EMPLOYMENT TRIBUNALS

Claimant:	**Mr L de Rose**
Respondent:	**Coleg Llanymddyfri (Cymru)**
Heard at:	**Cardiff (CVP)** **On: 6 and 7 January 2020**
Before:	Employment Judge R Brace

Representation

Claimant:	Ms S Bowen (Counsel)
Respondent:	Mr G Pollitt (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

WRITTEN REASONS

Preliminary

Hearing

1. This has been a partly remote hearing which has been consented to by the parties. The Judge and Clerk attended the venue and the parties, witnesses and all others participating, participated by remote video by CVP [V].

2. Apart from some connection issues at the outset, and at some points during the hearing after breaks were taken which were quickly resolved, there were no particular connection problems during the two day hearing regarding participants' ability to join and participate in the hearing.

Claim and Issues

3. The claim had been issued on 29 January 2020, following the termination of the Claimant's employment on 31 August 2019. Early Conciliation had commenced on 29 November 2019, with the EC Certificate being issued on 29 December 2019.

4. The complaint brought is one of unfair dismissal arising from the dismissal of the Claimant on 31 August 2019, asserted by the Respondent to be on

grounds of redundancy. The issues arising from this claim had been discussed at the preliminary hearing before Employment Judge Beard on 2 June 2020 and, at the outset of this hearing, these were revisited.

5. Both parties were represented by Counsel and both agreed that the list of issues remained good. The Claimant's Counsel did raise a concern that there had been limited disclosure from the Respondent's in this case, and that this would form the subject of some of her cross-examination. It was agreed that this did not necessitate changing the list of issues but would that I would consider this issue as part of my deliberations.

6. The issues between the parties to be determined by the Tribunal were therefore as follows:

    a. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was redundancy.

    b. Did the Respondent genuinely dismiss for redundancy or for some other reason? The burden of proof is neutral, but it helps to know the challenges to fairness. The Claimant identifies:

        i. Bias in that earlier dealings with the respondent had led to the respondent wishing to dismiss the Claimant.
        ii. That the pool for selection was wrongly identified.
        iii. That there was a failure to properly consult.
        iv. That there was a failure to consider/offer alternative employment.
        v. That the respondent engineered a suspension of the Claimant during a period where alternative employment could have been considered.

    c. Was the dismissal fair or unfair in accordance with Section 98(4) ERA? Was the decision to dismiss within the "band of reasonable responses" for a reasonable employer? Would the Claimant have been dismissed in any event if a fair procedure was adopted?

Evidence

7. Written witness statements were provided from the following witnesses on behalf of the Respondent:

    a. Mr Dominic Findlay (Warden);
    b. Ms Anna Sandford (Deputy Warden);
    c. Ms Lesley Rossiter (HR Consultant engaged by HCHR) ; and
    d. Mr Paul Bedford (Senior Faculty Lead (Acting Deputy Warden Trinity Term 2019)).

8. Written witness statements were provided from the Claimant and, on his behalf, from:

a. Ms Jill Owen (Biology teacher, employed by the Respondent up to 31 August 2020); and
b. Mr Mike Jenkins (Network Manager, employed by the Respondent up to 31 May 2019).

9. All witnesses relied upon those witness statements, which were taken as read, and all were subject to cross-examination, the Tribunal's questions and re-examination.

10. Prior to the commencement of the Respondent's evidence, a concern was raised by the Respondent's Counsel that a member of the public, an ex-employee of the Respondent, involved in an ongoing police matter involving allegations of harassment from Anna Sandford, was participating remotely via CVP. Claimant's Counsel requested that this individual be excluded, at least for Ms Sandford's evidence, as there was a concern that this could impact on Ms Sandford's evidence. As this was a public hearing, Claimant's Counsel was asked to indicate what power there was to remove such a participant and Mr Pollitt sought to rely on rule 50 Employment Tribunal Rules of Procedure 2013.

11. After hearing representations from the individual in question and considering Rule 59 and Rule 50 and 94, I determined that neither Rule 50 nor Rule 94 had been engaged and that the hearing would continue as a public hearing and I would not exclude any participant. Oral reasons were provided on that day and do not form part of these written reasons.

12. As Jill Owen was participating remotely from the Cayman Islands and had limited availability, it was agreed by the parties and the Tribunal that she could give evidence after the completion of the cross examination of the Respondent's second witness, on the morning of the second day and before completion of the Respondent evidence.

13. The Tribunal was satisfied that all witnesses gave their evidence honestly and to the best of their knowledge and belief. It is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:

    a. whether the evidence is probable,
    b. whether it is corroborated by other evidence from witnesses or contemporaneous records of documents,
    c. how reliable is witness' recall; and
    d. motive.

14. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle"). References to the hearing Bundle (pages 1-576) appear in square brackets [ ] below. It was confirmed to the parties that where documents had been lengthy it was important that the representative's took me to the specific section that was being relied upon and allowed time to read that particular section as the whole document would not have necessarily been read in detail prior to the cross-examination.

15. The Claimant's Counsel also sought to admit a copy of the Welsh Government Circular no 009/2014 '*Safeguarding children in education: handling allegations of abuse against teachers and other staff*'', non-statutory guidance for independent schools, as she indicated that she wished to cross-examine a number of the Respondent's witnesses on its content. This was not challenged by the Respondent and was accepted in evidence. I indicated that it would follow in the Bundle from page 576.

16. A number of documents in the Bundle had been redacted and during the course of the first day, it became of concern to the parties' representatives that the Tribunal would need to consider some without prejudice documentation, that was not contained in the Bundle, as this was relevant to the issue of suitable alternative employment in this case. The parties' representatives were directed to discuss the matter over the evening of 6 January 2021, to seek a resolution and the following morning both parties confirmed that they had agreed to waive any privilege in the documentation and wished to introduce that documentation in evidence.

17. As a result, on the morning of 7 January 2021, a further 89 page electronic bundle of without prejudice correspondence was emailed to the Tribunal which was also introduced as evidence (which will be referred to in these written reasons, if necessary, as the 'WoP Bundle'). It was confirmed that only those documents that were selectively referred to in cross-examination would be considered.

18. In terms of timetabling, the parties' representatives expressed concerns that the hearing would not be completed within the two day listing and proposed that the evidence could be completed within the two days but that a further, third day be listed for oral submissions.

19. It was directed that the hearing would consider liability only and that written submissions would be permitted and should be emailed in advance of oral submissions which could be made at the end of the evidence at the end of the second day and the evidence was time-tabled accordingly so that evidence and oral submissions could be made within the two day listing, and that a reserved judgment on liability only would be given.

Facts

20. The Respondent is an independent day and boarding school for pupils from 4 to 19 years old and was established in 2012 when its predecessor, Llandovery College (in existence since 1847) was placed into liquidation.

21. It is a registered charity and, in addition to the advancement of education, it has as its charitable objects the advancement of education through the provision of instruction in the Welsh language, heritage, culture and arts, and the advancement of religion through the provision of instruction in accordance with the principles and doctrines of the Church of Wales.

22. The Claimant had been employed by the Respondent from 3 January 2013. He had initially been employed as a Spanish teacher but was employed at the relevant time as a Modern Languages and Latin Teacher on terms and conditions set out in a contract of employment dated 15 March 2017 [113]. He was in receipt of a salary of around £27,000. He had from time also received an additional payment of around £1,340 per annum for his additional duties as a Boarding Tutor. This additional duty had ended by the end of 2018.

23. The contract of employment provided that the Claimant's employment could be terminated by either party giving to the other not less that one full term's notice in writing and for that purpose the last day of each term within the academic year would be deemed to fall on the following dates:

    a. Lent Term: 30 April
    b. Trinity Term: 31 August
    c. Michaelmas Term: 31 December.

24. The Claimant taught Spanish to pupils at Key Stage 3 (aged 11-14), GCSE and A level.

25. From 2015 until 2019, the Claimant had, in addition to teaching Spanish, also taught Latin to some Key Stage 3 and Key Stage 4 pupils, although this subject offering from the Respondent had phased out in 2019. This is not in issue in this claim.

26. The Claimant had also, at some point and particularly in around the 2013/2014 academic year, taught French to pupils at Key Stage 3 i.e. up to age 14 years' old. This had also ceased at some point in 2017 for the Claimant to focus on teaching Spanish and Latin.

27. There is an issue between the parties as to whether the Respondent's requirement for the Claimant to teach Key Stage 3 French had ended due to the Claimant's lack of confidence and competence in the language.

28. I make no finding on the quality of the Claimant's teaching in French up to and including Key Stage 3, but did find that any performance concerns held, were not considered significant enough to have raised them either on a formal or informal basis with the Claimant. The Claimant was capable of teaching Key Stage 3 French and had in fact done so. He felt confident to teach French at that level.

29. The Claimant had not taught French at Stage 4, i.e. GCSE. It was not an opportunity he had explored, as this was not of interest to him. The Claimant had confirmed to prospective employers that he was an experienced and qualified teacher in French up to Key Stage 3 only [459]. Whilst the Claimant was questioned on whether he was capable of teaching Key Stage 4, and had responded that he '*possessed skills experience in Key Stage 4'*, the Claimant had no experience in teaching French at Key Stage 4.

30. The Claimant was not capable of teaching A level French. This is not in dispute and was accepted by the Claimant.

31. The Claimant did not teach and had not taught pupils lower than Key Stage 3 in any language.

32. During the majority of time during the Claimant's employment, the Respondent's Warden (or headteacher), was a Mr Guy Ayling. He resigned from his position as Warden at the college and left the Respondent's employment at the end of Lent term i.e. 30 April 2019.

33. Since 1 September 2019, Mr Dominic Findlay has been employed as Warden.

34. The Respondent's current Deputy Warden is Anna Sandford. She has been employed in this capacity since 1 September 2018, following the departure of the previous Deputy Warden, Phillip Orrin, at some point in 2018. For the Trinity Term in 2019, i.e. from the date of Mr Ayling's departure on 30 April 2019 to the appointment of Dominic Finlay as Warden on 1 September 2019, Anna Sandford was appointed Acting Warden and Mr Paul Bedford (Senior Faculty Lead), Acting Deputy Warden.

35. In 2014, there had been a proposal to remove Spanish as a subject offered by the College. This proposal was not progressed at that time by the governing body of the Respondent.

36. In February 2018, the Claimant along with other members of staff, had signed a 'vote of no confidence' in Guy Aying. This had been organised by another member of staff, a member of the Respondent's leadership team.

37. Following Phillip Orrin's departure from the Respondent's employment, on his return to the college after the summer break in September 2018, the Claimant found on his desk a copy of an email that he had sent to Phillip Orrin in which he had expressed gratitude to Mr Orrin. The Claimant perceived this as a 'veiled threat' that he would be next to leave.

Curriculum Review

38. A review of the Respondent's curriculum took place on an annual basis, and in the 2018-19 Michaelmas Term, Anna Sandford as Deputy Warden, undertook a more in depth and wholesale curriculum review and a report was prepared and finalised on 15 January 2019 [151] ("Curriculum Review"). Teachers within each subject contributed to that review, including the Claimant, as part of the Modern Languages department [161-165].

39. Information provided indicated that the number of pupils studying A level French and Spanish in the period from 2014-2018 varied from year to year, but that in 2018, 2 pupils were studying A level French [182] and 2 pupils were study A level Spanish [190].

40. Information provided indicated that the number of pupils studying GCSE in each subject from 2014-2018 were of broadly similar numbers and that in 2018, 4 pupils were studying French GCSE [199] and 8 pupils were studying Spanish GCSE [206]. Numbers fluctuated each year.

41. The Curriculum Review, included 'Conclusions and Key Recommendations' at page 129 of the review. These pages were not included in the Bundle, sections of the Curriculum Review only being contained in the Bundle and ending at page 120 of the Review [210]. This was not an issue between the parties in the hearing. I draw no inference from this and found that, what is more likely than not contained in that section, was reflected within the Business Case Financial Investment document ("Business Case",) which was also finalised on 16 January 2019 [211@219-221].

42. One of the recommendations of the Curriculum Review related to the rationalisation of GCSE/A level subjects on offer, with specific consideration to the range of languages that the Respondent offered pupils and whether the Respondent could offer French and Spanish on a school of the Respondent's size (recommendation 8) [220].

Option Trawl

43. As part of a separate process to the Curriculum Review, in December 2018 pupils at the end of Key Stage 3 were asked to indicate which subjects they would like to study for GCSE, a 'trawl' as it had been termed by Anna Sanford.

44. Whilst pupils were only permitted to study four optional subjects of those on offer by the Respondent, at this point pupils were asked to select five optional subjects and to rank them in order of choice, as though they were to have complete free choice. In reality, pupils would eventually not have such free choice, as this information was then used by the Respondent to formulate timetables and for pupils to make firm choices within those timetable parameters, which limited their option choices.

45. Evidence was given by Anna Sandford, that during this initial trawl only two pupils expressed a fifth (out of five) option preference for Spanish (witness statement paragraph 16). This had also been communicated to the Claimant in his first formal consultation meeting on 5 March 2019 [287] albeit in that meeting Anna Sandford had confirmed to the Claimant that two pupils had put Spanish fourth *or* fifth (as opposed to fifth as had been included in her evidence).

46. This evidence is disputed by the Claimant. His dispute is centred on two issues:

    a. That he has not at any time, either during the consultation or in preparation of this claim, been provided with the documentary evidence to support the Respondent's assertion that pupil demand for GCSE Spanish in 2019/20 had dropped. He also relies on the trends reflected in the Curriculum Review which he felt contradicted that assertion; and

    b. His own survey, which he maintained reflected the number of pupils choosing Spanish to be higher than French, with his survey indicating that seven students were opting for Spanish and two for French.

47. No documentary evidence has been provided by the Respondent to support the assertion that only two pupils chose Spanish as a fifth option. Likewise, no documentary evidence has been provided by the Claimant as such.

48. In the correspondence provided in the Bundle [108] in relation to the Claimant's requests for specific disclosure, the Respondent had indicated that the initial pre-option trawl which had taken place in December 2018, no longer existed as the data had been transferred onto a spreadsheet and the paper copies shredded.

49. In cross examination, Anna Sandford confirmed that she had seen the original GCSE trawl documentation although this had not been referred to in her witness statement. Her explanation for that was that she did not know that it needed to be stated as, due to her role, it would have been expected that she would have seen them.

50. I found no assistance in determining the level of pupil uptake for GCSE Spanish in reviewing the spreadsheet provided [285] that was referred to in Anna Sandford's statement (paragraph 15) as

    a. the handwritten data following the options trawl had not been transferred to that final spreadsheet;
    b. any data on previous versions of that spreadsheet had not been retained or disclosed on this version of the spreadsheet; and
    c. the spreadsheet [285] showed options chosen by pupils after Spanish had been removed as an option choice.

51. Despite Anna Sandford's written statement differing slightly to that which she conveyed to the Claimant in March 2019 (that Spanish had been a fifth option as opposed to fourth or fifth option,) I did not consider this marginal difference significant, I accepted her live evidence, which I found to be candid, and which had been maintained throughout this process and continued in cross examination, that numbers wishing to potentially take Spanish were as low as two.

52. I also accepted her evidence, that she had seen the handwritten trawl documentation and expressing regret that such documentation was not still available, and I drew no adverse inference from the fact that she did not refer to this in her statement or to the fact that the Director of Studies, the teacher who she stated had originally collated and created the handwritten trawl document, did not give evidence at this hearing.

53. Notwithstanding the lack of documentary evidence, I was not persuaded, that at the point that the Respondent undertook the options 'trawl' in December 2018 i.e. prior to any decision to remove Spanish from the curriculum, that it would necessarily have been in the Respondent's collective minds that they would need to preserve this documentation as evidence for a claim such as the current claim. As a result, I drew no adverse inference from the fact that the original handwritten trawl documentation no longer existed.

54. There was also no evidence before me to find that Guy Ayling was 'instrumental' in the pre-option trawl of GCSE students, as had been asserted

by the Claimant. It was Anna Sandford's evidence that she had no recall of Guy Ayling having a role in collating the pre-trawl information, an exercise which had conducted by the Director of Studies, as part of her role. I accepted that evidence. The fact that Guy Ayling's email account had been deleted after his departure, did not interfere with my finding on this point. Had there been emails, between Guy Ayling and Anna Sandford (or indeed the Director of Studies or other teaching staff involved in the pre-option trawl,) I was satisfied that these would have been located, during email searches of either Anna Sandford's or the Director of Studies' email inboxes. Likewise, that would have been the case in respect of email exchanges between Mr Ayling and Anna Sandford, in relation to the Curriculum Review (or indeed the preparation of the Business Case dealt with later in these written reasons).

55. With regard to A level pupils, in her statement (paragraph 16), Anna Sandford stated '*No pupils chose to undertake Spanish at A level'.* However, I found that no pupils in Year 11 had actually been asked about their A level preferences at this time. A level option discussions, or 'trawl' as it had been termed, did not take place until later in 2019, towards the end of the Lent Term, that is after it had already been determined by the governing body that Spanish would not be offered. No pupils chose or could choose to study Spanish A level at the time that they actually chose their A level options, as A level Spanish was no longer an option that was available to them, the governing body of the Respondent having already determined to cease offering the subject to pupils.

Financial position of Respondent

56. By January 2019, the Respondent's Finance Director established that the Respondent would be facing a £257,000 shortfall during the 2018/2019 academic year.

57. The financial position was reflected in a substantial amount of documents that had been disclosed and were contained in the Bundle including, in particular:

    a. The Business Case prepared for the Finance Committee of the Respondent; and

    b. the exchange of emails on 29 January 2019, that referred to a Finance Committee meeting which had taken place on 28 January 2019 [140-146] and which reflected that the Finance Director was of the view that costs could only be reduced with reductions in staffing costs and marketing.

58. Whilst no minutes were included in the Bundle of the Finance Committee meeting, the lack of minutes has been explained by Anna Sandford as never having existed. Whilst the contemporaneous emails refer to the meeting and minutes should have been created, they were not. Whilst it is surprising that an organisation, such as the Respondent did not minute such a meeting as part of its governance, I accepted Anna Sandford's evidence on that point in the context of her further evidence, that at that time the Respondent was in a financial crisis, working daily to get a solution to the Respondent's financial

problems and did not draw an adverse inference from that lack of documentation in relation to this case as a result.

59. As such, no minutes of the meetings of the governing body, reflecting or confirming their decision-making on staff reductions have been disclosed. Staff reductions were agreed by the governing body of the Respondent, following its review of the Respondent's finances. These were focussed on finance, admissions and marketing and support staff.

60. As part of these deliberations, a decision was made by the governing body of the Respondent that there would be a phased withdrawal of Spanish due to the demand in order to achieve some of those costs savings. Whilst uptake in French was not high either, numbers were marginal and French was retained as the School needed to offer a modern language option and it was also taught at preparatory level.

61. That it was determined by the governing body that Spanish was to be phased out, was reflected in the Business Case, [221] and repeated in the Payroll Overview of the Financial Forecast [229] and included the phased removal of Spanish from the Respondent's curriculum.

Redundancy Proposal – Meeting 1 March 2019

62. A consultation pack in relation to the restructure of the Respondent College was prepared by HR Consultants engaged by the Respondent [266] which set out the procedure that would be adopted and detail of the business case for the consultation together with a section on what was termed 'Redundancy FAQs' ("Consultation Document"). Potential redundancies across finance, admissions, marketing were reflected in that documentation as well as the reduction in the requirement for a Spanish teacher down from one full time role to a part time role. In total 7 employees, including the Claimant, were included in the consultation process.

63. The Consultation Document confirmed that all new posts would be open to all staff directly affected to apply and that it was up to the individual to demonstrate that they met the relevant criteria set out in the person specification when competing an internal application form [@276].

64. As a result of the decision to phase out Spanish, on 28 February 2019, the Claimant was asked by Guy Ayling to attend an information consultation meeting with him the following day on Friday 1 March at 4.30pm to discuss proposed changes to his role and was informed that his post may be at risk of redundancy [262]. In the letter Guy Ayling confirmed that he would be joined by Anna Sandford.

65. On that day, the Claimant, accompanied by Jill Owen, who was still then an employee at the Respondent met with Respondent's Warden, Mr Guy Ayling, who was accompanied by Anna Sandford. There are no notes of that meeting.

66. There is a dispute as to whether the Claimant told Mr Ayling at that meeting that he had himself conducted a survey of potential take up of Spanish GCSE

by pupils and that he had a list of Year 9 students on whether they wanted to study Spanish. The Claimant's evidence on this issue was supported by the live evidence from Jill Owen who recalled that the Claimant had 'slid something across the table' and that there had been a discussion that the Claimant's survey hadn't been conducted through the school forum but through his discussion with pupils. Anna Sandford has no recall of any survey being discussed at any consultation meeting with the Claimant.

67. I accepted the Claimant and Jill Owen's evidence on this issue and concluded that it was more likely than not that the Claimant had, at this meeting raised his concerns that his own survey had led him to conclude that there were more students wishing to take up Spanish GCSE but that Mr Ayling rejected the results of the Claimant's survey on the basis that the evidence that was not acceptable. However the Claimant's survey was not raised again by him at any of the subsequent formal consultation meetings. They are not referred to in any of the notes of those meetings.

68. The Claimant was provided with the Consultation Document and a letter inviting him to a consultation meeting on 5 March 2019 [264]. The letter referred to the take up in Spanish being low and that there was a '*question over the viability of delivering the subject in a sustainable fashion'*.

First Consultation Meeting – 5 March 2019

69. The meeting, organised for 5 March 2019, was not conducted on behalf of the Respondent by Guy Ayling, who had no further involvement in the consultation process, but by Anna Sandford. The Claimant was accompanied by his trade union representative and Anna Sandford was accompanied by Lesley Rossiter, an independent HR adviser through HCHR Consultants. A note taker was also provided and notes were prepared of that meeting [286]. I accepted that those notes as an accurate reflection of the matters discussed.

70. The question of whether a skills audit had been done on staff and the fact that the Claimant's degree was in IT was discussed as well as his abilities to teach in French as well as Spanish. The Claimant confirmed that he had taught French from year 6 up to Key Stage 3 until 2017 but that he was not capable of teaching French at A level.

71. The Respondent was asked to consider extending the pool and reference was made to whether others within the Modern Foreign Languages should be included

    a. Lisa Burgess, the Head of Faculty who also taught pupils at A level; and
    b. Robin Edwards- a teacher working three days a week, teaching French up to A level, Welsh and ICT.

72. The Claimant questioned the need for both to teach A level French and was informed that this was due to Lisa Burgess' management responsibilities, as Head of Faculty and Head of Upper Prep. It was also questioned whether there was any capacity for the Claimant to teach some IT. He was informed that ICT was currently staffed.

73. The Respondent was asked to provide evidence on the assertion that the uptake of Spanish was extremely low and was informed that from the pre-option trawl only two pupils had chosen Spanish GCSE as a fourth or fifth option, but that six pupils had opted for French and that French was also taught at preparatory level. He was also informed that only two pupils were currently studying for A level Spanish and two pupils in year 11 were looking to study Spanish A level.

74. During the meeting, the Claimant also provided information from BBC news regarding in French decreasing. Options, regarding those pupils who were already partway through their GCSE and A level Spanish, was also discussed and the Claimant was informed that this could result in a potential option of a reduction in the Claimant's full time post to a part-time 0.35 fixed term contract, with the hours available across the week, for the following academic year to continue the teaching to pupils already taking the GCSE and A level Spanish course, with this potentially increasing to a 0.56 post. Options regarding working with other schools was also discussed.

75. During the period following that meeting and prior to the second consultation meeting, Anna Sandford assisted by Lesley Rossiter, considered whether the pool should be widened to include the other members of the Modern Language department. After speaking to the Head of Faculty, Anna Sandford concluded that not including others within the pool for selection could be justified. The Respondent's justification and decision for not widening the pool was that the other members of the Modern Foreign Languages department did not teach Spanish, the Claimant was unable to teach French higher than Key Stage 3 and that Lisa Burgess and Robin Edwards taught A level French. In addition Lisa Burgess held managerial positions.

76. The issue of whether the Claimant should also 'bump' Mr Edwards was also considered by Anna Sandford but was also rejected as the Claimant was unable to teach French to the A level. She also considered that the Claimant's degree had no relevance to the computing curriculum.

Second Consultation Meeting - 25 March 2019

77. On 15 March 2019, the Claimant was sent a letter requesting that he attend a second consultation meeting on 25 March 2019 [321] and on the same day Anna Sandford was informed that the Claimant had told pupils that he had been made redundant which had resulted in parents contacting the college. A decision was taken that no formal action would be taken in relation to this, but that the Claimant would be spoken to informally, understanding the pressures of being at risk of redundancy [312].

78. At the meeting the Claimant was again accompanied by his trade union representative and Anna Sandford was accompanied by Lesley Rossiter. Notes were taken at that meeting and there has been no suggestion that they are not an accurate reflection of the matters that were discussed at that meeting [338]. The meeting was brief and at the meeting the Claimant's representative again raised the suggested of a whole staff skills audit for future processes. The Claimant was informed that consideration had been

given to including Lisa Burgess and Robin Lee into the pool for selection but that this had been rejected as they did not teach Spanish. Little else, save for an issue relating to delaying the recruitment process for the new Warden, appears to have been discussed.

79. On 5 April 2019 the Claimant was provided with a letter confirming the outcome of the redundancy [345]. He was informed that his selection for redundancy was confirmed and that his last day of employment would be 31 August 2019 and that he was entitled to a tax-free redundancy payment of £3,412.50.

80. The Claimant was informed that if he wished to appeal the decision he should do so to the Chair of the college. The Claimant did not submit an appeal.

ICT Role

81. In May 2019, Mike Jenkins resigned from his position as Network Manager for the Respondent. Mr Jenkins had also helped out the Respondent for a number of roles and had undertaken teaching to pupils in computer science for Key Stage 3 and GCSE as a result of his experience as an IT technician for over 16 years, despite not being a qualified teacher.

82. The Claimant met with Anna Sandford and expressed an interest in teaching computing. He did not make any application for the teaching post when it was subsequently advertised by the Respondent later that month. No suitable applications were received by the Respondent and the advert was withdrawn with teaching being outsourced to an online teaching company.

Suspension

83. The Claimant continued teaching during his notice period but, following a report from a member of staff that comments had been made by a Year 7 student about ‘orgies’ in a lesson and that they had been watching a film called ‘Troy’ in Spanish lessons, on 20 May 2019, was suspended from work pending investigation into allegations of gross misconduct [350].

84. The letter of suspension confirmed that the allegations were of allowing students to watch a DVD during a scheduled lesson for entertainment purposes, not educational, and not teaching in accordance with the syllabus and allowing Year 7 students (aged 11-12) to watch a DVD classified as only suitable for viewers aged 15 years and over.

85. A fact-finding exercise was undertaken by Paul Bedford, then the Respondent’s Acting Deputy Warden and he interviewed the Claimant as part of that process on 6 June 2019 [366] as well as pupils from Year 7 and Lisa Burgess, the faculty head. At that meeting, the Claimant explained that he had shown the film to the class as part of an enrichment task to be used for languages generally, and that the film had been stored on the Respondent’s computer drive. He provided a lesson plan [405]. He did not recall the film’s rating but that he had skipped scenes of an inappropriate sexual nature and that he did not consider that this could breach safeguarding legislation as a result.

86. Paul Bedford had also undertaken a review of pupils books, referred to as a 'book scrutiny'. He took the opportunity to question the Claimant as it appeared to him to be no written work in Year 7 books after the end of January/early February. The Claimant explained that work had been undertaken on projects in the computer room and that student folders would have evidence of the work. He confirmed that he had completed the course requirements for the term and whilst normally he would have started teaching Spanish for the following year, he was carrying out an enrichment task instead.

87. During this period, advice received from the Respondent's HR Consultants [371] and draft letters prepared [438] reflect that the Respondent was deliberating whether to manage the concerns as ones of capability or conduct. Whilst Anna Sandford, as the Safeguarding Officer for the Respondent, had concluded that safeguarding concerns had diminished and were not ones that placed pupils at risk of significant harm, it was determined that it was appropriate for the matter to be dealt with as conduct and a disciplinary matter. She reported to the board meeting of the governing body on 17 June 2019, that the investigation would probably result in a written warning and that as a result it was unlikely that the Claimant would be offered the part time Spanish role in September.

88. Following the receipt of Paul Bedford's Investigation Report on 19 June 2019 [376] on 27 June 2019 the Claimant was invited to attend a disciplinary meeting to consider allegations of gross misconduct arranged to take place on 5 July 2019. The letter contained no allegations of safeguarding.

Without Prejudice Discussions

89. On the same date, a without prejudice letter was also sent to the Claimant offering the Claimant a severance package [WoP 1]. The letter confirmed that one of the outcomes of the disciplinary investigation could be the Claimant's summary dismissal, which would negate the Claimant's entitlement to redundancy. The Respondent confirmed that given the majority of the Claimant's role had been confirmed as redundant, it would offer the Claimant a redundancy payment, payment for the remainder of his notice period and a reference on agreed terms. The letter stated that if the offer were accepted the Claimant's employment would end on 31 August and he would remain on garden leave until such date. The Claimant was informed that he would need to take legal advice on the terms and effect of the settlement agreement and that the offer would remain open until 4 July 2019.

90. The disciplinary hearing did not take place and on 10 July the Claimant confirmed that he was willing to accept the offer made. Negotiations on the terms of the settlement agreement, between the Claimant and his solicitors and the Respondent, continued throughout July and August, but did not result in a formally concluded settlement employment and the Claimant's employment terminated on 31 August 2019 following the expiry of the Claimant's notice period.

91. On 24 September 2019 the Respondent's offer was retracted and the Claimant was informed that he would be paid his redundancy entitlement and that no further disciplinary action was being pursued.

Post termination

92. In September 2019, the Claimant requested a meeting with the new Warden, Dominic Finlay and that meeting took place on 4 November 2019. The Claimant asked if he could be considered for a teaching role in the ICT department.

93. The evidence from Dominic Findlay is that at that meeting the Claimant confirmed that he was planning to retain as an ICT teacher as he did not have the skills or experience necessary at that time for an IT role. The witness was challenged on cross examination, that he had misremembered his conversation with the Claimant. The Respondent's witness remained resolute in his evidence on this point and was also taken on re-examination, to a document in the Bundle, an application that had been made by the Claimant for a role as a teacher of computer science and/or ICT, made in April 2020 [464]. In that application the Claimant confirmed that he was attending a course and that once completed he would be '*fully qualified to teach Computer Science up to KS 4…. by the end of June*'.

94. I considered that this supported the live evidence from the Respondent which I accepted – the Claimant told the new Warden at that meeting that he was planning to retrain as an ICT teacher as he did not have the sills or experience at that time for an IT role.

Submissions

95. For reasons given regarding timetabling, the parties were directed to provide written submissions at the completion of the oral evidence and both Counsel filed detailed the Written Submissions by electronic copy on 7 January 2021. The Tribunal will not attempt to summarise those submissions, but incorporates them by reference.

96. The Respondent's Written Submissions ran to some 54 paragraphs/10 pages and the Claimant's Written Submissions ran to some 77 paragraphs/16 pages. Oral submissions were also taken from both Counsel which focussed on the other's written submissions.

Issues and Law

97. With unfair dismissal, I first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.

98. In this regard, the Respondent bears the burden of proving on balance of probabilities, that the claimant was dismissed for one of the potentially fair reason set out in section 98(2) Employment Rights Act 1996 (ERA 1996). The Respondent states that the Claimant was dismissed by reason of redundancy which was a potentially fair reason for dismissal pursuant to section 98(2)(b) Employment Rights Act 1996 (the "Act").

99. Taking into account I was dealing with a redundancy case, the factors suggested by the EAT in Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT, that a reasonable employer might be expected to follow in making redundancy dismissals, were to be considered, being mindful that it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead I had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted', the factors that a reasonable employer might be expected to consider being:

    a. whether the selection criteria were objectively chosen and fairly applied;
    b. whether employees were warned and consulted about the redundancy;
    c. whether, if there was a union, the union's view was sought, and
    d. whether any alternative work was available

100. This again was reflected in the HL decision in Polkey v AE Dayton Services Ltd 1988 ICR 142, in which the HL confirmed that the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organization.

101. With regards to the pool for selection, this must be fair. Thomas and Betts Manufacturing Co Ltd v Harding [1980] IRLR 255 indicates that the approach does not require a consideration of similarly placed employees unless the dismissal is for an automatically unfair reason (e.g. dismissal on grounds of TU activities). An employer has a degree of flexibility in defining the pool and there is a balance struck by tribunals between its powers of adjudication and the level of discretion to be given to an employer making economic decisions. The tribunal must not substitute its own view. Capita Hartshead Ltd v Byard [2012] IRLR 814 contains a summary of the law on assessing the fairness of a redundancy dismissal by reference to the pool of employees chosen. The employer has considerable latitude in redundancy selection cases and a tribunal must not overstep the mark to impose what it would have decided it will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem but that means that:

    a. the tribunal does have the power and right to consider the genuineness requirement; and
    b. ruling against the employer's choice of pool may be difficult but not impossible.

Conclusions

Reason for dismissal

102. In applying my findings to the issues identified at the outset, I needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal.

103. The Respondent has asserted that the reason for dismissal is redundancy or, in the alternative some other substantial reason, but the Claimant does not accept that this was the real reason for dismissal. He considers that he was '*ousted by design'* as his representative placed it in her written submissions.

104. The Claimant relies on issues he asserts existed in his relationship with the previous Warden Guy Ayling, and which he considers influenced the decision to terminate his employment and which he further asserts was in fact the real reason for dismissal.

105. Mr Ayling's involvement, in the decision to eliminate Spanish has been questioned by the Claimant, both at the trawl stage and the extent that he influenced the decision-making of the governing body to phase out Spanish.

106. The Claimant relies on the vote of no confidence in Guy Ayling, that he had signed along with other teaching staff at the Respondent, on the copy of the email written on his desk in September 2018 and on the lack of documentary evidence provided as part of the disclosure exercise, to call into question whether the Claimant was selected for an inadmissible reason, undermining the suggestion that there was a genuine redundancy situation.

107. On cross examination, Anna Sandford confirmed that whilst she was aware that there had been a vote of no confidence in Mr Ayling and she was not aware of how Mr Ayling had felt about that, she was not aware of any connection between the petition and the redundancy selection of the Claimant. Another member of the Senior Leadership Team at the Respondent had also signed the petition and remained at the school. I accepted this evidence and was not persuaded that the signing of the petition in itself, had any impact on the decision to remove Spanish from the curriculum or on the decision to select the Claimant for redundancy, particularly in light of the fact that there was no suggestion by the Claimant that Mr Ayling had any agenda against other staff signing the petition. A further factor that I took into consideration was that Mr Ayling was leaving his position at the Respondent and had no involvement in the process beyond the first meeting with the Claimant on 1 March 2019.

108. I was not persuaded that any of the evidence before me lead me to draw any conclusion that Anna Sandford, who did then take responsibility for the consultation process and decision-making, had in any way been influenced by Guy Ayling in any event.

109. With regard to the pre-option trawl, I would repeat my findings in relation to the lack of documentary evidence from the Respondent on the pre-trawl and draw no adverse inference from that. I did not consider the Claimant's own survey to be compelling evidence, sufficient to question or undermine the credibility the Respondent's own oral evidence. I accepted and also concluded that it would be difficult for pupils to tell a teacher that they did not wish to take the subject that the teacher had taught them and was not a reasonable way to conduct a survey for that reason. I also was not persuaded that Mr Ayling had any involvement in the pre-option trawl.

110. Whilst I accepted that the Curriculum Review had demonstrated an increase in the uptake of Spanish GCSE the previous year, this did not undermine the fact that in previous years the numbers were marginal or that in this academic year the pre-option trawl demonstrated a reduction in the interest from pupils to study GCSE Spanish.

111. The Claimant was informed at the meeting of 5 March 2019 of the option choices of the pupils and that only two had made Spanish has an option choiceThere was no evidence before me to find or conclude that the Warden influenced the governing body to remove the Claimant. The governing body had approved the removal of Spanish from the curriculum following consideration of the Curriculum Review and the financially problematic position of the Respondent

112. It did concern me that the Respondent's evidence, given in the witness statement of both Anna Sandford, (paragraph 15) and Lesley Rossiter (paragraph 8), in relation to the year 9 option choices made and referencing the [285] spreadsheet, presented a picture of students not choosing Spanish as an option as the rationale for the Spanish teaching role being at risk. It concerned me as this spreadsheet was prepared after Spanish had been removed as an option for pupils and could not have been and was not the basis of the original decision. However, on cross-examination Anna Sandford made clear that it was the formal option choice and I accepted the live evidence given by Ms Rossiter that she had misunderstood the information in that spreadsheet when preparing her witness statement and that this was a genuine error on her part.

113. Even taking all of the Claimant's concerns on a collective basis, including the concerns regarding lack of documentary evidence confirming the governing body's decision to phase out Spanish from the curriculum, I was not persuaded that there was some form of orchestration by the Warden to ensure the removal of the Claimant or that this undermined the Respondent's case, that the reason for dismissing the Claimant was redundancy, for the reasons given.

114. I was satisfied that there was, as it has been termed, a 'financial crisis' for the Respondent and concluded that the governing body, when approving the decision to commence a redundancy process and which included a decision to remove Spanish from the curriculum did so on the same evidence presented during this hearing, namely that the interest from pupils in studying Spanish at GCSE following an option trawl was low.

115. I was therefore satisfied that the Respondent had demonstrated that it had genuine grounds to justify the decision to make redundancies and that the decision to dismiss the Claimant was also genuinely on the grounds of redundancy which is a potentially fair reason for dismissal.

Overall Fairness

Pool for selection

116. With regard to the pool for selection, in this case I had found that:

a. the Claimant was incapable of teaching A level French;
b. the Claimant was not experienced in teaching French above Key Stage 3 and had not taught French above Key Stage 3 i.e. GCSE French;
c. that Lisa Burgess was also Head of Department and would not have had the capacity to teach the A level French course without support
d. that support was provided by Robin Edwards who assisted in the teaching of all pupils in French, including and up to A level. He also taught Welsh, a subject that the Claimant was unable to teach at any level.

117. On the basis of those findings, I concluded that it was not outside the range of reasonable responses for the Respondent to treat the Claimant as being in a pool of one and to take the view that there was no need for the pool to be widened and to then apply any form of objective selection criteria. I was satisfied that the Respondent had not acted unreasonably in placing the Claimant in a selection pool of just one.

118. In reaching that conclusion, I considered whether other groups of employees were doing similar work to the Claimant, whether others' jobs were interchangeable and whether the selection unit was agreed with any union. I was not persuaded that this was a case where the roles were interchangeable for the reasons given, most significantly the Claimant's inability to teach A level French.

119. Whilst some employers might have taken the decision that they would have widened the pool and then applied selection criteria, this did not in my mind render the decision that this Respondent took, unreasonable. I was satisfied that the Respondent had applied its mind to the pool for selection and acted from genuine motives and in turn that the decision to have a selection pool of just one employee, namely the Claimant, fell within the range of reasonable responses for the Respondent to have taken.

120. As Robin Edwards also taught French up to and including A level and Welsh (a subject that the Claimant could not deliver,) I did not consider that the Respondent's failure to consider bumping Robin Edwards into a redundancy in favour of the Claimant, to be unreasonable or led to any unfairness to the Claimant.

Consultation

121. Whilst there was no documentary evidence of the option pre-trawl documents, and as such no documents were provided to the Claimant at any time, the Claimant was verbally informed of the results of the pre-trawl at the first formal consultation meeting on 5 March 2019. The Claimant had, but did not take the opportunity, at either the meeting on 5 or 25 March 2019, to challenge the Respondent's position that Spanish had not been favoured as an option by the pupils as part of that trawl. Whilst I had accepted that he had raised this in his initial meeting with the Warden, on 1 March 2019, there was no evidence that he had raised this again as part of the formal consultation meeting. He had the opportunity yet did not do so.

122. I accepted that the consultation process had not given the Claimant the opportunity to address concerns that had been shared with Anna Sandford of Lisa Burgess' concerns regarding the level of the Claimant's competency to teach Key Stage 3 French. However, the Claimant had admitted that he was unable to teach A level French and had not taught GCSE French. I did not consider that this failure led to any unfairness to the Claimant or would have likely resulted in any different conclusion to the consultation.

123. During the consultation process the Claimant had the opportunity to challenge the pools for selection and this was raised by his representative at the meeting on 5 March 2019. This was considered but discounted by the Respondent and this was confirmed to the Claimant at the meeting on 25 March 2019. The Claimant had the opportunity to challenge that again on 25 March 2019, but did not do so.

124. Whilst there has been significant cross-examination in relation to the Claimant's degree certificate and in turn his expertise and knowledge, whilst I concluded that the Respondent had not explored with the Claimant his ability to teach ICT during the consultation, this did not lead to any unfairness and was not unreasonable in the context of the Respondent not having any roles in ICT at that time.

125. The Claimant was represented at both meetings by his union representative and at the end of the meeting on 25 March 2019 the Claimant's representative confirmed that the union was '*impressed with the ….way that the redundancy process had been carried out.*'. I concluded that had the union had concerns regarding the consultation process, that they had the opportunity to raise such concerns and did not.

126. I was not persuaded that the references in the documentation before me, to removing a full time equivalent role of around the Claimant's income value, evidenced some form of pre-determination. I accepted that the figures were average teaching salary figures and did not conclude that there was any form of pre-determination to dismiss the Claimant rendering the consultation a sham.

127. Overall I concluded that whilst criticisms could be made of the redundancy process, the consultation process did not fall outside the range of reasonable responses.

Suitable alternative employment/Disciplinary

128. There was no role in ICT during the consultation period that was available for consideration as suitable alternative employment for the Claimant. Whilst a role in ICT did become available after Mike Jenkins resignation in the latter part of May 2019, and the Claimant had expressed an interest in the role, he made no application for the job when it was advertised by the Respondent.

129. The Respondent had made it clear to all staff affected by redundancy that the process that they would be following regarding alternative employment,

was that all new posts would be open to all staff directly affected to apply and that it was up to the individual to demonstrate that they met the relevant criteria set out in the person specification when competing an internal application form [276]. The Claimant did not apply and so it was not unreasonable for the Claimant to not have proactively considered this position for the Claimant and did not lead to any unfairness in the process.

130. Whether the Claimant possessed the necessary skills, qualifications and/or experience, would have been addressed by the Respondent had he made such an application. Whilst I concluded that the Respondent did appear to have made a number of assumptions regarding the Claimant's ability to teach ICT and concluded that assumptions had been made rather than explored with the Claimant, this had not impacted on the process or fairness of the process.

131. The only alternative employment, that was available during the consultation period and up to the date of termination, was a limited part time role (0.35) teaching Spanish to existing pupils that was being covered by an agency teacher in the Claimant's absence.

132. This role was never formally offered to the Claimant at any point, or discussed further, either at the second consultation meeting on 25 March 2019 or indeed at any point up to the suspension of the Claimant on 20 May 2019. The letter confirming the outcome of the redundancy consultation had confirmed that the Respondent had no suitable alternative work and made no reference to this part time role.

133. Equally, the Claimant did not raise the possibility of taking this role on at any time after 25 March 2019, despite the Claimant in his witness statement (paragraph 50) stating that his plan to avoid the redundancy was to undertake the part-time hours and continue searching for other part-time work to supplement his overall income. I was not persuaded that this was the case. Had the Claimant wanted to undertake this role on a part time basis, I concluded that he would likely have raised this after the formal consultation ended in the latter part of March or when he had received his termination letter. He did not.

134. This alternative work did not form part of the without prejudice discussions and appears to have not been addressed by either party during those discussions.

135. I did not conclude that the suspension, or later invite to the disciplinary hearing, was contrived as leverage to support a dismissal of the Claimant, whether to remove redeployment opportunities or to contrive a situation from which the Claimant might be summarily dismissed, as has been believed by the Claimant (witness statement paragraph 62). I would repeat my conclusion in relation to the reason for dismissal, that on the evidence before me I was not persuaded to come to the conclusion that Anna Sandford (or indeed Mr Bedford) had any agenda set to remove the Claimant, whether influenced by Guy Ayling or not.

136. I concluded that it was a reasonable response for the Respondent to suspend the Claimant whilst they investigated the allegations that were before them following the discussion with the pupil regarding the showing of the film, 'Troy' . There had been a reasonable explanation from Anna Sandford, as the Respondent's safeguarding officer, on why she did not consider that the matter needed to be referred to the Local Authority Designated Officer on Safeguarding. This did not undermine the Respondent's concerns regarding the Claimant's conduct in my view and that their management of the concerns including inviting the Claimant to a disciplinary meeting, was a reasonable response.

137. I concluded that the tenor of the Respondent's without prejudice correspondence, in terms of referring to the potential of a referral to the Disclosure and Barring Service, had to be considered in the context of the correspondence with the Claimant's solicitor's correspondence and her query as to what incentive the Claimant had to enter into the settlement agreement. Whilst I did conclude that the intention behind such a reference was likely to be to act as leverage for the Claimant to agree and sign the settlement agreement, I did not conclude that the disciplinary investigation itself was in any way contrived to remove the Claimant from employment generally or to reduce redeployment opportunities.

138. However, I did conclude that a consequence of the disciplinary process, and in turn the without prejudice discussions that followed, was that alternative employment was not explored during this period.

139. In the unusual circumstances of this case, which included the specific without prejudice proposals and discussions, and the failure of the Claimant to also apply for or seek the revisit the part time role as a possible opportunity, I concluded that it was not unreasonable for the Respondent to conclude that the Claimant would not have accepted the role.

140. Taking into account all the circumstances of this specific case, I concluded that the failure to offer the Claimant the part time role was not unreasonable and did not lead to unfairness to the Claimant.

141. On that basis I concluded the complaint of unfair dismissal was not well founded and should be dismissed.

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Employment Judge R Brace

Date: 21 January 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 26 January 2021

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FOR EMPLOYMENT TRIBUNALS