# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Ranbir Kooner

**Respondent:** Charles Wells Limited

**HEARD AT:** Cambridge on 8 January 2019

**BEFORE**: Employment Judge Michell

**REPRESENTATION**: For the Claimant: Mr R. Fitzpatrick (Counsel)
For the Respondent: Miss T. Hudson (Solicitor)

# RESERVED JUDGMENT

1. The claimant's unfair dismissal claim is well founded.

2. Pursuant to **Polkey v. AE Dayton Services Ltd** and/or ss122(4) and/or 123(1) of the Employment Rights Act 1996, any basic or compensatory award which would otherwise be due to the claimant in respect of her unfair dismissal is reduced by 100%.

3. The remedy hearing provisionally listed for a half day on **18 March 2019** is vacated.

# REASONS

## BACKGROUND

1. The Claimant was employed by the Respondent from to September 2014 until 5 September 2017 ("**EDT**"), when she was dismissed purportedly by reason of redundancy. Following compliance with the Early Conciliation procedure, on 6 December 2017 she presented a claim alleging unfair dismissal.

## EVIDENCE

2. I heard oral evidence from the Claimant. On behalf of the Respondent, I heard from Mr Tom Foddy (Head of Retail Sales and Marketing) and Mr Peter Wells (Sales and Marketing Director). All witnesses did their best to give honest and full answers to questions. The claimant provided clarification in questioning as regards various points in her (long) witness statement which, she accepted on further consideration, did not really seem to reflect her case in many material respects[1]. I was also referred to an agreed 230-odd page bundle of documents.

3. The case was listed only for one day. By 4.30pm, evidence was concluded but there was insufficient time to then hear submissions or evidence on remedy. Accordingly, I gave directions for the parties to exchange written submissions, it being agreed that this was the most proportionate way forward. (I also listed a provisional half day remedy hearing in March 2019.) I have read, and I am grateful for, the lengthy and helpful written submissions which were thereafter provided to me on 22 January 2019.

## ISSUES

4. The issues for me to determine at this stage were agreed as follows:
    a. What was the reason for dismissal? As to this, the respondent asserted that the reason was redundancy (i.e. a potentially fair reason for the purposes of s.98(2) of the Employment Rights Act 1996 ("**ERA**"), alternatively, 'some other substantial reason' ("**SOSR**")- namely, a reorganisation within the business.
    b. The claimant's case was the redundancy process was purely a pretext, and that (as she put it in her witness statement) "the real reason for the dismissal" was because Mr Foddy wanted to put a friend of his, Mr Ben Howe, into her role.

[1] By way of example, reference at para 10 to the redundancy "scoring" being "superficial" did not make much sense, as there was no 'redundancy scoring'. This was not further explained in live evidence. I generally favoured the claimant's live evidence over the content of her statement, in the event of conflict between them.

c. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular:
   i. Was there a redundancy situation within the meaning of s.139 ERA?
   ii. If so, did the respondent warn and consult the claimant, and take such steps as may be reasonable to minimise a redundancy by redeployment within its organisation'?
   iii. If there was no redundancy situation within the meaning of ERA, was the dismissal nevertheless for SOSR, i.e. by reason of reorganisation within the business?
   iv. Did the decision to dismiss the Claimant in either case fall within the band of reasonable responses open to the Respondent for the purposes of s.98(4) of ERA?
d. If the dismissal was unfair, should any award be reduced (and if so, by how much) having regard to ss.122 and 123(1) ERA and/or the principles set out in **Polkey v. AE Dayton Services Ltd**?

## FACTUAL FINDINGS

Background

5. The respondent is a well-known name within the brewing and public house industry. The claimant was employed as a Retail Sales and Marketing Manager ("**RSMM**"). In summary, her role involved providing market support to the respondent estate of pubs. Her contract required her to "*carry out all of the duties, if any, which the company may from time to time direct you to perform and which are reasonably associated with the role… The company reserves the right to ask you to perform other duties that may fall outside your normal role responsibilities but which are within your reasonable capabilities*".

6. The claimant was one of two people performing the RSMM role, the other being Stephen Dryden-Hall. Both she and Mr Dryden-Hall were on the same pay grade (grade 15), albeit she earned slightly more than he did.

7. The claimant was good at her job. No disciplinary or capability issues arose at any point during her employment.

Sale of brewery business

8. On about 2 June 2017, the respondent sold almost all of its brewery business to Marston's (a well-established competitor in the trade). Some 90% on volume of 'on cask' product was sold off as part of a strategy to move the bulk of the respondent's' business from brewing and onto pub management. Albeit the respondent's intention was to continue with some microbrewing, the focus would henceforth be elsewhere.

9. As a result of the sale, about 300 members of staff who had been employed in the production, sales and brand marketing business transferred by operation of the TUPE Regulations to Marston's. About 15 redundancies were made in central services. This left about 80 members of staff at the respondent's head office, where the claimant worked.

10. She and Mr Dryden-Hall had various key performance indicators or 'KPIs' in respect of the RSMM role. The sale of the brewery business meant that about 20% of the matters comprising those KPIs (i.e. the kind of functions concerning the respondent's "own brew" products) would no longer form part of the role.

Changes to structure

11. In June 2017, shortly after the sale, Mr Foddy reviewed the remaining market function, and decided there should be changes in the structure. In particular, he proposed that about half of the job functions previously performed by the claimant and Mr Dryden-Hall in the RSMM role should be carried out by someone with a new role- 'pub marketing manager' ("**PMM**"), and that most of the remaining functions were to be carried out by someone with another new role- marketing activation manager ("**MAM**"). So, each new role largely focused on a portion of discrete aspects of the RSMM role.

12. Both such roles were anticipated to have a lower salary grade then the RSMM role. In particular, MAM role would pay substantially less, as it absorbed many of the less complex elements of the RSMM function. In her evidence before me, the claimant accepted this was sensible. Indeed, as she put it in her witness statement (albeit in a somewhat different context) it was "a cost saving exercise with the same output".

13. Mr Foddy explained in his evidence that both the PMM and the MAM roles would have involved a few additional functions to those carried out by the RSMM. However, he candidly accepted in his evidence that both the claimant and Mr Dryden-Hall could have performed either the PMM or the MAM role in full, with minimal need for further training.

14. It is clear that Mr Foddy was discussing his proposals with human resources by mid-June 2017. Hence, for example, he and Anne Prince, HR Director, were exchanging drafts of the job descriptions for the new roles by that time. However, none of the proposals were articulated to or shared with the claimant or Mr Dryden-Hall at that point. This, I accept, was partly because Mr Dryden Hall was away (on honeymoon) for some of the time. However, Mr Dryden-Hall's absence does not fully explain why matters were not discussed with the two individuals concerned at an earlier stage.

15. Mr Foddy explained in his evidence that the two new roles were to be 'ring fenced', in the sense that Mr Dryden planned for the claimant and Mr Dryden-Hall both to be invited to apply for either of them and, if interested, undergo an interview process. Meanwhile, neither role would be advertised, either internally or externally.

16. When asked by me why an interview process was proposed, rather than simply a 'slotting-in', Mr Foddy said it may have been the case that both the claimant and Mr Dryden Hall would have wanted the same role - e.g. the (better paid) PMM role. Hence, he said, an interview process was the fairest way of determining the outcome. I consider this was an approach which was validly open to the respondent. And in fact, the claimant also accepted Mr Foddy's reasoning in cross examination.

17. Whilst I understand there was 'ring-fencing' in the above limited sense, and that (as set out below) the opportunity to apply was duly offered to both the claimant and Mr Dryden-Hall, there is no reference to the idea that the claimant and Mr Dryden-Hall would have the opportunity for 'first bite at the cherry' in any of the correspondence which took place between (e.g.) Mr Foddy and Anne Prince at this time. Nevertheless, I accept Mr Foddy's evidence on this point, which was not challenged.

18. By 20 July 2017, Anne Prince of HR had already put together the interview questions which she proposed be asked of candidates for the two new roles.

Consultation process

19. Mr Foddy did not meet with the claimant or Mr Dryden-Hall until 25 July 2017. In the 25 July meeting Mr Foddy told the claimant and Mr Dryden-Hall that he was considering making the RSMM position redundant by reason of the proposed restructure. He also gave them a document which set out the functions which would be performed by the two new roles.

20. I accept the claimant's evidence that at the meeting, Mr Foddy did not explain in any specific detail the effect which sale of the brewery business would have on the KPIs for the RSMM role. (I would nevertheless have thought both the claimant and Mr Dryden-Hall would have some idea of the impact that sale of the brewery business would have on the functions they had previously been performing.)

21. On 26 July 2017, Mr Foddy and the claimant met again. He suggested to her that she consider applying for the two new roles. (He also made the same suggestion to Mr Dryden-Hall, who soon after told the claimant he was not interested.)

22. Fairly shortly after that 26 July meeting, the claimant was told in a telephone conversation that she no longer was required to attend work or perform any office functions, and that she should put an 'out of office' message on her computer. The claimant understood this to be some form of 'garden leave'.

23. By a letter dated 2 August 2017, and following another consultation meeting earlier that day, the claimant wrote a grievance letter about the process that had been followed. She asserted that there was no redundancy situation "*since Charles Wells is still operational*" and because "*as part of the new structure the business is adding additional resource to the team to carry out the same duties*". (Actually, no such "additional resource" was added.)

24. Rather than dealing with the letter by way of its grievance procedure and -as the claimant had asked in her letter- causing the redundancy procedure to be "discontinued" or "stayed" in the interim, the respondent chose to proceed with the process and allow the claimant to raise any issues and she had with that process in that context. I think it was open to the respondent to take that approach -which Mr Foddy explained to the claimant by way of a letter of even date- at least in principle. In fairness to her, the claimant conceded as much in cross-examination.

25. Mr Foddy and the claimant were due to have another consultation meeting on 7 August 2017. A note had been prepared for Mr Foddy by Anne Prince in anticipation of that meeting. In the note, it was explained that the two new roles were "narrower and more specialised", and that certain new tasks would be added to each role. It also says: "*we are proposing to reorganise the team to better meet the needs of the business. We have chosen to use a redundancy consultation to achieve this as we believe this is the fairest way for all concerned*".

26. The claimant told Mr Foddy she could not make the meeting because of a "prior commitment" (i.e. -though she did not mention this- with a recruitment consultant). The two of them met again on 9 August 2017, when Mr Foddy made use of the note prepared for 7 August. For that meeting, the claimant had prepared a speaking note. In that note she says that her tasks have been "*split over to roles*"[sic] and "*neither job is financially viable*". She queries why she should "reasonably be expected" to "*re-apply for my existing job with a substantial reduction in salary*". The note concludes:

"*…my trust and confidence in the business has been undermined and I'm demotivated having had to undergo this charade. Even if you were to propose that I get back to my existing role and ditch this process I still wouldn't go back as my confidence is at rock bottom for the way in which I've been treated. We can come to an agreement to part ways amicably or I will exercise my rights to which I can't comment at this point. The outcome of this process will determine my next steps…*" (underlining added).

27. In the meeting, the claimant expressed concern that the redundancy process was meant as a criticism of her performance. Mr Foddy assured her this was not the case.

28. On 11 August 2017, Mr Foddy wrote to the claimant. He set out in his letter much of what he had explained to the claimant in the course of their 9 August 2017 meeting. In particular, he articulated how workload was to be reorganised within the two new roles. His letter also explained that the question of salary had been reconsidered and that the PMM salary grade had been increased to align with the claimant's current role. The respondent would, he said, offer "*protected pay or red-circling*" if the claimant decided she "*wished to apply for one of the roles and was successful*". He asked her to reconsider her decision not to apply, and advise him by close of play on 15 August 2017.

29. By an email dated 15 August 2017, the claimant confirmed that she would not be reconsidering her decision not to apply for the PMM role. She explained:
"*the fact that Charles Wells has started this process has undermined my trust and confidence in the organisation. The only way I can see a future is to end the current process and have a full and formal apology and acceptance that this redundancy process is flawed by close of business on Thursday, 17 August 2017*".

30. The Claimant was invited to attend a further consultation meeting on 18 August 2017. She did not do so, because she was suffering from stress and anxiety.

31. On 22 August 2017, in the context of a consultation meeting, Mr Dryden-Hall told Mr Foddy for the first time that he was not interested in either of the two new roles, and that he would rather take a redundancy payment. (He duly did so.)

32. Mr Foddy did not relay this information to the claimant (although, as explained above, she already knew Mr Dryden-Hall did not want the PMM job). Mr Foddy did not then suggest to the claimant that she could, if she wanted, simply have the PMM role. I asked him in the course of his evidence of why this was so. He replied that he did not know. He said that "*there was nothing stopping us offering her the role"* but that he was "*following the process I had been working on*" (i.e., the process which had been designed with HR). He said in his evidence he had a "gut feeling" that she wouldn't have accepted it, even if it was offered. (It appears he was right about this, given the words underlined at para 26 above. See also para 33 below.) He posed himself the question "*should we have sat down and talked*"? He answered that question with "potentially".

33. I asked the claimant whether or not, if she had been offered a PMM role at around that time (or thereafter), on the same salary as she had received before, she would have accepted it. She said, clearly and categorically, that she would not have done. She did not seek to suggest that the PMM role would have been 'beneath her' or unduly limited. Rather, she explained in cross examination that any such offer would have come too late.

Dismissal

34. Mr Foddy tried to reschedule the consultation meeting for 5 September 2017, which date followed a pre-booked two week holiday by the claimant. The claimant indicated she would not attend the 5 September meeting. Mr Foddy offered her the opportunity to make written representations if she wished to do so. She did not take this offer up. On 6 September 2017, she instead provided a letter appealing her dismissal following Mr Foddy's letter dated 5 September 2017, which confirmed she was being made redundant.

35. Upon her dismissal, the claimant received a PILON, as well as an enhanced redundancy or severance payment.

Appeal against dismissal

36. In her appeal letter, the claimant asserted there was no "genuine redundancy" situation and (again) asserted "*Charles Wells will still operational and as part of the new structure that business is adding additional resource to the team to carry out the same duties*". She asserted the consultation process had been "a sham" and said she believed a suggestion that she consider the MAM or PMM role was "*offensive, as you have asked me to reapply for my existing role with the significant pay cut … if this was a genuine redundancy I would not in a position to accept either of these roles as they are not financially viable*". This is something of a reprise from the claimant's 9 August speaking note- but, as already explained above, the claimant had in fact been told in terms that, if she was successful in applying for (at least) the PMM role, she would be put on the same salary as before. Time had moved on, as had what the respondent proposed; curiously, the claimant did not acknowledge that fact.

37. The claimant was also critical in her letter of the fact that her employment had been terminated "*whilst I was on sickness absence and not well enough to meaningfully participate in the process that you were continuing*". I do not think this is of itself a wholly fair criticism in the light of the numerous consultation meetings that had already taken place, and given that the claimant had been offered (but not accepted) the chance to make written representations.

38. The claimant's appeal was heard by Mr Wells on 3 October 2017. At no point during the meeting did the claimant ask to be interviewed for or 'slotted into' the PMM role. Nor did Mr Wells offer her either such opportunity.

39. I asked Mr Wells why it was that the claimant had not simply been offered the PMM role once Mr Dryden-Hall had refused it. Mr Wells told me that it was "down to trust".

He said the claimant "*had said she had lost trust in the organisation*" and that "*when you break that line it's hard to come back from*".

Post-dismissal events

40. The PMM role was advertised post-5 September 2017, and was duly filled, by Mr Howe, in November 2017. Mr Howe was not the first contender for the role. It was initially offered to another candidate (Mr Garnett), who declined it because the salary was not enough. Mr Foddy was one of the people who interviewed Mr Howe. However, I accept Mr Foddy's evidence that in fact he was not particularly close to Mr Howe, that Mr Howe's application came via Mr Wells, that there was nothing inappropriate about his recruitment, and that in any event the 'reorganisation' did not take place with the purpose of uprooting the claimant in order to replace her with Mr Howe. That criticism of Mr Foddy is not well founded.

## THE LAW

41. The following principles are material:
    a. The initial burden is on the employer, to show the dismissal was for a potentially fair reason.
    b. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of reasonable responses reasonably open to the employer. See **Williams v Compair Maxam Limited** [1982] IRLR 83: "*it is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted*" (*per* Browne-Wilkinson J).
    c. Redundancy has the meaning assigned to it by s. 139 ERA . In every case, care must be taken to see that the exact words of s 139 are satisfied. **Lesney Products & Co Ltd v Nolan** [1977] IRLR 77.

d. Pursuant to **Amos v. Max-Arc** [1973] ICR 46, 'work of a particular kind' means work "*which is distinguished from other work of the same general kind by requiring special aptitude, skills or knowledge*".

e. The mere fact of reorganisation is not of itself conclusive of redundancy or, conversely, of the absence of redundancy. **Corus and Regal Hotels Plc v. Wilkinson**. EAT 0102/03.

f. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The tribunals will not sit in judgment on that particular business decision. **Moon v Homeworthy Furniture (Northern) Ltd** [1976] IRLR 298. (It is, though, entitled to consider whether the redundancy situation is genuine. **James W Cook Ltd v. Tipper** [1990] ICR 716.)

g. The following is amongst the guidance given in **Williams v Compair Maxam Ltd** [1982] IRLR 83:

    i. The employer should seek to give as much warning as possible of impending redundancies.

    ii. The employer should consult and seek to agree the criteria to be applied.

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

    (Similar observations concerning the need to commence consultation "when proposals are still at a formative stage" is made by Glidewell LJ in **R. v British Coal Corporation and Secretary of State for Traced and Industry, ex p. Price** [1994] IRLR 72.)

h. These are not principles of law but rather standards of behaviour which may alter over time. Cf **Royce Motors Ltd v Dewhurst** [1985] IRLR 184.

i. Following the opinion of the House of Lords in **Polkey**: "*… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected … and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation*".

j. As was held in **Lionel Leventhal Ltd v North** UKEAT/0265/04 *per* Bean J: "*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*".

k. In order to establish SOSR, and when relying on a business reorganisation, the employer need not show that the reorganisation was essential. A "*sound, good business reason"* will suffice. The employer must nevertheless demonstrate that it has discernible advantages to the business **Kerry Foods Ltd v Lynch** [2005] IRLR 680, EAT. A mere statement that there are advantages is insufficient. **Banerjee v City and East London Area Health Authority** [1979] IRLR 147.

## APPLICATION TO THE FACTS

### Unfair dismissal?

Redundancy situation

42. Was there a redundancy situation for s.139 ERA purposes? Probably. I understand the claimant's point that material numbers of staff did not diminish. In the old structure, she and Mr Dryden-Hall did the necessary work. In the new structure, most of that work was (again) to be done by two individuals - in the PMM and the MAM role. I also appreciate Mr Fitzpatrick's point that there was continuity in the 'old' and new roles viz the function of 'providing local marketing support to the respondent's' tied estate of pubs'. However, "redundancy" for s.139 purposes includes the situation where the requirements of the business for employees to carry out 'work of a particular kind' has ceased or diminished (or is expected to do so). There was, of course, a diminution in the work relating to 'own brew' products and knock-on effect on discrete KPIs as explained above.

Reason for dismissal

43. Even if Mr Fitzpatrick is correct in saying, in his well-argued submissions, that this did not amount to diminution in 'work of a particular kind' (i.e. work of a kind which was properly distinguishable from the other work done by the claimant), the respondent has persuaded me that if dismissal was not by reason of redundancy, it

was for SOSR, namely, a business reorganisation in the context of the sale to Marston's (which rationalised the two posts formally held by the claimant and Mr Dryden-Hall, and which had the additional purpose of cost saving.)

44. As I have already explained above, I reject the claimant's 'conspiracy theory' related to Mr Howe -which, in fairness to Mr Fitzpatrick, he sensibly did not seek to pursue on behalf of his client with any vigour in cross examination, and which he did not mention in his written submissions.

Fairness of dismissal

45. As explained above, I do not think the respondent can validly be criticised for seeking to update and realign its structure and introduce the two new roles in place of the RSMM roles.

46. There were nevertheless several matters which were of concern. In particular:
    a. The consultation process could have begun earlier. Fairness dictated early commencement of engagement with the staff concerned. As it was, the timescale involved and the paperwork to which I have referred above suggests that a provisional decision had been made about the new structure before consultation with the claimant commenced.
    b. I think that the consultation process could have involved a clearer explanation as to why the two new roles were proposed (albeit quite a lot of information was given).
    c. As regards redeployment, subject to the above I do not consider it was outside of the band of reasonable responses for both the claimant and Mr Dryden-Hall initially to be expected to go through an interview process, for the reasons explained by Mr Foddy (and accepted by the claimant).
    d. However, and most importantly, once it had become clear to Mr Foddy that Mr Dryden-Hall did not want the PMM, I think that fairness dictated the claimant be offered that role without the need to be interviewed.

47. I bear in mind the need not to adopt a substitution mindset. Nevertheless, I consider the dismissal was unfair for the purposes of s.98(4) of ERA.

**Sections 122 and 123(1) ERA and Polkey**

48. I must then consider the prospect of a **Polkey** or deduction pursuant to s.122/123(1) ERA. The claimant rejected the invitation to apply for the PMM role. This, despite the fact that about four weeks before her dismissal, the respondent told the claimant that she would be paid the same salary if she successfully applied for it. She told me in terms that even if the role had been offered to her on the same salary and without any preconditions such as an interview, she would not have accepted it. Even when she knew Mr Dryden-Hall would not be applying for it in late July, she at no point asked for the PMM (or MAM) role to be made hers.

49. The claimant did not suggest that- apart from the salary issue (which was rectified)- the PMM role was somehow inapt for her to perform. So, given the preceding paragraph, the claimant cannot validly say she has been deprived of the opportunity to take up a suitable role in the new structure which she would have accepted. If the respondent had offered her the PMM role from about 22 August 2017 (when Mr Dryden-Hall made clear to the respond he did not want a new role), she would have refused it.

50. I therefore conclude that although the dismissal was unfair, because the matter was not handled by the respondent as it should have been (even making allowance for the 'range of reasonable responses'), a 100% reduction ought to be applied pursuant to s.123(1) ERA to any compensatory award the claimant might otherwise have received.

51. Any basic award would be extinguished in any event, by reason of the claimant's receipt of an enhanced redundancy payment. See s.122(4) ERA.

52. It follows that the half day remedy hearing provisionally listed for **18 March 2019** can be vacated.

Employment Judge Michell, Cambridge

JUDGMENT SENT TO THE PARTIES ON

5/3/2019

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FOR THE SECRETARY TO THE TRIBUNAL