EMPLOYMENT TRIBUNALS

Claimant: **Miss A J E Boxall**

Respondent: **Smith Bradbeer & Co. Limited**

Heard at: **Southampton** **On: 27 and 28 February 2019**

Before: **Employment Judge C H O'Rourke**

Representation
Claimant: In person
Respondent: Mr England – counsel

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed, part-time, three days a week, as a display assistant at the Respondent's store, for approximately eight years, until her dismissal, on grounds of redundancy, with effect 31 July 2018. As a consequence, the Claimant brings a claim of unfair dismissal.

2. It is common ground that the bulk of the Claimant's work involved dressing displays in the Store's four street-facing main windows. It is also common ground that the Respondent decided to change the style of such displays, from 'boxed-in', self-contained displays, to open, smaller displays. The Respondent stated that because of this change, the Claimant's role was no longer required to the previous extent it had been and hence its redundancy.

3. The issues in respect of this claim are as follows:

    a. Has the Respondent shown the reason for dismissal, namely redundancy, which is potentially a fair reason under s.98 of the Employment Rights Act 1996 (ERA)? The Claimant states that the circumstances did not amount to a genuine redundancy situation, as the need for her role continued, with, she said '*80% of the windows still there'*. She considered the true reason to be an effort by the Respondent to save costs.

b. Did the Respondent follow a fair procedure? Such procedure would include the following:

   i. Due warning of the risk of redundancy and consultation in respect of it. The Claimant did not consider that such consultation as was carried out was meaningful, or took into account her views and concerns.

   ii. Consideration as to whether a pool for selection was appropriate. The Respondent did not consider a pool appropriate in this case, as they viewed the Claimant's role as 'stand-alone' and not comparable with the roles of other members of staff. The Claimant disputed this, arguing that there should have been a pool, with her and other staff included.

   iii. Consideration as to whether there was suitable alternative employment available to the Claimant and if so, the offer of such employment.

c. In the event that there was a finding of unfair dismissal, due to a failure in procedure, the Respondent would rely on a **Polkey** defence.

d. Did the Respondent act reasonably in treating the reason for dismissal, as sufficient to justify the Claimant's dismissal, taking into account all the circumstances, including its size and administrative resources?

The Law

4. Mr England referred to the definition of redundancy, as relevant to the circumstances of this case, at s.139(1)(b)(i) ERA, which states:

   '*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy, if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish'*

5. I was also reminded by Mr England of the guidance in the case of **Williams v Compair Maxam Ltd [1982] ICR 156 UKEAT** that in determining the question of reasonableness if was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether '*the dismissal lay within the range of conduct which a reasonable employer could have adopted'*.

The Facts

6. I heard evidence from the Claimant and on behalf of the Respondent, from Mr Paul Lewis, the then Store manager, who was involved in the initial

stages of the consultation process; Mr Mark Hall, a senior manager, who took over the process from Mr Lewis and dismissed the Claimant and Mr Greg Davies, a director, who heard the Claimant's appeal.

7. The Respondent is a medium-sized employer, with approximately 200 employees and several premises. It has all the appropriate managerial and administrative resources for an employer of that size, but I accept Mr England's submission that it cannot be compared to nationwide chains, such as John Lewis and others.

8. As stated, the Claimant's main role was to dress displays in the main street-facing display windows, in the Romsey store. It was agreed that she also dressed four mannequins in an entrance foyer, dressed some shelves within the Store and, at Christmas time, dressed the entire Store, in a seasonal manner. She said that she had worked as a display assistant, for all her working life, since the age of sixteen (she is now in her early sixties). She clearly loved her work and was very upset at losing it, after so many years.

9. Mr Lewis became store manager in early 2014, having worked previously, for some time, for John Lewis & Partners. He said that he had been taken on to make changes in the Store, based on his past experience and to modernise it. He considered the then style of enclosed window displays to be 'old-fashioned' and felt that if the displays were smaller and not enclosed that space could be used for shoppers to browse and also allow window-shoppers to see into the Store. It was agreed evidence that the Claimant and he had discussed these thoughts, in late 2017/early 2018 and the Claimant, it was agreed, voiced concerns about the likely effect of such changes on her role. The Claimant stated that at some point during this time, Mr Lewis had suggested to her that she should seek employment elsewhere, at another store, called Elphicks, where she had worked before. However, Mr Lewis vehemently denied this, stating that while working for Elphicks had been discussed, it had been at the instigation of the Claimant, who having become aware that Elphicks needed help with their displays, had asked him if he would have any objection to her working on other days for that Store. He said he had no objection to her doing so, provided it didn't conflict with her work for the Respondent and offered her contact details for a manager at Elphicks. He said that it was her who used the word 'redundancy', not him. The Claimant accepted that the conversation had taken place broadly in that manner, at her instigation, although there was some dispute as to its timing. It was clearly not, therefore, evidence of some pre-determination by Mr Lewis of her dismissal.

10. There was some discussion as to changes in the Claimant's role prior to Mr Lewis' arrival and the Claimant did agree that at some point, perhaps in 2013, it was decided, due to her workload on the windows that she should no longer dress mannequins in the ladies' fashion department (that being done by staff in that department). She also agreed that in approximately 2016, she ceased to dress the models in the menswear department. She disputed that she had requested, agreed to or acquiesced to such changes (as asserted by the Respondent) and had instead been directed to do so and argued, therefore that such roles should have been returned to her, to

obviate the need for the redundancy of her role. In answer to questioning, she did accept that she had not disputed these changes when they occurred, or subsequently, until that is the redundancy consultation. It's clear to me, therefore that these functions had, for some considerable time, been no part of her role and that until the redundancy consultation, she was content with that arrangement.

11. Mr Lewis informed her on 11 June 2018 that her position was at risk of redundancy [60]. He recorded in the minutes that he said that '*as you know, for some time now, we have been looking at making some changes to the Bell Street windows …* (and later in the same paragraph) *we have also been looking critically at job roles within our business to make savings'*. The Claimant said that she was shocked by this announcement, as she had thought that Mr Lewis had abandoned these plans.

12. He considered that as a consequence of his changes to the window displays, they would be smaller and simpler and that the Respondent would no longer need the Claimant's level of expertise, or the man hours in her role. He said in cross-examination that therefore the remaining displays could be dressed by shop-floor staff in much less time, with more frequent changes, as required, as the displays were smaller and simpler and the staff were available six days a week. Therefore, he said, there was no need for the Claimant's training or expertise. He said that nobody had a job for life and that inevitably jobs changed over time and unfortunately for the Claimant, hers was one of them.

13. The Claimant said that the decision to make her role redundant, leading to her dismissal was 'pre-determined' by Mr Lewis, who was '*on a crusade*' against her and nothing she said could change that situation. In this respect, however, I find, the Claimant confused two decisions: the first to change the method of window display and the second to make her role redundant. The first was a business decision, which the Respondent was entitled to make and in respect of which, while they may register the Claimant's views on the merits of the decision, was not one she was entitled to insist was reversed. They maintained the correctness of that decision and it is undisputed evidence that the change was made and no-one was recruited to replace the Claimant's role. Nor is it a decision, applying the case of **Compair Maxam** that I can second-guess. While, throughout the conduct of this case and this Hearing, the Claimant did not accept that rationale, she did, in closing submissions, accept that the decision was '*legitimate, but not actually actioned'*, referring to 'before and after' photographs of the Shop windows [107-137]. In respect of the second decision: whether or not to make her position redundant, I fully accept (and as at least partially conceded by Mr England) that the first decision having been made, it thus renders the consultation about the second decision somewhat artificial. Clearly, the Respondent was not going to (and has not) changed its decision about the window displays and that decision therefore inevitably put the Claimant's position at risk of redundancy. Nonetheless, the Respondent is obliged to consult with the Claimant, to the extent that they are able to, to attempt to avoid the need for redundancy.

14. All three Respondent witnesses said that the Claimant's role was 'stand-

alone' and not directly comparable with that of other staff in the Store and that therefore, the Claimant was effectively in a 'pool of one'. The Claimant considered, however that she should have been placed in a pool with other staff. The choice of pool for redundancy selection is again an area where Tribunals are guided against substituting their views for that of the employer on the ground, instead considering whether the employer applied their minds to the situation and whether the decision fell within the band of reasonable responses available to an employer in such circumstances. I find in this case that the Respondent did apply their mind to the question, but ruled out the creation of a multi-person pool, for entirely legitimate reasons. The Claimant accepted that she was the only person who dressed the window displays and also that she did not work on the shop-floor or on the tills, in a 'customer-facing role'. She did not wear staff uniform and was not subject to daily or routine management control. She was doing a specialised role, for which, she accepted, none of the other staff were qualified. The inclusion of such staff in a pool would, therefore, have been entirely unreasonable.

15. As canvassed with the Claimant, during closing submissions, it appeared to me that this consultation could have had only three successful outcomes, if the Claimant's dismissal was to be avoided. Firstly, the Respondent could have reversed their decision to change the window displays, which they were not minded to do, or obliged to. Secondly, the Claimant had suggested that she could go onto reduced hours, to continue to be employed to dress the new displays. The clear evidence of Mr Hall was that he had actively considered that possibility, but that it was his view that such work as might remain did not justify the retention of a member of staff, simply to carry out that role. Both he and Mr Davies said that displays were now dressed by shop-floor staff, in a couple of hours, approximately every three weeks. I had no reason to doubt their evidence on this point and the Claimant could offer no evidence to refute it. Therefore that option was clearly not feasible. The third option might have been for the Claimant to adopt what she referred to (in relation to the setting up of the selection pool) as a 'dual-role', i.e. working on the shop-floor and also dressing the remaining displays. She said she should have been offered such a dual-role (as she said was carried out by the shop-floor staff who now dress the displays), but she had said to Mr Lewis, from the very outset that she did not want to work on the shop-floor, or on the tills and therefore this option could not be available to her. She said she had made this statement, off the cuff, as she had been shocked at that first meeting, but agreed that she never subsequently, in the month that the consultation took, sought to change that stance and it is clear to me that in reality there was no question of her, genuinely, being willing to work on the shop-floor, with her presenting that possibility now merely as a point of argument in her favour. I am entirely confident that had she stated that she would have been willing to do so, at the time, that the Respondent would have given it active consideration, but had no requirement to do so, because she had ruled it out. Accordingly, therefore, the Respondent carried out as much consultation as they reasonably could, in the circumstances, but that that consultation was unable to save the Claimant's position.

16. At the second meeting with Mr Lewis, on 20 June 2018 [62-68], the Claimant

informed him that she did not consider, due to his 'personal crusade' against her that he was the appropriate person to conduct the consultation. Mr Lewis vehemently denied any such 'crusade' and apart from what he said was a business and stylistic decision to change the window displays, which had an inevitable direct effect on the Claimant's position, but which was not personally-based, he had no animus towards her. Based on his evidence, I concur: the Claimant, perhaps understandably, took his decision very personally, when it is clear it was not. In any event, however, to avoid the implication of bias, Mr Lewis withdrew himself from the process, being replaced by Mr Hall, who, it was agreed, had no day-to-day dealings with the Claimant.

17. He continued the consultation, with meetings on 4 July [69] and 18 July [84-89]. He concluded that following that consultation, there was no way of avoiding the redundancy and dismissed the Claimant. He did explore the possibility of suitable alternative employment, stating that three vacancies existed, but the Claimant confirmed that she did not consider them suitable for her [91].

18. The Claimant appealed against that decision, to Mr Davies, on the grounds that there was still a role for her, which could include all interior displays within the Store; that she had not been provided with a job description and that her suggestions as to maintaining her position had not been given due consideration. The Appeal hearing took place on 7 August [99-103]. Putting aside the complaint about the job description, which I consider irrelevant to the issues I need to decide, Mr Davies upheld Mr Hall's decision. He said that any remaining interior display work was minimal and carried out by shop-floor staff: such work did not justify retention of her previous role, even on reduced hours. He said that the window displays are now minimal, reduced in floor space by 80%, from that previously and he referred to two plans showing that difference [138 and 139], with which the Claimant could not dispute. It is also clear from the 'before and after' photographs that the scale of the displays is much reduced, with browsing areas now open for shoppers, where enclosed displays had previously been. He confirmed that that continued to be the situation and that nobody had been recruited to replace the Claimant's role. While the Claimant sought, in closing submissions, to argue that in fact much the same scale of display continued and that therefore her role was not truly redundant, it was self-evident from Mr Davies' evidence and the plans and photographs that that was not the case.

19. The Claimant also asserted that the true reason for her redundancy was to make costs savings. There are references in the minutes of meetings and in the Respondent's evidence to such costs savings, but I find that the Claimant's assertion in this respect is a willful misreading of those notes and statements. All the witnesses stressed that the driving force behind the decision was to modernise the window displays, but that a 'knock-on' benefit for the business was that cost savings would be also be made. The Claimant sought to rely mainly on Mr Lewis' comment in the meeting of 20 June [62 and 63], which was in response to her assertion that '*cost has become a factor'* that '*we have identified you as a cost saving'*, but that was to ignore the previous thrust of his comments: that her role, once the

displays changed, could not be justified, as there wouldn't be enough work left for her to do, even on reduced hours. It is of course obvious that cost savings would be made by the redundancy of her role, but I am satisfied that that was not the driving factor.

20. I find therefore that the true reason for the Claimant's dismissal was the genuine redundancy of her position, as her role had, at very least, substantially diminished and that in terms of procedure and consultation, the Respondent carried out as much meaningful consultation as the situation allowed them to, taking into account the stance taken by the Claimant as what roles she was not prepared to do. There was no requirement for the Respondent to create a pool for selection, due to the stand-alone nature of the Claimant's' role. Suitable alternative employment was considered by the Respondent, but such roles as were available were not considered suitable by the Claimant.

21. Accordingly, therefore, taking into account all the circumstances of the matter, to include the Respondent's size and resources, I find that the dismissal was fair.

22. Therefore, the Claimant's claim of unfair dismissal fails and is dismissed.

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Employment Judge O'Rourke

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Date: 15 March 2019