



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Lee Hart

Respondent: Amber Film & Photography Collective CIC

Heard at: Newcastle, by video **On:** 23 June, 25 June & 23 July 2021

Before: Employment Judge Moss

Representation:

Claimant: In person

Respondent: Ms M Craven, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The claimant was unfairly dismissed.
2. The claimant is not entitled to any compensation as a result of the unfair dismissal.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic and all issues could be determined in a remote hearing.

REASONS

Introduction

1. The respondent is a small publicly funded organisation based in Newcastle upon Tyne, operating within the arts sector. The claimant commenced his paid employment working for the Collective at Side Gallery, initially as a Gallery Worker/Assistant, on 14 November 2017 and subsequently as

Gallery Co-ordinator from 28 April 2018. The claimant was dismissed from his employment by the respondent on 22 May 2020.

Tribunal Hearing

2. The hearing took place over 3 days, 23 June, 25 June, 23 July 2021.
3. The claimant appeared in person. He and his witnesses, Peter Scott, Dean Chapman and Graeme Rigby, gave sworn evidence.
4. The respondent was represented by Ms Craven, Solicitor. Bryan Dixon and Laura Laffler gave sworn evidence on behalf of the respondent.
5. In addition to the witness statements of those who gave sworn evidence, I had regard to the hearing bundle of 545 pages that had been prepared for the Tribunal.
6. The respondent had prepared written closing submissions. As the claimant was a litigant in person, I invited Ms Craven to serve the respondent's written submissions on the claimant to assist him with preparing his own closing submissions. The claimant then made oral submissions and Ms Craven had a final right of reply on behalf of the respondent.

Claim and issues

7. The claimant brought a claim alleging that the respondent unfairly dismissed him. The claimant contends that he was unfairly singled out and that he should not have been placed in a pool of one. He further argues that the respondent ought to have offered him alternative employment. Although those were the primary complaints, the claimant intimated in his witness statement and during evidence that there may have been other motives for his dismissal. Whether a genuine redundancy situation existed and whether that was the cause of the claimant's dismissal is taken to be in dispute in the circumstances.
8. The respondent disputes the claim and contends that it acted reasonably in dismissing the claimant by reason of redundancy. Alternatively, that the claimant was reasonably dismissed for some other substantial reason (SOSR), namely a restructure carried out to effect long-term cost savings and to refocus the resources of the organisation towards Audience Development activities.
9. It was agreed at the outset that only issues of liability and the likelihood of the claimant being dismissed in any event (Polkey) could be dealt with during the hearing. If the claim of unfair dismissal was made out, directions would be issued towards a separate remedy hearing if appropriate.
10. The issue for me to determine was whether the claimant was unfairly dismissed. This would involve consideration of the following:

- 10.1 What was the reason (or the principal reason) for dismissal and did the respondent act reasonably in dismissing the claimant for that reason.
- 10.2 Was the dismissal fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996. In terms of procedural fairness it was agreed that the following issues would need to be considered:
 - 10.2.1 Did the respondent warn and properly consult the claimant about the redundancy situation.
 - 10.2.2 Was placing the Claimant in a pool of one within the range of reasonable responses.
 - 10.2.3 Was there a fair selection criteria and was it fairly and reasonably applied.
 - 10.2.4 Did the respondent consider alternative employment.
 - 10.2.5 Did the respondent follow a fair procedure and was dismissal reasonable in the circumstances of the case, in particular was dismissal within the range of reasonable responses.
 - 10.2.6 Would the claimant have been fairly dismissed in any event if a fair procedure had been adopted.

Findings of fact

11. On the documents and oral evidence presented I make the following essential findings of fact, restricted to those necessary to determine the list of issues.
12. Amber Film and Photography Collective CIC is made up of a number of elements - Side Gallery, Side Cinema, AmberSide Collection (Archive), AmberSide Production and AmberSide Education.
13. There were 5 Directors with accountability for the strategic direction of the Collective – Bryan Dixon, Laura Laffler, Peter Scott, Ellie Hare and Sirkka-Liisa Konttinen. They did not receive any remuneration for the role.
14. Each of the Directors had responsibility for a specific area. Peter Scott was the Director with responsibility for Side Gallery. Laura Laffler's area of responsibility was the Archive.
15. Peter Scott was a founding Director of the CIC, had worked within Side Gallery since 2003 and had extensive knowledge of the Archive, the works from which were displayed at the Gallery.
16. Bryan Dixon and Laura Laffler at various times in their witness statements and/or during the giving of evidence at the hearing refer to Peter Scott as Gallery Manager. The claimant did not regard Peter Scott as Gallery Manager and Peter Scott himself gave evidence that at no time did he

consider himself to be Gallery Manager. Even if he did not have that as a formal title, I find that he was actually and reasonably perceived as such by the other Directors based on his extensive experience and the fact that he was the Director responsible for the Gallery.

17. The claimant commenced his paid employment with the Collective in November 2017. In February 2018 a new role was created, that of Gallery Co-ordinator, and the claimant was appointed to the role in April 2018. At the time of his appointment, the claimant was advised that any questions he had were to be directed to Peter Scott.
18. The Gallery team was thereafter comprised of the claimant and Peter Scott on a PAYE basis and Dean Chapman who was self-employed.
19. An independent Governance and Management Review in 2019 highlighted some tensions around allocation of funding within the Collective. A facilitated session was held on 18 October 2019 in an effort to resolve the issues.
20. There was a risk that a formal complaint might be made against members of the Gallery team and Laura Laffler had taken advice from ACAS in anticipation.
21. The claimant was called to a meeting on 12 February 2020 and formed the view that it was to be a disciplinary meeting. It came to an abrupt end as a result. I accept the evidence of Laura Laffler that they weren't functioning as a full team and it was in fact going to be an attempt to discuss the difficulties of the past and to find a way of moving forward. Her evidence was that efforts would have been made to dismiss the claimant in October, had that been the intention. That it was to be anything other than Laura Laffler described is supposition on the part of the claimant and is not borne out by the evidence.
22. Dean Chapman is an experienced documentary photographer whose work had become part of the Archive and was regularly exhibited in the Gallery. He was the team member regarded as most adept at mounting and framing prints.
23. Peter Scott and Dean Chapman had curatorial responsibility at Side Gallery whereas the claimant did not. The claimant's evidence was that it was not an area that interested him but that anybody could do it. Bryan Dixon and Laura Laffler regarded curation as a specialist skill.
24. The claimant acknowledged that he did not share any duties with Laura Laffler, particularly that he did not undertake fundraising activities or write formal fund raising applications.
25. The claimant's role expanded over time from that originally advertised. Indeed, Bryan Dixon acknowledged that enquiries subsequent to the

redundancy consultation process revealed that the claimant was managing the payroll process.

26. Peter Scott gave evidence that the roles and the work of the Gallery team evolved over time and the sharing of skills and gaining of experience and knowledge had always been encouraged. He stated that the claimant had more to offer, that he was adaptable to take on any kind of work. I find that what Peter Scott was describing in his evidence was effective team work rather than the Gallery team members' roles being truly comparable or interchangeable.
27. The Collective was struggling financially in 2019 and a preliminary budget review was commenced in January 2020. Everyone, including the claimant, was tasked with identifying ways of making efficiency savings. The claimant's evidence was that he understood more than most the need to make cost savings.
28. The claimant submitted his proposals on 9 March 2020 (Survival – Gallery as Core). It focussed heavily on sustaining the Gallery, involved mothballing other elements of the Collective and included making Laura Laffler's role redundant.
29. The process concluded on 11 March on which date the Gallery team put forward a suggestion that Peter Scott reduce his paid days to 2 days per week and the claimant to 3 days per week.
30. At a Directors' meeting on 13 March Laura Laffler reported that the respondent was looking at a £60000 deficit and she and Bryan Dixon were nominated to undertake a more detailed strategic review.
31. On 16 March 2020 an emergency meeting was held to discuss the implications for the Gallery and Cinema of the government announcement regarding lockdowns due to Covid-19. It was decided that they should close.
32. On 19 March 2020 the Directors were presented with 3 budget options to consider for dealing with the deficit.
33. Budget Option A incorporated some of the claimant's suggestions but attempted to save the Archive.
34. Budget Option B placed the claimant's Gallery Co-ordinator role at risk of redundancy, with other members of the Collective absorbing the majority of the tasks. At the same time, this option allowed for a new 2-day Gallery Worker post to be created, subject to a new job description. The nature of the new role was undecided at this stage but ultimately became one focussed on audience development.
35. In November 2019 the Gallery team had drafted an audience development plan. Feedback from an independent consultant was that it

was drafted by people with no audience development knowledge and that external expertise was needed.

36. Budget Option C (which would also have placed the Gallery Co-ordinator role at risk) provided for a fundamental shift towards Front of House coverage in Side Gallery and paid Directors across all areas of the organisation.
37. The risk to the Collective from the deficit was significant, a risk compounded by the uncertainty regarding Covid-19. Due to the pandemic, Heritage Lottery Funding (HLF) funding round was cancelled in late March 2020.
38. The Gallery Co-Ordinator role having just been created in 2018, Budget Option B provided for Side Gallery to operate as it had prior to the role being created, with the administrative duties that formed the core basis of the claimant's role being absorbed by the gallery team and other Directors.
39. All Directors save for Peter Scott voted for Option B with Option C as second choice. It was felt by them that Option A jeopardised the ability to meet funding obligations since funding was granted based on the Collective as a whole and Option A cut multiple departments. Peter Scott voted for Option A.
40. I accept the evidence of Bryan Dixon that discussions had been had about what was needed in terms of basic staffing resource to survive and that it was genuinely decided that Laura Laffler's role was crucial to the continuance of the Archive function and that the curatorial experience of Peter Scott and Dean Chapman was essential to the functioning of the Gallery element of the Collective. On the other hand, the administrative duties that formed the core basis of the Gallery Co-ordinator role could be absorbed by the Gallery team and other Directors.
41. On 23 March Laura Laffler proposed putting the redundancy consultation on hold and taking advantage of the Furlough scheme. At a Directors' meeting on 26 March the vote was unanimous to place the claimant on furlough. It was agreed that Peter Scott, as bank signatory, could take over the management of payroll.
42. On 30 March Peter Scott asked to be furloughed instead of the claimant but Bryan Dixon responded that his role was deemed crucial and his contribution was needed to prepare for what might lie ahead.
43. On 1st April Peter Scott advised Bryan Dixon that he wished to resign as Director but not from his PAYE employment.
44. The respondent did not offer voluntary redundancies at any stage. Had Peter Scott indicated a wish to take voluntary redundancy, the

respondent would still not have offered that as an option since his experience and expertise was deemed crucial to the future functioning of the organisation.

45. Although early indications from ACE were that the respondent may be eligible to participate in the Furlough scheme, further guidance was released and it was clear to Bryan Dixon and Laura Laffler by 2 April that they could not take advantage of the scheme.
46. Bryan Dixon had delegated authority from the Board to lead the redundancy consultation process and to act as decision maker. He contacted Peter Scott on 8 April 2020 asking him to outline the duties of each of the Gallery team. Peter Scott provided the outline on 14 April and this formed the basis for the information used about pooling.
47. Although Peter Scott was aware at that stage of the potential for redundancies, he gave evidence that he felt under pressure to produce something and that it was a brief overview of duties. He stated that the list produced by the claimant for the purposes of these proceedings is much more accurate. I accept that Peter Scott felt under pressure at the time and it is likely that he may have produced a more comprehensive breakdown of duties had he not felt that way, but he did include in the document that the claimant performed a range of roles in addition to those in his job 'description' and provided some examples. The job description referred to was the job advert for the role when it was created.
48. In paragraph 8 of his witness statement the claimant states that Peter Scott and Dean Chapman had issues with the wording of the job advert and the lack of understanding regarding the skill set of applicants for the job. In so far as Peter Scott is concerned, I find this difficult to reconcile with the fact that it was he who put forward a description of proposed duties pertaining to the role to the other Directors on 5 February 2018. It was his suggested description of the role that formed the basis of the job advertisement.
49. Peter Scott also stated in evidence that he had for many months or years in conversations with Directors explained how the Gallery depended upon collaboration, co-operation and a flexible way of working. I find that there was an appreciation by Bryan Dixon of how the Gallery team operated during the redundancy process.
50. The outline of the claimant's duties confirmed Bryan Dixon's understanding of his role in important respects, crucially that he did not have curatorial responsibility nor did he undertake Archive conservation and maintenance, whereas both Peter Scott and Dean Chapman did. It was determined that the Gallery Co-ordinator role was less specialised than that of Peter Scott's or Dean Chapman's role and that it was appropriate for the claimant to be placed in a pool of one.

51. By way of letter dated 22 April the claimant was warned of the potential for redundancy and he was invited to attend an initial consultation meeting. The letter stated that the company was exploring ways of avoiding compulsory redundancies, invited the claimant to let them know if he had any suggestions on ways to avoid redundancies and included that the Gallery Co-ordinator role would be in a pool of one and at risk of redundancy should the company be unable to avoid the need for redundancies.
52. The first consultation meeting with the claimant took place on 30 April 2020, led by Bryan Dixon with Ellie Hare taking notes. Peter Scott was present as note taker for the claimant. The claimant was informed of the Budget Options that had been considered by the Directors, one of which had included his own cost-saving measures, and was advised of the decision to carry forward the option that placed his role at risk.
53. During the meeting, the claimant asked for a copy of the new budget, business plan and new organisational structure. Bryan Dixon stated the Directors were not required to supply them. The claimant felt that it would be difficult for him to give his views if he didn't understand what was being proposed. He also asked if there had been a redundancy matrix to which Bryan Dixon replied he couldn't comment. The claimant asked directly how he had been selected and Bryan Dixon ran through other measures that had been considered to save costs. The claimant asked why he was in a pool of one and what the criteria for the pool was. Bryan Dixon stated that the work of a Gallery Co-ordinator had diminished such that any remaining duties would be divided amongst the remaining two members of staff, finance and members of the Directorship. The claimant asked again why he was the only one in the pool, the only person selected when there were other PAYE employees, Laura Laffler and Peter Scott and asked why freelance staff were not considered. Bryan Dixon responded that the budget review had looked comprehensively at spending over the whole organisation.
54. The claimant did not believe that he had been given clarity about the decision to place him in a pool of one.
55. The claimant offered to reduce his wages and his days down from 4 to 3 per week (though clarified by email afterwards that he was only willing to do this on a temporary basis). The claimant also put forward a draft budget that he said reduced the shortfall from £60,000 to £19,500.
56. Bryan Dixon informed the claimant that, whilst there were proposals to create an alternative vacancy in the gallery, it would be a new post at 50% of his salary and would be subject to an open application process in which he would be entitled to apply.
57. At a Directors' meeting on 30 April 2020 Bryan Dixon fed back about the consultation meeting and about the claimant's cost saving ideas. Confirmation that furlough was not available was provided, discussions

regarding the fairness of the claimant being in a pool of one took place and it was reiterated that Peter Scott had curatorial responsibility and detailed knowledge of the Archive.

58. After the meeting, Bryan Dixon and Laura Laffler spent time going through the claimant's cost saving proposals and decided the continuing deficit would be too large to absorb.
59. A second consultation meeting took place on 8 May 2020, led by Bryan Dixon with Laura Laffler taking notes. The claimant was not accompanied and covertly recorded the meeting.
60. Bryan Dixon went through Budget Option B that had been voted upon with the claimant, and also a revised version that incorporated some of the claimant's own suggestions.
61. The claimant made it clear a number of times that it was not a budget consultation and that he would like to concentrate on details about his job.
62. Bryan Dixon continued to go through the budget considerations to demonstrate to the claimant that his suggestions had been taken into account.
63. The claimant asked about the 2 day per week Gallery Worker role that was created under Budget Option B. Bryan Dixon explained that it was not suitable alternative employment as it involved a reduction in hours and pay, but stated that the claimant could apply for the role if he chose to.
64. The claimant asked why he had been placed in a pool of one and said that he was more qualified than Peter Scott to run the Side Gallery. It was Bryan Dixon's perception that Peter Scott was the Gallery Manager and a curator who had worked at Side Gallery for over 15 years. Bryan Dixon did not share the claimant's view on who was more qualified between the two of them.
65. In terms of the claimant's offer to reduce his days and take a cut in pay, Bryan Dixon stated that it was merely a temporary solution and not considered viable in the long term.
66. Bryan Dixon explained to the claimant that he had been placed in a pool of one because his current role as Gallery Co-ordinator was the defined and singular role he was contracted and employed to carry out. As he was the only person undertaking that role, he was the only individual at risk and a redundancy matrix was not needed.
67. This explanation conflicted with the reason given by Bryan Dixon in evidence. Here he stated that the pooling was based on the disparity between the roles of the claimant, Peter Scott and Dean Chapman. He

stated that the Gallery Co-ordinator role was admin heavy and that it could be absorbed by the rest of the organisation. He regarded Peter Scott as one of the pillars of the organisation due to his knowledge of the Collection/Archive, history, conservation and the active part he took in the curation of exhibits. He went on to say that the skills and reputation of Peter Scott as Director and Dean Chapman as an internationally renowned photographer and curator were irreplaceable. It is worth noting here that Dean Chapman, being self-employed, could not have been included in any pool.

68. Bryan Dixon had some understanding of the job roles but appreciated that things had changed and had called upon Peter Scott to provide more detail on the basis that he was the Director based within the Gallery.
69. At no point during either consultation meeting was the outline of duties provided by Peter Scott disclosed to the claimant as forming the basis on which the pooling decision was made.
70. I find that Bryan Dixon's evaluation of job roles, the importance he attached to certain skills above others and his assessment of whether the roles were comparable or interchangeable led to the decision to place the claimant in a pool of one. Had it been as he had suggested to the claimant in the 2nd consultation meeting (put crudely, that it was his job so it had to be him), it would have been a *fait accompli* and he would not have proceeded to ask Peter Scott to produce a list of duties for the Gallery team for him to see whether there was any differentiation in roles/skills required.
71. The claimant had expected to receive an outcome from the second consultation meeting and was frustrated that he did not receive one. Bryan Dixon explained that the Directors would consult again before making a decision.
72. By his own admission in evidence, the claimant went into the meeting with an agenda, namely the prospect of bringing proceedings for unfair dismissal, and he formulated some of his questions with that in mind. He was disappointed when Bryan Dixon deferred making a decision, stating that some of what he had said was based on the understanding it was a conclusion meeting and that it may benefit the respondent more than him in the event of an appeal.
73. At a Directors' meeting on 11 May 2020 Bryan Dixon fed back the contents of the 2nd consultation meeting and explained that the claimant's proposals still led to a significant budget deficit and the recommendation was to proceed with the redundancy. The Directors ratified that, subject to Bryan Dixon giving further consideration to the claimant's interest in the 2-day Gallery Worker role.
74. Factors against offering the position to the claimant as a means of avoiding redundancy were that it represented a significant reduction in

hours and pay; the claimant had suggested his willingness to take a pay cut would be on a temporary basis; in the absence of guaranteed funding a commitment could not be given that the role would be permanent; the role was expected to focus on audience development since advice had been received from professional consultants that the gap in the organisation in that respect needed to be addressed due to the numbers of visitors falling. The lack of expertise within the organisation had been highlighted by their Arts Council Assessor. The claimant was thought not to have the expertise required for the specialist role. Consideration had been given to providing training but it was Bryan Dixon's opinion that it was a specialist role and it would take too long for the claimant to be trained.

75. In any event, there was not a vacancy available at the time of the claimant's dismissal.
76. On 19 May Bryan Dixon confirmed to the claimant that he was being dismissed by reason of redundancy and set out his right of appeal.
77. On 22 May the claimant indicated he wished to appeal the decision but did not proceed with the appeal on being informed that Laura Laffler would chair the appeal hearing with Bryan Dixon taking notes.
78. Subsequent to dismissal and for the purposes of these proceedings, the claimant produced his breakdown of the responsibilities of each member of the Gallery team. Notably absent from his own duties are the main skills that differentiated his role from the others in the mind of Bryan Dixon.
79. In August 2020 the recruitment process for the Gallery Worker (Audience Development Co-Ordinator) role began. It was advertised as a 2-day role and was a fixed term post until March 2021. The role was advertised publicly and candidates were shortlisted in September 2020. The claimant did not apply for the role.

Relevant Law

80. An employee has the right under section 94 of the Employment Rights Act 1996 not to be unfairly dismissed.
81. Where a complaint of unfair dismissal is made, it is for the employer to show that it dismissed the claimant for a potentially fair reason ie. one within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held. If the respondent fails to do that the dismissal will be unfair.
82. Dismissal for redundancy is a potentially fair reason falling within section 98(2).

83. The definition of redundancy is set out in S.139 ERA as follows:

*“(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.”*

84. Where redundancy is established by the employer as the reason (or main reason) for dismissal, then section 98(4) must be considered, the burden being neutral at this stage. S98(4) provides as follows:

Where the employer has fulfilled the requirements of subsection (1), 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.*

85. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

86. In **Safeway Stores plc v Burrell [1997] IRLR 200** the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

- a. Whether the employee was dismissed?
- b. If so, had the requirements of the employer’s business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

87. In considering the question of fairness, the correct approach is that set out in **Williams v Compair Maxam Limited [1982] IRLR 83**. In summary, employers acting reasonably will give as much warning as

possible of impending redundancies to employees, consult them about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job. However, the Tribunal must not put itself in the position of the respondent and decide the fairness of the dismissal based on what it would have done in that situation. It is not for the Tribunal to weigh up the evidence as if it was conducting the process afresh. Instead, its function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

88. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344**, where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness i.e., if a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the claimant would have been dismissed in any event.
89. In terms of consultation, what the employer must disclose in order to have acted within the range of reasonable responses will turn upon the facts of the case, with factors of particular relevance being what the employee asked for and whether he/she challenged the scores awarded to him/her (**Camelot Group Plc v Hogg (UKEATS/0019/10/BI) (13 October 2011, unreported)**).
90. Determining the pool from which those employees to be made redundant are selected is principally a matter for the employer and it will be *difficult* for an employee to challenge it when the employer has *genuinely applied his mind to the question (Taymech Limited v Ryan (UKEAT/663/94) (15 November 1994, unreported)*.
91. The tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy. The question for the Tribunal is whether the pool adopted by the employer was one which a reasonable employer could have adopted - **Capita Hartshead Ltd v Byard [2012] ICR 1256, [2012] IRLR 814**).
92. It is largely for the employer to decide how and whether to reorganise his business, and to decide whether requirements for employees to carry out work of a particular kind have ceased or diminished, but an employer must act on reasonable information reasonably acquired – **Orr v Vaughan [1981] IRLR 63**.

Conclusions

What was the reason (or the principal reason) for dismissal and did the respondent act reasonably in dismissing the claimant for that reason.

93. I am satisfied that the respondent has proved that the reason or principal reason for the claimant's dismissal was redundancy, which is a potentially fair reason for dismissal. It was not in dispute that the respondent was in financial difficulties and that cost savings had to be made. The claimant gave evidence that he understood that more than most and he participated in the staff-wide consultation by making his own proposals for cutting costs. The Directors undertook a preliminary budget review followed by a strategic budget review to determine how best to address the budget deficit. They carefully explored the options available and fully considered the claimant's proposals, incorporating them into one of those options, Budget Option A. Ultimately, a majority vote was passed to proceed with Option B which put the claimant's role of Gallery Co-ordinator at risk. The definition of redundancy does not solely include situations where the duties associated with a role have diminished but can include a redistribution of work such as to render a particular role redundant (absorption). In short, an employee can reasonably be made redundant as a result of reorganisation. It is not for me to investigate the commercial decisions of the respondent and it was entitled to reorganise its business in the way that it did. It had been decided that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished. The claimant's dismissal was wholly attributable to that fact.
94. I am satisfied that the meeting in February 2020 (and the events that precipitated it) was entirely distinct and had no bearing on the decision to dismiss the claimant. Laura Laffler's evidence that dismissal would have happened in October had that been the intention was especially convincing. It is also pertinent that Laura Laffler looked into the possibility of furlough being an alternative to redundancy and that the Directors voted unanimously to take advantage of the scheme when it was thought to be available. These are not the actions of an employer intent on dismissing someone under the guise of redundancy but for some ulterior motive.
95. Applying the 3-stage test in *Safeway Stores v Burrell* –
- It is agreed that the claimant was dismissed.
- I have concluded that the requirements of the respondent's business for employees to carry out the work of Gallery Co-ordinator had ceased or diminished or were expected to cease or diminish by virtue of the decision reasonably taken by the respondent to reorganise its business in the way that it did.

I have concluded that the dismissal of the claimant was caused wholly or mainly by such cessation or diminution.

96. It was within the band of reasonable responses to dismiss the claimant for that reason.
97. The alternative proposition, SOSR being the reason for dismissal, does not fall to be further considered in the circumstances.

Did the respondent warn and properly consult the claimant about the redundancy situation.

98. The respondent warned the claimant of the prospect of redundancy by way of letter on 22 April 2020. Consultation meetings were held at which the claimant was invited to put forward his suggestions for avoiding redundancy. However, I have concluded that the consultation process was flawed. At no stage did Bryan Dixon disclose to the claimant that the list of duties drawn up by Peter Scott formed the basis for the pooling decision. Even in the face of direct questioning by the claimant about the reason for his being placed in a pool of one, the information was not provided. Instead, the discussions were heavily centred around the budget deficit faced by the respondent which may have helped the claimant challenge the commercial need for redundancy had he been so minded but did not help him to understand at all and challenge the basis for his selection personally.
99. Consultation was inadequate because what the claimant was told about the basis for his selection was completely at odds with the reality of the situation. The reality was that Bryan Dixon and the other Directors did not consider the claimant's role comparable to, or interchangeable with, that of the other PAYE members, Peter Scott and Laura Laffler, or that of Dean Chapman for that matter. It had been decided that their skills needed to be retained and that the administrative functions at the core of the claimant's role could be absorbed elsewhere. I have concluded that it was outside of the band of reasonable responses for the respondent to withhold from the claimant crucial information that formed the basis for his selection in that it deprived him of the opportunity to properly understand and challenge the findings.

Was placing the Claimant in a pool of one within the range of reasonable responses.

100. I have reminded myself that determining the pool from which employees are selected is principally a matter for the employer and it will be difficult for an employee to challenge it provided the employer has genuinely applied his mind to the question. I have carefully considered the reasoning of the respondent to determine if he did genuinely apply his mind to the issue of who should be in the pool and

have remained cognisant of the need to avoid substituting my own view of what should have happened. It is not about whether the fairest approach was taken but whether the pool adopted was one which a reasonable employer could have adopted.

101. I am satisfied that the respondent did genuinely apply his mind to the question and that the pool adopted was one which a reasonable employer could have adopted. Notwithstanding that the information was not shared with the claimant, it was perfectly reasonable for Bryan Dixon to rely upon information provided by Peter Scott about what responsibilities each of the Gallery team members had at the relevant time. As I stated in my findings, Peter Scott was reasonably perceived as Gallery Manager, whether or not he had that title formally bestowed upon him. He had significant experience of the Gallery's operations and, up until a matter of days prior to producing the list of duties, had been the Director with responsibility for the Gallery.
102. On the information available to Bryan Dixon, from his own knowledge and coupled with that provided by Peter Scott, it was not outside of the band of reasonable responses for him to differentiate between the roles of the Gallery team members and to prioritise the skills he deemed important to retain. Nor was it outside of the band of reasonableness for the respondent to decide against pooling Peter Scott or Laura Laffler with the claimant on the basis that the claimant may have the capacity to undertake functions they were responsible for. It seems to me that an employer is reasonably entitled during a time of financial instability to choose to retain staff who have already demonstrated the ability to perform certain functions rather than to take a chance on someone who has not yet demonstrated that ability.

Was there a fair selection criteria and was it fairly and reasonably applied

103. I have concluded that the basis for selection was not outside the band of reasonable responses as set out above.
104. The reason for selection given to the claimant during the second consultation meeting suggested that there had been automatic assumption on Bryan Dixon's part that because the claimant's role had to go the pool should include him alone. Such assumption would have been cause for concern but in reality there had been no such assumption made. Bryan Dixon would have had no reason to go to the trouble of asking Peter Scott to draw up a list of duties to see if there was any differentiation between Gallery team members if that had been the case.

Did the respondent consider alternative employment.

105. Alternative employment was considered and ruled out, seemingly for a number of reasons. It would have been misguided had the respondent

ruled it out solely on the basis of it involving a reduction in status or pay. It is true that any offer of employment would need to be 'objectively' suitable if the employer was seeking to avoid making a redundancy payment. That was not the situation here. As far as unfair dismissal is concerned, where an employee makes it clear he would take a reduction in pay, as the claimant did here, the respondent should consider offering him an available role. An employer is entitled however, in a forward looking manner, to consider the employee's ability to perform the role and may reasonably decide to undertake an interview process.

106. I have concluded that it would have been within the band of reasonable responses for the respondent to determine that an interview process should be undertaken for the Audience Development role. The respondent had received independent advice that audience development was a skills gap within the organisation and I have concluded that it could not be criticised for deciding that interviews were called for rather than making a sideways move to avoid the claimant's redundancy. The claimant was invited to apply for the role when it became available in the future.
107. That is not however, the decisive factor in relation to the reasonableness or otherwise of the employer's actions regarding this aspect of the case. The simple fact is that the role was not available at the time of the claimant's dismissal, nor did it become available until some considerable time afterwards. The recruitment process did not begin until August 2020, well after the claimant had been dismissed. This was for entirely valid reasons considering the uncertainty around funding together with the impact of the Covid-19 pandemic.

Did the respondent follow a fair procedure and was dismissal reasonable in the circumstances of the case, in particular was dismissal within the range of reasonable responses.

108. Although this was agreed as a separate issue at the outset, I take the view that it has largely been addressed already. Aside from the consultation being inadequate in terms of the claimant not having the information that formed the basis for his selection disclosed to him, I have concluded that a fair procedure was followed. The claimant had advance warning of the prospect of redundancy, 2 consultation meetings were held, the respondent spent time genuinely considering representations made by the claimant following the meetings and an appeal hearing was offered but was not taken up by the claimant. In the dire financial situation it found itself in and having thoroughly considered options available to address the budget deficit the respondent acted within the band of reasonable responses dismissing the claimant for reason of redundancy in the circumstances of the case.

Would the claimant have been fairly dismissed in any event if a fair procedure had been adopted.

109. Having found procedural unfairness in terms of the consultation process being inadequate, I had to consider the likelihood of the claimant being dismissed in any event but for the procedural flaw. There was in my view a 100% chance that the claimant would have been dismissed had a fair procedure been followed. Disclosure of the list of duties compiled by Peter Scott would have simply accelerated the drawing up by the claimant of his own list of responsibilities. The claimant's list is a more comprehensive breakdown than that provided by Peter Scott but it only serves to endorse the belief held by Bryan Dixon at the time. The disparity in roles and responsibilities that influenced the respondent's decision remain evident. Accordingly any compensatory award should be reduced by 100% in line with the principles set out in Polkey.
110. The claimant was unfairly dismissed but is not entitled to any compensation as a result.

Employment Judge Moss

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

23 August 2021

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