EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Julie Pugh	AND	Omicways Limited (trading as CGB Giftware)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 16 August 2021
EMPLOYMENT JUDGE N J Roper
Representation
For the Claimant: In person
For the Respondent: Mr Williams, Consultant

JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mrs Julie Pugh, who was dismissed by reason of redundancy, claims that she has been unfairly dismissed, and that she has been discriminated against on the grounds of her age. The respondent contends that the reason for the dismissal was redundancy, and that the dismissal was fair, and denies that there was any discrimination.

2. The parties have consented to this matter being heard by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employments Tribunals Act 1996.

3. I have heard from the claimant, and I have heard from Mr Damon Marks and Mrs Gwyneth Marks who are directors of the respondent company on behalf of the respondent.

4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

5. The respondent company is a family business which is owned and run by three generations of the Marks family. It trades as CGB Giftware, or otherwise Container Group Buying. The respondent imports giftware and supplies it to independent shops. It also exports giftware directly to distributors abroad. In general terms it is a supplier to the gift and homeware industries.

6. The claimant Mrs Julie Pugh was born on 19 July 1960. She was employed by the respondent as an Office Administrator from 7 March 2010 until 25 March 2020 when she was dismissed by reason of redundancy. As at that date, she was aged 59. She was a valued employee with a good disciplinary and attendance record.

7. The respondent company had five employees in its warehouse and distribution unit. It had two offices at its premises. The downstairs office generally dealt with orders over the telephone and credit control. There were four employees in that downstairs office namely Mr Meadows who had been employed for over 30 years and dealt with credit control and payments; Shelley Marshall the General Manager who had also been employed for more than 30 years and who supervised and allocated jobs to administrators; and two Office Administrators namely the claimant, and Fiona Hodges. There was an upstairs office which at that stage employed two graphic designers who had postgraduate qualifications; a part-time business graduate; Linda Penfound who was a part-time personal assistant to Mr Marks; and Zoe Tomlin who was aged in her 20s. The respondent also employed a maintenance man sometimes known as the groundsman.

8. The downstairs office generally dealt with small UK based customers and processed their orders. The upstairs office which included the designers dealt with more complicated matters of delivery and offshore developments, particularly based in the Far East. Zoe Tomlin's role was to manage the Purchase Order Department, together with the Export Department. The two younger members of the Marks family Niall and Patrick also had management roles in that upstairs office.

9. As at the end of February 2020 the company was in a buoyant position with a number of orders from the Far East and looking forward to a successful spring and autumn business cycle. As a result of the Covid-19 pandemic the business effectively all but started to unravel within a week. Footfall collapsed in various shops nationwide and the respondent faced wholesale cancellation of orders from UK customers, and was facing the requirement to complete the purchase of orders from abroad which it no longer needed. In addition, the respondent faced the prospect of otherwise reliable debtors now defaulting.

10. Against this financial storm Mr Damon Marks and his wife Mrs Gwyneth Marks, from whom I have heard, took immediate advice. They then held a meeting with all employees on 16 March 2020. They explained the financial difficulties, and they suggested that the employees agreed to reduce their

working hours as a way of mitigating the losses. Some employees agreed to this, and some accepted unpaid leave. At that time the government's response to the crisis was still unknown although there was talk of a potential lockdown.

11. The respondent's family members then held a meeting on 21 March 2020 to decide how to proceed. It became clear that there had been a cancellation of approximately 95% of the respondent's 2020 orders, and the respondent was also facing production and shipping delays from China. It seemed that the respondent was likely to fall outside of the criteria for a small business grant by way of support from the Government, and redundancies seemed inevitable. Following discussion, the respondent identified that both Office Administrators, two warehouse assistants, and the maintenance/groundsman were no longer needed and that their roles were potentially redundant.

12. On Sunday, 22 March 2020 Mrs Marks sent a WhatsApp message to the claimant to inform her that she should remain at home to allow the business to practise social distancing and she was told that she would continue to receive her pay. The respondent then decided to issue laptops for critically important members so that they could work as necessary from home. These were issued to five managers, including Zoe Tomlin, but not to the claimant. The reason for this was that the role of both Office Administrators had been identified as effectively having disappeared and therefore being redundant, and there was no need for them to continue, whether by way of remote laptop or not.

13. The respondent then wrote to the claimant on 23 March 2020 confirming that she was at risk of redundancy and that letter invited her to a consultation meeting on 25 March 2020. That meeting was to take place by telephone because of the pandemic, and the claimant was informed that she could be accompanied during that process by a fellow employee. She was informed that she could make suggestions with regard to the need to make redundancies and any alternative options and/or alternative employment.

14. The consultation meeting then took place on 25 March 2020. The claimant suggested that she would be willing to work from home, to assist with the purchase ledger, and/or to be put on furlough leave. The respondent considered her replies but could see no genuine alternative to the redundancy which was then processed.

15. The respondent had considered the claimant's replies, and following discussion within the family the respondent concluded that her role was redundant. There were no alternative roles available and no vacancies. By letter dated 30 March 2020 the respondent confirmed to the claimant that her employment was terminated by reason of redundancy. The claimant was paid her notice and statutory redundancy payment in full and advised of her right of appeal within five working days.

16. The claimant appealed against her dismissal on 27 April 2020, and despite the fact that this was well outside the suggested five days, the respondent agreed to deal with the claimant's appeal. They appointed an HR consultancy linked to Peninsula who had been advising them on the redundancies and the procedure to be adopted. The claimant's appeal was dismissed, but that decision on appeal was taken by someone different and independent from the members of the Marks family who had made the original decision.

17. Fiona Hodges the other Office Administrator was employed under a fixed term contract which had expired at about this time. Her employment was terminated by way of non-renewal of the fixed term contract rather than by way of redundancy, but her employment also ended at that time. The two warehouse assistants and the groundsman were also dismissed by reason of redundancy at that stage. Shortly after this process two other employees namely Linda Penfound and Nick Dinner left the respondent's employment. None of these employees were replaced, although some months later the respondent did engage another part-time graphic designer.

18. Having established the above facts, I now apply the law.

19. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").

20. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or 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"

21. I have considered section 98 (4) of the Act which 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".

22. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination.

23. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.

24. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

25. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

26. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code"). However, this ACAS Code does not apply to redundancy dismissals.

27. I have considered the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT; Polkey v A E Dayton Services Ltd [1988] ICR 142 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Hewage v Grampian Health Board [2012] IRLR 870 SC; Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18; Ayodele v Citylink Ltd and Anor CA [2017].

28. Direct Age Discrimination:

29. The allegations of direct age discrimination to be determined by this tribunal were confirmed in a case management order dated 24 February 2021. There are four allegations of less favourable treatment as follows: (i) the claimant was not given the same opportunities in that she was not given a laptop so that she could work from home; (ii) the claimant was not put on furlough leave; (iii) Zoe Tomlin was trained to do the claimant's role; and (iv) the claimant was dismissed with Zoe Tomlin being given her role. I deal with each of these four allegations in turn.

30. In connection with the first allegation I accept the respondent's evidence that the claimant was not issued with a laptop because her role had disappeared. Only those employees whose roles were retained and were at that time perceived to be critical to the future of the respondent's business, who were five managers, were issued laptops. There was simply no need for the respondent to issue the claimant with a laptop in circumstances where her job had all but disappeared and she was not needed to do it. I reject the allegation that the claimant was not given a laptop because of her age, and I

reject the allegation that the younger staff who received a laptop were treated in that way because they were younger than the claimant.

31. In connection with the second allegation I accept the respondent's evidence that the claimant was not put on furlough leave instead of being made redundant for two reasons. In the first place the details of the furlough leave were still uncertain at the time of the claimant's dismissal and no other employees were put on furlough leave at that time. Secondly, the furlough scheme which was introduced immediately thereafter was aimed at retaining in employment those employees whose jobs were still required and who would be needed back after the lockdown caused by the pandemic. The respondent had made the decision that the jobs of the two Office Administrators, namely that of the claimant and Fiona Hodges, had effectively disappeared. That is why the claimant was not put on furlough leave. I accept the respondent's evidence that this decision had nothing to do with the claimant's age, and at that stage it was not the case that any other younger employees had been put on furlough leave when the claimant had not.

32. With regard to the third and fourth allegations, I accept the respondent's evidence that Zoe Tomlin was not trained to do the claimant's role, and in any event the vast majority of the Office Administrator roles performed by the claimant and Fiona Hodges had disappeared. What remnants were left by way of telephone enquiries were covered by a combination of the remaining staff, including the directors and other office employees. The residual work was minimal. It may well have been the case that Zoe Tomlin answered the occasional telephone enquiry, but it is not the case that the respondent trained Zoe Tomlin to take on the claimant's role, nor that the claimant was dismissed to make room for Zoe Tomlin to do that role, nor in any event was any such decision taken on the grounds that the claimant was aged 59 and Zoe Tomlin was in her late 20s.

33. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her age than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.

34. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v

Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

35. In this case, I find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.

36. Unfair Dismissal:

37. The allegations of unfair dismissal to be determined by this tribunal were also confirmed in the case management order dated 24 February 2021. The claimant challenges the genuineness of the redundancy and the procedure adopted, including the consultation, the selection process, and a failure to find alternative employment. Five specific aspects are also identified as follows: (i) there was a lack of meaningful consultation; (ii) the respondent did not consider putting the claimant on furlough leave; (iii) the claimant was not provided with the rationale or selection criteria for her redundancy; (iv) Peninsula, the consultants who advised the respondent, also conducted her appeal; and (v) the claimant was not given the same opportunity to work from home with a laptop as other younger members of staff, who were issued with a laptop.

38. In the first place I find that there was a genuine redundancy situation. The impact of the pandemic and the national lockdown, together with other lockdowns internationally, had a catastrophic and immediate impact on the respondent's business. The respondent had a number of options open to it to try to minimise the financial disruption. It chose to implement redundancies immediately in areas where it felt that there was no ongoing need for those employees. The fact that it had alternative options, such as seeking a further reduction in hours or awaiting details of the imminent furlough scheme, does not affect the genuineness of the redundancy situation. Similarly, the fact that some residual but minimal elements of the claimant's job continued and were shared amongst the respondent's remaining staff and managers does not affect the respondent's conclusion that there was a reduced need for employees. It is not for this Tribunal to criticise the respondent's decision at that time. The point is that the respondent identified that its need for employees to carry out work of a particular kind had ceased or diminished. The statutory definition of redundancy in section 139(1)(b) of the Act was met.

39. I am satisfied that the claimant's dismissal was attributable to that redundancy situation. The claimant was a valued employee who was good at her job and who had been with the respondent family business for 10 years, and the respondent only took the decision to dismiss her by reason of

redundancy in the immediate aftermath of the onset of the pandemic and the national lockdown.

40. The claimant's dismissal for redundancy was not a single dismissal in isolation. Following a meeting of the family directors, the respondent decided that it no longer had a need for two warehouse staff, the maintenance/groundsman, and the two Office Administrators in sales namely the claimant and Fiona Hodges. Shortly after this process two other employees namely Linda Penfound and Nick Dinner left the respondent's employment. None of these employees have been replaced.

41. The claimant asserts that there was no rationale for her selection. However, it is clear that there was a significant and immediate reduction in the need for Office Administrators, of which there were only two, namely the claimant and Fiona Hodges. The respondent declined to renew the fixed term contract which Fiona Hodges was employed under, which expired at that time. If it were not for the expiry of her fixed term contract at that time she would have gone through the redundancy process. The other Office Administrator namely the claimant was made redundant. The respondent was entitled to decide on a selection pool of both Office Administrators, and given that both had their employment terminated, there was no issue of unfair selection between the two of them.

42. The next question which arises is the extent to which the claimant should have been retained by way of alternative employment. It is clear that there were no vacancies which the claimant might been offered, and apart from taking on a part-time graphic designer some months later, the respondent has not recruited any replacements. It might have been possible for the respondent to have considered "bumping", in other words dismissing a different employee whose job was not redundant, in order to retain the claimant in that other position. I accept the claimant's evidence that some aspects of the administrative roles were interchangeable. However, I do not accept that the respondent's failure to bump out employees in the other office, for instance Zoe Tomlin who had managerial experience in dealing with international sales, in order to move the claimant into that position, renders the decision to dismiss the claimant unfair and/or unreasonable given that it was the claimant's position which was redundant.

43. The claimant originally raised a criticism of the appeal process in that it was heard by an HR consultancy offshoot of Peninsula who advised the respondent in the first place. I accept Mrs Marks' evidence that the decision to reject the appeal was taken by the consultants and not by the respondent, so the decision was therefore taken by someone different to and independent of the original decision makers. In any event the claimant has now conceded at this hearing that the appeal process was fair and transparent.

44. Another criticism is that the claimant was not given the same opportunity as other members of staff, including younger members of staff, to work at home

with a laptop. As noted above, I accept the respondent's evidence that the claimant was not issued with a laptop because her role had disappeared. Only those employees whose roles were retained and were at that time perceived to be critical to the future of the respondent's business, being five managers or directors, were issued laptops. There was simply no need for the respondent to issue the claimant with a laptop in circumstances where her job had all but disappeared and she was not needed to do it. The claimant may well be right that the respondent could if it wished to have issued her with a laptop and to ask her to work at home with it instead of making her redundant, but given that there was a clear redundancy situation the respondent was not required to do this. In my judgment its failure to do so does not render the decision to dismiss the claimant unreasonable or unfair.

45. I have left the matter of consultation to last, because this was not a lengthy process. It was clear from the meeting on 16 March 2020, which the claimant attended, that the respondent was facing significant problems with order cancellations and debtor default payments. A temporary reduction in working hours was agreed. This was not the start of a formal consultation process, but it must have been clear to all concerned (particularly against the backdrop of the pandemic and threatened lockdown) that the respondent business was facing financial difficulties. The claimant was then instructed on Sunday, 22 March 2020 by way of a WhatsApp message to remain at home to allow the business to practice social distancing. The day before that the respondent had held its family board meeting and they were considering redundancies generally. The respondent then wrote the claimant on 23 March 2020 confirming that she was at risk of redundancy and that letter invited her to a consultation meeting on 25 March 2020. That meeting was to take place by telephone because of the pandemic, and the claimant was informed that she could be accompanied during that process by a fellow employee. She was informed that she could make suggestions with regard to the need to make redundancies and any alternative options and/or alternative employment.

46. The consultation meeting then took place on 25 March 2020. The claimant suggested that she would be willing to work from home, to assist with the purchase ledger, and/or to be put on furlough leave. The respondent considered her replies but could see no genuine alternative to the redundancy which was then processed.

47. I accept that the consultation process was progressed more speedily than is often the case. However, I am satisfied that there was a genuine two-way process during which the claimant had been informed of the likelihood of her redundancy, and its reasons, and she was given the opportunity to make representations before the respondent made its final decision. To that extent I am satisfied that there was a genuine process of consultation prior to the decision being made.

48. In reaching its decision on unfair dismissal, the starting point for the Tribunal should always be the words of section 98(4) of the Act. In applying the

section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.

49. In this case I find that there was a genuine redundancy situation and that the claimant's dismissal was attributable to that redundancy. There was adequate and reasonable consultation. The respondent was entitled to adopt a pool of selection of both Office Administrators, and given that they both had their employment terminated, the claimant's selection for redundancy from within that pool of two cannot be said to have been unfair. The respondent considered alternative employment, but none was available. It was not required to bump out other employees to retain the claimant whose job was redundant. The claimant was afforded the right of appeal and the appeal process was fair and reasonable. I find that the respondent's decision to dismiss the claimant was within the band of responses reasonably open to it when faced with these facts. Accordingly, and bearing in mind the limited size and administrative resources of this employer, the claimant's dismissal was fair and reasonable in all the circumstances of the case. I therefore dismiss the claimant's unfair dismissal case.

50. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 17; a concise identification of the relevant law is at paragraphs 19 to 27; how that law has been applied to those findings in order to decide the issues is at paragraphs 28 to 49.

Employment Judge N J Roper
Date: 16 August 2021

Sent to the Parties: 26 August 2021

FOR THE TRIBUNAL OFFICE