



EMPLOYMENT TRIBUNALS

Claimant: Ms A Lyons-Shaw

Respondent: Royal Danish Embassy London

Heard at: London Central (by CVP) On: 23 September and 4 October 2021

Before: Employment Judge N Walker

Representation

Claimant: Ms N Mallik of Counsel

Respondent: Ms R Kennedy of Counsel

RESERVED JUDGMENT

The Claimant's Claim for unfair dismissal succeeds. The question of remedy will be heard at a future date.

REASONS

The Claim

1 The Claimant was employed by the Respondent from 3 September 2018 to 31 December 2020, a little over two years until her second fixed term contract came to an end without being renewed. The Claimant claimed that this was a dismissal and was unfair, and she was not paid her notice pay. Although the Claimant had been served with a strike out warning, the claim for notice pay had not been dismissed and remained a live issue. When I asked the Claimant's Counsel about this, I understood from her that she was expecting that the Claimant would not pursue the notice pay claim as a separate claim. The Respondent defended the claim.

The Evidence

2. I was provided with a bundle of documents and had witness statements from Mr Morten Ranieri-Svendsen, who heads the Trade Council at the

Respondent and from Mr Jens Jacob Simonsen, who is Head of Administration for the Respondent as well as a witness statement from the Claimant.

CVP Hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform, (CVP), under rule 46. The parties agreed to the hearing being conducted in this way. In accordance with rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties and members of the public were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal.

4. From a technical perspective, there were only a few minor difficulties. The Claimants' Counsel, Ms Mallik, was unable to connect initially. We paused the proceedings until she was able to connect effectively.

5. No requests were made by any members of the public to attend or to inspect any witness statements or for any other written materials before the Tribunal.

6. The participants were told that it is an offence to record the proceedings.

7. The Tribunal ensured that each of the witnesses, who were mostly in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party, while giving their evidence.

The Issues

8. The issues had been identified by Employment Judge Brown at a Preliminary Hearing for case management purposes on 14 May 2021. She identified them as follows.

Unfair Dismissal

1. Has the Respondent shown the reason, or principal reason, for dismissal and that it was a potentially fair reason?

1.1 The Respondent replies on SOSR or redundancy.

2. If the Respondent has shown a potentially fair reason, did it act fairly in dismissing the Claimant for that reason? This includes consideration of whether the Respondent acted fairly with regard to:

- 2.1 Selection of pool
- 2.2 Selection criteria
- 2.3 Application of selection criteria
- 2.4 Looking for alternative roles
- 2.5 Consultation on these matters

3. The third issue is a matter going to remedy and given the limited time available, the parties decided to split the remedy to be heard at a later date if required.

The Facts

9. Several acronyms were used frequently, which are set out below.

GOMP - Global On-line Marketplace
B2B - Business to Business
B2C - Business to Consumer
B2G - Business to Government

The Claimant

10. The Claimant describes herself as a dual Brazilian/British individual. She has a BA in journalism and has spent much of her career in the marketing and communications sector. The Claimant's CV indicates that she began work in the e-commerce sector by working with Alibaba.com as a marketing and business development manager for three years. I am told that Alibaba is a business-to-business marketplace. Amongst other matters her work involved leading B2B marketing for various markets and working on a governmental partnership between Brazil and Alibaba. Subsequently she worked for the UK government department for Trade and Investment as a Senior Marketing and E-Commerce advisor for a year and a half. She moved to work for an e-market place called Liquidity Services, which allowed industries of various sorts to sell their surpluses and she was responsible for three e-market places within the oil and gas and government and industrial machinery sectors. She had been with the Respondent for two years before the matters which I shall mainly refer to in this judgment arose. At the Respondent, the Claimant's work was undertaken for the Danish Trade Council in the UK and involved incentivising Danish businesses to sell more using digital channels.

The Respondent

11. The Respondent is the diplomatic mission of Denmark in the United Kingdom. The Claimant worked within the Trade Council, which was the official trade and investment promotion department within the Ministry of Foreign Affairs of Denmark at the London Danish embassy. The Ministry of Foreign Affairs of Denmark provides the budget for the Trade Council and, I was told, is responsible for allocating the budget to fund specific projects and positions in different Danish embassies across the world.

The Claimant's contract and job description

12. The Claimant commenced employment with the Respondent on a fixed term contract which ran from 3 September 2018 to 31 August 2020, when it was to expire without the need for further notice, unless previously terminated according to certain termination provisions. The job title in a contract was "E-commerce Advisor". The initial advert to which the Claimant responded was for an E-commerce Advisor and the advert said:

The Trade Council (TC) is looking for an enthusiastic experienced and ambitious advisor to support Danish companies in their internationalisation efforts within e-commerce. The Danish government's new strategy for Digital Growth 2018 - 2025 aims to develop the Trade Council's advisory support in order to increase the competitiveness and profitability of Danish e-commerce companies. The position is part of a united e-commerce effort

from the Trade Council where you will be part of not only your local team but also a newly started global team of regional e-commerce advisers in Shanghai, Berlin and New York.

The large e-retailers are expected to account for 40% of the global B2C online market in 2020. Building partnerships with the relevant online retailers and promoting Danish products and services vis a vis this target group will be one of the key priorities. You will also get the opportunity to develop strategies and business in collaboration with both large and small firms. Further, the job will expand your network and your relations within a broad range of Danish export firms and European partners.

E-commerce is an important priority in the export markets, and we want to leverage your experiences and existing networks within the sector in Denmark and on an international level.

13. The required qualifications included:

- *Experience with strategic sales within E commerce and the big online marketplaces in the EU. Strong ability to identify commercial opportunities and develop relevant export promotion activities. Commercial profile with several years of specific sales and export experience.*

14. The contract provided that the Claimant would be locally employed by the Embassy in that role “*or such other role as the Embassy reasonably considers appropriate*”. There was to be a job description at Schedule 1, which should have set out the key duties relevant to the Claimant’s particular employment. I do not have that job description in the bundle as the document at Schedule 1 of the contract is another item altogether. The Claimant’s contract provided that she may be required to perform other duties falling outside her job description that are commensurate with her position and status.

15. When the contract expired on 31 August 2020, it was extended. The parties entered into a new four month’ fixed term contract from 1 September 2020, expiring on 31 December 2020. The terms were similar and this contract provided that the Claimant was to:

“Diligently exercise such powers and perform such duties as set out in the attached Job Description and other duties as may from time to time be assigned to you by the Embassy.”

16. The Job Description to this new contract was attached and provided as follows:

“To promote and facilitate Danish E-commerce in the UK by entering into and maintaining strategic partnership agreements with relevant E-trading platforms and to put these agreements to use by onboarding Danish companies onto the E-trading platforms - in accordance with the MFA objectives and KPI’s for this area. To act as a MF A-focal point and competence developer for the best practice of E-commerce promotion.”

Email from C Staffeldt on future E-commerce plans dated 14 September 2020

17. I understand that Christian Staffeldt was the senior person in charge of the Danish efforts to support their businesses adjust to E-commerce. On 14 September 2020, Christian Staffeldt, who signed off his email as Team Leader Sector Advisory Team TECH, sent out an email to a large number of people including Mr Ranieri-Svensen and the Claimant in which he instructed them on the plans for e-commerce efforts in 2020 – 2021. He attached a PDF called E-commerce & export via digital channels, enhanced efforts 2020-2021.

18. The email explained:

“The Corona Pandemic amplifies the need to strengthen B2C, B2B and B2G sales through online channels and the “Eksport & Investeringspakke” demands a renewed focus on TC e-com initiatives. The process leading up to this document has been bilateral talks with the missions, partners and at HQ.

- *The overall objective for TC digital sales / E commerce initiatives is: to support Danish SME’s in their journey to initiate, upscale or optimize their digital sales on foreign markets.*
- *And internally- to broaden our understanding and ways of working with e-commerce to encompass all digital sales channels and segments (B2C B2B B2G...) across sectors.”*

19. The email then set out the KPI’s (Key Performance Indicators) for 2020 - 2021. These were to increase outreach activities together with partners, to work on Global Online Marketplaces with B2C/B2B online platforms or channels and onboarding and setup pilots. They included the development of scalable customer concepts with a special focus on B2B and continued focus on GOMP's but the memorandum of understanding strategy and usage had been revised. It referred to identifying and engaging with local/regional “preferred partners” (onboarding/integration specialists) and a focus on knowledge sharing /training with TC (e-com specialists and certain subsector groups, missions) and with partners.

20. There followed an explanation of some of the new steps that were planned. E commerce and export via digital channels were to be formalised as a sub sector group under the TECH advisory team. There were to be three new hires of e-com advisers in Stockholm, Shanghai and Brussels. The Global Response Team would be supporting outreach and company identification in Denmark.

21. The email explained that the main KPI focus would be on getting SME’s online on digital sales channels - and working towards actual sales. Based on pilots and other best practice cases, they aimed to develop scalable customer “Get started with E-com/Digital export” concepts. The email explained they proposed to explore and develop possibilities with external partners in Denmark and abroad and there would be an increase of awareness activities through social media and partners targeting relevant SMEs in Denmark.

22. Each mission with dedicated E-commerce / Digital Sales Advisors or planned Digital Sales /E-com initiatives was asked to return with an overview with specific dates for outreach activities for 2020 and 1H 2021; for example, webinars, relevant cases etcetera, by the 25th of September. There was an attachment to the email from Mr Staffeldt in the form of presentation document, one page of which was headed TE (standing for Trade Council’s) e-com resources 2020-2021. It

noted the current strategy and the initiatives for 2020-2021, which had been identified in the email. In the presentation one slide listed the Trade Council E-Com resources for 2020-2021 and in the list of representations with dedicated e-com experts London was included. Clearly Mr Staffeldt expected that there would be an e-com expert in London in 2021. It carried on noting that there would be 3 new hires in Stockholm, Brussels and an addition one extra person in Shanghai for B2B. It noted that a digital Sales/E-com subsector group was to be established (across SAT teams).

23. It is clear from this email that not only was there was a continuing plan to promote E-commerce and digital sales channels and support Danish businesses in their efforts to move into this form of sales, but Mr Staffeldt wanted to change enhance the global team and alter the emphasis and approach to this effort.

London efforts to meet the 20/21 strategy

24. Mr Ranieri-Svendson replied on 25 September with an email explaining the London plans which had been drawn up by him in conjunction with the Claimant. One of the tasks identified in that response was email/phone outreach to all relevant participants in past webinars to offer free onboarding onto a maximum of three platforms and discuss opportunities of how to get online sales started (major task, September- December). An email of nine October 2020 from Mr Ranieri-Svendson to the Claimant references the phone calls stating, we need to make email and telephonic contact with everyone before the year end, so I have to stress that you need to keep up the 10 phone follow ups to your emails per week. The Respondent drew attention of the fact that the Claimant was not entirely happy with this approach and with making the calls but in his witness statement Mr Ranieri-Svendson made no mention of it, instead saying that on a couple of occasions the Claimant expressed that she did not understand why the Ministry wanted to concentrate on B2B online sales, which he interpreted as indicating that she did not understand this line of business.

25. A few days later, on 13 October 2020, there was a further email in that email chain in which Mr Ranieri-Svendson reported to the Claimant the outcome of a phone call with Christian Staffeldt. The Claimant acknowledged in her witness evidence that she had been concerned about the charging strategy. She said they had done free work and then started charging which confused their contacts and discouraged Danish businesses from using their services. This was not agreed but charging for the work was clearly a topic of discussion as the email refers to Mr Ranieri-Svendson's discussions about this with Mr Staffeldt. He reported that he had just spoken to [Mr Staffeldt] and while he backed and supported our agreement in this approach, what he said is that it will not be the focus for the proactive efforts from Copenhagen going forward. The outcome, he recorded was that they could offer the five hours FOCS to on board companies on up to three marketplaces with the purpose of initiating a dialogue on how to get sales going and how we could advise on that.

Advert for new E-Commerce Advisor

26. Meanwhile the Respondent decided to advertise for a new E-commerce Advisor. Initially the Claimant was told that she could apply for this role and it seems that she understood she was applying for the same role she had been carrying out. On 19 October 2020, the Claimant wrote an email to Mr Ranieri-Svendson as a follow up to their chat early today in which she said:

*I will wait for your confirmation of when my position is being advertised so I can re-apply for it. I will wait for you to share a link with me.
The salary will be probably lower than what I am currently earning but you will check on the new funding to get an accurate figure.
I believe that the same condition will apply to the other two advisors. You said that the new funding requires currently employees to reapply for their current positions.*

27. On 20 October 2020 Mr Ranieri-Svendsen replied clarifying that this was not exactly the same role as the one the Claimant had been carrying out and saying:

“Yes of course, I will notify you when we post the position and share the link with you. And, as mentioned, we hope to see an application from you.

As to the position and salary, this is a new profile with a sales focus and down the lines of a commercial advisor, and not an expert position. This is also the reason for the salary being in line with the current average for commercial advisors. There is some room for negotiation but not a lot.

I don't know anything about the other e-commerce advisors and their contracts so can't advise on that, sorry.”

28. By Friday 23 October 2020, the E-commerce Commercial Advisor job, as it was termed, had been posted on at least one job website called Indeed, as there were applications in that day. On Monday 26 October Mr Ranieri-Svendsen sent an email to the Claimant telling him that the commercial e-commerce position was up on the website and sending her the link stating: *“I hope to see an application from you.”*

E-Commerce Commercial Advisor Job

29. The advert was titled “E-commerce Commercial Advisor” and described the Trade Council of the Royal Danish Embassy in London seeking to expand the team:

“with a dedicated and dynamic advisor to be responsible for export promotion of E commerce related activities. The position is part of the Danish government’s strategy for digital growth 2018-2025 which aims to increase the competitiveness and profitability of Danish companies by assisting them in the transition to online sales. The position is part of a united ecommerce effort from The Trade Council, where you will be part of not only your local team but also a global team of regional e-commerce advisors in Shanghai, Berlin and New York.

Your primary responsibility as an Advisor will be to advise Danish companies about online sales and internationalization to the United Kingdom. Furthermore, promoting Danish products and services to e-marketplaces will be one of the key priorities and you will also get the opportunity to develop strategies and business in collaboration with both large and small firms. In addition, the job will expand your network and your relations within a broad range of Danish businesses and European partners.

E commerce is an important export priority for Denmark, and we want to leverage your experience and existing network within the sector in Denmark and at an international level.”

30. The qualifications required included:
- “- Experience with strategic sales within e-commerce and the big online marketplaces in Europe.*
 - Strong ability to identify commercial opportunities and develop relevant export promotion activities.*
 - Commercial profile with several years of specific international sales experience.”*

It also required a solid network with e-marketplaces and a solid network amongst Danish companies and organisations.

31. The difference between this advert and the advert which the Claimant had applied for some two years earlier was minimal. The reference to an enthusiastic experienced and ambitious advisor became a dedicated and dynamic advisor. The responsibility for supporting Danish companies in their internationalisation efforts within E commerce became a responsibility for export promotion of e-commerce related activities. Both adverts referred to the Danish government’s strategy for digital growth 2018 to 2025 which aims to increase the competitiveness and profitability of Danish companies and indicated this related to e-commerce or online sales. Both adverts referred to the united e-commerce effort from the Trade Council and being part not only of the local team but also the global team in Shanghai Berlin and New York. The original advert explained that the large-retailers were expected to account for 40% of the global B2C online market in 2020 and went on to describe how building partnerships with this relevant online retailer and promoting Danish products and services to this target group would be a priority. The new advert referred to the primary responsibility being to advise Danish companies about online sales and internationalisation in the United Kingdom and promotion of Danish products and services to e-marketplaces was a key priority. Both adverts used the same wording about getting the opportunity to develop strategies and business in collaboration with both large and small firms and almost the identical wording about expanding the network and relations within a broad range of Danish export businesses and European partners. Both adverts used the same wording about the importance of e-commerce and the wish to leverage the applicant’s experience and existing networks within the sector in Denmark and [at/on] an international level. The experience listed as required was almost identical. The original advert required experience with strategic sales within e-commerce and the big online marketplaces in the Europe as did the new advert. Likewise, both adverts included the wording about a strong ability to identify commercial opportunities and develop relevant export promotion activities. Both adverts included the requirement for a commercial profile with several years of specific sales experience although the original advert referred to sales and export experience whereas the new advert referred to specific international sales experience.

32. The Claimant says she believed it was her post and she applied for the position. On 3 November 2020, Mr Staffeldt emailed Mr Ranieri-Svendson an email which was titled *“Will you help the UK screen for the two posts? All linked here :-)”*. Mr Staffeldt listed the candidates he thought should be looked at more closely. All the names have been redacted, but the Tribunal was told that the Claimant’s name was not among them. Mr Ranieri-Svendson replied an hour or

two later thanking the Mr Staffeldt but saying he thought they would wait until the deadline to look at the profiles.

Funding for the role

33. Mr Ranieri-Svendsen said the Ministry of Foreign Affairs usually set up broad guidance and objectives or strategy and then each local office must decide how to implement this in practical terms including resourcing. He explained that the permanent commercial positions and regular commercial activities are funded by the core budget, which is provided by the Ministry of Foreign Affairs and reviewed annually. Some additional funding is provided for specific projects whose implementation leads to fixed term project positions, which are also funded by the Ministry. The Claimant's position was one of these. The "representations", as Mr Ranieri-Svendsen called the various missions, are he explained, entirely responsible for the managing the implantation of the projects. The Ministry would review the project at the end of every funding cycle and take account of the effectiveness of the commercial activities.

Rejection of the Claimant's application

34. When Mr Ranieri-Svendsen considered the Claimant's application, he said he decided not to pursue it. He provided two reasons for his decision. The first one was that there was a change of direction, and the Claimant did not fit the profile required. The second reason was the Claimant's performance. Mr Ranieri-Svendsen recorded the fact that during the course of September and beginning of October 2020, he and Ambassador Thuesen discussed whether the Trade Council in London should make changes to the way in which it was offering its services, given the email of 14 September from Mr Staffeldt. He thought the Ministry of Foreign Affairs review of the project was that it had not produced the desired outcome. Mr Ranieri-Svendsen did not explain what made him form this view. There was no evidence to demonstrate this. There is no document setting this out, and no specific conversation identified at which this was notified to Mr Ranieri-Svendsen or Mr Thuesen.

35. According to Mr Ranieri-Svendsen' in his witness statement, he had concluded that, having seen the Claimant's CV and having been her line manager, she did in fact have these some of the E-commerce skills which were originally needed, with particular experience dealing with global online marketplaces and in fact even working in house for such a marketplace. He acknowledged that she had been hired as an expert in E-commerce with a large network and her role was to create partnerships with marketplaces like Amazon, Wayfair etcetera and then to onboard Danish businesses onto the same E marketplaces. Mr Ranieri-Svendsen went on to point out that in practice the Claimant had at the point when he had joined in August, made 11 partnerships with marketplaces but only onboarded 9 companies in total.

36. A third explanation given for the non-renewal of the Claimant's contract was that the role was temporary, and the funding had expired. Mr Jens-Jacob Simonsen, who was Head of Administration, said that the Claimant's previous line manager, Mette Diego-Roll, had originally told him that the Claimant had a relatively high salary, because her contract was fixed term due to time limited earmarked funding, and the position requiring "specific expert skills and performances". He then referenced a discussion he had had with the Ambassador in May 2020, who had told him that he considered that the number of companies

that had been on boarded was low. Further, he explained that in August 2020, in further discussions the Ambassador, expressed concern to him that in his assessment, insufficient results delivered by the E-commerce Advisor might lead to criticism from the Ministry if performance did not improve. As a result, Mr Jens-Jacob Simonsen inferred that the renewal of the contract with the Claimant would have to be for a short, fixed term in order to alleviate the Ambassador's concerns. Mr Ranieri's Svendsen was joining round that time to take over the post as Head of the Trade department, and it would give him an opportunity to assess the Claimant and the existing E commerce effort. He also explained that at the time when the contract was renewed for four months, earmarked funding was available until the end of 2020. They therefore concluded there could be a four-month fixed term contract and that if the funding was not renewed this would trigger the end of the contract. Mr Jens-Jacob Simonsen said there was no further funding for the position of E Commerce Expert after the end of 2020 as it was being replaced with the position of Commercial Advisor on Digital Sales with a different salary level. I was not shown any documentation about the funding.

37. I have taken these explanations in turn and considered the supporting facts.

Change of Focus

38. There is evidence of some change in the focus of the e-commerce activities. Mr Ranieri-Svendsen explained his understanding of the email of 14th September as a shift in focus from creating partnerships with e-marketplaces to advising SMEs directly on sales through all sorts of digital channels, mainly B2B and B2G. He described it as going from collaboration with e-marketplaces to working with individual Danish SMEs and from focusing on B2C to B&B and B2G. Mr Ranieri-Svendsen explained that the original focus was to create partnerships with GOMP's by making memorandums of understanding and then inviting Danish companies to sell their products on the GOMPs and also advising the companies on how to do that as required. He said the GOMP's are B2C in nature; that is business to consumer, as they sell directly to the consumer. He explained:

“The new focus on digital such channels was mainly to proactively seek a dialogue with Danish companies and advising them on all sorts of digital sales channels such as creating the company's own webshops, introduce to buyer portals or public procurement portals, selling through distribution partners' portals on board onto GOMP's where we have agreements and optimizing product marketing locally.”

39. To support this, Mr Ranieri-Svendsen referred in his witness statement to an email received after the Claimants departure. I have read that email carefully. It is dated 13 January 2021, and it relates to a new role of Digital Sales Advisors and explains that it is intended to hire 8-11 new locally employed Digital Sales advisors which positions are in addition to the existing seven Digital Advisor positions in NY, London, Berlin, Brussels, Stockholm, and Shanghai. It does explain that the Trade Council must be able to act as an advisor to Danish SMEs in relation to starting international digital sales in markets with high potential across sectors and segments. It refers to the fact that the Trade Council currently has seven trade advisers with special focus on digital sales but continues explaining that the digital Internationalization of SME's entails an increasing need for advice on digital sales and uncovering new digital market opportunities. By strengthening the digital sales area in the Trade Council, they would be better equipped to meet the SME's growing need for advice on exports and digital sales abroad, especially

with a focus on digital B2B and B2G sales. As Mr Ranieri-Svendsen notes in his witness statement, the email does explain this also means a general shift of focus from the initial focus on B2C online marketplaces to Digital Sales with a B2B/B2G focus.

The Claimant's Performance

40. Mr Ranieri-Svendsen clearly shared the view of the Ambassador, Mr Thuesen, and considered that 9 companies on boarded was a low number. He also suggested that the feedback received from companies as to the services offered by the Trade Council was not good enough.

Feedback Forms

41. I have examined the feedback forms and considered the arguments raised by Mr Ranieri-Svendsen in relation to them. Specifically, he said that two of the Danish businesses who had being supported by the Claimant had refused to pay their bills and there were complaints.

42. The bundle includes a document in which someone has created an undated summary of the Claimant's customer surveys compared with the average for other parts of the London operation and it demonstrates that her average was between 7.4 and 6.6 as opposed to an average of between approximately 8.03 and 8.64 in 2020 for the other parts of the London operation. It is not clear to me how that summary was prepared and what questions were used for the analysis. In the first questionnaire from client GP, the summary indicates a score of 8 whereas on the document which I understand to be the actual survey response from that client. the answer to the question, how satisfied have you been with this advice, is a 10. The lower score seems to relate to other questions about how likely the client is to recommend the Trade Council to other businesses. Likewise, client L also rates the Claimants advice a 10. Client BS rates her advice a 9 and client S also rates her advice a 9, saying "very precise and useful help". Client GP produced another survey which rated the results achieved a 9 but said they were not onboarded yet but that was partly their own fault. Client NF gave a satisfaction rating for the advice as a 9. Client C-BC answered the question "to what extent were the results achieved" with a 10. One client rated the Trade Council a 2 but that appears to relate to a connectivity issue. The same client later complained about the invoice and again raised the issue of connectivity problems. There is very little to substantiate the suggestion that the feedback forms indicated performance issues with the Claimant.

Fixed term Funding Expiry

43. As I noted, Mr Jens-Jacob Simonsen informed me that the Claimant was hired as the result of a fixed period of funding but, as at 31 December 2020, that funding had run out, hence the need to end the Claimant's contract. I have no documentary evidence of that at all. I was told by Mr Ranieri-Svendsen that if they could not hire a person to do a job at the rate proposed, they could go back to the Ministry and ask for an increase. This was not guaranteed, but it is far from clear that the budget was set in a fixed manner as suggested by Mr Simonsen. As I have noted the Ministry allocated funds and then the local offices implemented the plan.

44. In contrast to the assertions by Mr Simonsen and Mr Ranieri-Svendsen, the email dated 13 January 2021 from Lina Hansen suggests there was a renewed

funding package, which effectively continued the funding available for the Digital Advisor in London. That email, which I have referred to above, from Lina Hansen, who Mr Ranieri-Svendson describes as the Head of Export for Innovation and Public Affairs at the Ministry, to all the local Trade Council offices refers to the Export and Investment Package II providing the Trade Council with the opportunity to strengthen their efforts within Digital Sales (E-commerce & export via digital channels). She refers to the new funding being in addition to the existing 7 Digital Advisor positions in New York, London, Berlin, and other locations. That explanation indicates that the funding overall for e-commerce was increasing and there remained funding for the London post. Further, Mr Staffeldt's presentation document attached to his email of 14 September identifies the resources for the Trade Council in e-com in 2020-2021 and clearly envisages a continuing dedicated e-commerce expert in London in 2021.

The Claimant's knowledge about the temporary nature of her role

45. Mr Ranieri-Svendson says he came to the conclusion that they needed to ensure the new offering would consist of a wide variety of tasks, such as assisting in search engine optimization, setting up a web shop on their own homepage and identifying relevant via portals, government procurement portals and B2B online marketing. In consequence he refers to an email he sent to the Claimant on 13 October and a conversation with the Claimant on 19 October to let her know that her contract would not be renewed in January. I cannot accept Mr Ranieri-Svendson's assertions about the content of the conversation he describes. The Claimant's email on 20 October makes it clear that she thought she was reapplying for her own job. Her email confirming the conversation is headed "contract extension". While Mr Ranieri-Svendson replies to her stating this is a new profile with a sales focus down the lines of an E commercial advisor and not an expert position, he expressly refers to hoping to see an application from her. The claimant received the email from Mr Staffeldt dated 14 September and she would have seen the attachment which referred to a London ecommerce expert in 2021. She had applied for an advert which referred to a strategy for digital growth in 2018 dash 2025 and that appeared again in the advert for the new role which she applied for. As I've noted, that knew advert referred 2 the global team of regional ecommerce advisors in Shanghai Berlin and New York. There was a considerable amount of information which the claimant would have received which indicated there was a continuing requirement for her role. Furthermore, the advert for the new e-commerce commercial advisor was very close in wording to the advert originally placed for the Claimant's job.

Decision not to interview the Claimant

46. Although is clear is that a decision was taken not to interview the Claimant for the post, it is not clear when that decision was reached, but it was taken by Mr Ranieri-Svendson himself together with Mr Staffeldt, according to his witness statement. On the face of the documents and explanations I have seen, there was no objective assessment process. Mr Ranieri-Svendson simply states:

"After careful consideration, we made the decision not to interview the Claimant because we felt her strengths were with the online marketplaces and B2C business and because on a couple of occasions she had expressed that she did not understand why the MFA wanted to focus on B2B online sales (an example of over-the-counter medicine was given) underscoring that she did in fact not understand this line of business. In

addition, we knew the Claimant and her competences well and in any event we did not have a qualified candidate to benchmark her up against.”

The New Role

47. The new role went through what Mr Ranieri-Svendsen referred to as “an evolution”. He described not being able to find the kind of candidates he hoped for in response to the first advert which was for an E-Commerce Commercial Advisor and as a result on 14 December 2020 he published an amended job advert for a role he now described as “Digital Sales/E-commerce Commercial Advisor”. This was while the Claimant was still employed. She was not told about that role at all. Mr Ranieri-Svendsen explained how he developed a case study which would reveal if the candidate had knowledge on how to develop B2B sales as well as B2C. The Claimant was never asked or about this or shown that case study.

48. No one was interviewed following the second advert and eventually the position was advertised again on 26 January 2021 with the title Head of Digital Sales and Marketing.

49. The advert for the role of Head of Digital Sales and Marketing was sent out some time after the Claimant had left the Respondent’s employ in 2021. It included an introductory paragraph which was again similar to the previous adverts, although it tended to use the word digital as opposed to e-commerce. It referenced the Trade Council of Denmark in London looking for a dedicated and dynamic professional to head up Danish businesses’ digital sales activities in the United Kingdom. It referred again to the government’s strategy for Digital Growth 2018 to 2025. It explained the position was part of a joint digital sales effort of the Trade Council and it referred to as local team and global team or what it now referred to were regional digital trade advisors at the embassies in Berlin, Stockholm, Brussels, Shanghai, and New York. It set out the primary responsibility being to advise Danish companies on digital sales opportunities and on how to initiate or optimise their sales to United Kingdom on a consultancy basis. It then included the standard wording about the opportunity to develop strategies in business in collaboration with both small and large Danish companies. Under qualifications, it listed experience with strategic Digital Sales from a Digital Marketing & Sales Agency or from positions in the field of Digital Marketing in companies doing online business in the UK. Most of the rest of the wording was very similar.

50. The successful candidate contacted Mr Ranieri- Svendsen through a mutual friend or colleague. He then wrote and applied formally. His CV indicates that his primary experience was in B2C and B2B (retail partners) in retail markets. He does not mention any government experience.

Termination

51. On 7 December 2020, Mr Ranieri-Svendsen had a telephone discussion with the Claimant in which he referred to her contract ending. She emailed him on 8 December 2020 confirming that call stating:

“My contract won't be extended after its end date which is on December 31st. The reason is that the contract is up and it won't be renewed/extended.

I have now been dismissed from any future meetings however I will still work until December 23rd so I can try to finish up the projects which are

currently open on CR M.

As we haven't talked about returning my equipment (phone and MPC) I would like to confirm with you that I will be returning them on the 23rd this month.

I will then leave on holidays and will be paid up to January 15".

52. Mr Ranieri-Svendsen replied on 9 December. Apart from a question over the holidays, he confirmed the contract would not be extended after the end date which was 31st December and confirmed:

"The reason is that the contract is up and it won't be renewed/extended."

Reason for the termination of the Claimant's contract

53. Given the explanation by Lisa Hansen in her email of 13 January 2021, which I have described, and Mr Ranieri-Svendsen's own explanation that the London Trade Council team could devote the resources more or less as they liked, I reject the suggestion that the Claimant's role was temporary and that the funding ended.

54. The explanation given by Mr Ranieri-Svendsen in his email reply of 9 December was simply that the contract was up. There was no elaboration on that. I have considered the suggestion that the new role required different skills to the Claimant's skills and experience and this either justified the fixed term ending or amounted to a re-organisation. The new role went through three iterations. The initial role was very similar to the Claimant's own role. The Claimant had been advising Danish companies about online sales and internationalisation to the United Kingdom. She had been promoting Danish products and services to E marketplaces. She had been working with both large and small firms. She had been working on a network and relations within a broad range of Danish businesses. She had experience with strategic sales within E commerce and big online marketplaces in Europe. She had a profile of several years of specific international sales experience in the ecommerce field. Additionally, the Claimant in her CV recites both B2B and B2G experience. Those appear to the requirements of the new role. The emails in the bundle indicate that Mr Ranieri-Svendsen was concerned by the quality of candidate he was obtaining and that led to his re drafting the adverts twice. There was no reason given for the further changes to the advert save for a desire to attract what he regarded as better candidates.

55. In the light of the various explanations given, the one consistent fact is the concern expressed over the Claimant having onboarded only nine companies. It seems that the Ambassador's comments about the Claimant and his worry that the Ministry would regard her performance as an insufficient, was the driver for this short-term fixed contract entered into in August 2020. That concern was also behind the decision not even to interview the Claimant for either the first or second positions advertised while she was employed. It is noticeable that Mr Ranieri-Svendsen did not even ask the Claimant to complete the case study which he believed would reveal if the candidate had knowledge on how to develop B2B sales as well as B2C. He relied on his own knowledge of the Claimant's performance to decide that she did not merit an interview. Taking all of the evidence into consideration, my conclusion is that the Claimant's contract was not renewed because the Respondent was dissatisfied with her performance.

Submissions

Respondent's submissions

56. The Respondent submitted that the expiry of a fixed term contract may qualify as some other substantial reason and referred to the case of Terry v East Sussex County Council [1976] ICR 536 which explained that the important thing is to make sure that there is a genuine reason for placing the employee on a temporary contract. The Respondent argued that the first question for the Tribunal was whether the Respondent had a genuine reason for placing the Claimant on a temporary contract and not renewing it. The Respondent cited Tasneen v Dudley Group of Hospitals NHS Trust in which a locum Doctor had failed to be appointed to a permanent substantive post at the end of his temporary contract, but this was considered to be a fair dismissal by the EAT.

57. The Respondent stated that the Tribunal then had to consider whether the failure to renew the fixed term contract was within the band of reasonable responses. The Respondent cited from the case of Royal Surrey County NHS Foundation Trust v Dryzmala (unreported), *"there may still be a need for the employer to exercise judgement as in this case where the Claimant was competing for a permanent post and the employer must decide which candidate to prefer"*.

58. The Respondent also emphasised a sentence from that judgement which provided: *"That exercise of judgement is subject to the band of reasonable responses test and the Tribunal must not substitute its own view of the merits."*

59. The Respondent argued that it had, directed by the Ministry, exercised its judgement on whether to offer the Claimant the new role and the view was taken that the Claimant would not be the right fit for the new profile as she did not have experience in selling consultancy services within business to government and business to business sales. The Tribunal was again reminded not to substitute its own view.

60. The Respondent then drew attention to certain evidential points in support of its argument. Specifically, the Respondent argued that both Mr Ranieri-Svendsen and Mr Simonsen had given evidence that the Respondent had to apply to the Ministry in order to obtain a specific funded position and did not have a budget which it could allocate. Further the Claimant was employed as an e-market specialist, reflected in her job description and in the appendix to her contract of employment and onboarding Danish companies on to E marketplaces was central to her role. Thirdly, the Claimant had not produced successful results and had only onboarded 9 companies in two years of employment. Fourthly, the Claimant was aware she was on a fixed term contract and her employment would end if it was not renewed. The Claimant was aware of the shift to chargeable sales rather than e-marketplaces. Fifthly, the decision not to interview the Claimant was taken with input from the Ministry. Sixthly, the Respondent did not appoint another candidate in preference to the Claimant as no candidate had the appropriate experience to take up the envisaged role and the Respondent amended the job description twice in order to attract what was considered an appropriate candidate. That candidate was not appointed until March 2021, and was then placed on a fixed term contract in line with the funding allocation. The seventh reason was that the new role was substantially different to the Claimant's E-commerce commercial advisor position. The eighth factor was that the Claimant accepted in evidence that she was not happy to be asked to make 10 telephone calls in order to obtain new customers but calling potential customers to initiate sales was key to the role as indicated by

Mr Ranieri-Svendsen in his evidence.

The Claimant's Submissions

61. The Claimant submitted that the Respondent had relied on both some other substantial reason and redundancy as the potentially fair reasons for dismissal. The Claimant argued that the Respondent had failed to provide any evidence of a genuine redundancy or the use of a fair procedure for redundancy such as a selection pool or demonstrating any appropriate selection criteria or considering any alternative roles in the UK or within the embassy or elsewhere or demonstrating any consultation. On the evidence, the Respondent could not demonstrate that it applied a fair procedure. Therefore, the Claimant's submissions focused largely on whether the Respondent had established that the Claimant was fairly dismissed for some other substantial reason.

62. After reciting some of the facts, the Claimant argued that she believed the role that was advertised for an E-commerce adviser was exactly the role that she was undertaking. The Claimant submitted that the initial advert for the new role was her role and the job description sent to her was the same as the job role for an E-commerce advisor. The role was then advertised as Head of Digital Sales although the Claimant believed essentially that was still a role she was undertaking. She noted that Mr Ranieri-Svendsen described the Claimant as an expert (E-commerce advisor) which was essentially what was expected from the Head of Digital being the new title. The Claimant referred to her 2018 job description with the focus being on partnering with online retailers, whereas the first new version had a focus which remained on requiring the same experience of strategic sales in e-commerce. In the second version there was a slight modification referencing the same activity but with a special focus on business to business and business to government. In the third job advert for the Head of Digital, the reference to the special effort on B2B and B2G was deleted and the change in wording was to focus on digital sales opportunities and optimising sales. The Claimant's view was that apart from slight modifications the rest of the documents were essentially identical. As regards the salary, which the Respondent said was different, there was no evidence as to what the differential was.

63. The Claimant argued that Mr Ranieri-Svendsen had explained that the new employee was someone with sales marketing experience but the Claimant's experience and that of her replacement were almost identical. The Claimant argued that the 9 December 2020 email from Mr Ranieri-Svendsen about her contract ending indicated that her job role was continuing. The Claimant challenged this on 16 December in an email in which she pointed out that she had over two year's service and thus her dismissal was an unfair dismissal. The response on 18 December from Mr Ranieri-Svendsen was that the funds for the Claimant's position expired on 31 December 2020 and it had been concluded that the profile of the position as E-commerce advisor at the Embassy should be redefined in order for any funding of the effort to continue as the original objective had not been sufficiently met. However, the Claimant was not provided with the opportunity of any genuine consideration for the purported alternative role and there was no consultation nor was she offered an appeal against her dismissal.

64. The Claimant argued that she had expected her role to continue, and it was not akin to a maternity role where there was an expectation of the return of the original employee.

65. On the relevant legal provisions, the Claimant referred to the case of North Yorkshire County Council v Fay 1985 IRLR 247 in which the Court of Appeal laid stress on the need for the employment to be temporary for a genuine purpose, for the employee to be aware of that fact and for the dismissal to be as a result of that purpose ceasing to be applicable. In that case, the role was temporary cover for a permanent member of staff, being a teacher. The employee knew she was being employed to cover a specific period for a specific reason.

66. The Claimant also referred to the case of Royal Surrey County NHS Foundation Trust v Dryzmala UKEAT/0063/17 and cited the same part as the Respondent. However, the Claimant continued with further citations, in particular a citation pointing out that it is well established that to act reasonably under section 98(4), in such a case an employer may, depending on the facts, have to engage in some degree of discussion and consultation. In such cases, the emphasis is more on the 'equity' part of the fairness test and less on the 'substantial merits' part of the test.

67. The citation continued referencing the following:

“A dismissal by non-renewal of a standard fixed term contract may, depending on the facts, have some features in common with a redundancy dismissal or, where there is no redundancy situation, with a non redundancy “business reorganisation”, or a case where the employer wishes to impose changed working practices or terms of employment on an unwilling or reluctant employee. Possible alternatives to dismissal may need to be discussed as a matter of fairness, where such alternatives are or may be available.”

68. The Claimant provided an extensive citation from this case, including the citation of a paragraph which reads as follows:

“As regards the fairness of the dismissal under section 98(4) of the 1996 Act, there is nothing wrong in law with the proposition that, on the facts here, the Claimant should have been given a fair opportunity of staying on if there were potential roles for her. Fairness may demand as much on the facts, applying that test. If that was not the Respondent’s position below, it should have been.”

69. The Claimant argued that in order to suggest that the expiry of the fixed term contract amounted to a potentially fair reason for the dismissal on the basis of some of the substantial reason as per the case of Terry v East Sussex, the Respondent would have to demonstrate that the fixed term contract was adopted for a genuine purpose and that the employee knew from the outset the reason for the temporary nature of the contract and that the Respondent has shown that the specific purpose ceased to be applicable. In addition, the Claimant argued that even if those circumstances applied, the Respondent could not be excused from following a fair procedure in which, at a minimum the Claimant was informed of the reasons why the contract ceased and was given an opportunity to appeal against the decision.

70. In terms of the argument that the contract was temporary, the Claimant pointed out that the Claimant’s initial two year contract made no mention of the temporary nature of the contract indicating in the wording that it was part of the Danish government strategy for digital growth 2018 to 2025 which aims to increase

the profitability of Danish digital companies by assisting in the transition of online sales where you will be not only part of the local team, but part of a global team in New York and Shanghai.

71. The Claimant argued that although she signed a fixed term contract she expected it to be extended and had every reason to believe it would be, including the job description itself which stated “you will be employed as a local employee on a 2 year period, with an extension option”. Further some of the terms addressed long term service and also provided a basis for the Claimant to consider there was likely to be a renewal or extension for a longer period. Additionally, the Claimant argued that there was a clear requirement to continue the work of the E-commerce advisor from 1 January 2021, after her second fixed term contract expired and the recruitment drive in November 2020 was simply an effort to have someone on board to do that job going forward.

72. The Claimant disputed the reasons given by Mr Ranieri-Svendsen suggesting that the Claimant did not have experience of B2B sales, which is why she was not interviewed, and argued they could only refer to the second job description for which the Claimant was not invited for interview. Mr Ranieri-Svendsen did not explain why he thought the Claimant did not have B2B experience. His answer was to suggest it was possible to say you had that experience, but it was not necessarily the case that you actually had such experience.

73. The Claimant argued that on the question of funding, Mr Simonsen referred to the Ambassador earmarking time limited funding but noted that the earmarked funding ran till 31 December 2020. However, the Claimant’s initial contract was for two years which expired before the end of that funding period, and there was no explanation for that. Additionally, there is no evidence about the future position. There was no probative evidence to support the Respondent’s position.

74. On the question of performance, the Claimant rejected the suggestion that there were any performance issues and specifically noted that the evidence relied upon by the Respondent of the number of onboarded companies related to the weakness in strategy deployed in effecting the service. On the question of capability concerns, the Claimant pointed out that Mr Ranieri-Svendsen accepted he did not raise such concerns with the Claimant. The Claimant also pointed out that references to the customer satisfaction questionnaires were not specifically about the Claimant but rather about the service itself.

75. The Claimant argued that the position of Mr Ranieri-Svendsen was circular in that he had considered the test he had developed to be significant in enabling the Respondent to assess the ability of candidates but denied the Claimant the opportunity of doing the test. His explanation was that he did not interview the Claimant but when asked why he did not, he pointed to her B2B sales ability but could not point to evidence which allowed him to understand her ability in this regard. Overall, the Claimant suggested Mr Ranieri-Svendsen’s evidence lacked credibility.

76. On the question of fairness, the Claimant argued that she was not given a fair opportunity to continue with the Respondent before being dismissed. The Respondent discussed her applying for the new purported role but she was not given an opportunity for an interview, nor was it ever explained to her why she was not interviewed. She was not given a meeting to explain why her contract was not

being extended, and no performance or capability issues were raised with her. The Claimant also argued that she believed her contract would continue and given the first contract she signed there was a good reason for her to believe that.

The Law

77. Section 95(1) of the Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed for the Part of the Act which addresses the right not to be unfairly dismissed. These include at subsection (b) that the employee:

“is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract”.

78. Unfair dismissal is a statutory right. By section 98(1) of the Employment Rights Act 1996, 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”.

79. If a potentially fair reason is shown, section 98 (4) provides:

“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.”

80. Case law has shown that the termination of a fixed term contract can amount to a dismissal for some other substantial reason. The case of Terry v East Sussex County Council [1977] 1 All ER 567 was one where the Employment Appeal Tribunal considered the temporary nature of the employment might justify the dismissal. However, it was subject to the tribunal ensuring the case was a genuine one where the employee had, to his own knowledge been employed for a particular period, or a particular job, on a temporary basis. The EAT explained:

We think it would be useful to add some observations about the considerations proper to be taken into account in a case such as the present when considering the applicability of para 6(1)(b) and whether 'some other substantial reason' has been shown. We think that some guidance can be obtained from the kind of requirement which is laid down in [ss 33](#) and [51](#) of the Employment Protection Act 1975, though we should deprecate those sections being used as though they formed part of the 1974 Act, or a habit growing up of those sections being taken as laying down a specific requirement applicable to all cases. What an industrial tribunal must do is to ensure that the case is a genuine one where an employee has to his own knowledge been employed for a particular period, or a particular job, on a

temporary basis. We accept counsel for the local authority's suggestion that there may be a wide scale in what can ordinarily be described as 'temporary' jobs. At one end is the plain case where a person (for example a school teacher) is employed to fill a gap where somebody is absent, and it is made plain at the moment of engagement that he is only being employed during the period of the absence of the person he is temporarily replacing. At the other end is the case of the employee who is engaged on a short fixed term contract, perhaps described as 'temporary', in an employment where as a general rule the employees are engaged on a weekly basis and where there is no particular end served by the employment being arranged in the manner in which it has been. In between, there will be every possible variety of case. We would not wish the actual words which we have used in this judgment, for the purpose of indicating the matters which we have in mind, to be taken in other cases as a touchstone, as though they were to be found in an Act of Parliament laying down the test. They are merely indications of the sort of points which an industrial tribunal should have in mind. The great thing is to make sure that the case is a genuine one, and for industrial tribunals to hold a balance. On the one hand, employers who have a genuine need for a fixed term employment, which can be seen from the outset not to be ongoing, need to be protected. On the other hand, employees have to be protected against being deprived of their rights through ordinary employments being dressed up in the form of temporary fixed term contracts. What we are saying in this judgment is that there is no magic about fixed term contracts; that they are not, except where otherwise provided, excluded from the provisions of the 1974 Act, and that the rights of those employed under them are to be judged by the good sense of industrial tribunals, applying the tests prescribed by para 6 of Sch 1 to the 1974 Act.

81. This approach was confirmed by the Court of Appeal in North Yorkshire County Council v Fay 1985 IRLR 247.

“If it is shown that the fixed term contract was adopted for a genuine purpose and that fact was known to the employee, and it is also shown that the specific purpose for which the fixed term contract has ceased to be applicable then, for the purposes of [section 98] these facts are capable of constituting some other substantial reason.”

82. However, that is not the end of the matter. The employer may by showing that the contract ended on the expiry of the fixed term demonstrate a potentially fair reason, but the second part of section 98(4) involves consideration of the fairness of the process. In Beard v The Governors of St Joseph's School [1979] IRLR 144 a situation arose where the employee in question was not considered for a post for which she might have been qualified. The EAT said:

Mrs Beard held the post of needlework teacher, admittedly on a temporary basis. We proceed on the assumption, as did the Tribunal, that the most that was held out to her was some hope that the post might continue. But she was given notice of the qualifications needed for the new appointment; and she applied, and she stated on the application form that she had, so it appeared, the very qualification for which the local authority was looking. That was overlooked, and accordingly, because this part of her application form was ignored or overlooked, she was, as we understand it, not

interviewed as a possible applicant for the post. She, to all intents and purposes, was never a starter in the race. It seems to us that where an applicant in the school where the appointment is to be made does notify the authority that she has, or may have, the qualifications which are required by the new holder of the post, then she ought to be given the opportunity, at any rate, of being considered. In the present case the Tribunal took the view that had the headmaster realised that she may have had the necessary qualifications it would have been unreasonable not to go to the stage of interview. We take the view that, equally, if the school authority on the facts of this case overlooked or failed to notice an oversight or omission, that she had or might have the qualifications, that also amounts to unreasonable behaviour on the part of the local authority. We accept what is said by the Tribunal that it would have been unreasonable not to interview her had the school known that she had the qualifications. We consider that in proceeding to say that because they had overlooked it they had not acted unreasonably, the Tribunal erred. It does not follow that if interviewed she would have got the post, still less that she had any right to it. The failure to interview her and adequately to consider her application as she was already there we think in all the circumstances was unfair.

83. This approach was followed in the case of Royal Surrey County NHS Foundation Trust v Dryzmalá UKEAT/0063/17. The employer argued that it had complied with the Fixed Term Regulations and the dismissal must have been fair. This concept was rejected by the EAT, which held but it is still necessary to apply the general test of fairness in section 98(4) of the Employment Rights Act. Consequently, where the tribunal had found her dismissal unfair on procedural grounds, the EAT upheld their decision.

Conclusions

Unfair Dismissal

Has the Respondent shown the reason, or principal reason, for dismissal and that it was a potentially fair reason?

84. The burden of proof falls on the Respondent to show the reason. In submissions the Respondent relied upon the expiry of the fixed term contract. The Respondent argued that the first question I should consider is whether the Respondent had a genuine reason for placing the Claimant on a fixed term contract and not renewing it. The Respondent emphasised the evidence which it suggested supported this conclusion.

85. I accept that case law shows that the expiry of a fixed term contract can amount to some other substantial reason, and thus a potentially fair reason for dismissal if there was a genuine need for the fixed term contract and it expired at the end of that period. The Respondent argues that the need for the fixed term was to do with the funding having expired. I appreciate that the evidence of both Mr Ranieri-Svendsen and Mr Simonsen was that there was fixed term funding, and this expired at the end of 2020, but as I have noted, there was no supportive documentary evidence. In contrast, there was documentation indicating that the funding for the promotion of digital sales internationally by the Ministry of Foreign Affairs continued, albeit in a renewed package, and it was part of a plan running from 2018 to 2025.

85. Lina Hansen's email dated 13 January 2021 describes the Export and Investment Package II which she says covers a three-year period, 2021-2023. That appears to be the successor funding package to the funding which expired in 2020, and she explains that it continued funding for what she describes as the existing seven Digital Advisor positions, which she lists. One of those is the London position.

86. The initial advert to which the Claimant responded explained in the first paragraph that it was for a position which was part of the united e-commerce effort from the Trade Council where the Claimant was to be part of not only her local team but also a newly started global team of regional e-commerce advisors in Shanghai, Berlin and New York. That team clearly continued to exist as it is referred to in the further adverts. The advert for the E-commerce Commercial Advisor, which job was due to start on 1 January 2021 (i.e. the day after the Claimant finished) provided in the first paragraph that the position is part of a united e-commerce effort from the Trade Council where you will be part of not only your local team but also a global team of regional e-commerce advisors in Shanghai, Berlin and New York. The next advert for the Digital Sales/E-commerce Commercial Advisor included exactly the same wording in the first paragraph. The advert for the Head of Digital Sales and Marketing had similar wording stating: "the position is part of a joint digital sales effort of the Trade Council where you will be part of not only your local team but also a global team of a regional digital trade advisers at the embassies in Berlin, Stockholm, Brussels, Shanghai and New York among others. As I have noted, by this stage, Lina Henson had explained the intention to recruit additional Digital Sales Advisors.

87. Additionally, the attachment to the 14 September 2020 email from Mr Staffeldt was a form of presentation document, one page of which was headed TE (standing for Trade Council's) e-com resources 2020-2021. It listed the representations with dedicated e-com experts and included London in that list. Clearly it was expected that there would be an e-com expert in London in 2021, and the Claimant was that expert.

88. The Respondents position turns on a very narrow interpretation of the role that the Claimant was undertaking and on distinguishing that role from the new role for which funding was clearly available. What the Respondent seeks to do is argue that the role of E-commerce Advisor ended and that a new post was created with a different emphasis. The EAT, in the case of Terry v East Sussex County Council, made clear that an employment tribunal must ensure that the case is a genuine one where the employee has to his own knowledge been employed for a particular period, or a particular job on a temporary basis. In this case there was significant amount of evidence indicating the Claimant was employed as part of the global team which continued and her role, whatever its title, was effectively to be the e-commerce expert in London. I have recited this in the fact section of this judgment. I do not accept the Claimant was aware that she was appointed on such a limited basis as the Respondent contends.

89. In the circumstances, it appears that there was not a genuine reason for placing the Claimant on a fixed term contract. Certainly, there was no genuine reason for not renewing it. The Claimant was part of the Trade Council's global team of regional e-commerce advisors, and there was continued funding in the form of the Export and Investment Package II, which allowed for the continuation of funding for a role of a digital advisor position in London.

90. As I have noted, other than the fact that the contract specified it was a fixed term contract, the position did not appear to be time limited from the outset as the Respondent suggests. The Claimant was told that she was part of the global team of regional e-commerce advisors. On 14 September 2020, the Claimant was the recipient of an email from Mr Staffeldt which set out his intention to strengthen the Trade Council's E-commerce initiatives. It set out the KPI's for 2020-2021. Each mission with a dedicated E-commerce/digital sales Advisor or planned Digital Sales/E-com initiatives were asked to return with an overview with specific dates for outreach activities for 2020, 1H 2021 such as webinars, relevant cases etc by the 25th of September. The Claimant and Mr Ranieri-Svendsen worked on a reply together. As noted above, the attachment to that email was a form of presentation document, one page of which listed the Trade Council's e-com resources for 2020-2021. It included London in that list.

91. In these circumstances, from the outset the Claimant was led to understand that she was part of an ongoing team which in was directed at e-commerce as part of a strategy which was planned to continue till 2025, and she was the London specialist e-com expert. The message that the London office had an expert and that would continue into 2021 was repeated in the manner in which the Headquarters addressed the London e-com resource in documents circulated widely to others in the international e-commerce team including the Claimant.

92. It is clear that the Respondent argues that the Claimant's dismissal was due to the job requirements having changed. I take that as akin to a reorganisation in which there was one job still to do, so no reduction in staff numbers, but it required a different emphasis and different skills. I noted the similarity between the job that the Claimant originally applied for and the role of E-commerce Commercial Advisor. The Respondent did not submit that was the reason for the Claimant's dismissal. However, I bear in mind the importance of not substituting my judgement for that of the Respondent. The Respondent referred to the case of *Tasneen v Dudley Group of Hospitals NHS Trust* and cited from the EAT judgement. Their argument was that a locum doctor, Mr Tasneen, was fairly dismissed when his contract ended because a substantive consultant post was created. Effectively, the Respondent argues that if a locum doctor can be fairly dismissed when the position is replaced by a substantive post, the facts in this case fall within the scope of the non-renewal of a fixed term contract being some other substantial reason. However, the facts of the *Tasneen* case and the nature of the claims brought were somewhat different and I do not regard it as helpful in determining this case. In that case it had been recognised by the tribunal that it was common practice for the National Health Service to discontinue locum posts when substantive posts were created. Mr Tasneen was interviewed for the substantive post but failed to obtain it and his argument was that he was unfairly dismissed because he said his failure was due to race or age discrimination. The position was very different in that case.

93. The third reason which came up in the evidence and which I consider was the reason for the non-renewal of the Claimant's contract was essentially the doubts about the Claimant's performance. The Respondent relied upon this in terms of justifying the failure to progress the Claimant's application and indicating that she was not a suitable candidate. I have noted the references to the Ambassador's comments and the suggestion by both Mr Simonson and Mr

Ranieri-Svendsen that the Ambassador appeared to think the Claimant's onboarding of nine companies was an inadequate result. Mr Simonsen specifically explained how in August 2020 the Ambassador expressed concern that in his assessment, insufficient results delivered by the e-commerce adviser might lead to criticism from the Ministry if performance did not improve and he explained that he inferred from this that any renewal of the contract with the Claimant would have to be short and fixed term in order to alleviate the Ambassador's concerns. While he went on from this to refer to the funding position as well, that concern about the Claimant's performance appears to have been a significant focus of his thought process.

94. Mr Ranieri-Svendsen explained in his witness statement that during the course of September and the beginning of October 2020 he and the Ambassador discussed whether the Trade Council in London should make changes to the way it was offering its services. He noted that they looked at certain factors which included the low number of companies on boarded to online marketplaces. He also said they came to the conclusion that they needed to ensure that the best possible skills and competences were available for this project.

95. Mr Ranieri-Svendsen said the Ministry's review of the project was that it had not produced the desired outcome and a new strategic direction was set for the project to continue which I understand to be a reference to the overall approach to promoting E-commerce among Danish companies by the Trade Council. That is to some extent the reason why the email of 14 September for Mr Staffeldt suggested a new emphasis. This was not an assessment by the Ministry of the Claimant.

96. Mr Ranieri-Svendsen indicates that he noted the change of emphasis set out in Mr Staffeldt's email of 14 September 2020, and the wide variety of tasks needed, and also suggests that budget allocated was lower than previous years, although I have no idea by how much or how that impacted the Claimant as no documentation or details were provided. This led him to advertise the new position of E-Commerce Commercial Advisor.

97. Having advertised the position, the Claimant's application was simply ignored. I can only take that as indicating that despite Mr Ranieri-Svendsen apparently encouraging the Claimant to apply, a decision had been taken that the Claimant would not be considered. If that decision was taken after she applied, there is nothing to explain it other than the redacted email from Mr Staffeldt who did not include her amongst the candidates he thought should be interviewed. Either way, the only reason this could be the case was the sense of dissatisfaction with her performance. The Respondent relies on this in terms of its decision not to progress the Claimant's application indicating she was not suitably skilled for the role. It is part of the Respondent's argument that it dealt with the ending of the fixed term contract appropriately. The Respondent did not seek to suggest the Claimant was fairly dismissed for poor performance. However, it was my conclusion that this was the reason for the Claimant's employment ending.

98. Notwithstanding the fact that I have rejected the Respondent's suggestions as to the reason for the dismissal, I have gone on to consider the next stages of the issues list.

If the Respondent has shown a potentially fair reason, did it act fairly in dismissing the Claimant for that reason? This includes consideration of whether the Respondent acted fairly with regard to:

1. Selection of pool
- 3 Selection criteria
- 4 Application of selection criteria
- 5 Looking for alternative roles
- 6 Consultation on these matters

99. These fairness criteria are applicable to a redundancy situation and are frequently used in a re-organisation. The Respondent has not made any submissions about it being a redundancy, which requires there to be a reduction in the employer's requirement for employees to carry out the work they had been doing at the place they had been doing it. There is no suggestion of a reduction in requirement. This is not a redundancy. It does potentially have elements of a re-organisation.

100. Section 98(4) does however, necessitate a consideration of a fair procedure. Even if the Respondent had demonstrated that the Claimants employment was temporary and she was aware of this, the Claimant's case is similar to the case of Beard v The Governors of Saint Joseph's School. In that case as I have recorded in the law section of this judgement, Mrs Beard was given notice of the qualifications needed for the new appointment and applied and stated that she had the very qualifications which were being sought. She was not interviewed as a potential applicant for the post. The view taken was that as the as an applicant, having notified the employer that she had or might have the qualifications required, she ought to have been given the opportunity of being considered. The EAT went on to say that it did not follow that if interviewed she would have got the post but the failure to interview her and adequately consider her application was they thought unfair. If the Claimant's role had come to an end by reason of the fixed term, she had applied and indicated experience in the sectors being sought and she was entitled to an interview. Failure to interview her was unfair.

101 If the Respondent had shown that the real reason was a reorganisation, again, a fair procedure would have involved a similar process to a redundancy with some degree of consultation, and the Claimant at least having an objective assessment of her ability for the new role and that would have necessitated an interview, not just disregard of her application.

102. If the reality was the Claimant was being dismissed because her performance was poor, she was entitled to a reasonable procedure which would have involved various stages of formal meetings to identify the weakness in her performance and give her an opportunity to improve. None of this occurred.

103. My conclusion therefore is that the Claimant was unfairly dismissed.

Employment Judge N Walker

4 October 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

04/10/2021

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FOR EMPLOYMENT TRIBUNALS