Case Number 3312844/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Andrew Poole	**v**	TypeStart Limited

Heard at: Watford by CVP On: 6 August 2021
Before: Employment Judge Allen sitting alone

Appearances

For the Claimant: In person
For the Respondent: Ms Platt, Solicitor
Witnesses for the respondent: Mrs Caroline Nall – Director;
Mr William Nall - Director

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals "This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 50 pages, and witness statements of 17 pages the contents of which I have recorded. The order made is described at the end of these reasons.

RESERVED JUDGMENT

1. The claim of unfair dismissal filed on 25 October 2020 is well made and succeeds.
2. Remedy will be considered at a separate hearing at Watford Employment Tribunal by a judge sitting alone on.
3. The parties have 7 days to apply to the court if 29 November 2021 is unsuitable.

REASONS

Background

1. Mr and Mrs Nall are the Co-directors of TypeStart Limited; a print and book binding business employing 4 typesetters at the time of the claimant's dismissal. There are in fact two companies in the group; the other does not engage in typesetting work and does not feature in the redundancy considerations which are at the heart of this case. The directors relied on a NatWest Bank "mentor" to advise them on the redundancy process and HR issues. The directors' reliance on this advice was a business decision for them to make.

2. The claimant and Mrs Nall were both employed by the company before she purchased it with her husband in the early 1990s. The actual date of purchase does not affect the period of continuous employment which commenced in September 1991 (page 28 bundle).

3. All 4 of the company's employees were typesetters, whilst Mrs Nall is described as an employee Mr Nall was not; Mr Nall dealt with financial issues for both companies and liaised with the NatWest Bank "mentor"; he was not a typesetter:

   3.1 Mrs Nall - Director managed the company and ran the business; she had over 20 years' experience as a typesetter.

   3.2 The claimant, employed as a typesetter (and also acted as a general factotum) had over 20 years' experience*;* he 'acted-up' for Mrs Nall when she was not on the premises which was frequently (weekly rather than daily). If the claimant were not available to act-up in her absence then the manager of the sister company, (Julie) would cover. The claimant installed and maintained the IT system; he had also carried out plumbing, electrical and general building work (putting up partitions). (*Factotum meaning does all sorts of jobs)*

      3.2.1 The claimant's contract of employment states his job title is 'General Manager'.

      3.2.2 Mrs Nall describes the claimant's responsibilities as IT, design, printing and estimating – significantly she does not list any managerial responsibilities.

      3.2.3 Mr Nall, was unable to point to any specific managerial tasks forming a part of the claimant's role although he acknowledged the claimant knew the business better than anyone and Mr Nall deferred to him whenever he had an issue.

   3.3 Mr Thompson, 20 years' experience as a typesetter; and

   3.4 Miss Holly Briggs, a typesetter of some seven years' experience who also carried out admin tasks; she was employed to do relatively unskilled work producing orders of service for funerals.

4. The respondent has not produced evidence the claimant was responsible for any managerial tasks other than 'acting-up' for Mrs Nall in her absence.

5. I find that TypeStart Ltd had one manager; Mrs Nall; the claimant was an occasional manager with no distinct managerial responsibilities notwithstanding his job title.

6. In the period Mr and Mrs Nall owned the company the claimant received one pay rise. The parties were uncertain of when this was but all agreed it was about 10 years ago. The claimant negotiated an increase of £5,000 per year and at the time of dismissal was earning £45,000 per annum. He concedes he was paid far in

excess of the market rate for his role. He felt 'invested' (my words) in the company and said as much during the hearing.

Covid 19 Pandemic

7. The company suffered a drop off in work; 80% was suggested during today's hearing.

8. Furlough meeting 8 April 2020.

   8.1 The directors furloughed the claimant and Mr Thompson.

   8.2 The parties agree the claimant was not impressed with the amount he would receive under the government job retention scheme which was capped at £2,500. He observed he was worth every penny of his salary and wouldn't take a cut. The claimant signed for a letter setting out the terms of the furlough (not included in the bundle).

   8.3 Notes of meeting - the meeting notes were not offered to the claimant and he disputes their accuracy in so far as they state he was aggressive.

      8.3.1 When informed he was to be furloughed the claimant suggested Mr Thompson and Miss Briggs should be 'terminated' as less skilled than he.

      8.3.2 He suggested Miss Briggs should be furloughed instead of him. Mr Nall responded that Miss Briggs' job was producing funeral orders of service, a relatively unskilled job which did not generate enough income to pay the claimant's salary and it would be unfair to take her job away from her. The claimant asserts the real reason was that Mr and Mrs Nall were friendly with Miss Briggs' parents whom they held in high regard and who had significant status in the local community.

      8.3.3 Mr Nall's notes conclude the claimant's anger, attitude and aggression were unacceptable. Mr Nall gave evidence today he thought the claimant was aggressive but could not express how that was manifested. Since the claimant was not given the opportunity to agree or revise the contents of the notes at the time I give him the benefit of the doubt and accept his assertion he was not aggressive.

9. Between 8 April and 9 June 2020, the directors kept the business afloat with their own savings. They kept two employees on site; Mrs Nall (and Miss Briggs on the basis she lived nearby given the ban on unnecessary travel). Mrs Nall did not receive a salary during this period. By 9 June it was apparent the directors couldn't continue to keep the business afloat in that way and they made the decision to consider redundancies.

Selection

10. At page 36 of the bundle is an undated document entitled 'Business Redundancy Case'. Whilst it purports to evaluate each of the 4 typesetters; including the director Mrs Nall it is actually written from the standpoint of how the company could continue without the claimant. It notes the claimant's salary equates to the combined salaries

of Mr Thompson and Miss Briggs; and that since there was a significant crossover between the roles performed by the claimant and Mrs Nall, she could handle his workload. There is no meaningful assessment of the 4 typesetter roles and it concentrates more on personality.

The Consultation Process

11. On 9 June 2020 Mrs Nall telephoned the claimant and informed him the directors were considering redundancies. The claimant has no recollection of the call but does not dispute it took place. It is significant Mrs Nall accepts the call was neither pre-arranged nor did she state her purpose in calling. It was followed the same day by a letter (page 39 of the agreed bundle) headed *'warning of potential redundancies'*. Mrs Nall considered the call to be a consultation meeting however concedes she did not tell the claimant that. The references in the letter to consultations having 'commenced' and 'further' formal meeting might be taken to imply the call was a consultation but it is not sufficiently clear in my view. I give the claimant the benefit of the doubt in this instance that he was not aware the call that day was a consultation meeting.

12. The letter, signed by both directors states its purpose is to:

- Confirm consultations have commenced with the claimant and all other employees affected with the aim of preventing or reducing job losses;
- warns the claimant his role is being considered as part of that process;
- invites the claimant to put forward any proposals he may have that might avoid the need to make him redundant;
- the claimant will be invited to a further formal meeting before the process is complete; and
- invites him to raise questions with the senders.

14. The directors accept that this was a template letter provided to them by their NatWest Bank "mentor". They also accept at this stage the claimant was the only candidate for redundancy and that this was the wrong template in those circumstances. This letter is misleading because it suggests the claimant is not alone in being considered for redundancy. Whether the claimant was the only candidate or not was important information effectively withheld from him and which prevented him from considering the full extent of the reality of his situation.

15. The respondent did not remedy this by sending the correct template and explained this was because their NatWest Bank "mentor" had not advised them to do so.

13. Mrs Nall made telephone calls to the claimant on 9, 22 and 29 June 2020 in pursuance of a consultation process, each one was followed by a letter in confirmation of what was discussed, no meeting notes were included with the letters nor do the letters reflect any detail of what was discussed. Given Mrs Nall's concession that none of these calls were pre-arranged nor did she set out their purpose at the beginning of each call I accept the claimant's assertion he had no idea they were intended to be consultations. He thought they were 'keeping in touch calls' because his wife was receiving similar calls from her employer; as in fact did

many furloughed staff during this period. The letters do not state that these calls were consultation meetings, only that the consultation process has started. I accept the claimant relied on the final paragraph of the 9 June letter that he would be 'invited to a formal meeting'. No such invitation ever came.

15. The claimant accepts he had no issue in principle with formal consultations being conducted over the telephone given the pandemic but he had anticipated there would have been some formality, at least an invitation. There is no dispute between the parties that there was none.

16. The 9 June call was made from Mrs Nall's desk. She explained today privacy was achieved by asking staff to stay in another part of the premises for a few minutes. Further, on 22 June Mrs Nall concedes she made that call from the car park as she was unable to achieve the degree of privacy she felt the call warranted from her desk. That the claimant was aware she was calling from outside supports his assertion he had no idea this was intended to be a formal consultation meeting. Mrs Nall tells me she made a few notes about the 22 June call on her return to her desk. I am told notes were made of the calls but none were shared with the claimant consequently he was not given the opportunity to agree/amend their content. The notes that were made are brief and amount to little more than bullet points.

17. The letters of 9 and 22 June invite the claimant to make proposals as part of the consultation process. Neither letter sets out a structure for submission of proposals and today the respondent has sought to blame the claimant for failing to put forward proposals. Given they are template letters provided by the NatWest "mentor" the first of which asserts there will be a formal meeting something more was required from the respondent than correspondence which makes vague, open ended invitations for proposals. In addition, since the first letter is on the wrong template any proposals the claimant might make would not take account of the fact he was the only candidate. The claimant explained he anticipated putting his proposal forward in the formal consultation meeting promised by the letter of 9 June; he was unaware the calls on 9 and 22 were in fact those meetings consequently he did not make his proposals.

18. The claimant asserted today that notwithstanding his expressed view he would not take a pay cut during the meeting with Mr Nall on 8 April as the pandemic progressed, he changed his view and intended to make just such a proposal to ensure the business's survival such was his commitment and his investment in it in terms of time served. Mr Nall explained he took that stated view of 8 April as final and did not return to it. He did not consider if the claimant's view might change given the course of the pandemic and its effect on businesses everywhere.

<u>The Redundancy Decision</u>

19. The government funded job retention scheme was due to come to an end In October 2020. Mr and Mrs Nall concluded they could not afford the claimant's salary beyond that date without the support of the furlough payments. They decided the claimant should be made redundant on two grounds:

19.1 His salary was the equivalent of the salaries of Mr Thompson and Ms Briggs combined.

19.2 As General Manager his role was a standalone one which was no longer needed:

19.2.1 Mrs Nall would deal with the management of the business; and

19.2.2 IT support would be contracted out.

Termination of Employment

20. In a telephone call of 29 June Mrs Nall informed the claimant he was to be made redundant.

21. Letter of 30 June included details of the claimant's right of appeal. He did not appeal and explained he felt once the decision was made he knew Mr and Mrs Nall well enough to know they would not change their minds. The claimant's decision not to appeal does not affect the fairness or otherwise of the procedure the respondent followed.

22. The effective date of termination (EDT) was 25 September 2020 as set out in the 30 June letter of dismissal.

23. Redundancy payment was stated to be and was £13,719:00 together with a payment in respect of accrued holiday outstanding at EDT.

24. On 29 September 2020 the claimant wrote to the directors on the advice of ACAS requesting information about the redundancy process including selection criteria, the number of employees facing redundancy and details of the consultation meeting.

25. On 1 October 2020 Mr Nall responded in writing inviting the claimant to an appeal meeting. Mr Nall explains in his letter that whilst he called it an appeal meeting this was an invitation to meet to discuss the questions raised by the claimant in his letter at 18 above and I find that it was not an actual appeal meeting.

26. On 4 October the claimant responded in writing clarifying that his letter of 29 September was not an appeal, his contract having already come to an end. He repeats his request for information about the redundancy process adding a deadline of 14 October 2020.

27. On 12 October the respondent responded in writing stating:

27.1 The claimant had been informed all meetings would be conducted by telephone.

27.2 As the only manager at TypeStart the claimant was the only one considered for redundancy; and

27.3 As a standalone role there was no requirement for a selection criteria;

27.4 The claimant had been invited to face to face appeal meetings in correspondence on 30 June and 1 October but declined.

27.5 The letter concludes it has always been a pleasure to work with the claimant.

The Law

Selection Pool of One

28. In Wrexham Golf Co Ltd v Ingham EAT 0190/12. Ingham worked as club steward, managing the bar, cashing up, closing etc. WGC Ltd decided, to save money, it would combine its bar and catering functions, the club steward's duties could be divided among other staff, so Ingham would be redundant.

29. WGC Ltd successfully appealed to the EAT.

30. Remitting the case for consideration by a fresh tribunal, the EAT noted that the word 'pool' is not found in S.98(4) ERA and 'there is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy'.

31. Furthermore, in the EAT's view: 'There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool.'

    Accordingly, the question the tribunal ought to have considered was if it was reasonable or not for WGC Ltd to consider developing a wider pool of employees given the nature of the role.

32. Fairbanks v David Ross Education Trust ET Case No.2600410/17: F was a teacher in the CDT (design and technology) department. CDT offered a number of subjects, including food technology. F spent approximately 80 per cent of her time teaching food technology, with the remainder spent teaching other CDT subjects. All staff in the department had a particular speciality subject, but they were all able to teach, and on occasion taught, other CDT subjects according to department needs.

33. Following the decision to stop teaching food technology at GCSE level, F was made redundant. An employment tribunal found it was outside the range of reasonable responses for the employer to treat F as being in a pool of one and to take the view there was no need for objective selection criteria.

34. The tribunal considered it was unreasonable **not** to include all CDT teachers within a pool and to fail to carry out a skills audit of the department as had occurred in previous selection exercises.

Selection Generally

35. Kvaerner Oil and Gas Ltd v Parker and ors*:* the EAT upheld an employment tribunal's decision that an employer's pool for selection fell outside the range of reasonable responses.

36. Four of the workers who were made redundant challenged the decision, claiming KOG had artificially restricted the pool in order to get rid of employees who were on more expensive terms.

37. The EAT upheld the tribunal's decision and concluded a reasonable employer would have adopted a wider approach and would have brought into consideration other factors, such as, in particular, the interchangeableness of the work.

Bumping

38. In Lionel Leventhal Ltd v North EAT 0265/04 the EAT gave detailed guidance on the circumstances in which an employer should consider bumping.

39. A senior editor was selected for redundancy because he was the company's most expensive employee.

40. An employment tribunal found his dismissal unfair, partly on the basis the employer should have considered making a more junior employee redundant and offering his or her job to the claimant rather than merely assuming that the claimant would be unwilling to accept the resulting drop in salary.

41. On appeal, the EAT was referred to case law, including the Court of Appeal's decision in Thomas and Betts Manufacturing Co v Harding [1980] IRLR 255, CA, which established it can be unfair for an employer to fail to consider offering alternative employment to a potentially redundant employee, even in the absence of a vacancy.

42. In the view of the EAT in Leventhal, whether or not such a failure is unfair is a question of fact for the tribunal, which should consider matters such as:

    - whether or not there is a vacancy
    - how different the two jobs are
    - the difference in remuneration between them
    - the relative length of service of the two employees, and
    - the qualifications of the employee in danger of redundancy.

43. The EAT accepted the tribunal had been entitled, on the facts, to hold the employer's failure to take the initiative in considering the above matters rendered the claimant's dismissal unfair.

Consultation

44. De Grasse v Stockwell Tools Ltd [1992] IRLR 269, EAT: D was made redundant from his position as machinist in a very small company with no warning and no consultation.

45. He gave evidence that, had he been consulted, he would have suggested being considered for a position of driver-handyman — a job he could have done and which was held by an employee with less service than he had.

46. The employment tribunal appeared to apply the 'no difference rule'.

47. The EAT, applying Polkey, overturned this finding on the ground that the 'no difference rule' was no longer good law.

48. Furthermore, consultation would have made a difference — D might have been considered for another post. Regarding the size and administrative resources of the company, the EAT acknowledged that S.98(4) ERA specifically referred to these factors as relevant to the determination of reasonableness. It accepted that size could affect the nature and formality of the consultation process but refused to accept that it could excuse a total absence of consultation.

49. R v British Coal Corporation, ex parte Price (No.3) [1994] IRLR 72, Div Ct. Although there were no invariable rules and the outcome of each case depended on its own facts, the EAT stated that 'when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests'.

50. Fulcrum Pharma (Europe) Ltd v Bonassera and anor EAT 0198/10. In that case, the EAT agreed with the employment tribunal that the employer had been wrong to conclude, without any further or meaningful consultation as to the size of the pool, that the pool was one person because it was the manager's role that had to go.

51. Although notes prepared by the employer clearly showed that it had considered the issue of pooling, this had not been discussed with the employee who was at risk. More than this was required in terms of consultation.

52. For example, the EAT thought it might be for the employer to determine within the consultation process whether the more senior employee would be prepared to consider the more junior role at a reduced salary.

Remedy

53. S123(1) Employment Rights Act 1996 - compensatory Awards.

> (1) Subject to the provisions of this section and [sections 124, 124A and 126][1], the amount of the compensatory award shall be such amount as the tribunal **considers just and equitable** in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

54. **Polkey Reduction** Polkey v AE Dayton Services Ltd 1988 ICR 142 HL. Polkey effectively ended the 'no difference' rule. A failure to follow procedure still makes the dismissal unfair; what is affected under Polkey is the compensation/remedy which may be reduced by as much as 100% if the losses suffered by the claimant would have been the same if the company had followed a fair procedure.

Conclusion

55. Applying the law to the facts found above I have come to the following conclusions:

56. I have no difficulty in concluding this was a small company (as with De Grasse above) with no in-house HR department; relying on a NatWest Bank "mentor" on redundancy processes and HR matters.

Selection

57. In assessing the fairness of dismissals, tribunals will first look to the pool from which the selection was made, since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair. The question then is whether the employer actually applied its mind to the problem in this case. It was argued today the directors did apply their minds to the question of a pool and that their decision it should be a pool of 1 was reasonable. I was referred to the case of Wrexham Golf Club above in this regard. If that were the only question the matter would rest there however, an employer that *has* applied its mind to the question of a pool may still be challenged on its decision if the employment tribunal considers it defined the pool in a particular way in order to ensure the dismissal of a particular individual.

58. I am satisfied the pool was defined in a particular way to ensure the dismissal of the claimant for the reasons set out above, namely;

- The claimant was the only employee with the job title of general manager; and
- The claimant's salary was the equivalent of the salaries of the other two employees combined. (The director, Mrs Nall not receiving any salary at that point). [Kvaener Oil, Leventhal and De Grasse above].

59. I have found above that Mrs Nall was the only manager, a managing director in fact. Notwithstanding the claimant's job title of General Manager, no evidence was put forward of his managerial responsibilities other than that he regularly 'acted-up' for Mrs Nall when she was off site.

60. Given the size of the claimant's salary Mr and Mrs Nall decided this was where the most significant savings were to be made but only considered one option, namely his departure.

61. In all cases, the tribunal must be satisfied the employer acted reasonably and, in considering whether this was so, the following factors may be relevant:

    61.1 Whether other groups of employees are doing similar work to the group from which selections were made. The claimant was one of three employed typesetters. Only the role of one of those employees was assessed in any meaningful way. That of Miss Briggs who was described as doing relatively unskilled 'cut and paste work'. [Wrexham golf club; Fairbanks above.]

    61.2 Whether employees' jobs are interchangeable. Of the 4 typesetters at the company Miss Briggs was very junior and relatively unskilled; one was the director, Mrs Nall. Of the remaining two Mr Thompson had 20 years' experience and the claimant 29. No real assessment was carried out as to whether these two roles were interchangeable however the document on page 36 states Mr Thompson can turn his hand to anything and that there was a significant crossover between the claimant and Mrs Nall (Caroline). The witnesses gave clear evidence the claimant could also turn his hand to

anything. I was told Mr Thompson had no interest in a managerial role however since I heard no evidence that there were formal managerial responsibilities in the claimant's role that would not be a bar to the roles being interchangeable. In the circumstances I find that it is more likely than not Mr Thompson's role and the claimant's were interchangeable and both could easily have slotted into Miss Briggs relatively inexperienced and unskilled role, notwithstanding her admin responsibilities given both were able to 'turn their hands to anything'. On that basis I find the claimant's role was interchangeable with the roles filled by both of his employed colleagues.

61.3 Neither of the remaining two categories apply in this case.

Selection Pool of One

62. I was specifically referred to Wrexham Golf Co Ltd v Ingham EAT 0190/12 by the respondent. I agree that it is helpful in identifying a pool of one based on a standalone role. I do not agree the facts of that case apply in this instance; there is a clear distinction to be drawn between the claimant in that case who had many managerial responsibilities and the claimant in this case. I conclude this was not a case where it was reasonable to focus on a single employee without developing a pool or even considering the development of a pool given the nature of the claimant's role.

63. In my opinion the case of Fairbanks above is more helpful based as it is on the interchangeable nature of the claimant and colleagues. On that occasion the tribunal considered it was unreasonable not to include all CDT teachers within a pool and to fail to carry out a skills audit of the department. No meaningful skills audit having been carried out in this case either.

64. In cases regarding larger pools as in Kvaerner Oil above it was asserted the respondent artificially restricted the selection pool in order to get rid of employees who were on more expensive terms. The EAT held that a reasonable employer would have adopted a wider approach and would have brought into consideration other factors, such as, in particular, the interchangeableness of the work. In fact selection of an employee purely on the basis of cost of the individual/s in question appears to be problematic (Leventhal and De Grasse above).

65. Kvaener Oil is perhaps the closest of the cases I have considered to the facts in this case. I conclude that in this case the selection pool was artificially restricted in order to get rid of the claimant on the basis of cost the job title having little if any relevance. Applying the decision of the EAT in that case to the facts of this one I find a reasonable employer would have adopted a wider approach and would have brought into consideration other facts, such as, in particular, the interchangeableness of the work done by the claimant and his colleagues.

66. In each of these cases it was held the employer had not acted reasonably in deciding the composition of the selection pool and the employee was unfairly dismissed. The circumstances of this case are so closely aligned with the cases of Kvaener Oil and Fairbanks I am satisfied having applied them to the circumstances of this case that the selection of the claimant into a selection pool of one was not within the range of

reasonable responses and I must draw the inevitable conclusion the clamant was unfairly dismissed.

Consultation Process

66. I was also referred to the case of De Grasse (above) by the respondent. In my view that case deals with a situation not that far removed from the claimant's. It was brought to my attention to establish that in a selection pool of one a consultation is essentially otiose. Having found that in this case a selection pool of one was not within the band of reasonable responses I find this case helpful because the EAT refused to accept that it could excuse a total absence of consultation.

67. To some extent, the subject matter will depend upon the specific circumstances, but best practice suggests that a consultation process should normally include:

    67.1 An indication (i.e., warning) that the individual has been provisionally selected for redundancy. The letter of 9 June makes that clear but the respondent accepts the wrong letter was sent, consequently the letter of 9 June creates a false impression that the claimant was not the only one facing redundancy.

    67.2 Confirmation of the basis for selection. It was not until the claimant wrote and asked for this information long after he was informed he had been made redundant that the respondent told him he had been the only candidate and that there had been no selection criteria because he was considered to be in a standalone position as general manager.

    67.3 An opportunity for the employee to comment on his or her redundancy selection assessment. The claimant was not invited to a formal consultation meeting as promised in the respondent's letter of 9 June. Much has been made today of the fact the claimant did not make any proposals when invited to do so. He assures me he had proposals prepared for the formal consultation meeting. In any event since the letter of 9 June was on the wrong template and gave misleading information the claimant would have been disadvantaged in his consideration of proposals. I am not persuaded by the respondent's argument that no face-to-face meeting could be held due to the pandemic. At the time this process was ongoing news programmes were full of reports of how companies were adapting to remote meetings. I have no qualms about the respondent holding a consultation meeting by telephone and the claimant confirmed today that neither did he. What does concern me is that the respondent thought it appropriate to telephone the claimant without warning and without explaining the purpose of the call. Either one would have afforded the claimant the opportunity to prepare and put forward his proposals. I reject the respondent's suggestion the claimant has since come up with his proposals having been dismissed. The claimant did throw out some ad hoc suggestions during one of the calls so there is no reason to suppose he would not have presented considered proposals in a more formal setting especially since Mr Nall has stated the claimant knew the business better than anybody.

67.4 Consideration as to what, if any, alternative positions of employment may exist. The company was small [as in De Grasse], the only prospect of an alternative position would have been to allow the claimant to replace Miss Briggs; something he himself suggested at the meeting on 8 April. Had there been a consultation process this could have been properly explored together with the claimant's proposal he take a significant pay cut.

67.5 An opportunity for the employee to address any other matters he or she may wish to raise. The letter of 9 June did invite the claimant to raise 'any issues' with either of the directors. The claimant could have raised such issues informally but equally he could not be criticised for waiting to be invited to a formal meeting since the letter of 9 June promised precisely that. That he chose not to appeal when on 29 June it became plain no such formal meeting would take place does not absolve the respondent.

67.6 The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided, it also helps employees to protect themselves against the consequences of being made redundant. In my view the claimant was not afforded such an opportunity.

68. Where an employee has been identified as the only employee at risk of redundancy, a failure to consult properly with him or her as to whether a more junior employee should be included in the pool for selection may render his or her dismissal unfair, even if the employer had considered the matter as was the case on 8 April when the claimant suggested it.

69. I have considered the case of Fulcrum Pharma (Europe) Ltd above. This case is different given that in April the claimant made it plain he would not consider a cut in his salary. Given the progression of the pandemic and the rapidly changing economic landscape the claimant argues this should have been returned to. In this instance I am of the opinion the respondent ought to have considered them words spoken in haste and returned to the subject when the question of redundancies arose in June. Consultation required a considered discussion of the option with the employee which did not happen in this case.

70. I am satisfied the claimant was made redundant by an unfair process on two grounds:

70.1 In selecting a pool of one the respondent failed to properly assess the role of the claimant as compared with his colleagues and whether their posts might be interchangeable; and

70.2. The respondent failed to carry out any meaningful consultation process with the claimant and in so doing deprived him of the opportunity to present proposals that may have disposed of the need to make him redundant.

71. Remedy,

72. Finally, it was argued on behalf of the respondent that the claimant would have been dismissed if the respondent had followed a fair process and any remedy should be subject to the decision in the case of Polkey. Following Polkey a Tribunal must consider whether the respondent could and would have dismissed the claimant fairly if it had followed a fair procedure and apply that answer to the question of appropriate remedy.

73. The leading case remains Software 2000 Limited v Andrews and others (EAT/0533/06). The EAT explained a Tribunal should look to reconstruct what might have been. However, it must not embark upon a 'sea of speculation'. It must base its determination as to what might have been on the evidence before it.

74. I am satisfied the claimant's redundancy was not inevitable. A fair consultation process, one which the employee knew was a consultation process, on the evidence provided by the claimant would have elicited proposals from him including his suggestion he take a significant pay cut and 'bump' a less qualified employee. To retain the claimant on a reduced salary; acknowledged by Mr Nall to know the business better than anybody; would have put the company in a much stronger position and enabled it to deal with any work coming in both during 'lockdown' and afterwards when the market began to recover and was therefore within range of responses of a reasonable employer.

75. Having concluded the claimant could and would have been retained if the respondent had acted reasonably this is not a case where it would be appropriate to apply a Polkey reduction.

76. Case Management Orders have been dealt with in a separate document attached.

_____
Employment Judge Allen

Date: …3 September 2021……..

Sent to the parties on: .....

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For the Tribunal Office