Neutral Citation Number: [2019] 2403 EWHC (ChD)

Case No: CH-2018-000216

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
APPEALS (ChD)

Business and Property Courts of England & Wales
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 13 September 2019

Before:

ADAM JOHNSON QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between:

Gail Downe	**Appellant**
- and -	
(1) Universities Superannuation Scheme (USS)	**Respondents**
(2) The Society of College, National and University Libraries (SCONUL)	

- -
- -

Simon Harding for the **Appellant**
Andrew Short QC (instructed by **Walker Morris**) for the **Second Respondent**
The First Respondent was not represented and did not appear

Hearing dates: 12 July 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR ADAM JOHNSON QC

Adam Johnson QC :

Introduction

1. This is an appeal under section 151(4) of the Pension Schemes Act 1993 from a Determination of the Pensions Ombudsman dated 18 July 2018 (Ref: PO7946).

2. The Appellant, Ms Downe, is a member of the First Respondent, the Universities Superannuation Scheme ("*USS*"). Until 16 November 2012 Ms Downe was employed by the Second Respondent, the Society of College, National and University Libraries ("*SCONUL*"). Her employment was terminated on 16 November 2012, on terms which are recorded in a compromise agreement ("*the Compromise Agreement*") dated 30 November 2012.

3. This appeal concerns the question whether the termination of Ms Downe's employment was "*by reason of redundancy*", within the meaning of Rule 11.2.1 of the Consolidated Rules of the USS ("*the USS Rules*"). That is significant to her because, if it was, then under the Rules she will be entitled to an *unreduced* pension from the date on which her employment terminated. It is significant to SCONUL because, if Ms Downe is entitled to an unreduced pension immediately from the date of termination, then SCONUL will have to bear the additional costs involved in paying that unreduced pension in the period up to Ms Downe's expected retirement age of 65. The Ombudsman in his Determination concluded that "*Rule 11.2 was not satisfied*", and that therefore Ms Down was *not* entitled to an unreduced pension. Ms Downe argues that that conclusion was wrong. SCONUL seeks to uphold it.

Background

4. Rule 11 of the USS Rules provides as follows (the words underlined are defined terms):

> *"11.* ***EARLY RETIREMENT AT THE INSTANCE OF THE EMPLOYER***
>
> ***11.1 Members to whom this rule applies***
>
> *This rule applies to a member:*
>
> *11.1.1* *who has 5 or more years' pensionable service ...;*
>
> *11.1.2* *who has attained minimum pension age;*
>
> *11.1.3* *has not in respect of that eligible employment become entitled to [another pension]; and*
>
> *11.1.4* *to whom rule 11.2 ... applies.*

> ***11.2 Applicable circumstances of retirement***
>
> *This rule applies to a member:*
>
> *11.2.1 whose eligible employment is terminated by reason of redundancy; or*
>
> *11.2.2 whose employment is terminated in the interests of the efficient exercise of the institution's functions ... and the employer gives its consent to payment of the benefits; or*
>
> *11.2.3 who has attained age 60 and retires with the consent of the employer (such consent not to be unreasonably withheld).*
>
> ***11.3 Benefits***
>
> *A member to whom this rule applies may elect to receive from the day after the date of retirement [an unreduced pension]."*

5. The relevant definition of "*redundancy*" is in Rule 1.1 of the USS Rules, and provides as follows:

> "*'Redundancy' means cessation of eligible employment attributable wholly or mainly to:*
>
> *(a) the employer ceasing, or intending to cease, to carry on the activity for the purpose of which the member was employed, or ceasing, or intending to cease, to carry on that activity in the place in which the member worked; or*
>
> *(b) the requirements of that activity for employees of the employer to carry out work of a particular kind, or for employees of the employer to carry out work of a particular kind in that place, ceasing or diminishing, or being expected to cease or diminish*."

6. As Mr Short QC pointed out, this definition follows closely the language of the Employment Rights Act 1996 ("*ERA*"), section 139, although importantly the latter is concerned with the case of an employee who has been "*dismissed by reason of redundancy*" (my emphasis). The USS Rules do not refer to dismissal. I will return to the significance of this point below.

7. The Ombudsman's Determination summarised the material facts at paragraphs 5-32. For present purposes, the key points may be briefly stated.

8. During the course of her employment Ms Downe carried out a number of roles, including in particular accounts and events management.

9. Unfortunately, Ms Downe had a poor professional working relationship with her manager, Mrs R, who joined SCONUL as Executive Director in 2010. Ms Downe went on long term sick leave with stress-related illness on 27 April 2012. SCONUL subsequently investigated the difficulties between her and Mrs R and produced an investigation report.

10. On 1 August 2012, Ms Downe met with SCONUL's human resources adviser ("*HR*"). HR suggested "*in the most general of terms*" the possibility of a "*without prejudice*" conversation and an "*amicable separation*" if she felt unable to return to work.

11. In the event, Ms Downe did not take up that offer and went back to work in September 2012 on a phased return basis; but then in emails dated 11 and 16 October 2012, she informed HR that she was again having problems with Mrs R. HR responded on 17 October and said (amongst other things):

> "*It is our intention to make sure that you do feel supported during your phased return and, whilst arrangements have not been put in place very swiftly, I hope that the coaching arrangements will provide you with very specific and direct support.*"

12. On 19 October 2012, SCONUL sent Ms Downe an email about an intended restructuring. Before me, Mr Harding placed particular reliance on this email. The sections quoted in the Decision of the Ombudsman are as follows:

> "*At yesterday's Board meeting, Mrs R put forward a paper for approval setting out the basis for a new structure. The proposal is to create a structure which will be aligned to the strategy within the current budget and with no overall reduction in staff numbers.*
>
> *The main differences will be in the focus of the new roles within the structure and a change in the balance between the work carried out internally as opposed to being outsourced.*
>
> *The Board gave its approval to this proposal and over the coming month, Mrs R supported by [HR] … will be putting together the details of the new structure in terms of job descriptions … Once that work has been completed, this will be shared with you and Ms N and there will be a period of consultation with both before final decisions are made. During the consultation period you will be fully able to engage with the process and ask any questions and make any suggestions you have.*
>
> *At this stage, we are not in a position to give you any more detail on what new posts there would be under the new structure and the implications for you personally.*"

13. Shortly after that, on 31 October 2012, Ms Downe's legal representative Mr Harding contacted HR to discuss possible severance terms (I should explain that Mr Harding advised Ms Downe at the time of termination of her employment, and also appeared before me on this appeal). Following a telephone discussion, Mr Harding sent HR an email in which he referred to Ms Downe feeling aggrieved at the way she had been treated by Mrs R, and said that she would want any settlement package to reflect her experiences in some way "*as consideration of her not bringing an employment tribunal claim were the process to make her redundant and her to still feel aggrieved*".

14. Severance terms were negotiated and the Compromise Agreement entered into on 30 November 2012. It referred to a number of claims which Ms Downe "*has or may have*", including "*any claim for redundancy under part XI ERA*". That is a reference to Part XI ERA 1996, which contains provisions relating to statutory redundancy payments, including section 139 referred to above. Under clause 2.1 of the Compromise Agreement, SCONUL agreed to make a payment to Ms Downe "*without admission of liability*", part of which was non-taxable and was described as referable to "*Enhanced Redundancy Pay*".

15. In January 2013, Ms Downe decided to apply for an unreduced pension. This was after she had received a USS booklet saying that she would be entitled to an unreduced pension in certain circumstances, including if she had been made redundant. Mr Harding contacted HR again and asked whether HR could confirm that the reason for the Compromise Agreement *"... (reflected with the enhanced redundancy payment) was redundancy*". HR replied and said no:

> "*I am sorry but I cannot confirm* that *the reason for [Ms Downe's] compromise agreement was redundancy. She was not made redundant. If you recall, you initiated the process by calling me on 31 October 2012 and explaining that [Ms Downe] wished to leave. You set out a suggested framework for a package which included a sum that you called a redundancy payment and we were happy to progress our discussion with you using that sort of short hand for payments but that does not mean that [Ms Downe] was redundant*".

The Ombudsman's Determination

16. The parties' submissions are set out in some detail by the Ombudsman at paragraphs 33-78 of his Determination.

17. Ms Downe's position (broadly) was that the history of her employment going back to October 2010 showed that, by October 2012, the implications for her were not in doubt – i.e., that SCONUL had in fact reduced, or expected a reduction in, the type of work for which she was employed (paragraph 70). That history included a document produced by Mrs R in February 2011 which proposed a complete restructuring and recommended making her post and most of her functions redundant (paragraph 70). It also included a decision by the Board on 4 October 2011 permanently to outsource events management (paragraph 70). Later when she was made ill by the persistent aggravation an agency accountant was taken on (paragraph 70). After her return to work in mid-October 2012 she had no functions left (paragraph 70). Moreover, Mrs

R had confidentially presented a paper in September 2012 that reinforced SCONUL's commitment to outsource accounts (paragraph 70); and before that in August, HR had informed her that "*accounts work may be something that could change quite radically quite quickly*" (paragraph 70). Clearly, therefore, by the time of the 19 October email, a decision had been taken not to return accounts to her, and to keep the agency accountant in place as part of the new structure (paragraph 70). SCONUL had no genuine intention to retain her in employment, because if it had then the remedial measures recommended in the investigation report should have been implemented (paragraph 64). The word "*redundancy*" had been used in the severance negotiations both by HR and by her own lawyer, Mr Harding, and was referred to in relevant documents including the Compromise Agreement (paragraphs 66-67). Termination of her employment contract did not come about at her instigation or by mutual agreement; instead SCONUL had coerced her to resign and she had therefore effectively been constructively dismissed by SCONUL (paragraph 69).

18. SCONUL's position (broadly) was that Ms Downe's employment had been terminated by mutual consent following her approach via Mr Harding (paragraph 33). They accepted that a reorganisation was underway by October 2012, as identified in the 19 October 2012 email, but argued that reorganisations do not necessarily give rise to redundancy situations, and the proposal in this case involved an increase in the actual headcount because functions which had been outsourced were brought back in house (paragraph 39). At the time the Compromise Agreement was being discussed and negotiated, no decisions had yet been made about the outcome of the process and no redundancies proposed (paragraph 40). As matters turned out, no redundancies were implemented as part of the reorganisation process (paragraph 41). Mrs R's February 2011 proposal document was confidential and was never presented to the Board, and by late 2012 was obsolete (paragraph 44). As to the agency accountant, that person was recruited on a temporary basis only to provide cover during Ms Downe's sickness absence to ensure that this key role (which was never outsourced) was carried out (paragraph 42). In those circumstances, the impetus for Ms Downe approaching SCONUL via HR was really that she had a difficult relationship with Mrs R, and had incorrectly assumed that the proposed reorganisation would inevitably lead to her redundancy (paragraph 43). Consequently, Ms Downe's employment was terminated by mutual agreement and not because of any redundancy situation (paragraph 50). The inclusion of an "*Enhanced Redundancy Payment*" in the Compromise Agreement was at Mr Harding's initiative, and SCONUL went along with it because it was happy to support a process that would allow Ms Downe a dignified exit (paragraph 35). The label had been used to maximise the tax-free slice of the severance payment, and "*redundancy*" was not used as the reason for termination of Ms Downe's employment.

19. Against that background, the Ombudsman set out his findings a paragraphs 79-101. At paragraphs 79-84 he said as follows:

> *"**Conclusions***
>
> *79. [Ms Downe's] complaint centres on the reason for the termination of her employment with SCONUL. If [Ms Downe] had been made redundant by SCONUL on 16 November 2012 for the purposes of the USS Rules, she would be eligible to receive an immediate unreduced pension from the USS.*

> *80. SCONUL contend that as [Ms Downe] was not dismissed but left by mutual agreement, her leaving was not at its instance. As there was no dismissal, SCONUL says that the reason for termination was therefore not redundancy as defined in Rule 11 of the USS Rules.*
>
> *81. Rule 11 is titled: 'Early retirement at the instance of the employer'. Rule 11.2 allows for receipt of an unreduced pension if 'eligible employment is terminated by reason of redundancy'. Redundancy is a defined term and I do not think its definition precludes termination by agreement. Unlike the redundancy definition in Section 139 of the Employment Rights At 1996, the definition in the USS Rules does not use the word 'dismissal'.*
>
> *82. No formal redundancy process had started. I have seen no documents showing otherwise, which one would expect, e.g. an 'at risk letter'. Reorganisations are not always redundancies. It depends on the facts and whether the definition is met – i.e. substance not form (see [68] of Agco Ltd v Massey Ferguson Works Pension Trust [2003] EWCA Civ 1044) (Agco).*
>
> *83. Furthermore, I do not think that on 31 October 2012 [Ms Downe] had accepted the offer of a termination package that HR made on 1 August 2012. A lot of time had passed and this offer was in very general terms, although I would accept that the offer may have given [Ms Downe] the idea.*
>
> *84. Employment Tribunals often find that voluntary redundancies were dismissals (and so at the instigation of the employer). Had a formal redundancy process been underway and volunteers invited, I would say that was a dismissal/the contract ended at SCONUL's instance without any hesitation. In employment tribunal claims for redundancy payments, there is a presumption that the reason for dismissal was redundancy unless shown otherwise: s163 (2) Employment Rights Act 1996. An employee agreeing does not stop it being dismissal though: Burton, Alton and Johnson Ltd v Peck [1975] ICR 193. "*

20. The Ombudsman then referred in some detail to the *Agco* and *Birch* decisions which I describe below, and then at paragraphs 88-89 said the following:

> *"88. In reviewing the caselaw, [Ms Downe's] case seems to me to be comparable to the 2001 'redundancies' in*

> *Agco and the hypothetical example in Birch and therefore not at SCONUL's insistence.*
>
> *89. I must consider therefore, whether there was any coercion on [Ms Downe] such that the termination may be treated as at SCONUL's insistence."*

21. After describing the circumstances surrounding Ms Downe's return to work in 2012, the Ombudsman then set out his conclusion on the coercion question at paragraphs 95-99:

> *"95. In my view, if SCONUL were looking to make [Ms Downe] redundant in the near future, it would not be trying its best to retain [Ms Downe] in its employment.*
>
> *96. It was somewhat unfortunate that the announcement about a possible restructure at SCONUL was made so soon after [Ms Downe] had expressed her concerns and before the positive effects of the arrangements being put in place could be felt by [Ms Downe] at work. In my view, [Ms Downe's] perception that nothing had changed on her return was chiefly responsible for her belief that the proposed reorganisation would ultimately lead to her redundancy.*
>
> *97. In my opinion, SCONUL would have done its best to secure alternative employment for [Ms Downe] following the restructure and her belief that she would inevitably be made redundant cannot be considered as coercion.*
>
> *98. [Ms Downe's] decision to ask Mr Harding to contact HR in order to discuss the possibility of signing a Compromise Agreement based on her flawed perception that she was going to be made redundant prevented SCONUL from trying to match her to one of the new posts in the organisation following the restructure.*
>
> *99. On that basis, I consider that Rule 11.2 was not satisfied because [Ms Downe] instigated the termination of her employment and there was no coercion on SCONUL's part to instigate termination."*

22. His overall conclusion, therefore, was that Ms Downe was not made redundant and he declined to uphold her complaint.

The Appeal and the Parties' Submissions

23. The appeal jurisdiction under section 151(4) of the Pension Schemes Act is a narrow one. It is limited to an appeal "*on a point of law*". In *Dollond* v. *The Trustees of the BTG Pension Fund* [2011] EWHC 1373 (Ch), Norris J. at [30] gave guidance on what that means:

> "*I must first consider my task on the appeal. Section 151 of the Pension Schemes Act 1993 treats the Ombudsman's determination as final and binding on Mr. Dollond, subject only to an appeal to this court on a point of law; the factual conclusions based on evidence or inference or on judicial notice of an experienced specialist tribunal are not open to challenge in this court. The burden lies on Mr. Dollond, and lay on him before the Ombudsman, to establish the relevant evidential foundation. In this he had a free run because the Trustees were not invited to contribute any evidence to the process or to respond to the evidence which Mr. Dolland had adduced. On this appeal what I must look for is for a fault in the legal analysis, or alternatively to try and identify a factual conclusion for which there is simply no evidence at all or which is based on an inference from material which, in truth, inexorably points to the opposite conclusion (so that the finding is 'perverse').* "

24. At [31] of his judgment, Norris J. went on to quote the following passages from the judgment of Mummery LJ in *Wakelin* v. *Read* [2000] Pens. L.R. 319:

> "*Under Section 151(4) there is an appeal to the High Court from a determination or direction of the Ombudsman 'on a point of law'. There is no appeal on fact ... It is irrelevant that the High Court or the Court of Appeal would have taken a different view from him on the evidence revealed in his investigation. The Ombudsman is the sole judge of fact and he can only be corrected on errors of law.*
>
> *The only question for the High Court and for this court, on appeal from the High Court, is this: is there an error of law in the determination or direction of the Ombudsman? In answering that restricted question the appellate court should be astute not to entertain appeals on points of fact dressed up as points of law ... In this exercise the written statement of the determination must be read broadly and fairly. The findings of fact and the reasons for the determination should not be subjected to minute, meticulous or over-elaborate critical analysis in an attempt to find a point of law on which the disappointed party to the reference can appeal.*"

25. Following receipt of the Ombudsman's Decision, Ms Downe filed an Appellant's Notice supported by Grounds of Appeal and a Skeleton Argument from Mr Harding dated 14 August 2018. By Order dated 14 November 2018, Fancourt J. granted Ms Downe's application for permission to appeal, but limited (paragraph 1 of the Order) to the following reasonably arguable grounds of appeal:

> "*(a) that the Ombudsman took too narrow an interpretation of 'redundancy' for the purposes of rules 1.1 and 11.2.1 of the Scheme Rules by addressing whether or not a formal redundancy process had started or whether the termination of the Appellant's employment was at SCONUL's instigation or the Appellant was coerced into the Compromise Agreement;*
>
> *(b) the wording of the Compromise Agreement should have led the Ombudsman to conclude that the Appellant's eligible employment was terminated by reason of redundancy within the meaning of rule 11.2.1*."

26. By paragraph 2 of Fancourt J.'s Order, permission to appeal was refused on all other grounds identified in the earlier Grounds of Appeal and Skeleton.

27. Before me, the main thrust of Mr Harding's arguments was as follows:

i) The reorganisation flagged by SCONUL, as set out in the email of 19 October 2012, has all the features of a redundancy process. It talks about a "*new structure*" and "*new roles within the structure*". That overall impression is reinforced by the Outline Process and Indicative Timetable, attached to the email, which refers to "*Preparation of job descriptions*" and to there being a period of consultation leading to implementation of the intended new structure in January 2013.

ii) In light of those matters, the Ombudsman was simply wrong to conclude in his paragraph 82 that *"[n]o formal redundancy process had started*", and that he had "*seen no documents*" showing that one had. Those conclusions involved either a misdirection or were perverse on the available facts.

iii) The Ombudsman's emphasis in paragraphs 88-89 on the questions whether termination of Ms Downe's employment was "*at SCONUL's insistence*", or was the product of "*coercion*" on Ms Downe, had deflected the Ombudsman's attention from the correct legal test. The correct test for determining redundancy is that set out in the definition in USS Rules, Rule 1.1, and that test says nothing about "*insistence*" or "*coercion*". Instead, that test requires one to analyse whether the requirements of the employer have changed, or are expected to change, in one or other of the ways identified; and if so, to assess whether the cessation of employment by the employee was wholly or mainly attributable to that change or expected change. The Ombudsman had not

properly addressed those issues, including by reference to the terms of the Compromise Agreement.

28. Mr Short QC, for SCONUL, sought to uphold the Determination of the Ombudsman. His main points were:

i) The Ombudsman's conclusion that no formal redundancy process had started was a finding of fact, as to which no permission to appeal had been given by Fancourt J., and which in any event was in no sense perverse.

ii) As to the Ombudsman's focus on the "*instigation*" and "*coercion*" questions, what the Ombudsman was doing was looking in the round at why Ms Downe's employment had terminated; and although he may not have spelled it out in so many words, his approach and findings are consistent with the idea that he had the test under the USS Rules in mind, and indeed he made a number of findings of fact which show he did and that it was not satisfied.

iii) The Compromise Agreement says nothing about the reason for termination of Ms Downe's employment. The payment of "*Enhanced Redundancy Pay*" was expressly "*[w]ithout admission of liability*", and so tells one nothing about why Ms Downe's employment was actually terminated.

The Law

Section 139 ERA: requirement for "*dismissal*"

29. In order properly to understand the Ombudsman's Determination, it seems to me important to bear in mind certain features of the concept of "*redundancy*" as it is expressed in the employment legislation.

30. Section 139 ERA deals with the case where an employee has been *"dismissed by reason of redundancy*" (emphasis added). Section 139 provides as follows (the added emphasis is mine):

> *"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
>
> *(a) the fact that his employer has ceased or intends to cease -*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business –*
>
> *(i) for employees to carry out work of a particular kind, or*

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

31. It is thus an independent requirement of an award under section 139 that there should have been a dismissal. This is so even if there exists what might by way of shorthand be described as a *redundancy situation* (i.e., even assuming that one or other of the situations described at section 139(1)(a) or (b) exists). There is no requirement under the USS Rules for there to have been a "*dismissal*."

When is there a "*dismissal*"?

32. The requirement under section 139 and its predecessors for there to have been a "*dismissal*" has given rise in some cases to problems of classification. Is there a *dismissal* if the redundancy arises as a result of a process which is voluntary or consensual?

33. The Courts have answered this question by reference to the definition of "*dismissal*", which focuses on whether the contract of employment was terminated *by the employer*. The emphasis is therefore on *who* was in substance responsible for the termination.

34. An example is *Burton, Allton & Johnson Ltd* v. *Peck* [1975] ICR 183. There, the employee was absent from work on the "*sick list*" for a substantial period of time. While he was away his work was shared out amongst other employees, and he was told by the employers that it would be in his interests to accept redundancy. On his return to work he was given no work and no pay and was sent home, in the expectation that he would receive a redundancy payment. When he later made a claim, the point was taken against him that on the evidence he was only too willing to be dismissed on the ground of redundancy and, that being so, there had been a parting of the ways by mutual consent rather than a unilateral act of dismissal by the employer.

35. That argument was rejected by Griffiths J. on appeal from the employment tribunal. The relevant definition of "*dismissal*" was in what was then section 3(1)(a) of the Redundancy Payments Act 1965, and required termination of the contract of employment to be "*by the employer*". Griffiths J. held that in substance the employee's contract of employment *had* been terminated by the employer, notwithstanding that the employee effectively agreed to his redundancy. He said, at p. 198C-D:

> *"It must be appreciated that it is to be hoped that in the large majority of cases where a man is made redundant, it will be effected after discussions and where both parties are in agreement that it is the best course to take. In any large organisation one expects to find that there are consultations between management and the unions to thrash out the whole redundancy situation, that the employees are then brought into*

> *the discussions and that the first to be made redundant are those who volunteer for it. One also hopes that before they are made redundant very serious efforts will have been made to have other employment ready for them. But the fact that all that is done does not prevent the dismissal, when it comes, being a dismissal within the terms of section 3(1)(a) of the Act of 1965."*

36. *Birch* v. *Liverpool University* [1985] 470, however, shows that it is equally possible for there to be *no* dismissal, even if there is a *redundancy situation*, if in substance the termination comes about not because of the actions of the employer, but as a result of a mutual agreement between employer and employee.

37. In that case, the university employer was forced by economic circumstances to make a substantial reduction in its staff. It therefore issued a number of circular letters inviting its employees to take advantage of an early retirement scheme. The two appellant employees chose to do so. In accordance with the terms advertised, their application letters were considered by the employer, which confirmed its agreement to their early retirement under the scheme. The Employment Appeal Tribunal held that in those circumstances their contracts of employment had been terminated by mutual consent, and therefore they did not qualify for redundancy payments because they had not been dismissed.

38. The Court of Appeal, construing the definition of "*dismissal"* in what by then was section 83(2) of the Employment Protection (Consolidation) Act 1978, agreed. The Court held that the definition does *not* include the case where there is in truth a termination by mutual agreement. Slade LJ said, at p. 483 E-F:

> "*In my opinion this subsection, on its true construction, is directed to the case where, on a proper analysis of the facts, the contract of employment is terminated by the employer alone. It is not apt to cover the case where, on such an analysis, the contract of employment has been terminated by the employee, or by the mutual, freely given consents of the employer and employee. In a case where it has been terminated by such mutual agreement, it may properly be said that the contract has been terminated by the employer and the employee jointly, but it cannot, in my view, be said that it has been terminated by the employer alone*" (emphasis added).

39. In the course of argument in the same case, Ackner LJ addressed a submission by Ms Cotton, counsel for the employees, that because in the background there existed a redundancy situation (i.e., because the requirements of the university for employees were expected to diminish), that made it impossible for the contracts of employment to be terminated by mutual consent. It was in response to this submission that Ackner LJ developed the hypothetical, referred to by the Ombudsman in his Determination at paragraph 87. This was as follows (per Ackner LJ at pp. 479G-480A):

> *"I put to her [Miss Cotton] the simple example of an employer who envisages at some time in the future, e.g. because of new technology, the need to slim down his workforce and makes an*

> *offer to those who are prepared to resign rather than to wait to volunteer for redundancy and supports that offer with a financial inducement which is far in excess of what is likely to be obtained under the redundancy legislation. It seems to me clear that in such a situation, assuming no question of any coercion of any kind, that if that offer is accepted there can be no question of there having been a dismissal."*

40. This focus on *who* in substance was responsible for the termination was expressly recognised by Sir John Donaldson MR in an earlier case, *Martin* v. *Glynwed Distribution Ltd* [1983] ICR 511, when he said at 519:

> "*Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who <u>really</u> terminated the contract of employment?'*" (emphasis in original).

<u>Agco Ltd v. Massey Ferguson Works Pension Trust Ltd & Ors</u>

41. *Agco Ltd* v. *Massey Ferguson Works Pension Trust Ltd & Ors* [2003] EWCA Civ. 1044, [2004] ICR 15, another of the cases relied on by the Ombudsman, was also concerned with problems of classification, but of a different kind. That case concerned the rules of a pension scheme which provided that a full pension would be available to any employee over the age of 50 who "*retires from service at the request of the employer ...*".

42. A large number of employees were made compulsorily redundant, and a smaller number took voluntary redundancy. The question was whether those who were over 50 were entitled to claim a full pension. The difficulty was that the scheme rules nowhere referred expressly to redundancy (whether voluntary or compulsory), or to dismissal. The issue was therefore one as to how such concepts, derived from the world of employment legislation, could be mapped onto the rules of a pension scheme which made no reference to them and indeed had a different structure expressed in different language.

43. By a majority, the Court of Appeal held that the phrase "*retires from service at the request of the employer*" suggested a consensual event distinct from a *dismissal*. Therefore, cases of *compulsory* redundancy were excluded. However, cases of *voluntary* redundancy fell within the rule. That was because, although technically they involved a dismissal, the overall process of an employer seeking volunteers for redundancy was in another sense a consensual one (Rix LJ at [68] described "*the very language of voluntary redundancy ... as an oxymoron*"), and moreover the practicalities of an employer seeking volunteers would involve him having to "*take the first step and issue his invitation or make his request*" (per Rix LJ at [70]), and that was apt to describe a situation which came about "*at the request of the employer*."

44. In the course of his judgment, Rix LJ drew attention to the difficulty of having to transpose concepts derived from the world of employment law onto the framework of the scheme rules, an exercise which was made doubly complicated by the varied

circumstances in which in practice redundancies may occur. At [68] Rix LJ gave two examples:

> *"In 1998, however, it appears from notices dated 29 October 1998 that the employer stated plainly that if 'sufficient volunteers are not forthcoming ... then a selection process will be implemented to effect compulsory redundancies'. In 2001, on the other hand, a further round of redundancies seems to have been initiated by the employees themselves, for a notice issued in May 2001 stated that in response to a trade union generated request for a 'voluntary early retirement/redundancy programme to facilitate a return to full-time working', the employer was willing to offer a lump sum of £10,000 for those who chose to leave. That 2001 round of reductions in the payroll took place pursuant to an entirely consensual scheme outside the statutory redundancy framework, since those employees who took up the offer were not dismissed."*

45. The second example, of the 2001 "*redundancies*", is the one referred to by the Ombudsman at paragraph 88 of his determination. The reference by Rix LJ to the relevant employees not being dismissed reflects the result in the *Birch* case, which Rix LJ had referred to earlier in his judgment as supporting the proposition that " ... *the termination of employment may be arrived at, on terms, by mutual consent in such a way as not to involve dismissal*" (see *Agco* at [6]).

Redundancy: *Murray* v. *Foyle Meats*

46. Aside from the issue of *dismissal*, other problems of interpretation have arisen in connection with the definition of *redundancy* in section 139 ERA and its predecessors. Until about 1997, one controversial question affecting section 139(1)(b) was about how to approach the case where the employer's requirements for employees to carry out work of a particular kind have diminished (or were expected to diminish), but where under their contracts of employment the affected employees could be redeployed elsewhere. Two schools of thought developed: the "*contract*" test, which suggested there was no redundancy if the employee could be redeployed elsewhere, even if the role he habitually performed was made redundant; and the "*function*" test, which focused attention on what the employee actually did and so suggested the opposite.

47. As a result of two important decisions in the late 1990s, however, a fresh approach was adopted and both the "*contract*" test and the "*function*" test were abandoned. The two decisions were *Safeway Stores plc* v. *Burrell* [1997] ICR 523 (EAT), and *Murray* v. *Foyle Meats* [1999] ICR 827 (a decision of the House of Lords on the meaning of the then current Northern Irish legislation, which was in materially the same terms as section 139 ERA). In the latter case, Lord Irvine of Lairg LC described the new approach as follows at p. 829G-H:

> "*My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the*

> *requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation."*

48. Applying this approach, the terms of the employee's contract of employment are not relevant at all to the first question. They may be relevant to (but not determinative of) the second (causation) question, but only in the sense that if an employee can be deployed elsewhere and if an offer to redeploy him is made, it may be more difficult as a matter of causation for him to show that his dismissal was "*attributable wholly or mainly*" to the underlying redundancy situation (i.e., to the fact that the requirements of the business have diminished or are expected to), rather than to his own decision to leave even though alternative employment was available (see per Lord Irvine at p. 831D).

49. Looking at matters in this way, both questions are questions of fact. This explains the result in *Murray* v. *Foyle Meats* itself. There, the appellant employees had been employed in the respondent's slaughterhouse business in Londonderry. They normally worked on one of two "*killing lines*" in the slaughter hall, although under their contracts of employment they could be required to work elsewhere and occasionally did so. There was a decline in business and the decision was made to reduce the number of "*killing lines*" from two to one. The 35 appellants were selected for redundancy. They complained that they had not truly been made redundant, and therefore that they had been unfairly dismissed. The House of Lords affirmed the decision of the industrial tribunal that the reason for the appellants' dismissal *was* redundancy. At p.829G-H, Lord Irvine said:

> *"In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the applicants being dismissed. That, in my opinion, is the end of the matter."*

Discussion and Conclusions

50. It is convenient to approach the analysis by reference to the two grounds of Appeal identified in Fancourt J.'s Order.

Ground (a): interpretation of "*redundancy*" under the USS Rules

Overview

51. With respect, I have not found it entirely straightforward to interpret the Ombudsman's reasoning on this point, which I described in argument before me as somewhat compressed. Ultimately I have come to the view that he *was* in error in conducting his analysis in the way he did, and that his error was an error of law.

52. I start with the requirements of USS Rule 11.2.1, and the definition of "*redundancy*". I agree with Mr Short QC that only the second limb of the definition (paragraph (b)) can be relevant here: there is no suggestion that SCONUL was ceasing or intending to cease its *activity*, whether at Ms Downe's place of work or at all.

53. As to the second limb, this requires three questions to be determined, namely:

    i) Has the employment terminated?

    ii) Have the requirements of the employer for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

    iii) Was the termination of employment wholly or mainly attributable to any actual or expected cessation or diminution?

54. As I understood it from the submissions before me, there was no real controversy about whether that was the correct analytical framework. Nor, as I understood it, was there any controversy or issue about whether in this case Ms Downe's employment had terminated (i.e., issue (i) above).

55. It follows that the issues for the Ombudsman were issues (ii) and (iii) above. They correspond to the two factual questions posited by Lord Irvine in *Murray* v. *Foyle Meats*. Again, I do not understand this to be contested between the parties. The issue is rather whether the Ombudsman properly addressed these questions or not. Mr Short says he did; Mr Harding says he did not.

56. On my reading, the Ombudsman's Conclusions at paragraphs 79-101 do not state a clear answer to either question. It seems to me that that is because he was seeking to answer a different question, namely whether the termination of Ms Downe's contract of employment had come about at SCONUL's "*instance*" or "*insistence",* or had been *"instigated*" by SCONUL (the Ombudsman appears to me to use these different words as synonyms). In other words, he was looking to answer the question, *who* really was responsible for the termination of Ms Downe's employment? - rather than the question: looked at objectively, *what were the reasons* the Compromise Agreement came about, and more specifically, was its existence, looked at objectively, wholly or mainly attributable to SCONUL's requirements for employees to carry out work of a particular kind having ceased or diminished, or being expected to cease or diminish?

Analysis of The Ombudsman's Approach

57. I have set out above the Ombudsman's reasoning at paragraphs 79-84 of his Determination. In my judgment, the analysis in this section of whether there was in fact a *redundancy situation* is undeveloped. That is to say, beyond stating that no "*formal redundancy process had started*" at paragraph 82, there is no analysis of the intended reorganisation and what it might actually involve, and specifically of whether it justified the conclusion that SCONUL's requirements for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish. To put it another way, there is no analysis of what Lord Irvine in *Murray* v. *Foyle Meats* described as the question whether the requisite state of economic affairs existed, or not.

58. This is despite the 19 October 2012 email, which explained that the main differences under the new structure were to be " … *in the focus of the new roles … and a change in the balance between the work carried out internally as opposed to being outsourced*." In submissions before me, Mr Short placed emphasis on the fact that the

same email of 19 October 2012 stated that the new structure was intended to involve "*no overall reduction in staff numbers.*" That is true, but in my view the fact that overall numbers were expected to stay the same does not necessarily mean that no redundancy situation had arisen: paragraph (b) of the USS definition speaks of a cessation or diminution in the requirement for *employees to carry out work of a particular kind*. It therefore seems to me entirely possible for the test to be met where the overall number of employees remains the same but where the type of work required to be undertaken by those employees is expected to change. Here, as I understand it, an important part of Ms Downe's case was that just such a situation had arisen because (amongst other things) the intention was for her accounting role to be outsourced. SCONUL's position was that that was not an intended effect of the reorganisation. There was thus an issue of fact between the parties on that point, but as I read the Ombudsman's Determination, that issue was not analysed or resolved.

59. Likewise, having regard to the second of the factual questions posed by the definition in USS Rule 1.1, i.e. the question whether the employee's cessation of employment is "*attributable*" to a change in the requirements of the business, one sees no analysis in the Determination of issues which might be relevant to that question – for example, what work Ms Downe was in fact doing at the time her employment terminated; how such work might be affected (or might be expected to be affected) by the intended reorganisation; and if it was to be affected, then whether under her contract of employment Ms Downe could be required to do something else.

60. The reason these points were not addressed seems to me to be because the Ombudsman was focused instead on the question of *who* instigated the process that led to the Compromise Agreement. That may be because of the way the case was put to him by the parties. In any event, it seems to me to follow from the Ombudsman's reference in paragraph 81 to the fact that USS Rule 11 is headed "*Early retirement <u>at the instance</u> of the employer"*. The thrust of the Ombudsman's reasoning is thus to inquire: was the Compromise Agreement concluded at the *instance* of SCONUL (or at its insistence or instigation); or was it concluded at the *instance* of Ms Downe (or at her insistence or instigation), or as the result of a mutual agreement?

61. One can see this clearly from the Ombudsman's paragraph 83, where he states his finding that when Ms Downe instructed Mr Harding to telephone HR on 31 October, that was not an acceptance of the earlier offer made by HR on 1 August 2012. That conclusion is addressing the question of *who* started the process that led to the Compromise Agreement. And when at paragraph 84 the Ombudsman indicated that *"[h]ad a formal redundancy process been underway and volunteers invited, I would say that was a dismissal/the contract ended at SCONUL's instance without hesitation*", it seems to me he was addressing the same question: by analogy with the dismissal cases in the employment law context, he was asking (to paraphrase Lord Donaldson MR *Martin* v. *Glynwed Distribution Ltd)*, "*Who <u>really</u> terminated Ms Downe's contract of employment?*"

62. This view of the Ombudsman's reasoning is fortified by an examination of the later passages in his Determination at paragraphs 88-100, and in particular by the following (the emphasis is mine in each case):

i) his conclusion at paragraph 88 that: *"... Ms Downe's case seems to me to be comparable to the 2001 'redundancies' in Agco and the hypothetical example in Birch and therefore not at SCONUL's insistence*";

ii) his reference at paragraph 89 to the need to assess whether there was coercion on Ms Downe, in order to determine whether " *... the termination may be treated as at SCONUL's insistence*"; and

iii) his overall conclusion at paragraph 99 that: *" ... Rule 11.2 was not satisfied because [Ms Downe] instigated the termination of her employment and there was no coercion on SCONUL's part to instigate termination*."

63. Looking at the first of these points, the characteristic shared by both "*the 2001 'redundancies' in Agco and the hypothetical example in Birch"* is that both were examples of termination of a contract of employment by mutual agreement, in a manner which resulted in there being no *dismissal*, precisely because there was no termination of the contract *by the employer*. But expressing that conclusion does not address the separate question of whether there is nonetheless an underlying redundancy situation, and if so whether that had the relevant causative effect on the termination in issue: indeed in *Birch*, Ackner LJ pointed out expressly at p. 479 F-G that *"[t]he decision whether or not there has been a dismissal ... has to be decided before one considers whether the result of that dismissal is to entitle the employee to make a claim for redundancy payments. The two are dissociated*."

64. The same must be true here, and speaking for myself I cannot see why the idea that the Compromise Agreement was either a mutual agreement or alternatively was instigated by Ms Downe herself should necessarily be incompatible with the ideas that either (a) there existed a redundancy situation within the meaning of USS Rules, Rule 1.1, and/or (b) that such redundancy situation was the sole or main cause of the Compromise Agreement coming about.

65. The Ombudsman's assessment at paragraphs 80-99 of whether there was coercion is part and parcel of the same analysis. I think Mr Harding must be correct to say that this part of his approach was inspired by Ackner LJ's hypothetical example in *Birch*. Its relevance is as part of Ombudsman's assessment of whether the Compromise Agreement was concluded *at the instance* of Ms Downe, and was something she freely entered into; or whether in reality it was something she was forced into, and was therefore concluded *at SCONUL's instance*. However, in my judgment that is a separate matter to the questions posed by the definition of redundancy in USS Rule 1.1.

66. With respect, it seems to me that the difficulty with the Ombudsman's approach is that it places undue emphasis on the heading of USS Rule 11, i.e. "*Early retirement at the instance of the employer."* The Ombudsman appears to have elevated this descriptive language in the heading to the status of it being an independent requirement for a showing of termination "*by reason of redundancy*" under Rule 11.2.1 that the termination should have been *at the instance* of the employer. Before me, neither party argued for such a construction of the Rule, and I think they were right not to do so. Under section 139 ERA, the word "*dismissed*" in the phrase "*dismissed by reason of redundancy*" is a defined term with a particular meaning, which depends on showing there was a termination *by the employer*. But the word "*terminated*" in the

phrase "*terminated by reason of redundancy*" in USS Rules 11.2.1 is not a defined term, and to my mind the use of the word "*instance*" in the overall heading of Rule 11 does not justify including in the operation of Rule 11.2.1 any additional requirement of showing *who* instigated the termination.

67. To put it another way, it seems to me that unlike the situation in *Agco*, where the difficulty was that the framework of the pension scheme rules was quite different to that under the corresponding employment legislation, and consequently the exercise for the Court involved mapping the one onto the other, in this case the USS Rules have adopted a test for redundancy which borrows directly from the language of the employment legislation, but minus any requirement (which could quite easily have been incorporated if that was what was intended) that the employee should have been *dismissed*. The Ombudsman himself recognised this at his paragraph 81, when he said: "*Unlike the redundancy definition in section 139 of the Employment rights Act 1996, the definition in the USS Rules does not use the word dismissal*." He was correct to say that, but in my view incorrect to assume – as I think he must have done – that the use of the word "*instance*" in the heading of Rule 11 gave rise to the same or a similar requirement. Such a gloss on the language of the definition in Rule 1.1 is unnecessary: it seems to me that the draftsmen of the Rules must have intended the definition to be construed in just the same way as the corresponding language under the employment legislation, without any gloss, so as to avoid having to conduct the type of mapping exercise which was so difficult in *Agco*.

Mr Short's Submissions

68. Having set out my reading of the Ombudsman's Determination, I should comment on the points made by Mr Short in seeking to uphold the Ombudsman's conclusions. These were essentially that (1) the Ombudsman had nonetheless sufficiently well directed himself on the law, and (2) he had in any event made a number of findings of fact which sufficiently well addressed the test of redundancy under the USS Rules, and no appeal had been made (or was possible) against those findings of fact.

69. I have concluded that I cannot accept those submissions.

70. As to the first submission, Mr Short relied on the Ombudsman having directed himself at paragraph 81 to the fact that termination of Ms Downe's employment by agreement did not preclude a finding that it was also terminated by reason of redundancy. Mr Short described that as a correct statement of the law, by reference to the employment cases such as *Burton, Allton & Johnson Ltd* v. *Peck* (referred to by the Ombudsman at paragraph 28), which establish that there can still be a dismissal by reason of redundancy even if the employee agrees to it. I of course agree. But there is no getting away from the fact that after making these remarks, the Ombudsman directed his attention very clearly to the question: at *whose instance* was the Compromise Agreement concluded? To put it another way, the Ombudsman may have correctly assumed that the mere fact that there was an agreement was not determinative of the question he had to address. But he also assumed (incorrectly in my view) that the issue of *at whose instance* the agreement came into being *was* determinative, and that the test for redundancy under the Rules could be met only if it were shown that the agreement was concluded *at the instance* of SCONUL, and not if it was concluded at the instance of Ms Downe or by mutual agreement (as in the case of the "*2001 'redundancies' in Agco or the hypothetical example in Birch*.") I can see

no other sensible way of reading the Ombudsman's conclusion at his paragraph 88, or of interpreting the significance he placed in paragraph 89-99 on analysing whether Ms Downe acted under coercion.

71. Next, Mr Short defended the Ombudsman's finding at paragraph 82 that *"[n]o formal redundancy process had started*" as a finding of fact, and defended the Ombudsman's self-direction in the same paragraph that "*[r]eorganisations are not always redundancies. It depends on the facts."* He went on in his Skeleton at paragraph 29 to say that the Ombudsman did not direct himself that he could *only* find that Ms Downe's employment was terminated by reason of redundancy if there had been a formal redundancy process.

72. As to these points, I think Mr Short is correct on all counts, but that still does not answer Mr Harding's basic objection. The reason is that I cannot see in the Ombudsman's Determination any reasoned assessment by the Ombudsman of the question whether the reorganisation, even if in its early stages and therefore falling short of a *formal redundancy process*, nonetheless *still* met the test for redundancy in the USS Rules, or not. To put it another way, I think Mr Short is correct that in stating his finding about there being no formal redundancy process, the Ombudsman left that question open; his error though was in not going on to answer it.

73. In his paragraph 84 the Ombudsman found that, had a formal redundancy process been underway and volunteers invited, that would have made a difference to his analysis, and in paragraphs 84-87 he referred to the three key employment law authorities analysed above, namely *Burton, Allton and Johnson Ltd v. Peck*, *Birch* and *Agco.* At paragraph 28 of his Skeleton Mr Short submitted that taken together these points demonstrate that the Ombudsman "*was considering whether there was such a process*."

74. Again, that seems to me to be correct, but it does not go far enough. The Ombudsman may have been "*considering*" whether there was a redundancy process, but he did not set out any clear finding as to whether that process met the definition in the USS Rules or not. He only went as far as saying that it had not progressed as far as SCONUL calling for volunteers, but that does not answer the question whether, in line with the definition, a redundancy situation had arisen.

75. Finally, before coming on to Mr Short's further point about the factual findings made by the Ombudsman, he also submitted that there was no error of law in the Ombudsman considering whether Ms Downe left at the instigation of SCONUL (and relatedly, whether there was an element of coercion), because, as he put it (Skeleton at paragraph 31): " … *had the appellant left at the instigation of SCONUL, it could have amounted to a redundancy if SCONUL had instigated the departure because it intended or expected a reduction in the number of employees carrying out work of a particular kind*" (emphasis added). Once more, that is true, but only carries one so far. Saying that a finding of instigation by SCONUL *could* have amounted to redundancy *if* the underlying circumstances showed that a redundancy situation existed only begs the question whether one did or not. That is a separate and analytically distinct question. In any event, the Ombudsman's finding here was not that *SCONUL* had instigated the Compromise Agreement, but that *Ms Downe* had

done so. It does not seem to me to follow from that finding that there was necessarily *no* underlying redundancy situation, or that, if there was, that the Compromise Agreement was not wholly or mainly attributable to it.

76. That leads me on to the remaining issue here, which is whether notwithstanding his focus on *instigation/coercion*, the Ombudsman did enough in terms of his findings of fact to mean one can be satisfied the test in the USS Rules was met.

77. Mr Harding's basic submission on this point was that, by looking at the issue of redundancy solely through the prism of *instigation/coercion*, the Ombudsman had asked the wrong question and therefore conducted the wrong analysis. Mr Short's submission (Skeleton at paragraphs 30-32) was that although he looked at *instigation/coercion*, the Ombudsman did not in fact limit himself to considering whether Ms Downe jumped before she was pushed: his analysis also went on to examine *why* her employment came to an end, and he made findings of fact as to the reasons for the termination. The particular findings relied on by Mr Short are taken from paragraphs 94-99 of the Determination, and are described by Mr Short at paragraph 32 of his Skeleton as follows:

    i) SCONUL was not looking to make Ms Downe redundant in the near future, it was trying its best to retain her in its employment by putting in place (albeit slowly) the measures to support her phased return to work. It would have done its best to secure alternative employment following the restructure.

    ii) Ms Downe's perception was that nothing had changed following her return to work and that she was still being treated unfairly by Mrs R. This was chiefly responsible for her flawed belief that the proposed reorganisation would lead to her redundancy.

    iii) Ms Downe instigated the termination of her employment because of her flawed belief that the proposed reorganisation would result in her redundancy.

78. In his Skeleton Mr Short argued that, given these findings, the Ombudsman "*was bound to find that the appellant did not satisfy Rule 11.2.1.*"

79. On these points, I have come to the conclusion that I prefer Mr Harding's submission. I say that for the following reasons:

    i) To my mind, none of the findings made by the Ombudsman are determinative of the two factual questions which the definition of redundancy required him to address.

    ii) The first question (per Lord Irvine in *Murray* v. *Foyle Meats*) is whether a certain state of economic affairs exists. The practical effect of the way the Ombudsman approached his reasoning, as I have already pointed out, is that he did not analyse, and certainly to my mind did not express any reasoned conclusion about, this question. In fact, his reasoning gives mixed signals on this topic. I say that because at paragraph 95 he suggests that SCONUL were not looking to make Ms Downe redundant in the near future, which on one view is consistent with the idea that SCONUL's requirement for employees to carry out work of the type she had previously carried out was *not* intended or

expected to cease or diminish. But then on the other hand, at paragraphs 97-98, the Ombudsman talks about SCONUL offering Ms Downe "*alternative employment … following the restructuring*", and about SCONUL "*trying to match her to one of the new posts in the organisation following the restructure*", both of which statements suggest he might have thought there *was* to be a diminution in the requirement for employees to carry out work of the kind Ms Downe had been employed to do.

iii) Given the lack of clarity as the first question, I do not see that the Ombudsman was in a position to express a reasoned view of the second (causation) question either. In fact, it does not seem to me that he sought to do so. As I have already said, as I interpret it, the question he was seeking to answer at paragraphs 89-99 of the Determination was, *who* instigated the process that led to the Compromise Agreement? That is not the same as asking: *objectively, what factors was the Compromise Agreement attributable to*, and in particular, *was it wholly or mainly attributable to SCONUL's requirements for employees to carry out a particular kind of work having ceased or diminished, or being expected to*?

iv) Concluding that Ms Downe acted without coercion when she instructed Mr Harding to contact HR, because she jumped to her own conclusion about what the proposed reorganisation might mean for her and therefore "*instigated the termination of her employment*" (Determination at paragraph 99), does not answer that question. To my mind, determining the causation question posed by the USS Rules involves a much broader inquiry, including in particular an assessment of what the reorganisation *really did* mean for Ms Downe, and whether in fact some or all of the work she had previously carried out *was* to be outsourced, and if so (cf *Murray* v. *Foyle Meats*, per Lord Irvine at p. 831C-D), whether she could be required under her contract of employment to perform other tasks.

Summary on Ground (a)

80. I will return below to the consequences which flow from my conclusions on Ground (a). For now, I merely record that in reaching them I have very much borne in mind Mummery LJ's direction in *Wakelin* v. *Read* [2000] Pens, L.R. 319, that the Ombudsman's findings of fact should not be subjected to meticulous and over-elaborate critical analysis. With respect it seems to me that, even taking a very broad approach to interpreting what he decided, it is not possible to discern in the Ombudsman's Determination reasoned answers to the two relevant factual questions posed by the test for redundancy in the USS Rules. In my judgment, Mr Harding is correct to say that the reason for that is because the Ombudsman was asking himself a different question altogether, and that that was an error of law.

Ground (b): Compromise Agreement

81. I next come to the issue of the Compromise Agreement, and whether its terms should have led the Ombudsman to conclude that Ms Downe's eligible employment was in fact terminated by redundancy. This is a short point.

82. The thrust of Mr Harding's criticism was that the Compromise Agreement is a critical document, which refers expressly to the payment of "*Enhanced Redundancy Pay*", and yet it is not referred to at all in the Ombudsman's reasoning starting at paragraph 79 of his Determination. Had its effect been properly analysed by the Ombudsman, it would have driven him to find (or at least, strongly supported a finding) that the test for redundancy was made out.

83. I do not agree. I say that because, on its proper construction, it seems to me that the terms of the Compromise Agreement are of no real assistance in conducting the inquiry contemplated by the test for redundancy in the USS Rules. That is because:

i) the Compromise Agreement does not seek to explain the cause of the termination of Ms Downe's employment: it is entirely neutral in stating (Recital (A)) that *"[t]he Employee's contract of employment is to be terminated*";

ii) it is also entirely neutral as to whether any claim for redundancy under Part XI ERA 1996 would lie: this is described in Recital (B), along with other possible statutory claims, as a claim which Ms Downe "*has or may have*"; and

iii) although the Compromise Agreement certainly does provide for the payment of "*Enhanced Redundancy Pay*", that was to be paid (as with all the other sums referred to) *"[w]ithout admission of liability*".

84. In my view, this studied neutrality makes it impossible to say that the Compromise Agreement, even with its reference to "*Enhanced Redundancy Pay*", is of any real value in determining whether the cause of termination of Ms Downe's employment was in reality redundancy or something else. No concession is made either way. As a matter of construction, therefore, I think Mr Short is correct to say that the Compromise Agreement neither compels or permits a finding that the employment was terminated by reason of redundancy, within the meaning of USS Rule 1.1 or at all.

Overall Conclusions and Remedy

85. In summary, having regard to the Grounds of Appeal in Fancourt J's Order:

i) *Ground (a)*: I would allow the appeal on Ground (a). My conclusion is that the Ombudsman's analysis had a misplaced emphasis on the question whether the termination of Ms Downe's employment arose at the instance of SCONUL (including the question whether she was coerced), and that in consequence the Ombudsman did not properly or sufficiently address the relevant elements of the test for redundancy in USS Rule 1.1, namely:

a) Had SCONUL's requirements for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? And –

b) Was the termination of Ms Downe's employment wholly or mainly attributable to any such actual or expected cessation or diminution?

ii) *Ground (b)*: I would dismiss the appeal on ground (b), on the basis that the terms of the Compromise Agreement, when properly construed, do not assist with the inquiry contemplated by the test for redundancy set out immediately above.

86. As to what practical consequences should follow from these findings, in his submissions Mr Harding advanced the argument that the terms of the 19 October email and its attachment (see above at [12]) gave rise in and of themselves to the conclusion that the test for redundancy was met. On examination, however, I do not think that the meaning and effect of either document can be stretched that far, although I agree that they are consistent with the idea that the test for redundancy *might* have been met at the time. I say that because, as noted above, both the email and the attachment indicate an intention to put in place a new structure, and for the "*main differences*" to be "*in the focus of the new roles within the structure and a change in the balance between work carried out internally as opposed to being outsourced*". Such statements certainly support an argument that a redundancy situation *had* arisen, but in and of themselves they do not determine that question, because they do not enable any conclusions to be drawn as to what the new roles were in fact expected to be, or as to what the expected change in the balance between work carried out internally and outsourced work was intended to be, or indeed whether SCONUL's planning had progressed far enough for there to be an *expectation* (within the language of the Rule) that SCONUL's requirements would cease or diminish. It seems to me that such matters should be addressed in light of the relevant evidence as a whole, which in turn may involve any contested issues of fact being resolved (which might include, for example, determining whether Mrs R did in fact present a confidential paper in September 2012 which reinforced SCONUL's commitment to outsource accounts, and the weight (if any) to be attributed to Ms Downe's statement that she was told by HR in August 2012 that "*accounts work may be something that could change quite radically quite quickly*").

87. Regrettably, I have come to the conclusion that I cannot address such matters on this appeal. I therefore propose that Ms Downe's complaint should be remitted to the Ombudsman, with a view to him determining the issues identified at [85] above.

Disposal

88. For all the reasons given above, I would allow Ms Downe's appeal to the extent I have identified, and remit her complaint to the Ombudsman.

89.