# EMPLOYMENT TRIBUNALS

**Claimant** **Respondent**

v

Mrs Ewa Phillips Avis Budget Services Ltd

**Heard at**: Watford by CVP **On**: 8 July 2021
**Before:** Employment Judge Anderson

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Mathew Purchase QC

## JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.

## REASONS

### Claim and Issues

1. By a claim form presented on 19 May 2020 the claimant complained of unfair dismissal by way of an unfair redundancy process which led to her dismissal on 8 April 2020.

2. The respondent filed a response on 5 July 2020 resisting the claim.

3. No list of issues for the tribunal to determine having been agreed between the parties, the following list was agreed at the outset of the hearing:

    a. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent relies on redundancy.

    b. Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant, in all the circumstances of the case?

c. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*.

**The hearing**

4. I received from the parties an agreed bundle of 205 pages, a skeleton argument and authorities bundle from the respondent, and a document entitled 'Claimant's Counter Argument' which was the claimant's response to the respondent's skeleton argument. In addition, I received four witness statements. One was the claimant's statement. The respondent submitted witness statements from Brandon Clark, Gemma Hathway and Naomi Smith. All of the witnesses attended the hearing and gave evidence.

5. Mr Purchase made an application on behalf of the respondent to exclude evidence of pre-termination negotiations. The evidence was included at pages 190-205 of the bundle. Mr Purchase said that the evidence was inadmissible under s111A(1) of the Employment Rights Act 1996. Ms Phillips said that she believed it was admissible under S111(A)(3) and that the without prejudice rule would not apply. I found that s111A(1) did apply and the evidence was inadmissible. S111(A)(3) applies to dismissals which are automatically unfair. Redundancy is not an automatically unfair reason for dismissal. As the material is inadmissible under s111A(1), it is irrelevant whether the without prejudice rule applies. I advised the parties that I had been alerted to the application before I viewed the bundle and had not read pages 190-205.

6. Further matters were raised with me by the parties about preparation deadlines, late evidence and amended witness statements. Both parties had had sufficient time before the hearing to consider all evidence disclosed and made in witness statements. Whilst I noted the points raised, I was satisfied that no further action was necessary.

**Relevant Findings of Fact**

7. The claimant worked as an auditor for the respondent (a vehicle rental service) from 11 September 2017 until her dismissal on 8 April 2020.

8. In a series of all staff emails dated 14 October 2019, 27 February 2020 and 12 March 2020 the respondent's International President set out that the respondent was facing challenges in its profitability and needed to adapt to meet those challenges.

9. On 13 March 2020 the claimant's manager and Senior Director of Internal Audit, Brandon Clark, advised the respondent's Chief Financial Officer that he would be reducing the number of staff in the Internal Audit team by seven,

including the claimant. His decision was to remove six specialist auditor roles. The claimant was a specialist auditor in IT.

10. One international auditor identified for redundancy also worked in the finance department in the country in which she was based. That person moved to the finance department.

11. On 18 March 2020 the respondent sent an email to all Northern Regional and International HQ employees, which included the claimant, inviting applications for voluntary redundancy. The claimant did not apply for voluntary redundancy.

12. On 27 March 2020, Naomi Smith, HR Business Partner wrote to the claimant confirming that her role was at risk and inviting her to a consultation meeting on 30 March 2020.

13. At the meeting on 30 March 2020 the consultation process and purpose were set out, as were the reasons for the redundancy process, including that IT audit was being centralised in the US. The claimant raised a number of queries about the process and suggested alternatives to redundancy. Some responses were provided at the meeting and others deferred until the respondent had obtained the relevant information. The minutes of the meeting were set out in detail in a document provided to the claimant after the meeting. The deferred answers were provided in an email from Naomi Smith to the claimant on 31 March 2020, in which email the claimant was offered a follow up meeting.

*14.* On 1 April 2020 the claimant emailed Ms Smith and stated as follows: '*It seems clear to me that ABG is not serious about resolving this redundancy dispute. You have closed every suggestion I made (relocation, government contingency plan and other suitable alternative role within the wider business area) and you are even unaware of the terms of my contract.'*

15. On 2 April 2020 Ms Smith replied *'The consultation period is ongoing and we continue to discuss and answer your questions.'* Ms Smith offered a further consultation meeting. The Claimant responded that she would prefer to continue discussion by email.

16. Correspondence between Ms Smith and the claimant continued until 6 April 2020 when the claimant confirmed that she had no further questions.

17. On 8 April 2020 Ms Smith wrote to the claimant confirming that she was dismissed by way of redundancy, effective 8 April 2020. The claimant appealed against that decision the same day. Her grounds of appeal included that the respondent had made a decision about the claimant's redundancy before consultation began and that the consultation was a one-way street in which all of the claimant's proposed options were dismissed.

18. An appeal hearing took place on 15 April 2020. Notes of the meeting were taken and provided to the claimant after the meeting. In a letter dated 20

April 2020, but sent to the claimant on 12 May 2020, Louise Bell, the appeal manager advised the claimant in writing that her appeal was not upheld.

**Submissions**

19. Mrs Phillips said that the respondent did not follow a fair selection procedure. She should have been in a pool of all internal auditors and some auditors received preferential or different treatment. For the claimant there were no other options available because of the global recruitment freeze. No effort was made by the respondent to avoid the claimant's redundancy. Mrs Phillips said that she was an auditor of seventeen years' experience and could have performed any of the audit roles within the Internal Audit department.

20. Mrs Phillips said that there was no redundancy process described in her contract or the staff handbook and it was the respondent's duty to ensure the claimant knew what process the respondent was going to follow. The process should explain how people would be selected. She said there were repeated errors made during the process leading to her redundancy which showed that there was no process being followed and assumptions were being made.

21. In relation to redundancy under s139 of the 1996 Act, as the respondent had supported staff to work remotely for two years it could not be said that s139(1)(b)((ii) applied. Furthermore the requirement for IT audit work had not diminished during the pandemic as it is related to providing business assurance and is entirely unrelated to the volume of sales. She noted that the respondent had approved extra headcount in February 2020 as more auditors were required. She said the recruitment freeze was a temporary measure in response to the pandemic and not a change in business strategy towards the audit function.

22. Mrs Phillips said that whilst the consultation process should have been a two way street the respondent only reacted to her questions and did not answer all of them giving as an example her request to relocate to the US which she says the respondent did not properly research.

23. Mrs Phillips said that the respondent displayed negligence and a lack of a professional duty of care in handling her redundancy by failing to interpret the claimant's contract accurately in producing redundancy calculations. Furthermore, the appeal manager was under pressure to complete the appeal as she was about to leave the business, so did not give the appeal proper consideration. Additionally, the appeal manager sought assistance from HR on drafting which is evidence that the decision was not made independently.

24. For the respondent, Mr Purchase said he relied on his skeleton argument. He said that business decisions are matters for the employer to decide and not matters that the tribunal should investigate. The question for the tribunal is whether the employer took an approach within the range of reasonable responses. Mr Purchase referred to *Halpin v Sandpiper Books [UKEAT/0171/11/LA]* on the matter of pool selection, particularly

paragraphs 14, 15 and 17. He said that the respondent had identified the roles it could do without, not particular people. The respondent's approach of selecting between functions and making redundant the specific functions was not unreasonable.

25. Mr Purchase said that there were two connected and separate reasons for the redundancy process in the audit team, which were the planned centralisation of the team in the US and the pandemic which created an immediate need for cost savings. He said that both limbs of s139(1) were met in that there was reduced work and the respondent had decided that there was no requirement in the UK for a person doing the claimant's job. That is a decision open to the respondent and it was not relevant whether the claimant could have worked remotely.

26. Mr Purchase said that the respondent not having a written redundancy policy did not make the process unfair, the claimant was given plenty of notice and ample warning. It is wrong to say that the respondent did not respond to the claimant's questions or consider them carefully.

27. On the appeal Mr Purchase said it was clear on the face of the documents that the appeal manager had taken an independent view and it was normal for HR to provide advice.

28. Mr Purchase said the respondent sought a significant Polkey reduction should the dismissal be found to be unfair for procedural reasons and that the claimant had not taken sufficient steps to mitigate her losses.

**Law and conclusions**

29. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

30. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(c) that the employee was redundant. I am satisfied on the evidence that the Claimant was dismissed for redundancy.

31. It is not the role of the tribunal to consider or challenge the business decision of the respondent and I find that the respondent has satisfied s139(1) Employment Rights Act 1996 in that it has shown that the requirements of the business for an employee to carry out work of a particular kind had ceased or diminished and also the requirements of the business for an employee to carry out work of a particular kind in the place where the employee was employed by the employer had ceased or diminished and that the dismissal of the claimant was mainly attributable to that. The respondent has shown that it decided that there was an urgent need to make savings as the pandemic hit the business in March 2020, leading to a recruitment freeze and reduction in employee numbers. It has also shown

that the director of audit, Brandon Clark, had decided to centralise IT audit in the US, and no longer had a requirement for an IT auditor in the UK.

32. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair. In a case of dismissal for redundancy this involves a consideration of the redundancy process and specifically whether there was a fair process involving (i) warning and consultation (ii) a fair basis for selection, (iii) consideration of alternative employment and (iv) an opportunity to appeal (Polkey v A E Dayton Services [1987] IRLR 503). The claimant claims that none of these criteria were met. I have considered each in turn.

33. I find that there was both warning and full and meaningful consultation. On warning the respondent had set out in a series of emails dating back to 14 October 2019 that the business was facing challenges and needed to cut costs. On 12 March 2020 when the impacts of the pandemic on the business were being felt the International President warned that the business needed to accelerate streamlining and cost cutting. On 13 March 2020 Brandon Clark presented his plan for a reduction in staff numbers in the audit function to the Chief Financial Officer. On 18 March 2020, the claimant was told that her job was at risk of redundancy, and this was confirmed in writing on 27 March 2020 when she was invited to a consultation meeting that commenced a process that ended on 8 April 2020 with her redundancy. The claimant was given adequate warning in the circumstances in which the redundancy situation arose.

34. Consultation should involve (i) consultation when the proposals are still at a formative stage (ii) adequate information on which to respond (iii) adequate time in which to respond and (iv) conscientious consideration of the response to consultation (*R v Gwent County Council ex parte Bryant, [1988] Crown Office Digest p.19, R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price [1994] IRLR 72)*. The claimant was invited to and took part in a consultation once her role had been identified for redundancy. In this case only one consultation meeting took place but that was a decision made by the claimant who preferred to discuss the matter by email. Further discussions took place by email. Full information about the process was provided at the meeting on 27 March 2020 as documented in the minutes of that meeting. There is no statutory requirement for a business to have a written redundancy policy and I find that sufficient information was provided to the claimant at the meeting and in the minutes that followed to enable her to understand the process. Whilst the claimant had been identified by Brandon Clark for redundancy on 13 March 2020 along with five other internal auditors, and it is the clear intention of the respondent that those roles should be made redundant, I accept that this was an urgent matter for the business that was suddenly suffering a large financial impact due to the pandemic, and also that despite this the respondent did engage in a meaningful consultation process in which it invited queries and suggestions from the respondent and gave conscientious consideration to the claimant's responses. Brandon Clark was guided by Naomi Smith, the HR business partner, on the legal

requirements of a redundancy process in England. The claimant's proposals and questions were considered by the respondent and a response made to each. Whilst the respondent did not accept that any of the claimant's proposals were a workable alternative to redundancy, I find that it did consider each of them and this was not an exercise in which the respondent was simply going through the motions of a consultation. The alternatives proposed, namely that the claimant should be put on furlough, that she could relocate to the US or be found an alternative role, were considered and when rejected, reasons for this were given. The consultation process ended only after the claimant confirmed to the respondent that she had no further questions.

35. I find that the selection criteria used by the respondent was fair. Of 14 internal auditors six were identified for redundancy as the respondent determined that those roles could be removed without a threat to its international compliance responsibilities and/or because those roles were being relocated to the US. Brandon Clark, the respondent's head of audit made the decision that the eight auditors not identified for redundancy were carrying out work of a specific type in which they had experience and expertise. Whilst the claimant argues that there should have been a pool of all internal auditors and that she could have caried out other audit roles, I find that the respondent's decision to proceed as it did in selecting roles for redundancy was reasonable.

36. The claimant claims that she was not assisted to obtain alternative employment or alternative employment was not considered by the respondent. The respondent confirmed that there was a global recruitment freeze except for business-critical roles and that any business-critical roles were advertised on its intranet. The claimant had access to the intranet. I find that the respondent has complied with the requirements upon it in relation to considering alternative employment.

37. The claimant had a right of appeal but she claims that the process was flawed in that the decision making was rushed and the appeal manager sought advice from HR, thus calling into question the independence of the appeal manager. I find that a right of appeal was offered, and a fair appeal process was followed. There was no evidence that the decision of the appeal manager was rushed. The mere fact that she was leaving the employment of the respondent is not evidence that she was lacking in time to deal with the appeal. It is common practice for those invited to take on the role of appeal or decision manager in an internal employment matter to consult with expert HR colleagues on the process and on drafting. There is no evidence that HR offered anything more than suggestions and advice that the appeal manager could then adopt or reject as she saw fit.

38. The claimant claimed that mistakes made in the calculation of her redundancy payment and notice period are evidence of negligence and a lack of professional duty of care. Mistakes were made by the respondent which it corrected and for which it apologised. These mistakes do not make the redundancy process unfair.

39. I am satisfied that the Respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant, and the claim of unfair dismissal is dismissed.

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Employment Judge Anderson

Date: 19 July 2021

Sent to the parties on:

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For the Tribunal Office

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