Case No: 2302988/2020

EMPLOYMENT TRIBUNALS

Claimant: **N Vaz**

Respondent: **Voiceflex Limited**

Heard at: **London South Employment Tribunal by CVP**

On: **30 June 2021**

Before: **EJ L Burge**

Representation
Claimant: R Vaz (Claimant's husband)
Respondent: O Lawrence (Counsel)

JUDGMENT having been sent to the parties on **8 July 2021** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant brought a claim for unlawful deductions from wages because she said that the Respondent had reduced her pay to 80% without her agreement while she was furloughed in May 2020. The Claimant also claimed that she had been unfairly dismissed when she was made redundant on 30 June 2020.

The Hearing

2. The Claimant gave evidence on her own behalf. Matt Jenkins (Finance Director) and Paul Taylor (Chief Commercial Officer) gave evidence on behalf of the Respondent. The Tribunal had before it an electronic bundle

with 113 pages, an updated Schedule of Loss from the Claimant and a Counter Schedule from the Respondent.

3. At the start of the hearing the list of issues were agreed to be:

    a. Did the Claimant suffer an unlawful deduction to her wages in that she should have been paid 100% of her salary rather than 80% for the month of May 2020?

    b. Was redundancy the reason for the Claimant's dismissal?

        i. The Claimant contended that her role of Channel Manager was not redundant;

        ii. The Respondent denied this, contending that there was a genuine diminution in the need for a Channel Manager for Southern area due to downturn in business.

    c. Did the Respondent act reasonably in treating redundancy as a sufficient reason to dismiss the Claimant taking into account all the circumstances, including the size and administrative resources of the Respondent, equity and the substantive merits of the case. In particular, did the Respondent:

        i. Warn and consult the Claimant about the proposed redundancy?

        ii. Adopt a fair basis on which to select for redundancy? The Respondent said that the Claimant was fairly selected by the end of the process.

        iii. Consider suitable alternative employment?

    d. If the dismissal was procedurally unfair, should a *Polkey* deduction be made to reflect the likelihood that the Claimant would have been dismissed in any event? If so, what is the appropriate deduction? The Respondent said that the Claimant would have been dismissed in one or two weeks had a fair procedure been adopted. The Claimant was claiming losses up to 1 October 2020 when she started higher paid employment.

Findings of Fact

4. The Claimant commenced employment on 1 July 2017 as a Channel Manager with the Respondent, a provider of internet protocol (VOIP) telephony services. She worked from her home office in Surrey.

5. Wayne Nieuwouldt commenced work at the Respondent in February 2020. The Tribunal finds as a fact that for part of his time he worked as Channel Manager and did the same work as the Claimant. The only difference was that he made calls to clients who had not been contacted for a while. The other part of his job was to increase the Respondent’s market share of unified communications. While “Unify” was discontinued, he also worked in

developing other UC products and an in-house replacement. The Tribunal finds as a fact that the Claimant also had previous experience in this area.

6. On 24 March 2020 Mr Taylor asked all sales team members to type up a business plan for the rest of the year. Mr Taylor gave evidence to the Tribunal, which the Tribunal accepts, that this business plan did not form the basis for what happened next, as covid then significantly disrupted the business.

7. At the end of March 2020 the Respondent decided to furlough the Claimant. Mr Taylor and Mr Jenkins both gave evidence to the Tribunal that the reason why they selected the Claimant was because she and her husband were suffering with covid related illness/family issues. The Claimant did not challenge the decision to be furloughed at the time nor did she challenge that decision in the Tribunal.

8. The letter dated 31 March 2020 set out the terms of the furlough:

   "If you agree, this will mean that your contract of employment will be temporarily varied from 31 March 2020 in order to seek support from and implement the governments coronavirus job retention scheme. During the furlough period, the following will apply:
   - *you will continue to be employed by us;*
   - *you will not carry out any work for us;*
   - *you will continue to receive your salary;*
   - *your other terms and conditions of employment and Continuity of employment will not be affected during this period.*

   The anticipated period of this action is until 31 May 2020 although the position will be reviewed on a regular basis in the meantime and it will end on the earliest of the following events:
   - the governments coronavirus job retention scheme ending; or
   - either you or the company ceasing to be eligible for funding under that scheme; or
   - the company deciding to cancel furlough leave and bring you back to work."

9. The Claimant signed the letter on the same day, 31 March 2020. The Claimant was then paid 100% of her salary for the month of April in accordance with the terms of the agreement but she did not attend work.

10. At the beginning of May the Claimant and Mr Jenkins emailed each other in relation to the Respondent now wishing to pay the Claimant 80% of her salary. The Claimant said that she had raised the issue in a telephone call with Mr Taylor and that it contradicted the original agreement to be furloughed on 100%. Mr Taylor reverted to the Claimant on 7 May 2020 and said that the Respondent has reserved its position "so as to allow [themselves] to review the position at any time and with immediate effect.."

11. The Respondent subsequently paid the Claimant 80% of her salary for the month of June 2020.

12. At a Senior Management review in May 2020 Mr Taylor and Mr Jenkins discussed the downturn in business that the Respondent was suffering. They gave evidence to the Tribunal that it was evident that the southern region had been affected more than the other two, with a decline of almost 20%. They made the decision that the Claimant was to be made redundant. Mr Jenkins' evidence to the Tribunal was:

    "*we therefore concluded that the most sensible step in the light of this review was to eliminate the southern region altogether and redistribute its functions and activities to the other areas. The would mean making [the Claimant] redundant. We took the view it would have been futile to consult her before telling her our decision…*".

13. Mr Taylor gave evidence to the Tribunal that he tried to call the Claimant "a couple of times" prior to the redundancy notice letter being sent out. The Claimant gave evidence that there were many ways in which he could have contacted her had he wanted. The Tribunal finds as a fact that Mr Taylor did not try to contact the Claimant to any meaningful extent prior to the notice of redundancy being sent out nor was the Claimant consulted at all.

14. The letter giving notice of redundancy was sent to the Claimant on 27 May 2020. The letter said that:

    "*As a result of COVID-19, the reduction in sales and revenue predicted for the next 12,18 months means we are unable to return you from furlough. The need to reduce the Sales Team staff costs has resulted in the re-organisation of the sales team and re-allocation of areas with a smaller team. Therefore, I am sorry to inform you that your role as Sales Account Manager is redundant. In addition, after checking your skill set, no other suitable alternative employment within the company can be identified for you currently*."

15. It is agreed between the parties that, although the letter was not before the Tribunal, on 6 June 2020 the Claimant wrote to the Respondent at length complaining about the selection process and complained about the way she had been treated.

16. On 15 June 2020 a letter in the name of Patricia Wright, HR Manager, was sent to the Claimant saying that the Claimant's letter of 6 June 2020 was to be treated as her appeal of redundancy. The letter said that it was because the Claimant was the only Sales Account Manager in the Southern Region and that the Southern Region had been amalgamated with the other regions. Mr Jenkins was to "address the appeal" by telephone conference.

17. As there was no reply from the Claimant Mr Jenkins wrote to the Claimant and requested that the Claimant call him by midday on 29 June 2020 to confirm if she was appealing. The letter also said that if her appeal was successful she would be reinstated.

18. On 30 June 2020 a telephone conversation was held between the Claimant and Mr Jenkins. The Claimant reiterated her complaints set out in her letter dated 6 June 2020 and Mr Jenkins explained further about the financial

downturn. The Claimant was not accompanied to the meeting and there was no Human Resources presence.

19. The Claimant was made redundant on 30 June 2020 and received a redundancy payment from the Respondent.

The law

20. Section 13(1) Employment Rights Act 1996 ("ERA") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to s.23 ERA.

21. Section 94 ERA states that an employee has the right not to be unfairly dismissed by their employer.

22. Redundancy is one of the potentially fair reasons for dismissal listed in S.98(2)(c) ERA:

> (1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held
> (2) A reason falls within this subsection if it—
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) **is that the employee was redundant**, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

[Tribunal's emphasis]

23. S.139. ERA "Redundancy" states:
    - "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
      (a) the fact that his employer has ceased or intends to cease—
        (i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

[Tribunal's emphasis]

24. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied which states that "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".

25. The manner in which the employer handled the dismissal is important in considering whether the Respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the Claimant's dismissal was affected in an appropriate way, i.e. within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

26. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer.

27. The EAT in the case of *Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT*, laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals, when asking whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'. The factors suggested by the EAT in *Compare Maxam* that a reasonable employer might be expected to consider were:

- whether the selection criteria were objectively chosen and fairly applied;

- whether employees were warned and consulted about the redundancy ;

- whether, if there was a union, the union's view was sought; and

- whether any alternative work was available.

28. However, the overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

29. If an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair — *Taymech Ltd v Ryan EAT 663/94*.

30. In *Capita Hartshead Ltd v Byard 2012* ICR 1256, EAT, the claimant, an actuary, was made redundant due to a decline in the number of pension funds she managed (through no fault of her own). Although there were three other actuaries, she was treated as being in a pool of one. According to Capita Hartshead this was because there was not enough work to sustain four actuaries and, given the personal nature of the work done by an actuary for a pension fund, there was a risk of losing clients if they were transferred between actuaries. When the claimant was made redundant, she lodged an unfair dismissal claim, arguing that all four actuaries should have been included in the pool. An employment tribunal upheld that claim and the EAT upheld the case on appeal and said that "*the tribunal was entitled, if not obliged, to scrutinise carefully the reasoning of the employer to determine if he had genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy*;"

31. S.123(1) of the ERA provides that the compensatory award shall be 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal'.

32. The case of *Polkey* said that if a Claimant is entitled to compensation their compensation can be reduced or limited to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome.

Conclusions and associated findings of fact

Unlawful deductions from wages

33. In evidence to the Tribunal both Mr Taylor and Mr Jenkins said that the Claimant was chosen to be furloughed because of her family situation in the covid context. The Claimant did not object to being placed on furlough. The letter dated 31 March 2020 set out a variation to the Claimant's contract. It provided that her contract was varied so that she was continued to be employed by the Respondent, she was not to carry out work and she was to continue to receive her salary for the period until 31 May 2020. Mr Taylor and Mr Jenkins said that sentence "*the position will be reviewed on a regular basis in the meantime"* written in the variation letter meant that they could unilaterally change the Claimant's pay to 80%. The Tribunal rejects this interpretation. It did enable the Respondent to review the position, and it could have sought consent to vary the terms further, but it did not entitle the Respondent to unilaterally change the Claimant's pay. The Tribunal finds that the Claimant did not agree to the variation of her pay to 80% and so the Respondent was attempting to unilaterally vary her contract. By reducing

her pay to 80% the Respondent unlawfully deducted the Claimant's wages for the month of May 2020.

Redundancy Dismissal

Was redundancy the reason for the Claimant's dismissal?

34. Evidence of financial downturn in the southern region as a result of Covid was demonstrated by the Respondent, the Tribunal finds that the decision to make redundancies was genuine. The Claimant accepted that it was the Respondent's decision as to how to respond to that downturn. The Tribunal concludes that there was a genuine diminution in the need for the work of Channel Manager in the southern region and so the potentially fair reason for the Claimant's dismissal was redundancy in accordance with s.98(2) and s.139(1)(b) ERA.

Fairness of the decision

35. Did the Respondent act reasonably in treating redundancy as a sufficient reason to dismiss the Claimant taking into account all the circumstances, including the size and administrative resources of the Respondent, equity and the substantive merits of the case. In particular, and in accordance with the relevant guidelines of the *Compare Maxam* case, did the Respondent:

    (1) Warn and consult the Claimant about the proposed redundancy?

    (2) Adopt a fair basis on which to select for redundancy?

    (3) Consider suitable alternative employment?

36. When determining the question of reasonableness, *Compare Maxam* stressed that it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead the Tribunal must ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted".

37. The Claimant said she was not consulted about the proposed redundancy. The Tribunal finds that the Respondent did not make a proper effort to contact the Claimant prior to sending the notice of redundancy and did not seek her views. Mr Jenkins gave evidence to the Tribunal that the Claimant was not consulted before the decision was made to make her redundant. Contrary to the submission of Mr Lawrence, the Tribunal finds that this lack of consultation was not remedied on appeal. A letter saying that she could be reinstated if her appeal was upheld did not reflect the reality that the Respondent did not genuinely address its mind as to whether there was any ways to avoid the redundancy and to the other criticisms the Claimant had made of the process. The appeal hearing itself was deficient, again there was little attempt to properly consider the Claimant's complaints. Additionally the Claimant had been offered no representation and there was no Human Resources attendance at the hearing.

38. The Claimant also said that the Respondent did not adopt a fair basis on

which to select her for redundancy. In particular she says that the Respondent did not consider what the appropriate pool was. The Respondent said that it was clear that there should be a pool of one – the downturn of almost 20% was in the southern region and that was her area. The Tribunal concludes that Mr Jenkins and Mr Taylor did not, however, genuinely address their minds as to whether or not anybody else could be made redundant, whether to include anyone else in the redundancy "pool" despite the fact that they had 3 other employees doing Channel Manager work. They had a closed mind and had simply decided that it was the Claimant who was to be dismissed.

39. The Claimant argued that there was suitable alternative employment that she could have undertaken – she could have done Mr Nieuwouldt's job. However, she agreed that Mr Nieuwouldt's job was not vacant. The Tribunal finds that there were no vacancies that would have been suitable for the Claimant to undertake.

40. The Respondent is a relatively small employer, having approximately 33 employees at the time of the Claimant's dismissal, but it also had one inhouse Human Resources officer and utilised external legal advice. Despite this access to Human Resources and legal advice, the decision to make the Claimant redundant had been made, there was no consultation to try to explore redundancy avoidance measures and there was no consideration of including anyone else in the selection pool despite the fact that there were two other Channel Managers working in the North/Midlands and a recently recruited employee who lived in the South of England and who worked as a Channel Manager for part of his role. The overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses. The Tribunal concludes that the Respondent did not fairly consult with the Claimant and did not undertake a fair selection process, it had a closed mind that the Claimant was being made redundant, and these actions were outside the range of reasonable responses. The Respondent did not act as a reasonable employer would have done and so the decision to dismiss was unfair.

Polkey

41. It is difficult for the Tribunal to say with any certainty as to what the outcome would have been had the Respondent consulted properly and genuinely applied its mind to fair selection but nevertheless the Tribunal must do so in order to determine whether there should be a *Polkey* deduction, in other words, a reduction in compensation to reflect the chance that the Claimant would have been dismissed in any event had a fair procedure been followed. Based on the evidence before the Tribunal the Tribunal concludes that had the Respondent consulted fairly and considered the question of selection, it would have placed both the Claimant and Mr Nieuwouldt in the selection pool as they were both located in the South of England and part of Mr Nieuwouldt's job was working as a Channel Manager. Both parties agreed that a Channel Manager should be able to visit clients within their region rather than travelling excessively, so the pool would not have included other Channel Managers in the Midlands and the North who would have been unable to regularly attend clients. The Claimant did provide some examples of occasions where Channel Managers in other areas had clients

out of area but the Tribunal finds that these were the exception, not the norm.

42. A consultation/selection process would have followed with points allocated. The Claimant would have scored higher for length of service with the Respondent, Mr Nieuwouldt would have scored higher based on the unified communications work he was performing which was valuable to the Respondent. The Tribunal concludes that it is likely that it would have taken an extra month to carry out a fair consultation and selection process where the Claimant was properly consulted and the fair selection pool was determined and assessed. At the end of that month the Tribunal concludes that it is 80% likely that it would be the Claimant who was made redundant because of the value placed by the Respondent's witnesses on Mr Nieuwouldt's unified communications skills. The compensation awarded to the Claimant should therefore be reduced by 80%.

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Employment Judge L Burge

Date: 2 July 2021