EMPLOYMENT TRIBUNALS

Claimant: Anantharaman Sambasivam

Respondent: Playbox Technology (UK) Ltd

Heard at: Watford (by CVP) **On:** 24-26 May 2021

Before: Employment Judge Housego

Representation

Claimant: Shobaná Iyer, of Counsel
Respondent: Matthew Sellwood, of Counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. There is no basic award as the Claimant received a redundancy payment of the correct amount which extinguishes that liability.

3. There is no reduction to the compensatory award.

4. The Respondent is ordered to pay to the Claimant the sum of £14,253.20.

REASONS

Summary

1. The Respondent says that it dismissed the Claimant by reason of redundancy, and followed a fair procedure. The Claimant says that he was specifically targeted and that there was no redundancy situation, and that this was an unfair dismissal was dressed up as a redundancy.

Evidence

2. I heard oral evidence from Maya Gocheva-Ash (who owns the Respondent) and from Phillip Neighbour, Chief Operating Officer, who dismissed Mr Sambasivan. Mr Sambasivan also gave oral evidence, as did Maurice de Jonge. There was a very large bundle of documents.

Law

3. The reason put forward is redundancy, which is a potentially fair reason for dismissal.[1] Was that the reason (was there a redundancy situation)? If yes, was the dismissal procedurally fair? (Issues of pool for selection, consultation and alternatives to dismissal need to be addressed). If the procedure was not fair, what were the chances of dismissal if there had been a fair procedure[2]?

4. The decision whether a dismissal is fair or unfair involves findings of fact about what the employer did (the burden of proof, on the balance of probabilities, being on the employer), and an assessment of whether it was fair or unfair (where there is no burden or standard of proof).

5. It is not for the Tribunal to substitute its own view for that of the employer.

6. In deciding fairness Section 98 (4) of the Employment Rights Act 1996 ("the Act") provides

> *"…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case"*.

There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.

7. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code").

8. There is provision for increase in compensation of up to 25% if the Acas Code is not followed by an employer which unfairly dismisses an employee.

9. If the claim is successful, the Judge must set out the remedies for unfair dismissal of reinstatement or re-engagement, and ask the Claimant if he wishes to seek such an order.[3] The primary remedy is an order for reinstatement or re-engagement.[4]

10. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS

[1] S98(2)(b) Employment Rights Act 1996
[2] Polkey v A E Dayton Services Ltd [1988] ICR 142 HL
[3] Sections 112-115 Employment Rights Act 1996.
[4] S116 Employment Rights Act 1996

Trust [2010] IRLR 508 CA; Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588; Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_260. I have considered the guidance in Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601 about remedy.

Submissions

11. Both Counsel provided very helpful written submissions (which can be read by a higher Court if required) and I made a typed not of their oral submissions in support.

12. Those of the Respondent stressed the need not to remake or judge the business decisions of the Respondent, but to look at the test for redundancy – whether the needs of the business for employees to carry out a particular type of work had ceased or diminished. As to fairness, S98(4) required all the circumstances to be considered including size, and this was a very small employer. While it had to be accepted that there were some difficulties with procedure it was unlikely to have made a difference.

13. Those of the Claimant focussed on the asserted unfairness of the procedure and the lack of meaningful consultation, that there was an ulterior motive, and details of reasons why the evidence of the Respondent was not credible.

Findings of fact

14. The Respondent is a technology company selling software in devices for tv downloads. The Claimant worked for them from 2007 until dismissed on 31 August 2018, after working 3 months' notice. Donald Ash owned the Respondent company. He died suddenly in November 2017. His wife, Maya Gocheva-Ash inherited his shares. There are several other Playbox companies, with linked shareholdings. Ms Gocheva- Ash does not control any of the others, although she has a 50% stake in at least one of them. The group of companies trades worldwide, as does the Respondent.

15. The Claimant had a very close relationship with Mr Ash, as did another long-standing employee, Ben Gunkel. Ms Gorcheva-Ash did not have much to do with the business before her husband died. She did not have the same close relationship with the Claimant.

16. There are few people in the Respondent. The owner of the company was its sole director. Mr Neighbour was COO, and also sold products. The Claimant and Mr Gunkel were also salesmen. Graham [his surname did not feature in the evidence] was a systems engineer. He remains with the Respondent, having accepted a sales consultancy agreement through a limited company he set up for the purpose. Apparently, they are satisfied that this is compliant with IR35. There was an accounts person and an administrator, one of whom left later and one remained.

17. The Respondent turned over towards £5m a year, and made a small profit on paper. It had substantial negative net assets, and its accounts were on a *"going concern"* basis with an accountants note that this was because the director said there were realistic plans to return the Respondent to substantial

profitability. From her oral evidence, Ms Gorcheva-Ash did not really understand the nature of or reason for this accountant's note to the accounts. The Respondent was not in a strong financial position. In an email to the Claimant Ms Gorcheva-Ash described it as in *"dire straights"* (03 April 2018, when offering a share option to the Claimant (95/473). It was most certainly a company that was financially troubled. It had to borrow money from another company in the group to pay the salary bill one month. I reject the Claimant's assertion that this was a device, pre-planned to show poverty in the Respondent so as to justify his dismissal for financial reasons. That is speculative to the point of being fanciful.

18. The Claimant is a talented man. He was a systems designer and could troubleshoot problems. At the time of his dismissal he was in sales, principally, and across the world.

19. On 01 April 2018 Ms Gorcheva-Ash brought in Michael Provancha to be managing director. He lives in the USA, and was in another Playbox company.

20. On 03 April 2018 Ms Gorseva-Ash emailed the Claimant about a share option agreement, and on 04 April 2018 about going to a sales agency agreement. The Claimant was nonplussed about what he saw as conflicting messages.

21. Phillip Neighbour was and is Chief Operating Officer of the Respondent. He has been with the Respondent for some years. The Claimant trusted him.

22. Mr Provancha prepared a "30 day review". He concluded that to merge all the Playbox companies into one, as had once been hoped, was unrealistic, because the person holding the other 50% in another company had ambitions making that impossible.

23. It is clear from that document that Mr Provancha intended that the Claimant would exit the business, as would Mr Gunkel. A series of extracts show this:

> *"Ben is talented, but undisciplined. Ananth is one of the best systems engineers I have ever met - but does not have the skill set for sales nor the apparent willingness to take leadership advice from someone who does. Let me restate that: he does have the willingness to take advice, he doesn't have the ability to take advice."*
>
> *"Both Ben and Ananth have led privileged lives at Playbox – but we have enabled their behavior. Neither would survive 6 months in any other sales organization."*
>
> *"I will be adding more products to their portfolio… and while Ananth does have the experience to sell them, he does not have the sales skillset necessary."*
>
> *"Ananth … must be moved somewhere else. While talented, he has proven to be a pain in the ass for virtually everyone… I have offered to pay half a contract with LNS systems [a company with whom the Respondent*

had commercial connections] for 6 months. He will then move on to LNS systems full time…"

"If we do not get a deal [with LNS] I would keep Ananth on ½ time as an engineer … Regardless, Ananth would be out of sales."

"Should the deal with John [LNS] not work out, Ananth must be made redundant."

"Phill [Mr Neighbour] *is checking whether we can bring in a person under contract (not under employment) after we have made a position redundant. … By the way, this plan does not supersede our plan to begin redundancy proceedings with them both [The Claimant and Mr Gunkel] – that must be done in any case."*

"I plan to bring Tim Rawlings on board … either as a contract salesperson … or as an exclusive rep. … I will appoint Tim Rawlings as my number 2 in sales."

"Should Ben [Gunkel] *accept this role and still be effective in sales, I see no reason to not keep him on. He is very talented – he just needs to be brought down a rung or two – maybe three or four! If Ben cannot accept being a subordinate to Tim and quits, then I have a couple of options to replace Ben."*

"With Ananth gone…"

"On or about January 2019, I plan to bring on Kevin Broadbent for systems sales…"

"Ananth will be the systems tester should we have to keep him on as an engineer for a while… then Graham…"

"Plamen should be our first additional hire (I don't consider replacing Ananth as a "hire")."

"America's expansion … depends on when Ananth's salary cost is freed up…"

24. On 11 June 2018 Ms Gocheva-Ash provided a letter of dismissal for Mr Neighbour to give to the Claimant. On the same day Mr Neighbour gave the Claimant a letter about an initial consultation about redundancy. There was a meeting with Ben Gunkel, the Claimant and Mr Neighbour. It lasted about 2 ½ hours but was mostly taken up by Mr Gunkel. On 13 June 2018 Mr Neighbour gave the Claimant the letter of dismissal, which Ms Gocheva-Ash had emailed him on 11 June 2018.

25. Mr Gunkel signed a sales agency agreement, but left the Respondent in mid-August 2018.

26. The Claimant worked until 31 August 2018, when his notice expired.

Conclusions

27. The following is my analysis:

27.1. The company was in a difficult position financially.

27.2. It was decided that most of the senior people would be required to go to sales agreements. That included the 2 sales people (the Claimant and Ben Gunkel), and Graham.

27.3. Mr Provencha was brought in as a new MD, starting 01 April 2018. He had been with another Playbox company.

27.4. A share option agreement was proposed by Ms Gorcheva-Ash on 03 April 2018 (95/473). The email was addressed to Mr Provencha, Ms Laurence, Mr Neighbour and to the Claimant. This was doubtless because Mr Provencha had started as MD and wanted a share option. There was no evidence that it was progressed with anyone. It predated the input of Mr Provancha into the management of the Respondent. The draft agreement is so vague that it is meaningless, save that the option would not require the payment of anything other than a nominal sum. It predated Mr Provancha's assessment that the Claimant had no future with the Respondent.

27.5. The next day, 04 April 2018, Ms Gorcheva-Ash had a Skype text exchange with the Claimant (103/473) in which she asked him whether he would be signing a *"consultancy agreement"* with the Respondent. She meant a sales agency agreement. The Claimant expressed concern. Ms Gorcheva-Ash said that she was not forcing him either to take share options or to sign a sales agreement.

27.6. However, she stated that if his employment was ended on the basis that the Respondent did not have the capacity to maintain a team of sales people, he would not then have the option to sign that agreement as that would be a breach of the law (103/473). This means that Ms Gorcheva-Ash was telling the Claimant that he could sign now, but if he did not and was made redundant, it would not then be offered, because that would mean there was no redundancy situation.

27.7. Ben Gunkel and Graham [surname unknown] did cease to be employees and signed sales agency agreements before the start of June 2018. However Mr Gunkel left the Respondent in mid August 2018.

27.8. These agreements are very poorly drafted. Ms Gorcheva-Ash told Mr Neighbour that they were not to be changed save as to the amount of a monthly retainer. The document was sent by her to Mr Neighbour on 12 June 2018. This was the day after she signed the dismissal letter which Mr Neighbour gave to the Claimant on 13 June 2018. It provided for a retainer of £5,000 a month, which was the same as the Claimant's basic salary of £60,000 a year. It provided for commission, in a schedule. It stated that the agent was not to present himself as an agent or representative of the Respondent, which is oxymoronic, as the whole point of the agreement was that the agent would be precisely that, an

agent of the Respondent. It contained a 36 month restrictive covenant and a prohibition on working for anyone else without the consent of the Respondent.

27.9. Mr Provancha provided a 30 day plan, in which the Claimant was to exit the business. He sent this to Ms Gorcheva-Ash and to Mr Neighbour on 23 May 2018. This involved the Claimant exiting the business completely, either sooner or (not much) later.

27.10. The Respondent did appreciate that there was an IT35 issue if the people who were employees did the same job as contractors. They do not seem to have appreciated that there may be an obligation to pay one or two years' commission to the agent on termination.

27.11. Mr Provancha left in June 2018, when he had health issues.

27.12. By then it was clear the Claimant was to go. It was decided by 23 May 2018 when Mr Provancha sent his 30 day review to Ms Gorcheva-Ash and to Mr Neighbour.

27.13. The process was a sham: the letter of dismissal was typed and signed on 11 June 2018 by Ms Gorcheva-Ash, and emailed to Mr Neighbour. That was the same day as the first meeting, said to be a consultation meeting. The decision had been made long since.

27.14. Mr Neighbour's evidence was that there was a matrix for selection of people to be made redundant, but none was produced, nor explanation given for its absence. There was no such matrix. None was needed for the decision had been made at or soon after 23 May 2018.

27.15. The Claimant was handed the letter of dismissal by Mr Neighbour at a meeting on 13 June 2018.

27.16. One way or another he thought he would be staying until late on in his notice period, and he continued to work.

27.17. The sales consultancy agreement in April was designed so that the Claimant could be dispensed with on 30 days' notice with no reason given. This was very likely in response to Mr Provancha's US style approach to employment, which is (to oversimplify) that anyone can be dismissed at any time, which is not the case in England and Wales. If he had signed it then it would have been terminated soon thereafter.

27.18. The Claimant never expressed a wish to be on a sales agency agreement – he asked about what it meant when he learned of it, but by 11 April 2018 he had clearly expressed the wish to remain an employee (110/473). He said that he needed this for the purposes of a mortgage application, but did not say that he would sign when that was complete.

27.19. The Claimant's suspicions that there was a large scale conspiracy to get rid of him and that matters such as intercompany transfers of money are to dress up financial affairs to justify dismissal are not credible or plausible.

27.20. The evidence of the Respondents about the genuineness of the process is not credible.

27.21. There is no issue with the pool for selection, for first it was everyone senior, and then, when others signed sales agency agreements the Claimant was the only one left who was affected. The accounts and administration people could not have formed part of the pool, for their roles were at a lower level and were internal.

27.22. It was intended to replace the Claimant with Tim Rawlings, but this did not happen, as he would not join the Respondent. Because it was intended to replace the Claimant the reason the Claimant was dismissed was not that the role had disappeared. Mr Rawlings was intended to be on a sales agency agreement, if this was legal, and not be an employee.

27.23. By the time the Claimant left Mr Gunkel had also left. The Respondent now approaches the market through internet connections and via those it supplies. This was not the reason the Claimant and Mr Gunkel left, but a response to the Respondent now having only Mr Neighbour in a sales function. That change is the result of them both leaving, not the reason for them leaving.

27.24. The issue is not whether the role had disappeared (or reduced) but whether the need for employees to do that work had ceased or diminished.

27.25. Whether a good reason or a bad reason, and whether IR35 compliant or not, the Respondent decided that the only employee doing sales would be Mr Neighbour, and that the other two would be sales agents.

27.26. They were to be permitted to work for others, if the Respondent consented – the Claimant was intended by the Respondent to work for LNS in part. That is clear from the Claimant's evidence as well as that of the Respondent. (Of course, this was to be in the short term, as Mr Provancha wanted the Claimant to leave.)

27.27. Accordingly, the need of the Respondent for employees to do sales work had ceased or diminished.

27.28. This was not a device simply to move the Claimant to a sales agency agreement, so as to be able to get rid of him easily, as the other salesperson and Graham had the same situation.

27.29. That means there was a redundancy situation.

27.30. For the reasons given above, the whole process was a sham – there was no consultation. A decision had been made to cease having sales employees and to have sales agents instead with no consultation at all. Whether this was sensible, or even compliant with IR35, is not to the point.

27.31. The asserted consultation was the result of retaining a solicitor to provide some general advice and some templates, but not to advise in detail. As it involved the signing of a letter on 11 June 2018 by the MD giving notice of dismissal on the same day as the first consultation meeting it is apparent that the procedure was unfair.

27.32. The decision was one of principle, and so there was nothing that consultation could have changed.

27.33. There was no other employee engaged in sales for about 18 months, and that was at a junior level. That does not impact on my findings about the period from the beginning of April to the end of August 2018.

27.34. I do not find convincing the evidence that attempts were made to find a role for the Claimant in another group company. The emails from Ms Gorcheva-Ash are self-serving and are not backed up by any evidence from anyone in any other group company.

27.35. (I observe that I do not find convincing the Claimant's diary entry of 01 May 2018 (473/473) which was not disclosed until recently, and which required amendment to the witness statement of the Claimant. In it the Claimant says that Mr Provancha told him that if he did not sign the sales agency agreement he would be made redundant by Ms Gorcheva-Ash. Mr Provancha wanted the Claimant out of the business and so would not have had any interest in the Claimant signing the agreement. I observe also that while my findings accord with the evidence of Mr de Jonge my findings were not influenced by his evidence. The findings are largely based on what emanated from Mr Provancha and from Ms Gorcheva-Ash.)

27.36. It is clear from Mr Neighbour's evidence that the Claimant is a talented and multi-skilled person, with great understanding of the Respondent's products. It is clear from Mr Provancha's evidence that there were tasks that the Claimant was competent to do, and that needed doing. Mr Provancha intended the Claimant to do them until he could be replaced by someone else. There is no reason, save for a desire to get rid of the Claimant, why he could not have done them, and continue to do them.

27.37. Therefore, I find that there was not sufficient or genuine effort to find alternative employment for the Claimant.

27.38. For this reason the dismissal was unfair.

27.39. Because:

27.39.1. the talents of the Claimant could have been utilised elsewhere in the Company,

27.39.2. and that other people were going to be brought in to do those things,

27.39.3. and the sales agency agreement put forward for him had the same retainer as his salary and with commission (such there would have been no saving, so that the financial position of the company did not require him to leave),

27.39.4. and as the Respondent has continued to trade,

I find that reduction on the *Polkey* principle (what would have happened had a fair procedure been followed) is not appropriate, because there was work the Claimant could have been found, and because it was always intended by the Respondent that he should leave.

28. In summary:

28.1. There was a redundancy situation because the Respondent decided that its principal roles and all its sales, other than by the COO, were to be handled by sales agents, and not by employees.

28.2. The consultation process was a sham, as the decision had been made before the *"consultation"* started.

28.3. It was a decision of principle, which management was entitled to make, and so the failure to follow a proper procedure made no difference.

28.4. The change was in part a reason to have the Claimant leave the business, but as it was applied generally it was still a redundancy dismissal.

28.5. Although there were things the Claimant could have done within the Respondent, the Respondent did not offer them to the Claimant, because they wanted him to leave the company.

28.6. Therefore, the dismissal was unfair, and the compensatory award does not fall to be reduced.

Remedy

29. The procedure was not said to be in breach of the ACAS code and so there is no increase in any compensatory award for that reason.

30. Reinstatement or reengagement would not be practicable, given the reasons for dismissal.

31. For the avoidance of doubt, I have considered all the evidence, oral and documentary, provided to me, and that I do not refer to a specific piece of evidence does not mean that I have not considered it. Nor should any one sentence or phrase be analysed other than in the context of this whole judgment.

32. There is no basic award as the Claimant received an equivalent redundancy payment.

33. I bear in mind the words of S123 of the Employment Rights Act 1996.

34. The compensatory award is based on net pay, and with pension contributions this was agreed at £3,438.30 pcm.

35. The Claimant was given notice on 13 June 2019. He ought to have set about obtaining other employment then, even if hoping to find some way of getting this reversed.

36. He was then worried about his restrictive covenant. By letter of 25 September 2018 the Respondent said he could work for anyone. They would have found it very difficult to resile from that even though they did not know of the covenants in the contract then.

37. The contract itself has in different places 3 and 6 months, and the Respondent would in any event have found it very difficult to enforce past 3 months.

38. The Claimant said that he did not work for LNS as he viewed this as a *"honey trap"* so that the Respondent could then pursue him for breach. This is not credible. There was no reason why he could not have asked the question about any limit in what he might do for LNS, but he did not.

39. No evidence is produced of any job application or interview.

40. The Claimant has skills in sales (even if unappreciated by the Respondent). This is the ultimate transferable skill.

41. The Claimant is a skilled and able systems architect, which is again transferable skill. He may have wanted to stay in the TV sector, but he did not have to do so.

42. The Claimant is now in business in his own account, but that is a choice.

43. All this is pre-Covid, and I consider that it meets all the parameters of S123 to award 4 months' net pay from the date of dismissal.

44. 4 x £3,438.30 = £13,753.20.

45. To that I add £500 for loss of statutory industrial rights (which I regret I overlooked in the hearing) making a total of £14,253.20.

Employment Judge Housego

Date 26 May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

29 June 21

FOR THE TRIBUNAL OFFICE