EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Lewis**

Respondent: **Cognita Schools Limited**

Held at: **East London Hearing Centre (by Cloud Video Platform)**

On: **27 August 2021**

Before: **Employment Judge Henderson (sitting alone)**

Appearances
For the claimant: Mr M Lewis (Claimant's husband)
For the respondent: Ms K Hosking (Counsel)

RESERVED JUDGMENT

The claim for unfair dismissal does not succeed and is dismissed.

REASONS

1. This was a claim for unfair dismissal (under section 94 of the Employment Rights Act 1996 – the **ERA**) and an enhanced redundancy payment brought by the claimant on 1 March 2021. The claimant was employed by the respondent group (which runs 13 Montessori schools) at the Oakfields School in Upminster Essex (the **School)** as a part-time After School Care Assistant. The claimant's employment began on 3 September 2015 and ended on 8 December 2020, when she was dismissed for redundancy.

The Issues

2. At the commencement of the hearing I clarified with the issues for determination in this case. These were as follows:

> -Was there a genuine redundancy? The respondent said that the reason for the dismissal was redundancy, which was a potentially fair reason (section 98 (2)

ERA). The claimant did not accept that the definition in section 139 (1) (b) (ii) was met in her case; namely that the requirements of the respondent for employees to carry out work of a particular kind in the place where she was employed (the School) had ceased or diminished or were expected to cease or diminish;

-Was the dismissal reasonable in all the circumstances? The claimant said that the dismissal was not reasonable within the meaning of section 98 (4) in that: (i) the consultation was not genuine as the outcome was a foregone conclusion; (ii) the appeal was unfair as it had been carried out by the Head Teacher Ms Carroll, who would have already approved the business case for the redundancies and so did not have an open mind and (iii) that the respondent had not implemented the option of retaining the claimant on the Government's Furlough Scheme which would have continued her employment until end September 2021. The respondent relied (in the Grounds of Resistance) on a **Polkey** argument that in the light of any finding of procedural unfairness, the claimant would have been dismissed in any event;

-Enhanced Redundancy Payment? The claimant said she was entitled to an enhanced redundancy payment (which was an implied term in her contract of employment). Ms Hosking initially raised an objection to this issue on the ground that breach of contract had not been pleaded in the ET1 and this was a late amendment. I noted that paragraph 19 (c) (i) of the Grounds of Resistance denied any contractual entitlement to a redundancy payment. This suggested that the respondent was prepared to deal with this point and there would be no prejudice to them in proceeding with it. The issue would be dealt with at this hearing.

Conduct of the Hearing

3. The hearing was listed for one day and was conducted using the Cloud Video Platform (CVP). There were some connection/technical problems at the commencement of and during the hearing (including those of the Tribunal clerk – who was unable to join the hearing). Generally (other than the clerk) all the relevant parties were able to participate by reconnecting.

4. At the commencement of the hearing, I flagged to Ms Hosking that during one of the breaks required for technical issues, I had accessed the School's website and noted that under the section headed "School Life" the website offered the provision of the Breakfast and After School Clubs. I said that I had done so because the final paragraph of Mr Wootton's statement said that the School's website no longer included a reference to Wrap Around Care. I accordingly, allowed Ms Hosking an opportunity to take instructions prior to Mr Wootton giving his evidence.

5. The parties had lodged an agreed electronic bundle of documents (154 pages): page references in these reasons are to that bundle. The tribunal heard evidence from the claimant and Ms Christine Scott (on her behalf) and from Bradley Wootton (HR Business Partner) on behalf of the respondent.

6. Mr Lewis, who confirmed that he was familiar with the Tribunal process and employment law generally, objected to the fact that the respondent had not called Ms Makwana (Business Manager) or Ms Carroll (Headteacher who heard the appeal) to give evidence. I pointed out that he could raise that point and draw any adverse conclusions from that in his submissions to the effect that the respondent had not made out its case.

7. The witnesses adopted their written statements as their evidence in chief. The Tribunal was assisted by oral submissions from both parties' representatives. The hearing concluded at 4:35 PM and judgment was reserved.

The Relevant Law

8. The relevant statutory provisions are sections 94; 98 (4) and 139 of the ERA.

9. The Tribunal was referred to the following cases by the parties' representatives (although no copies of the authorities were provided): **Williams v Compair Maxam [1982] IRLR 83; Polkey v AE Dayton Services [1988] ICR 142 (HL); Mhindurwa v Lovingangels Care Limited (ET 3311636/2020); Handley v Tatenhill Aviation Limited (ET 2603087/2020);**by the respondent and **Mental Health Care (UK) Ltd v Biluan and another UKEAT/0248/12; Rowell v Hubbard Group Services Ltd [1995] IRLR 195; Ladbroke Courage Holidays v Asten [1981] IRLR 59 and Orr v Vaughan [1981] IRLR 63** by the claimant.

Findings of Fact

10. The Tribunal will only make such findings of fact as are relevant for determination of the issues set out above.

11. The School's Wrap Around Care Service had been provided by means of a Breakfast Club (7:30 AM to 8:30 AM) and After School Care (end of class until 5:50 PM). The claimant worked as an After School Care Assistant on Monday-Friday from 3-6 PM during term time (being 171 school working days and totalling 15 hours per week). This was confirmed in the claimant's contract of employment (pages 38-43).

<u>The claimant's contract/enhanced redundancy payment</u>

12. The claimant accepted that her contract of employment made no express reference to any enhanced redundancy payment. In his evidence, Mr Wootton was referred to the contents page of the respondent's employment Handbook at pages 87-91 (the parties had not provided copies of the relevant extracts). He said that he could not recall the exact details of the section relating to "leaving" but believed it set out the payments paid to an employee on termination, such as outstanding wages; holiday pay etc. He did not believe there would be any reference to an enhanced redundancy payment in that section. Mr Wootton said that there was no written redundancy policy for the School or the respondent group.

13. Both the claimant and Ms Scott said in their evidence that in the past, the respondent had paid more than the statutory minimum to employees who were made

redundant. The claimant's case was that this practice constituted an implied term in her contract.

14. Mr Wootton said (at paragraph 14 of his statement) that all respondent employees made redundant from September 2020 onwards had received only a statutory redundancy payment. In his oral evidence, Mr Wootton said that prior to September 2020 the respondent group had made redundancy payments over the statutory limits, for example paying a full, uncapped weekly wage rather than the maximum specified. He said that this had been done in situations where the respondent was required to select employees from a redundancy pool and the payments had been offered as an enhancement for individuals to come forward for voluntary redundancy. This was at other schools within the respondent group but not at the School (Oakfields).

15. There was no selection process at the School in November/December 2020 as all employees in the After School Care group were being made redundant. Mr Wootton also confirmed that this was the first set of redundancies made at the School, as opposed to at other schools within the respondent group. This was also mentioned by Ms Makwana at the second consultation meeting on 23 November 2020. She also noted that the pandemic had an adverse financial impact on the School ie the need to offer substantial discounts to parents; freezing of fees and a significant reduction in the pupil roll.

16. Mr Wootton was clear in his evidence that there was no contractual term (express or implied) in the contract of employment; nor was enhanced redundancy in any way a contractual benefit. The claimant in her oral evidence accepted, in her own words, that the enhanced redundancy payments previously made by the respondent were "their choice; their discretion" to reward loyal employees.

17. Given the evidence of both Mr Wootton and the claimant herself, I find that there is no contractual entitlement to an enhanced redundancy payment. Such payments as had been made by the respondent at other schools within the group were not shown to be a sufficiently established practice to constitute an implied term.

<u>The redundancy decision-maker</u>

18. Mr Wootton's evidence was that the decision on redundancies was that of the School's Business Manager, Ms Gita Makwana, with input from himself and with approval from Daniel Ratcliffe (the Chief Financial Officer). The claimant accepted that her contract of employment named the Business Manager as her immediate line manager.

19. Mr Wootton said that whilst Ms Carroll had input into the discussions about the closure of After School Care, she had not actively participated in, nor made, the final decision on the redundancies.

20. I agree with the claimant's observations in her evidence and the submissions made on her behalf that it is implausible that the Headteacher would not be involved in such a decision. However, I also note that Wrap Around Care is not strictly part of the

School's educational curriculum but an enhanced service provided for parents; this is supported by the fact that all the employees in this service were not qualified teachers.

21. Therefore, I accept (on a balance of probabilities) the respondent's evidence that the decision to close the Wrap Around Care was effectively a business (and not an educational) one.

The redundancy consultation process

22. It is not disputed that the School's Wrap Around Care Service was closed in March 2020 following the Covid-19 pandemic and the impending Lockdown. The claimant was placed on Furlough (the Government Coronavirus Job Retention Scheme) from 1 April 2020. There were several extensions and the claimant remained on Furlough until her dismissal in December 2020.

23. On 27 October 2020 Ms Makwana produced a Business Case proposal (pages 50-53) concerning the restructure of Wrap Around Care. This was based on two parent surveys conducted in or around summer and September/October 2020. It was also following changes in Safeguarding regulations which required a higher ratio of qualified: unqualified staff in the Wrap Around Care service and the requirement for specific "class bubbles" as a result of the Covid-19 restrictions. The proposal concluded that the School would not be able to re-open the Wrap Around Care services. The proposal set out an intended timetable for consultation with the staff on redundancy, which would commence on 30 October with suggested notices of termination issued on 10 November 2020. The proposal noted that sign-off was required from Mr Ratcliffe, CFO.

24. There was also a Wrap Around Care Review document in the form of slides (pages 44-49). This contained graphs which showed the decline in uptake for the After Care service following the surveys.

25. The employees were notified at an initial group consultation meeting on 17 November 2020 that they were at risk of redundancy and told there would be individual consultation meetings held with them commencing on 19 November 2020 (pages 54-55). The claimant attended three individual consultation meetings on 19 November, 23 November and 8 December 2020. These were held using Zoom/remote means. Following that final consultation meeting, the claimant was dismissed with effect from 8 December; she received statutory redundancy pay of £947.18 and 5 weeks' full notice pay (Termination letter at pages 74-75).

26. At the claimant's first individual consultation meeting (pages 56-58) Ms Makwana summarised the rationale contained in the Business Case proposal (although she did not give the claimant a copy of that proposal) and said that the long-term commercial viability for the provision of Wrap Around Care was "not clear".

27. The claimant said that she took this to mean that the School was unsure whether or not the service was commercially viable; Mr Wootton said that he understood this to mean that the School did not believe that the service was commercially viable. Given the fact that the meeting was clearly expressed for the purpose of discussing proposed redundancy and suitable alternative roles, I find it

disingenuous of the claimant to suggest that she did not understand the true purpose/context of the consultation meeting and the nature of the School's proposals. This is supported by the fact that Ms Makwana clearly stated at that first meeting, that the proposal was that the claimant's role would be made redundant as of 3 December 2020.

28. The claimant complains that comments such as this and the nature of the proposed timetable indicated that the respondent had reached a foregone conclusion of the redundancies and that the consultation was not a genuine one. Mr Wootton said that the purpose of the consultation was to hear any comments or suggestions from the employees, but was predominantly to discuss whether there could be any mitigating factors, such as alternative employment.

29. A second consultation meeting took place on 23 November 2020 (pages 60-64). At this meeting the claimant raised the issue of enhanced redundancy pay and the respondent's position was summarised (as set out above) by Ms Makwana. Following questions from the claimant, Ms Makwana again explained the outcome of the surveys and shared on the screen copies of the graphs contained in a Wrap Around Care Review documents (pages 44-49). These showed a low interest in the After-School club and that, combined with the compliance issues of ensuring a ratio of qualified: unqualified staff, had led to the decision to close the service.

30. The claimant raised the issue of whether the service might be reintroduced at a later stage but Ms Makwana said that the School could only look at the current case and that it was difficult to predict future interest. The claimant raised the possibility of remaining on the furlough scheme as this only cost the School around £5 per week and as the redundancies would be very near to Christmas.

31. Ms Makwana accepted that it was difficult to be made redundant shortly before Christmas but noted that there was a cost to the School (albeit minimal) to use the scheme. The claimant also observed that the Wrap Around Care service was still being advertised by the School in its prospectus and on the website. Ms Makwana noted that no final decision would be made until the consultation process had been completed. The claimant raised again the lack of a redundancy policy.

32. The third and final consultation meeting took place on 8 December 2020 (pages 68-72). At this meeting the claimant was allowed to have her husband present and to confer with him although he was not allowed to represent her as such.

33. The claimant again expressed her scepticism that the Wrap Around Care service would not return. Ms Makwana repeated that she could not confirm whether or not this would be the case. The claimant repeated that she believed it was unfair to make her redundant two weeks before Christmas especially when she could continue on the furlough scheme. Ms Makwana showed the graphs indicating the decline in interest in the After Care service. The claimant asked various questions about the graphs and the surveys.

34. At the end of the meeting the claimant was told that her employment would end on 8 December and she would receive a termination letter confirming the payments

due to her and also her right of appeal. The termination letter (pages 74-75) confirmed that the right of appeal was to Ms Carroll.

35. The claimant appealed her dismissal on 14 December 2020 (page 77-78). The grounds of appeal were the 1) lack of any redundancy policy which meant the claimant was unable to assess whether she was being treated unfairly; 2) failure to make an enhanced redundancy payment; 3) the refusal to allow the claimant to continue on the furlough scheme instead of being made redundant 4) lack of provision of information on the schools financial position/business case justifying the redundancies; 5) the claimant's belief that the Wrap Around Care service would re-open in 2021 and 6) a repetition that the School could extend her employment under the furlough scheme and should not make her redundant so close to Christmas.

36. The appeal meeting was held on 8 January 2021 (pages 80-83). The claimant accepted in her oral evidence that she had at no stage objected to Ms Carroll hearing the appeal, given that she had been notified of this in her termination letter. The claimant said that she believed it was all a foregone conclusion and that the appeal would make no difference which was why she had raised no objections.

37. The claimant accepted that the matters raised in her appeal letter were discussed in full at the appeal meeting. The appeal outcome (pages 84-85) was sent to the claimant on 18 January 2021. Her appeal was not upheld, other than her point on not being provided with the supporting financial information.

Genuine Redundancy

38. The claimant's case was essentially that on the basis of the financial information available to the School, the respondent could not have reached the decision to make redundancies in the Wrap Around Care service. She said that the downturn in demand was inevitable given the pandemic, but that she believed there would be an upturn in the future, once the effects of the pandemic had subsided. However, the claimant accepted in her oral evidence that she had no objective evidence to support this assertion.

39. Ms Scott gave evidence that whilst walking her dog, she had met someone who told her that the School was considering using an agency to run the After School clubs, which would be a more economic method. She also believed that the School had no intention of permanently ending the service, and was simply waiting until the resolution of the Tribunal proceedings before recommencing the service. Both of the claimant's witnesses reiterated the fact that the School's prospectus and the website had not removed the reference to provision of a Wrap Around Care service, which was they said, significant.

40. Mr Wootton's evidence was that the School was unable to update the prospectus at short notice due to lead times on submission to the publishers, print runs etc. he corrected his written witness statement as regards the website but reiterated that prospective parents were notified that the service was no longer offered, though no documentary evidence of this was presented by the respondent. Mr Wootton stressed that the service had not been provided since March 2020 and said that it was

"not anticipated that the service will return for the foreseeable future". He also noted that the School may well be looking to hire out the School's facilities to third-parties in the evenings and obtain income by that means.

41. I accept that the claimant has shown that the school has not amended either its prospectus or its website and Mr Wootton's explanation for this was not a plausible one. Even if correct on the long lead times with printers, it would have been possible to include "Errata slips" with prospectuses to explain the removal of the service (which he did not say had occurred) and an alerter heading could be added to the website to note the change.

42. However, it was not disputed that the school had not actually provided a Wrap Around Care service since March 2020 and was not providing such a service as at the date of the Tribunal hearing. Further, there was no objective evidence presented to the Tribunal to indicate that there was any intention not to provide the service in the future, other than to draw an inference from the failure to amend the prospectus/website.

43. The claimant accepted in her oral evidence that her views were based on speculation and rumour, as was Ms Scott's evidence that the school intended to use an agency. On that basis. I find that the claimant has not shown on a balance of probabilities that there is a real, current intention to re-open the Wrap Around Care facilities.

44. I also find that the School has shown a plausible business case to justify a restructuring/closure of the Wrap Around service. It was accepted by Ms Carroll that the details of the background financial information had not been fully disclosed to the claimant during the consultation process; however, that does not negate the basis of the School's decision to make redundancies.

45. The claimant accepted in her oral evidence that she had no business experience herself in running/managing a school. Her belief that the After Care Service was commercially viable was based on her own observations of what she described as the "profits" taken at the end of a week, when she was working. In fact, this was the income from the service (which the claimant subsequently accepted) and she also acknowledged that she had no information about the overhead costs of running the service and so could not be sure of the actual profit figures and whether they differed from the forecasts provided in the Business Care Proposal.

Conclusions

Genuine Redundancy

46. It is generally not open to tribunals to "second guess" a business decision by an employer to make redundancies. (***Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298***, ***[1977] ICR 117***, and the **Court of Appeal in *James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386*, *[1990] ICR 716*.)** In **Tipper**, the Court of Appeal concluded that whilst it could be argued in principle that the courts ought to have that power to decide whether the employer was justified in implementing

redundancies, as a matter of law it was not open to the court to investigate the commercial and economic reasons prompting the closure.

47. Two earlier EAT decisions (cited to me by Mr Lewis) had indicated that to a limited extent the courts may be willing to question a redundancy decision. ***Ladbroke Courage Holidays Ltd v Asten*** **[1981] IRLR 59** and ***Orr v Vaughan*** **[1981] IRLR 63** However, these cases must be viewed as doubtful authority in the light of **Tipper**, and are certainly inconsistent with the current position demonstrated by the decision of the EAT in ***Berkeley Catering Ltd v Jackson*** **UKEAT/0074/20** *(unreported)*, that the existence of a redundancy situation is one of fact, unaffected by what may or may not have been the employer's motivation. Where there are allegations that a redundancy was being used cynically to get rid of employees, that is to be dealt with by concentrating on whether the redundancy was the real reason for dismissal and/or whether the dismissal was unfair, *not* by stretching the basic concept of 'redundancy' itself, which is an objective concept.

48. Based on the findings of fact and the case law set out above, I find that the redundancy situation was a genuine one.

Reasonableness – section 98 (4)

Genuine Consultation

49. In ***Williams v Compair Maxam Ltd*** *[1982] IRLR 83*, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). These principles (where selection for redundancy is not an issue) included:

> -The employer will seek to give as much warning as possible of impending redundancies so as to enable [the union and] employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> -The employer will consult [the union] as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible.
>
> - The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

50. Moreover, whilst accepting that there were no invariable rules as to what consultation involved, the tribunal stated that so far as possible it should comply with the following guidance given by Glidewell LJ in the case of ***R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price*** *[1994] IRLR 72*, at [24]:

'It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is

consulting. Fair consultation means:(a) consultation when the proposals are still at a formative stage;(b) adequate information on which to respond; (c) adequate time in which to respond; (d) conscientious consideration by an authority of the response to consultation."

51. On the basis of those tests, I find that the consultation was reasonable and genuine in the circumstances. As with the majority of consultations for redundancy, the commercial /financial imperative is already well underway and would only be altered if the employees could present another way of restructuring/saving money etc.

52. In this case the respondent met the tests set out in **Williams v Compare Maxam and R v British Coal:** there was advance warning of nearly 3 weeks (which is 9 days short of the 30 days needed for collective consultation where there are 20 or more redundancies); the views of the employees were heard and considered, if not strictly adhered to; the claimant accepted that she was offered the opportunity to apply for a midday assistant role, but felt that it was not a suitable role for her as it was less pay (for fewer hours) and the timing of the role did not suit her.

53. I find that the consultation was fair and reasonable in all the circumstances.

The appeal

54. I have accepted (on a balance of probabilities) that Ms Carroll had not been formally involved in the decision to make redundancies and do not find that her decision on the appeal was "tainted" by any earlier involvement in the decision to close the After Care Service.

Use of the Furlough Scheme

55. The claimant's main argument on unfairness was that she should have been retained by use of the Government's furlough scheme and kept in employment until end September 2021, when that scheme is withdrawn. There was minimal cost to the employer to do so and it would have avoided her being made redundant just before Christmas.

56. In her oral evidence, the claimant said that she had been a loyal and productive member of staff (which was not in dispute) and that she believed that the respondent had "jumped the gun" in deciding to close the Wrap Around Care service. If they had waited for longer, things would have improved and they could have (and she believed intended to) resumed the service. They could have used the furlough scheme to maintain her employment over this period.

57. Ms Hosking referred to two first instance ET decisions on whether failure to use furlough could make a dismissal unfair: **Mhindurwa** and **Handley** (see Relevant Law above).

58. In **Mhindurwa** the EJ held that employers have a duty to actively consider furlough to avoid dismissals for redundancy. In that case, the EJ said that although the employer had no work for the employee at the time of the dismissal (in July 2020) it had no way of knowing if that was going to change. In that sense, this is possibly an

extension of the duty to consider ways of mitigating the employee's situation and avoiding dismissal.

59. In **Handley** the EJ decided that it was for the employer (and not the Employment Tribunal) to decide how to structure its business and to decide whether to make redundancies. The decision to dismiss the employee notwithstanding the existence of the furlough scheme, did not render the dismissal unfair.

60. Neither decision is technically binding on this Tribunal. I note that the Furlough Scheme was introduced to avoid the need for redundancies where employees could not carry out their jobs because of the pandemic/lockdown. There is no legal right for an employee to be put on furlough. The **Mhindurwa** case said that employers should consider furlough as a means to avoid dismissal (and this is also mentioned in the ACAS "Redundancy map"). However, the case did not say that employers must do so. **Handley** followed the established principle that Tribunals must not substitute their own view on the employer's decision, but should look at the reasonable range of responses open to an employer.

61. In this case, the claimant had already been on furlough since the inception of the scheme in April 2020. The employer considered the possibility of retaining the staff on furlough but given the view that the demand for the After Care service had diminished (even after the School reopened in September/October 2020) and that it was no longer commercially viable, it decided not to extend furlough. At the time of the dismissal in December 2020, it was not known that the scheme would extend beyond March 2021.

62. Ms Makwana's explanation to the claimant in the consultation meetings was that retaining her on furlough was done at an ongoing cost to the School – though this was only around £5 a week. Mr Wootton's evidence on this point was more public-spirited in that he noted that this was essentially a public-funded scheme and putting the claimant on furlough would not have changed the decision to make the redundancies, so could be seen as a misuse of the scheme.

63. I accept that it would not be appropriate to use the furlough scheme to retain employees who would otherwise be redundant, regardless of lockdown/the pandemic. The claimant believes that the After Care service will be resumed, possibly by use of agency workers, but as mentioned above, there is no objective evidence to support this belief (however genuine it may be). On that basis I find that failure to retain the claimant on the furlough scheme did not render the dismissal unfair.

64. The dismissal was procedurally fair and reasonable in all the circumstances, for the reasons set out above. Even if I were wrong on this point, I would find that the dismissal would be inevitable even if a proper procedure were to be followed, and so on the **Polkey** principle, compensation would be reduced to nil in any event.

Enhanced Redundancy Payment

65. Based on the findings of fact set out above, I find that there was no contractual (or other) entitlement to enhanced redundancy pay.

66. The claim for unfair dismissal does not succeed.

Employment Judge Henderson
Date: 2 September 2021