EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs J Waters		Connect Distribution Services Limited

HELD AT Birmingham **ON** 28th and 29th October 2019

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In person

For the respondent: Mr J Heard - Counsel

JUDGMENT

(1) The claimant's claim for unfair dismissal succeeds.
(2) The respondent is ordered to pay the claimant £450 for loss of statutory rights.
(3) The parties have 28 days from the date of this Judgment to agree the rest of the compensatory award failing which they should write to the Tribunal to request a remedy hearing.

REASONS

Background

1. The claimant brought a claim for unfair dismissal following the termination of her contract of employment by the Respondent on 8th October 2018 by reason of redundancy.

2. The respondent is the largest independent home appliance and spare parts distribution organisation in the UK employing some 600 employees.

Evidence and documents

3. I heard evidence from the claimant and for the respondent from Mr Andrew Sharp (Managing Director), Mr Carl Bould (Head of Trade), Mrs Leanne Haines (General Manager – People Services) and Mrs Michaela Pugh (Head of HR). In addition, on the first day of the hearing I was presented with an agreed bundle of some 136 pages.
4. On the second day of the hearing Mr Heard sought permission to add extra documents to the bundle. The first was a presentation from September 2018 at which the ultimate decision had been made about the restructure of the respondent's business. Mr Heard explained that it was a relevant document, that it had not been disclosed due to an oversight and no more. This presentation had links to other documentation which were not available to Mr Heard. In addition, Mr Heard asked to add notes of a meeting held with the claimant on 24th September 2018 when the respondent held a 1-2-1 with the claimant and other employees about the new structure. Mr Heard indicated that Mr Bould was happy to be recalled in order to answer questions on the documentation.
5. The claimant was, understandably, unhappy with the late disclosure and had concerns about the authenticity of the documentation. The claimant also requested some time to consider the documentation if I was minded to permit the documentation to be admitted in evidence.
6. After considering both parties' representations I was satisfied that it was in the interests of justice to allow the submission of the 1-2-1 notes. In relation to the presentation from September 2018 I suggested to Mr Heard that he only submit this when we also had the reference documents and suggested that the respondent tried to locate these during the adjournment that I would be making to allow the claimant to consider the 1-2-1 documents. Following the adjournment I was informed by Mr Heard that attempts had been made to locate the reference documents but either the links did not work or they were live documents which were regularly updated and, as such, did not contain the information that was relevant in September 2018, at the time Mr Bould made his presentation. The claimant objected to the inclusion of the presentation on the basis that they were incomplete. I shared the claimant's concerns but as the documents appeared to be relevant to the issues therefore I was satisfied that it was in the interests of justice to permit the inclusion of the presentation. The claimant was offered more time to consider the presentation but she indicated that this was not necessary. Mr Bould was called a second time to answer questions on the presentation and 1-2-1 documents.

Issues

7. The agreed issues were as follows:

Unfair dismissal

7.1 Can the respondent show, per section 98 of the Employment Rights Act 1996 ("ERA"), that the claimant was dismissed for a potentially fair reason?
7.2 In particular, was the claimant dismissed in circumstances which amounted to a genuine redundancy situation?
7.3 If so, did the respondent, in all the circumstances, act reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissing the employee?
7.4 Was the dismissal fair or unfair having regard to equity and the substantive merits of the case?
7.5 In particular, did the respondent:
7.5.1 Consult fairly with the claimant over redundancy?
7.5.2 Select the claimant fairly for redundancy?
7.5.3 Give adequate consideration to any alternatives to redundancy?
7.5.4 Adopt a fair procedure in implementing the claimant's redundancy?
7.6 Was dismissal within the bands of reasonable responses?
7.7 If the tribunal determines that the dismissal was procedurally unfair, what difference, if any would a fair procedure have made ?

8. The claimant disputed that there was a genuine redundancy situation and asserted that the real reason that she was dismissed was due to the fact that she had had a clash with the Sales and Marketing Director, Jonathan Metcalfe, a few weeks prior to her being put At Risk of redundancy.

Facts

9. I make the following findings of fact:

9.1 The claimant commenced employment with the respondent on 5th August 2012 as Dyson Brand Manager, having previously worked at Dyson. The claimant worked in the respondent's Trade Department. The respondent was Dyson's sole UK distributor for floorcare (vacuum cleaners) and Environmental Control (fans and air purifiers) suppling independent businesses and some national accounts. The claimant worked in the Major Accounts Team, although the Dyson Brand Manager role was a stand-alone role and its focus was on Dyson products.
9.2 There were two other Brand Managers employed by the respondent. However, they focused on multiple brands, although they managed the spare parts and consumables and there was

very little overlap between the claimant and the other Brand Managers.

9.3 The claimant had responsibility for driving overall sales of Dyson products throughout the respondent's business as well as managing some larger accounts that exclusively bought Dyson products. During her employment the Dyson business grew substantially in both turnover and profit with annual turnover growing from £4 million in 2012 to £20.7 million by the end of 2017.

9.4 The Dyson business fell broadly into 3 categories: (1) Core Range Floor Products; (2) Environmental Control; and (3) Tactical or Clearance Stock which was usually discontinued models or overstocks that Dyson wished to sell. Tactical or Clearance stock was not guaranteed and therefore difficult to forecast although the claimant, as an ex-employee of Dyson, generally faired well with this work.

9.5 In January 2018 the respondent underwent an initial review of its trade strategy which included the segmentation of customers, sales profiles, sales organisational structure, pricing structure, bonus scheme and the portfolio of products. This review was on-going process lasting until September 2018 in relation to the claimant's department.

9.6 In April 2018 Dyson changed their market strategy which affected how their vacuum cleaners were sold in the UK. This resulted in the respondent losing the floor range products business as the changes made it no longer financially viable for distribution. However, Dyson agreed that the respondent could continue to supply 3 national accounts with floorcare under a complex fulfilment agreement, the exact terms of which were to be agreed between Dyson and the respondent. The Environmental Control and Tactical and Clearance business was to continue unchanged.

9.7 Around this time the claimant had discussions with her line manager, Carl Bould, about the loss of the business and how it might affect her position. These discussions included potentially broadening the claimant's role to include managing other floorcare brands that the respondent sold thereby creating a new position of Floorcare Category Manager. However, nothing concrete came out of these discussions.

9.8 Around this time the respondent became a distributor for Hoover floorcare products and launched a new range of Hoover vacuums. A new role of Hoover Brand Manager was created within the Major Accounts department where the claimant worked. Despite people being interviewed for the role the position of Hoover Brand Manager remained unfilled. The role was comparable to that of the claimant carrying an identical bonus structure as the claimant enjoyed but with a lower salary.

9.9 The loss of the Floorcare business did not, initially, have any impact on either the respondent's turnover or the claimant's workload. The hot summer of 2018 generated huge demand for

Dyson cooling fans and purifiers and kept the claimant very busy. In July 2018 Dyson monthly sales were the highest ever achieving over £2.6 million from sales of Environmental Control products and Tactical and Clearance lines.

9.10 Around 24th June 2018 the respondent recruited a new employee, Colin Bence, within the Major Accounts team to take up a newly created role of Buying Groups Manager. This was a full time position working with all buying groups to plan promotions and trade shows, stock and sales forecasting. Mr Bence was a former employee of Hoover where he had been unhappy and looking to move on.

9.11 Hoover had had a change in leadership and Mr Bence was associated with the old brigade and, as such, he had left their employ to join the respondent. As Hoover were funding the role of Hoover Brand Manager they were not keen on Mr Bence taking up this role. As such the role of Hoover Brand Manager remained vacant although Mr Bence had input on the Hoover launch given his experience.

9.12 Around May 2018 the respondent purchased a parcel of 3200 Dyson clearance vacuums, the sales of which started to slow down through the summer. The respondent was keen to sell these products and Jonathan Metcalfe, the Sales and Marketing Director requested daily updates on sales. In July 2018 the claimant received an offer from a customer to buy all the stock but at a price below cost which Mr Metcalfe told the claimant not to accept.

9.13 In August 2018 the Dyson sales started to slow down as the stocks of cooling fans slowed down and there were no more to buy from Dyson. Furthermore, no Tactical or Clearance stock was available either. The claimant began discussions with Dyson during the mid-August regarding Tactical and Clearance stock which would be becoming available. This led to amounts smaller than previously of Tactical stock and well as some £22,000 of Environmental Control stock. However, by September 2018 the claimant herself was concerned about the amount of revenue Dyson was generating and, in particular, that this meant that she would not be able to achieve her bonus. The claimant spoke to her line manager, Mr Bould, on both an informal and formal basis and suggested that she took on some additional duties such as some business development projects to find new business.

9.14 Around mid-September 2018 Dyson sent the respondent a draft Fulfilment Process Agreement which would enable it to supply floorcare to 3 national accounts.

9.15 On 19th September 2019, Mr Metcalfe authorised the sale of the Dyson clearance vacuums which had been purchased in May 2019 (paragraph 9.10 above refers). These products were sold at a significant loss when the claimant was not at work. The claimant spoke to Mr Metcalfe a few days later when she found out about the sale. The claimant clearly was not happy given that

she had been offered a higher price previously and informed Mr Metcalfe that she felt undermined.

9.16 In September 2018 a further review of the respondent's Trade department was undertaken which included a review of improving profitability and enhancing the services of the Trade Department. The reduction in Dyson sales and concerns about whether the respondent would enter into a contract with Dyson was clearly of concern to the respondent. As such, as a part of this review the claimant's role of Brand Manager – Dyson was identified as at risk of redundancy.

9.17 On 24th September 2018 the claimant attended a meeting with Mr Bould and HR about the respondent's restructure. The claimant was shown a copy of the respondent's proposed structure which showed the Dyson and Hoover Brand Manager roles. The claimant was provided with a copy of the new bonus structure which was to be effective 1st October 2019. The state of the Dyson sales was discussed and the claimant, mindful of the reducing sales, indicated that she was willing to take on other duties. The claimant was not informed at this point that her role was potentially at risk of redundancy.

9.18 On 25th September 2018 the claimant received an email from Dyson confirming Environmental Stock numbers for the remainder of 2018. This amounted to some £980,000 in invoice value. A substantial drop from the sales of Dyson products in the earlier parts of the year when the respondent had sales of £2,296,135 in March 2018, £1,744,124 in April 2018, £1,674,355 in May 2018, £2,634,562 in June 2018 and £2,634,562 in July 2018.

9.19 On Thursday, 27th September 2018 the claimant attended a meeting with Mrs Haines and Mrs Pugh at which she was informed that she was at risk of redundancy. The claimant was placed on immediate garden leave and presented with a letter confirming that she was at risk of redundancy. She was also provided with a vacancy list. The claimant was advised that there would be a consultation meeting on Monday 1st October 2018 which would be the last day of the consultation period effectively giving the claimant a 24 working hour consultation period. The letter sent to the claimant indicated that the during the consultation period the respondent would explore redeployment opportunities within the respondent's business.

9.20 In the event the claimant asked for the consultation meeting arranged for 1st October 2019 to be re-arranged which the respondent agreed to do re-arrange for 3rd October 2019.

9.21 On 1st October 2019 the claimant sent a grievance a grievance about the way she had been treated by Mrs Pugh and Mrs Haines at the meeting on 27th September 2018.

9.22 Also on the same day Mrs Pugh wrote to the claimant to confirm that her next consultation meeting would be on 3rd September 2018. The claimant was advised that if she did not attend the meeting without good cause a decision could be taken to hold

the meeting in her absence. The claimant was also provided with further details of two roles that she had expressed an interest in : Brand Manager (Hoover) and Category Manager – Purchase and Supply Chain.

9.23 The following day Mr Sharp responded to the claimant's letter of grievance indicating "*I am confident having spoken with both Leanne and Michaela that they are only trying to do their best to support you through what is a very sensitive situation".* Mr Sharp further indicated that he looked at the process followed so far and was happy that the respondent was following "*what is deemed best practice*".

9.24 The claimant responded to Mr Sharp to indicate that her understanding of the grievance procedure was that she should have been invited to a meeting to discuss her grievance in more detail before she was provided with an outcome to her grievance.

9.25 The claimant duly attended the re-arranged redundancy consultation meeting on 3rd October 2018. During the meeting Mrs Pugh confirmed that the claimant's role of Dyson Brand Manager was the only role that was being considered for redundancy. The claimant asked for more details of the profitability review which the respondent had undertaken which had been referred to in her At Risk letter but she was not provided with a detailed explanation. During the meeting the claimant made it clear that she was interested in the Hoover Brand Manager role event though she was told that it was a more junior role. The claimant was willing to undertake this role despite it being at a lower salary as she was in the middle of buying a new house and did not want to jeopardise this. The claimant also raised the option of being given additional duties which she could do alongside her Dyson role as she was already managing another brand (Melitta).

9.26 The claimant attended a final consultation meeting on 5th October 2018. At this meeting she was informed that the respondent could not create a Floorcare Category Manager role, nor was it an option for her to be given additional duties. The claimant was informed that going forward Dyson had a £25K fulfilment forecast for 5 clients who were managed by another employee, Katie Clark.

9.27 The claimant was also informed that the Hoover Brand Manager role had also been withdrawn on 4th October 2018 – the day after she had applied for it. The claimant was informed that the role would be undertaken by Colin Bence in addition to this normal full time position. Mrs Haines advised the claimant that Hoover had requested this which the claimant thought was a ruse to avoid giving her the role. At the conclusion of the meeting the claimant was issued with notice of redundancy with immediate effect.

9.28 During the hearing I was presented with an email dated 25th September 2019 – almost a year after the claimant was made redundant - from Bobby Watkins, Head of Sales & Marketing for

Hoover. In this email Mr Watkins reflects on the person specification for the Hoover Brand Manager role. Mr Watkins indicates in his email that he wanted to have an individual who was experienced. I note that in his email Mr Watkins indicated that he was *"supportive of this appointment since he was the stand-out candidate for the job description*". I note that Mr Watkins does not say that Hoover had requested the appointment of Mr Bence. Furthermore, there is no contemporaneous evidence confirming that Mr Bence was appointed at the request of Hoover.

9.29 On 9th October 2018 the claimant was invited to attend a formal grievance meeting on 11th October 2018 to consider grievances which she had raised firstly in relation to Mrs Haines and Mrs Pugh and secondly in relation to Jonathan Metcalfe. The claimant duly attended the grievance meeting which was chaired by Mr Sharp. The claimant raised concerns about how Mr Sharp seemed to have predetermined her grievance and also the way she had been treated at her initial At Risk meeting.

9.30 On 12th October 2018 the claimant raised an appeal against the decision to make her role redundant. She also raised concerns about the Hoover Brand Manager role and in particular sought confirmation that the role was "live" redeployment as the date of her consultation meeting on 3rd October 2018 and that it was only withdrawn on 4th October 2018 the day before the final consultation meeting. The claimant was invited to attend an appeal meeting on 1st November 2018, once again to be chaired by Mr Sharp. On 16th October 2018 Mr Sharp informed the claimant in writing that her grievance against Mrs Haines and Mrs Pugh had not been upheld. On 19th October 2019 Mrs Pugh confirmed to the claimant that the vacancy for Hoover Brand Manager at been a "live" redeployment opportunity during the consultation meeting on 3rd October 2018 and had only been withdrawn after that.

9.31 On 1st November 2018 the claimant attended a meeting with Mr Sharp to consider her appeal against dismissal. During this meeting Mr Sharp initially indicated that Hoover had requested Mr Bence to take over the Hoover Brand Manager role and then subsequently indicated that it had been a joint decision (*"Hoover and I have made the decision to place this role with Colin*" page 101). Later the same day the claimant attended a separate meeting to discuss her grievance appeal. In the event neither appeals were successful and the decision to dismissal remained in place.

9.32 Mr Bence ceased to undertake the Hoover Brand Manager role in August 2019 and the role is now undertaken by the Head of Finished Goods.

9.33 Following the termination of the claimant's employment the respondent's sales of Dyson products continued to fall with sales of £235,506 in December 2018, £156,755 in January 2019, £169,733 in February 2019 and £278,355 in March 2019. The

sales for Dyson have been zero since the final week of April 2019. The contract with Dyson officially terminated on 29th March 2019.

9.34 The claimant secured another role as a Regional Account Manager on 7th March 2019 earning £35,000 per annum with a bonus of up to 25% of salary and a 5% stretch.

Applicable law

10. Section 98 (1) Employment Rights Act 1996 provides that in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) The reason (or if more than one the principle reason for the dismissal).

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within the subsection if it –

(c) is that the employee was redundant,

11. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) -

(a) *depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*

(b) shall be determined in accordance with equity and the substantial merits of the case.

12. Redundancy is defined in s139 as :

For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(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.

11. In determining whether an employee has been dismissed by reason of redundancy one should have regard to the case of **Safeway Stores plc –v- Burrell [1997] IRLR 200 (EAT)**. In **Safeway**, the EAT formulated a three-stage test for applying section 139 ERA 1996 as follows :
11.1 Was the employee dismissed? If so,
11.2 Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in section 139(1) exist)? If so,
11.3 Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2 above.

12. In considering the question of fairness of a redundancy dismissal consideration should be had to warning and consultation, adoption of fair selection criteria and consideration of alternative employment as per **Williams –v-Compare Maxam Ltd [1982] IRLR 83.** The question at each stage is whether the decision taken by the employer was within the bands of reasonable responses as per **Whitbread plc v Hall [2001] IRLR 275.**

13. Furthermore, a tribunal must not investigate the commercial merits of an employer's decision that redundancies are required (**James W Cook & Co (Wivenhoe) Ltd –v- Tipper [1990] ICR 716**) nor should the tribunal's substitute its own view about how an employee should be scored for that of an employer (**Russell –v- College of North West London UK/0314/13/MC).**

Conclusions

14. In reaching my conclusions I have considered all the evidence I have heard and considered the pages of the bundle to which I have been referred. I also considered the very helpful oral and written submissions made by and on behalf of the parties.

15. The first issue I need to consider is whether the respondent had a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996, namely redundancy.

16. It is clear from the evidence that by 24th September 2018 the claimant's workload had reduced significantly as a result of the loss of the Dyson Core Range Floorcare and the unpredictable volume of the Environmental Control and Tactical or Clearance products that would be sold to the respondent. Indeed, by this date the claimant had been concerned about how she would achieve her bonus and had indicated to the respondent that she was willing to undertake other duties. As such

the respondent's need for a Dyson Brand Manager had diminished by September 2018 and, indeed, ceased totally by March 2019. In the circumstances, I am satisfied that the respondent had a genuine redundancy situation as defined in section 139 of the ERA 1996 and that the claimant was dismissed by reason of redundancy and not due to her disagreement with Mr Metcalfe,

17. As such I am satisfied that the respondent had a potentially fair reason to dismiss the claimant.

18. I, therefore, need to consider whether or not the respondent followed a fair process in dismissing the claimant for redundancy. In making this assessment I need to consider the consultation process, the selection pool adopted and the consideration given to suitable alternative employment. Whilst I accept the respondent's representations that the appropriate pool was one containing the claimant only as she was the only Dyson Brand Manager I am not satisfied that the respondent followed a fair process in terms of consultation and seeking alternative employment in dismissing the claimant for redundancy. The claimant was effectively given a consultation period of 1 working day which was woefully inadequate, this period was only increased when the claimant requested more time. In his submissions Mr Heard submits that the consultation period in this case was not unreasonable such as to render the whole process unfair. However, the duration of the consultation period was not the only part of the process that was inadequate. When the claimant raised a grievance about the lack of consultation and her treatment during the consultation process Mr Sharp spoke to Ms Pugh and Ms Haines accepted their version of events at face value and without even meeting the claimant or conducting any further investigation. It was only when the claimant expressed surprise that she had been informed by Mr Sharp of the outcome of her grievance without him giving her an opportunity to meet with him to put forward her concerns that a meeting was arranged. The respondent approached the whole process with a closed mind and it was clear that the decision to dismiss had already been made on 26th September 2018 when the claimant was informed that she was at risk of redundancy and once that decision was taken the respondent was not open to other suggestions.

19. The same closed mind approach was taken in relation to alternative employment. Despite the fact that the Hoover Brand Manager role was available on 3rd October 2018 and provided to the claimant on a list of vacancies as soon as the claimant became interested in the role she was told that the vacancy was withdrawn. At no point prior to the claimant expressing interest in the role was she informed that the role was already being undertaken by Colin Bence and that it might not be available.

20. I am not satisfied, in the circumstances, that a fair process was adopted for the reasons set out above and, as such, the claimant's claim for unfair dismissal succeeds.

21. I have considered whether a fair process would have been dismissed fairly in any event (the Polkey argument). However, I am not satisfied that if a fair process had been followed that the claimant would have been fairly dismissed in any event. as if the respondent had not approached the matter with a closed mind the likelihood is that the claimant would have remained in employment in the role of Hoover Brand Manager.

22. As the claimant has already had a redundancy payment she is not entitled to a Basic Award. I award the claimant the sum of £450 for loss of statutory rights and the respondent is ordered to pay this to the claimant. In relation to the rest of the claimant's compensatory award the parties are invited to try to agree the claimant's losses based upon the findings in this Judgment. If such losses cannot be agreed between the parties should write to the Tribunal within 28 days of this Judgment requesting a remedy hearing.

Employment Judge Choudry
31 December 2019