Case No. 2404370/2016

RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant: Miss AM Gillett

Respondent: TFHC Limited t/a Transform

HELD AT: Manchester **ON:** 11-13 September 2017

BEFORE: Employment Judge Humble
Mr MC Smith
Mrs SJ Ensell

REPRESENTATION:

Claimant: Mr McDevitt
Respondent: Mr Searle

Reserved Judgment

The unanimous judgment of the Employment Tribunal is that:

1. The claimant's dismissal was not direct discrimination under section 13 Equality Act 2010.

2. The remaining claims for direct discrimination under section 13 Equality Act 2010 were out of time. It was not just and equitable to extend time.

3. The claimant was not unfairly dismissed.

4. The claims are dismissed.

5. The claimant has paid fees in connection with this claim. In R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these

circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the claimant. The details of the repayment scheme are a matter for HMCTS.

REASONS

The Hearing:

1. The claimant was represented at the Hearing by Mr McDevitt of Counsel and she gave evidence on her own behalf. The respondent was represented by Mr Searle of Counsel and evidence was given by Jane Dawson, the respondent's Head of Human Resources. There were two further witness statements presented to the Tribunal on behalf of the respondent, which were from Martin Edwards, the Director of Service Quality for the respondent at the material time, and Ludwig Goebl, an employee of Aurelious Equity Opportunities SE & Co. Mr Edwards and Mr Goebl did not attend the Hearing and therefore, whilst their statements were read by the Tribunal, little weight was attached to that evidence since the claimant did not have an opportunity to challenge it under cross-examination. The parties had prepared an agreed bundle of documents which comprised 178 pages.

2. The evidence and submissions were concluded on the afternoon of Tuesday 12 September 2017. Judgment was reserved and the Tribunal convened in Chambers on 13 September 2017 for deliberations.

The Issues:

3. The claims and issues had been identified at an earlier case management discussion and a case management order outlining the issues was sent to the parties on 6 February 2017. At the outset of the Hearing the Tribunal took the opportunity to further identify the claims and refine the issues which were agreed with the parties as follows:

<u>Section 13 - Direct Discrimination</u>

3.1 The Claimant claimed direct discrimination pursuant to section 13 of the Equality Act. She relied upon the protected characteristics of sex and age. The less favourable treatment relied up was as follows:

3.1.1 On 10 February 2016 the CEO Mr Medcraft made a remark, "You have a rich boyfriend" in the response to the claimant's comments to the effect that she needed a certain level of salary to cover her mortgage and other expenses. The claimant's pleaded case was that this remark was made twice on the same occasion; the respondent accepted that it was said once but denied that it was said twice and denied that it was less favourable treatment.

3.1.2 On 15 December 2015 Ludwig Goebl allegedly said that the claimant was "too old" to be trained to construct spread sheets.

3.1.3 On 17 March 2016 Mr Goebl allegedly said to the claimant, "maybe you should

get married and everything would be okay" in response to concerns she expressed about her position and the earlier alleged remarks made by Mr Medcraft.

3.1.4 The dismissal which took effect on 21 July 2016. The claimant relied upon the alleged comments made by Mr Medcraft and Mr Goebl as evidence that the dismissal was "tainted" by discrimination.

3.2 The claimant sought to rely upon hypothetical comparators, in respect of the sex discrimination claims a man in the same circumstances as the claimant, and in respect of the age discrimination claims someone in the same circumstances as the claimant who was below the age of 50. The claimant identified her own age as being between 50 and 55.

3.3 If less favourable treatment was established then the Tribunal would be required to determine whether the less favourable treatment was because of the claimant's sex and/or age.

3.4 The respondent initially sought to rely upon the statutory defence pursuant to section 109 (4) Equality Act 2010 but no evidence was presented in that respect and the reliance upon that defence was withdrawn by the respondent during submissions.

3.5 There was a timing point. While the dismissal was within the relevant time limit, the effective date of termination being 21 July 2016 and the claim form having been presented to the Tribunal on 20 October 2016, the earlier alleged acts of discrimination were prima facie out of time. Accordingly, the claimant needed to show either that the dismissal was a discriminatory act and the alleged earlier acts were sufficiently linked to the dismissal to amount to a continuing act for the purposes of section 123(3) of the Act or, if there was no such continuing act, it was just and equitable to extend time under section 123(1).

Unfair Dismissal

3.6 There was a claim for unfair dismissal. The Tribunal would determine:

3.6.1 Whether the respondent had shown a potentially fair reason for dismissal pursuant to section 98(1) and (2). The reason relied upon by the respondent was redundancy and the claimant took issue with whether the dismissal met the definition of redundancy for the purposes of section 139 Employment Rights Act 1996.

3.6.2 If the respondent was able to show that the dismissal was for a potentially fair reason of redundancy, then whether the respondent acted reasonably under section 98(4) having particular regard to whether there was:

a) adequate warning and consultation;

b) fair selection; and

c) adequate consideration to an alternative role.

The Law

4.1 In respect of the discrimination claim, the Tribunal had reference to section 13 of the Equality Act 2010:

> *"13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

4.2 If a Tribunal is in a position to make an explicit finding as to the reason for the claimant's treatment (for example a straight finding of fact as to whether the dismissal was because of the Claimant's sex) then there is no obligation upon it to invoke the reverse burden of proof provisions set out in section 136 of the EA 2010, see Hewage v Grampian Health Board [2012] IRLR 870, SC. If the Tribunal are not able to make such straight forward findings on the evidence then section 136 of the Act provides that:

> "*(2) If there are facts from which the court can decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

4.3 Guidance as to the application of the reverse burden of proof is provided in the cases of Igen Limited v Wong [2005] IRLR 258, CA and Madarassy v Nomura International plc [2007] IRLR 246, CA. A comparator may be used by the Tribunal to assist in assessing whether discrimination has occurred.

4.4 The Tribunal also had reference to the cases of CLFIS v Reynolds [2015] IRLR 562, CA and British Coal v Keeble [1997] IRLR 336, EAT.

4.5 In respect of the unfair dismissal claim, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons set out in Section 98(1) and (2) of the Employment Rights Act 1996. The definition of redundancy is contained in section 139 (1) of the Employment Rights Act 1996, which states:

> "*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 employee*
>
> *have ceased or diminished or are expected to cease or diminish*."

4.6 In Sainsbury's Stores v Burrell [1997] IRLR 200 the EAT stated that the

correct approach for determining whether a dismissal was by reason of redundancy in terms of s.139(1)(b) involved a three-stage process: (1) was the employee dismissed? If so, (2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so, (3) was the dismissal of the employee caused wholly or mainly by that state of affairs?

4.7 If it is established that the reason for dismissal was redundancy then it is necessary for the Tribunal to decide if that dismissal was reasonable under section 98 (4) of the Employment Rights Act 1996.

4.8 In a redundancy case, a reasonable employer would be expected to act in a manner consistent with the principles enunciated in (among other cases) Polkey v A E Dayton Services Ltd [1988] ICR 142, HL in which it was stated by the House of Lords that, in the case of redundancy, the employer will not normally act reasonably unless he (a) warns and consults any employees affected or their representatives, (b) adopts a fair basis on which to select redundancy i.e. uses objective criteria and applies those criteria fairly (c) takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.

4.9 The Tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

> "*It is the function of the [Employment Tribunal] 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 that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

The band of reasonable responses test applies to procedural as well as substantive considerations, see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA.

4.10 This was a case in which the claimant was identified as being in a pool of one and the fairness of the respondent's decision to limit the pool in that manner was challenged. The Tribunal therefore had reference to the case of Capita Hartshead Limited v Byard [2012] IRLR 814, EAT.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the Tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

5.1 TFHC Limited, which trades under the name Transform ("the respondent") is a private medical company specialising in cosmetic procedures and it operates a number of clinics across the United Kingdom.

5.2 Miss AM Gillett ("the claimant") commenced work for Transform Medical Group Limited on 11 July 2015. That organisation went in the administration in about June

2015 and on 30 June 2015 the claimant's employment transferred, under TU(PE)R 2006, to the respondent. At the time the claimant was employed as Group Non-Surgical Operations Manager, a role in which she was required to oversee 25 clinics and manage approximately 50 staff. She had a salary of £58,000, together with a bonus and car allowance. She was among the most highly paid of the respondent's managers, her total remuneration package was somewhere between the third and sixth highest paid in the company.

5.3 Following the transfer of the business there was a change in the senior management team. John Medcraft was appointed as Chief Executive Officer and Martin Edwards was appointed as Director of Service Quality. The claimant was thereafter required to report to Mr Edwards.

5.4 In July 2015 the claimant had an initial meeting with Mr Edwards during which she felt that she was given short thrift and was of the view that Mr Edwards showed little interest in her role. Following that meeting there were no further formal meetings with Mr Edwards, and little interaction between Mr Edwards and the claimant before the claimant was put at risk of redundancy. The Tribunal accepted the claimant's evidence that, over about a ten month period from July 2015, she received only three direct emails from Mr Edwards, there were only three telephone calls and there were no formal one-to-one meetings although there were some infrequent informal meetings. It was noted that the claimant and Mr Edwards were situated at different locations and so would not generally cross paths during the ordinary course of their day-to-day business, nevertheless the claimant felt ignored by Mr Edwards.

5.5 During the Autumn of 2015 the claimant's workload increased and this had an adverse impact upon her health. In October 2015 she was diagnosed with an erratic heartbeat. The claimant raised this with Mr Edwards at an informal meeting which took place on 29 October 2015 and during which she said words to the effect that she was struggling with her workload. Mr Edwards said that he would arrange a formal meeting with the claimant to discuss this further but no such meeting was convened.

5.6 At the end of November 2015 the claimant had a meeting with Mr Medcraft during which, among other things, she complained that she was "*busting a gut with [her] workload*". There were some discussions about the claimant's duties and workload and, as a consequence of that meeting, the claimant was asked by Mr Edwards to prepare a matrix listing her responsibilities and the percentage of time which she spent each day on each of her duties. The claimant then spent some time preparing a matrix containing that information, which was reproduced at page 53 of the bundle.

5.7 On 15 December 2015 the claimant had a meeting with Mr Edwards, which was also attended by Jane Dawson, at which the claimant presented her matrix and discussed some of the ways in which she believed her excessive workload could be reduced. During the meeting Mr Edwards said words to the effect that they would be required to "reconsider" the claimant's bonuses since his view was that the claimant was being paid for matters over which she did not have any managerial influence.

5.8 Later that same day the claimant was in a conference room with Ludwig Goebl

and Daniel Ebert. These were senior managers who, it transpired during the course of the evidence, were employed by the respondent's parent company Aurelious Equity Opportunities SE & Co. which was based in Germany. There was a discussion between the claimant and Mr Goebl about a complex spreadsheet which Mr Goebl had compiled. The claimant said words to the effect of, "*I need to learn how to do spreadsheets like the one you've produced*". Mr Goebl replied, "*You're too old Ann-Marie*". The claimant said, "*you shouldn't say that*" and Mr Ebert agreed with the claimant, saying that Mr Goebl should not make comments to that effect. The respondent's case was that Mr Goebl had not made that remark and there was a witness statement produced from him in which he gave a different version of events, alleging that it was the claimant who said she was too old to learn about the spreadsheets. However, the claimant presented as a genuine and credible witness and Mr Goebl was not present at the Hearing to enable the Tribunal to assess his evidence. Accordingly, on the balance of probabilities, the Tribunal accepted the evidence of the claimant and held that the remark was made.

5.9 During the weeks preceding Christmas 2015, the respondent was planning a major reorganisation of the company. This was, in large part, due to a desire to curtail costs which was driven by the German parent company. Mr Ebert had produced a report setting out areas in which cost savings could be made and by January 2016, following discussions about Mr Ebert's report and some meetings which had taken place between Mrs Dawson, Mr Medcraft and Mr Edwards, it was determined that a restructure would take place within the respondent's organisation. Mrs Dawson's evidence on these points was accepted, although Mr Ebert's report was not presented to the Tribunal. Nor did the Tribunal have the benefit of any structural charts to clarify the structure of the organisation before and after the re-organisation, and details of the restructure were not adequately explained in any of the witness statements. Clarification was therefore provided by Mrs Dawson in evidence and she explained that there was the claimant and three regional managers who reported in to Mr Edwards and approximately 25 clinical managers who in turn reported to the claimant. There was a further role of patient co-ordinators which was less senior than the clinical managers.

5.10 The outcome of the meetings which took place around Christmas 2015 was that a decision was taken that all clinical manager roles within the organisation would be made redundant, the three existing regional manager would remain in place and five new area manager roles would be created. The claimant's role, which was a unique national role, was also to be made redundant and aspects of the claimant's responsibilities would be distributed among the regional and area managers. The effect of this was that the regional and area managers would have responsibility for smaller geographical areas but would take on some of duties previously carried out by the claimant. Mrs Dawson was unable to recall with accuracy when this decision was taken, her evidence was that it was around Christmas 2015 and that the decision was taken jointly following input from Mr Medcraft, Mr Edwards and herself. Mr Goebl was not involved in the decision-making process. The roles of clinical manager and patient co-ordinator roles were to be made redundant and replaced with 'patient advisors' who would work alongside regional and area managers. As a consequence of the restructure there was an overall reduction in headcount of 15 employees, more employees were put at risk of redundancy but some of them were redeployed within the organisation.

5.11 There were two phases to the redundancy process since the redundancy of the clinical manager positions did not commence until April 2016. Mrs Dawson could not recall why there was a disconnect between the claimant being put at risk of redundancy in January and the redundancy process for the clinical managers being commenced in April 2016. She did however present as a credible witness and the Tribunal accepted her evidence that the claimant's redundancy was part of a wider restructure which was motivated by a desire to save costs.

5.12 On 25 January 2016 Mrs Dawson wrote to the Claimant by way of a letter (incorrectly) dated 26 January which requested that the claimant attend a meeting to discuss plans for a reorganisation of the company and "*the effect this may have on [her] current role*." It stated, *"At this point, I need to advise you formally that your role as Non-Surgical Operations Manager is at risk from redundancy.*"

5.13 The claimant attended a meeting the following day, 26 January 2016, with Mr Edwards and Mrs Dawson where she was informed that her position was at risk of redundancy. A note from that meeting was reproduced at page 55. The claimant was told that aspects of her role were to be distributed among eight area and regional managers. When the claimant questioned why she had been selected Mrs Dawson replied, with words to the effect, "*you are too expensive*". The claimant took issue with the fact that the regional managers were being retained when, in her view, some of them were underperforming. Mrs Dawson explained that the respondent intended that the regional and area managers would take more operational control of services within their regions. The claimant accepted in her evidence that she had conceded at the meeting that she, "*saw the sense in what the [respondent] was doing*", although she qualified that by saying she was shocked by the announcement and so "*would have said anything*". By the time of that meeting a decision had already been taken to make the role of Group Non-Surgical Operations Manager redundant. The respondent did however wish to retain the claimant in an alternative role. The claimant was invited at that meeting to apply for an area manager's position and there were some discussions over the creation of a training role which the claimant indicated she might be interested in pursuing.

5.14 On 4 February 2016 the claimant met again with Mr Edwards and Mrs Dawson. At that meeting the claimant questioned why she had not been considered for the regional manager's role in the North East region, which was based in Leeds and was nearest to her home. She said that she had performed well in that role previously, having held the role up to 2014, and that she had the proven skills to undertake the position. The claimant expressed her view that the current manager, Jane Larsson, was under performing. Mrs Dawson's response was that the regional manager roles were not at risk of redundancy since it was intended that they would take on additional duties. The claimant then gave a presentation in respect of an alternative role which she proposed to undertake as 'Training and Project Manager'. Mrs Dawson said that she would discuss the matter with Mr Medcraft to find out whether he was interested in the claimant's proposal.

5.15 Later that day the claimant met with Mr Medcraft and she presented her ideas on the new role which appeared to meet with his approval. Mr Medcraft also suggested that the claimant should consider the regional manager's position in Bristol which was available, but the claimant said this would not be feasible as it was a four hour journey from her home.

5.16 On 10 February 2016 the claimant had a further meeting with Mr Edwards, Mrs Dawson and Mr Medcraft in respect of the proposed new role. There was some discussion about the appropriate salary for the role and the claimant indicated that she would not be able to accept a salary less than that of a regional manager, which was approximately £45,000. During the course of that meeting Mr Edwards asked some questions which gave the claimant a clear impression that he believed she was being overpaid. After Mr Edwards and Mrs Dawson left the meeting, the claimant and Mr Medcraft continued the discussion about the proposed new job. The claimant said words to the effect that she would be looking for a salary of £50,000, and that she could not accept "*less than £45,000 plus benefits*" since she had a mortgage and a car and other expenses to cover. Mr Medcraft replied, "*you have rich boyfriend*". The claimant felt insulted by this comment and said words to the effect that they were not married and had no plans for a wedding. There was some further discussion which ended with Mr Medcraft suggesting the claimant should prepare a job description for the proposed new role of Training and Project Manager. The claimant later prepared a job description for the role (pages 66-67) and submitted it for approval.

5.17 On 19 February 2016 Mrs Dawson contacted the claimant by telephone to inform her that her proposal for the role of Training and Project Manager was agreed subject to salary, which was still to be determined.

5.18 The claimant next met with Mr Medcraft on 4 March 2016. During the course of that meeting she said that the redundancy exercise was placing a lot of strain on her and he responded by saying, "*remember you have the benefit of a rich boyfriend*". The claimant responded with the words to the effect that she was an independent woman who was pursuing her own career. She was offended by the implication that she could rely upon her boyfriend to finance her. There was some difficulty with this part of the evidence since, while the claimant gave evidence of this conversation in her witness statement, it did not form part of the claimant's pleaded case and the Tribunal pointed out that the pleaded case differed from the claimant's witness evidence. The claimant explained the discrepancy by saying that her solicitor had incorrectly presented the evidence in her claim form and that she had sent an email to her solicitor to correct the error once she became aware of it. No explanation was given as to why the error was not brought to the Tribunal's attention at the previous case management discussion or when the issues were revisited at the start of the substantive hearing.

5.19 The claimant was on holiday between 5 and 14 March, and on 17 March 2016 she had a meeting with Mr Goebl who had by this time heard about her possible redundancy. Mr Goebl appeared to be supportive and asked the claimant whether she needed to work. The claimant replied that she was not married and therefore she did need to work to which Mr Goebl replied, "*maybe you should get married and everything will be okay*". Again, the Tribunal accepted the claimant's evidence in the absence of Mr Goebl being present to refute it. The claimant found this comment demeaning.

5.20 On 17 March 2016, the claimant also met with Mrs Dawson for a further consultation meeting, the main purpose of which was to discuss the proposed training role. Mrs Dawson said that Mr Edwards and Mr Medcraft would not be

attending the meeting and she then informed the claimant that she was embarrassed about the level of salary which had been decided upon, which was £38,000 a year. The claimant expressed her disappointment. Mrs Dawson suggested that the claimant should revert to Mr Medcraft to seek to negotiate a better package.

5.21 Following that meeting the claimant was sent a letter dated 18 March 2016 (pages 73-74) in which she was offered a trial period of one month in the alternative position of Trainer. On 21 March 2016 the claimant sent an email to Mrs Dawson seeking clarification upon the terms of the alternative offer which had been put to her, including where the position would be based and whether there would be a car allowance. Mrs Dawson responded to that email informing the claimant, among other things, that there would be no car allowance, the position was based in Manchester and that travelling would be extensive.

5.22 There was a further exchange of emails during which the claimant enquired whether the role could be carried out on a part-time basis and sought an extension to the date by which she was to decide upon whether or not to accept the alternative role. The respondent had initially set a deadline of 1 April but Mrs Dawson agreed to extend the deadline to 18 April 2016. The claimant was informed that the position could not be carried out on a part-time basis. At this point Mrs Dawson was still of the view that the salary might be open to negotiation and she informed the claimant of that, which was reflected in the content of her email of 21 March 2016 (page 77).

5.23 The claimant ultimately decided to decline the role of Training and Project Manager and she sent an email to Mrs Dawson to that effect on 17 April 2016 (pages 82 to 83), which stated, "*I was very optimistic at the start of the consultation period that there was a strong possibility of me continuing my employment…however what has transpired has been somewhat disappointing and has made it difficult for me to accept the role.*"

5.24 A final consultation meeting took place on 19 April 2016 which was attended by the claimant and Mrs Dawson. At that point Mrs Dawson was still seeking to persuade the claimant to take the Trainer position and said that there was also still a vacancy for the North West Area Manager which the claimant might wish to reconsider. The claimant said the position would not be viable since it would take up to three hours to travel to Manchester.

5.25 The claimant met with Mr Medcraft on 20 April 2016 and Mr Medcraft expressed some disappointment that the claimant had not accepted the alternative job offer. The claimant expressed her disappointment with the manner in which Mr Edwards had managed her and explained why she was not able to accept the alternative job offer, essentially because of the considerable drop in remuneration.

5.26 The claimant received formal notice of redundancy on 22 April 2016 in a letter which confirmed that her employment would be terminated by reason of redundancy on 21 July 2016 (page 55). The claimant was informed that she was obliged to work her notice period and was advised of a right of appeal.

5.27 On 20 April 2016 the claimant sent an email to Mrs Dawson in respect of the respondent's proposed purchase of another business, the Hospital Group, and stated that there may be new roles "coming up" as a consequence of that purchase.

She therefore requested that her redundancy be put on hold until a decision was made upon the proposed purchase. Mrs Dawson replied that the proposed acquisition was in its early stages and due diligence could go on for several months before any deal might be reached, in the meantime the respondent was required to proceed as normal in respect of all operational matters.

5.28 The claimant appealed against her redundancy, her letter of appeal was set out at page 96 of the Bundle. There was some discussion as to who would be the appropriate person to deal with the appeal with the claimant initially requesting someone from the parent company, but she ultimately agreed that Mr Norfolk, an employee of the respondent, would deal with it.

5.29 The appeal hearing took place on 31 May 2016 and notes from that meeting were reproduced at pages 114 to 115. At that meeting, the claimant outlined her concerns at the alleged sexist and ageist comments made by Mr Medcraft and Mr Goebl. She also said, among other things, that she was singled out because of her high salary and that the respondent was simply seeking to save money on her salary.

5.30 The decision to dismiss the claimant was upheld and the claimant was advised of the outcome of appeal by way of a letter of 3 June 2016 (pages 119-120).

5.31 The claimant's employment terminated on 21 July 2016.

Submissions

6.1 The Tribunal took oral submissions from the parties' representatives. There were no skeleton arguments or written submissions and the Tribunal were not referred to any specific case law.

6.2 Mr McDevitt, on behalf of the claimant, submitted that the comments made by Mr Goebl on 15 December 2015 and 17 March 2016 were less favourable treatment, in the first instance because of the claimant's age and in the second because of the claimant's sex. The Tribunal pointed out that the undisputed evidence had shown that Mr Goebl was not an employee of the respondent but in fact he was an employee of Aurelious, which was the respondent's parent company and a separate legal entity and so Mr Goebl did not fall within in the ambit of section 109(1) which extends only to employees. Mr McDevitt's submission was that nonetheless the respondent had an obligation to protect the claimant against discriminatory comments. The Tribunal enquired whether there was any specific authority upon which the claimant sought to rely but no such authority was relied upon. There was a further issue which had transpired from the evidence, which was that there was no evidence before the Tribunal that Mr Goebl was involved in the decision-making process such that it could be said that the comments he made, or any discriminatory view he may have held, influenced the dismissal. The Tribunal drew the claimant's attention to the principles in CLFIS v Reynolds [2015] IRLR 562, CA. Mr McDevitt conceded that the claimant had no evidence that Mr Goebl was involved in the decision-making process but suggested that it was incumbent upon the respondent to produce documents to disprove that Mr Goebl was involved in the process. To the Tribunal's knowledge no such documentation had been put in evidence by the respondent or requested by the claimant.

6.3 In respect of the comments themselves it was said that the comment that the claimant was "*too old*" was less favourable treatment because of the claimant's age. Further, the "*rich boyfriend*" comments made by Mr Medcraft was a form of sexual stereotyping since the implication was that the claimant's boyfriend would provide for the claimant, which suggested a very traditional and outdated mindset on the part of Mr Medcraft. The Tribunal pointed out that there was an additional difficulty in respect of the comment of Mr Medcraft made on the 4 March 2016 since this was not pleaded by the claimant as part of its case. It was not set out in the original pleading as a second and separate incident, and it was not raised at the case management discussion. The Tribunal pointed out that no application to amend had been made and, in those circumstances, it did not have the option of determining the matter as a separate act of discrimination. No application was forthcoming.

6.4 It was alleged that Mr Medcraft had a traditional mindset and that the comments made by him showed a thread that ran through the consultation process and, given that he was the key decision-maker, meant that the dismissal was less favourable treatment because of the claimant's sex.

6.5 The Tribunal enquired whether, if it were to hold that the dismissal was not less favourable treatment due to the claimant's sex or age, the just and equitable argument was still relied upon. Mr McDevitt consulted that he had "difficulty with that" because the claimant had conceded during cross-examination that she was aware of the three month time limit by early June 2016 when she notified ACAS and took legal advice. He submitted that the claimant was "struggling with the process" and so "didn't have a mind to bring a claim".

6.6 In respect of the redundancy, it was submitted that there was a dearth of evidence to show that there was any costs savings. There was a belated suggestion by the respondent, during cross examination and submissions, that the respondents had saved £480,000 as a consequence of the redundancy exercise but no evidence had in fact been put forward by the respondent to that effect. It was also said that the claimant's role was not redundant, her duties were essentially just re-allocated to other employees. It was argued that definition under section 139 (1)(b) was not met and that the workload upon the respondent's employees had increased after the claimant's departure, and that the respondent had recruited both a Trainer and a National Aesthetic Clinical Manager (evidenced from page 173 of the Bundle) and that these two people effectively took over the claimant's duties. It was alleged that the claimant was singled out because she was highly paid and not because her job no longer needed doing. It was therefore submitted that the respondent had failed to make out that the dismissal was for the potentially fair reason of redundancy.

6.7 In respect of section 98(4), it was submitted that the respondent had unreasonably limited the pool to one person when the regional managers, who were on the same hierarchal level as the claimant, should have been included in the pool. There was no evidence as to what Mr Medcraft's thought process was upon the pool even though he was one of the key decision-makers. It was said that no thought was given to "bumping" the North East Regional Manager out of her role to enable the claimant to take over that position.

6.8 In respect of consultation, there was no meaningful consultation with the claimant

and the decision to make her redundant was pre-determined at the point that consultation commenced on 26 January. In respect of the alternative employment, it was said that it was not reasonable to expect the claimant to accept a position in the North West which would require a three hour journey to and from work. The same point applied, to an even greater extent, in respect of the Bristol position and these jobs were offered at half the level of the claimant's remuneration. It was suggested that the respondent offered a salary of £38,000 in full knowledge that the claimant would reject it, having previously told the respondent that she could only accept £45,000.

6.9 It was said that the timetable "was a mess" and, while the claimant's redundancy took place in January 2015, the subsequent process commenced in April. It was also unreasonable not to put the process on hold while there was the potential for the acquisition of another company which might be imminent and might create new opportunities.

6.10 The respondent's closing submission was relatively brief. It was said that all of the discrimination claims were out of time save for the alleged dismissal and there was no evidence at all to connect Mr Goebl to the decision to dismiss. In the case of Mr Medcraft, while his comment may have been inappropriate, it was not discriminatory and in any event it had no connection to the decision to dismiss.

6.11 In respect of the redundancy, it was said that it was a "classic" redundancy situation. There was a requirement to make substantial costs savings due to financial pressures upon the business and the respondent had properly applied its mind to the manner in which costs savings could be made. It was not disputed that the claimant was one of the highest paid employees and a reasonable view was taken that her role was a unique one and the duties could be allocated to other more junior employees.

6.12 It was said that there was full and proper consultation and the respondent allowed the claimant to create her own role and that it was the claimant in fact who refused to engage with the process since she was looking for other work. For her it was "all about the money", she was not prepared to take any substantial pay cut and could have accepted an alternative role if she had so chosen.

Conclusions

7.1 The Tribunal held that the claimant had established the following:

(a) On 10 February 2016, Mr Medcraft referred to the claimant as having a "rich boyfriend" with the implication that her boyfriend would support her following any redundancy.

(b) On 15 December 2015 Mr Goebl said that the claimant was "too old" to be trained on preparing complex spreadsheets.

(c) On 17 March 2016 Mr Goebl suggested that the claimant should "get married" with the suggestion that it would alleviate any financial problems she may have.

7.2 The Tribunal was satisfied, after some debate, that the comment made by Mr Medcraft was less favourable treatment because of the claimant's sex. It was arguable that, in the same situation, a hypothetical male comparator would have been treated the same way. In other words a man under threat of redundancy might have been told that he would be able to rely upon a "*rich girlfriend*". However, on balance the Tribunal was of the view that the comment of Mr Medcraft was indicative of a traditional and sexist attitude to the effect that the claimant was able or required to rely upon a man to support her, despite the fact that she was an independent career woman. A different view might have been taken if Mr Medcraft had been available to give his own explanation of the context in which the comment was made. In the absence of Mr Medcraft however the Tribunal accepted the claimant's evidence upon the manner and context in which the comment was made. The Tribunal could not, because it was not pleaded as part of the respondent's case, find that the comment made on 4 March 2016 (during which Mr Medcraft referred to the claimant having the "*benefit of a rich boyfriend*") was a separate discriminatory act but did take that remark into account when assessing whether the earlier remark amounted to less favourable treatment.

7.3 The Tribunal was satisfied that the remarks of Mr Goebl, on 15 December 2015 and 17 March 2016, were less favourable treatment in the first instance because of the claimant's age and in the second because of her sex. This however, did not assist the claimant since Mr Goebl was not an employee of the respondent and therefore the respondent was not liable for his actions pursuant to section 109(1). There was no other basis before the Tribunal upon which it was argued that the respondent should be held liable for Mr Goebl's discriminatory comments.

7.4 Turning to the dismissal, Mr Goebl was not involved in the decision-making process and there could not therefore be any discriminatory motive on his part which contributed to the claimant's dismissal. In the case of Mr Medcraft, the Tribunal were not convinced that the two comments made by him, which demonstrated traditional stereo-typical assumptions to the effect that a "rich boyfriend" would support his girlfriend, were sufficient to shift the burden of proof under section 136 (2) such that the respondent was required to show that the dismissal was for a non-discriminatory reason. Two isolated comments did not, in the Tribunal's view, give much weight to the contention that the claimant was dismissed because she was a woman. Even if the burden of proof had shifted the Tribunal were satisfied that the respondent would have discharged the burden under section 136(3) by showing that the dismissal was for a genuine and lawful reason, that of redundancy (see below).

7.5 Given that the claimant had not established that the dismissal was for a discriminatory motive, the earlier incidents were out of time. In fact, the only incident upon which the Tribunal could make a finding of discrimination under the Act was the comment of Mr Medcraft which was made on 10 February 2016. The claim form was not submitted to the Employment Tribunal until 20 October 2016 and therefore that claim was substantially out of time. The Tribunal had reference to the principles enunciated in British Coal v Keeble [1997] IRLR 336, EAT. The Tribunal were not of the view that the evidence was adversely affected by the delay which had occurred. However, the claimant failed to advance any convincing explanation as to why the Tribunal should exercise its discretion to extend time in this particular case. The claimant admitted in her evidence that she was aware from June 2016 of the existence of the three month time limit and notified ACAS and took advice from a

solicitor at about that time. The only reason submitted for the delay between June and October 2016 was that she was not of the "mind set" to proceed with a claim. In evidence the claimant said that she was in fact debating whether or not to bring a claim since she was carrying out some work for a company which was likely to have some dealings with the respondent and therefore took the view that might not be in her interests to bring the claim. It was only when those potential dealings failed to transpire that she made the decision to bring the case. The Tribunal were not convinced that was an adequate explanation such that it would be just and equitable to extend time, particularly as there was a four month delay between the date the claimant had instructed solicitors and notified ACAS of the potential claim and the date the claim form was presented to the Tribunal. That claim was therefore dismissed as being out of time. It follows that the direct discrimination claims do not succeed and are dismissed.

7.6 In respect of the unfair dismissal claim, it was for the respondent to show that the dismissal was for the potentially fair reason of redundancy. The Tribunal was satisfied, having reference to the statutory definition and the principles set out in the case of Sainsbury's Stores v Burrell (above), that the definition was met. The background to this case was that the predecessor of the respondent went in to administration in June 2015, and there was a desire to save costs in late 2015 which appeared to be driven by the parent company and which culminated in the report prepared by Mr Ebert. A decision was taken to restructure the business which affected the main managerial positions. The claimant's position, which was one of the most highly paid in the organisation, was identified for redundancy along with the clinical manager roles and ultimately there was a reduced headcount of approximately 15 employees. Although the redundancies were implemented in two phases, the Tribunal were satisfied that the claimant's redundancy was part of a wider restructure programme with the specific aim of saving costs. The definition of section 139 (1) was met since as a consequence of the re-structure, there was a diminution in the "requirements of [the] business for employees to carry out work of particular kind…" in this case there was a reduced requirement for managers across the business. No doubt the claimant's role was more of a target because of the comparatively high salary, and was perceived by Mr Edwards at least to be overpaid, but that fitted with the respondent's desire to reduce costs. It was not the role of the Tribunal to examine whether any substantial (or indeed any) cost saving was in fact made but the reduced managerial head count was consistent with the respondent's aim.

7.7 Turning to section 98(4) the Tribunal had some sympathy with the submission that the pool was unreasonably limited to one person. It could well have been expanded to encompass the regional managers, a role which the claimant had carried out only two years previously and no doubt had all the necessary skills to perform. It was not however for the Employment Tribunal to substitute its view on what would form a reasonable pool for the view of the respondent. The Tribunal re-visited the law on this area which is well summarised at paragraph 31 of the judgment in Capita Hartshead Ltd v Byard [2012] IRLR 815, EAT. The Tribunal was satisfied from Mrs Dawson's evidence that the respondent had genuinely applied its mind to the issue of the pool and that the choice of a pool of one, given that the claimant had a unique role within the organisation and it was believed her duties could be distributed among the regional and area managers, was one which fell within the band of reasonable responses of a reasonable employer.

7.8. The Tribunal had some reservations in respect of the consultation process, specifically the fact that at the point that the consultation commenced the respondent had already determined that the claimant's role was redundant. The initial letter warning of the redundancy stated that the claimant's position was "at risk" but it was evident from the notes of the meeting, and from the evidence of Mrs Dawson, that a decision had already been taken to make the role of Non-Surgical Operations Manager redundant. A better approach would have been to have advised the claimant that her role was a risk of redundancy and thereafter invited consultation upon the extent of the pool along with all other matters which were open for discussion. Identifying a position as being redundant however is not the same as pre-determining that the claimant would be dismissed. There followed from that initial meeting a period of nearly three months during which there was a series of consultation meetings and the claimant was given ample time to make representations about her position, including upon the appropriate pool. She did indeed make representations about the regional manager roles and in particular asked to be considered for the role of North East Regional Manager. The Tribunal did not accept that the decision not to 'bump' the North East Regional Manager out of her position was unreasonable.

7.9. While the consultation process was flawed the Tribunal, on balance, took the view that it did not fall outside the band of reasonable responses. The respondent had a reasonable rationale for identifying a pool of one, it consulted at some length and made several attempts to find an alternative role and indeed was, offering her regional manager roles and giving her an opportunity to formulate her own job description for a separate training manager position. Viewed as a whole the Tribunal were satisfied that there was a reasonable consultation process, the respondent considered alternative roles and indeed offered a role which the claimant herself had devised, albeit one on a much lesser salary than she earned in her existing role. The Tribunal was satisfied that Mrs Dawson in particular was keen to retain the claimant within the respondent's organisation. Accordingly, the Tribunal found that the consultation and selection process fell within the band of reasonable responses and that due consideration was given to redeployment and alternative positions. The claimant refused that offer, not because it was "all about the money" as the respondent suggested, but because the remuneration was not at sufficient level to cover her outgoings and no doubt because she was hurt at being made redundant and by an apparent lack of appreciation of her contribution to the business on the part of Mr Edwards and Mr Medcraft.

7.10 The Tribunal were not convinced that the two additional jobs for which the respondent later sought to recruit directly replaced the claimant's role. There were some differences with the National Aesthetic Clinical Support Manager role which required a clinical qualification, and the Trainer position was not relevant since it was essentially the role which the claimant had been offered during the consultation. These new roles had to be viewed as part of the wider restructure and were not simply two jobs created to replace the claimant's position. Further, there was no obligation upon the respondent to await the outcome of a proposed business purchase (which might not have proceeded) in the hope that new roles would be created. In the event, the business purchase did proceed but it resulted in further redundancies since there were duplication of roles across the two businesses.

7.11 In all the circumstances of the case, the Tribunal were satisfied that the respondent acted reasonably pursuant to section 98(4) ERA 1996.

7.12 The claims are dismissed.

Employment Judge Humble

Date: 30th September 2017

JUDGMENT SENT TO THE PARTIES ON
9 October 2017

FOR THE TRIBUNAL OFFICE