EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107734/2021

Held by CVP on 22, 23, and 26 July 2021

Employment Judge I McFatridge
Tribunal Member G Doherty
Tribunal Member G Powell

Mrs P Woodward	**Claimant** **In person**
Cornerstone Community Care	**Respondent** **Represented by:** **Mr Stafford,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

1. The claimant was not unfairly dismissed by the respondent.

2. The respondent did not unlawfully discriminate against the claimant.

3. The claims are dismissed.

REASONS

Introduction

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondent and that the respondent had unlawfully discriminated against her on grounds of sex. The respondent submitted a response in which they denied the claims. It was their position that the claimant had been dismissed by reason of redundancy and that the dismissal was procedurally and substantively fair. They denied discrimination. The claim was subject to a degree of case management and the claimant produced a Scott Schedule setting out the detail of her discrimination claims. At the hearing evidence was led on behalf of the respondent from Jamie Stewart an HR Advisor with the respondent, Nicola O'Brien a Branch Leader with the respondent, Jennifer Emery a Service Manager with the respondent, Claire Brown a Mentor with the respondent and Trisha McEwan an Investigation Officer with the respondent who had dealt with a grievance raised by the claimant which dealt with some of the issues raised. The respondent had intended to lead evidence from Kenneth Stirling a Manager with the respondent who had dealt with the claimant's appeal against dismissal however unfortunately Mr Stirling took unwell prior to his evidence commencing and at the end of the day the respondent decided not to call Mr Stirling but to simply submit the witness statement produced by Mr Stirling into the bundle so that the claimant could be asked about this. This meant that Mr Stirling's evidence was not subject to cross examination. The claimant gave evidence herself and led evidence from Laura MacDonald a former team leader with the respondent. We noted that the claimant had also intended to call Jennifer Emery had she not been called by the respondent and she had also lodged a witness statement from Ms Emery. A joint bundle of productions was lodged. This was added to at the last minute by the respondent and the claimant in respect of documentation relating to the claimant's self employed earnings since dismissal. The productions are referred to by page number in the judgement below. On the basis of the evidence and the

productions the Tribunal found the following matters relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent is a charity based in Scotland providing care and support for children, young people and adults within the local community. The claimant commenced employment with the respondent on 28 November 2016. Her contract of employment was lodged (pages 77-82). Latterly, the claimant was employed as team leader within the respondent's Dundee Children's Service (DCS). In or about July/August 2020 the respondent took a decision to discontinue the Dundee Children's Service for financial reasons. It had been running at a loss for a number of years and was difficult to manage. This was part of a number of changes which were made within the respondent's organisation at that time for financial reasons.

3. On or about 1 July 2020 Nicola O'Brien spoke to the claimant on the telephone to indicate that the service might be ending and staff within the service might be at risk of redundancy. During the discussion she asked the claimant if she might be better off financially accepting redundancy.

4. On or about 7 August 2020 the respondent held a meeting with DCS staff members to formally advise them that the DCS was being shut down. The service had approximately 20 employees. It was headed by a Service Manager (Jennifer Emery) who was supported by two team leaders namely the claimant and Laura MacDonald. The other staff were Support Workers who are classed as team members. They were on a lower rate of pay than the team leaders such as the claimant. Due to the Covid pandemic three meetings took place on 7 August so as to comply with social distancing requirements. Employees were advised of the closure of the DCS service as a result of financial issues and were advised that there would be a potential impact on their jobs. They were directed to an employee helpline and were advised that no decision would be taken immediately and that individual consultation would follow.

5. The respondent have a redundancy policy which was lodged (pages 88-92). The policy had been produced following consultation with the

recognised trade union Unison. Unison had been advised of the potential redundancies within DCS in a letter to them dated 24 July 2020.

6. The claimant attended all three of the meetings on 7 August since she was a team leader. At some point between the meetings Ms O'Brien had a conversation with the claimant, Ms Emery was also present. During this conversation Ms O'Brien made a comment to the claimant along the lines that she might be better off financially accepting redundancy. What she meant was that the claimant should consider her options and keep an open mind. Ms Emery also made a similar statement to the claimant at some point.

7. At this stage the claimant was working around 20 hours per week. Her hours were generally 10 until 2 so as to fit in with her childcare commitments. The claimant is a single parent of young children. The claimant lived in Kinross which is around 45 miles from Dundee. In her post as team leader she was paid around £12-odd per hour. In addition to this the claimant was paid her petrol mileage between her home in Kinross and Dundee for each shift she worked there. This was a concession which the respondent had made to the claimant previously when she had been moved to the Dundee role. The only other posts available in Dundee were team member posts which paid around £3 per hour less than the claimant's current rate. In addition, the concession by which the respondent made a contribution to the claimant's mileage was specific to her role as team leader in the Dundee Children's Service and would not transfer to any new role.

8. Ms O'Brien followed up the discussion at the meeting on 7 August with a letter written to the claimant on 3 September 2020 which was lodged (p96). This reflects the terms of what was discussed at the meeting on 7 August. It noted that the organisation would soon begin its consultation process and described this.

9. In the meantime on 17 August the claimant had telephoned Mr Stewart the HR Advisor who was dealing with the redundancy process. The claimant stated she was concerned about the comments made by Nicola O'Brien and Jenny Emery. The claimant indicated that both of these had

separately asked her whether or not she would be better off being made redundant or words to that effect. Mr Stewart asked the claimant why she found this question objectionable and the claimant indicated that she felt she was being singled out because she was a single parent. Mr Stewart again described the redundancy processes to the claimant and confirmed that childcare was not a relevant factor. He suggested that if Ms O'Brien's comments had made her feel uncomfortable she should feed this back to Ms O'Brien.

10. The claimant had a further discussion with Mr Stewart on or about 31 August where she expressed general concerns regarding the process. The claimant again spoke to Mr Stewart on or about 17 September to discuss general concerns regarding the process. The claimant advised Mr Stewart at that point that she had other job opportunities. Mr Stewart advised her that if he took his HR hat off she should consider these. The claimant was concerned that if she did so she would lose out on redundancy as the consultation had not taken place yet. The claimant stated that she did not have any imminent job prospects but didn't want to leave. Mr Stewart explained to the claimant that she would need to consider what her best interests were and look after herself.

11. On 2 October the respondent wrote to the claimant inviting her to a consultation meeting which was to take place through Microsoft Teams on 6 October (page 97). The claimant duly attended this meeting which was also attended by Nicola O'Brien Branch Leader and Jamie Stewart HR Advisor, Neil Crawford a Branch Administrator took minutes. The minutes of the meeting were lodged (page 98-100). The Tribunal considered that these were an accurate (though not verbatim) record of what took place at the meeting.

12. The claimant indicated that she was upset at the decision to close the DCS. The respondent's representatives confirmed that the reason for the closure was financial. The claimant stated that both Nicola O'Brien and Jennifer Emery were saying to her that redundancy was her best bet and would she not be better off being made redundant. Ms O'Brien said that they were only highlighting possibilities and advising the claimant to

keep her options open. The claimant went on to state that there were "no options for her". She said there was nothing that would work around her childcare and her exact circumstances. All she was able to work was basically what she was working now. She advised that she could not do sleepovers or waking nights because she 'does not have the childcare'.

13. The claimant was advised that one way of avoiding redundancy would be to be reassigned to another service. At that time the respondent had a number of vacancies in Dundee and at Finavon. These were team member roles. The claimant highlighted that she currently spends two days travelling to the office in Dundee and gets her petrol paid for her at about £35 per week. It was clarified that if the claimant's contract was changed to a team member role then she would lose this travel money. The claimant said that she could not afford this. There was a discussion regarding the new Finavon Service and the claimant said that it would not be suitable for her to travel to Perth for two hours in the morning and two hours in the afternoon. Ms O'Brien said that the services were not open yet and there were no shifts assigned and 'block hours would depend on the needs of the service to see how their contracts work'. The claimant stated that she would consider any possible positions in Fife. She said she had looked at a vacancy which had been recently advertised but the hours were not suitable starting at 7am. She said there her current hours of 10am until 2pm worked for her. Ms O'Brien said that she would check with the Fife Services to see if there were any roles available. The claimant discussed the effect that a change from team leader to team member would have on her wages. Ms O'Brien confirmed the claimant would be paid the same rate as the role required. As there were no team leader options available the claimant would be paid at team member rates. The claimant became visibly upset at this and stated that she was currently on a team leader wage of around £12 an hour and there would be a drop of about £3 per hour if she took the team member role. The claimant questioned why the respondent could not honour the team leader wage if she became a team member. Ms O'Brien said that her role was redundant. The claimant said that the difference amounted to a huge cut to her. Mr Stewart stated that the

respondent appreciated the claimant was in a difficult position but the fact was that there were no team leader positions available. He suggested that the claimant take some time to think about the services discussed and her possible options. Ms O'Brien would check if there were any vacancies in the Fife area that could be put on the table.

14. Following the meeting Mr O'Brien checked if there were any positions in Fife but there was nothing available for the claimant at that time. Ms O'Brien did not specifically check whether there were any positions in Perth. As Manager of the Perth Service she believed that she would have a good knowledge if any positions were available in Perth and she was aware that at that stage there were none. As is noted below there was in fact a team member position possibly coming up within two to three weeks for a new service that Ms O'Brien was unaware of.

15. The claimant was then invited to a second consultation meeting which was due to take place on 21 October. This meeting was to take place with Mr Stewart and a Pauline Forbes another Manager since Ms O'Brien was on annual leave. The claimant said that she wanted the meeting to be with Ms O'Brien and the meeting was rescheduled for 22 October with Ms O'Brien. On that date the claimant said she could not attend work as she was unwell. Ms O'Brien contacted her by telephone. During the course of the call the claimant stated that she was unable to take up any of the positions offered within Dundee and as there were no other positions in Fife or Perth she wanted to take redundancy. Following the telephone conversation Ms O'Brien sent a confirmatory email to the claimant which was lodged (page 140). She stated

> "Hi Pauline. Once again sorry to hear you are unwell and hope you make a speedy recovery. As per our conversation earlier today whereby you stated that you were unable to take up a position offered within Dundee Services and where there is no other suitable alternative within Fife or Perth you have stated that you will be looking to take redundancy, please can you email me to confirm this by tomorrow. A letter will be sent out to you to confirm the outcome of the consultations within the next few days."

16. The claimant responded a few minutes later stating

> "Hi Nicki, I would like to confirm that the positions offered to me in Dundee are not a suitable alternative and if a suitable alternative is not sought I would have no choice but to take redundancy."

17. The respondent's position had been that members of the DCS team being made redundant would be offered the available roles within Dundee. If there was competition for any of the available roles then the respondent intended to use the selection criteria as per their policy. In the event of the 16-20 employees, around five or six were allocated to team member roles in Dundee. There were actually more roles available than people willing to take them so the situation did not arise where the respondent required to use any selection criteria. Of the remainder some were made redundant. Some others transferred to provide care to the service users they had supported under "direct care package" arrangements brokered through Dundee Council. Where existing team members were allocated to a team member role in one of the positions in Dundee there was no requirement for them to apply for the role or attend for interview. They were simply allocated to the new posts. Had the claimant decided to accept one of these roles then she would have been allocated to this directly without the need to apply or go through an interview although in the event that there had been more employees wishing to be redeployed to these posts than there were posts then a matrix selection process may have been required in terms of the respondent's policy.

18. On 30 October 2020 Ms O'Brien wrote formally to the claimant. The letter was lodged (page 101). It is headed

> "Outcome of redundancy consultation"

It goes on to state

> "Following on from your consultation meetings on 6 October 2020 with Jamie Stewart HR Advisor and myself I write to confirm that your current position of team leader Dundee Children's Service will

be made redundant. Unfortunately and as discussed there are no other suitable alternative roles currently available."

19. The letter then goes on to confirm that the claimant is given four weeks' notice and that her last date of employment would be 30 November 2020. The claimant was advised that she would be receiving a statutory redundancy payment of £942.30.

20. On or about 5 November 2020 the claimant saw an advertisement by the respondent on the 'Indeed' job vacancy site for a position in Perth. The position was as a team member, a copy of the advert was lodged (page 155).

21. The position advertised was to be part of a team which was to provide care to a new supported person who was in the course of transferring his care package to the respondent. The person who had had the initial contact with this service user and his family was Claire Brown. Within the respondent certain teams are given their own responsibility for recruiting new members and the advertisement had been placed by Chloe Breen, a team member with the respondent. As this was a completely new role Ms O'Brien had not been aware that this was in the pipeline.

22. The advertisement for the role confirmed that support required to be provided tailored to the needs of the individual 0715 to 1900 hours Monday to Friday and 1000-1730 hours on weekends and also occasional evenings. Essentially the post being advertised would be on a rota which would require the person to be available seven days per week. The new recruit would provide care to this service user along with existing staff. Any additional hours might be worked with another service user but the main purpose of the new role was to provide assistance to this specific new service user. Split shifts would be required. The weekends were focused upon respite care whereas during the week they were split shifts and times. This would require split shifts where the team member would have to provide some hours in the morning and then again in the afternoon. This was to meet the needs of the supported

person and ensure that he was prepared for work in the morning and that he received his evening meal.

23. During the negotiations with the respondent the service user's family (and legal guardians) had indicated that they wished to be involved in the recruitment process. This is something which the respondent always offer for the Perth services especially when recruiting for a new package when the family want involvement. The individual concerns in this case very much wanted to be part of the recruitment exercise and select those who would provide care to the supported person. The respondent take a person centred approach to care and where personal care is required they would not place someone in that post without interview and having the opportunity to meet the supporter person and any appropriate family. This would either be an interview or something called a 'meet and greet'. A 'meet and greet' would be where existing members of staff who were going to be allocated to this particular service user would meet with the service user. Other individuals already employed in the Perth branch required to go through a 'meet and greet' procedure before starting to work for the new service user.

24. On finding out about the role the claimant contacted the respondent's HR department. She was advised to contact Ms O'Brien. Mr Stewart was on holiday at the time of the call returning from this on 9 November. When he returned he was told the claimant was wishing to discuss a team member post in Perth and contacted Nicola O'Brien and asked her to contact the claimant to tell her about the role and what was involved. Mr Stewart's understanding was that the claimant had already ruled out team member roles at the first consultation meeting because of the drop in pay. In addition from looking at the advert he could see that this made it clear the working day started at 7:15 and could extend to 7pm at night and that there would be a need for a weekend working and occasional evenings. These were hours which the claimant had previously indicated were not suitable for her. He noted that split shifts may also be required and the claimant had previously said that she was unable to do this. In any event, Mr Stewart contacted Nicola O'Brien and asked her to contact the claimant to discuss the role.

25. Mr Stewart contacted Nicola O'Brien around 10 November. During that week Ms O'Brien was dealing with budgets and was extremely busy. She contacted the claimant by telephone on 16 November. Ms O'Brien had previously been unaware of the role but was able to find out about it. She advised the claimant that, as noted above, the family were insisting on being involved in the recruitment process. Her understanding was that the family wanted to have a choice of care givers from which to choose. She explained to the claimant that the role could not be ring-fenced for her in the same way as the Dundee roles had been ring-fenced. She explained that the reason was that this was a new contract with a new supported person and the family wanted to be involved in the recruitment process. She was aware that in this type of situation families have a choice and it would be open to the family to simply choose to go with another care provider (other than the respondent) if the family were unhappy. She was also aware that in this particular case the family had had a poor experience with a previous care provider and this was one of the reasons they were particularly insistent that they meet with any proposed care givers. Ms O'Brien also said that she would arrange for the mentor in charge of this new contract to speak to the claimant about the role. She indicated to the claimant that the closing date for the job was 17 November which was the following day but that if the claimant was interested there would be no problem with extending the closing date so as to give the claimant the chance to apply.

26. Ms O'Brien also arranged to contact Claire Brown herself in order to discuss matters and asked her to contact the claimant. Ms O'Brien indicated that the claimant wanted some additional information regarding the specific hours.

27. Ms Brown contacted the claimant. She spoke to the claimant by telephone on two occasions on 16 November. Ms Brown subsequently produced a note of these telephone calls which was lodged (page 127). The Tribunal considered these were an accurate record of these phone calls. She advised the claimant of the basic hours and that the job would entail split shifts Monday to Friday with respite care over the weekend. Effectively the job would be over seven days. It would be expected that

the claimant would work five out of the seven days but these would not always be week days. Ms Brown again advised the claimant that if she was interested in the role then the respondent would be happy to extend the closing date. Ms Brown also advised the claimant that the service user insisted on being on the interview panel. The claimant advised Ms Brown that she was not happy with the hours quoted and she would not be taking the matter further.

28. Later that day Ms Brown was contacted by a member of the respondent's staff in the Dundee office who stated that the claimant had popped in to the Dundee office to say that she had been advised by Claire Brown that if she applied for the Perth post she would be able to work 9 until 2. Claire Brown telephoned the claimant again to confirm that this was not the case and the post was potentially over seven days with split shifts and would be across all Perth CS services. The claimant advised Ms Brown that she was putting in a complaint about this.

29. On 16 November the claimant lodged an application for the Perth post which she had discussed with Ms Brown. On the same day the claimant submitted a written grievance. The claimant's grievance letter was lodged (page 102). The claimant also lodged an appeal against her redundancy under the respondent's redundancy process.

30. The claimant subsequently clarified her grounds of appeal against redundancy in a letter lodged (page 103-105).

31. The respondent have an investigating officer who tends to deal with grievance investigations. This is Trish McEwan. Ms McEwan invited the claimant to a grievance meeting which took place on 23 November 2020. The meeting was chaired by Ms McEwan. The claimant attended and was accompanied by Jenny Emery who was there to provide support for the claimant. The claimant had been advised that she could have either a trade union official or work colleague at the meeting. Minutes of the meeting were taken by Heather Farquhar. These minutes were lodged (page 107-110). The Tribunal considered them to be an accurate though not verbatim account of what took place at that meeting. During the meeting the claimant indicated that she was aware there weren't any

suitable alternatives at the time and that Nicola had told her there were none on the horizon. She complained about the comment made by Ms O'Brien that she might be better off financially taking redundancy. Following the meeting, Ms McEwan arranged to meet with Jamie Stewart. She met with him on 24 November 2020. The minute of this meeting was lodged (page 111-115). Mr Stewart explained the process to her and confirmed the claimant had been treated in the same way as other staff. He also gave further details of the various conversations he had had with the claimant. He explained to Ms McEwan that there was a requirement for an interview for the new role in Perth as the family of the supported person wanted to be involved in the recruitment process.

32. By this time the claimant had in fact spoken again to Mr Stewart regarding the Perth post. The claimant had phoned him on 20 November 2020 to complain asking why she was required to interview for the Perth post. At that time Mr Stewart had not known the reason but he had contacted Nicola O'Brien who had advised him of the position regarding the service user's family. He suggested to Ms O'Brien that the family's concerns could perhaps be met if rather than a formal interview the claimant simply did a meet and greet style meeting with the service user's family as there would be no requirement for any of the usual formal interview questions to be asked. Ms O'Brien agreed with this. Mr Stewart thereafter discussed the matter with Claire Brown in relation to the hours. Claire Brown confirmed to Mr Stewart that she had already advised the claimant of the hours and the claimant had indicated that they were not compatible with her expectations. Mr Stewart thereafter called the claimant back and advised her of the correct position. He mentioned the possibility of having a meet and greet with the family rather than a formal interview and that the family would be involved in the hiring decision. He further explained the hours for the job were those hours required by the family. The claimant had indicated to him she would think matters over the weekend. Mr Stewart passed this information on to Ms McEwan. He also confirmed to her the new position was that of a team member so it would attract less pay than a team leader rate. He explained that on the basis of the information he

had regarding the role it was not something which the claimant would find suitable.

33. Ms McEwan arranged a meeting with Ms O'Brien which also took place on 24 November. The minutes of this were lodged (page 116-119). The Tribunal accepted that these were accurate though not verbatim records of this meeting. Ms O'Brien advised Ms McEwan of the redundancy process. It was put to her that she had asked the claimant a question about whether or not she'd be better off financially. She confirmed that she had done this but in a supportive way so that the claimant could weigh up all the information available to her. Ms O'Brien confirmed that she had not been aware of the advert being put out prior to Mr Stewart telling her about it

34. Ms McEwan then telephoned Claire Brown. Claire Brown provided her with the information regarding the phone calls lodged at page 127.

35. Thereafter, Ms McEwan produced an investigation report which was lodged (pages 120-126). Ms McEwan's finding was that she could not uphold any of the allegations made by the claimant. She considered the claimant had been treated consistently with other members of staff. Ms McEwan then sent a grievance outcome letter to the claimant – page 141-144.

36. In the meantime, the claimant had been asked to contact the respondent's HR department with a view to arranging a time for an interview/meet and greet involving the service user's family. The claimant phoned back and advised the HR department that she did not wish to proceed with her application for the Perth post.

37. The claimant's appeal against her redundancy was considered by Kenneth Stirling, Director of Delivery with the respondent. He held a redundancy appeal hearing with the claimant on 1 December, notes of which were lodged (page 132-139). He did not uphold the claimant's appeal against her redundancy dismissal. The claimant's employment was extended until 7 December which was her last day at work. Following dismissal the claimant received a redundancy payment of £942.40. She also received pay in lieu of notice of £942.40.

38. The claimant had been on Universal Credit whilst employed with the respondent. She continued on Universal Credit since her dismissal. She has not been in employment since the date of her dismissal.

39. The claimant has started a small internet based business working from home mainly in order to keep her busy. At present profits from this are fairly minimal.

Matters arising from the evidence

40. Generally, there was very little difference between the witnesses in relation to the events which took place. The claimant placed a particular interpretation on these events which was not shared by the respondent's witnesses.

41. Ms O'Brien had no recollection of the telephone call with the claimant on or about 1 July. She accepted that she had said words similar to those mentioned above at a break during the meetings on 7 August. The claimant had a clear recollection that Ms O'Brien had used similar words on 1 July. The Tribunal could see no reason to disbelieve the claimant on this.

42. The claimant appeared to suggest in her cross examination of the respondent's witnesses – not in her own evidence - that she had used the words flexible working when she was discussing matters with Claire Brown. Ms Brown was quite clear that the claimant had not discussed flexible working or raised the issue in any way. Claire Brown was simply phoning her to advise her what the hours required were. She advised that had the claimant raised the issue of flexible working then the respondent would have followed their policies and there would have been a meeting to find out what the claimant's requirements were and whether or not they could be accommodated. Her view was that had there been such a meeting it was unlikely that the claimant would have been able to work on this contract 9 until 2 as she appeared to wish. This was due to the requirements of the service user. The claimant's own evidence on this point was somewhat unclear but the Tribunal was in no doubt that the claimant had not in fact made any request for flexible working in respect of the Perth post. At various times the claimant's

evidence was also somewhat unclear in relation to what her requirements were. On the one hand she was highly critical of the respondent for offering her posts in Dundee which were not suitable alternatives because of pay, hours etc. but she was equally critical of the respondent for not taking steps to advise her of the Perth post which had similar "unsuitable" characteristics. The claimant also appeared to believe that the respondent was subject to various obligations, namely to freeze all recruitment and to maintain her salary in a new post, where there was no such obligation imposed either in terms of the respondent's policy or employment law in general.

Discussion and decision - Issues

43. The claimant claimed that she had been unfairly dismissed by the respondent. She sought compensation. The claimant also claimed that she had been unlawfully discriminated against on grounds of sex. The claimant had produced a Scott Schedule which was lodged at pages 66-69. She claimed direct discrimination and harassment.

Discussion

44. Both parties submitted written submissions which they expanded upon orally. Given that these are available to the parties there is no need to repeat the terms of them but they will be referred to where appropriate in the discussion below.

Unfair dismissal

45. The right not to be unfairly dismissed is a statutory right contained in Part X of the Employment Rights Act 1996. Section 98 of the Act states

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) 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."

46. It was the respondent's position that the reason for dismissal was redundancy which is a potentially fair reason for dismissal in terms of section 98(2)(c) of the said Act. Redundancy is defined by section 139 of the 1996 Act which states

"(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) The fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(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."

47. In this case the Tribunal was satisfied on the basis of the evidence from the respondent's witnesses Mr Stewart and Ms O'Brien that the reason for dismissal was indeed redundancy. We would also agree with the respondent's representative who referred us to the case of ***Post Office Counters v Heevey*** [1989] IRLR 513 that the claimant did not at any point suggest that this was not the real reason for the dismissal. The fact of the matter was that the respondent had decided to discontinue the Dundee Children's Service for financial reasons. The claimant was employed as a team leader in that service. Her role was redundant.

48. Having determined that the dismissal was for a potentially fair reason, the Tribunal then requires to go on to consider the terms of section 98(4) of the 1996 Act. This states

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

49. With regard to the issue of reasonableness the Tribunal is required to approach the matter using a test which is well known in employment law known as the range of reasonable responses. This test was famously set out in the case of ***Iceland Frozen Foods Ltd v Jones*** [1982] IRLR 439 EAT as follows:-

(1) The starting point should always be the words of section 98(4) themselves.

(2) In applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) In many (though not all) cases there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view, another quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the

dismissal is fair; if the dismissal falls outside the band it is unfair.

50. Although the Iceland Frozen Foods case was applying the test to a conduct dismissal the test is of general application. Essentially it recognises that in most situations there is no 'one size fits all' approach which an employer is required to adopt. Instead there will usually be a range of responses which are all reasonable. So long as the employer's conduct falls within this band of reasonableness the Tribunal is not entitled to interfere with it.

51. In this case having established that there was what is often called a redundancy situation the Tribunal required to decide whether in all the circumstances the respondent's response to this of dismissing the claimant was one which was within the band of reasonableness.

52. The Tribunal also requires to consider procedural fairness. The case of ***Polkey v A E Dayton Services Ltd*** makes it clear that procedural fairness is an important part of overall fairness. The Tribunal agreed with the respondent's submission that a fair redundancy process usually comprises a number of stages namely warning and consultation, a fair basis for selection if appropriate, consideration of alternative employment and an opportunity to appeal.

53. In this case it was clear that the respondent did consult with the claimant. There was a consultation meeting in early October and the claimant was given the opportunity to attend a further consultation meeting.

54. During the Tribunal hearing the claimant did not challenge the selection process. The Employment Judge put it to the respondent that for example they may have dealt with a redundancy situation by placing all team leaders in a pool and deciding, using objective scoring criteria, who should remain in employment. The respondent's witness indicated that this would be impractical but in any event this was not something suggested by the claimant either at the consultation stage or during the course of the Tribunal hearing. In any event the tribunal's view was that it was well within the band of reasonableness for the respondent to proceed as they did.

55. Realistically, given the closure of the service and the decision not to place the employees of the service in a pool along with others, it was clear that the only way that the claimant could remain in employment would be if an alternative role was found for her. It was clear that the respondent did consider alternative employment and the roles which were available were put to the claimant but the claimant turned them down. During her evidence the claimant made much of the point that she did not consider these to be reasonable alternatives. Unfortunately the fact of the matter is that these were the only alternatives available at the time. The claimant's position at the meeting on 6 October was quite clearly set out in the minutes. She was essentially only prepared to work the hours she was currently working. She was not able to do split shifts nor was she able to do weekend or evening working. Most importantly, the claimant considered that she would have severe difficulty in accepting the cut in wages of around £3 per hour which would result from her moving from a team leader to a team member position. It was the claimant's position that the respondent ought to have dealt with this by agreeing to preserve her pay and also the arrangements regarding mileage. The Tribunal's view was that whilst there is no doubt that some employers may well have considered this it was not outwith the range of reasonable responses for the employers in this case to decide not to do this. The organisation was under financial pressure. The whole reason for the redundancy process was to save money. There was no obligation on the respondent either in terms of their own policies or in terms of general employment law for the respondent to do this. At this point it is probably also as well to note that despite the claimant arguing to the contrary the respondent's policy does not require them to impose a recruitment freeze whilst a redundancy process is ongoing. The Tribunal was in no doubt that the steps which the respondent took to look at alternative roles for the claimant prior to issuing her with her redundancy notice were well within the band of reasonable responses.

56. We then come to the issue of the role in Perth. The Tribunal was satisfied that the reason this was not initially brought to the claimant's attention was because the managers who were dealing with the

redundancy policy were unaware that this job would be coming up. The Tribunal accepted the evidence of Ms O'Brien on this point.

57. We also accepted the other points made by the respondent that on the face of it, given the comments the claimant had made at the consultation meeting, this was not a role which the claimant would be interested in. It required split shifts and weekend and evening work. It was also a team member role. We were directed by the respondent to the case of ***Barratt Construction v Dalrymple*** [1984] IRLR 385 EAT where it was held that it will not necessarily be unreasonable for an employer to assume that an employee would not wish to accept an inferior position and that without laying down a hard and fast rule a senior manager who is prepared to accept the subordinate post rather than being dismissed should make this known to his or her employer as soon as possible. This case went well beyond the situation in the Barratt Construction case. Not only had the claimant not made it clear to the respondent that she would be prepared to take an inferior position in order to avoid dismissal the claimant had said the exact opposite of this at her consultation meeting.

58. The Tribunal's view was that once the claimant brought the existence of the role and the fact that she might be interested in it to the attention of the respondent then the respondent behaved entirely within the band of reasonable responses in the way that they dealt with the matter. Clearly it would have been better had Ms O'Brien contacted the claimant immediately after her call with the respondent's HR department however this delay was explained. The Tribunal accepted that Ms O'Brien contacted the claimant and told her that if she wished to apply for the job then the closing date would be extended to allow her to do so. The claimant was put in touch with the manager dealing with the service and was provided with additional information. In view of the Tribunal it was entirely reasonable in the circumstances for the respondent to say that the claimant would require to meet the family for an interview/meet and greet and would not automatically be given the role if she wanted it. The respondent had agreed with the family that the family would be involved in the recruitment process. During her evidence Ms O'Brien confirmed

that the family wanted to have the opportunity to choose between competing candidates. Even if it is arguable that some employers could have decided to simply allocate the claimant to the role and present the family with a fait accompli, the Tribunal's view that there is no way that we could find that it was outwith the range of reasonable responses for the employer to proceed as they did in this case.

59. With regard to the issue of flexible working the fact of the matter is that the claimant did not make a flexible working request. In addition to this, even if she had, the claimant did not present the respondent with an opportunity to deal with such a request in a reasonable way. The claimant was asked to contact the respondent's HR department to arrange an interview. The claimant had been told in advance by Mr Stewart that this would take the form of a meet and greet. The claimant decided to withdraw her application before such a meet and greet could take place.

60. Finally, the Tribunal noted that not only had the claimant been afforded an appeal against her dismissal but that she had appealed and the appeal had been dealt with by a senior manager. The claimant in her evidence did not raise any specific issues regarding the appeal.

61. Considering matters in the round the Tribunal believed that the respondent had met the tests set out in section 98(4) and the dismissal was fair in terms of the Employment Rights Act 1996.

Sex discrimination

62. The claimant made claims of direct discrimination and harassment. These were set out in her Scott Schedule.

63. In his submission the respondent's agent made reference to the burden of proof provisions contained within the Equality Act. The Tribunal essentially agreed with the respondent's submission regarding the way the Tribunal should approach the burden of proof and considered the references made to the various cases which have clarified this as being appropriate. In the view of the Tribunal the most accessible statement of the position regarding burden of proof is still that contained in the case of

Igen Ltd v Wong [2005] IRLR 258 CA which referred to the previous Sex Discrimination Act which contains similar provision. This states

"(1) It is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination against the claimant which is unlawful.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that he or she would not have fitted in.

(4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word 'could' in section 136(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences the secondary facts could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from primary facts the Tribunal must assume that there is no adequate explanation for these facts.

(7) These inferences can include in appropriate cases any inference that it is just and equitable to draw from any evasive or equivocal reply to a questionnaire or any other statutory question.

(8) Likewise the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so take it into

account. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit or as the case may be is not to be treated as having committed that act.

(11) To discharge that burden is necessary for the respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex since no discrimination whatsoever is compatible with the burden of proof directive.

(12) That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and or code of practice."

64. The more recent case of ***Hewage v Grampian Health Board*** clarified that it is for the claimant to discharge the initial burden to establish a prima facie case that the less favourable treatment was on grounds of sex. The case of ***Igen v Wong*** also noted that although there are two stages in the Tribunal's decision making process Tribunals should not divide hearings into two parts to correspond to those stages. The Tribunal requires to hear all the evidence including the respondent's explanation before deciding whether the requirements of the first stage are satisfied and if so whether the respondent has discharged the onus which has shifted.

65. In her Scott Schedule the claimant refers to four matters. The first two of these relate to an allegation that Ms O'Brien "asked if I would be better off financially if I took redundancy". It is noted that it was the respondent's position that the words had not been said on the first occasion alleged on 1 July. Ms O'Brien's position in evidence was that she simply could not recall this conversation. In the circumstances the Tribunal could see no reason to disbelieve the claimant and accepted that the words had been said. It was the claimant's position that this amounted to both less favourable treatment and harassment and that the claimant had been singled out because of her sex. She justified this on the basis that she was a single parent with childcare responsibilities and more women then men are in this position. She did not provide any evidence to report this contention. Ms O'Brien's position was that she had asked the question because she wanted the claimant to explore all her options. Incidentally, a similar question was asked by Ms Emery and the claimant did not appear to take exception to this since she did not mention Ms Emery in her grievance. The claimant sought to justify this difference on the basis that she was closer to Ms Emery than to Ms O'Brien. It appeared to be the claimant's view that Ms O'Brien was making stereotypical sexist assumptions by suggesting that the claimant would be better off on benefits than working.

66. The Tribunal's view was that it was the claimant who was making assumptions in this case. There was absolutely no evidence to suggest that the claimant's sex had anything to do with this remark being made. The claimant was a team leader whose service was being closed. She was at risk of redundancy as her role had gone. Ms O'Brien knew that there were no team leader posts available and that for obvious common sense reasons the claimant was unlikely to find that a team member role paying £3 an hour less would be financially acceptable to her. She indicated that the claimant should consider all her options. Interestingly, this was also the advice given to the claimant by Mr Stewart when the claimant contacted him on or about 31 August. to indicate that she had the possibility of obtaining other jobs outwith the organisation. His advice to the claimant was that she should put herself first. It is simple common sense to say that in such a situation it may be better for any

employee, of whatever sex, to take redundancy and obtain another job outwith the organisation rather than accept redeployment to a job with a substantially lower rate of pay. The Tribunal's view was that so far as the remarks were concerned the claimant had entirely failed to prove facts from which an inference of sex discrimination could be drawn.

67. In order to reinforce the point we note that with regard to her direct discrimination claim the claimant was relying on a hypothetical comparator who would presumably be a male whose personal and work circumstances were the same as the claimant. There was absolutely no evidence to suggest that the claimant was treated differently from such a hypothetical male comparator. So far as it was alleged that the asking of this question amounted to harassment the Tribunal's view that if the claimant had indeed considered that asking this question had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, the Tribunal did not accept that it would be reasonable for the asking of the question to have that effect and in any event did not consider that asking the question was in any way related to her sex.

68. The third matter raised by the claimant is in relation to her telephone call with Ms O'Brien on 16 November 2020 which she considers to amount to direct discrimination as well as harassment. The claimant also refers to this amounting to bullying but bullying is not a type of discrimination recognised by the Equality Act.

69. So far as the claim of direct discrimination is concerned there is absolutely no evidence to suggest that a hypothetical male comparator would have been treated differently. The claimant is critical of Ms O'Brien for giving three reasons as to why she had not been contacted about the vacancy. The difficulty is that all three reasons were entirely valid. The fact of the matter is that Ms O'Brien had not been aware of the vacancy. The second point is that based on what the claimant had said at her consultation meeting the role was not suitable for the claimant. It had not been discussed during the consultation process because the role was not available then. It only became available afterwards. There is no doubt that as a matter of law the

respondent's obligation to consider redeployment continues until she ceases to be an employee however in this case the claimant had already said that the pay cut to team member would cause her difficulty and that she was not able to do split shifts or weekend or evening working. The claimant also complains in this section about having to apply for and attend an interview for the role. It is quite clear that a hypothetical male employee would have been treated in exactly the same way. The reason for this process having to be carried out was because it was a new role and the family sought involvement in the recruitment process. With regard to the harassment claim the Tribunal's view was that it was absolutely clear that Ms O'Brien's treatment of the claimant was not in relation to her sex.

70. With regard to the fourth matter the claimant referred to the fact that she was required to attend for interview rather than simply be redeployed to the position. Once again, the Tribunal's view was that the claimant had not presented any evidence that a male employee in a similar situation would not have been treated exactly the same. The Tribunal accepted as a fact that the family had wanted to be involved in the recruitment process. That was the reason why the claimant required to be called in for interview. When the claimant queried this it is quite clear that Mr Stewart agreed that the interview would take the form of a meet and greet. Whether it was an interview or a meet and greet the reason for the respondent insisting on this was due to the requirements of the service user's family and had nothing to do with sex.

71. For these reasons the claimant's claims of sex discrimination also fail. It would be true to say that in this case we had considerable sympathy for the position in which the claimant found herself. It is unfortunately the case that in a redundancy situation perfectly good employees lose their jobs and are dismissed through no fault of their own. It is clear from the way she conducted the case that the claimant is intelligent and well organised and would be a good employee. The unfortunate fact of the matter was that the respondent did not have any team leader positions to which they could redeploy her. There were really no suitable alternative roles. The respondent dealt with the process appropriately in terms of

employment law. There was no discrimination. The claims are dismissed.

Employment Judge:	**I McFatridge**
Date of Judgment:	**03 August 2021**
Date sent to parties:	**03 August 2021**