



5

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104123/2020**

10

**Held in Glasgow on 22 and 23 February  
and remotely by Cloud Video Platform on 3 March 2021**

**Employment Judge S MacLean**

15

**Mr Francis MacDonald**

**Claimant  
Represented by:  
Mr G Bathgate,  
Solicitor**

20

**The Corum Partnership**

**Respondents  
Represented by:  
Ms K Beattie,  
Solicitor**

25

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30

The judgment of the Employment Tribunal is the claim of unfair dismissal should be dismissed.

## **REASONS**

### **Introduction**

35

1. The claimant complains that he was unfairly dismissed when the respondents terminated his employment on 27 March 2020. He asserts that the redundancy was a construct or sham and the real reason for his dismissal was an agenda to have him removed from the business following a

disciplinary process which started in October 2019. The claimant sought compensation.

2. The respondents resist the claim stating that the claimant was dismissed by reason of redundancy which is a potentially fair reason for dismissal. The respondents assert that the claimant's dismissal was attributable to the respondents' diminished requirements for the role of Finance Director. The respondents say that the dismissal was both substantively and procedurally fair.
3. At the final hearing which was conducted in person the Tribunal heard oral evidence from the respondents' senior partners, John Davidson and John Kelly. The claimant gave oral evidence on his own account. The Tribunal was also referred to a joint set of documents.
4. After the evidence was heard, Ms Beattie and Mr Bathgate exchanged written submissions. With the parties' agreement, Mr Beattie and Mr Bathgate addressed the Tribunal on the submissions remotely by Cloud Video Platform.
5. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to the understanding of the important parts of the evidence. The written submissions provided to the Tribunal have been summarised.
6. The issues that the Tribunal had to determine were as follows:
  1. Have the respondents shown a reason for the dismissal?
  2. Was it a potentially fair reason?
  3. In all the circumstances did the respondents act reasonably in treating the reason shown as a sufficient reason for dismissal.
  4. What, if any, remedy should be awarded?

7. The onus is on the respondents to show the reason (or if there is more than one the principal reason) for dismissal and that it was a potentially fair one section 98 (1)(a) and (b) of the Employment Rights Act 1996 (the ERA).
8. A “reason for dismissal” has been described as a “set of facts known to the employer, or it may be of beliefs held by him, which caused him to dismiss the employee” (see *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA).
9. The potentially fair reasons set out in section 98(2) of the ERA include an employee was redundant. The respondents assert this is reason for dismissal.
10. At this stage the employer does not have to prove that the reason actually did justify the dismissal.
11. If on the face of it the reason the employer shows for dismissal is potentially fair the Tribunal has to consider section 98(4) of the ERA and the question of reasonableness.
12. As the respondents are asserting that the dismissal was for redundancy, they must show that what is being asserted is true; that the claimant was in fact redundant defined by statute.
13. Section 139(1) of the ERA states that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to be the fact that the requirements of that business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish.
14. The guidelines that a reasonable employer might be expected to follow in making redundancies are set out in the case of *Williams & other v Compare Maxim Limited* 1982 ICR 152.

## Findings in Fact

### Background

15. The respondents are a partnership providing an estate agency services across nine offices in the West of Scotland. The owners and senior partners of the business are John Davidson and John Kelly. At each branch office there are “local” equity partners who only have standing in their respective local offices.
16. Before Mr Davidson and Mr Kelly set up the estate agency business in 2003 they worked for a number of years in another business with the claimant. Mr Davidson and Mr Kelly approached the claimant to join them as Head of Finance in their new business.
17. The respondents employed the claimant from 7 April 2003 until his employment terminated on 27 March 2020 when he held the position of Finance Director and was based at Blythswood Square, Glasgow.

#### **The finance team and tax advice**

18. The claimant provided financial planning and produced detailed operational statistics for the branches. He prepared management accounts and liaised with Mr Davidson and Mr Kelly about strategy and cash flows. The claimant was involved with partnership property and issues arising from it.
19. The finance team supporting the claimant comprised Ewan Fyfe, Janice Hamilton and Rhona Brown. They reported to the claimant.
20. In 2019 the respondents invested in an electronic CRM system which produced reports and automated a number of aspects of the finance function and customer facing roles. Around May 2019 the respondents re-banked.
21. For many years the respondents received tax advice from an independent tax adviser, Ray O’Connor. Mr O’Connor was not an employee of the respondents. He was a personal friend of Mr Davidson. The claimant liaised on various matters with Mr O’Connor and had a good working relationship. Mr O’Connor suddenly and unexpectedly died around July 2019.

#### **Appointment of Robertson Craig**

22. Around 29 August 2019 during a meeting to discuss banking Mr Kelly mentioned in passing that he was looking at appointing new tax advisers. The claimant was not involved in the process.

5 23. On 2 September 2019 Mr Kelly sent an email to the claimant informing him that the respondents were appointing Robertson and Craig as tax advisers. Mr Kelly directed that the claimant provide Robertson and Craig by 30 September 2019 with information necessary for preparation of tax returns due at the end of January 2021. The claimant was not consulted about the timescale.

10 24. On 26 September 2019 the claimant advised Mr Kelly that he was unable to meet the deadline. The claimant provided the information to Robertson Craig on 7 October 2019.

### **Disciplinary proceedings**

15 25. Mr Kelly considered that his request had not been actioned and that he had not been informed about the inability to meet the deadline until 24 days later. Mr Kelly instructed Marc Leslie, a Local Partner in the Newton Mearns Branch to conduct an investigation under the disciplinary procedure.

20 26. On 8 October 2019 the claimant was called to an investigation meeting with Mr Leslie to discuss allegations that the claimant (1) failed to follow management instruction to provide tax information for the business to an external adviser; and (2) was dishonest when discussing his availability for a meeting with the tax adviser. Notes were taken by Patricia Sutherland, a Senior Consultant.

25 27. On 10 October 2019 Mr Davidson wrote to the claimant inviting him to the formal disciplinary hearing on 11 October 2019 to consider an allegation that the claimant failed to follow a mandatory instruction to provide tax information of the business to the newly appointed tax advisers by 30 September 2019 and the failure to inform Mr Kelly that he would be unable to meet this deadline in a timely manner. The claimant was informed of his right to be accompanied and that failure to attend is a disciplinary offence and may result in further  
30

disciplinary action. If the non-attendance was medically related a medical certificate was required as evidence. The letter did not advise that the alleged misconduct was considered to be gross misconduct and the claimant did not have a disciplinary record.

5 28. The claimant attended his general practitioner on 11 October 2019 and was certified unfit to work due to work related stress. The disciplinary hearing did not take place on 11 October 2019.

29. The claimant returned to work on 6 December 2019. The disciplinary hearing was not rescheduled on his return.

10 **Restructuring**

30. 2019 had been a tumultuous year for the respondents due to a decreasing volume of business. The respondents had introduced an electronic CRM system to enhance customer experience and operational efficiency.

15 31. At the year end the respondents were incurring losses in sales and profits. In some branch offices there were staffing issues due to changes in personnel.

32. In early January 2020 Mr Davidson and Mr Kelly decided that there was a need to make cost savings and to do so by restructuring the management and senior team. At branch level they identified the exiting roles of Manager and Negotiators being at risk with the creation of a new role of Sales Coordinator.  
20 They also decided that the role of Finance Director was at risk as it could be absorbed into the existing finance team.

33. On 10 January 2020 at around 1.30pm Mr Kelly sent an email to all staff referring to the impact on the business due to volumes of both incoming new business and reductions in sales volumes overall exacerbated further by  
25 reduced fee margins in an industry wide corner for stock (the 10 January Email). The 10 January Email continued that in light of the political and economic uncertainty which inevitably would continue it was time for a proactive efficiency based strategy. The email continued,

“The successful estate agency of the future must be a virtuous hybrid of technology and highly accomplished sales people; to that end at your behest we have invested a lot of time, energy and money in creating our own bespoke electronic CRM system.

5 By embracing and involving this new platform we will enhance our customer experience and drive greater operational efficiency albeit potentially at the expense of some job roles.

To that end there will be a restructuring management and senior team, self included to embrace the challenges.

10 That effectively means certain job roles will be put “at risk”, however we are committed to maximising employment levels as best we can. The process will continue forthwith and details as such will be communicated by your local partner or partner responsible for your area of the business.”

### **Consultation**

15 *10 January Meeting*

34. About an hour later Mr Davidson met the claimant. Mr Davidson said that the business was restructuring as a result of the fee income and stock levels. They wanted to make changes as to how things are run including management team and the Finance Director. He said that the claimant was in a unique stand-alone position which could be split between the existing support finance team and Robertson Craig. Mr Davidson said that the roles at risk were the claimant’s position, branch managers and negotiators. The claimant asked whether his job was being reallocated on the basis of cost. Mr Davidson confirmed that he and Mr Kelly had reached the decision that week and that the claimant was being advised that his position was at risk. There would be a consultation process to discuss ideas and suggestions to avoid redundancy happening. The claimant asked about the disciplinary process and was informed that it was being put on hold until the redundancy process was resolved.

20

25

35. Mr Davidson wrote to the claimant on 10 January 2020 reiterating what was said in the 10 January Email confirming that the business was proposing to restructure the management and senior team. The claimant was told that his job was at risk and he may be dismissed by reason of redundancy. While his position was at risk no final decision had been taken. A further consultation meeting was arranged for 15 January 2020.

*15 January Meeting*

36. At the next meeting the claimant asked about the roles being displaced as the 10 January Email referred to Mr Kelly's role being displaced. Mr Davidson said that it was branch managers; negotiators and the claimant's role that were at risk. There were six sales coordinators positions available for which the claimant could apply. The claimant asked that if this was an economic case could he see the costings so that he could give suggestions. Mr Davidson said that he would revert to the claimant. A further consultation meeting was arranged for 22 January 2020.

*22 January Meeting*

37. The claimant said that he was an accountant with no sales or negotiating experience. He would not be applying for the sales coordinator roles for which interviews had started. Mr Davidson said that he wanted to explore all opportunities to hopefully avoid redundancy.

38. Mr Davidson said that expected a cost saving of the claimant's costs and benefits of approximately £90,000. He was happy to look at this in more detail as the claimant had the figures and it could be discussed at the next meeting. The claimant asked for Robertson Craig's letter of engagement to be produced. He asked if it was about saving costs because if not then it would be wasting time. The claimant asked if he made the difference less than £90,000 and have alternatives would they consider it. Mr Davidson indicated that he would be happy to review all costs. The next consultation meeting was arranged for 30 January 2020.

*30 January Meeting*



39. Mr Davidson said that there would be a job previously undertaken by Ms Brown was available in the finance team. The claimant did not wish to apply for it. There were four other jobs available, with sales consultant's salary of £20,000 plus bonus across the business. The claimant asked if Mr Davidson had approached Robertson Craig or the finance team to see whether they were able to take up the claimant's duties and if additional costs would be incurred. Mr Davidson said that he worked with the finance team. Robertson Craig are tax specialist, but they would work with other accountants if required. Mr Davidson maintained that the existing team could absorb some of the claimant's duties and would look at some additional outsourcing. Mr Davidson reiterated that he would be happy to consider alternative cost saving to avoid redundancy.

*6 February Meeting*

40. During this meeting Mr Davidson said that the cost of the role of Finance Director is approximately £90,000. He was satisfied that the duties involved within the role could be absorbed with the remaining finance team, but he had not discussed this with them as he felt it was inappropriate to do so until the consultation process had been completed. If the Finance Director post was made redundant the staff would be fully consulted and supported in their new duties. Mr Davidson acknowledged there would require to be some upskilling. He also acknowledged that the claimant's position involved production of accounts. He had taken advice from Robertson Craig who advised that work (production of quarterly accounts) could be produced by a small chartered accountant business at a cost of £6,000 to £8,000 per year. Therefore, a simple calculation would be saving of £80,000 to £84,000 per year. Mr Davidson said he did not agree with the calculation that the claimant had produced and that the cost of Robertson Craig was irrelevant as their services were that of a tax specialist which would always be separate from the Finance Director's role.

41. The claimant questioned whether the estimate for the accountancy role was realistic given the amount of work that was involved. He also questioned the actual savings that would be made. The claimant suggested that other non-

operational savings of £90,000 could be made if the roles of personal assistants to Mr Davidson and Mr Kelly, who happened to be their wives were redundant.

*19 February Meeting*

5 42. The claimant had approached Robertson Craig for information. Mr Davidson was annoyed as he considered that he had been undermined by the claimant. Mr Davidson said that he was satisfied that there was a robust case for no longer requiring the Finance Director position. He was happy with his proposal and cost savings and did not feel that he required a cost comparison exercise.  
10 The claimant asked why he had then been asked to prepare one. Mr Davidson said it was part of the consultation process.

43. Mr Davidson was unimpressed with the cost comparison exercise prepared by the claimant. Mr Davidson did not agree with it as the task of the Finance Director's position would be absorbed by the existing team and other tasks  
15 for which they were not capable for example accounts would be produced by an outsourced firm on a quarterly basis. The finance team would likely report to Mr Kelly. The statistics and weekly reports would be prepared by Ms Hamilton. The finance team could do more such as cash flow projection and could work with Mr Kelly on business planning and other requirements. Mr  
20 Kelly's role was not at risk; he would take on more responsibility if required.

44. The claimant was advised that the final consultation meeting would take place on 28 February 2020 when a decision would be made about the termination of the claimant's employment on the grounds of redundancy. This was confirmed in a letter dated 21 February 2020 in which the claimant was  
25 advised of his right to be accompanied.

*28 February Meeting*

45. Norman King, Unite Regional Officer accompanied the claimant to the meeting.

46. Mr Davidson indicated that during the course of a number of meetings he had  
30 concluded there was no longer a requirement for the Finance Director

position. The role was to be covered by the existing team, Robertson Craig and an outsourced chartered accountant firm and supported by Mr Kelly. This would result in a significant cost saving to the business. While he had considered the claimant's points regarding cost savings this had not changed his opinion that the Finance Director's role was no longer required. The only other role which has developed since the last meeting was a vacancy in Bearsden for a sales consultant role but based on a previous discussion Mr Davidson did not think the claimant would be interested in this.

5

10

15

47. The claimant was advised at this meeting that his employment was being terminated and that he would receive a redundancy of £13,387.20 with 12 weeks' notice of termination. The claimant was informed that he would be on four weeks' garden leave which meant that his effective date of employment would be 27 March 2020. The claimant was informed that he would have the right of appeal to Mr Kelly. Mr King expressed concern about Mr Kelly hearing the appeal as Mr Kelly would be taking on some of the claimant's role.

48. The outcome was confirmed to the claimant in a letter dated 3 March 2020.

### **Post Termination**

20

49. The claimant exercised his right of appeal which was delayed due to the pandemic. The appeal hearing was scheduled for 14 July 2020. The appeal hearing did not proceed as when the claimant attended with Mr King the claimant discovered that it was to be conducted by Mr Kelly.

25

50. As at the date of termination the claimant was 62 years of age. His gross monthly salary was £5,908. His net monthly salary was £3,400. Since the termination of his employment the claimant has been seeking employment from around October 2020. The claimant had not applied for new employment for approximately 35 years. Between October 2020 and February 2021, the claimant applied for 24 jobs. The claimant has been in receipt of Jobseeker's Allowance.

30

51. The work previously undertaken by the claimant is now undertaken by the finance team: Ewan Fyfe, Janice Hamilton, Rhona Brown and Hayley

reporting to Mr Kelly. The respondents have not yet appointed a firm of chartered accountants.

**Observations on witnesses and conflict of evidence**

52. The Tribunal considered that Mr Davidson was a credible witness who  
5 approached the consultation process in a mechanistic way. The Tribunal's  
impression was that Mr Davidson was uncomfortable during the consultation  
process and appeared more focused on how difficult the consultation process  
was for him rather than the claimant. The Tribunal suspected that this was  
10 due to Mr Davidson's lack of experience in handling redundancies having  
previously been involved in growing the business. During the consultation  
process Mr Davidson was critical of the claimant and in the Tribunal's view  
devoid of empathy towards him despite describing the claimant as a trusted  
employee and friend.

53. With regard to Mr Kelly, the Tribunal considered him at times evasive,  
15 deflecting questions by referring to the legal advice that he had been given  
rather than answering the question. Mr Kelly appeared reluctant to concede  
any facts that would not put him in the best light or were favourable to the  
claimant.

54. The Tribunal considered the claimant to be an honest and credible witness  
20 and had no impression that he was anything but genuine in the evidence  
which he gave which was at times protracted.

55. The Tribunal had the following observations on the evidence.

56. In relation to the disciplinary proceedings Mr Kelly's evidence was that he was  
greatly distressed and surprised about the allegations against the claimant.  
25 Mr Kelly did not accept that it would have been more appropriate to speak to  
the claimant informally. Mr Kelly said he asked a partner to carry out an  
investigation on the recommendation of the respondents' employment  
lawyers. Mr Davidson's evidence was that he considered the disciplinary  
proceedings were in line with the disciplinary procedures. He did not  
30 contemplate that the claimant would be dismissed as a result. Mr Davidson

did not accept that in the circumstances the process was heavy handed. The claimant's evidence was that after the investigation he did not believe that the matter would be taken further and was shocked to be invited to a disciplinary hearing.

5 57. The Tribunal considered the respondents' position on the disciplinary proceedings incongruous. The Tribunal had no doubt that Mr Kelly was angry at the claimant's failure to follow his instruction to provide information to Robertson Craig by 30 September 2019. Mr Kelly considered that the alleged misconduct was serious enough to merit the formal procedure. Mr Davidson  
10 appeared to become involved after the investigation. He decided to send the letter dated 10 October 2019 inviting the claimant to a disciplinary hearing the following afternoon. The letter did not state that the alleged misconduct was considered gross misconduct or that the likely penalty was dismissal. This was consistent with Mr Davidson's evidence that he was not contemplating  
15 dismissal. Nonetheless the letter triggers the claimant's absence for work related stress. Despite having taken the decision to hold a disciplinary hearing, knowing that the claimant found the disciplinary proceedings stressful and the claimant returning to work on 5 December 2019 Mr Davidson did not reschedule the disciplinary hearing. Indeed, it was the claimant who  
20 the raised the issue at the first consultation meeting in January 2020, when he was told by Mr Davidson that the disciplinary process was "on hold" pending the redundancy consultation.

58. Mr Davidson gave evidence about the current finance team. While the Tribunal found his evidence on this point vague and confusing, the Tribunal  
25 did not consider that Mr Davidson was trying to mislead the Tribunal. It was put to the claimant in cross examination that he was not replaced, and the current finance team consists of three full time equivalent employees. Understandably having been dismissed the claimant had no insight into what had happened since his dismissal.

30 59. It was not be disputed was that during the consultation period, the finance team comprised of the claimant, Ewan Fyfe, Janice Hamilton and a vacancy as Rhona Brown had resigned in January 2020. Mr Davidson's evidence was

that at the date of the Tribunal hearing, the claimant had not been replaced; Ms Hamilton remained employed; Ms Brown had been re-employed; Mr Fyfe had reduced his hours and was retiring in March 2021; and Hayley had been appointed. The respondents had not appointed a firm of chartered accountants. The timing of Ms Brown's return and Hayley's appointment were unclear. The Tribunal's understanding was while ostensibly four people were employed in the finance team at the date of the Tribunal hearing they were not all employed on a full time basis and one was retiring imminently.

### Submissions

60. The representatives helpfully prepared submissions in writing on which they addressed the Tribunal orally on the cloud video platform. The following is an outline of those submissions.

#### The Respondents' Submissions

61. The issue for the Tribunal is whether or not the claimant was fairly dismissed by the respondent. The Tribunal has to ask (a) have the respondents shown a reason for dismissal; (b) was the reason shown one of the potentially fair reasons for dismissal; and (c) in all the circumstances, did the respondents act reasonably in treating the reason shown as sufficient reason for dismissal?
62. The respondents have advanced redundancy as the reason for the claimant's dismissal. Redundancy is a potentially fair reason under section 98(2)(c) of the ERA. The respondents submit that they acted reasonably in treating the claimant's redundancy as a sufficient reason to dismiss him in the circumstances. The claimant's dismissal was within the band of reasonable responses open to them in the circumstances, and the dismissal was procedurally fair.
63. The Tribunal was referred the respondents' evidence that having prepared a business case in January 2020 they identified that the claimant's role, of Finance Director, and a number of other roles were surplus to their requirements. They identified that they had a genuinely diminished need for a single employee to carry out the work that the Finance Director was

responsible for. This amounts to a potential redundancy situation under section 139(1)(b) of the ERA. The Tribunal was also referred to the respondent's evidence about new technology (a CRM system) which would produce reports and perform other aspects of the claimant's role in an automated way; it had identified capability and capacity within the junior finance team and felt that with some upskilling and training, they could assume many of the claimant's duties; the death of the respondents former tax adviser meant it had appointed a new firm, Robertson Craig, to support the team with the respondents' tax affairs, and they had recommended additional support from a small chartered accountancy firm on a quarterly basis if necessary; and it identified that Mr Kelly, had the ability and capacity to take on the strategic and leadership aspects of the finance function. The respondents it was submitted had demonstrated a genuinely diminished requirement for the standalone Finance Director role.

15 64. The respondents' business case was underpinned by cost savings. They had a genuine belief that by working smarter and more efficiently, they could save the entirety of the claimant's employment costs. This was in the context of a sharp decline in sales and profits. The new structure is working effectively, and the claimant has not been replaced. The anticipated cost savings are now being met albeit it is acknowledged that the unique pressures of last year may not provide a true like-for-like comparison.

25 65. The respondents were incurring losses in both sales and profits at year end of 2019. Removing the claimant's role from the structure would save around £90,000. The respondents could operate without the position of Finance Director to make those savings. They have shown how the claimant's role would be split. This amounted to a redundancy situation irrespective of whether a desire to save costs was the main driving force (see *TNS UK Ltd v Swainston* EAT 0603/12).

30 66. The claimant's position is that the true reason for his dismissal was the disciplinary proceeding in October 2019. The respondents denied. This. The Tribunal was referred to Mr Davidson's that dismissing the claimant for

misconduct was never in his contemplation. Also, that the claimant was not the only employee to be made redundant at this time: the respondent undertook a full restructure, incurring the financial and emotional cost of three redundancies, and displaced several other employees from their substantive roles. The respondents would never have done this as a means of terminating the claimant's employment if they could simply have dismissed him for misconduct. The catalyst for commencing the redundancy consultation in January 2020 were the dwindling figures at year end in December 2019. Redundancies were not commonplace for the respondents which had otherwise been a successful and growing business, and the respondents were deeply saddened at having to part company with the claimant after 17 years. The claimant's dismissal and that of the other two redundant employees, were not decision taken lightly.

5

10

15

20

25

30

67. It was also denied that there was an agenda to exit the claimant. Even if that were the case, it is the respondent's position that their motive is irrelevant. Applying the judgment in *Berkeley Catering Limited v Jackson* (UKEAT/0074/20), the employer's motive is irrelevant when it comes to assessing whether or not a redundancy situation exists. The splitting and absorption of the claimant's duties meant, as a fact, there was a diminished requirement for his role, and thereby there was a redundancy situation in accordance with section 139(1)(b) of the ERA.

68. It matters not whether the claimant agreed with the proposed structure, or the anticipated cost savings underpinning that structure, or the proposed reallocation of his duties. The respondents are free to structure their business however they like and the removal of the claimant's position from the structure amounted to a redundancy situation.

69. In relation to the reasonableness of the decision, to treat the claimant's redundancy as a sufficient reason to dismiss him, the Tribunal was referred to the respondents' evidence: ten roles were placed at risk across each of the branches, meaning only individual consultation was required. Nevertheless,



consultation with the claimant endured over a period of around six weeks, during which the Mr Davidson met with the claimant seven times.

- 5 70. The claimant was the only employee in the role of Finance Director. He had a team of three junior finance personnel supporting him. The claimant's role was unique and sufficiently different from any other role within the business. There was an ongoing need for the work of the junior finance team to be carried out, hence it was reasonable to place the claimant in a pool of one. It is the respondent's position that this was within the band of reasonable pools open to them to adopt in the circumstances (see *Hendy Banks City Print Limited v Fairbrother and others* UKEAT/0691/04).
- 10
- 15 71. During the consultation, the claimant was invited to present alternatives to his redundancy. The claimant focused largely on the cost-savings which the respondents had suggested his redundancy would entail. The respondents were disappointed with the claimant's cost comparison which they considered was flawed did not demonstrate that there was a credible, more cost-effective alternative to the claimant's redundancy.
- 20 72. The claimant also suggested that two other employees could be dismissed and their combined salary costs would give a roughly equal saving to the claimant's redundancy. The roles concerned were largely administrative positions which were unaffected by the streamlining of the respondent's finance function. The respondent identified that there was a genuinely diminished need for the claimant's role but not for the other two. They were therefore unable to implement that as a viable alternative to the claimant's dismissal at that time but committed to keeping that situation under review.
- 25 73. Throughout the consultation meetings, alternative vacant roles were discussed. The restructure resulted in the removal not only of the Finance Director position, but that of Branch Manager and Negotiator. It also resulted in the creation of Branch Sales Coordinator and Sales Consultant roles which all of the at-risk employees were entitled to be considered for. The claimant understandably refused these positions and further refused the vacant junior position within the finance team given his seniority and experience.
- 30

74. It was suggested that Mr Davidson failed to present the claimant with evidence to support his assertions during the consultation process. The respondents' position was that there was no complex matrix of different savings which required to be spelt out: the costs in relation to the claimant's position would go from £90,000 to zero. It is not clear what more the respondents could have been expected to present in the circumstances.
75. It is reasonable for the respondent not to have approached the junior finance team before the claimant's redundancy to assess their willingness to undertake parts of his role. Doing so would have been unprofessional and indicative that the consultation process had a preconceived outcome. The respondents' position was that Mr Davidson worked closely with the junior finance team and had an understanding of their capabilities and capacity which would be explored further if the claimant was dismissed. Similarly, as a joint owner of the business, Mr Davidson understood that Mr Kelly would be willing to do whatever was required of him to assist the finance team following the claimant's dismissal. The respondents did not start the redundancy consultation process with a predetermined plan or outcome in mind.
76. The respondent offered the claimant a right of appeal against his dismissal. The claimant opted not to pursue his appeal. It was reasonable for Mr Kelly to hear the appeal. He was the only person capable of hearing the appeal given both the claimant's seniority and Mr Kelly, as Managing Partner, was the sole person more senior than Mr Davidson who could legitimately overturn his decision if necessary. It would not have been appropriate to appoint an external appeal manager to bind the respondents to a particular outcome when the most senior person within the business was available. The claimant knew throughout the prolonged attempt to arrange his appeal hearing that Mr Kelly would act as the appeal chair. The appeal process followed was reasonable in the circumstances.
77. The respondent's position that the claimant's dismissal was fair in the circumstances and respectfully requests that the claim is rejected in its entirety.

78. In relation to loss, the claimant confirms that he seeks is financial compensation. The respondents' primary position is that the claimant's dismissal was fair and therefore no compensation is due to him.

5 79. In any event the respondents submit that the payment of statutory redundancy pay would be offset against the claimant's entitlement to a basic award. In accordance with the statutory cap, the claimant's maximum compensatory award is one years' pay.

10 80. The claimant first applied for an alternative role in October 2020, some eight months after he was served notice of his redundancy. The reason given by the claimant was that he was awaiting the outcome of his redundancy appeal which was delivered on 17 July 2020. The two were not mutually exclusive and that the claimant could reasonably have commenced a search for alternative employment whilst the appeal process was ongoing. The respondent produced a list of 25 job vacancies which the claimant could reasonably have applied for. The claimant applied for just one of those jobs, although it is accepted that there was limited detail of the source and date of the job adverts provided. Between October 2020 and February 2021, the claimant applied for 24 jobs, averaging at four per month. The respondent's position that the claimant unreasonably failed to mitigate his loss contrary to his obligation under section 123(4) of the ERA and any compensation should be reduced accordingly.

25 81. The consultation procedure followed was fair and reasonable in the circumstances. However, if the Tribunal does not agree the respondent submits that any procedural error made no difference to the outcome. Having consulted with the claimant for six weeks and having demonstrated a genuinely diminished requirement for the claimant's role, it would have taken only a very short time to dismiss the claimant fairly, perhaps only one week. In accordance with *Polkey v AE Dayton Services Ltd [1987] IRLR 503*, the any compensation should be reduced to reflect the amount of time it would have taken for the respondent to dismiss the claimant fairly.

### **The Claimant's Submissions**

82. The claimant agreed with the issues that the respondents identified that the Tribunal had to determine. The Tribunal was referred to *Williams & Ors v. Compair Maxam Ltd* 1982 ICR 156 The burden is on the respondents to show the reason for dismissal.
- 5 83. The fact a redundancy situation existed does not automatically mean that a particular employee was dismissed by reason of redundancy. The Tribunal is entitled, as a matter of law, to question whether the decision to dismiss the claimant was genuinely the ground of redundancy.
- 10 84. The section 98(4) consideration requires the Tribunal to examine whether the claimant was consulted meaningfully about the proposed redundancy. The underlying premise of meaningful redundancy is that attempts are made to address whether the redundancy can be avoided. An employee has to be given adequate information in order to give him or her the opportunity to challenge their at-risk status. What constitutes fair and proper consultation in  
15 each individual case is a question of fact for the Tribunal to determine.
85. By definition, it is a two-way process. Where reasonable, if one party asks for something which will allow them to advance the consultation process it should be provided.
- 20 86. The claimant's position is that the redundancy was, in effect, a construct or a sham. The Tribunal was referred to the minutes of the meetings and the evidence given in relation to that process by the respondents which raise the inference that the reason for the claimant's dismissal was not one of redundancy. The claimant asserts that there was an agenda to have him removed from the business following the disciplinary process which started in  
25 October 2019.
87. The claimant referred to the evidence which he said supported that position.
88. Mr Davidson approached this consultation process with his mind made up. The consultation process was more about deflecting what the claimant was saying and going through the motions rather than responding to the

reasonable enquiries that were made by the claimant for evidence and information which would allow him to contribute meaningfully to the process.

89. The claimant was the only person in the Senior Management Team who left the business.

5 90. The suggestion by Mr Kelly that Branch Managers were part of the Senior Management Team does not withstand even the slightest degree of scrutiny. The evidence was that the Local Partners had equity in each of their offices. It was clear, therefore, that Branch Managers do not form the Senior Level of Management within the business but are effectively in a rung below that of the  
10 Local Equity Partners and, as such, they do not carry the same level of seniority and management status as the claimant.

15 91. Mr Davidson asserted that new technologies were now eating into the claimant's role. He cited the examples of SAGE and the CRM System. SAGE has been around for a long time, principally in the area of payroll and therefore at December 2019 could not have been a factor in deciding whether the claimant's role was at risk or not. The evidence supports the CRM System being used for those in the respondent's business who have customer facing roles and did not impact on the finance function.

20 92. Mr Kelly was chosen to consider the claimant's appeal despite him identifying, at the outset, that his role was under scrutiny and as things developed it was portrayed that he would take over part of the claimant's role or, at least, that was what was represented to the claimant as part of the consultation process whether that was intended or not.

25 93. Mr Kelly was indeed angry at the claimant's failure to complete the task of securing the information for Robertson Craig by 30 September 2019. This information was required for tax returns due at the end of January. There was no indication made that the date of the 30 September 2019 carried with it any real significance insofar as prejudicing the Partnership in the event that it was not complied with. The claimant had not been consulted in respect of whether  
30 he was able to provide the information by that date nor was he spoken to

informally when he told Mr Kelly that there would be a short delay in that being provided. This all suggests that there were some moves afoot to put the claimant's position in the spotlight and as asserted by the claimant under the cloak of the redundancy process being instituted on account of a downturn in the sales figures which would rationally lead to the Branch Managers of the Estate Agency Offices being put at risk, the respondents took the opportunity to tag the claimant on to the end of this.

5

94. While these factors impact upon the consideration of the reason for the claimant's dismissal the substance of the consultation process is also demonstrative of the respondent's failing to act reasonably in treating the reason of redundancy as a sufficient reason for the claimant's dismissal.

10

95. The evidence taken as a whole is demonstrative of a failure on the part of the respondents to let the claimant meaningfully consult. When he made a legitimate enquiry of Robertson Craig this was described by the respondents as undermining Mr Davidson's position as he was in control of the process. This is a clear indicator that Mr Davidson did not want to get into the details that was necessary for the claimant to make meaningful submissions.

15

96. The respondent's position on staff and their assertion that they have less staff now and are fully able to undertake the claimant's duties is again not borne out by the evidence. An appreciation of the minutes is that at the material time the respondents had Mr Fyfe, who was a part time employee, Ms Hamilton, who was almost a full-time employee and Ms Brown who left the business on 25 January 2020. It appears thereafter that Ms Brown was rehired and that, at the date of this Tribunal, they have Mr Fyfe, Ms Hamilton, Ms Brown and a new employee referred to in evidence as Hayley, so four members of staff instead of two which would in effect mean that the assertion that £90,000 had been saved is not borne out.

20

25

97. The concessions in evidence that none of the finance team had been approached to enquire whether they were willing and able to absorb some of the claimant's duties and on what terms adds further credence to the

30

submission that the reason for the dismissal was not redundancy and that the consultation process was a sham and meaningless.

- 5 98. For the respondents to make statements without substance merely to give the appearance that this was a genuine attempt to avoid redundancy, does not stack up to consultation.
- 10 99. The claimant sought assurances that if he was able to prevent savings to the tune of £90,000 that would save his job. Mr Davidson's evidence stated that if he had so presented such savings, this potentially would have saved his job. The minutes do not bear Mr Davidson's evidence out. He had a closed mind. Despite protestations to the contrary, Mr Davidson's mind was made up from the outset. The most telling evidence in this regard is the entry in the minutes of the final consultation meeting (page 126) which I took Mr Davidson to during cross-examination which say: "Over the course of a number of meetings, I have concluded there is no longer a requirement for a Financial Director."
- 15 100. For Mr Davidson to assert that no decision had been made in this regard is simply not credible and this is fortified by him moving seamlessly to terminate the claimant's employment as shown in the minutes. Whether there was adjournment before the decision to dismiss, was not borne out by the structure of the minutes nor the language used. The minutes are littered with details of adjournments taking place for a whole plethora of reasons. In summary, Mr Davidson had a closed mind as he and Mr Kelly decided that the claimant would go.
- 20 101. The final ignominy was for the claimant being asked to handover his keys at the conclusion of a consultation meeting after 17 years of faithful and committed service to the business.
- 25 102. The respondents have not established that the reason for dismissal was one of redundancy. Even if this is accepted, then they have not acted reasonably in treating this reason as a sufficient reason for the claimant's dismissal on

account of the consultation process being wholly inadequate and indeed a sham.

103. There is no room for a *Polkey* reduction. The claimant has taken steps to wholly mitigate his loss as evidenced by the productions. A Schedule of Loss  
5 has been provided setting out the claimant's losses to date.

### Deliberations

104. The Tribunal referred to the issues that were to be determined. The Tribunal referred to section 98 of the ERA. The Tribunal asked if the respondents have shown a reason for the dismissal.
- 10 105. The respondents assert that the dismissal was for redundancy. Accordingly, the respondents must show what is being asserted is true: the claimant was redundant as defined by statute. The claimant asserts that while a redundancy situation existed, there was an agenda to have him removed from the business following the disciplinary process which started in October 2019.
- 15 106. The Tribunal referred to section 139(1)(b) of the ERA. The Tribunal found that in 2019 the respondents introduced a CRM system that automated some of the work undertaken by the finance team. At the end of 2019 the respondents were incurring losses in sales and profits. In early January 2020 the respondents decided that there was a need to make cost savings by  
20 restructuring the management and senior team resulting in some roles being surplus to requirements. The respondents considered that the existing junior members of finance team could assume some of the claimant's duties with other accounting work undertaken by the claimant being outsourced to a firm of chartered accountants on a quarterly basis; and the strategic and  
25 leadership aspects of the finance function being absorbed by Mr Kelly. The Tribunal considered that Robertson Craig's role was to undertake the work previously done by Mr O'Connor who was not an employee of the respondents.
107. The Tribunal was satisfied that a redundancy situated existed. The Tribunal  
30 then considered if that is what caused the claimant's dismissal. The claimant's



assertion was that there was an agenda to remove him from the business following the disciplinary process.

5 108. In the Tribunal's view there were several changes in the business in 2019, the introduction of the CRM system, re-banking; the unexpected death of Mr O'Connor resulting in the appointment of new tax advisers; and the significant reduction in sales, new business and profits. The Tribunal had no doubt that against this background the respondents as owners of the business and the claimant as Finance Director were under considerable pressure and relationships would be strained. The Tribunal also considered that the relationship between the claimant and Mr Kelly was particularly strained from 10 September 2019 onwards. Given the longevity of their working relationship which they described as good the Tribunal had no reason to believe that the deterioration was due to anything other than the business pressure that they were experiencing. The Tribunal could understand the claimant's surprise at 15 the formal way in which the respondents chose to deal with the conduct issue and could see why the claimant was then concerned about the redundancy process given that the disciplinary process was unresolved. However the Tribunal felt that had it not been for the financial pressure the respondents were facing in late 2019 and the challenging decisions that they forced to 20 make the disciplinary proceedings would have been resolved on the claimant's return to work in December 2019 and would not have resulted in his dismissal.

25 109. The Tribunal concluded that the reason for the claimant's dismissal was redundancy and that it was a potentially fair reason under section 98(2)(c) of the ERA.

30 110. The Tribunal then asked whether in all the circumstances did the respondents acted reasonably in treating redundancy as a sufficient reason for dismissal under section 98(4) of the ERA. The determination of that question depends on the whether in the circumstances, including the size and administrative resources of the respondents' undertaking, the respondents acted reasonably

in treating it as a sufficient reason for dismissing the claimant and shall be determined in accordance with equity and the substantial merits of the case.

111. The Tribunal was mindful that it had to ask if the dismissal lay within the range of conduct which a reasonable employer could have adopted.

5 112. The claimant's position was that the respondents failed to meaningfully consult and therefore failed to act reasonably in treating the reason of redundancy as a sufficient reason for his dismissal.

10 113. The 10 January Email was sent to all the respondents' employees giving an indication that certain unidentified jobs were at risk. The other at-risk employees were based in the branch offices and the local partner dealt with the consultation process.

15 114. Mr Davidson was one of the partners responsible for the finance team in which the claimant held the role of Finance Director. Mr Davidson met with the claimant on 10 January 2020 and warned the claimant that the role of Finance Director was at risk of redundancy. While the claimant was supported by three more junior employees the respondents advised that the claimant's role was unique and stand-alone. His role was to be split between the support finance team and Robertson and Craig. This was confirmed in writing.

20 115. The Tribunal considered that the respondents had warned the claimant that he was provisionally selected for redundancy. Given the claimant's seniority and unique role he was in a pool of one. The Tribunal considered this approach to be within the band of reasonable pool open to them.

25 116. The Tribunal then turned to consider whether Mr Davidson gave the claimant a fair and proper opportunity to understand fully the basis of his selection; to express views on that with Mr Davidson; then considered those views properly and genuinely.

117. While the respondents referred to the number of meetings with the claimant which took place over six weeks the Tribunal considered that it was not the quantity but the quality of the meetings that was relevant.

118. The Tribunal was of the view that Mr Davidson had provisionally selected the claimant for redundancy on the basis that the role could be split and there would be cost savings. However, the Tribunal did not feel that his mind was made up. Mr Davidson did not appear to have a definitive view of how the role would be split up and specifically what cost savings there would be. At this stage Robertson Craig, who were tax advisers were mentioned by Mr Davidson, but he did not mention any direct involvement by Mr Kelly in the finance team.
119. It was not until the 22 January Meeting that the cost savings of £90,000 were mentioned by Mr Davidson. His position was that the respondents' costs in relation to the role of Finance Director would go from £90,000 to zero. There was no sophisticated analysis. At that point the claimant offered to provide alternative savings. Mr Davidson appears to be under the impression that as Finance Director the claimant would have relevant information to hand and would be able to produce alternatives cost savings at the next meeting that he would be happy to discuss.
120. At subsequent meetings the Tribunal considered that Mr Davidson encouraged the claimant to propose alternative cost savings then appeared frustrated when the claimant sought information from Robertson Craig and annoyed when the alternative cost savings produced by the claimant were not up to the professional standard that Mr Davidson anticipated. Given the respondents simplistic approach to the cost savings of £90,000 the Tribunal felt that Mr Davidson expectations of the claimant were unrealistic and his comments were unnecessarily harsh. The Tribunal considered that Mr Davidson's response was defensive probably because the claimant raised several legitimate points about the role of Robertson and Craig, the level of experience of the existing finance team and the potential costs of work being outsourced.
121. In the Tribunal's view Mr Davidson did consider the points raised by the claimant. There was an acknowledgement that there would require to be some upskilling by the existing team, and they would report to Mr Kelly. Given

that the claimant's position involved production of accounts Mr Davidson had taken advice and that work could be produced by a small chartered accountant business at a cost. It was also acknowledged that the savings would therefore be less than £90,000. The suggestion that the personal assistants be made redundant was not considered viable at this point as their roles were needed. Mr Davidson considered that there was not a diminishing need for the roles of personal assistant.

5

10

15

122. The Tribunal understood the claimant's concern about the concession that the existing finance team had not been consulted about the proposed changes particularly as during the consultation process the claimant had expressed concern about their ability to do so. However, given the size of the business, the fact that Mr Davidson knew the employees concerned had had worked closely with them, and they were recruiting a replacement for Ms Brown the Tribunal did not consider that not to do so was out with the band of reasonable responses.

20

25

123. The Tribunal noted that throughout the consultation period the claimant was informed of positions that were available. The claimant was not interested, for justifiable reasons and the respondent did not suggest that any of these positions were suitable alternative employment. At the 28 February Meeting the claimant was advised of a vacancy in Bearsden for a sales consultant role. Although based on a previous discussion Mr Davidson did not think the claimant would be interested in this vacancy there was always a possibility that the claimant would express an interest. Had that happened the Tribunal had no reason to believe that the claimant would have been made redundant that day.

30

124. The claimant had an opportunity to address any matters which he wanted to raise and that included expressing concern about any appeal hearing being conducted by Mr Kelly.

125. In relation to the appeal hearing the Tribunal considered that the local partners only had standing in their own branches and would not on the basis of the evidence available been prepared to overturn Mr Davidson's decision. The

Tribunal understood the claimant's reservations in Mr Kelly dealing with the appeal hearing. However, had there not been a national lockdown in March 2020 the Tribunal considered that Mr Kelly would have been best placed to see if the reallocation of duties were feasible and truly cost savings. Notwithstanding any strain in the relationship with the claimant as an owner of the business the Tribunal felt that Mr Kelly would be prepared to overturn Mr Davidson's decision if he felt that it was wrong. Given the respondents willingness to follow professional advice it would have been open to the respondents to appoint an external appeal manager. However, the Tribunal did not consider that in the circumstances it was out with the band of reasonable response not to do so.

126. The Tribunal therefore concluded that the claimant's dismissal was fair in the circumstances and dismissed the claim. Accordingly, the Tribunal did not need to consider remedy.

127. The Tribunal had considerable sympathy for the claimant's situation. While the Tribunal acknowledged that redundancy situations are incredibly challenging for all concerned this was a particularly poignant case. The parties had worked well together for many years and the claimant had helped grow the respondents' business. To be made redundant at the claimant's time in life is especially hard and contrary to the respondents' submissions about the claimant failing to mitigate his loss, had the Tribunal been considering remedy, the Tribunal had no doubt that the claimant found it arduous coming to terms with the manner in which his employment came to an end; applying for employment after all these years; and doing so during a global pandemic.

Employment Judge: S Maclean  
Date of Judgement: 22 April 2021  
Entered in register: 06 May 2021

and copied to parties