confirm that her employment ceased on 31 December 2019 and that no redundancy payment is payable [158]. Friday 10 and Monday, 13 April 2020 were both bank holidays. The claimant appealed the grievance on 13 April 2020, but the respondent did not accept this appeal as it said it was out of time. The grievance policy was not in the bundle, but it was asserted in correspondence between the claimant's trade union representative and the respondent, and not apparently challenged, that the policy allowed five "working days" to appeal decisions. This would have meant that her appeal was within time.

38. The claimant sought work as a nursery manager shortly after she was dismissed. I accept that the pandemic had a significant effect on the availability of work in her field, in that furloughed workers and those working from home had less call for childcare. She applied for one job and did not get it on the basis that the prospective employer was suspicious that she had been made redundant from a nursery that was still operating.

39. At some stage the claimant lowered her sights and applied for non-managerial jobs, and she succeeded in getting a Pre-school team leader role at Bright Horizons. She worked here from 23 September 2020 to 24 December 2020, receiving £5050.59 net in total from this work.

40. She successfully applied for a role as manager of Queen's Crescent Community Centre and worked here from 4 January 2021. This was a part-time fixed-term post which comes to an end 23 July 2021. She is paid at the net rate of £241.01 per week. The claimant considered that it was appropriate to take a part-time post to ensure that she remained upskilled as a manager within her chosen profession.

The law

41. Under section 98(1) Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for dismissal and that such reason is a fair one under section 98(2) ERA.

42. Redundancy, one of the potentially fair reason is under section 98(2) ERA, is defined under section 139 ERA as follows: -

> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a)[not relevant in this case]*

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

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

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

43. General principles relating to fairness in redundancy process emerge from ***Polkey v A E Dayton Services Ltd*** **[1988] ICR 142** where it was held that an employer will not be acting reasonably unless it:

- Warns and consults affected employees or their representatives;
- Adopts a fair basis on which to make selections for redundancy; and;
- Takes reasonable steps to avoid redundances.

44. In ***Williams v Compair Maxam Ltd*** **[1982] ICR 156** guidance was given on the factors which the tribunal should consider when assessing fairness within a redundancy process: -

- The employer should seek to give as much warning as possible of impending redundancies to employees;
- It should consult them or their unions about the best means of achieving redundancies, including the applicable criteria in selecting for redundancies;
- That criteria for selection should, so far as possible, not depend solely on the subjective opinions of decision-makers;
- Selection is made fairly according to the criteria; and
- The employer will take reasonable steps to offer alternative employment instead of dismissing.

45. For a business organisation to constitute a substantial reason this level the employer generally must demonstrate:

- that the reorganisation has discernible advantages to the business;
- that the employer has acted properly in all the circumstances in seeking to impose changes.

46. The claimant seeks an order for reinstatement or re-engagement. In exercising its discretion as to whether to make one of these orders the tribunal must first consider whether to make an order for reinstatement and in doing so shall take into account:-

a) Whether the complainant wishes to be reinstated,

b) whether it is practicable for the employer to comply with an order for reinstatement, and

c) where the claimant caused or contributed to some extent the dismissal, whether it would be just to order his reinstatement.

47. If the tribunal decides not to make an order for reinstatement it should then consider whether to make an order for the engagement and, if so, on what terms, taking into account:-

    a) any wishes expressed by the complainant as to the nature of the order to be made,

    b) whether it is practicable for the employer to comply with an order for re-engagement, and

    c) where the complainant caused or contributed to some extent that the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

48. It was observed in ***Nothman v London Borough of Barnet (No 2)*** **[1980] IRLR 65** that an employee who considers himself a victim of conspiracy is unlikely to be a satisfactory employee if reinstated. In ***Wood Group Heavy Industrial Turbines Ltd v Crossan*** **[1998] IRLR 680** it was held that a claimant's defence of "*conspiracy*" and assertions that people had been "*out to get him*" were sufficient factors bearing on the issue of practicability.

49. In this case the claimant conceded that it was not practicable for the respondent to arrange for the claimant's work to be done without engaging a permanent replacement (see section 116(5) ERA) and therefore that I could take the fact that the claimant has been replaced into account in considering whether it was reasonably practicable to reinstate the claimant. However, the fact that the claimant has been replaced does not necessarily mean it is impracticable to reinstate or re-engage ***United States Navy v Coady*** **UKEAT/275/94.**

50. A breakdown in mutual trust and confidence is material to the question of practicability. It is the employer's view of trust and confidence, subject to whether it was genuine and founded on a rational basis, which is important and not the tribunal's view ***United Lincolnshire Hospitals NHS Foundations Trust v Farren*** **[2017] ICR 513**.

51. Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA) provides: -

    (1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

    (2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

        (a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

        (b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

52. Paragraph 1 of the ACAS statutory Code of Practice on discipline and grievance ("the Code") states "*The Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts*".

Conclusions

The reason for dismissal

53. I accept the respondent's evidence that there was a compelling financial need for it to reduce staff costs. I also accept that the respondent reasonably considered that there was no business case for keeping any of its employees throughout the 52 weeks of the year when the nursery was only open for 38 weeks. I therefore accept that what is sometimes referred to by employment professionals as a "redundancy situation" arose. I have reached this conclusion without examining the fine detail of the staff complement at various times, evidence of which I found not entirely satisfactory on either side. There was a need to save money and a business case to reduce the hours of the claimant's role.

54. I agree with the claimant (and with the respondent's representative at the preliminary hearing) that the new role was essentially the old role performed in 14 fewer weeks per year. The differences between the two job descriptions are minor and consist, in the main, in formalising tasks already carried out by the claimant or clarifying certain matters rather than making substantive changes to the tasks to be performed or the way they were to be performed. The new job description added nothing of substance and the changes can fairly be described as cosmetic.

55. Whether there was a "redundancy situation" is not the question I have to determine, however. I have to determine what the reason for the claimant's dismissal was, and in this context I remind myself that a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (***Abernethy v Mott, Hay & Anderson*** **[1974] ICR 323**).

56. Mr Counsell was cross examined specifically about his reasons for dismissing the claimant, and my note of his evidence is as follows: -

"*Why did you dismiss her? Responses that she provided informed our view that we should go to market. To a point informed that view. When we appointed her she was the only person we interviewed and in urgent need of person to fill post for the New Year. In the light of this restructure this was opportunity to test the market, we had not had the possibility of doing that before. She said no way this could be done in 38 weeks. We were rather surprised by all of this. When I put that to the board, that in part led board to conclude that it wanted to test the market. She said the job could not be done. Felt in the interests of the setting opportunity to look at the market and see how best to go forwards as incredibly reluctant and resistant to going down to 38 weeks. She was aware this was part of the restructuring plan anyway*". Mr Counsell, in response to my question about whether he "went to market" to get someone who could perform the role better than the

claimant, responded that he wanted to get someone who could "*take things to the next stage*". He told me that the nursery had missed out on an "outstanding" OFSTED rating, and that was the ambition for the nursery. He said that when the claimant had been interviewed when she had originally been appointed, there had been no opportunity to compare her with anyone.

57. The claimant's dismissal certainly was not wholly attributable to the expected diminution of the respondent's requirements for employees to carry out work of a particular kind. Ms Veale took him to the statutory definition of redundancy in her cross-examination, and he said that he was not certain "how comfortably" her dismissal fitted within the definition, but that the respondent had deferred to its HR consultants. Mr Counsell gave evidence that part of the reason for going through with the process that led to the claimant's dismissal was the feeling that the respondent had appointed an employee who was no more than satisfactory, and that the respondent could "test the market" in order to see whether it could appoint someone who could help the nursery gain an outstanding rating. Mr Counsell was candid about this notwithstanding the fact that it might undermine the given reason for redundancy, and such motivation is readily understandable, in contrast with the rather far-fetched and small-minded motivation (Mr Counsell felt challenged about the AGM and other matters) advanced by the claimant.

58. One issue which caused me some trouble was the fact that at the time when potential redundancy was first raised with the claimant, she had not acquired the right to a redundancy payment nor the right not to be unfairly dismissed. To put things bluntly, the respondent did not need to show a reason to dismiss the claimant when it first apparently contemplated dismissal. This is not a factor that featured in the way the claimant put her case, but I did ask Mr Counsell whether the claimant's length of service was a factor that he bore in mind at any stage, and he denied that it was a consideration.

59. The letter of 12 December 2019 possibly complicates things further. On the one hand, Mr Counsell was asserting that the claimant's role will be terminated on 31 December 2019, which is two days before she would have gained two years' service. However, he expresses that to be by way of redundancy. Confusingly he says that it is "*necessary to continue with the redundancy consultation process*". While this is something of a mess, it does look as though the respondent was attempting to terminate the claimant's contract of employment two days before she acquired employment rights. The respondent continued to assert the claimant did not have sufficient service to bring an unfair dismissal claim in its grounds of resistance and at the preliminary hearing.

60. It is for the respondent to prove the reason for dismissal. While I find that there was a need to reduce expenditure and a business case for reducing the claimant's role to a 38 week per year one, I do not consider that this was the reason for her dismissal. I find that the reason the respondent dismissed the claimant is that it wrongly believed that she did not have two years' service and that it used its "redundancy situation" as a pretext to dismiss an employee it considered merely satisfactory in the hope that it could appoint one who was outstanding. I am conscious that this was not the case put to the respondent on the claimant's behalf, but I am satisfied that Mr Counsell

had the opportunity to give evidence about this issue, and indeed was very candid about it for the most part.

61. The respondent, accordingly, has not shown a potentially fair reason for dismissal.

Fair or unfair redundancy/SOSR

62. If I am wrong on the reason for dismissal, I continue to consider issues of fairness had the respondent proved redundancy and/or SOSR as reasons for dismissal. I remind myself that is not for me to substitute my decision for that of an employer, but to assess whether the actions of the employer fell within the range of reasonable responses open to a reasonable employer.

Warning/consultation

63. The first time the claimant was made aware of potential redundancies was in the at-risk meeting of 29 November 2019. It was acknowledged within that meeting that this must have come as a shock to the claimant. It was made clear to her that she would have the opportunity to make further comments when she received a draft new job description for the new role. She was assured that this would be sent to her personal email address and that they were "boxing blind" until they got the job description. The claimant was not told that her role would be terminated if she did not make any comments on the job description, indeed the claimant was told "*If you don't come back with alternative suggestions, it is not held against you*" and "*If you come back with nothing, it's not an issue*". This was in contrast to his later assertion that "*it was made clear at the meeting that in the absence of any viable alternative proposals, it will be necessary to continue with the redundancy process*".

64. While I find myself surprised at the claimant's evidence about why she chose not to chase Mr Pegg by email for the job description, not least when, according to her evidence, he was not answering the phone to her, I accept that Mr Pegg did not email the job description to her personal email address as promised. The respondent then purported to make the claimant's role redundant by letter of 12 December 2019. This was before she had any opportunity to come back with any proposals about the job description which, on her evidence, she had not even seen. The purported redundancy of the claimant's role took place before any selection process took place to fill the new role.

65. Accordingly, by the time the claimant purported to dismiss on 31 December 2019 by letter or 12 December 2019, there had been inadequate consultation with the claimant. No reasonable employer would have indicated that the claimant's role was redundant in these circumstances.

Unfair selection process

66. It is not the function of the tribunal to examine the minutiae of the selection process operated by a respondent. It is sufficient for the employer to have set a good system for selection and to have administered it fairly. I was invited at the outset of the hearing to order disclosure of a number of documents relating to the interview process which led to the claimant's non-appointment to the new role. I did not consider it appropriate to make such

an order, as I considered I was being invited to undertake an "over–minute" examination of the redundancy exercise.

67. I do not find that the setting up of competitive interviews with the means of selection that was outside the range of reasonable responses. Although I didn't hear detailed evidence on the interviews, I did not consider that the application of these criteria was outside the range of reasonable responses.

68. However, this is entirely irrelevant. The respondent purported to dismiss by reason of redundancy on 31 December 2019 by its letter of 12 December 2019. Fair selection criteria are pointless if they are not applied until after the employer purports to make an employee redundant. The respondent's actions in this regard were outside the range of reasonable responses.

Reasonable attempts to avoid redundancy

69. The obligation is on the employer to make reasonable efforts to avoid redundancy. I have found that the "new role" with more or less the same as the "old role" subject to minor cosmetic differences, and the more substantial fact that it was a 38 week rather than 52 week role.

70. As set out above, the claimant was notified on 12 December 2019 that her role would be made redundant on 31 December 2019 before the job description was sent to her personal email address. Admittedly, she had indicated that she would not consider less than a 44-week role at the at-risk meeting of the 29 November 2019. However, by the 17 December 2019, by applying for the "new role" the claimant had impliedly assented to consider the 38-week role.

71. Ms Valentine-Hsuing's evidence was that the claimant had initially refused to accept the role and took some time before she accepted it and that by then the role had been advertised internally and externally and that it was too late to stop this process. She further gave evidence that the respondent had been advised that given this was a totally new role the respondent would have to advertise it internally and externally.

72. No reasonable employer would have denied the claimant, as alternative employment, what was essentially the claimant's job carried out 14 fewer weeks per annum. No reasonable employer would have denied the claimant the opportunity of this alternative employment on the basis that she had initially not accepted the proposal within one week when she had been told that she did not have to come back with proposals until she received the job description. I do not accept that the respondent was, effectively, locked into a recruitment exercise that it could not stop. In all respects the failure to offer the new role as a reasonable alternative employment was outside the range of reasonable responses.

Appeal

73. I have not considered it appropriate to make conclusions in respect of the appeal. There is no requirement in redundancy dismissal for there to be an appeal against dismissal (in contrast with conduct or capability dismissals, for example). In any event I have found the redundancy process to have been unfair.

Business re-organisation/SOSR

74. The difficulty for the respondent in running an SOSR case is that a critical element in business reorganisation cases is that the employer has sought to affect change and the employee has refused to accept it (see ***Hollister v National Farmers' Union*** **[1979] IRLR 238** at 550). While there was an initial reluctance of the claimant to accept 38 weeks, she came round to accepting it and applying for the new role. Had the respondent sought to impose a 38-week role on the claimant, and shown a reasonable business case for this, and the claimant refused to accept the new role, then I accept this could well have been run as an SOSR case.

75. I do not accept that business reorganisation was a substantial reason for the claimant's dismissal, and I have difficulty in squeezing the fact into SOSR to determine whether such a hypothetical dismissal was, on the facts, carried out fairly.

Conclusion on fairness

76. In the circumstances, had I found that the respondent had established a fair reason for dismissal, either redundancy or SOSR, I would have found such dismissal unfair.

Conclusion on liability

77. Accordingly I find that the claimant was unfairly dismissed by the respondent.

Remedy

Reinstatement/Re-engagement

78. It was put to Mr Counsell that if the claimant were reinstated then her replacement could be redeployed. Mr Counsell said that the total staff complement was 12 (five in the nursery) and there was no opportunity for the current manager to be redeployed anywhere. It was put to him that it would be possible to accommodate the claimant to come back as a job share with her replacement. Mr Counsell questioned why the respondent would visit that situation on the post-holder. He commented that she would have to be agreeable to a reduction in salary and not maintaining what she has built with staff children and parents.

79. It was put to Mr Counsell that it would be an easy matter for the claimant to put behind her difficulties and return to the job. Mr Counsell was concerned that the claimant had been adamant that she was entitled to her job and had a right to hold onto this role and does not care about anything else. She was prepared to take three years in order to get a job back that she feels entitled to (referring to matters the claimant raised at her grievance hearing [147].

80. In response to questions from me about a possible working relationship if the claimant were reinstated, Mr Counsell said he would "*feel very concerned about it*". He made reference to the numerous allegations the claimant had made about him in her grievance (which he had outlined in paragraphs 44-46 of his witness statement). He believed it would be very difficult or almost impossible to work with the claimant bearing in mind what

she had said about him. The claimant had expressed strong personal references about the chair which was a major concern. He held the view that the relationship has completely broken down.

81. I find that it is not reasonably practicable to make an order for reinstatement. The respondent is a small organisation with only around five people working in the nursery. This is relevant in two ways.

82. First, the respondent has effectively engaged a replacement for the claimant, albeit having unfairly dismissed the claimant. The claimant sensibly concedes that I am entitled to take account of the fact that the respondent has engaged a permanent replacement for her when I determine whether it is practicable to comply with an order for reinstatement or re-engagement. However, this is not a workplace like the ***United States Navy*** case. Mr Counsell's evidence was clear in that the claimant could not be accommodated back into the organisation. Reinstatement or re-engagement for that matter, is not simply inexpedient, it is impossible to achieve because the replacement cannot be redeployed elsewhere within a small organisation and something like a job share cannot be accommodated.

83. Second, is the question of working relationships. While Mr Counsell is a director of the whole of the respondent organisation, and does not spend time day-to-day in the nursery, he is nonetheless her line manager. In her at risk meeting she repeatedly accused Mr Counsell of pursuing a vendetta against her which she has described as a "*betrayal*" and "*well-orchestrated*". She has accused him of dismissing her because she challenged his authority by asking to be invited to the AGM, and challenging him on absences. She further said that he was negligent, could not manage staff and had "*irrationally*" "*attacked/seized*" her role. While she has not specifically used the term "conspiracy" or said that Mr Counsell was "out to get her", her cumulative evidence was entirely to that effect. Additionally, I find that Mr Counsell was genuine in his belief that trust and confidence had broken down, and that his belief was rationally formed on the basis of the allegations against him and the chair repeatedly made by the claimant.

84. I make some allowances for the fact that the prospect of losing one's employment is a highly stressful situation, however, in all the circumstances I find that it is not practicable to make an order for reinstatement.

85. Having considered reinstatement I turn to re-engagement. While a finding that reinstatement was not practicable does not necessarily lead to a conclusion that re-engagement is not practicable, in this case the factors against reinstatement are also relevant to re-engagement. There is no point of distinction about re-engagement here. There is no scope to rejig the replacement role, and the allegations and ensuing breakdown of trust and confidence mean that it is not practicable to re-engage the claimant into the respondent organisation.

Compensation

86. The basic award is agreed, the respondent conceded before the hearing and accepts the claimant is entitled to notice pay of £1,888.55. Her notice would have expired on 11 February 2020, one month after the admitted

dismissal. Additionally the claimant is entitled to unpaid wages from 1 to 11 January 2020.

87. I consider that it is just and equitable for the claimant to be compensated at the rate of £23,827 gross per annum from 11 February 2020 onwards (the date valid notice would have taken effect) to reflect the fact that had she not been unfairly dismissed she would have been employed by the respondent in the new role at that salary. The net weekly rate of pay for this gross annual sum would be £381.58[1] .

88. I find that the respondent has not demonstrated that the claimant failed reasonably to mitigate her loss. She came onto the childcare job market at a terrible time. She sought work and was nearly successful on one occasion. She lowered her sights appropriately and secured non-managerial work after a reasonable time and was successful in gaining the Bright Horizons role. I consider that it was an appropriate decision to seek to get back into a managerial role after having been out of such a role for around a year, so as not to lose her skills and training, even though this role was part time. I consider it reasonable to extend the period of future loss up until the 23 July 2021, the end of the fixed term at Queen's Crescent. This would have been a reasonable time in which she could have secured full time work paying an equivalent to her old salary, or at least the salary of the new role at the respondent. The claimant received a total of £5050.59 net from the Bright Horizons role and received £241.01 per week from Queen's Crescent. She received this for 20 weeks up to the date of the tribunal hearing (£4820.20).

89. A further point on remedy is that the face of the Code makes it clear that it does not apply to redundancy dismissals. An uplift under section 207A TULRCA is only appropriate if "*the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies*". The Code does not apply to a redundancy dismissal, and case law would suggest that the Code has no relevance outside of dismissals which have a disciplinary element. So, even though I have found that redundancy was not the real reason for the dismissal, I still find that the Code did not apply to the circumstances about which the claimant makes claim. She is accordingly not entitled to an uplift.

90. The claimant is entitled to the following sums for notice pay, unpaid wages and unpaid dismissal: -

i) **Notice pay**

1 month net pay **£1,888.55**

ii) **Unauthorised deduction of wages**

8 days 1 to 11 January 2020

8 x £87.16 **£697.28**

[1] Source www.salarycalculator.co.uk

iii) Unfair dismissal – Basic award

£525 x 2	**£1050**

iv) **Unfair dismissal compensatory award**

Prescribed element	
11/2/21 to 26/5/21 (67 weeks) at £381.58	**£25,565.86**
Less room leader pay £5,050.59	£20,515.27
Less nursery manager £4,820.20	£15,695.07
Total past losses	**£15,695.07**
Future losses	
Loss to 23/7/21 (£381.58 minus £241.01 per week)	
Total future losses (8.5 x £140.57)	**£1194.85**
Total compensatory award	**£16,889.92**

91. **The total amount payable** **£20,525.75**

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Employment Judge **Heath**

8 July 2021_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 08/07/2021.

FOR EMPLOYMENT TRIBUNALS