EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4112639/18 Held at Aberdeen on 19 & 20 November 2018

Employment Judge: Mr R King (sitting alone)

Mrs Tracy Dinning	Claimant In Person
Costain Engineering & Construction Limited	Respondent Represented by: Ms A Stobbart – Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent did not unfairly dismiss the claimant and accordingly her complaint of unfair dismissal is dismissed.

REASONS

Preliminary issue

1. Prior to the commencement of the hearing the respondent's agent raised a preliminary matter to the effect that she understood that the respondent is a client of the firm in which the Employment Judge is currently a partner, which could give rise to a conflict of interest that would make it necessary for the Employment Judge to recuse himself.

2. As he was unaware of any ongoing relationship between his firm and the respondent the Employment Judge retired to make appropriate enquiries and discovered that his firm's Dubai office had an ongoing business relationship with the respondent but that it had no business with the respondent in Scotland. He therefore recalled the parties and explained the position to them. The respondent's representative stated that it was also her understanding that the respondent had no business relationship in Scotland with the Employment Judge's firm.

3. Having explained the position, the Employment Judge adjourned the proceedings to allow both parties to consider their respective positions and to enable the claimant, who was unrepresented, to take advice.

4. When the proceedings resumed both parties confirmed that they were content for the Employment Judge to hear the case and he therefore decided to proceed on that basis.

Introduction

5. The claimant has presented a complaint of unfair dismissal. It is not in dispute that the reason for her dismissal was redundancy. The dispute relates to whether the respondent acted reasonably in dismissing her in circumstances where she claims her selection for redundancy was unfair because of the way in which the respondent defined the pool of employees to be considered for redundancy.

6. At the hearing the claimant gave evidence on her own behalf. Evidence was led on behalf of the respondent by Dawn Priestner (HR Business Partner), Paul Morris (Sector Commercial Director) and Ross MacKenzie (Strategic Development Director). All the witnesses gave credible and reliable

evidence. The parties lodged a joint set of documents and each side made closing submissions.

Findings in fact

The Tribunal made the following findings in fact.

7. The claimant commenced her employment with the respondent on 25 August 2014 and worked as a Contract Specialist for its Upstream business in Aberdeen. Her gross monthly pay was £4,023 and her net monthly pay was £2,618. She was also entitled to private health care and was a member of the respondent's pension scheme.

8. The respondent is a large-scale engineering consultancy business that provides a wide range of services across the UK's energy, water and transportation infrastructure.

9. The respondent's business is split into two customer-facing divisions, namely (1) Natural Resources and (2) Infrastructure. Each division is split into three sectors. Within National Resources the sectors are (i) Oil and Gas, (ii) Power and (iii) Water. Within Infrastructure the sectors are (i) Rail, (ii) Highways and (iii) Nuclear. While allocated to one or other division, all 'white collar' employees remain employees of Costain Engineering and Construction Limited.

10. The Oil and Gas sector is split into three sub-divisions; 'Upstream', which is based in Aberdeen and provides front end consultancy services in the offshore market; 'Midstream', which is based in Manchester and provides onshore gas processing; and 'Downstream', which is a refinery operation based at Immingham. At all times during her employment the claimant worked within its Upstream sub division at its Aberdeen offices.

11. During her employment as a Contract Specialist, the claimant's principal duties related to the review of contracts within a suite of standard form contracts known as "LOGIC'', which the respondent only uses within its Upstream business. Such contracts normally have a value of several thousand pounds and are of relatively low value and complexity compared to most of the contracts the respondent enters across its business, which are based on the "NEC3" suite of contracts, the value of which can be as high as £1 billion. The claimant was also responsible for reviewing other standard agreements including client non-disclosure agreements.

12. Throughout 2017 the respondent closely reviewed its Upstream business considering the significant decline that had taken place in the Aberdeen oil and gas market, which had led to a dramatic reduction in its work. As a result of this decline, the Upstream business had suffered losses of £559,000 in 2016, £689,000 in 2017 and an estimated loss of £157,000 in 2018. In addition, the Upstream business had failed to secure a number of contracts on which its 2017 business plan had been based.

13. In the circumstances the respondent was forced to review the low utilisation of certain roles within the Aberdeen office due to their reduced workload and the potential need to reduce the overheads of the Upstream business if market conditions did not improve.

14. For some time prior to the redundancy consultation process that began in early 2018 there had been limited contract review work available to the claimant because of the downturn in work within the Upstream business. As a result, she had also taken on a number of administrative tasks (such as the co-ordination of the Aberdeen office move) as well as some HR functions (such as the administration of sub-consultant contracts).

15. The respondent's review of its Upstream business concluded that based on its current and projected future workload there was no longer a requirement

for the full-time roles then undertaken by the Study Manager, the Quality Manager and the claimant's role of Contract Specialist.

16. The review noted that, due to a lack of appropriate work that was core to their roles, the claimant and the Quality Manager had for some time been undertaking a significant amount of administrative duties. It therefore concluded that major cost savings could be made by condensing the administrative duties they each carried out into a single full time Office Manager role, based in Aberdeen, which would attract a substantially lower salary than those of the Contract Specialist and Quality Manager.

17. The review also concluded that the technical elements of the Quality Manager and the Contract Specialist roles could be absorbed into the respondent's other group functions. The legal elements of the Contract Specialist role would be absorbed by its Group Legal function, which is based in Maidenhead and Manchester, and the wider commercial team would absorb the other commercial elements.

18. In the circumstances a redundancy consultation exercise took place with the employees who were at risk of redundancy as a result of the reorganisation proposed by the review.

19. So far as the claimant was concerned, she was initially informed in an informal meeting in Aberdeen with Dawn Priestner (HR Business Partner) and Sean Close (Upstream Director) on 8 February 2018 that her role was at risk of redundancy as a result of the reorganisation proposed by the review.

20. Thereafter, the respondent's first formal redundancy consultation meeting with the claimant took place on 14 February 2018. Dawn Priestner represented the respondent and Leah Barron accompanied the claimant. At the claimant's request, her line manager Paul Morris did not attend, as she believed that he had not been supportive of her.

21. During the consultation meeting the claimant raised several issues that she asked Miss Priestner to consider on behalf of the respondent. The first related to the availability of work within Group Legal. The claimant explained that in 2015 she had previously applied for a role in Group Legal, but that she had been unsuccessful. However, she understood that this same role had recently become vacant again and she queried why she had not been given the opportunity to apply for it again. The claimant also raised with Miss Priestner that she had previously discussed certain training opportunities with Paul Morris, but that these had not materialised.

22. During the meeting the claimant also confirmed that she was not interested in applying for the newly created Office Manager role in Aberdeen.

23. Following the consultation meeting Miss Priestner made enquiries about the matters the claimant had raised with her and subsequently discussed her findings with her in a call on 21 February 2018. In relation to the position within Group Legal Miss Priestner acknowledged that the claimant had previously been permitted to apply for a role within Group Legal in July 2015 even though she was not a qualified solicitor. However, the post had ultimately been offered to a qualified solicitor and when she had subsequently moved on to another job the respondent had decided to replace her with a like-for-like replacement who was legally qualified and had experience in the industry. In the circumstances the claimant would no longer have been a suitable candidate and therefore she had therefore not been invited to apply.

24. Miss Priestner also explained that the training opportunities that the claimant had discussed with Paul Morris had not materialised because they were reliant on key contracts being secured. However, as the respondent had not secured those contracts the training had not been necessary.

25. A second formal consultation meeting then took place between Miss Priestner and the claimant on 22 February 2018. On this occasion the claimant was unaccompanied. During this meeting Miss Priestner reassured the claimant that the redundancy consultation was not related to her level of training or her abilities and that even if she had attended the training sessions previously discussed with Mr Morris there would still be a need to reduce the Upstream head count in Aberdeen because the level of business could not sustain the Contract Specialist role.

26. During this meeting the claimant questioned how her role differed from that of solicitors within Group Legal. In response Miss Priestner explained that the respondent's in-house solicitors were formally legally qualified with at least three years' post qualifying experience. Furthermore, they worked across all business sectors and were expected to have a deep understanding of a broad range of contracts. She explained that the respondent considered their role to be significantly different to the claimant's Contract Specialist role, which was limited to a small number of standard formed contracts, typically used in the oil and gas market.

27. Following the 22 February consultation meeting the claimant sent an e-mail to Miss Priestner on 23 February 2018, which stated as follows: -

"*Hi Dawn*

I would like to advise that I have looked further into what constitutes a fair redundancy process and that I believe that I have been unfairly singled out.

It is my belief that a fair redundancy process should include all those that are doing a similar role within the company and therefore my pool should consist of all those that are undertaking broadly similar work to mine. I don't think that Costain has looked past my own job title in the company when determining who should be included in the pool and the fact that the company had not included Kay and Ruth in their redundancy pool would, on the face of it, be targeting an individual not acting in good faith or in a reasonable manner.

As discussed yesterday during my consultation meeting, the function that has been stated as requiring a solicitor for has already been delegated to me and I have been performing these tasks with the permission of the company and subsequently since the BP Global Contract on a number of other tenders. Therefore excluding those based on solicitor qualifications is, on the face of it, a false barrier that once again ensures that I am the only one in the group that can be made redundant.

Also had training been provided as discussed with Paul on two previous occasions then I wouldn't find myself in this position."

28. A conference call then took place with the claimant on 2 March 2018 during which the issues raised in her 23 February e-mail were discussed. Present on the call were the claimant, Leah Barron, Miss Priestner, Paul Morris and Sean Close. Miss Priestner explained that the claimant worked within the Upstream business, which was a discrete part of the respondent's business in respect of which there was a clear business need to reduce the overheads and increase efficiency because work streams had dramatically reduced. In the circumstances the 'relevant establishment' for the purpose of the consultation was its Upstream business and there were no other employees in the Upstream business carrying out a similar role to her who could be included in a redundancy pool.

29. In response to the claimant's assertion that the pool should be widened to include the respondent's solicitors, Mr Morris explained that he did not accept that it should. The role of solicitor within Group Legal included not only reviewing contracts but also dealing with contentious activities, adjudications, managing external legal support and providing training. It was therefore not reasonable to include solicitors in the pool for selection for redundancy because their role and the claimant's role were significantly different.

30. A final consultation meeting took place with the claimant on 13 March 2018, which was attended in person by the claimant, Miss Priestner and Sean Close. Mr Morris attended by telephone. At the outset Miss Priestner summarised the consultation process to date and confirmed that it had not been possible to avoid her role being made redundant.

31. Miss Priestner then explained to the claimant that throughout the period of the redundancy consultation she had also been trying to find her a suitable alternative role within the respondent's wider organisation by distributing her CV and her details among the HR team and throughout the wider business, but that unfortunately she had been unsuccessful. As the claimant had previously indicated that she was not interested in applying for the new Aberdeen based Office Manager role there was therefore no suitable alternative role available for her. In the circumstances Miss Priestner informed the claimant that she would be dismissed on grounds of redundancy.

32. On 14 March 2018 Miss Priestner wrote to the claimant confirming her dismissal by reason of redundancy and the terms of her redundancy payment. Her last date of employment was confirmed as 16 March 2018. In the letter Miss Priestner also explained the claimant's right of appeal against her dismissal.

33. The claimant elected to appeal against her dismissal. The appeal was heard by Ross Mackenzie (Strategic Development Director) and conducted by telephone hearing on 10 April 2018 at which the claimant was unrepresented and Mr Mackenzie was accompanied by Jenny Tomkins from Human Resources.

34. During the appeal the claimant explained that she wished to appeal the decision to dismiss her on two connected grounds. In the first place she submitted that all the respondent's business and not just its Aberdeen based Upstream subdivision should have been considered when determining the pool for redundancy. She believed there were other roles within the respondent's wider organisation that were similar to hers and that the respondent should have identified such roles and included them in the redundancy pool, rather than limiting the scope of the redundancy exercise to the Upstream division.

35. In the second place, she argued that there should have been a wider redundancy pool, which included other employees with similar or interchangeable skills relative to her own, such as its in house solicitors within Group Legal. She believed her day-to-day role was sufficiently similar to that of the solicitors within the respondent's group legal function that they should also be included in the pool for redundancy. In the claimant's view the only difference between them was that the solicitors had completed their postgraduate year and a two year traineeship.

36. In response Mr MacKenzie pointed out that the qualified solicitors within Group Legal would routinely be involved in more complex and large-scale contracts than the claimant would. They were also involved in a broader range of work than contract reviews. Furthermore, unlike the claimant, they were fully legally qualified. In the circumstances he did not believe her role was truly comparable to theirs and he did not accept they should be included in the redundancy pool.

37. During the appeal, other than the role of solicitor within the Group Legal function the claimant did not identify any specific role within the respondent's wider business that she believed was sufficiently similar to hers that it should be included in the pool for selection.

38. Following the appeal hearing, Mr MacKenzie instructed Miss Tomkins to carry out a job search for any similar roles to the claimant across the respondent's wider business. Having regard to the grounds of appeal advanced, he requested that she search for both (1) roles with the same or similar job title to the claimant and (2) roles with the same or similar job content to the claimant. The searches did not identify any role that was either the same as or sufficiently similar to the claimant's, which could reasonably have been included in a redundancy pool along with the claimant's role.

39. Having considered all the matters raised in the appeal and having completed the search for similar roles, Mr MacKenzie wrote to the claimant on 18 April 2018 rejecting her appeal against dismissal. In his letter Mr MacKenzie firstly explained that he considered that it was appropriate to focus the redundancy process on the Upstream business, which was a separate and stand-alone business unit within the respondent's group of companies.

40. In relation to the claimant's assertion that the pool for selection should have been widened he stated as follows -

"*... Even if we had chosen not to treat Upstream as a separate business unit and considered redundancies across Costain Group I still do not believe that there would have been any obligation to include you in this pool of selection because you do not carry out the same or similar role.*

Your role and job description is a Contracts Specialist, whilst I acknowledge there are some cross over in tasks and a level of collaborative working, it is fundamentally different to the role of a Solicitor, because to be a solicitor you obviously need to be qualified as such. This is an essential requirement of the role which you do not have. I am therefore satisfied that it was not appropriate to pool you with the other two solicitors that you have mentioned and, even if that had happened, you would ultimately been selected for redundancy because you are unable to practice as a Solicitor. I can also confirm that there are no other employees with the title/role of Contracts Specialist across Costain. There are of course other significant differences between the roles, such as the geographical distance between Aberdeen and Manchester, salary expectations and job content."

41. In the appeal outcome letter Mr MacKenzie erroneously stated that Costain Group Ltd had employed the claimant. This was not a material error affecting the fairness of his approach to the appeal or the decision that he reached.

42. While certain work was diverted from the claimant to Group Legal during the redundancy consultation exercise, this was due to her being absent when work required to be completed urgently. It was therefore entirely unrelated to the redundancy consultation and did not indicate a predisposition on the respondent's part to dismissing her.

43. Following the claimant's dismissal, she initially found employment within Aberdeen City Council, albeit on a lower salary than she had enjoyed with the respondent. However, she was unable to settle there and left it having gained employment with another business as of 22 October 2018. Her claim for loss of earnings is limited to the period between the date of dismissal and 22 October 2018.

Respondent's Submission

44. On behalf of the respondent it was submitted that the redundancy exercise conducted by the respondent was necessary in circumstances where the respondent's Upstream business had been making a loss and there was a diminishing need for the role of Contract Specialist.

45. The respondent's decision to create a pool of one for selection for redundancy was reasonable in all the circumstances. During the consultation process serious consideration had been given to extending the pool based on the claimant's representations. However, the respondent had been unable to identify anyone within the business who was in an interchangeable role and who ought to have been included in the pool for selection.

46. The respondent's decision that it was inappropriate to pool the solicitors within Group Legal was entirely fair and reasonable having regard to the significant differences between their job content and location. The claimant's role was limited to looking at one particular suite of contracts whereas the group legal function looked at a wider range of contracts, which were of a higher complexity and higher value and also related to large infrastructure projects. The claimant's remit was narrow and of low risk whereas the Group Legal solicitors would provide advice on contracts with values up to £1 billion.

47. It was also submitted there were no other roles that would have been appropriate to pool with the claimants and that this conclusion had been reached following job searches that had been carried out during the consultation and appeal process. Mr Morris had considered similar roles and Mr MacKenzie had carried out two job searches neither of which had identified any similar or interchangeable role. The respondent had properly applied its mind to the possibility of creating a wider pool for selection but that had not been appropriate.

48. It was also submitted that the claimant's dismissal had not been predetermined and that other than one piece of work that had been diverted when the claimant was off work for one day when that work had to be done urgently, there was no other occasion when work was redirected from her.

49. Finally, it was submitted that the appeal process had been fair and the error in Mr MacKenzie's decision letter had not undermined the fairness of the appeal.

50. The respondent had acted reasonably in all the circumstances and the dismissal had been fair.

Claimant's Submission

51. The claimant submitted her dismissal had been unfair. She claimed the selection process had been based on an artificial construct by limiting the selection pool to only those within the Upstream business in circumstances where it would have been reasonable to include all of the respondents' business.

52. She submitted that no other part of the business had genuinely been looked at with a view to consideration of a wider and fairer pool for selection. She believed that the respondent had only looked for others within the business

with the job title of "Contract Specialist" without any proper attempt to compare job content.

53. She believed that there must have been others within the business who had similar job content, but a different job title and the respondent had unreasonably failed to identify such employees who should have been included in the consultation process. She believed that it was highly unlikely that there were no others in similar roles reviewing contracts within the business.

54. The claimant also asserted that the respondent had failed to follow its legal obligations and the appeal had failed to independently consider the evidence.

55. The claimant also submitted that her dismissal had been predetermined, which was apparent from the fact that work had been diverted from her during the consultation process.

Discussion & Decision

56. The relevant law is not in dispute. The Tribunal was concerned with the application of section 98 of the Employment Rights Act 1996. It is for the respondent to establish a potentially fair reason. In this case the reason for dismissal was redundancy, which is a potentially fair reason.

57. It is then for the Tribunal to assess whether the respondent acted reasonably in dismissing the claimant for that reason. It is not for the Tribunal to rehear the redundancy process. Its task is to assess whether a fair process was adopted for selection and whether that process was applied fairly.

58. In this case the dispute related to the fairness of the respondent's decision to create a pool of one for selection for redundancy in circumstances where the

claimant asserted that there were others within the business who should have been included in the pool.

59. The Tribunal must take care not to substitute its own view of the pool that should have been created.

60. There are no fixed rules about how the pool for selection should be defined in a redundancy situation. (**Thomas & Betts Manufacturing Ltd v. Harding [1980] IRLR 255 (CA)** Unless there is a collectively agreed or customary selection pool an employer has a wide measure of flexibility. In this particular case there was no such standing agreement that the respondent was bound by.

61. In deciding whether a redundancy selection was fair, a Tribunal must decide whether the employer's choice of pool was within the range of reasonable responses. It should not substitute its own view as to what the pool should have been **(Hendy Banks City Print Limited v. Fairbrother & Others UKEAT/0691/04).**

62. The question of how the pool should be defined is primarily a matter for the employer to determine and provided an employer genuinely applies its mind to the choice of pool, it will be difficult for an employee (or a Tribunal) to challenge that choice.

63. The Tribunal was satisfied that the respondent had applied its mind fairly to the choice of pool when determining that the claimant was in a pool of one. While the consultation process had focussed on the Upstream business, it was clear that during the consultation both Mr Morris and Mr MacKenzie properly applied their minds to whether there were any similar or interchangeable roles throughout the business that could be included in a wider pool for selection.

64. The only positions put forward by the claimant as similar to or interchangeable with her own were those of solicitors within the Group Legal function.

However, the claimant's role was limited to the review of contracts within the LOGIC suite of contracts. On the other hand, the solicitors' role was far wider in terms of the range of contracts that they would review and the complexity and the value of those contracts, including providing advice to the respondent's most senior management about them. Solicitors also have far more varied roles in terms of providing contentious advice, managing external legal experts and providing training to the business.

65. In the circumstances the Tribunal finds that Mr Morris and Mr MacKenzie both acted reasonably when they determined that it was not appropriate to include qualified solicitors within the pool for selection in circumstances where their role and the claimant's role were materially different.

66. The Tribunal also finds that the respondent carried out suitable job searches and that it concluded reasonably that there were no other roles within the respondent's business that ought to have been included in the pool for selection for redundancy.

67. In all the circumstances the Tribunal finds that there was a genuine redundancy situation and that the claimant's selection for redundancy was fair and reasonable. Her claim for unfair dismissal is therefore dismissed.

Employment Judge: **R King**
Date of Judgment: **10 January 2019**
Entered in the Register: **14 January 2019**
And copied to parties