EMPLOYMENT TRIBUNAL (SCOTLAND)

Case No: 4103324/2020

Held by CVP on 8 & 9 February 2021

Employment Judge: Ronald Mackay (sitting alone)

Ms M Mason	**Claimant** **Represented by:** **Ms S Maclean – Solicitor**
Robot UK Limited	**Respondent** **Represented by:** **Mr G Hine – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1 The Claimant having withdrawn her claim for arrears of pay, that claim is dismissed.

2 The Respondent having fairly dismissed the Claimant by reason of redundancy, the Claimant's claim of unfair dismissal is dismissed.

REASONS

Introduction

3 Prior to the commencement of the Hearing, the Claimant's representative had prepared an amended ET1 which she sought to be allowed. No objection was put forward on behalf of the Respondent. The Tribunal accepted the amended ET1. It had not been included in the agreed bundle of documents placed before the Tribunal. Parties agreed that it should be and it was accordingly added to the bundle.

4 The amended ET1 made no reference to the Claimant's original claim for payment of arrears of pay. The Claimant's solicitor confirmed that that claim had been withdrawn.

5 The Tribunal proceeded to consider the claim of unfair dismissal alone.

6 The Respondent led evidence from Mr Stuart Allan (Managing Director of the Respondent) and Mr Andrew Heapy, an independent HR Consultant. The Claimant gave evidence on her own behalf.

7 The Tribunal found both of the Respondent's witnesses to be credible and reliable. They gave their evidence in a candid and clear manner, consistent with the documentation contained in the bundle. The Claimant was on the whole credible and reliable. On occasion, however, she failed to respond directly to questions put to her and responded to some questions to the effect that she was guessing.

8 Few of the relevant facts in the case were disputed. Any areas of conflict are dealt with in the findings in fact section which follows.

Findings in Fact

9 The Respondent is a small company engaged in the supply of underfloor heating. At the time of the Claimant's dismissal, it was wholly owned by a corporation in the Netherlands. With effect from January 2020, that entity was in turn wholly owned by an investment company.

10 The Claimant was employed from June 2017 as a Business Development Manager. Her role involved generating sales.

11 Immediately prior to her dismissal, the Respondent employed four other employees.

12 Towards the end of 2019 and in early 2020, the Respondent's financial projections were positive. A Project Manager was appointed by the Respondent in January 2020, principally to relieve pressure on Mr Allan who had been carrying out the function without the preferred qualifications.

13 In early March 2020, the Respondent's financial results were poorer than had been anticipated. For the previous financial year, the Respondent made a loss of £32,000. Sales were significantly below target for the first quarter of 2020.

14 As a consequence of the financial position, the Dutch parent company instructed Mr Allan to implement an overhead reduction. Mr Allan considered cost cutting measures and concluded that he would require to make one position redundant in order to make the necessary savings.

15 At that time, the five members of staff were as follows: (a) Mr Allan as Managing Director and ultimate responsibility for sales; (b) an Operations Manager who had responsibility for operations and administration; (c) a Technical Manager who in addition to his technical role performed a degree of sales activity; (d) the Claimant who was focused exclusively on sales; and (e) the Project Manager who was responsible for all onsite administration of contracts.

16 The Claimant gave evidence that the Project Manager was also involved in sales. Mr Allan's evidence was that only he, the Claimant and the Technical Manager were involved in sales. It was not put to Mr Allan that he was wrong in this. On balance, having regard to Mr Allan's evidence and his oversight of the work of all employees as Managing Director, I preferred his evidence on this point.

17 Mr Allan considered which of the roles it would be possible to lose and in particular considered whether functions could be amalgamated. He considered the roles of the Operations Manager and Technical Manager to be critical. In both cases, certain of their functions could not be carried out by anyone else. In relation to the Claimant's position, he considered that both he and the Technical Manager who had experience of sales, could absorb sales into their wider functions.

18 He considered the Project Manager position to be an important ongoing role. He gave evidence that a lot of projects were ongoing and that although he

had previously performed that function, he did not have the full qualifications and did not have sufficient time to devote to the function.

19 He came to the conclusion, therefore, that the Claimant's role was the only one which could be removed from the structure with the activities being absorbed elsewhere.

20 The Claimant and all other employees with the exception of Mr Allan were placed on furlough leave with effect from 26 March 2020.

21 Mr Allan contacted the Claimant by telephone on 17 April 2020 to advise that her role was possibly redundant. A letter dated 17 April 2020 was sent to her confirming this position. In the letter, Mr Allan advised that the proposal was no longer to employ anyone in a Business Development Manager role. He indicated that the Respondent would consider suitable alternative employment although he noted that at that time no vacancies were available.

22 In the letter of 17 April, the Claimant was invited to a meeting to be held on Monday 20 April 2020 by telephone. The letter stated amongst other things that the aim of the meeting was to give the Claimant an opportunity to discuss and ask questions about the content of the letter and the process. It also indicated that the Respondent would discuss any ideas the Claimant might have for avoiding the need to make her role redundant.

23 The meeting took place by telephone on 20 April 2020 as scheduled. The Tribunal was advised that the meeting was recorded albeit no transcript of the meeting was produced. The parties were broadly in agreement that the content of the meeting was summarised in a letter dated 21 April 2020 from Mr Allan to the Claimant.

24 In her evidence, the Claimant suggested that she was unaware that the meeting of 20 April 2020 was a consultation meeting or that she would be given an opportunity to put forward suggestions. It seemed clear to the Tribunal, however, that her position was not supported by the terms of the letter of 17 April 2020. Moreover, as is apparent from the letter of 21 April

2020, the Claimant did in fact put forward alternatives to her role being made redundant. In particular, she suggested that the Respondent consider making the Project Manager role redundant. She put forward the option of dismissing the Project Manager and allowing her to take on that role.

25 Mr Allan considered this suggestion but concluded that the holder of the Project Manager position had the necessary experience and qualifications which the Claimant did not have.

26 Following the meeting of 20 April 2020, the Claimant raised a number of questions by email. In particular, she set out a series of questions by email of 22 April 2020. Mr Allan responded the same day. In response to a question as to why he had chosen the Claimant's role as possibly redundant, he responded to the effect that "*It may no longer required on a stand alone position"* [*sic*]. In response to a question as to who would do the Claimant's work, Mr Allan replied: "*All sales will be split between myself and Kyle Scott if the position is made redundant.*" Kyle Scott was the Technical Manager. Certain of the other questions posed by the Claimant dealt with the practicalities of what might happen in the event that her position were to be confirmed as redundant.

27 On being questioned during the Hearing as to whether Mr Allan had ever explained to the Claimant that her role could be absorbed by those two individuals, the Claimant responded "*not at all*". In terms of credibility, the Tribunal noted that the oral evidence was not supported by the email exchange noted above.

28 A further meeting took place on 27 April 2020, having been rearranged at the request of the Claimant. Again, the meeting was recorded and again, it was broadly accepted that a follow-up letter dated 29 April 2020 to the Claimant summarised what was discussed. It was also accepted by Mr Allan and the Claimant that the meeting was cut short. Mr Allan explained that the reason for that was that the discussion was "*going round in circles*", a position broadly accepted by the Claimant.

29 The Claimant gave evidence that by virtue of the meeting being cut short, she did not have an opportunity to put forward alternatives to redundancy such as job sharing or a reduction in hours. She did however, put forward a suggestion that she continue on furlough for a further period. Mr Allan advised that the Respondent had concerns about the requirement for the Business Development Manager role prior to the COVID crisis. He also indicated that he felt, from a reputational point of view, that the scheme should only be used to preserve jobs where it is known that the roles will be needed in the future.

30 The Tribunal was satisfied that, had the Claimant wished to make any other alternative suggestions, she was in a position to do so.

31 The letter of 29 April 2020 confirmed the Claimant's dismissal by reason of redundancy and set out her statutory and contractual entitlements. No alternative roles were available. The Claimant was offered a right of appeal against the decision to dismiss which she exercised.

32 The appeal was originally to have been conducted by Mr Sim Wout, the Chief Executive of the Dutch parent company. At the time, however, he was involved in a redundancy process affecting 20 employees in the Netherlands. As a consequence, the Respondent asked its solicitors to identify an independent HR Consultant to hear the appeal.

33 Mr Heapy was identified. He stated in his evidence that he saw his role as acting as an independent hearer of the appeal. He was clear that he would have been willing to overturn the decision or criticise the Respondent if he had felt it appropriate to do so.

34 The Claimant identified eight grounds of appeal. These were summarised by Mr Heapy as follows:

1 You believe you were not given enough time to arrange a companion for your final redundancy meeting on 27th April. You also believe you should have been permitted to have Sim Woud act as your companion.

2 You believe that you should have been considered for a project management role within the organisation. Alternatively, the company should have made the project management role redundant and engaged a cheaper third party to carry out project management work to make costs savings.

3 You believe that Stuart Allan should have agreed to extend your consultation period to a 90 day period.

4 You believe that you should have continued on furlough leave for a longer period rather than being made redundant.

5 You believe that all elements that should have been considered during a redundancy consultation were not considered.

6 You believe that the Company should have looked at other ways of saving costs, such as removing car allowances from the Company's entire staff rather than making your role redundant.

7 You believe that your redundancy was unfair as Robot UK recruited Greg into the role of project manager on 6th January 2020.

8 You believe you have been singled out for redundancy and treated differently. You believe this is personal rather than a business decision.

35 An appeal hearing took place on 11 May. The Claimant was accompanied by her husband.

36 In what can be described as a thorough and considered outcome, Mr Heapy responded to each of the Claimant's points in turn.

37 In relation to Point 1, Mr Heapy held that there had been sufficient time to arrange a companion and that having Mr Woud as a companion would not have been appropriate given his seniority as well as the fact that he had originally been identified as the person to hear any appeal against dismissal. The Claimant had been invited to identify another companion, but declined to do so.

38 In relation to Point 2, Mr Heapy concluded that a reasonable business analysis had led to the conclusion that the Claimant's role was no longer required. He endorsed the Respondent's analysis that the Claimant's role and that of the Project Manager were quite different and that the Claimant did not have the skills or qualifications to perform the latter.

39 In relation to Point 3, the finding was that extending the consultation period to 90 days was not warranted.

40 In relation to Point 4, Mr Heapy confirmed that the redundancy situation arose more broadly than from the COVID-19 situation and the Respondent's decision not to extend furlough was reasonable.

41 In relation to Point 5, Mr Heapy pointed out that the Claimant had not put forward certain of the alternatives to redundancy before. In relation to the suggestion of job share, he found that this would not have been an option given that there was no other employee carrying out the same role as the Claimant. In relation to a reduction in hours or a change in car allowances, he concluded that the alternatives would not meet the necessary financial objectives of the Respondent.

42 A similar conclusion was reached for Point 6 on a related point.

43 For Point 7, the suggestion that the Project Manager should have been made redundant on a last in, first out basis, Mr Heapy concluded that that was not an appropriate means of approaching the issue and that the Respondent's commercial rationale was sound.

44 In her final point, the Claimant suggested that the reason for the dismissal was "personal". She referred to issues between her and Mr Allan in the past. The Claimant suggested that Mr Allan had regularly monitored her emails in circumstances where he had not done so for other employees.

45 A conflict arose on this point. In his evidence Mr Allan confirmed that he did monitor the Claimant's emails as he had done for sales employees in the past. The Claimant sought to dispute that but the Tribunal preferred the evidence of Mr Allan. The Claimant had no direct knowledge of what he

may or may not have done. She also accepted his evidence that he monitored the emails of the Project Manager.

46 Mr Heapy found that any such issues had no bearing on the decision.

47 The decision to dismiss was, accordingly, upheld and confirmed by letter of 15 May 2020.

48 By email of 18 May 2020 the Claimant asked to remain on furlough until the end of the scheme. Her request was refused for reasons broadly the same as those outlined above.

49 Since the Claimant's dismissal, the ultimate owner of the Respondent put forward a proposal to close the Respondent's business. This led to an acquisition of the shares in the Respondent by Mr Allan such that he is now the beneficial owner, having invested his own funds.

Relevant Law and Submissions

50 S94 of the Employment Rights Act 1996 ("**ERA**") provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(2)(c) 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.

51 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).

52 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?

53 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.

54 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*".

55 For the Respondent, Mr Hine submitted that the test for redundancy set out in Section 139(1)(b) of ERA was satisfied, namely a diminution in the need for employees to carry out work of a particular kind. Due to the Respondent's reorganisation, one fewer employee was required.

56 In considering fairness, Mr Hine submitted that it is not for the Tribunal to investigate the commercial merits of the decision. Having regard to the speech of Lord Bridge in ***Polkey***, at Pages 162 and 163, he invited the Tribunal to find that the dismissal was procedurally fair. He asked that,

should the Tribunal find that there were shortcomings in the process, invited the Tribunal to find that they had no impact on the fairness.

57 Having regard to the correspondence and email exchanges contained within the bundle, he submitted that adequate consultation had taken place.

58 So far as the Claimant's request for continued placement on furlough was concerned, Mr Hine submitted that this was a redundancy situation unrelated to the pandemic which commenced its evolution prior to that time. The Claimant had no entitlement to remain on furlough in circumstances where the Respondent was clear that the role was not sustainable in the future.

59 Turning to the Claimant's criticisms of the process, as pleaded in the revised ET1, Mr Hine submitted that there were no interchangeable roles which could have led to a pooling situation. He argued that the explanation of the redundancy had been reasonable and proportionate. No suitable alternative employment was available stressing the small scale of the Respondent.

60 In response to the criticism that there was an inadequate attempt to avoid redundancies, he submitted that these points, some of which were introduced at the appeal stage, were considered unviable.

61 On behalf of the Claimant, Ms Maclean divided her submission into four parts: (1) there was no genuine redundancy situation; (2) there was a failure to give reasons for the redundancy; (3) the Respondent did not meaningfully consult with the Claimant; and (4) the Claimant's selection for redundancy was unfair.

62 In relation to the first point, Ms Maclean submitted that there was no reduction in the Claimant's work. The Respondent required to continue with sales and there was no evidence of a cessation or diminution or likely cessation or diminution in that work. Ms Maclean went on to submit that the dismissal was based on personal animosity on the part of Mr Allan rather than a redundancy situation. She pointed to what both the Claimant and Mr

Allan described as a difficult relationship between the two which had ups and downs.

63 In relation to her second point, Ms Maclean submitted that the reason given for the redundancy was muddled and that the detailed analysis put forward at the Tribunal was not provided to the Claimant prior to her dismissal.

64 In support of her third submission, that the Respondent did not meaningfully consult, Ms Maclean referred to an inadequate explanation of the selection process. She also referred to the cutting short of the meeting on 27 April 2020, denying the Claimant an opportunity to put forward alternatives. She again pointed to the lack of detailed information which she said was put forward as to the rationale for the proposal. She also argued that insufficient consideration was given to suitable alternative employment.

65 More generally, Ms Maclean criticised the timeframe of the consultation process. Nine working days she submitted was insufficient. Finally on the third point, she submitted that there was a failure to consider a continuation of furlough leave as a means of mitigating the consequence of the redundancy.

66 In relation to her fourth point, Ms Maclean accepted that determining the pool for selection is a matter for the employer. She submitted, however, that the Respondent did not properly address its mind to this. She submitted that the Claimant should have been placed in a pool with the Technical Manager and the Project Manager, both of whom she submitted carried out sales work. The singling out as she put it of the Claimant was unfair. in this context Ms Maclean referred to authorities which are more properly directed towards selection criteria within pools of comparable employees.

Discussion and Decision

67 Given the dispute between the parties as to whether a redundancy situation existed, the Tribunal first of all considered that question and concluded that a redundancy situation within the meaning of Section 139(1)(b) did arise. It was not disputed that sales activities would continue. It was, however, clear

that in reducing overheads, the Respondent eliminated its dedicated sales function with sales activities being redistributed to the Managing Director and the Technical Director. It was clear to the Tribunal that the financial situation facing the Respondent was such that cost cutting was required. The Tribunal accepted the Respondent's submission that even in circumstances where work of a particular kind continues (in this case sales), a redundancy situation will arise where that work is reorganised such that there is a reduced need for employees overall (see ***Kingwell & Others v Elizabeth Bradley Designs Ltd*** EAT/0661/02).

68 The Tribunal was satisfied that the state of affairs noted above was the reason for the Claimant's dismissal. It had no hesitation in rejecting the Claimant's assertion that the decision was based on personal animosity rather than a genuine business requirement.

69 The Tribunal being satisfied that the dismissal was potentially fair in accordance with Section 98(2)(c) ERA, it went on to consider the test of fairness.

70 Dealing firstly with the question as to the clarity or completeness of the Respondent's explanations as to why it proposed to make the Claimant's role redundant, the detailed explanation given by Mr Allan in the course of his evidence as to the functions of each of the employees and the extent to which functions could be transferred to other employees was not fully reflected in the written communications with the Claimant. In his evidence, Mr Allan made reference in particular to a detailed comparison of the Claimant's role and that of the Project Manager. This was not produced before the Tribunal, nor was it provided to the Claimant. In the view of the Tribunal, it would have been advantageous for more information to have been given to the Claimant in this context. That said, considering the email and other correspondence and the evidence of the witnesses, the Tribunal was satisfied that the Claimant was made aware of the financial issues affecting the Respondent, the need to reduce costs and the identification of her role as one which could be absorbed by others. It was clear to the Tribunal that the Claimant's principal concern was why her role was chosen

for redundancy rather than that of the Project Manager. She personally disagreed strongly with that decision. It was, however, a decision open to the Respondent to make. The Claimant was not, by virtue of the quality of information provided, precluded from advancing her position and suggesting alternatives.

71 The Tribunal turned then to consider whether the consultation with the Claimant was adequate. Having regard to the size and administrative resources of the Respondent, the Tribunal had no hesitation in concluding that it was. A period of nine days is not insubstantial for a single redundancy. The Claimant was also provided with the benefit of an appeal stage conducted thoroughly and independently.

72 The Tribunal found that the Respondent properly considered suggestions advanced by the Claimant and reasonably concluded that it should proceed with its proposal to make her role redundant. On the question of furlough, the Respondent properly considered the Claimant's request. Having regard to the fact that the proposed redundancy initially arose prior to the pandemic with no likelihood of the role ever being retained, the Respondent reasonably concluded that it was not correct, and could potentially cause reputational damage, to use the scheme in those circumstances. Whilst continuing to employ the Claimant on furlough leave would certainly have been to her advantage financially, the Respondent's decision was one which a reasonable employer might take in the circumstances.

73 In response to the Claimant's suggestion that the Project Manager should be made redundant instead of her, the Tribunal was satisfied that the Respondent properly addressed its mind to its business requirements and concluded that retaining the Project Manager was a commercial decision which it was permitted to take.

74 The Tribunal went on to consider the Claimant's criticisms over selection or more accurately the choice of pool.

75 The Tribunal was satisfied that identifying the Claimant in a pool of one was appropriate. Each of the five employees in the Respondent had distinct functions. None was interchangeable with any other.

76 The suggestion that the Claimant should have been pooled with the Technical Manager and the Project Manager is flawed. She did not have the skills and experience of either the Project Manager or the Technical Manager. Moreover, her suggestion that the Project Manager was involved in sales was not accepted as noted above (paragraph 16). Equally, the Tribunal was satisfied that the Respondent's decision to retain the Project Manager, instead of retaining the Claimant and providing her with training such that she could perform that role, was a commercial decision it was entitled to take.

77 The Tribunal for completeness went on to consider the question of suitable alternative employment. It was clear that there was none. That is not surprising in an organisation of the scale of the Respondent. Whilst the Respondent in its consultation exercise made reference to considering suitable alternative employment, it properly highlighted that at that time, none was available.

78 For those reasons, the decision of the Tribunal is that the claim for unfair dismissal be dismissed.

R Mackay
Employment Judge

18 February 2021
Date of Judgment

22 February 2021
Date sent to parties