EMPLOYMENT TRIBUNALS

Claimant: **Mai Ching Chim**

Respondent: **IG Design Group UK Ltd**

Heard at: **Cardiff by CVP** **On: 4th and 5th March 2021**

Before: **Employment Judge Duncan**

Representation:
Claimant: In person
Respondent: Ms Gardiner, Counsel

JUDGMENT having been sent to the parties on 10th March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mai Ching Chim, started her employment with the Respondent, IG Design Group UK Ltd, on the 26th March 2012. She was employed as a Technical Manager. The Respondent is a wholesale designer, manufacturer, and distributor of gift cards, wrapping paper, stationary and paper bags selling to global retailers. The Respondent was dismissed on 31st March 2020.

2. The Claimant represented herself throughout the course of the proceedings. The Respondent was represented by Ms Gardiner of Counsel.

3. The hearing has taken place by way of two day CVP hearing. Both parties agreed that the full hearing was capable of being heard remotely.

4. By ET1, dated 4th August 2020, the Claimant outlines a chronology leading to her dismissal. She claims for unfair dismissal and makes reference within the ET1 to a number of discrete concerns that she has with the process that was followed, namely:

   a) There was only one consultation meeting;
   b) The redundancy pool was only the Claimant at the Wales site. She states that the restructure that followed involved all technical employees across other sites;
   c) There were no alternative roles at the time or in the foreseeable future; and,
   d) That a job was advertised some two months post-dismissal that the Claimant states she would have been likely to accept if it was raised with her.

5. She seeks compensation and has outlined her loss in a schedule contained within the bundle.

6. The Respondent, by ET3 and accompanying grounds of resistance, dated 1st October 2020, states that there was a downturn of work due to the economic climate, poor Christmas 2019 and clients ceasing to trade. It is stated that the decision was made that the role of Technical Manager was at risk and the Claimant was in a pool of one as the only individual at that level in the business. The Respondent states that a fair process was followed, that the identification of the pool was fair, and that the consultation was fair. The Respondent states that Claimant did not engage meaningfully in the consultation, withdrew from the process and was focused on negotiating a more substantial financial settlement rather than discussing the fact that she was at risk. In respect of the role that was advertised following dismissal, the Respondent states that this was a completely different type of role to that previously filled by the Claimant.

7. In terms of the procedural background of this case, the matter came before EJ Moore on the 11th November 2020. Directions were given through to the full hearing and a list of issues identified. It was confirmed at the outset of the hearing that these remained relevant and would form the framework of my decision. Those issues can be found at page 37 of the bundle.

8. Prior to the commencement of evidence, I explained the hearing procedure to both parties but mainly for the benefit of the Claimant. The Claimant confirmed that she had made notes in preparation but was unaware of the need to ask questions. I explained the importance of

properly formulating questions during cross-examination. It was agreed that we would commence the evidence at 11am so to allow the Claimant a further 40 minutes to prepare questions. The Claimant articulately put her case through the questions she had prepared. Following the evidence of Mrs Jenkins, I adjourned for a further half hour to allow her to undertake the same process for Mrs Regan. There were occasions where I needed to assist the Claimant to formulate a question, or break down a long question, to enable the Respondent to respond – but generally the Claimant was able to put her case entirely appropriately.

Findings of Fact

9. I heard oral evidence from: Melanie Jenkins, HR Director; Lucy Regan, Supply Chain Controller; and, the Claimant. I have read the entire bundle and the witness statements.

10. On 18th March 2020, the Claimant attended an at risk meeting with Mrs Jenkins and Mrs Regan. It is agreed that the downturn in the business was discussed. The Respondent explained that the reason for the downturn was the poor Christmas trading, customers ceasing to trade and a move away from some products that the Respondent produced such as glitter and wrapping.

11. It is agreed between the parties that there was a downturn in the business. It was recognised by the Claimant in the course of her evidence that a major client had been lost. It was further agreed that a technical assistant had been made redundant following the loss of the client. This evidence fits into a clear pattern of a financial downturn towards the end of 2019. The totality of the evidence overwhelmingly leads me to find that the downturn in the business was significant.

12. What is in dispute is the specific impact upon the work that the Claimant undertook in her role. The Claimant states that whilst there may have been fewer orders, from a technical perspective the size of the order did not matter as the technical work still needed to be undertaken. She further states that if there was a reduction in her work, then due to a change in focus in the business towards sustainability, there was an increase in workload in this area. The Respondent invites me to consider that the decline in sales led to a decrease in activity, for example, in glitter products and the loss of certain clients.

13. I have no contemporaneous or independent evidence that assists me on this point. There are no breakdowns of orders, work flow or time sheets that may assist. The point is therefore primarily an exercise in considering the written and oral evidence and assessing the competing accounts of the witnesses. However, the allegation that the Claimant's work was

diminishing is set in the agreed context of the wider issues that the company was facing. I have already made findings in respect of the financial difficulty that the Respondent was facing. I appreciate fully that the Claimant states that the size of the order does not impact the amount of work from a technical level and I accept that as a principle relevant to her role, but, in my view, if the number of clients is shrinking, if the number of orders is down, if the number of products sought is diminishing, it is highly likely to have had a direct impact upon the Claimant's role and the tasks that she needed to undertake in turn. Whilst I accept that some of her time was spent trying to build new areas of profit through sustainability products, on balance, I accept the evidence of Mrs Jenkins and Mrs Regan in that the downturn in work led to the work that the Claimant had to undertake also diminishing.

14. A letter sent following the meeting on 18th March 2020 can be found at page 43 of the bundle. The letter makes it clear that the Claimant was at risk as, based upon a review of the business, the role of Technical Manager was considered for redundancy. The letter states clearly that no decision has yet been made in respect of the redundancy and that the Respondent will consider any representations that the Claimant may make.

15. It is accepted that the Claimant was placed in a pool of one. The Claimant worked in a reporting line as follows: one technical assistant, the Claimant as technical manager, one technical controller, one supply chain controller and one operations and manufacturing director. Both Mrs Jenkins and Mrs Regan state in their evidence that there was diminishing work for the Claimant in the role of Technical Manager – I have already found that to be the case. They state that following a review with senior management, it was considered that the tasks that Claimant undertook could be consolidated into the remaining technical team. The Claimant was the only individual at the level of technical manager.

16. Turning to the meeting on 18th March 2020, at paragraph 7 of the statement of Mrs Jenkins, she states that the Claimant did not offer any alternatives to redundancy at that stage and wanted to focus on the financial element of the redundancy. This was accepted by the Claimant in her evidence. This is, in my view, in any event supported by the email that Mrs Jenkins sent to the Claimant at 13:30 on 19th March 2020. The email responds to the Claimant's questions relating to telephone costs, health care, when the redundancy award would be made and the tax implications.

17. The Claimant accepts that she did not put forward any alternatives at this juncture, or indeed any juncture thereafter. She accepts that she did not put forward any suggestions regarding the process for redundancy. For

example, she did not engage in any dialogue regarding specific tasks that may be consumed by other individuals, she did not raise any issue with the fact that her role had been identified as at risk instead of other roles, she did not make any suggestions as to how the role could be kept at all.

18. It was put to Mrs Jenkins that the Claimant was informed of two or three vacancies that existed at the meeting on the 18th March 2020. Mrs Jenkins is clear in her evidence that there were no vacancies at the time of the meeting. The Claimant states that there was discussion at the at risk meeting but that she was told at the subsequent meeting that there were no alternative roles. In deciding this issue, I have particular regard to the contents of the subsequent letter dated 24th March 2020 in which it states that there are no alternative positions to offer you. In my view, if Mrs Jenkins had been told of two or three vacancies, she would have asked questions in relation to those roles. There is no reference in any of the emails or letters to or from the Claimant asking about the nature of those roles. Nor is there any mention in her ET1, accompanying statement or statement prepared in advance of this hearing – this is despite the C levying a specific criticism of the Respondent that they had not foreseen a need for a role that later came to be advertised in June 2020. I found Mrs Jenkins to be compelling and consistent on this particular issue and I find her version of events to be more likely on this point. I therefore find that the Claimant was told that there were currently no vacancies at the risk meeting on 18th March 2020.

19. Attached to the email of 19th March 2020 is a letter inviting her to a meeting on 23rd March 2020. The letter is found at page 44 of the bundle. Again, the letter is clear in explaining the purpose of the consultation meeting and exploring alternatives with the aim of trying to avoid redundancy. The letter states that if the Claimant has any question or requires clarification, then to ask. The Claimant accepts that following the 18th March 2020 meeting she understood the redundancy process and that she was at risk.

20. Both of the Respondent witnesses state that the Claimant was very focused upon the financial element of the redundancy as opposed to any constructive engagement in the process. Indeed, the Claimant accepts that she did not offer alternative suggestions to redundancy and that the focus of her questions following the meeting on 18th March were financially motivated. She candidly makes no bones about it as she states that her focus was on ensuring that, if she was made redundant, then her family was protected and that she was effectively being sensible in the approach taken. I accept the Claimant's evidence on this issue in so far as it relates to ensuring that she was able to get the best offer possible in terms of redundancy. No criticism, in my view, can be made of the C for wanting to protect her position financially in a precarious position.

21. The difficulty for the Claimant, however, is that her reason for a failure to engage in consultation was that she felt that the outcome was inevitable. She gave clear oral evidence stating this. It was put to the Claimant in evidence that this clearly cannot have been the case as the Respondent specifically stated in correspondence that no decision had been made. The Claimant's interpretation cannot be reconciled with the contemporaneous evidence and the Respondent's actions in inviting the Claimant to an at risk meeting and then arranging a further meeting to discuss options and continue the consultation. I find that the Respondent actively sought to engage the Claimant in meaningful consultation, and the Claimant had concluded that the outcome was inevitable at a time when this was not necessarily the case. I cannot speculate as to what may have happened if the Claimant had engaged in the process. The Claimant is an intelligent and articulate individual. She clearly has considerable knowledge of her role and the company generally. It was the assumption that the outcome was inevitable that led, in my view, the Claimant to fail to engage in the process properly. I cannot speculate as to the outcome of the consultation if the Claimant had, for example, utilised her knowledge of the role and the company to make suggestions regarding cost savings, delegation of tasks, restructuring etc. The Respondent, likewise, cannot speculate as to the outcome if the Claimant had engaged. I find that the Claimant's erroneous belief that the process was a forgone conclusion prevented her from meaningfully engaging in the process.

22. On the 23rd March 2020, the Claimant attended the meeting. The contemporaneous evidence of the meeting is limited to the contents of a letter, dated 24th March 2020, found at page 48, informing the Claimant that her role is to be made redundant. The letter states that as per the discussion at the meeting, no alternative positions were identified and that this was likely to be the situation for the foreseeable future. It is, in my view, highly relevant that a telephone conversation took place between Claimant and Mrs Jenkins on the 24th March 2020 that triggered the letter being sent. Mrs Jenkins, at paragraph 12 of her statement, states that during the telephone conversation, the Claimant requested that she be withdrawn from the consultation process. In oral evidence, the Claimant accepted that a telephone conversation took place but could not be specific as to whether the term 'withdraw' was used. The Claimant was vague as to the precise term used and her intentions in making that call. It was reiterated that she felt resigned to the process ending with an inevitable outcome of her losing her job, hence the failure to engage. In considering whether she did effectively request that the consultation conclude, and the inevitable result of redundancy follow, I have regard to some of the surrounding evidence.

a) The Claimant's email of 19th March 2020 at page 45 of the bundle reads, in my view, as to give the impression that the Claimant had already decided that she would be leaving. She states that she was negotiating on the hypothetical that she would be made redundant. The email though is, in my judgment, consistent with someone that had decided she was already leaving;

b) The lack of engagement in the consultation and alternative work strategies or roles carries significant weight;

c) At page 73 of the bundle, the Claimant's diary confirms that she created a job alert. Again, in and of itself, is not determinative of the issue. She may have simply taken this action on a precautionary basis, but it is another piece in the evidential jigsaw;

d) The timing of the conversation and the alleged "withdrawal" takes place on receipt of the improved offer of redundancy payment. I was taken to pages 55 and 58 of the bundle and the improved offer made is £2625 higher.

e) I also have regard to the timing of the redundancy letter confirming dismissal. It immediately follows the conversation on 24th March. On any reading, a consultation period that started on Wednesday 18th March 2020 and concluded on Tuesday 24th March 2020, some six days, and only three clear working days later, is extremely quick, especially in the context of a company with resources and their own HR department.

f) I further attach weight to the oral evidence of Mrs Jenkins – she was clear and consistent on the point and stated that Claimant withdrew from the process and that she explained the implications for doing so. As I have already stated, she was an impressive witness, clear and consistent on the point.

23. In my view, the factors I have listed support the oral evidence of Mrs Jenkins. I therefore find that the Claimant contacted Mrs Jenkins with the intention of withdrawing from the process.

24. The letter of 24th March 2020 confirms the redundancy, outlines that there were no alternative roles for consideration and that the last date of employment would be the 31st March 2020. That date has increased relevance following the oral evidence. The Claimant states that a phone call took place on the 31st March 2020 between her and Mrs Jenkins in which she requested that she be furloughed. Mrs Jenkins does not recall such a phone call taking place and points to the email dated 16th April 2020 as the first time that a request for furlough was made. Mrs Jenkins states that the email does not refer to a specific telephone call in which the same request was made and to the best her knowledge this was the first

request. In my view, whether a telephone call took place on 31st March is potentially relevant as it would have been on the last day of the Claimant's employment. She would still have been employed by the Respondent. It would have been potentially relevant correspondence within the period of appeal that had yet to expire. It is curious as to why this was not raised forcefully within the documentation by the Claimant, whether in the email of 14th April 2020, the ET1 or Claimant's statement. The final statement prepared by the Claimant outlines a chronology of involvement and does not reference the telephone call. I also have regard to the fact that the Claimant appears to have conducted the majority of the correspondence via email – there is the exchange of emails on 19th and 20th March in addition to that on 16th April 2020. I also have regard to the fact that the Respondent has an HR department with, in my view, a competent member of staff in Mrs Jenkins – I form this view having heard from her in oral evidence. If she had received a phone call on 31st March, prior to the appeal period ending, and prior to the end of employment, I consider it likely that this would have triggered some form of further investigation on the part of the company – whether clarification as to whether she was seeking to appeal, clarification of any further meeting or at least some record of the discussion taking place. Mrs Jenkins is clear, she does not recall a phone call taking place. In my view, I prefer the evidence of Mrs Jenkins on this issue. She gave clear evidence with regard to her involvement in this process – she took her role seriously and has undertaken a number of tasks in a professional manner. I therefore find that it is more likely than not that there was no such telephone call on the 31st March and that the first request for furlough was on 16th April.

25. There is passing criticism that the Respondent failed to agree to furlough. The Claimant accepted in oral evidence that the decision was reasonable in the circumstances. Regardless of her concession, I have had regard to the contemporaneous evidence that states clearly that the Respondent did not consider it appropriate to furlough the Claimant and then make her redundant following furlough. It was the Claimant's request that she be furloughed with a view to being made redundant – I take the view that it was reasonable for the Respondent to take the stance it did.

26. The Claimant's employment ended formally on 31st March 2020.

27. At page 52 of the bundle is an email dated 20th May 2020 from Lucy Jenkins to another member of staff requesting that a role for a Technologist is advertised. The role was subsequently advertised formally on 4th June 2020 before being withdrawn. The reason for withdrawal was that, according to the Respondent's evidence, a collective consultation process was commenced that ultimately led to 52 employees being made redundant. The advert was removed as it was determined that the role

may have been filled by those at risk. It transpired that the role was not filled by those at risk and so it was readvertised in July 2020.

28. The Claimant gave evidence to state that the technologist role was one that she would have likely accepted had it been offered to her. She states that the role is comparable to her old role and that many of the functions are the same. In her oral evidence, she points to a number of areas of her old role that have considerable overlap to the technologist role. The Claimant also considers that it was foreseeable that the role would have been required at the time of her redundancy as there would have been increased admin workload of the technical controller. The thrust of her complaint is that the Respondent could and should have foreseen that there was a need for such a new role given her role being made redundant, that the role should have been offered to her at the time of her redundancy process.

29. Contrary to the Claimant's evidence on the point is the Respondent's witness evidence to state that it was not foreseeable that a new role of the nature of technologist was required. Mrs Regan states that the role came about following the downturn in March to May and the pressures that covid placed on the business. She states that nobody could have foreseen the pressures on the business at that time. In any event, Mrs Regan states that the role was completely different to that of the Claimant's old role and that even if it were available it would have been unsuitable.

30. In balancing the competing evidence, I will firstly consider the suggestion that the role was foreseeable at the time of Claimant's redundancy.

    a) The Respondent's financial position at the end of 2019 and start of 2020 was clearly subject to significant change. I have heard evidence regarding the changes in priorities and work flow. I have heard evidence regarding the change in demand due to environmental factors such as glitter and wrap. I have heard evidence as to the loss of clients and the impact that had. It seems that the business was going through a period of change prior to March 2020, this carried with it some unpredictability.

    b) March 2020 to May 2020 were the first few months of the pandemic in the UK. Nobody could have predicted the impact of the pandemic, not least the Respondent. The Respondent ended up making significant redundancies as a result of pandemic induced pressures. The evidence of Mrs Regan to state that many of the businesses they were selling to were closing is compelling – this, no doubt, would have been the position for many companies across the UK and the globe. The pandemic led to further unpredictability, as is borne out by the Respondent's actions in making collective redundancies;

c) The Respondent does not have a crystal ball. I pose myself the question, if the need for a new role was foreseeable, why didn't the Claimant foresee the need during the consultancy process and raise the issue at that stage;

d) The evidence of Mrs Regan is that it was not foreseen given the difficulties the company was encountering at the time. There is nothing to rebut her evidence other than the Claimant's belief that it should have been foreseen.

31. For those reasons, I find that it was not foreseeable that the Respondent would need to advertise for a new role of technologist.

32. The second criticism regarding the suitability of the role is largely academic as a result of the finding regarding foreseeability and the fact that it was not available until at least two months from the date of dismissal. But in any event, I have had regard to the following when assessing the comparable nature of the roles:

a) Salary – the role was remunerated at around half of the Claimant's previous salary;
b) Benefits – no car and other benefits were advertised as part of the role;
c) Tasks – whilst I accept that there were elements of the new role that Claimant would have undertaken, such as basic admin, I accept the evidence of Mrs Regan that the main difference was that the technologist role was admin and the Claimant's old role was managerial. Her old role was based on leadership, it was taking the lead on tasks and taking responsibility through to fruition. It was not, as I heard from Mrs Regan, the collecting or gathering of data to effectively be passed onto a manager to consider and action.

33. In my view, the roles were not comparable for those reasons.

The Law

34. The key statutory considerations are found under section 98(1) and (2) of ERA 1996. It is for the employer to show the reason for dismissal. Where the employer can show a potentially fair reason for dismissing the claimant, the determination of the question whether a dismissal is fair or unfair 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 shall be determined in accordance with equity and the substantial merits of the case.

Section 139 ERA 1996 provides that:

> *(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 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.*

35. The leading case in respect of redundancy is that of **Williams v Compare Maxam Ltd [1982] ICR 156**. In general terms, employers acting reasonably will give as much warning as possible of impending redundancies to employees, consult about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job.

Conclusions

36. I have carefully considered the totality of the evidence relating to the reason for dismissal and the evidence is strongly in support of a finding that this was a genuine redundancy situation. The Respondent was going through a down turn in relation to the loss of clients, had made a voluntary redundancy in late 2019 and had been impacted by poor Christmas trading. In light of my findings on this point, and those that relate to the diminishing work in the Claimant's role, I conclude that this was a genuine redundancy situation. I therefore find that the reason for dismissal was redundancy as defined by section 139(1)(b) of ERA 1996. Accordingly, the reason for dismissal is a potentially fair reason and I am required to move on to consider whether the dismissal was fair or unfair.

37. In considering whether the Respondent acted within the range of reasonable responses, I turn to the issues outlined at the start of the hearing as identified by EJ Moore on 11th November 2020. In addition to this there is the additional point as to whether the Respondent acted reasonably in placing the Claimant in a pool of one.

38. In consideration of the identification of the pool, I have regard to my findings relating to the fact that the Claimant was the only individual in the role of technical manager within the respondent company. The evidence was such that a review had been undertaken and that this review had identified that the Claimant's existing tasks could be given to the other staff members in the management line. I have regard to the findings made in respect of the diminishing level of work, the absence of evidence relating to other roles that the Claimant states could have been considered for redundancy, the downturn in the business and the fact that the Tribunal's role is not to interfere with business decision's relating to restructuring given the changing needs of a business – I find that the Respondent decision to place the Claimant in a pool of one was in the reasonable band of responses. This was a standalone position, unique within the management structure, and it was in my judgment reasonable to place the Claimant in a pool of one.

39. The second issue is whether the Claimant was adequately warned and consulted in the circumstances. This is an unusual case given that, in my finding, it was the Claimant's assumption that the conclusion of the process was inevitable that prevented her own meaningful engagement. I found that the Respondent gave notice to the Claimant of being at risk, arranged a meeting the following week, offered the opportunity to ask questions and engage in the process. It is hard to see what more the Respondent could have done in the circumstances that I have found, namely, that the Claimant withdrew from the process. Given my findings relating to the Claimant's focus on the financial elements, and the request to withdraw, I conclude that the Respondent acted reasonably in giving notice and attempting to consult. The Respondent cannot force the Claimant to consult if she does not want to.

40. Given my findings regarding the absence of alternative roles, and the fact that it was not foreseeable that the Technologist role would become available thereafter, I conclude that the Respondent actively considered whether there were alternative roles and, unfortunately for the Claimant at the time of the redundancy process, as a result of the wider downturn in business, there were none. There is no burden on a Respondent to create a role. In circumstances where the Claimant failed to engage with the consultation, it is again difficult to see what further steps could have been taken by the Respondent during the

consultation process. I have already highlighted that the Claimant chose not to raise any concerns relating to the identification of the pool, chose not to raise issue relating to division of tasks, chose not to make any suggestions as to how her role could be saved – this, in my view, carries significant weight. In the particular circumstances of this case, I conclude that the Respondent did take reasonable steps to consider alternative employment.

41. In all the circumstances, in light of my findings above, I find that the Respondent's actions in totality fall within the range of reasonable responses and the claim is therefore dismissed.

Employment Judge G Duncan
Dated: 9th April 2021

JUDGMENT SENT TO THE PARTIES ON 27 April 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche