Case No: 2417489/2020

EMPLOYMENT TRIBUNALS

Claimant : **Matthew Rohani**

Respondent: **Zest Publications Ltd**

Heard at: Manchester Via CVP **On: 26 and 29 March 2021 (in Chambers)**

Before: Employment Judge Serr

Representation
Claimant : Mr M Rohani in Person
Respondent: Mr G Hodgson Company Director

JUDGMENT

1. The Claimant's Claim for Unfair Dismissal is well founded and succeeds.

2. There is a 70% chance that the Claimant would have been fairly dismissed in any event and any compensatory award shall be reduced by that amount pursuant to the principle in *Polkey v A E Dayton Services Ltd* (1988) ICR 142.

3. The Claimant is not entitled to a Basic award by reason of his redundancy payment pursuant to s.122 (4) (b) Employment Rights Act 1996.

4. The Respondent did not breach the Claimant's contract of employment.

5. The Parties should request a date for a remedy hearing in writing to the Tribunal within 21 days of receipt of this judgment if necessary.

REASONS

This is the claim of Mr Matthew Rohani against Zest Publications Limited. By an Employment Tribunal claim dated 29 October 2020 the Claimant brought a claim against his former employer for unfair dismissal and breach of contract.

Issues

1. At the outset of the hearing the Tribunal identified the following issues with the parties as those to be determined

   (i) The reason for dismissal. Both parties accept that the reason for the Claimant's dismissal was redundancy.

   (ii) The Grounds on which the Claimant states his dismissal was unfair – these are set out in the claim form at p.17-18 para 34 (1)-(8) of the hearing bundle. These primarily relate to issues around the selection criteria. In particular, the Claimant says that he was never shown the selection criteria or invited to make any comments on those selection criteria or make any representations to the Claimant in light of the knowledge of the selection criteria that will be applied to him and others. The other matters listed under unfair treatment were not pursued by the Claimant.

   (iii) Polkey and contributory fault -it was accepted by both parties that should the Tribunal find that the Claimant was unfairly dismissed the issue of contributory fault would not be an issue. However, the Tribunal indicated to both parties that it would be going on to consider if necessary the issue of any Polkey deduction at this stage, that is whether but for any procedural failings identified there is a chance the Claimant would have been fairly dismissed in any event.

   (iv) Remedy – save for the issue of Polkey the Tribunal indicated that no consideration of remedy would take place at this stage and that if relevant this would be considered at a later date.

   (v) Breach of Contract – The Claimant alleges that there was an oral agreement around December 2019 to increase the Claimant's salary by £2000 to reflect an amended roll whereby he would take over duties as Design Coordinator previously undertaken by a previous employee Sarah Thomas who had left in July 2019. While the Tribunal was concerned as to whether this claim had been fully particularised in the ET1, having discussed the matter with the Claimant and the Respondent and there being no objection from the Respondent to the claim being run (albeit that the claim was disputed) the Tribunal permitted the claim to proceed. The Tribunal did indicate however to the Claimant that as the Claimant had left his employment less than one year after this agreement took place that the figure of £2000 would have to be prorated to take this into account. The Claimant accepted this and produced an amended figure during the course of the hearing.

Witnesses and Documentation

2. The Tribunal had before it a 202-page bundle including witness statements. It had written witnesses statements and heard oral evidence from the Claimant himself and for the Respondent from Mark Prada sales manager, Vikki Phillips, Office Manager and Graham Hodgson Company Director.

Facts

3. The Tribunal makes the following findings of fact on the balance of probabilities.

4. The Respondent is a small business publishing 4 local generic monthly magazines along with several one-off annual specials that focus on one customer specific sector such as eating out visitor guides etc. The magazine is provided free to users and relies on advertising by local businesses.

5. The Claimant joined the Respondent's business on 13 February 2017. He has a degree in architecture but has no specific qualification in respect of graphic design. The Claimant was provided with a contract of employment. A staff handbook was also provided. The Tribunal notes that paragraph 17 dealing with the redundancy policy states inter alia:

   If compulsory redundancies are necessary, employees will be involved and consulted at various meetings to discuss selection criteria, any alternative positions, and be given every opportunity to put forward any views of their own.

   Employees will be given the opportunity to discuss the selection criteria drawn up.

6. The Respondent's business is split into three teams- Sales, Design and Operations. The Claimant was placed in the Design team. That team as of 2017 contained five employees - three graphic designers and two coordinators (who performed essentially an administrative role supporting the graphic design work). The total headcount of the Respondent's business in 2017 was 14 employees. The three graphic designers were Freddie Satterthwaite, Sian Whyley and the Claimant. The two coordinators were Sarah Thomas and Joe Akrigg. Mr Sattherwaite and Ms Whyley were qualified and experienced Senior Graphic Designers. Both employees' employment with the Respondent pre-dated the Claimant's by 3 and 2 years respectively. Joe Akirgg also joined the Respondent 2 years prior to the Claimant.

7. Over the period of the Claimant's employment the number of employees reduced by 5 to a total of 9 employees at the date of the beginning of the redundancy exercise in 2020. These individuals were not replaced, and the workload was absorbed by the remaining employees.

8. Sarah Thomas announced that she was leaving the Claimant's employment in early July 2019. It was subsequently agreed with the Claimant that he would take over her duties and fulfil a dual role for a trial period of three months.

9. On the 26th of July 2019 Ms Phillips, the Operations Manager who was also the Claimant's line manager sent an email to staff in the Respondent's business confirming that Sarah Thomas, who undertook a coordinator role with the design team, would be leaving and that the Claimant will be taking over Ms Thomas's role working alongside the other designated coordinator, Joe.

10. On the 15th of August 2019, Ms Phillips sent another email to the team clarifying what would be happening going forward following Sarah Thomas leaving. That email confirmed that the Claimant would still be doing some design work as and when it was needed but primarily his role will be focused on design coordination alongside Joe and that the process will be reviewed after three months to ensure that it was working effectively to meet the demands of the business in full.

11. On the 3rd of December 2019, an email exchange took place between the Claimant and Ms Phillips. Ms Phillips wrote to the Claimant in respect of a salary review stating that that would take place in January of the following year. The Claimant in reply stated "*management is already aware of my reluctance to take on this role with clear and solid grounds for it and part of the reason I agreed to it was due to Mark agreeing to a pending noticeable increase in salary soon after the three-month mark and the review meeting based on that topic. We had an agreement to have a discussion on or around three months from the date of our initial meeting (which I believe was the 29th of July so that would have realistically been mid-November once the 3 full print cycles have taken place, which I think is completely fair rather than expecting a meeting strictly on the 29th of October) so waiting until January means I would miss out on at least one additional month adjusted pay if not two*".

12. The Tribunal does not find as a fact that there was an agreement for a definite salary rise of £2000 on accepting the role of coordinator along with designer. The Tribunal accept the evidence of Ms Phillips and Mr Prada that the Claimant was told only that there would be a review of this role and salary not that there would be a definite increase of £2000 or any particular amount. In fact, the Claimant received a salary increase of 2.5% following the review in January of 2020 which amounted to approximately £600.

13. On the 24th of March 2020 the Claimant along with other staff in the business were put on furlough following the start of the global pandemic and the Government's coronavirus job retention scheme introduction. As an alternative to redundancy the Claimant was asked to accept a 20% reduction in salary which he accepted.

14. On the 16th of May 2020 the Claimant was written to along with other staff by Mr Hodgson. The correspondence gave an update as to the situation in respect of the pandemic and its impact on the business. The Claimant and other staff were asked to take one week's holiday commencing on the 1st of June 2020 in which he will be paid his normal salary. The business was expected to reopen in stages following the ending of the lockdown.

15. On the 10th of June 2020 Mr Hudson had a meeting with all of the staff of the Respondent's business via zoom. The Tribunal has seen and accepts as accurate the notes of that meeting contained in the hearing bundle at page 103 to 105. The staff were told that the pandemic had caused a significant decrease in advertising revenue. The magazine had not been printed for three months and had lost out in competition to other publications that had continued to publish during this period. There was a significant lack of earnings for a full quarter. The pandemic had had a considerable detrimental impact on the Respondent's business and the Respondent had to consider savings including staffing levels. The staff were invited to provide options to avoid a redundancy situation. The staff were told that any redundancies were likely to come from the sales and design team. For the avoidance of doubt the Tribunal accepts the assertions that were made by Mr Hodgson in this meeting in respect of the impact financially on the Respondent's business by the pandemic.

16. On the 16th of June 2020 a one to one meeting took place with the Claimant and Mr Prada and Ms Phillips as note taker. The meeting took place via the zoom video platform. The notes were taken by Ms Phillips. Ms Phillips had access to the recording of the zoom meeting. The Tribunal accepts the notes contained in the hearing at page 107 are a broadly accurate record of that hearing. The Claimant understood the challenge that the Respondent's business was facing as a result of the pandemic and confirmed he understood that this was a likely outcome following COVID-19. The Claimant did not have any specific suggestions on how redundancies might be avoided other than a suggestion of job share or part time hours. The Claimant was asked whether he wished to be considered for redundancy and he replied that he would not.

17. On the 22nd of June 2020 a second one to one meeting took place with the Claimant and Mr Prada via zoom. The notes are contained in the Tribunal's bundle at page 11 one to 112. Again, the Tribunal accepts that they are a broadly accurate record of what took place on that day. The Claimant was told that the likely look of the design team will be 2 designers and one person chasing and managing the collection and proofing of artwork in other words the coordinator role. It was said that Vicky Phillips had offered to aid with the collection and proofing of artwork as an additional duty to her role. Two of the designers had done the same. If the Claimant was not to be made redundant his role going forward would have to be a full time Designer with some additional light duties approving artwork or to continue with artwork collection and artwork proofing as a Design Coordinator. The Claimant indicated that while he did not really want to have the role of

Coordinator and Graphic Designer combined originally, choice isn't in abundance at the current time and full time admin is in no different to what he was currently doing. The Tribunal accepts the Claimant was indicating to the Respondent that while he would ideally rather have a design role than a coordinator role he was prepared to undertake the coordinator role full time if necessary. At the meeting it was also confirmed the job share would not be an option. It was confirmed that there would be one or two redundancies in the Sales Department.

18. It was clear from the one-to-one meeting on the 22nd of June 2020 that there would be redundancies in the Design team and that the redundancy would likely entail the loss of one employee from that team. It was clear that the Respondent was considering the whole of the Design team which includes the Claimant, the two Graphic Designers and the one full time Coordinator in the same pool with a reduction in headcount of one person leaving a team of three.

19. Sometime after 22 June and before 26 June, Mr Prada undertook a selection exercise to determine who should be made redundant in the Sales and Design team. He used four criteria that were obtained from the Gov.uk website providing advice to businesses. Length of service, experience, flexibility, and absence record. Length of service was simply a number based on the number of years of service which in the Claimant 's case was three. The absence record was based on the previous year's absence record. It was marked out of 10 but it is unclear how the figure (of 7 for the Claimant) was arrived at. Every member of the Design team was given the same score in respect of Flexibility, 5. So far as experience was concerned, he considered proficiency in layouts, design artworks, adverts. He did not consider expressly proficiency with software. Mr Prada did consider technical ability so in that respect it did encompass software. It also encompassed whether artwork was done incorrectly or with mistakes. Mr Prada took a small sample of work. When cross examined, he did not have dates of the samples used and could give no further details.

20. The score sheet for the Claimant is contained in the bundle at page 118. That sheet completed by Mr Prada records that the Claimant scored for the graphic design role 21 and for the coordinator role 19. The score for experience in the role was 6 for the design role and 4 for the coordinator role. The Tribunal did not see any of the other score sheets for the other employees in the Design team, but it accepts that scoring was undertaken applying these criteria for the other employees. The Tribunal was told by Mr Prada, and accepts, that the two Graphic Designers scored 26 and 25 for the Graphic Design role and that the Coordinator, Joe Akrigg scored 28 for the coordinator role. Only the Claimant was scored for both roles.

21. At neither of the one-to-one meetings was the Claimant informed in any way about the criteria that Mr Prada intended to use for the redundancy exercise or indeed if there was to be any criteria. The Claimant was never invited to make any representations in respect of those criteria either as to whether the criteria themselves could be improved or were appropriate or to adduce

evidence or examples that would support a particular score for himself or increase any score. The Claimant was not given his individual scores at any time and nor was he provided with any of the scores of any of the other employees in his team. Mr Prada undertook the scoring exercise alone and without any input from any other person including Ms Phillips.

22. On the 25th of June 2020 Mr Prada wrote to the Claimant enclosing the minutes of the one-to-one consultation meeting on the 22nd of June. The letter stated that it was still hoped that the loss of the Claimant's employment could be avoided and they were looking at alternatives within the company. The letter also said that the situation was being reviewed today where we intend to make a final decision on your continued employment or redundancy.

23. On 26 June 2020 Mr Prada held a telephone conversation with the Claimant in which he told the Claimant he was being made redundant. This was confirmed in a letter of the same date. The letter confirmed that the Claimant would be dismissed with effect from 21 July 2020. The Claimant would be given a redundancy payment of £957.99 along with any wages due and accrued holiday with the normal payroll run following his last day. He was given a right of appeal against the decision to Graham Hodgson to be made within 5 working days.

24. The Claimant appealed by email dated the 1st of July 2020. Within that email he stated that he wished to appeal the decision of his redundancy because he did not understand why he was the one made redundant.

25. The Claimant's appeal took place on 8 July 2020. The Claimant was told his appeal had been dismissed on that day. The Claimant asked for his individual score for the redundancy exercise and was refused. Surprisingly, given it was via zoom video platform and recorded, one aspect of the minutes of the hearing proved controversial. This was in relation to the selection criteria. The original minutes produced by Mr Hodgson and emailed on 13 July 2020 had reference to some assessment criteria although not the exact ones used by Mr Prada (it stated "GH informed him that it had been based on several criteria such as experience; the needs of the business; flexibility and attitude"). This was disputed by the Claimant who submitted amended minutes omitting these criteria but adding in a reference to a lack of experience in the field. A third set of minutes was sent on 19 July by Mr Hodgson. Some of the amendments were accepted but these minutes still recorded the criteria as being experience, the needs of the business, flexibility and attitude.

26. The Tribunal is quite satisfied that the Claimant's version of this meeting is correct and no selection criteria were given to him save for reference to experience. This was accepted by Mr Hodgson when cross examined by the Claimant.

The Law

27. The Claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

28. The potentially fair reasons in Section 98(2) includes that the employee was redundant s.98 (2) (c). Redundancy is defined at s.139 ERA. This states

"139(1) 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 attributable wholly or mainly 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."

29. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "…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 employer's 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". the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band.

30. The basic constituents of a fair redundancy dismissal are set out by Lord Bridge in Polkey v Dayton [1987] 3 All ER 974:

'" … in the case of redundancy, the employer will normally not act 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 his own organisation … It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."

31. In Davies v Farnborough College of Technology (2008) IRLR 14 the EAT held that on the facts of any given case, an employer must give sufficient information in relation to how the criteria were applied to a particular employee to give him the opportunity, to which they refer, of challenging and correcting and supplementing the information which the employer may wrongly have taken into account or may inappropriately not have known of, in order to arrive at the conclusions on those criteria. That may involve the giving of the particular marks, but it may not.

32. So far as the Polkey exercise is concerned the Tribunal reminds itself of the guidance in the leading case of Andrews v Software 2000 Ltd (2007) IRLR 568 which does not need to be repeated.

Conclusions

Unfair Dismissal

33. The Tribunal turns firstly to the reason for the Claimant 's dismissal. The reason for the Claimant's dismissal was redundancy and this is not disputed. The Tribunal notes that even prior to the global pandemic and introduction of the CJRS the Respondent had reduced headcount. The Pandemic had a significant financial impact on the Respondent's business. Many of its advertisers who it relies on for income were closed. The magazine was forced into stopping print production for a period. Staff were placed on furlough but CJRS was insufficient to cover all of the overheads.

34. There can be no serious criticism of the Respondent's decision to select a pool of those in the Design team. Such a decision clearly reflected the problems that the Respondent faced caused by the pandemic and was one which a reasonable employer in the Respondent's position could have taken. Likewise, while only the Claimant was considered for both roles this was a reflection of the fact that he was the only employee in the team undertaking both roles at the date of the redundancy exercise.

35. The criteria for selection arguably include a mixture of subjective (flexibility and experience) and objective (length of service and absence record) criteria. There may be criticism levelled at the fact that it contains no weighting between the categories and that length of service is simply a figure equating to number of years' service. There may also be perhaps

more serious criticism of the fact that the employer did not consult with the Claimant prior to formulating these criteria. That said, the Tribunal reminds itself that this is a very small employer with no professional HR input that was required to make a redundancy decision in the context of very severe immediate financial constraints. The decision to formulate the selection criteria it did and without prior consultation fell within a range of reasonable responses open to it.

36. The Tribunal then turns to the fact that the Claimant was never told what the selection criteria were and the scoring matrix by Mr Prada or indeed Mr Hodgson. The Tribunal considers this to be a serious failing. The decision not to communicate the selection criteria being used to the Claimant was one which no reasonable employer in the Respondent's position could have taken. Without knowing on what basis he was being assessed and selected, the Claimant was denied the opportunity to make any effective representations and have any meaningful input into the Respondent's decision making process. For example, the Claimant was unable to highlight his perceived strengths and support such assertions with concrete examples from his employment with the Respondent (or previous employment) that would support the experience and flexibility categories. This was particularly important given that Mr Prada made the decision on his own without the input of Vicky Phillips. The actions of the Respondent in this regard were also clearly not in accordance with the policy contained in the employee handbook.

37. In evidence Mr Prada stated that given the size of the employer and the fact that he worked closely with the Claimant he already knew the Claimant's skill set. He said that the redundancy decision was his and that the Claimant could not tell him how his score could be higher or lower. However, part of the purpose of a reasonable redundancy procedure is to ensure that the employee is assessed fairly and that the employer has the requisite information before it to score the employee accurately based on a fair assessment of the Claimant's work. While obviously to some extent impressionistic and accepting that Mr Prada had personal knowledge of the Claimant's work the Tribunal still found Mr Prada's evidence on what informed the score on experience somewhat vague and lacking in concrete examples. Likewise, while all those in the pool scored 5 for flexibility the Claimant was the only employee doing two roles which Mr Hodgson conceded in questioning meant he could pivot potentially between both roles. This may have been considered an advantage had it been considered. So far as absence was concerned, the Claimant in answer to the Tribunal's question thought he was only off sick for one day and that the score of 7 may have been based on an erroneous understanding of his sick leave record. While it is no part of the Tribunal's function to re-score the redundancy exercise, the aforesaid does suggest that the Respondent would have benefited from the Claimant addressing it on the specific criteria he was being judged by and being afforded an opportunity to provide examples and correct any misapprehensions.

38. The failure to provide the selection criteria to the Claimant renders the dismissal unfair. The Tribunal has also separately considered the question as to whether the Claimant should have been provided with his scores and/or the scores of others. To some extent this is hypothetical as the Claimant was not even provided with the criteria. It would only be relevant had the Claimant been provided with the criteria and the scoring matrix at the outset which would have been a prerequisite to being given any scores. The Tribunal concludes that given the size and administrative resources of this employer acting reasonably would not necessarily have required the Claimant to have been provided with his scores and certainly not the other scores of those in the pool. It did require the Respondent to give the gist of how the Claimant had done and at least where he had scored well or poorly compared with those others in the pool. This was not done, and this failure meant the appeal before Mr Hodgson became somewhat nugatory and for this additional reason the Claimant's dismissal was unfair.

39. The Tribunal then considers whether had the Respondent provided the Claimant with the criteria and scoring matrix at the outset, allowed him to make representations in the light of that information and given him an effective opportunity to challenge his selection for redundancy at the appeal stage the Claimant may have been fairly dismissed in any event.

40. The Tribunal is quite satisfied that the Claimant had no real prospect of being offered a graphic design job ahead of Freddie Satterthwaite and Sian Whyley. They were competent and qualified graphic designers who were more experienced and had a number of years more service with the Respondent than the Claimant did.

41. The Tribunal is however of the view that the Claimant had a chance of being offered the coordinator role ahead of Joe Akrigg, which he would have accepted had it been offered to him. As is noted, the Claimant given the opportunity may have increased scores in respect of sickness absence and flexibility and experience. It must be acknowledged that Joe Akrigg had longer service with the Respondent. He was also already in that post and unlike the Claimant had only ever undertaken the coordinator role. The Tribunal is of the view that had a fair procedure been followed he was still the most likely to have been selected to retain his role and the Claimant was the most likely to have been selected for redundancy. Based on all the evidence the Tribunal finds that there was a 70% chance that the Claimant would have been dismissed fairly in any event.

Breach of Contract

42. Based on the Tribunals findings of fact the Claimant's claim for breach of contract is dismissed. There was no agreement to pay the Claimant a fixed increase of £2000 on accepting the new combined role of Designer and Coordinator.

Disposal

43. The Parties are encouraged to attempt to agree the value of the Claimant's Claim. In absence of agreement the Parties shall write into the Tribunal within 21 days of receipt of this judgment giving their dates to avoid in order for a remedy hearing to be fixed.

Employment Judge Serr

29 March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

1 April 2021

FOR THE TRIBUNAL OFFICE