EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105972/2019

Held in Glasgow on 28 & 29 August 2019

Employment Judge M Sangster

Ms M Gardiner	**Claimant**
MPS Housing Limited	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed and the respondent is ordered to pay to the claimant the sum of nine thousand, eight hundred and thirty-seven pounds and sixty pence (**£9,837.60**) by way of compensation.

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is £8,485.60 and relates to the period from 4 March 2019 to 29 August 2019. The monetary award exceeds the prescribed element by £1,352.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was redundancy, failing which some other substantial reason, which are potentially fair reasons for dismissal. The respondent maintained

that they acted fairly and reasonably in treating redundancy, failing which some other substantial reason, as sufficient reason for dismissal.

2. The respondent led evidence from Christopher Nixon (**CN**), Operations Director, and Marcus Hainey (**MH**), Operations Manager. The claimant gave evidence on her own behalf.

3. A joint set of productions was lodged, extending to 317 pages.

4. Parties also agreed a schedule of loss, which was produced to the Tribunal.

Issues to be Determined

5. The issues in this case were:

   a. What was the principal reason for dismissal?

   b. Was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**); and,

   c. If so, was the dismissal fair or unfair in accordance with s98(4) ERA?

   d. If the claimant was unfairly dismissed what compensation should be awarded, taking into account, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed (***Polkey v AE Dayton Services Ltd*** [1987] UKHL 8).

Findings in Fact

6. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

7. The respondent delivers a range of property services, including reactive repairs and planned and cyclical maintenance to local authorities and social housing providers throughout the UK. It is a wholly owned subsidiary of Mears Group plc.

8. The claimant commenced employment with the respondent on 25 April 2016, as an Estimator. Her salary on commencement of her employment was £32,000, increasing to £40,000 per annum from 1 September 2017. She was also entitled to a car allowance of £6,100 per annum. She was based in central Scotland: initially working in Rutherglen and, from 1 November 2017, in Airdrie.

9. In the latter part of 2017, the respondent was successful in securing a 4 year contract with Aberdeenshire Council for capital investment works (the **Contract**). The claimant had been involved in estimating some of the work for the respondent's bid for the Contract, but the bid was primarily led by the then senior management team, who were no longer employed by the respondent. As such, when the Contract was awarded to the respondent, CN took on responsibility for this.

10. At that time, the respondent only had one other, small, contract in the North East of Scotland and had no physical presence in the area. Given the value of the Contract and the extent of the work which would require to be undertaken by the respondent in relation to this, it was clear that they would require to establish an office, infrastructure and team in the North East of Scotland, to service the Contract.

11. The claimant was the only individual who remained in the business who had any knowledge of the work which was to be undertaken under the Contract, as she had been involved in estimating for the work. Given her knowledge of the work to be undertaken under the Contract, CN viewed her input in the mobilisation process, to allow the respondent to undertake work under the Contract, as critical. Accordingly, in February 2018, CN asked the claimant to move to the respondent's newly created office in Dyce to facilitate mobilisation for, and work under, the Contract. The claimant was offered a substantial pay rise – to £53,000, together with a relocation allowance of £500 per month for 12 months. The claimant accepted the offer and moved to the respondent's Dyce office the following month.

12. The claimant retained the title of Estimator following her move to Dyce, but the reality was that her estimating duties were negligible from that point onwards. Instead, she carried out a varied role, covering and providing key support to all areas of the work carried out by respondent, and across all disciplines, in relation to the Contract.

13. The respondent encountered a number of problems in relation to the Contract, including:

    a. The full extent of the respondent's obligations under the contract had not been appreciated - it was much more complex and involved more elements than they had anticipated;

    b. Assumptions that the cost of delivery would be the same as in the central belt proved to be incorrect, leading to the work being under-priced/loss-making on certain activities; and

    c. A decision taken to outsource architectural work under the Contract did not prove to be successful and required to be brought back inhouse.

14. By July 2018 it was clear that the respondent was not performing to the required standards under the Contract. In August 2018, CN undertook a review of the respondent's work under the Contract and identified a number of issues, including those highlighted above. It was apparent at that time that, whilst the respondent had anticipated the year one revenue under the Contract would be around £10m, it would in fact be closer to £7m. He also concluded that one of the contributing elements was that the structure of the team in Dyce was flawed from the outset, with ambiguous responsibilities and leadership issues, manifesting in poor performance. This meant that there was duplication and lack of efficiency. As such, he proposed to restructure the team to ensure work was undertaken by the appropriate people and there were clear lines of responsibility and authority.

15. Following discussion and consultation, it was agreed that the team in Dyce would be restructured as follows:

a. Rather than being jointly led by a Commercial Manager and an Operations Manager, the Operations Manager would take over sole responsibility for the performance and delivery of the Contract.

b. The Commercial Manager would report into the Operations Manager and, rather than having 6 direct reports, he would have only one - a Project Surveyor.

c. A new role of Project Manager would be created with 4 direct reports (who each previously reported to the Commercial Manager).

d. The administration team would be streamlined, with two roles (Administrator and Customer Engagement Officer) being removed.

16. Leaving aside the staffing reduction in the administration team, the net result was that two roles would be removed from the previous structure, that of Senior Quantity Surveyor and Estimator, both of whom previously reported directly to the Commercial Manager, and two roles would be created – Project Surveyor (reporting to the Commercial Manager) and Project Manager (reporting to the Operations Manager). Restructuring the team in this way was not as a result of there being less work available or envisaged, but to ensure clear lines of responsibility and authority, which would remove duplication of tasks and increase efficiency in the day to day operations of the respondent's operations in Dyce.

17. The role of Senior Quantity Surveyor was occupied by Graham Duncan (**GD**) and the role of Estimator was held by the claimant. Both were placed at risk of redundancy on 23 August 2018.

18. At a consultation meeting on 1 October 2018, conducted by CN, the claimant was provided with the job descriptions for the two new roles. The salaries attached to the roles were around £42,000 for the Project Surveyor role and between £50,000-£55,000 for the Project Manager role. At the consultation meeting the claimant noted that the Project Surveyor role appeared to be akin to the role of a Quantity Surveyor (the role which her colleague GD was currently undertaking). She noted that the salary for the Project Surveyor was

considerably less than her current salary and stated she would be reluctant to take a drop in pay. CN understood from this that the claimant was not interested in the Quantity Surveyor role, even though she did not expressly state this. In relation to the Project Manager role, the claimant stated that she already carried out the majority of the tasks set out in the job description. CN agreed that this was the case and encouraged the claimant to apply for the Project Manager role. He felt that she was currently doing a great job across a variety of tasks, covering all disciplines of the Contract. Whilst she didn't currently do every element of the Project Manager role, her current was akin to a Project Manager position. He felt that she would do a good job in the role of Project Manager. CN asked the claimant to consider her position and express an interest by close of business on 5 October 2018. She agreed to confirm her position by email.

19. On 3 October 2018 at 12.12pm, GD emailed CN to ask if there had been any progress with regard to the position following CN's meeting with the claimant on Monday. CN responded at 3.20pm that the claimant had confirmed that she did not wish to be considered for the Project Surveyor role. He asked GD if he still wished to be considered for both roles, or to simply take the now vacant role. GD responded at 4.05pm that he felt that his skillset lay with the surveying post so, on the understanding that his financial package would remain unchanged, he would happily accept the Project Surveyor position and would not apply for the Project Manager role.

20. On 4 October 2018, at 9.47am, the claimant emailed CN to inform him that she had hurt her back on the evening of Monday 1 October 2018 and had been signed off work by her GP for a week. At the end of her email she stated, '*On another note, I am aware I had to advise you of my interest for the current positions within the Aberdeenshire office, please take this email as my interest in both vacancies that are available*.' CN responded at 3.51pm stating '*Thank you for your expression of interest in the PM role, I am delighted. Just to confirm though, as per our discussion at our meeting, you confirmed that you had no interest in the Project Surveyor role and as there were only two*

candidates this role has been secured by your colleague Graeme, who has therefore withdrawn his interest in the PM post.'

21. There was only one internal applicant, the claimant, for the Project Manager role. Rather than simply offering role to the claimant, the respondent advertised externally for the position and invited the claimant, along with the external applicants, for interview. The respondent could not confirm in evidence when the position was advertised, but the interviews were scheduled to take place on 24 October 2018. The claimant was not asked to submit a CV or application form, as external applicants were. She was invited to interview by letter which she received on 22 October 2018. She sent an email to CN that day at 12.38pm stating *'I received your letter regarding the interview but unfortunately my GP has signed me off for a further week and referred me to the hospital for physio therefore I will be unable to attend on the 24th of October. I am hopeful that I will manage to return to work on the 29th October, please let me know what you want to do.'* CN responded at 4.48pm suggesting an alternative format, such as telephone or skype, for the interview. The claimant responded on 23 October 2018 at 5.59pm indicating that, due to the medication she was on she felt in no fit state to be interviewed. She had been prescribed diazepam for her back injury and was not reacting well to it. CN responded at 6.29pm acknowledging her email and stating, *'I will come back to you regarding what I need to do regarding the post.*'

22. Two interviews with external candidates were scheduled for the evening of 24 October 2018. One proceeded. The other candidate withdrew his application. MH and Jennifer McCann (**JM**) conducted the interview.

23. Following the interview MH and JM discussed the claimant's skills and experience, which MH indicated that he was aware of. Neither he nor JM had the claimant's CV or personnel file before them when doing so. They concluded that there was not much difference at all between the skills and qualifications of the claimant and the external applicant. It was determined that the external applicant was slightly more suited to the role than the claimant and he would be offered the role. MH was clear however that the claimant would have been able to undertake the role and stated that, if the

external applicant had not applied for the role, it would have been offered to the claimant.

24. The respondent's position was that they required to proceed in the claimant's absence as it was critical to fill the Project Manager role: there was pressure from the client and internally to resolve the problems encountered with the Contract.

25. At 10.40pm on 24 October 2018 JM sent an email to a member of the respondent's HR team stating *'We have a precarious situation in Aberdeen, where we have an employee who is at risk of redundancy and expressed an interest in an open vacancy. She has been off work since 3rd of October and declined the interview invitation. As such, Marcus and I commenced with the interviews in her absence and we also had a chat regarding Michelle to assess her suitability for the role, in this case she was deemed unsuccessful. I believe Chris ran this by you, however could you please review the attached letter and advise if this is suitable to send on.'* The letter attached was a draft letter to the claimant, dated 24 October 2018, advising her that she been unsuccessful in her application as there was another applicant who more closely met the job requirements. It was not clear when/if that letter was sent but, in any event, it was not received by the claimant. Instead she found out about this when she returned to work on 29 October 2018, through discussion with colleagues.

26. On 14 November 2018, JM sent an email to CN detailing a timeline of dates of meetings and discussions held with the claimant. In that email, in relation to the Project Manager position she stated, *'Michelle was not considered for the role as no CV was submitted on the job board, nor was any interview invite accepted.'* The Tribunal noted the contradiction between the terms of this email from JM and that of 24 October 2018. The Tribunal concluded that this demonstrated that the discussion in relation to the claimant's suitability for the role, conducted by MH and JM on 24 October 2018, was cursory at best.

27. A final consultation meeting was conducted with the claimant on 10 December 2018. CN conducted this meeting and MH was present. The purpose of the meeting was to inform the claimant of the decision to terminate her employment and provide her with details of the redundancy package. The claimant was informed that her employment would cease that day and she would receive a payment in lieu of her notice entitlement.

28. A letter dated 10 December 2018 was sent to the claimant confirming the termination of her employment on grounds of redundancy. Enclosed with the letter was an individual redundancy schedule detailing the claimant's entitlement to statutory redundancy payment of £1,016 and a payment in lieu of her one month notice entitlement. Those sums were subsequently paid to her.

29. The successful candidate for the Project Manager role commenced in the role at either the end of December 2018, or the start of January 2019, having worked a period of notice with his previous employer.

30. Following the termination of her employment with the respondent, the claimant received job seekers' allowance for a period of 4 weeks, before commencing alternative employment on 4 March 2019, earning £45,000 with a car allowance of £4,500 per annum.

Relevant Law

31. S94 ERA provides that an employee has the right not to be unfairly dismissed.

32. It is for the respondent to show the reason (or principle reason if more than one) for the dismissal (s98(1)(a) ERA).

33. That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c)), as is 'some other substantial reason' (section 98(1)(b) ERA).

34. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so

employed, or 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 (s139(1) ERA). In ***Safeway Stores plc v Burrell*** [1997] IRLR 200 the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A tribunal must decide: -

a. Whether the employee was dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

35. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

36. The House of Lords in ***Polkey v A E Dayton Services Ltd*** 1988 ICR 142 held that *"in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation".*

37. If the Tribunal determines that the employee was unfairly dismissed, and in a case (as this case is) where the employee does not seek re-employment, the Tribunal must determine what, if any, compensation to award.

Submissions

38. The respondent submitted that the reason for dismissal was redundancy, failing which business reorganisation, which amounted to some other substantial reason for dismissal. They submitted that the respondent followed a fair procedure in treating this as sufficient reason to dismiss the claimant. Whilst there was an alternative position available, there were tasks within that job description which the claimant didn't undertake and which she had no experience of. It was reasonable for the respondent to seek an external candidate and proceed with interviews in the claimant's absence. The external candidate was the stronger applicant and it was reasonable for the respondent to offer him the role, rather than the claimant, in light of his skills and qualifications.

39. The claimant submitted that there was no redundancy situation, taking into account the terms of section 139(1)(b) ERA: the requirement for employees to carry out work of a particular kind had not ceased or diminished. Reference was made to ***Safeway Stores plc v Burrell*** [1997] IRLR 200, ***Murray v Foyle Meats Limited (Northern Ireland)*** [1999] IRLR 562 and ***Shawkat v Nottingham City Hospital NHS Trust*** [2001] IRLR 555. The mere fact of a restructure does not automatically lead to a diminished requirement. The respondent accepted that there was no diminished requirement in this case and there was no reduction in headcount. There was accordingly no redundancy situation. Esto, there was a redundancy situation, the process followed was unfair. The claimant should have been offered the Project Manager role, without competing against an external applicant for the role. The process followed by the respondent was not fair or reasonable.

Discussion & Decision

40. The Tribunal referred to s98 ERA, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2). If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was

fair or unfair and this requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

41. The employer must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in s98(2) ERA. Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute. Where some other substantial reason is the reason for dismissal, the employer requires to show only that the reason for dismissal was a substantial reason which could justify dismissal. At this stage the Tribunal noted that it was not considering the question of reasonableness.

42. The Tribunal considered whether the respondent had shown the reason for the claimant's dismissal. The respondent asserted that the reason for dismissal was redundancy or alternatively some other substantial reason which are fair reasons under s98(2) ERA. The claimant asserted there was no redundancy situation or business reorganisation.

43. The Tribunal referred to the definition of redundancy in s139(1) ERA. The Tribunal considered whether there had been or was expected to be a diminishing need for employees to do the work available. The Tribunal noted that the restructure undertaken by the respondent was not as a result of there being less work available or envisaged, but to ensure clear lines of responsibility and authority, reduce duplication of tasks and improve efficiency. There was accordingly no redundancy situation as defined in s139(1) ERA.

44. Given that there was no redundancy situation, the Tribunal find that the respondent has not demonstrated that the reason for the claimant's dismissal was that she was redundant.

45. The Tribunal then turned to the alternative reason asserted by the respondent: some other substantial reason (SOSR). The Tribunal noted that the respondent did not require to show that a reorganisation or change in working patterns was essential, nor was it for the Tribunal to make its own assessment of the advantages of the respondent's business decision to reorganise or change. The employer is required to show only that the substantial reason for dismissal was

a potentially fair one. The Tribunal was satisfied that the reason for the claimant's dismissal was the restructuring of the respondent's operations in Dyce and that this was could amount to some other substantial reason to justify the dismissal of an employee in the same position as the claimant. This was accordingly a potentially fair reason under s98(1)(b) ERA.

46. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** [1982] IRLR 439 that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

47. In considering whether the respondent in this case acted reasonably in treating restructure as a sufficient reason for dismissing the claimant, the Tribunal noted that this was not a case where the claimant was dismissed having refused a change to her terms and conditions, proposed as a result of a restructure. She was not offered the alternative position. Accordingly, whilst not technically a redundancy situation, it was most akin to that scenario. The Tribunal determined therefore that it was appropriate to have regard to the guidance laid down in ***Polkey*** in relation to whether the respondent acted reasonably in treating the restructure as sufficient reason for dismissal. One of the three factors referred to (see paragraph 36 above) is that the employer '*takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organization.'*

48. The Tribunal found that the respondent acted unreasonably in treating restructure of their operations in Dyce as a sufficient reason to dismiss the claimant, for the following reasons:

a. At the time of the restructure, the claimant was no longer carrying out the role of Estimator: her role was more akin to that of a Project Manager. This was accepted by CN.

b. There was no suggestion that external recruitment was appropriate or considered in relation to any other role, such as the role of Quantity Surveyor. GD was simply matched into that role.

c. There was no explanation from the respondent as to why, or when, they decided to also look externally for candidates for the Project Manager role. The respondent's evidence, from both CN and MH, was that they felt that the claimant could undertake the role of Project Manager (CN encouraged her to apply) and would be effective in the role. No reasonable employer would recruit externally for a position when they have a suitable candidate internally, whose employment would be terminated if the external candidate is recruited.

d. The Tribunal also concluded that no reasonable employer would have proceeded to make a decision on the appointment to the role Project Manager on the evening of Wednesday 24 October 2018, rather than wait until the claimant returned to work on Monday 29 October 2019 and allow her to be properly interviewed and assessed for the role, on the same basis as the external candidate. MH accepted he could have waited and could not provide any satisfactory explanation for why he did not do so. While he stated it was due to the fact that it was critical to fill the Project Manager role, this did not make sense. Had the claimant been offered this role she would have started immediately. The external candidate required to work a period of notice and did not start until over 2 months later.

49. The Tribunal therefore concluded that no reasonable employer would have dismissed the claimant in these circumstances. The claimant's dismissal was accordingly unfair.

Calculation of Compensation

Polkey

50. Given that the Tribunal's finding that the dismissal was unfair is not restricted to procedural irregularities, a reduction in any compensation awarded on the basis of ***Polkey*** is not appropriate.

Mitigation

51. The respondent confirmed that it did not take any point in relation to failure to mitigate.

Basic Award

52. The claimant received a statutory redundancy payment of £1,016. No basic award is accordingly appropriate.

Compensatory Award

53. The claimant secured alternative employment on 4 March 2019. She remains in that role. She is currently earning £184.61 (gross) / £104 (net) less per week (including car allowance) than she was with the respondent. She seeks 3 months' future loss. The Tribunal find that this period is reasonable. The Tribunal calculated the compensatory award as follows:

Loss of earnings 4 March 2019 – 7.3 weeks at £792	£5,781.60
Loss of earnings 4 March 19 to hearing - 26 weeks at £104	£2,704.00
Future loss – 13 weeks at £104	£1,352.00
Total Compensatory Award	**£9,837.60**

M Sangster
Employment Judge

22 September 2019
Date of Judgment

Date sent to parties **26 September 2019**

I confirm that this is my judgment or order in the case of Gardiner v MPS Housing Limited 4100046/2019 and that I have signed the order by electronic signature.