RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms Jaime Sasha Symeou**

Respondent: **Marston Group Limited**

Heard at: **East London Hearing Centre**

On: **11 January 2019**

Before: **Employment Judge Ross**

Representation

Claimant: In person
Respondent: Ms K Barry (Counsel)

JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is not well-founded. The claim is dismissed.

REASONS

1 The Claimant was continuously employed by the Respondent between 28 October 2013 and 30 June 2018. After a period of early conciliation, a claim was presented on 16 August 2018. The Claimant brought a complaint of unfair dismissal. At the outset of the hearing, the Claimant agreed that the correct Respondent was Marston Group Limited. I directed that this Respondent be substituted as the Respondent in place of the original First and Second Respondents.

2 The case was listed for two days. It was not possible to commence the hearing on 10 January 2019, but I pre-read the witness statements and relevant documents in the trial bundle on the afternoon of 10 January 2019.

Complaints and Issues

3 The issues between the parties were broadly as set down in the list prepared by Counsel for the Respondent. Following some discussion, the Claimant produced her own list, which was given to me at the start of the submissions. Putting the two lists together in a coherent way led to the following list which of its nature was not agreed, but which

contained all the issues that the parties wished to be determined at the liability stage of the hearing. This list was as follows:

Respondent's list of Issues

1. What was the reason for dismissal and was it a potentially fair reason?

    1.1 The Respondent avers that the Claimant was dismissed by reason of redundancy. In the alternative the Respondent avers that the Claimant was dismissed for some other substantial reason of a kind such as to justify the dismissal of the Claimant, namely a business re-organisation carried out in the interests of economy and efficiency.

    1.2 The Claimant alleges that her role was not genuinely redundant in accordance with section 139ERA.

2. If the reason for dismissal was potentially fair, was the actual decision to dismiss within the range of reasonable responses available to the Respondent so as to be fair under section 98(4) ERA? In particular, did the Respondent:

    2.1 warn and consult the Claimant about the proposed redundancy?

    2.2 adopt a fair basis upon which to select for redundancy?

    2.3 consider suitable alternative employment?

    2.4 consider bumping?

    In addition, the Claimant raises as issues:

    2.5. whether the decision to dismiss for redundancy was procedurally fair;

    2.6. whether the consultation process was a sham;

    2.7. whether redundancy was the real reason for her dismissal;

    2.8. whether the Claimant was fairly selected for redundancy.

3. If the Claimant was unfairly dismissed

    3.1 Should there be a Polkey reduction to reflect the chance she wold have been dismissed in any event? If so, by what percentage?

    3.2 Should there be a reduction for contributory conduct? If so by what percentage?

4 If the Claimant was unfairly dismissed, has she acted reasonably in mitigating her losses? If so, what are her losses?

The Evidence

4 There was an agreed bundle of documents. Page references in this set of Reasons refer to this bundle. I pre-read witness statements and heard oral evidence from the following witnesses:

4.1 Mr John O'Donnell

4.2 Mr Keith Hanshaw

4.3 The Claimant.

5 There were relatively few disputes of facts. I accepted the Respondent's witness evidence as honest and generally reliable, being corroborated by documentary evidence. I have indicated where I have found the evidence of Mr O'Donnell to be less reliable.

6 I accepted that the Claimant was an honest witness and generally reliable, but she felt so strongly about the merits of her case that this had clouded her ability to recall all details accurately. The main difference between the witnesses was the emphasis of the Claimant on certain facts and documents and the inferences that she drew from them. I did not agree with several of her conclusions as to the inferences to be drawn from the facts.

The findings of fact

The Parties

7 The Respondent provides outsourcing services to clients in central and local government. It has more than 4,500 staff in about 250 locations across the UK.

8 The Respondent had grown organically through acquisition. By the end of 2017, the Respondent decided it was necessary to centralise its core finance function in a new structure in its Oldham Shared Service Centre. This was for efficiency reasons. The Respondent also proposed that for efficiency purposes the directors should operate more self-sufficiently without dedicated executive assistants.

9 Moving the finance function to Oldham would result in redundancies at sites in Epping, Birmingham and Helmshore, because the financial function roles would be removed from those sites.

10 The Claimant was originally employed as a recruitment assistant. The Claimant was no doubt a valuable and committed worker. She was promoted to the role of administrator in the Finance department on 3 March 2014. In 2015, the Claimant became an executive assistant to the CFO and financial director.

11 From 1 April 2017, the Claimant became financial executive assistant to Mr John Crichton, the Chief Financial Officer. Mr Crichton had wanted his own executive (which was like a personal assistant role) and had not wanted support from the Executive Assistant Team, which supported other Executive Board members.

12 When Mr Crichton left, the Claimant supported Roy Dexter, Group Finance Director. The other four directors in the Finance department were more self-sufficient so when Mr Dexter left they did not need such a degree of support from the Claimant. Mr Dexter left the Respondent's employment in November 2017. At no point did the Claimant become part of the Executive Assistant Team.

13 Richard Shearer was appointed Chief Financial Officer on 15 May 2017. In May 2017, it was decided that the Executive Board members would be supported by the Executive Assistant Team. Mr Shearer was supported by an executive assistant (Ms Lauren O'Sullivan) from the Executive Assistant Team who supported at least one other Executive Director. The Claimant was not part of the Executive Assistant Team at any time.

14 The Claimant accepted that her "*reporting line was Finance*" and that she sat in the Finance team. But her case was that she was not part of the core finance function because she was not a financial system user and provided purely administrative support to directors and senior managers across a range of departments.

15 Having heard the evidence, I attached more weight to the Claimant's statements during the consultation process than during her evidence, finding the contemporaneous comments more likely to accurately reflect her position. As the Claimant explained in the first individual consultation meeting (page 127 – 128) on 7 February 2018, the Claimant admitted that she sat in the Finance department. The Claimant did not dispute that she helped Mr Shearer (the new CFO), Mr Rothery, and John O'Donnell, Operational Finance Director. At page 128, the Claimant's objection is that she did not work with finance systems and functions which is what the briefing matter of the 17 January 2018 referred to; her case was that her work was more varied and that she also worked for Mr Hoskins, Luke Jarvis and the Inciper Team.

16 I accepted Mr O'Donnell's evidence that the Inciper Team were an external consultancy team working on a specific project (the migration of the Respondent's Finance department from Sage to 365 Dynamic), which was directly linked to the finance function restructure. Therefore, the Claimant's support given to that project team was support to the finance function in substance. It was a unique position held by the Claimant. This project was time-limited and was due to end on 30 June 2018.

17 Although Mr O'Donnell tried to resist, I found that the staff change form signed by the Claimant on 14 November 2017, at page 99, had been submitted to Human Resources prior to the announcement of the redundancy situation. It was regrettable that Mr O'Donnell alleged in his witness statement that this was only submitted to the Respondent after the briefing meeting of 17 January 2018. I find that this evidence was made despite Mr O'Donnell not knowing when it had been submitted. I accepted the Claimant's evidence on this point, as did Mr Hoskins at the grievance appeal and before me.

18 The point relied on by the Claimant was that the form at page 99 confirmed a change in her line manager and job title to that of "Finance and PMO Executive", reporting to John Rothery. "PMO" stands for Project Management Office.

19 I found that this was a change in the form, but not the substance, of the Claimant's role. The Claimant's project management work was limited to assisting the Inciper Team.

20 In addition, I accepted the Claimant's evidence about work that she did for Mr Hoskins in preparing a board pack for the MSL board meetings. MSL had been purchased by the Respondent. I preferred the evidence of Keith Hoskins about this which I found reliable. I found that this work took the Claimant only between half a day and one day per month, albeit that this work was interwoven amongst her main duties for the Finance department. Also, I found that this developed in an organic way; it was not part of her substantive role assisting the Finance Directors.

21 The Claimant also relied on page 101, which was an email from Mr Shearer to Mr O'Donnell. I did not find that this supported the Claimant's case. On the contrary, I found as a fact what Mr Shearer believed and stated in that email: "*I think she is one of a kind in PMO so don't need to put whole PMO at risk*".

22 The PMO team was not part of the finance function. The point was that the Claimant's role was predominantly supporting the Finance Directors or the external project team, Inciper. In the circumstances, it was quite understandable why the pool for selection was not extended to include all of the PMO team of assistants.

23 Further, the fact that the Claimant could do much of her role remotely, whilst not at the office in Epping, did not mean that her role was independent of the Finance department, but only of the finance software system (because she was not a system user).

Warning of redundancy and consultation

24 All staff to be affected and at risk of redundancy were addressed in a briefing by Mr O'Donnell on 17 January 2018. The staff at the briefing meeting received a briefing document, at page 91. This included the following:

> "*Therefore, we are proposing and moved to centralise the core finance function under a new structure into the Oldham shared service centre. This will provide a platform to build on the implementation of Dynamics 365 as an integrated system and improved processes to build and embed an efficient finance cycle. This in turn will enable a further move towards a Business Partner model which aims to deliver value to our stakeholders….*
>
> *Departments that fall under the line management of Finance but are not core finance functions are not in scope for the consultation and are therefore not at risk. This includes the payroll and cashier teams.*"

25 The staff present also received a letter (at page 96) stating that they were at risk of redundancy. The Claimant received both these documents.

26 The briefing letter did not specifically state that the Finance Directors would be moving to a self-sufficient model (or a more self-sufficient model), but I accepted the evidence that this was part of the new structure referred to in the letter. As I pointed out to Counsel, a lot of upset could perhaps have been avoided by a clearer and more precise briefing letter of 17 January 2018, with pared down management speak.

27 I found the Respondent always intended that the new structure in Oldham would not contain any Finance Executive Assistant role. In fact, the Finance department in the new structure did not contain a specific executive assistant or administrative role. This explains why the Claimant was included in the redundancy consultation groups identified at page 102C (a powerpoint slide) and demonstrated by the new structure at page 102H. Both these documents were slides used at the first collective consultation meeting.

28 The chronology of the consultation meetings given by Mr O'Donnell was not disputed. The Claimant's case was that the consultation was not a genuine exercise but a sham. I found that although this was the Claimant's honest belief, it was not based on any reasonable grounds.

29 The collective consultation meetings held by Mr O'Donnell took place as follows:

29.1 24 January 2018 (page 102);

29.2 On 31 January 2018 (page 108 – 110);

29.3 5 February 2018 (page 114 – 115).

30 At these meetings, the Claimant and those within Accounts were represented by Frances Malone, another employee. The Claimant did not suggest Ms Malone did not represent her or failed in her role. I found the minutes of those meetings to be broadly accurate, if brief and not verbatim.

31 During the course of this consultation process, the Claimant emailed the Head of Human Resources to explain her belief why she should not be in scope for redundancy (see page 111).

32 Mr O'Donnell held three individual consultation meetings with the Claimant as follows:

32.1 On 7 February 2018 (page 126 – 128 showing amendments made by the Claimant).

32.2 On 7 March 2018 (at page 131 – 134).

32.3 26 June 2018 (page 245 – 248)

33 This part of the consultation was a genuine process. There was no persuasive evidence that it was a sham. The documentary evidence is detailed in terms of the matters discussed and points to the exercise being a genuine one.

34 The key point was that the collective consultation had not produced any counter-proposal to mitigate the redundancies or to propose a different structure to that proposed by the Respondent, and given the nature of the management case for efficiency, to centralise the finance function in the Oldham centre, this was understandable.

35 At the first individual consultation meeting, Mr O'Donnell explained that the Claimant had been pooled with the Finance department in Epping due to the fact her duties involved supporting the directors in Finance who would be moving to Oldham, and he explained that the Respondent would be looking at a self-sufficient director model, which meant removing the need for administrative support to the financial directors. This explanation was honest and accurate; it was not part of a plan which had been pre-determined.

36 At that meeting, the Claimant identified two colleagues who were not being made redundant. However, both Paul Bliss and Amy Pickering had comparable roles in the new structure in Oldham, and were prepared to move to Oldham. The Claimant's role did not exist in the new structure. After the meeting, the Claimant sent a list of her duties to the Human Resources representative. This is at page 121. I accepted Mr O'Donnell's evidence that this shows duties which were primarily allocated to the Finance department and that were likely to disappear in the new structure of self-sufficiency for directors in Finance.

37 The notes of the individual consultation meetings demonstrate that the consultation was not a sham. They deal with both conceptual differences about the Claimant's work and practical questions. In particular, the Claimant was asked if she would move to Oldham; she agreed, but not on a full-time basis, and only if visiting occasionally.

38 One of the Claimant's points was that the work that she was doing was not going to disappear. This was not disputed by the Respondent. The point that Mr O'Donnell made was that the administrative work needed to be done by the directors going forward, with the support of the Executive Assistant team if required, which meant that the Claimant's role was redundant.

39 The Claimant contended in the individual consultation process that she was a personal assistant in effect and should be in "Operations". This satisfies me that the Claimant realised at that time that she was in the Finance department, but it also demonstrates a failure to grasp that whatever department she sat in, her role was disappearing.

40 By the third individual consultation meeting, the Claimant believed that she had been treated incorrectly and unfairly by her selection. This arose because she believed that she was out of scope (that she was not a financial systems user and not part of the core financial function in her mind, because she performed only an administrative role) and because she believed that the Respondent was changing the goal posts in its rationale for the redundancy.

41 As a result, at the third consultation meeting, the Claimant was defensive. In that meeting, the Claimant argued, as she did in evidence before me, that her work diminished after the redundancy announcement. I found that much of the Claimant's work as a

Finance Executive Assistant had diminished before the announcement. The work done specifically for Mr Crichton on Acquisitions diminished after he left in May 2017, and thereafter she worked for Mr Dexter. When Mr Shearer joined the business, he was able to be more self-sufficient than Mr Crichton had been, with support from the Executive Assistant Team, specifically Ms O'Sullivan.

42 After the announcement, I find it likely that the Claimant was left out of certain work, such as Acquisitions. This was because Human Resources or Finance Directors wanted to ensure continuity in their work going forward. This was not such as to make her selection unfair or alter it in any way.

43 I accepted Mr O'Donnell's evidence that some duties such as travel bookings were not deliberately removed from the Claimant. I did not find the Claimant's evidence, that her duties were reduced from the date of the announcement of the redundancy situation, to be correct. I found it is likely that her duties reduced before that date and there was some further reduction from that date up to the end of June.

44 I accepted Mr O'Donnell's evidence about alternative employment contained in a vacancy list which was sent to the Claimant. In her third individual consultation meeting, it was clear that the Claimant did not apply for those alternative roles and found none available that were suitable in terms of pay or role. The Claimant alleged in cross-examination that she was not offered a role available in the Project Management Office. This was never mentioned before this hearing, neither in the consultation meetings nor in the claim nor in her witness statement. I found it unlikely that any such role was not contained in the vacancy list which was brought to the Claimant's attention.

45 At the final consultation meeting, the Claimant was informed that her employment would terminate on 30 June 2018. The Claimant was provided with a dismissal letter at page 255 – 256. I accepted that this document does state the rationale for the redundancy included "… *for all finance directors to adopt a self-sufficient model going forward*…", which was not in the briefing letter of 17 January 2018. I accepted Mr O'Donnell's explanation why this was so, which was that the briefing letter of January 2018 was in more general terms because it was directed not to the role done by the Claimant but to the finance system users, who were working on finance functions not administrative roles.

46 The Claimant did not appeal the dismissal, believing that there was no point. This indicates the degree of upset that she felt at this time. But the appeal would have provided her with an opportunity to identify any potential "bumping" of post-holders out of roles that could have been considered as alternative roles for her, or permitted her to raise any other roles that she felt should have been offered to her.

The grievance

47 The Claimant did raise a grievance. Evidence of this is included in the witness statement of Mr Hoskins. I found his account to be reliable. I accepted his evidence because he was providing a fresh pair of eyes from the outside of the Finance department. He made a genuine attempt to address the Claimant's grievance. Mr Hoskins uncovered no evidence that the process was a sham, nor that there was pre-determination to remove the Claimant after the departure of Mr Crichton. Mr Hoskins did

not uphold the appeal. I find that his analysis of the changing of her duties to be persuasive. From the list provided by the Claimant, Mr Hoskins identified that some of her duties had not been part of her role for some time. Mr Hoskins found, as I did, that the changing title of the Claimant's role to "Finance and PMO Executive" reflected the temporary project management help given to the Inciper team. This was logical and consistent with most of the evidence that I saw and heard. Although the Claimant cross-examined Mr Hoskins about two grievance appeal decision letters that were in the bundle (one dated 12 June 2018 and one 15 June 2018), it was clear that only the 15 June version was sent to the Claimant. There was no real argument from the Claimant that the 12 June version supported the Claimant's case.

Other Matters

48 The Claimant also relied on an incident on 11 June 2018, described in her email at page 237. The Claimant relied on this as evidence that her dismissal was pre-determined. On balance, I do not accept that this incident provided evidence of any pre-determination. Such an allegation is a serious one requiring cogent evidence, which was lacking in this case. Moreover, Ms Malone was not part of the management team and the Claimant had no complaint against her in her role as the Claimant's representative, so it is difficult to understand why the words used by Ms. Malone were evidence of pre-determination.

49 The Claimant also relied on the contents of the email at page 113 as evidence for pre-determination. This email was produced without any context or sequence of correspondence. There was no real evidence of anything other than an ill-judged remark by Mr Shearer.

50 None of the Executive Assistant team was dedicated to the Finance department as the Claimant generally was.

The Law

51 In determining whether unfair dismissal, it is for the employer to show the reason for the dismissal is a potentially fair reason within s.98 ERA. A potentially fair reason is one which relates to redundancy s.98(1)(b) ERA.

52 The definition of redundancy in section 139(1)(b) of the Employment Rights Act provides as follows:

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

53 The correct approach to determining what is a dismissal by reason of redundancy in terms of s.139(1)(b)(1)(i) is:

53.1 was the employee dismissed?

53.2 had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished?

53.3 if so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

54 This is the approach set down in *Safeway Stores v Burrell* [1997] IRLR 200, upheld in *Murray v Foyle Meats* [2000] 1 AC 51.

55 A reorganisation may or may not end in redundancy; it all depends on the nature and effect of the reorganisation: *Shawkat v Nottingham City Hospital NHS Trust* (no.2) [2001] EWCA Civ 954, at paragraphs 12-14.

Duty to consult

56 I found the summary of the law in *Mugford v Midland Bank* [1997] ICR 399, 406-407, most helpful:

> "(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
>
> (2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.
>
> (3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

57 Both parties accepted that in a redundancy case of this type there must be fair consultation. The requirements of fair consultation in the Employment context are summarised in *R v British Coal ex p. Price* [1994] IRLR 72 at para 24:

> "fair consultation means
>
> "(a) Consultation when the proposals are still at a formative stage.
> (b) Adequate information on which to respond.
> (c) Adequate time in which to respond.

(d) Conscientious consideration by an authority of the response to consultation."

58 I also referred to the ACAS Code, specifically paragraphs 10-11. For my part, I find that the ACAS Code is setting general guidance – it is reflecting modern employment standards. There is no rule of law about the precise timing of when the "formative stage" has been reached and when consultation should begin which is applicable in every case.

Scope of the principles in Williams v Compair Maxam

59 Although it was impossible to set out detailed procedures which all reasonable employers would follow in all circumstances in a redundancy situation, in general, reasonable employers should act in accordance with the following principles, if circumstances permit:

58.1. The employer will seek to give as much warning as possible of impending redundancies;

58.2. Whether or not an agreement as to the criteria to be adopted has been agreed with a trade union or employees, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

58.3. The employer should seek to ensure that the selection is made fairly in accordance with these criteria.

58.4. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

See *Williams v Compair Maxam* [1982] ICR 156.

Choice of Selection Pool

60 The following summary of the law in respect of the choice of selection pool is taken *Fulcrum Pharma (Europe) v Bonassera* UKEAT/0198/10:

59.1. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it, where the employer has genuinely applied his mind to the problem (citing with approval *Taymech Ltd v Ryan* [1994] UKEAT/663/94).

59.2. The pool should include all those employees carrying out work of that particular kind, but may be widened to include other employees such as those whose jobs are similar to or interchangeable with those employees. [Harvey on Employment Law, para 1685, cited with apparent approval]

59.3. Whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the

> Tribunal. When determining whether subordinate employees should be brought into a pool, the following are relevant factors:
>
> (a) whether or not there is a vacancy;
>
> (b) how different the two jobs are
>
> (c) the difference in remuneration between them
>
> (d) the relative length of service of the two employees
>
> (e) the qualifications of the employee in danger of redundancy;
>
> (f) there are other factors which may apply in a particular case.
>
> (citing *Leventhal Limited v North* UKEAT/0265/04, paragraph 12)

61 Also, I have taken into account the more recent decision of Eady J in *Dr. H. Mirab v Mentor Graphics (UK) Limited* UKEAT 0712/17, especially the guidance at paragraphs 43-48, which applies *Bonassera*. Both *Mirab* and *Bonassera* concern an employee who complained that he should have been offered a less senior role rather than dismissal. The facts in the Claimant's case are different.

Selection criteria

62 I have taken into account the more recent decision of Eady J in *Dr. H. Mirab v Mentor Graphics (UK) Limited* UKEAT 0712/17, especially the guidance at paragraphs 43-48, which applies *Bonassera*.

63 I reminded myself that a Tribunal cannot substitute their own selection criteria for that of the employer, but can only interfere if the selection criteria adopted are such that no reasonable employer could have adopted them in the way in which the employer did: see *Earl of Bradford v Jowett no.2* [1978] IRLR 16.

> *Suitable alternative employment: whether "bumping" must be considered in every case?*

64 The duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment. The basic principles of fair handling of a redundancy case were set out in *Williams v Compair Maxam* and the normal expectation that 'the employer will seek to see whether instead of dismissing the employee he could offer him alternative employment' was included as the fifth factor.

65 There may also be cases where it might be reasonable to look for a vacancy that *might be created*, possibly at the expense of another employee. In *Lionel Leventhal* Ltd *v North* UKEAT/0265/04 Bean J said that 'It can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy'.

66 In *Stroud RFC v Monkman* UKEAT 0314/13 pointed out that Bean J's judgment continues by stressing that it will always be a question of fact, not of legal obligation. This is consistent with the other authorities on this subject. In *Byrne v Arvin Meritor LUS (UK)*

Ltd UKEAT/0239/02, Burton P explained:

> "The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"

67 This was approved in dicta in *Samuels v University of the Creative Arts*[2012] EWCA Civ 1152 (where bumping was an incidental question) by Arden LJ who said that ' … the key is that it is not compulsory for an employer to consider whether he should bump an employee…. It is a voluntary procedure.'

Test of Fairness

68 I directed myself to section 98(4) of the Employment Rights Act 1996 which I will not repeat here. I reminded myself that the burden of proof on the issue of fairness was neutral. The principles which I must apply when applying section 98(4) are:

65.1. In applying section 98(4) the Employment Tribunal must consider the reasonableness of the employer's conduct.

65.2. The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

65.3. On the issue of liability the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

65.4. The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See *Foley v Post Office and HSBC Bank plc v Madden* [2000] IRLR 3.)

69 I reminded myself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see *Sainsbury plc v Hitt* [2003] ICR 111.

70 Also, I reminded myself that the Tribunal must avoid the vice of substitution.

Submissions

71 I heard oral submissions from the parties and took all the submissions into account, even if I do not deal with each of them separately below.

Conclusions

72 Applying the findings of fact made and the law set out above to the list of issues, I have reached the following conclusions.

Issue 1: what was the reason for dismissal; and was it a potentially fair reason

73 On the findings of fact made, the reason for dismissal was redundancy which is a potentially fair reason.

74 The Claimant alleged that there was no genuine redundancy situation within Section 139(1) of the Employment Rights Act 1996. I found that there was a genuine redundancy situation despite the Claimant's honest belief that no such situation existed. Having heard the Claimant give evidence, I found that her strong belief arose out of two main things. First, the briefing giving to staff on 17 January 2018 which failed to mention her role specifically, and why it was being included, and failed to explain that the finance directors were moving to a self-sufficient model. Second the Claimant like many employees did not understand the effect of the statutory definition of redundancy as explained in *Burrell*. Applying the questions identified in *Burrell* to this case produces the following:

74.1 The Claimant was dismissed.

74.2 The employer's business requirements for a finance and PMO executive dealing with the Inciper Team had ceased or diminished. This was the effect of the model for directors moving to a self-sufficient model in the interest of cost saving.

74.3 The business requirements for a finance executive and PMO role in Epping was ended by the relocation: there was no such role in the new structure in Oldham.

74.4 The dismissal of the Claimant was caused by those states of affairs.

Issue 2: was the decision to dismiss procedurally fair? Was the consultation process a sham?

75 The Claimant did not cross-examine on the basis that the Respondent had not complied with a specific redundancy policy. I have therefore directed myself to consider the factors referred to in the *Compair Maxam* case and the issues raised by the Claimant.

Adequate warning

76 Although the degree of warning could have been more explicit in the original briefing letter, this did set out that the core finance function was being centralised in Oldham service centre. The Claimant knew that she sat in the Finance department and that there was some risk of redundancy. In submissions, her complaint was not that she did not know of the redundancy situation and she never questioned why she had been invited to the meeting.

77 In my judgment, the Claimant had adequate warning, in any event, as a result of the three collective consultation meetings and the three individual consultation meetings. The first collective consultation was on 24 January 2018 and this made clear, at page 102C and the new structured chart at page 102H, that the new structure did not include the role currently held by the Claimant. In any event, adequate warning was given to the Claimant bearing in mind that she was not dismissed until 30 June 2018.

Was the consultation process a sham?

78 The degree and nature of the consultation led to the conclusion that the consultation process was not a sham. There was adequate consultation at a collective level across three sessions. There is no evidence in any of these that an alternative proposal, to the centralising of the finance function proposed by the Respondent, was made. This is understandable and not unusual; the management side had figures and data showing the efficiencies that could be made by centralising the Finance department at the Oldham shared service centre. Also, in demonstration of this, the notes of 24 January meeting consultation include:

> "*Many people are looking for roles, CV Building, especially those on shorter notice periods or service. Many just want to leave. People feel that it was definitely going to happen, so just want to know how much and when*.
>
> *People asking about handover and training. Atmosphere is very quiet*."

79 The point from this is that, collectively, the staff at risk and their representative did not propose any alternative to the Oldham move and centralisation of the finance function.

80 I have found that there was adequate individual consultation as set out in the findings of fact.

81 The degree of consultation overall was well within the band of reasonable responses open to this employer, in the circumstances of this case.

82 The Claimant alleges that the outcome of the redundancy process was "pre-determined" but I did not accept that because:

82.1 I accepted the evidence of Mr O'Donnell that the decision to dismiss the Claimant for redundancy was not predetermined.

82.2 The Claimant was sent vacancy lists. The Claimant chose not to apply. There is no evidence that she would have been restricted or prevented from applying.

82.3 The employee group consulted and the representatives did not put forward any alternative model or structure. So the Respondent proceeded with its proposals. This is not surprising nor evidence of predetermination.

83 I am satisfied that the Claimant's responses during the consultation work

considered. The point is that the Respondent did not accept them because it had decided that its proposal should be put in place.

Was there a fair selection for redundancy?

84 Although the Claimant put weight on this allegation, I concluded that the selection of the Claimant for redundancy was well within the band of reasonable responses.

85 Those at risk of redundancy were those in the Finance department at Epping and elsewhere who were involved in the core financial functions. The Claimant was such an employee even if she was not financially qualified and not a systems user. The fact was that she was supporting the finance function. The fact that she was not a system user was of very limited relevance, given the nature of her role and where she sat within the Respondent company.

86 The question of how the pool should be defined is primarily a question for the employer. This employer did apply its mind to it; and it included all those staff involved in the finance function at Epping.

87 Given the proposal to centralise the finance function in Oldham, the decision to choose all those in the finance function in Epping and elsewhere was within the band of reasonable responses.

88 The Claimant's case was that she worked for the directors, not just in finance; but this was the minority of her work. The majority of her work at the point of selection was for those performing core finance functions. The pool for selection of finance executive assistants and PMO assisting Inciper was, in effect, just one, namely the Claimant. The decision to have such a pool was well within the band of reasonable responses. The basis on which the Claimant was selected for redundancy was fair in the circumstances of this case.

89 On the facts, it was reasonable for the Respondent not to consider a "bumping" redundancy at the pool for selection stage. The Claimant did not, in any event, propose any subordinate role from which bumping should take effect.

90 Furthermore, the Claimant did not, as I have explained, consider any alternative available role suitable for her.

91 In summary, I concluded that the decision to dismiss the Claimant for redundancy was procedurally fair, being within the band of reasonableness in terms of procedure.

Issue 3: if procedurally fair, was the decision to dismiss fair and within the band of reasonable responses?

92 In the circumstances of this case, taking account the resources of this employer and the equity and merits of the case, the decision to dismiss the Claimant was within the band of reasonable responses open to it. The Respondent did invite the Claimant to consider alternative employment opportunities on the vacancy list. The Claimant did not apply for any role.

93 It was reasonable for the Respondent not to consider "bumping" redundancy in this case nor to offer the Claimant any subordinate role. Her role appeared to be one of a kind, so it was unlikely that bumping was feasible; but in any event the Claimant did not ask for bumping or raise it in any consultation meeting, so the Respondent can hardly be blamed for not addressing it.

Remaining issues

94 In the light of the above findings, there is no need for me to reach conclusions on the remaining issues. However, if I am wrong about consultation being adequate, and it is found to be inadequate by not exploring bumping and/or the dismissal of a subordinate for the Claimant, there is no evidence that any such consultation would have made any difference. I concluded that it was 100% likely that the Claimant would have been made redundant in any event, and such further investigation would only have taken one month. This would mean that the Claimant would have been dismissed in any event by 31 July 2018 at the latest.

95 There was no evidence of any contributory fault by the Claimant, and this allegation was not pleaded. I found that it was a misjudgement to raise this as an issue.

Summary

96 Given the above conclusions the complaint of unfair dismissal is not upheld.

Employment Judge Ross

Dated: 11 February 2019