



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs K Nezami

v

Somerbond Ltd

Heard at: Watford

On: 1 and 2 November 2016

Written submissions 11 November 2016

Before: Employment Judge Henry

Appearances

For the Claimant: Mr J Theaker, FRU

For the Respondent: Mr B Gray, Counsel

JUDGMENT

1. The claimant was unfairly dismissed when her employment was terminated for reasons of redundancy on 21 March 2016.
2. The issue of remedy will be addressed at a hearing the date for which will be furnished to the parties in due course.

REASONS

1. The claimant by a claim form presented to the tribunal on 18 June 2016 presents a complaint for unfair dismissal when her employment was terminated on grounds of redundancy. The claimant commenced employment with the respondent on 14 October 2013. The effective date of termination was 21 March 2016. The claimant then having been continuously employed for two years.

The issues

2. The issues for the tribunal's determination were as follows:
 - 2.1 Was there a redundancy situation in law?

- 2.2 What was the reason for dismissal? The respondent alleges redundancy and/or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- 2.3 If redundancy was the main reason for dismissal:
- 2.3.1 Was a fair procedure followed in that:
- 2.2.1.1 Was there reasonable consultation?
- 2.2.1.2 Was the pool for selection fair?
- 2.2.1.3 Was there a reasonable search for alternative employment?
- 2.4 If there was not a redundancy situation in law, was there such other substantial reason of the kind for which the claimant could not continue to hold the position that she held?
- 2.5 If so, was it reasonable for the respondent, for those reasons, to terminate the claimant's employment?
- 2.6 Was a fair procedure followed
- 2.7 Was dismissal reasonable in all the circumstances of the case?
- 2.8 If the dismissal was unfair, has the claimant contributed to that dismissal by culpable conduct?
- 2.9 If the dismissal was unfair on procedural grounds, but for those procedural failures, would dismissal have ensued in any event?

Evidence

3. The tribunal heard evidence from the claimant and from the following witnesses on behalf of the respondent.
- Ms Heidi Ramsay – head of design/studio manager;
 - Mr Richard Hershman – joint owner and managing director; and
 - Mr Peter Greane – joint owner and chairman of the respondent.
4. The witnesses' evidence in chief was received by written statements upon which they were then cross-examined. The tribunal had before it a bundle of documents, exhibit R1 and R2.
5. From the documents seen and the evidence heard, the tribunal finds the following material facts.

Facts

6. The respondent is a supplier to the retail industry of “in demand branded apparel” for adults and children having negotiated licences from renowned companies such as Walt Disney, Warner Bros and Coca Cola to use their branded images on products which are then supplied to the respondent’s clients, to include t-shirts, nightwear and underwear.
7. With regard these licences, it is not in dispute that they are prescriptive in terms of style guides and fonts, and are in place for 1-3 years.
8. The respondent has about 35 licences, and in respect of which, have a Design Team to work creatively within the confines of the licensing criteria to design product ranges for their clients. The market is competitive and there is a need for designs to be “current and unique”.
9. The respondent’s clients rank amongst Primark, Top Shop, Next, Tesco and Asda.
10. Once a design is approved, the respondent then manufactures the products through internationally located manufacturers.
11. The respondent has expressed their business, in the following:

“There are three fundamental elements to the business: the licensor, the customer and the Design Team. There is constant interaction between the three to ensure that the Design Team adheres to the licence terms whilst satisfying customer requirements, changes to designs and deadlines. The business is fast moving and we continuously have to adapt to change, to re-invent and re-align. We have to have the right team and resources in place to deliver to our customers. The business tends to run to a three year cycle, we look at pricing, our current and respective licences and mix of licences, manufacturers, speed to market, external factors, trends, the economy, etc.”
12. In this regard, the respondent further identifies that the “credit crunch” was a “challenging period for our business and placed real pressure on orders”. The respondent has not been challenged in respect hereof.
13. The respondent employs 31 employees, structured as to; two directors, two commercial managers responsible for sales, six support merchandisers split across two teams supported by five quality control personnel. There is an accounts department of two employees, a logistics department of three employees, licensing support, consisting of two employees, two admin staff and a part-time HR manager. There is then a Design Team of seven, consisting of; the head of design/studio manager, one junior designer, two menswear designers and three ladieswear designers and the claimant, the claimant’s role being the subject of dispute which is addressed herein.
14. The business operates on the premise of the commercial managers dealing with clients on a brief, which is then communicated to a designated member of the Design Team to work on. In this respect, it is a respondent’s evidence that the designers are assigned to specific clients, which is of importance,

because the designers thereby got a feel for what the particular client requires.

15. The studio manager holds overall responsibility for the design function within the company, and in respect of which, she has been involved in their recruitment and selection, ensuring that the company has a team of designers in place with the correct skill sets and graphic handwriting to meet the client portfolio. The studio manager also provides a link between the client commercial managers and the Design Team, in that, she would sit in on the majority of client meetings with the commercial manager, and then translate what she believes the client wanted to buy and what the commercial managers believe they should have and could afford, into a design brief for the studio designers. The studio manager would then allocate the work to the most suited designer.
16. The Design Team is the core of the respondent's business, and the design studio is considered the hub, and for which the whole Design Team are studio based. The respondent here submits that this is necessary as they are continually liaising with the commercial teams, the clients, production, licensing, and manufacturing and merchandising, Ms Ramsay giving evidence as to the functioning of the Design Team, that:

“If you plan on a Monday for everyone's week, a commercial manager may receive a call to suddenly say that a buying meeting has been moved forward, or a client wants to see more ideas, urgently. The commercial managers, merchandising and others are in and out of the studio asking studio designers to change this/change that as they receive feedback from clients or licences... it is a constant juggling job as the designers are always busy...”
17. The respondent's financial year runs from 1 June to 31 May. The business operates on a cyclical stream, for which approximately 65% of their business comes from autumn/winterwear; clients placing forward orders for the season from January to March/April for delivery from July onwards.
18. The financial indicators for the company are the orders on the books and invoiced orders which they have nine months in advance, for which by the March, the company has a good idea of how revenues are shaping up, and their resourcing requirements for the following year.
19. It is here noted that in 2013, the forecast for the financial year 2013/14 was for it to have been one of the respondent's best years and for which they took a strategic decision to position themselves above their competitors, by being proactive and creative in designs going forward, pushing the boundaries within their licensing terms; the respondent hitherto unable to spot trends and develop new designs owing to the nature of, and the incumbent pressures on, the design studio.
20. In respect thereof the idea was floated of having someone who could think outside of the box and who would be given the time to think, research and come up with new ideas, for which a brief was given to HR to recruit another designer being “someone with a bit of an edge” whose role it would be to

focus on trend spotting and to showcase the respondent's designs and push the boundaries of the licences.

21. The claimant was a candidate under this recruitment exercise, and of which it is not in dispute that the claimant was not of the normal ilke of candidate which the respondent usually recruited, being persons who had done or were doing licensed graphics already, the claimant having a background in fashion graphics which the respondent considered an asset, as she did not then have pre-defined ideas of what licensed products should look like.
22. In this respect, it is the respondent's submission that on explaining how licensing worked, and of the relationship between what the customer may want and what the license holder would allow, which did not allow for development of licensing moving forward, they advised that, "we wanted to take on someone that could push the boundaries of licensing and get us ahead so that we could offer our customers, real cutting edge and more interesting ideas".
23. The claimant does not dispute such discussions being had, but maintains that she was subsequently engaged as a designer commensurate to the designers within the studio, and challenges the special status advocated by the respondent. In this regard, the tribunal has been taken to correspondence of the claimant on 1 February 2015 in respect of her role, the claimant stating:

"I have been thinking about my role at Somerbond and my contribution as a designer. I strongly feel I am not contributing to new development and research as much as I would like to.

I am aware that the core of the business is not boundary-pushing designs, but I was employed to think outside of the box with new creative development.

I was excited to start at Somerbond because of the energy you both wanted to invest in new development and keeping ahead of your competitors.

Recognising suitable trends, research, new development and inspiring fellow designers is where my strengths lie. As discussed during my annual review I would like to set and lead trends/creative direction for new development and work closely with the Design Team to develop the product. I also think a big part of my role should be to work closely with Ingrid and the Licensers to get new and exciting concepts accepted.

At this point in my career I prefer to focus more on new development. Currently I am hardly working on new development in the way I envisaged..."

24. It is clear from this correspondence that, there was a clear understanding on the engagement of the claimant, of the nature of the claimant's role which was to be distinct from the role of her colleague designers.
25. The claimant commenced employment with the respondent on 14 October 2013. Her terms and conditions identified her job title as "Designer", the further terms providing for the claimant's place of work to be at the

respondent's business premises London, NW2, and her normal working hours from 8.45am to 5.15pm, Monday to Friday.

26. It is not in dispute, and there is no evidence to suggest otherwise, that the claimant was competent in designing to license and there is no criticism of the claimant's work in her capacity as a designer.
27. All designers have similar skills, all use Illustrator, and all designers understand the licensing procedure, and how and where art work is filed on the respondent's IT system.
28. It is however, here noted, that there are subtle differences between designers and for which they have different "handwriting", such that a designer doing Ladieswear for Tesco, would not have the correct skills/handwriting to design successfully for example Topshop or high fashion clients, even though they may use the same computer, same software and start with the same style guide.
29. It is equally not in dispute that, the respondent being a small company, all staff are prepared to put all hands to the pump at times when the studio was unable to meet deadlines, or if a designer was off ill; other designers would be called upon for assistance.
30. I pause at this juncture, as it is the claimant's contention that, similar to her colleague designers she was tasked with working on client briefs which, although not disputed by the respondent that the claimant did work on client briefs, the respondent submits that this was the exception rather than the rule, dictated by pressures at the material time. In challenging this contention, the claimant has referred the tribunal to the respondent's client, Primark, for which she was integral in that company's brief, as being illustrative of her functioning commensurate with her colleague designers.
31. With regards the Primark brief, the tribunal was taken to correspondence which, on the claimant raising issue as to the company needing to work on trend forecasting as opposed to the work they were currently doing, namely; catering to what clients needs were in the short term, she was responded to by the managing director, Mr Hershman, that:

"Thank you for your feedback and yes we all recognise that trend forecasting is your strength and where we need to be as a business, so I don't see your role changing. However, I feel that all designers do need to get much closer to our customers and where appropriate you should also be attending meetings with either Kevin or Heidi, although in your case I don't envisage this will be that often, as you aren't working directly with any specific accounts other than Primark ladies where your handwriting has been very well received by Emma.

Please continue to work with Heidi to refine ways as to how you can deliver trend awareness to our designers in a "speedy way" as trend lead designs are the lifeblood of the business so it's vital these are identified and effectively communicated to the designers for easier reference for them to intrepid (sic)"

32. Further, with regards the claimant functioning as her colleague designers, the claimant has taken the tribunal to correspondence of 24 June 2015, to the design department, in respect of a “Ministry of Sound” brief. Wherein the correspondence being addressed to designers engaged thereon, stating:

“We have an exciting brief to work on for Ministry of Sound.

To design boards for Ladies and men’s;

Tees Chris to do men’s, Kati to do ladies.

Loungewear Chris to do men’s, Kati to do ladies.

Underwear Hazel to do men’s, Julie to do ladies

Branding Swinger etc Chris

Deadline is next Wednesday but want to get started on this ASAP, can you all look at some research today/tomorrow...

Let’s review Thursday morning, Kati if you work on research today we can use that as a starting point but also want everyone to do a bit of research, also call slogans that we can use”

33. The respondent here submits that this was a potentially very big license for them, and that they had wanted as much creative input as was possible which the claimant would not have been able to do by herself. The respondent here submits that this was an exception as opposed to the rule
34. I further pause at this juncture, and reflect on the claimant’s performance review for the period 2013/2014 which, giving the claimant a very favourable report on her performance, the claimant in providing her comments thereon, states:

“I was very pleased with the extremely positive and encouraging feedback from Heidi. Most of the issues I wanted to raise were addressed, however I feel that in the Part 3: objectives, there were some items that I thought would be clearer. In particular, points relating to the future of the company and my role within in (items 8 and 9). I welcome the chance to over see my own trend project under Heidi’s guidance. My ambition would be to work on such projects independently in due course and present my ideas to clients directly. It would be a great incentive if this increased responsibility could be reflected in my remuneration...”

35. And further, the comments of HR on the report, that:

“Kati started with Somerbond in October 2013, during this time has developed well in her role. As this was a new role within Somerbond, it has given Kati the opportunity to make it her own. Heidi, is very happy with the work that Kati is producing, she will often over deliver and delivers on time. Kati is now hungry for more and wants to take the role further. Heidi has asked her to work on a system where she can share her research with the team. For her personal development she would like to visit a printing house to see how printing is done

and understand our factories more as she feels this will help her create better designs by way of what can be achieved. She would also like to go to customer and licensor meetings to understand their needs and wants better.”

36. On 3 March 2014, the claimant, finding the commute to work challenging, tendered her resignation. Mr Greane, joint owner and chairman, responded, informing the claimant that the company wanted her to stay, asking the claimant to give further consideration to her resignation, which she duly did, suggesting a resolve, of her working three days from home and two days in the office. This arrangement was duly agreed, and after a trial period of two months, confirmed on 14 July 2014; the claimant working from home Tuesday, Wednesday and Thursdays and in the office on Monday and Friday.
37. I again pause here, as the respondent places significant reliance hereon, in that all other designers worked in house from the studio which, by the nature of the role, required them to be in constant contact with the departments above referred at paragraph 16 above maintaining that, the claimant working from home was beneficial to the respondent, in that it allowed her to focus on generic new development briefs which could be worked on remotely, and gave her time to think and concentrate on creativity.
38. In this regard the respondent has referred the tribunal to a designer in Ladieswear who having equally requested flexible working for paternity reasons, had their request rejected to work from home on Tuesday, Wednesday and Thursdays, determining that to agree to the change would have a detrimental effect on the company's ability to meet its internal/external customers demand, stating:

“As you are aware our customer's requirements/specs change on a continual basis throughout the day, as well as daily. As soon as a merchandiser or sales manager receives an amendment/alternation, they are required to, with immediate effect, liaise with the designer who is responsible for the original design/garment/handwriting etc. In this case, should you not be available in person to discuss these amendments it will mean that the response time back to a customer or factory will have a knockon effect, and immediately have a detrimental effect on quality. We may face losing single or multiple custom in the long run, should this scenario continue to repeat itself. Furthermore, you are aware that you are required to be in regular person contact with the License Department, during your working hours when there are approval issues/comments which need your prompt action. In addition, we pride ourselves as being a market leader within our industry, having a multi tasked design studio and Design Team means that each designer is able to “pitch in” where and when required. For example, if you are busy working on a very important task with a sales manager, you can instruct one of the designers to hand, to amend and/or assist where required. If you were to be working from home, you will have to call or email the office to request a designer's assistance and the response from them may not be automatic”.

39. And in respect of this individual raising the situation regarding the claimant, the individual was advised:

“During the meeting held... you questioned why Kati Nezami was allowed to work from home and you were not. It was explained to you that Kati’s role focuses solely on future designs, which is therefore not customer specific. Unlike yourself, Kati is not required to liaise with others from the team as a matter of urgency, where you will have to carry this action out. Kati also does not need to liaise with the License Department or the sales managers /merchandisers. ...”

40. On 1 February 2015, as above referred at paragraph 23, the claimant raised concerns as to her contribution as a designer. This was responded to by Ms Ramsey identifying that the claimant’s strengths were in trend research and in identifying new directions, and that she had been doing much research relevant to both the men’s and ladies products, further advising the claimant:

“As discussed we are also coming up to our SS16 research trip and will be working on our trend board, this is the project I want you to manage and guide the other designers”.

41. It is also here noted that, Ms Ramsey, referencing a busy period for the company, stated:

“We have been working on customer’s AW15 ranges, (Autumn/Winter) for many of our customers this is their busiest time of year and so it has been essential to have you working on these briefs also. I always bear in mind your strengths and your role within the department and don’t want you to be working on day-to-day briefs more than you really need to. Let’s discuss the new Corona beer product and also plan the SS16 trend brief. I think it would also be an idea to regularly present new ideas/trends to the rest of team, let’s discuss.”

42. In March 2015, following an audit of personnel files by the HR manager, the HR manager wrote to the claimant stating that, she had noticed that the claimant’s current terms and conditions/job description, did not include a description of her working from home or the fact that she carried out research and work on designs for the coming future, advising that amended particulars would be furnished for her to sign and return, further advising that “Should you be required to work in-House on a permanent basis in the future, as well as work on current customers specific briefs, we shall amend/revert the terms accordingly as well as update yourself”.

43. The claimant responded hereto advising that her only comment would be that *“the job title “Designer/Research and Future” sounds vague. I have given it some thought and think “New Development Designer” might be more fitting”*.

44. The claimant was subsequently advised that, the title as furnished was a more apt description of her particular role.

45. The claimant here submits that, this was an administrative task which did not affect her role, which role was that of a designer, and did not by the amendment, change the particular functions she performed and had been performing before the amended document was furnished.

46. The amended terms and conditions were signed on 22 October 2015, the key purpose identified as:

“Creating highly creative designs for the future business growth with the assistance of in-depth trend research in order to enhance new business opportunities and grow existing business. Ensuring a good understanding of the business requirements in order to reach optimum design flair and creativity for future designs, which in turn will be fed in to the customer specific Design Team/In-house studio.

Design focus

Creating directional trend boards to aid innovative fashionable designs and ideas with minimum input from line manager.

Core subject: Ladies and Menswear”

47. In this regard, the claimant refers the tribunal to the criteria on the skill's sheet, being documents that are generic to the whole Design Team, by which the claimant identifies that emphasis was placed on all designer's ability to carry out good internet research and that designers were appraised against their ability to continually research the market and contribute ideas to the business, submitting that these are not specialist skills sitting outside the role of designer and that her being required to carry out more research was nothing more than what other designers could and should have been doing as part of their role.
48. Ms Ramsey here submits that, the skill sheets, being generic and used for all designers, had emphasis placed on the differing criteria as was relevant to the particular designer; there being nothing particular by the cohort of criteria contained on the skill sheet.
49. On 18 November 2015, one of the designers resigned, leaving the respondent in December 2015, for which a recruitment drive for a replacement was undertaken. A replacement was recruited to, on 11 January 2016, at a salary of £28,000 to commence on 8 February 2016.
50. The respondent also, on 11 February 2016, in respect of a newly created position of graphic designer assistant, made an appointment to commence on 15 February 2016, on a fixed term six month contract, with a possibility of an extension, at a salary of £20,000; the post being introduced to alleviate the designers of the routine mundane tasks that they were performing.
51. I pause here, to address an issue raised as to an altercation arising between the studio manager, Ms Ramsey and the claimant, the significance of which is that the claimant maintains that this incident was a material factor in the termination of her employment.
52. On 10 February 2016, at a time when it is not in dispute that designers were under pressure working to very tight deadlines on customer briefs, Ms Ramsey gave directions to the claimant in respect of a brief she was

working on. The claimant maintains that having carried out Ms Ramsey's instructions, she was subsequently excessively criticised by Ms Ramsey who, having attended her desk to review the design boards, said loudly that, the claimant had not listened to her and was wasting her time, which was clear to her colleagues that she was being told off, which caused the claimant distress, for which the claimant states she left work very embarrassed and upset and that her working relationship with Ms Ramsey did not thereafter recover.

53. In respect of this outburst, the claimant references events in October 2015, when on attending a client meeting with Ms Ramsey, in respect of the Primark brief, on the respondent being told that the client was unhappy with some of the work produced, the negative feedback implicated Ms Ramsey, for which the claimant states Ms Ramsey, became very short with her thereafter, and that she sometimes was rude to her in the office and stopped answering her emails, for which the claimant states she felt that she began to be singled out as a result of Ms Ramsey's authority, thereby having been questioned.
54. The tribunal can find no evidence to support the connection between these events as advanced by the claimant.
55. With regards the event on 10 February 2016, it is Ms Ramsey's evidence that, having been clear in the guidance given to the claimant in respect of the brief, she was then frustrated when she observed that many of the points discussed had not been followed, and that she had merely pointed out that the claimant was missing the points discussed, for which the claimant's response was then loud and aggressive, for which she was then taken aback by the outburst which had been overheard by staff, Ms Ramsey further stating that, she walked away feeling embarrassed. It is Ms Ramsey's further evidence that, on their working to very tight deadlines she had requested all designers to stay back to finish the task, but that the claimant refused and went home with further designers, leaving Ms Ramsey and one other designer to complete the required work.
56. On 11 February 2016 the claimant wrote to Ms Ramsey, stating:

"I wanted to write an email to bring your attention to yesterday. I thought the atmosphere in the office was stressful and it was difficult to communicate with you. I feel you were being indecisive, uncommunicative, negative and confrontational with me.

I left work very upset and was affected negatively. This kind of atmosphere has a bad impact on the team. I think we all work very hard and well together. I would like to put this incident behind me and to focus on the work at hand and hope the situation will improve. I truly feel tensions within the team does not make for a productive work environment.

I enjoy the work I do at Somerbond and the team I work with. It is important for me to work in a transparent, positive and constructive environment..."

57. Ms Ramsey responded later that day, stating:

“In reply to your email today I would like to say how disappointed I am in the fact that you feel this way about the constructive critique I gave you yesterday.

We had discussed the Teletubbies and Power Rangers the previous day and I had outlined how important it was for us to offer Primark ladies a new and exciting approach graphically and specific looks, ideas and slogans relating to products that we looked at together in the showroom. The initial work that you produced did not meet my brief and did not follow the inspiration we had discussed.

I found you immediately very defensive and unreasonable to my comments, I always aim to be professional in the way that I address members of staff but found your reaction quite disruptive and unprofessional. Our conversation was overheard by other members of staff who found your tone and language surprising and inappropriate.

Kati, I am very aware that we are all very busy at the moment and under pressure at the time, which is our busiest period, I ask that you please listen carefully when briefed and that any direction that is given is actioned to avoid this in the future.”

58. On 12 February 2016, the claimant responded thereto, stating:

“I think we both would like to move on from how things developed on Wednesday. I disagree with your account of what happened last thing on Wednesday. I am concerned you have questioned by professionalism and how I met the brief you set out on that day. I am confident I executed the brief professionally taking all your comments on board and using all the samples you showed me.

I am aware that after I left the office on Wednesday there were further issues with other designers also feeling uneasy, under pressure and upset. This even required a meeting on Thursday morning to clear the air. I think this is proof that others felt treated wrongly too.

Like I said, I would like to leave this incident behind me as it has caused me a lot of negative nervous energy.”

59. In respect of the claimant subsequently approaching Ms Ramsey to have a “catch-up”, Ms Ramsey advised:

“Due to the nature and tone of your emails, I have asked Anita (HR) to sit in the catch-up so that nothing is misconstrued and further such emails are not exchanged, with the hope that we can establish a positive way forward. You are next in the office on Friday, as you are aware Anita does not work on a Friday therefore the next time we will all be in the office at the same time will be on Monday 22 February.

I will send you an invite for a catch-up meeting on Monday 22 February at 1pm”

60. The claimant subsequently responded asking for the meeting to take place for the Thursday. In the circumstances, it was not then possible to arrange a meeting for all parties to be present and the meeting did not then take place. It is however noted that, despite Ms Ramsey’s initial objection to meeting the

claimant, there were subsequent one-to-one meetings between the claimant and Ms Ramsey and there is no suggestion that there was any tensions arising at these meetings.

61. It is however, noted that the claimant states that, she noted that Ms Ramsey began to allocate some of her work to other designers which she then had less work to do than normal.
62. It is Ms Ramsey's further evidence that, on subsequently meeting the claimant and having a meeting on their own, it was agreed to move on from this position, as neither of them wanted a bad atmosphere and that the relationship thereafter went back to normal, and that they continued to work together, and there were no further issues. Ms Ramsey further advanced that, she had not reallocated the claimant's work but that owing to business being slow, the effects of which was being seen in the amount of orders being received.
63. In respect of the incident on 10 February 2016, the claimant did not raise a grievance and has informed the tribunal that she had not done so because she had found the whole matter upsetting and that she had had no experience in bringing grievance proceedings.
64. In 2015, it is the respondent's evidence that they were becoming increasingly aware of challenging times, and that forward orders were down and feedback from customers regarding design concepts were negative, and that they were not seeing the conversation levels to orders that they had hoped, and in respect of which, the tribunal was taken to correspondence from Mr Greane, dated 17 December, that:

“We need to get the work out even if you have to burn the hours. We have had a really bad few months with the conversion rate on orders bordering on disastrous and now we have some interest from customers for quality and timing of our design has been questioned by customers recently and we simply can't afford for that to continue.”
65. Mr Hershman's evidence is that, the reaction from customers and buyers to design concepts on paper and mood boards, were being dismissed as interesting to see, but that they could not visualise the end product, so conversation rates were low and that they wanted samples, but that the samples provided were significantly different to their expectations; Mr Hershman submitting that, the quality and specifications of the samples produced by their suppliers and manufacturers were significantly below the expected finished product to be able to convince customers to order, which samples needed to be near perfect, down to the fastenings used and print. This is not challenged by the claimant.
66. Together with the demand for high spec samples, there were also changes in the markets, which began to impact on the respondent, namely; there had been a growth in “direct to retail licenses,” where large retailers took on licenses direct from the licensor and recruited their own in-house designers to work on these, thereby circumventing companies such as the respondent.

67. From September 2015, Mr Greane and Mr Hershman, in considering business strategy going forward, considered the role of Ms Ramsey, focussing on sampling, on the premises that her background, experience and skill base as the head of the design/studio meant that she would be ideally suited for this task, albeit she would not be able to undertake the task in addition to her design studio managers role, for which they made enquiries in the market of their recruitment agents, for potential candidates who might be able to take on the role of studio manager. Which, on potential candidates being identified in December 2015 and January 2016, a proposal was then put to Ms Ramsey for a new role, of “product development manager”, to liaise with the design department, QC function and factory supply base, to assess their capabilities in terms of product innovation, printing techniques, and garment accessories supplies. The role was subsequently awarded to Ms Ramsey on 4 April 2016, having appointed a replacement head of design on 4 March 2016, who commenced employment on 21 March 2016.
68. As above stated at paragraph 17, the respondent’s key order taking period for its forthcoming financial year is between January and end of March. In respect of the up-coming financial year 2016/17, Mr Hershman and Mr Greane, observed that the outlook was not healthy, it being the case that the current year to May 2016 was going to run around 23% below the previous year to May 2015, and that the forward order indicator for the year to May 2015 was then running between 6 and 17% below 2015/16, for which they decided to make cuts and reorganise business.
69. It is Mr Greane’s evidence that, the business was going in a different direction from that when they had engaged the claimant, for which they now hoped to create orders via high specification sampling and shortening lead and sampling times, rather than mood boards and graphics. As a consequence, the respondent determined that the only role that the company could manage without, was that of the claimants, the emphasis of which role was on future trends and designs, from which they were then removing emphasis. In this respect, the tribunal notes, on the claimant meeting the client Primark on 22 October 2015, she informed management, to include Mr Hershman, of feedback there from, for which Mr Hershman responded advising:

“Thank you for your feedback notes which is most useful.

It is clear we need a different approach especially regards our sampling.

I have suggested to Kevin and Heidi that we need to work a lot closer with our suppliers to ensure the ideas translate in to “perfect” sampling and most likely this will require factory trips to oversee the developments to improve our sampling/order hit rates;

...

I would like to review this next week as time is very much the essence to achieve perfect sampling for a W16 sales meeting.” -

70. This was a position position clearly understood by claimant.
71. Mr Greane’s further evidence is that the claimant’s role was bespoke and her role and working arrangements were different from the studio designers, which were customer facing and had designated clients and briefs and were studio based to deliver those briefs, which had been carefully developed to ensure that there were the right skill set and particular handwritings, to meet their client base.
72. Miss Ramsey was not involved in these discussions, who was informed only after Mr Greane and Mr Hershman had made their determination to delete the claimant’s role and put her at risk of redundancy. Ms Ramsey did not have any involvement in the redundancy process and there is no evidence of Ms Ramsey being consulted in respect thereof.
73. Circa 8 March 2016, the respondent took advice in respect of the redundancy process, and from which a meeting was arranged with the claimant for 14 March, a note of the issues discussed is at R1 p183, which was subsequently confirmed by letter of the same date to the claimant, identifying that the claimant’s role was being made redundant and that she was, as a consequence, at risk of redundancy.
74. The claimant was advised of the business case for the decision, namely; that the role of the forward concept graphic designer, having been created a couple of years previous, in the hope that it would “wow” the customers and increase sales, that customers for some time have been demanding physical samples far more, and not just nice graphics, and that the company needed to look at overheads, and the role of the forward graphic designer was a luxury that the company could no longer afford and that customers were not showing an appetite for it.
75. The claimant was thereon advised that, she would be entering a period of consultation and informed of what the consultation period would mean, being advised that the period was to commence from that day, and that the consultation process was for the company to endeavour to find a suitable alternative role within the business within a suitable time frame, and that the period would allow the claimant time to ask any questions she may have regarding other suitable employment and options available to her, and that:

“As your role is at risk of redundancy, I will be inviting you to attend a series of individual consultation meetings or email communications as you work predominantly remotely. This will allow us to help/assist you find suitable employment externally should we not be able to assist with an internal transfer/suitable role.”
76. The claimant was further advised that, should a suitable internal role not be successful, that they would meet over the coming days to confirm redundancy. The correspondence concluding:

“As part of the consultation procedure, we also wish to fully explore with yourself whether there are options available other than with redundancy in order to fulfil the company’s business needs. If you have any viable suggestions or proposals to put forward, please feel (sic) contact me by no later than Thursday 17 March”.

77. On the claimant asking whether she could go home after the meeting, this was authorised, and on the claimant asking for how many days the consultation processes would last, Ms Sandhu of HR, advised that “the consultation process would last for a duration which the business deemed fit” whereby the business felt that they could do all they could to assist the claimant find suitable other employment, be it internal or external, for which it is noted that the claimant was eager to have a date in mind, for which Mr Hershman suggested that, they consult until the end of the week and recap/regroup on Monday 21 March, which was acceptable to the claimant.

78. Following the meeting with the claimant on 14 March, Ms Sandhu wrote to Ms Ramsey advising of the meeting with the claimant, stating:

“Kati asked if she could leave soon after she had completed a task in order to digest that her role was at risk. This was authorised.

By the sounds of it Kati is eager to see this process through quicker than the company’s timeframe of consultation. She may have been in shock but did say that she saw the potential redundancy an advantage for her.

She asked if she was able to tell her colleagues of the risk. This again was authorised.

Kati will now over the next few days have the opportunity to ask any questions re this matter. I will be in regular touch with her.

Can I request that you refer Kati to either myself or Richard should she have any questions.”

79. On 15 March, the claimant informed Ms Sandhu of HR, that she was on annual leave on 21 March, asking for the meeting to be changed to 18 March or alternatively 23 March.

80. Ms Sandhu responded, advising that she had just noticed that she, the claimant, was indeed on annual leave for the 21st but that on the following Wednesday, the managing director had business meetings arranged for that day which they could not withdraw from, and that Friday would not be appropriate as she, Ms Sandhu, did not work on Fridays.

81. Ms Sandhu thereon advised:

“As your days of being present in the office are Mondays and Fridays both Richard and I are not keen on requesting that you come in on the days that you do not usually travel in to the office. Therefore we will write (by email) to you

confirming redundancy (should we be unsuccessful in securing you an internal role) at some point next week.

In the meantime could you please let me know by Thursday 17 March if you would like for me to reach out to any of our preferred supplier agencies, in order for them to be able to assist you with an external role.”

82. Ms Sandhu thereon furnished a number of electronic links to agencies, and concluded her correspondence, stating “*Please do not hesitate to contact me should you have any questions re this communication.*”

83. Equally on 15 March, Ms Sandhu wrote to Mr Greane and Mr Hershman advising of the redundancy process for the following week, stating:

“Should all go according to time and schedule and if Kati doesn’t go on sick leave or raise a grievance, we will plan to exit her from our payroll and from the business by end of close on Monday.

Monday 2pm, I will send her a letter confirming redundancy. The letter will include all payments in lieu of notice details/redundancy and outstanding leave payment details. The letter will also explain that her role ends effective of Tuesday 22 March. Not Monday 21 March as she is on leave.

...

Peter, can I request that Simon create a STOP on all IT access for Kati from Monday 21 March, 3pm...”

84. In the course of events, the claimant did not thereafter contact the respondent and on 21 March 2016 the claimant was written to, being advised that the respondent had been unable to secure an internal role for her within the consultation period and confirmed the redundancy, advising that she was not required to work her notice period which would terminate as of 21 March, and that she would be paid in lieu of notice. The claimant was further advised of the redundancy payment to consist of one months pay in lieu of notice, two week’s redundancy pay and four days in respect of outstanding holiday.

85. On 24 March 2016, the claimant presented an appeal against the termination of her employment by reason of redundancy, on grounds that her selection for redundancy was unfair, in that:

85.1 The respondent did not make reasonable efforts to find her suitable alternative employment within the company, namely that, although they had advised that they would be consulting with her regarding internal positions, they had made no efforts in this respect and that the consultation period had lasted for only four days, during which time she was only contacted once by HR who offered advice exclusively regarding external roles, and that suitable alternative employment could have been found for her within the design department, and that she should have been offered either of the two new roles that had been filled within the design department earlier;

- 85.2 That there was no genuine need to make her redundant in the design department, namely that, two new members had recently been added to the design department, evincing an expansion of the Design Team contrary to the financial case for redundancy;
- 85.3 That the decision to select her was unfair, in that, there was no reason given why she should have been selected for redundancy from the Design Department and that the role of forward concept graphic designer being created a couple of years ago was incorrect, and that her role had wrongly been described as forward concept graphic designer, in that she was a “designer”.
- 85.4 That with regards the need for sampling, she had been a major contributor thereto since joining the company and in respect of her role being a luxury – she equally disputed, because her role was not that of forward graphic designer.
86. The claimant concluded, submitting that, there was not a genuine redundancy situation and that the respondent had not followed a fair process.
87. On 29 March, the claimant, further to her grounds of appeal, wrote to the respondent advising:

“Upon further reflection I wanted to raise the following issue which I think might have influenced your decision and therefore further support my claim that the consultation and subsequent redundancy have been unfair.

You are probably aware that the relationship between Heidi and I has not been good for some time. I have been wanting to raise a formal grievance against Heidi for the incident which happened on Wednesday 10 February 2016. I felt bullied by Heidi and left the office on that day completely degraded in front of my fellow colleagues. I know I was not the only member of the Design Team to have felt Heidi was out of line on that particular day. In fact other designers raised this with Heidi. Heidi and I were supposed to have a meeting with HR to speak about the incident but this never happened. I emailed HR and Heidi requesting a meeting to discuss the incident but my email was never replied to. I have correspondence to support this if required.

Overall I am feeling discriminated against. I strongly believe I have been targeted for redundancy unfairly and the situation with my line manager has influenced your decision and further supports my case.

88. In respect of this matter being raised, on enquires being made of the Design Team as to the events on 10 February, the tribunal notes this response from Mr Tomlin, stating:

“Unfortunately I can’t give you dates or times but I am happy to state the following:

Kati, introduced a new employer around the office, not sure why as she was not asked or expected to do so. I was introduced as the “gobby one” of which I took great offence and was entirely inappropriate.

I have also witnessed a number of occasions where Kati has raised her voice and become very aggressive towards Heidi when being requested to do some work alterations. Heidi, in no way gave Kati cause to act in this was [sic] and talked to her calmly and professionally.

I hope this is a help and will be happy to elaborate further should more information be required.”

89. The respondent has not pursued Mr Tomlin further.
90. On 13 April 2016, Mr Greane furnished an outcome to the claimant’s appeal and grievance. A copy of which is at R1 p220 to 235 which did not uphold the claimant’s appeal.
91. The claimant presented her complaint to the tribunal on 18 June 2016.

Submission

92. The tribunal received written submissions on behalf of the parties. The submissions have been fully considered.

The law

93. The law relevant to the issues in this case are directed by s.98 and s.139 of the Employment Rights Act 1996.
94. Section 98 provides:

“1 In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show

- a) The reason (or, if more than one, the principal reason) for the dismissal, and
- b) That it is either a reason falling within sub section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2 A reason falls within this sub section if it

- (a)
- (b) ...
- (c) Is that the employee was redundant, or
- (d)

3

- 4 Where the employer has fulfilled the requirements of sub section (1), the determination of the question whether dismissal is fair or unfair (having regard to the reasons shown by the employer)
 - (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) Shall be determined in accordance with equity and the substantial merits of the case.

- 139 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 same place where the employee was so employed, or
 - (b) The fact that the requirements of that business
 - (ii) For employers to carry out work of a particular kind, or
 - (iii) For employees to carry out work of a particular kind in the place where the employee was employed by the employer,
 - (iv) Have ceased or diminished or are expected to cease or diminish

.....

- 6. In sub section (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

95. It is trite law that, the tribunal is not to review the wisdom of the decision to make redundancies. Essentially, the employer is to provide evidence to show that the alleged reason for the dismissal does have some basis in fact and that a proper business decision was reached. Where the employer is unable so to do, they will not be able to show that redundancy was the true reason. The wisdom or otherwise of that decision, whether to make redundancies remains the preserve of the employer.

96. In considering the question of reasonableness, authority in Williams and others v Compare Maxam Limited [1982] ICR 156, provides that in determining the question of reasonableness, it is not for the tribunal to impose its standard and decide whether the employer should have behaved differently but whether the dismissal lays within the range of conduct which a reasonable employer could have adopted, and in doing so, suggested the following criteria which a reasonable employer might be expected to

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

97. Where there is found to be procedural failures this will render a redundancy dismissal unfair under section 98(4) and any question as to whether the employee would have been dismissed even if a fair procedure had been followed, is relevant only in remedy.
98. [In assessing the fairness of dismissal, it is the tribunal's task to first look at the pool from which the selection is made and to which any selection criteria is then considered.
99. Where there are customary arrangements or agreed procedures that specify a particular selection pool the employer will normally be expected to adhere to that procedure. Where there is no customary arrangement or agreed procedure, the employer need only show that they have applied their minds to the issue and acted from genuine motives, see Thomas and Betts Manufacturing Co v Harding [1980] IRLR 255. The tribunal will here be concerned that the employer acted reasonably and in considering whether this is the case, the following factors may be relevant:
 - 99.1 Whether other groups of employees are doing similar work to the group from which the selections were made,
 - 99.2 whether employee's jobs are interchangeable,
 - 99.3 whether the employees inclusion in the unit is consistent with his/her previous position, and
 - 99.4 whether the selection unit was agreed with any union.
100. The tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. The tribunal is reminded that it is not for the tribunal to substitute their own view for that of the employer.
101. The employer is expected to consult with the individual affected and at risk of redundancy, which was made clear by Lord Bridge in Polkey v A E Dayton Services Limited [1998] ICR 142 that:

“In the case of redundancy.... The employer will normally not act reasonably unless he warns and consults the employees affected or their representatives, 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 organisation”.
102. Lord Bridge's guidance being further defined where, to do so, would be utterly useless or futile per Lord MacKay in Polkey that, if the employer could reasonably have concluded in the light of the circumstances known to

it at the time that consultation or warning would be utterly useless, it might well be acting reasonably in failing to consult. And per Lord Bridge that, a dismissal might be fair despite the lack of proper procedure if “the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile.” Which has been further illuminated by Lord Justice Balcombe in Duffy v Yeomans & Partners Limited [1995] ICR1, that the tribunal must judge

“What the employer did and not what it might have done. It is what the employer “as a reasonable employer” could have done which is required to be tested; so the tribunal must ask whether an employer, acting reasonably, could have failed to consult in the given circumstances”.

Some other substantial reason

103. It has long been established as espoused by Lord Denning MR in Lesney Products and Co Limited v Nolan & Others [1977] ICR 235 CA that “It is important that nothing should be done to impair the ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency. Where the some other substantial reason for dismissal is a business reorganisation, the employer does not have to show that a reorganisation was essential but that a “sound good business reason” for reorganisation is sufficient for establishing some other substantial reason for dismissing an employee, see Hollister v National Farmer’s Union [1979] ICR 542 Court of Appeal.
104. It is not for the tribunal to make an assessment of the advantages of the employer’s business decision to reorganisation or to change employee’s working pattern. The employer need only show that there were “clear advantages” in introducing a particular change. The employer does not need to show in particular “quantum of improvement” achieved. See Kerry Foods Limited v Linch [2005] IRLR 680, EAT.
105. On an employer establishing some other substantial reason as the reason for the dismissal the tribunal, pursuant to s.98 (4) of the Employment Rights Act 1996, must then consider the reasonableness of the change and of the dismissal; this involves considering whether, in all the circumstances, including the employer’s size and administrative resources, the employer acted reasonably in treating the business reason as a sufficient reason to dismiss. The tribunal must be mindful that it does not substitute its own view of whether or not the decision to dismiss for some other substantial reason fell within the range of reasonable responses that a reasonable employer might adopt. See William Cook Sheffield Limited v Bramhall and Others EAT 0899/03, and St John of God (Care services) Limited v Brooks and Others [1992] ICR 715 EAT.

Conclusions

106. On the respondent suffering a downturn in orders, predicated on a failure to convert designs in to samples and upon which orders would be made, there

being a change of emphasis for the respondent's business from cutting edge design to effective samples, I am satisfied that there was a diminution in the requirement of the respondent's business for employees to carry out cutting edge designs within the scope of their licences in order to generate sales. In these circumstances, I find that there was a redundancy situation within law.

107. Having determined that a redundancy situation existed in law, it is not for the tribunal to question the business decision of the respondent in determining whether or not to make redundancies. That decision is solely the province of the employer.
108. Turning to consider the selection pool, on the claimant advancing that as a designer she was a member of the group of designers performing similar functions who should equally have been a part of the selection pool, I deal with this issue briefly. I find that the recruitment and appointment of the claimant was to a new position, newly created focussing on "someone who could think outside the box and would be given time... to think, research and come up with new ideas" beyond those of the Design Team (being reactionary) and as referred by the claimant that "the core of the business is not boundary/pushing designs, but I was employed to think outside of the box with new creative development".
109. It was clearly envisaged on the appointment of the claimant that, her role would not be that of a designer within the Design Team and that at all material times the respondent has strived to maintain the unique position of the claimant's role in future design, as distinct from the requirements of the Design Team, as was evident by the working arrangements which were possible for the claimant in her role which had not then been possible for a member in the Design Team.
110. It is also material here to note that, the particular purpose for which the claimant's role was created was to meet the particular business strategy which was now being abandoned, that the claimant's role was a specific role , which had diminished.
111. In giving consideration to the functioning of the Design Team within the hub, and the particular relationship of the designer within the Team and the needs of the business, in particular handwriting, I am satisfied that there were sufficient business reasons for which it was then reasonable for the respondent not to increase the pool for selection to encompass the designers in the Design Team, and I am satisfied that the selection pool was reasonable.
112. In giving consideration to consultation with the claimant, it is not the respondent's contention that consultation was futile, in that it is evident by their efforts, that they had sought to consult the claimant, such that were they to have had a genuine belief that consultation would have been futile, that course of action could then not be explained.

113. On the respondent seeking to consult with the claimant, by the correspondence of Ms Sandhu on 15 March, giving direction for the claimant's exit on 21 (22) March, it is evident that, save for the events as to the claimant being on sick leave or otherwise raising a grievance, a determination had been made for the termination of the claimant's employment. I find that there was, as a result, no opportunity for any meaningful consultation to take place. In stating this, I am however conscious that the claimant did not raise any issues with the respondent despite the respondent, by their correspondence to the claimant, informing her of the consultation process, setting out what the consultation process was to achieve and for there to be explored options otherwise than redundancy in order to fulfil the company's business needs, had asked the claimant to put forward any viable suggestions or proposals, further asking for her to contact them by 17 March, which the claimant did not do.
114. On the respondent being a small business of 31 staff, and the Design Team consisting of 7 members, I accept the respondent's evidence that there were no internal vacancies at the material time, and I accept that there is a high probability that positions within the respondent's business would not have been suitable for the claimant, acknowledging that the claimant had not been prepared to work full time in the respondent's offices, and that of the positions within the Design Team to which the claimant has aligned herself to, as being suitable alternative employment were office based and not suitable for flexible home working.
115. Giving the above, I find that on the respondent having failed to consult the claimant, this was a procedural failure and for which the claimant's dismissal was unfair.
116. I accordingly find that the claimant was unfairly dismissed when her employment was terminated for reasons of redundancy on 21 March 2016.
117. The issue of remedy will be addressed at a hearing, the date for which will be furnished to the parties in due course.
118. Should the parties however, determine between themselves that a hearing on remedy will not be necessary, in that the parties are able to resolve the issue of remedy between themselves, they are to inform the tribunal without delay, whereon the matter of remedy will be dismissed.

Employment Judge Henry

Date: 27/3/2017

Sent to the parties on: 27/3/2017

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For the Tribunal Office