EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Chetna Patel	v	Hive Education Trust

Heard at: Watford **On**: 26 February 2021

Before: Employment Judge de Silva Q.C.

Appearances

For the Claimant: Paul O'Callaghan

For the Respondent: Laurene Veale, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing"

JUDGMENT

1. The correct Respondent is Hive Education Trust.

2. The Claimant's claim against the Respondent for unfair dismissal is dismissed.

REASONS

Proceedings

1. By a Claim Form presented on 6 January 2020, the Claimant made a claim for unfair dismissal against St Mary Magdalene Academy. In its Response filed on 17 February 2020, the Respondent stated that the correct identity of the Respondent was Hive Education Trust, that the reason for dismissal was redundancy and that the dismissal was fair in all the circumstances.

2. At the outset of the Final Hearing, the Parties filed an Agreed List of Issues to which I refer below and for which I am grateful to Counsel for preparing.

3. At the Final Hearing, the parties agreed that the correct Respondent was Hive Education Trust and I accordingly substituted Hive Education Trust as Respondent pursuant to rule 34 of the Employment Tribunal Rules 2013.

4. I heard evidence on behalf of the Respondent from Vicky Linsley (Headteacher) and Majeda Clarke (Vice Chair of Governors) and from the Claimant on her own behalf. All of the witnesses were cross-examined. As there was insufficient time to hear oral submissions at the hearing, the Parties each filed written submissions on 10 March 2021. I wish to express my further gratitude to both Counsel for their clear and concise submissions on the law and the facts.

Findings of Fact

5. The Respondent is a multi-academy trust operation one school in London, the St Mary Magdalene Academy (**"the Academy"**). The Academy is a non-selective school educating students aged 4 to 18. The Claimant commenced employment with the Respondent on 1 April 2007 as a Director of Learning. At the time of the redundancy exercise referred to below, there were eight Directors, including Elaine Kneller (Director of Timetabling) who worked part-time two days a week. The Headteacher, Deputy Headteachers and Directors formed the senior leadership team of the Respondent.

6. A budget forecast produced in early 2019 projected a deficit of over £400,000 for the academic year 2019/2020 and a deficit of just under £600,000 for the academic year 2020/2021. Staff costs were the highest costs.

7. Ms Linsley and Ian Ship (Director of Finance and Corporate Services who had prepared the budget), decided that the best way to achieve cost savings was a wholesale change to the senior leadership team and support staff structure. They proposed the removal of the seven full-time Director posts which would be replaced by five Assistant Head Teacher (**"AHT"**) posts. These would be ringfenced for the seven existing full-time Directors. The Director of Timetabling role was excluded from the exercise as it was determined that specialist systems and mathematical skills were needed to carry out this role and it was in any event a part-time role. The view of Ms Linsley was that the seven full-time Director roles were generalist roles which could each be done by any Director, albeit each such role had a different focus.

8. A Redundancy Policy was drafted in March 2019. This stated at paragraph 5.2: *"Where more than one employee is employed in an affected role, a process of selection will be carried out. The criteria used to select will be objective, robust, transparent, non-discriminatory and fair, and based on the skills required to meet our existing and anticipated Academy needs. We will consider the most appropriate method of selection in relation to the circumstances surrounding the specific redundancy situation"*. A redundancy process had been carried out in 2016 under a different policy.

9. The Policy specifically addressed the proposed change from seven full-time Directors to five new AHT roles, stating at paragraph 6.2: *"The AHT roles represent an increased scope of responsibility within the SLT with the minimum of supervision. This requires higher level leadership skills and abilities…".*

10. Following consultation with the HR department of the London Diocesan Board for Schools (**"LDBS"**), the Academy's sponsor, the Respondent decided that selection for the AHT roles would be carried out by a single competency-based interview.

11. A Restructure Consultation Paper was prepared in March 2019. A job description for the new role was appended to this paper which included a Person Specification. This set out a number of *"Essential"* and *"Desirable"* specifications for the new role in under four headings: *"Qualifications and Training"*, *"Experience"*, *"Skills, knowledge and aptitude"* and *"Personal Attributes".*

12. In early March 2019, two science teacher roles were advertised. Recruitment for these posts had to and did take place by May so that the recruits could give notice in order to start in the new school year. In addition, the Head of Year 13 role was advertised as ringfenced for Heads of Year only. This was

part of a separate internal restructure whereby the pastoral team moved from five heads of year to four heads of house. The head of year/hours roles were not full posts but additions to existing teaching roles.

13. On 25 March 2019, Ms Linsley met with the Academy's recognised unions and explained that the proposed selection process would consist of an interview. No objections were raised. The Claimant's own union, the National Association of Head Teachers, was not invited to this meeting as Ms Linsley did not know that she was a member of this union.

14. On 27 March 2019, a staff meeting was held with all affected staff. They were told of the proposals and also that they were at risk of redundancy. The senior leadership team had been given advance notice of these matters as well. Staff were informed that the selection process would be by interview.

15. Prior to the interviews, one Director resigned with the effect that six Directors were applying for the five new AHT roles. A part-time role of Director of Operations was identified outside the senior leadership team which would be offered to the unsuccessful candidate. Ms Linsley asked the Directors for suggestions about other ways to save money. The Claimant and at least one other Director said that they would be willing to work three days per week but none said that they were willing to work two days per week.

16. The Claimant attended a consultation meeting with Mr Ship on 24 April 2019 accompanied by Jason Hogg of the National Association of Head Teachers. Part-time working was discussed and the Claimant mentioned again that she was willing to work three days per week.

17. Interviews were held on 8 May 2019. The interviewers were Ms Linsley, Damilola Ajabonna (Senior Deputy Head Teacher), Kate Roskell (Secondary School Adviser from LDBS) and Kathryn Davis (Governor). All six candidates were asked the same six questions and were then asked whether there was anything else they would like to say. The candidates had been told of this format in advance. The panel agreed the questions on the morning of the interviews based on the requirements of the new role.

18. Following the interviews, the Claimant saw Ms Roskell and Ms Linsley in the interview room without the other panel members, from which the Claimant inferred that they were making the final decision themselves.

19. After the interviews, the panel ranked the six candidates. They unanimously agreed on the ranking of the candidates. To determine which candidate would not be appointed, they compared the answers of the bottom two ranked candidates, determining which of these two candidates had given a better

answer to each question. They determined that the Claimant had given a better answer to one question and that the other candidate had given a better answer to five questions. On this basis, the Claimant was selected for redundancy.

20. The same day, Ms Linsley invited the Claimant to her office to inform her that she had not been successful. I do not accept that she used the words *"bottom of the pile"* as the Claimant suggests. She was a friend of the Claimant as well as a colleague and I accept that she handled the meeting sensitively. I note that Ms Linsley expressed the view in evidence that the Claimant was an excellent Director and a valued member of staff.

21. By letter dated 10 May 2019, the Claimant was formally notified of the outcome of the interview process. The letter invited the Claimant to accept the Operations Manager role as an alternative to redundancy. By email of the same date, Ms Linsley told the Claimant that her salary would be protected for three years in this role. The Claimant turned this role down as it was finally determined to be a support role rather than a teaching role and therefore her pay and conditions, in particular her pension, were not protected.

22. A final consultation meeting was held with Mr Ship on 24 May 2019 at which the Claimant stated that she believed the redundancy process was discriminatory. By letter dated 24 May 2019, the Claimant was informed that the decision had been made to terminate her employment by reason of redundancy. The letter told her that she had the right of appeal. The Claimant was placed on garden leave until her employment terminated on 31 August 2019. Her emails were blocked while she was on garden leave. Although she originally stated that this was standard practice, Ms Linsley accepted in evidence that this was standard practice only following dismissal and concluded that this was done while the Claimant was on garden leave because it was unusual that someone would be placed on garden leave and the standard practice for dismissal was followed.

23. The Head of Science role was advertised internally as the incumbent, Mr Lovelock, was recruited to one of the new AHT roles from his original Director role and the Respondent believed that he would be unable to manage this additional responsibility. This was not a full role but an addition to an existing teaching role for which the incumbent was paid a sum of around £800 for the additional responsibility.

24. On 4 June 2019, the Claimant appealed her dismissal and followed up with detailed grounds of appeal. The Claimant asserted among other things that there was no need for redundancy, that the selection pool and process was

unfair, including in that the process did not adequately allow her to display her skills, and that she was not offered suitable alternative employment.

25. The appeal hearing took place on 2 July 2019. The panel consisted of three governors, including Ms Clarke. They were assisted by a clerk, Robert Frost. The Claimant presented her case and Ms Linsley responded. The Claimant then summarised her case. The panel asked questions, for example about roles that the Claimant said were suitable alternatives. The appeal hearing lasted a little over an hour.

26. By letter dated 7 August 2019, Mr Frost told the Claimant that the appeal panel had upheld the decision to make her redundant. No reasons for this were given. Although Ms Clarke said in evidence that Mr Frost had advised not to give reasons and also that the Claimant could ask for reasons if she wanted them, Ms Clarke accepted that she saw Mr Frost's letter before it was sent and that it did not tell the Claimant that she could seek reasons.

Relevant Law

27. Under section 98(1) of the Employment Rights Act 1996 (**"the Act"**), the Respondent must establish a potentially fair reason for dismissal. Redundancy is a potentially fair reason for dismissal.

28. In ***Williams v Compair Maxam Ltd*** [1982] ICR 156, the EAT set out the following factors which a Tribunal may consider when assessing the fairness of a redundancy process: what warning of impending redundancies was given, whether there was consultation with the union and agreement of criteria, objective criteria, fair selection and seeking alternative employment. The EAT also made clear that the Tribunal must consider whether the dismissal lay within the range of conduct which a reasonable employer could have adopted rather than substitute its own views.

29. In ***British Aerospace plc v Green*** [1995] ICR 1006, the Court of Appeal held that the employer must only demonstrate that it set up a system of selection which can reasonably be described as fair and applied it without any overt signs of conduct which marred fairness. Once a Tribunal finds that a redundancy selection process was fair and fairly applied, it should not embark upon a detailed critique of individual items of scoring.

30. In ***Samels v University of the Creative Arts*** [2012] EWCA Civ 1152, the Court of Appeal cited with approval Mummery P in ***Taymech v Ryan*** [1994] EAT/663/94: *"The question of how the pool should be defined is primarily a*

matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem".

31. Lack of objectively in the selection process may lead to unfairness (***E-Zec Medical Transport Service Ltd v Gregory*** UKEAT/0129/08). The more subjectivity there is in the selection process, the more powerful the need for personal consultation (***Graham v ABF Ltd*** [1986] IRLR 90). In ***Canning v National Institute for Health*** [2019] 3 WLUK 794, the EAT held that the effects of any subjectivity in a redundancy interview process could be adequately countered by 'checks and balances' such as the number of interviewers.

32. In ***Morgan v The Welsh Rugby Union*** [2011] IRLR 376, the EAT drew a distinction between an employer selecting employees who should be made redundant from an existing role and an employer choosing who should be recruited to a new role following a reorganisation. In the latter case, the employer's decision must of necessity be forward-looking and an interview process is more likely to be appropriate and is likely to involve a substantial element of judgment.

33. Failure to provide the dismissed employee with a breakdown of their scores so that there is no means of challenging it may lead to unfairness (***Alstom Traction Ltd v Birkenhead*** (UKEAT/1131/00) as might a failure to explain to an employee why they have been marked down in a scoring exercise (***Pinewood Repro Ltd v Page*** (UKEAT/0028/10).

34. An employer should make reasonable efforts to find suitable alternative employment (***Vokes Ltd v Bear*** [1973] IRLR 363).

35. A consultation process which is highly insensitive and perfunctory may render the dismissal unfair (***Thomas v BNP Paribas Real Estate Advisory and Property Management UK Ltd*** (UKEAT/0134/16).

Issues

36. The issues on liability agreed by the Parties were as follows:

"1. Was the Claimant dismissed for a potentially fair reason per s.98(1) of the Employment Rights Act 1996 ('ERA'), namely redundancy by reason of a diminished need for employees to do work of a particular kind?

2. *If so:*
    a. *Was the redundancy genuine under s.139(1) ERA?*
    b. *Was C sufficiently warned of the redundancy situation?*
    c. *Did R undertake meaningful consultation of affected employees?*
    d. *Did R adequately apply its mind to a fair selection pool and fair selection criteria?*
    e. *Did R consider suitable alternative employment opportunities for C?*
    f. *Was C offered her right of appeal against redundancy?*

3. *Was C's dismissal fair or unfair in all the circumstances?*

4. *Did the ACAS Code on Disciplinary and Grievance Procedures ('the ACAS Code') apply?"*

37. I take each of these issues in turn when making my conclusions.

Conclusions

(1) Was the Claimant dismissed for a potentially fair reason per s.98(1) of the Employment Rights Act 1996 ('ERA'), namely redundancy by reason of a diminished need for employees to do work of a particular kind?

38. The Claimant accepts that the reason for dismissal was redundancy which is a potentially fair reason for dismissal.

(2a) Was the redundancy genuine under s.139(1) ERA

39. The Claimant also accepts that the redundancy was genuine.

(2b) Was the Claimant sufficiently warned of the redundancy situation?

40. The Claimant further accepts that she was sufficiently warned of the redundancy situation. I pause to note that I am of the view that this concession and the two concessions referred to above were correctly made.

(2c) Did the Respondent undertake meaningful consultation of affected employees?

41. The Respondent consulted collectively with the recognised unions, including about using an interview process to select for redundancy, and with the Claimant individually.

42. The Claimant was told that there would be an interview process but states that it was not made clear to her that it would be a competency-based interview or that real life examples would be expected. However, the job description with a detailed person specification had been provided and it was clear that it was these specifications that the individuals in the pool were going to be assessed against. In any event, all the individuals in the pool were given the same information prior to the interviews.

43. I do not accept that the Claimant was not given the opportunity to make representations about the application of selection criteria or that the absence of a scoring matrix denied the Claimant the opportunity to challenge the assessment of her answers. She could have done these things, even though there were no specific marks, for example at the meeting of 24 May 2019. However, it was the process as a whole, rather than the views of her answers, that was the focus of her concerns.

44. I do not accept that the way in which the Respondent, in particular Ms Linsley, handled the process was insensitive or perfunctory, as the Claimant suggests. As I have found above, she did not tell the Claimant that she was *"bottom of the pile"* when telling her that she was the Director who had not been selected for a new role. Lastly under this heading, I conclude that the process was genuine in that the Claimant was not selected because she was the highest paid candidate. This is mere speculation on the Claimant's part and there is no evidence for this. The pay of the individuals in the pool was broadly similar.

(2d) Did the Respondent adequately apply its mind to a fair selection pool and fair selection criteria?

The Pool

45. The Respondent gave genuine consideration to what the selection pool should be, based on the needs of the Academy, and determined that the pool should include all of the Directors save for the Director of Timetabling. It excluded the Director of Timetabling from the pool because if concluded that the role was different to the other roles and required specific skills which the incumbent possessed, including knowledge of the complex timetabling system and a high-level mathematics qualification. It was not interchangeable with the other Director roles and the other Directors would have needed substantial retraining to carry out this role. In addition, it was a two day per

week role and all of the other Directors worked full-time. I therefore conclude that the Respondent acted reasonably in determining the pool for selection.

The Selection Criteria

46. The Directors were all members of the senior leadership team. As set out in the 2019 Redundancy Policy, the AHT roles represented an increased scope of responsibility within the SLT requiring higher level leadership skills and abilities. Given their seniority and given the fact that the AHT roles were new roles with different responsibilities, it was appropriate for the Respondent to carry out an interview process to select who would be recruited to the five new roles.

47. It was reasonable to have an exercise focusing on the ability of these senior individuals to carry out their new roles rather than to focus on their skills and experience but, in any event, their skills and experience could be demonstrated when giving competency-based answers at interview. In the circumstances, it was reasonable not to have a skills audit as part of the process. The Respondent's approach was consistent with the provisions of the Policy which stated "*We will consider the most appropriate method of selection in relation to the circumstances surrounding the specific redundancy situation"*.

48. Such an approach introduced a substantial element of subjectivity into the process. However, I do not believe that this was unreasonable or unfair given the nature of the exercise (selection for a new role), the fact that the exercise was carried out by four experienced individuals who came to their own conclusions before a joint discussion and the fact that all of the candidates were asked precisely the same questions which were all formulated by reference to the person specification for the new role. This was not a case where it would have been appropriate to use objective factors such as attendance or length of service.

49. It was suggested by the Claimant that their may have been bias in the process because of friendships between the panel and some candidates but there is no evidence of bias. Indeed, the Claimant was on friendly terms with two of the panel, Ms Linsley and Mr Ajabonna, herself.

50. While I accept that scoring each candidate's answers to each question might have provided greater transparency about the outcome, it was not unreasonable for the Respondent to adopt the approach of simply ranking them. Although the interviewers had in mind beforehand that a matrix might be used, in the event there was unanimity about the ranking of the candidates.

51. So far as the second stage of the selection process is concerned, i.e. comparing the answers of the two lowest-ranked candidates, this was not the only approach that the panel could have taken and it was not following any pre-determined process. However, this was a fair way to identify which individual would not be selected for one of the new roles and it is clear from the documentation that in relation to five out of the six main questions, the answer of the other individual was considered by the panel to be stronger.

52. I do not accept that it can be inferred from the fact that Ms Linsley and Ms Roskell may have been in the interview room together without the other panel members that they decided on the final outcome themselves. I do not attach significance to the fact that the procedure in 2019 differed from that used in an earlier process in 2016. The 2019 process was tailored to the specific situation in hand.

(2e) Did the Respondent consider suitable alternative employment opportunities for the Claimant?

53. The Claimant first suggests that the Respondent over-recruited by recruiting two science teachers in May 2019. However, I accept that Respondent recruited the two candidates because genuinely believed that it needed two. I also accept that it had to recruit at that time so that the successful candidates could give notice in time for the new school year. These were in any event specialist roles and not suitable simply to be offered as alternative employment.

54. As for the Head of Year 13 role, this was ringfenced for Heads of Year as part of a separate internal restructure whereby the pastoral team moved from five heads of year to four heads of house. This was a reasonable approach to take and role was in any event not a full post but as addition to an existing teaching role.

55. The Claimant states that the Operations Manager role would have been a suitable role if not for the fact that it was a non-teaching role and as such her pension in particular would not have been protected. However, to treat a support role as a teaching role in order to protect a redundant employee's benefits goes well beyond what is required of an employer when making reasonable efforts to find suitable alternative employment.

56. The Claimant also states that she should have been notified of the Head of Science role which became available as result of the Director redundancy process. However, this was not a role in itself but an addition to an existing teacffhing role.

(3) Was the Claimant offered her right of appeal against redundancy?

57. The Claimant alleges that the appeal process was procedurally flawed, specifically that she was not provided with *"the selection matrix"*, that the panel failed to ask probing questions, taking Ms Linsley'sf answers at face value, and failed to consider the redundancy policy.

58. However:

    a. There was no selection matrix to provide, as set out above. In any event, the focus of the Claimant's appeal was the interview format, the pool and allegedly suitable alternative employment, rather than the quality of her answers to the interview questions themselves;

    b. The panel did ask questions and nothing in the evidence suggests that they simply took Ms Linsley's answers at face value;

    c. It is not clear how it is alleged that they did not consider the redundancy policy but in any event they did consider in detail the overall fairness of the process.

59. Although the appeal outcome letter did not provide the reasons for upholding the decision to dismissal the Claimant for redundancy, I do not believe that this affected the overall fairness of the process. The Claimant presented her case on the grounds of appeal at a hearing lasting around an hour and the appeal panel asked questions about these. The appeal panel deliberated on these grounds before coming to their conclusion.

(4) Was the Claimant's dismissal fair or unfair in all the circumstances?

60. For the reasons set out above, the Claimant's dismissal for redundancy was within the range of conduct which a reasonable employer could have adopted and it was fair.

61. I note that a number of other criticisms were made in evidence by the Claimant about the Respondent's conduct, such as blocking her email and putting her on garden leave. These matters were correctly not pursued in closing submissions as they did not affect the overall fairness of the process and the decision to dismiss for redundancy.

(5) Did the ACAS Code on Disciplinary and Grievance Procedures ('the ACAS Code') apply?

62. It is correctly accepted by the Claimant that the ACAS Code does not apply as there was no grievance and the Code does not apply to redundancy dismissals.

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Employment Judge de Silva Q.C.

Date: 27 April 2021……..

Sent to the parties on: ..

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For the Tribunal Office

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