EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs D Tite	**v**	Bennie Equipment Limited

Heard at: Watford Employment Tribunal (by video) **On**: 3 September 2021

Before: Employment Judge Dobbie, sitting alone

Appearances
For the Claimant: Liam Pike (solicitor)
For the Respondent: Jennifer Platt (solicitor)

JUDGMENT

1. Upon the Respondent having conceded liability in respect of a short-fall in the redundancy payment in the sum of £109.32, judgment for that sum is given under that claim accordingly.

2. The Claimant's claim for unfair dismissal succeeds.

REASONS

Parties

1. The Claimant was employed by the Respondent from 10 November 2015 to 2 August 2020 as an administrator.

2. The Respondent is a private limited company carrying on business in the hire and servicing of equipment and machinery such as forklift trucks.

Issues

3. The Claimant brought claims for unfair dismissal and a redundancy payment. In respect of the latter, she accepted she had been paid some of her redundancy payment but contended it was underpaid by £109.32. Liability for

that claim was accepted at the full merits hearing and judgment issued accordingly (as above).

4. The remaining issues to be determined were for unfair dismissal and were agreed between the parties in a list of issues which read as follows:

"1. Was redundancy the reason for the Claimant's dismissal?

a) What was the particular kind of work performed by the Claimant for the purposes of section 139 of the Employment Rights Act 1996? (Was it junior administration work generally or sales administration work specifically)?

b) Was there a reduction in the requirements for employees to perform that work for the purposes of section 139 of the Employment Rights Act 1996?

c) If yes, was that reduction the reason for the Claimant's dismissal? s. 98(4) ERA 1996

2. Did the Respondent act reasonably or unreasonably in all the circumstances in treating redundancy as a sufficient reason for dismissing the Claimant and was the Claimant's dismissal fair or unfair for the purposes of s. 98(4) ERA 1996? In particular:

a) Pooling: Has the Respondent genuinely applied its mind to the issue of who should be in the pool?

b) Was the decision to treat the Claimant's role as unique and exclude the Hire Co-ordinator (Lauren White) and Service Co-ordinator (Kelly White) from the pool within the range of conduct which a reasonable employer could have adopted?

c) Selection: It is agreed that the Respondent treated the Claimant's role as unique and therefore no selection process between the Claimant and other employees took place.

d) Alternative Employment: Did the Respondent consider suitable alternative employment?

e) Was the interview process and scoring for vacancies flawed?

f) Consultation: Did the Respondent warn and consult the Claimant (in particular about the decision to treat her role as unique and not pool her with the Hire Co-ordinator (Lauren White) and Service Co-ordinator (Kelly White), about alternative employment and about ways of avoiding redundancy)?

g) Was the process fair? Did the consultation process satisfy the four key elements in *British Coal*? (consultation at a formative stage, adequate information, adequate time to respond and conscientious consideration of the response to consultation).

h) Bumping Redundancy: Did the Respondent consider dismissing one of the other administrators by way of a bumping redundancy?

i) Decision to dismiss: Was the decision to dismiss the Claimant within the band of reasonable responses open to an employer in all the circumstances?

3. Polkey: If there were procedural flaws would they have made any difference to the outcome – should there be a Polkey reduction? If so, what amount?

4. Remedy: If the Tribunal finds the dismissal unfair, should any compensation be awarded?

   a) What are the Claimant's losses?

   b) Has the Claimant taken sufficient steps to mitigate her losses?"

Facts

5. The Claimant commenced working for the Respondent on 10 November 2015, and signed an employment contract on 25 November 2015. Her job title was Sales Administrator. Under clause 3 of her contract of employment, it states: "Your job title does not restrict your duties and you may be required to carry out other work within your capabilities from time to time at the request of the Company".

6. In the Claimant's job description, it states that the purpose of her role is to "effectively administrate support for the Sales and Short-Term Hire Departments." The main duties of the job description included matters pertaining to Sales and Hire.

7. The Claimant's job title was subsequently changed to Hire and Sales Controller and then Sales Coordinator. There is nothing to suggest that her contract was otherwise changed or varied or that the job description was ever updated.

8. The Respondent operates three divisions: Sales, Hire and Service and at the material time the Respondent had one administrator dedicated to each division. There was also an accounts / finance administrator supporting the different business areas.

9. The Respondent owned a fleet of vehicles and leased them out. A sale or contract lease exceeding 12 months was deemed to fall within the remit of Sales (the Claimant's remit) and any lease agreement for a period less than 12 months was deemed to fall to the Hire department (and the Hire Coordinator's remit). Servicing of the vehicles was dealt with by the Service Coordinator and therefore the Hire and Sales Coordinators worked closely with the Service Coordinator.

10. At times (such as holiday cover) the Claimant undertook the work of the administrators in Hire and Service and they also undertook her work when she was absent. This included a period in February 2020 when the Claimant was required to cover the duties of the Hire Coordinator.

11. In early April 2020, the Claimant was placed on furlough along with the Service Coordinator and various others. The Hire Coordinator continued to work, covering the duties of the Claimant and the Service Coordinator. The Respondent chose the Hire Coordinator as the administrator to continue working on the basis that she was both able and willing to undertake the duties

of the other two administrators, whereas the Respondent took the view that the Claimant was able to but reluctant to undertake the duties of the Hire Coordinator.

12. The Respondent suffered a downturn in work which it says affected the Sales department more heavily than the Hire department. The Respondent placed its Area Sales Managers on furlough and the Sales Director continued to work whilst also carrying out the activities of the Area Sales Managers.

13. The Senior Management Team agreed to reduce their pay by 20% for a time to protect the company's interests.

14. Prior to 14 May 2020, the Senior management Team took the decision that since the Sales division had suffered the greatest reduction in work due to the pandemic, there was no longer a need for a dedicated Sales Coordinator. A full-time HGV Driver was also placed at risk. Advice was sought about this decision from an organisation called Mentor on 14 May 2020.

15. A business case was produced by 8 June 2020 but was dated April 2020, which is presumably when discussions began in respect of making redundancies. The first page of the business case identifies that the Claimant's role is unnecessary due to: "use of technology... The job you do no longer exists within the company. The company needs to reduce staff numbers to save costs. Change in processes & reorganisation with fewer staff".

16. The Claimant was never provided with a copy of this business case, despite it being worded in ways suggesting it was intended to be shared with her (referring to "you" for example).

17. On 15 June 2020, in a Microsoft Teams video meeting, the Claimant was informed by Simon Burton that her role was at risk of redundancy. From the comments made during the consultation meeting and the fact that the Claimant had not been provided with the business case, it would appear that she was not aware she was in a pool of one. She commented "it's obvious that I am going to go. Lauren is the golden girl and Kelly is pregnant" which suggests she believed it was a pool of the three administrators from which one would be selected (and she suspected it would be her). Simon Burton did not clarify the situation and inform the Claimant it had decided on a pool of one for her role. Instead he replied "he could not discuss anyone else [sic] role".

18. Also on 15 June 2020, the Respondent wrote to the Claimant stating, amongst other matters, "your role is potentially going to be made redundant" stating that the reason was broadly due to the effect of the pandemic on orders and changes to the operating system.

19. On 19 June 2020, the Respondent convened a consultation meeting by Microsoft Teams with the Claimant. At this meeting, it would appear that the discussion focused on finding alternative roles within the company group rather than exploring ways of retaining her within the team or within the Respondent. The Claimant enquired about covering for the Hire Administrator during her

imminent maternity leave, but this was rejected seemingly on the basis that there was no need for cover because the majority of the business was furloughed. She also suggested reducing her hours permanently to 80% FTE and cross training to do Hire administration or retraining to do Service administration (as well as Sales administration). Simon Burton stated he would revert on that suggestion.

20. On 26 June 2020, there was a further consultation meeting by Microsoft Teams with Simon Burton at which the Claimant again raised her suggestion of working 80% FTE doing administration across the three divisions. Mr Burton declined this suggestion on the basis that he did not believe there would be enough administration work. There was no suggestion that the Claimant was not able to do such work or that it would require extensive of prohibitive training to be able to do such work.

21. The Claimant applied for two vacancies in the Bennie Group of companies (not with the Respondent): Sales Advisor and Operations Co-ordinator. She was not successful in being offered either role and the Respondent continued consultation on 2 July 2020.

22. On 2 July 2020, the Claimant was informed that since she had not secured an alternative role, she would be dismissed for redundancy. The Claimant again asked whether she could cover the maternity leave of the Hire Administrator who was due to commence leave in August 2020. Mr Burton declined this suggestion stating there was no requirement for her to work.

23. On 8 July 2020, the Respondent informed the Claimant in writing that her employment would terminate by reason of redundancy on 2 August 2020.

24. On 13 July 2020, the Claimant wrote to the Respondent requesting a copy of the Respondent's grievance procedure and various information in respect of the selection process (of which there was none).

25. On 15 July 2020, the Respondent informed the Claimant of the vacancy of Gate House Administrator. The Claimant did not reply to this email.

26. On 20 July 2020, the Respondent replied to the Claimant's letter of 13 July 2020 and reminded her of her right of appeal. The Claimant replied she did not wish to appeal because she had by then secured an alternative role elsewhere.

27. The Claimant's employment terminated on 2 August 2020. On 1st September 2020, the Claimant commenced work as a Finance Assistant part time for another employer.

28. The Hire Administrator commenced maternity leave on 10 August 2020 and the Respondent did not engage maternity cover for her at that time due to the reduced workload.

29. On 14 September 2020, the Respondent contacted the Claimant to offer her the role as maternity cover for the Hire Administrator on the basis that work

had improved and there was a need for such cover after all. The Claimant did not take up this offer because she had already secured a permanent (though less well-paid) role elsewhere.

Relevant Law

30. Under s.139(1)(b) ERA, there is a statutory definition of redundancy which states that:

> **"139 Redundancy.**
>
> (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—
>
> ...(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."

31. Under s.98(2) ERA. Redundancy is one of the potentially fair reasons for dismissal, however, even if redundancy is established as the sole or principal reason for dismissal, the dismissal will not be regarded as fair unless s.98(4) ERA is satisfied. It states:

> "(4) 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."

32. The leading case on reasonableness in the context of redundancy is Polkey v AE Dayton Service Ltd [1987] IRLR 503. In this case, the House of Lords (as it then was) stated that:

> "In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

33. There are no fixed rules about how the pool for selection should be defined, it is a matter for the employer to determine and this decision will only be impugned if falls outside the range of reasonable responses. A tribunal must decide whether the employer's choice of pool was within the range of reasonable responses, not whether the Tribunal would have decided upon a different pool, nor whether there was a more appropriate or more reasonable pool than the one selected (see Hendy Banks City Print Ltd v Fairbrother and ors UKEAT/0691/04). There may be multiple ways to define the pool which

would be reasonable and only if the employer's choice is outside of that range will it be unreasonable and unfair.

34. In Capita Hartshead Ltd v Byard [2012] IRLR 814**,** at paragraph 31, the EAT drew upon various authorities to "pull the threads together" in respect of the legal principles and stated:

> "the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that
>
> (a) "It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted"
>
> (b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn"
>
> (c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem"
>
> (d) the Employment 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; and that
>
> (e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

35. In Russell v London Borough of Haringey [2000] 6 WLUK 196 the employee was employed as a Panel Administrator but argued that his role was interchangeable with others (such that the others should have been pooled with him) on the basis that his job description required him to be interchangeable with another role and that he had sometimes undertaken the duties of the other role. The Court of Appeal upheld the finding that the dismissal was fair on the basis that there were no other employees carrying out duties as a Panel Administrator. Just because the employee might be contractually required to do other duties (and had done so) did not mean that his role was interchangeable with those other roles.

36. In Hendy Banks City Print Ltd v Fairbrother and ors UKEAT/0691/04, the two claimants worked in the finishing department of a printing company. One third of their time was spent using a binding machine and the other two thirds doing general finishing work, which was also undertaken by other employees. The employer decided to limit the pool for selection the two employees who worked on the binding machine. The tribunal (with which the EAT agreed) held this was too narrow and it was unreasonable to limit the pool in this way given the employees' length of service and that the majority of their roles (two thirds) was the same as other employees' roles.

Application of law to facts

37. On the issue of whether there was a redundancy situation within the meaning of s.139 ERA, more precisely, whether there was an actual or anticipated diminution or cessation in the need for work of a particular kind, I find that there was. An employer does not need to demonstrate financial hardship or a downturn in work to establish this, even a voluntary decision to re-organise can suffice to create a redundancy situation. However, in this case, there was a reduction in orders and this, coupled with the implementation of (or greater use of) a computerised system, led to the Respondent taking a decision that it did not need a dedicated administrator for the Sales Division. This is a decision it was entitled to make and one which created a redundancy situation which affected the Claimant's role.

38. There is however no presumption that the dismissal was for redundancy in the context of an unfair dismissal claim (unlike the redundancy pay claim for which there is such a presumption). The Respondent carries the burden of proof as to the sole or principal reason for dismissal.

39. I find on balance of probabilities that the sole reason for dismissing the Claimant was redundancy. The Claimant has advanced a suggestion that it was instead a personal issue between herself and a Mr Jason McNally, but the evidence does not support this. Further, the Respondent did invite the Claimant to apply for the maternity cover when it decided it did in fact need administrative cover in September 2020, suggesting there was no animosity or disinterest in employing her. Therefore, I accept the Respondent's evidence and find on balance of probabilities that the reason for the decision to dismiss the Claimant was redundancy.

40. The next matter is whether that decision was within the range of reasonable responses, including how it was carried out. I find that the decision on the pool was not within the range of reasonable responses and that the Respondent did not properly apply its mind to the pool.

41. In comparing the roles, it is necessary to consider what the employees actually did. The employees' contracts of employment and any job descriptions can be helpful in comparing their roles (if they are representative of the role and are not, for example, outdated) but the focus must be on the actual day to day reality of the role. The Claimant gave evidence that the roles of the coordinators were broadly the same. She stated that the only difference between much of her work and that of the Hire Coordinator was the duration of the contract for leasing the vehicle. A contract for sale or a hire for over 12 months was deemed to fall within Sales, whereas a shorter contract for hire was deemed to be the remit of the Hire department. Therefore, she stated that whilst they were assigned to separate departments for convenience, to divide the work, they actually undertook very similar roles.

42. When challenged during cross examination as to the differences between the Claimant's and Kelly's (the Service Coordinator's) role, Simon Burton stated the unique features of the Service Coordinator's role was its need to coordinate engineers and take calls from customers. However, he conceded that all three of the coordinators took customer calls, that Protean allocates tickets to

engineers (based on information typed in) and that all three coordinators handled difficult (irate) customers.

43. When asked what the differences between the Claimant's and Lauren's (the Hire Coordinator's) roles were, Simon Burton stated it occasionally required her (Lauren) to cross-hire equipment from other companies. He conceded that all this entailed was calling the hire company to arrange. When asked by the Claimant's representative "So the differences between the roles are minimal?" he stated "I am sure if you asked them you would know the differences". This indicated to the Tribunal that the Respondent itself was not aware of the differences to be able to explain them even at the date of trial.

44. Mr Burton was then asked "so you did not ask them about the differences at the time?" and he answered "that's possibly fair, but I understand the roles and they are different".

45. From Mr Burton's answers in cross examination, I find that the Respondent did not apply its mind to the extent of any similarities between the coordinators' roles and hence did not apply its mind to the pool at the time of deciding that the Claimant was in a pool of one. The Respondent's response asserts (at paragraph 14) that it considered the pool and decided on a pool of one, however there is no evidence of this and no explanation or evidence as to how the roles were compared and the conclusion on the pool reached. The evidence that there is suggests this was an automatic conclusion rather than one that was considered. By this I mean that because it was the Sales Department that suffered the greatest decline in orders, the Respondent took the view that it must be the Sales Coordinator's role that should be deleted, rather than applying its mind to the appropriate pool. This conclusion is supported by the wording of paragraph 14 itself, Mr Burton's testimony (including his apparent lack of knowledge of the differences between the coordinators' roles), the wording of his witness statement at paragraphs 12-14, the business case at pages 56-58 and the communication with Mentor in May 2020 which shows that the business decided that the Claimant and the HGV driver were the only employees to be affected ("at risk") and declared them to be in "unique" or "standalone" roles. This tends to suggest that the decision as to the pool for the Claimant was taken early on, without advice and without any real consideration of the appropriate pool.

46. Had the Respondent applied its mind to the pool, the only conclusion which it could fairly have reached was that the Claimant should have been pooled with the Hire Coordinator at the very least. A wider pool of all three coordinators would also have been within the range of reasonable responses. This is because of the extent of the similarities between the coordinators' roles. Whilst it was accepted that the coordinators were assigned to different departments, the substance or nature of the work they did was broadly the same. The similarity between the work of the Hire Coordinator and the Claimant was particularly close.

47. As stated above, Mr Burton was unable to articulate any material or significant differences between the duties of the Hire and Sales Coordinators. He also

conceded that the Claimant had covered the duties of the Hire Coordinator at times and was unable to recall (but could not positively refute) that she had also covered the duties of the Service Coordinator at times. The Claimant provided positive testimony that she had covered for the Service Coordinator too, and I accepted that. Whilst being able to do another's role does not mean that the roles are similar (a cook might be capable of cleaning and vice versa but their roles are not interchangeable / similar) on the evidence provided by the Claimant it was clear that the reason she was able to cover for the other coordinator's (and they for her) was because the roles and systems used was / were so similar.

48. Indeed the Claimant stated that "the Sales guys are just as likely to bring in Hire enquiries as Sales enquiries" and that she would service the work from the Sales team regardless.

49. When she was asked "So anybody could have been asked to do anything across the team?" she answered "Absolutely. Primarily you'd go to the person dedicated to that team but not always, it depends who was free". As such, whilst a Sales enquiry would most normally be directed at her, if she were busy when the call came in, the matter would be serviced by one of the other two coordinators and that she did the same when receiving a call referable to Hire, at times when the Hire Coordinator was busy on another call or matter.

50. Mr Burton also accepted that the Claimant had undertaken duties in invoicing for Hire and that she had arranged forklift training for clients from the Hire and Sales departments. When asked by the Tribunal "so the Claimant had the ability and experience to do the Hire Coordinator's work, but was not interested in it?" Simon Burton answered "Yes Madam, that is my understanding". I find that the reason she was able to do this work was because it was so similar to her own and she often undertook some of it for the Hire Coordinator as part of her role in any event.

51. As to the training she might need to be able to take over the role of Hire or Service Coordinator on a permanent basis, the Claimant stated "a week to ten days to be fully skilled in either role".

52. Simon Burton acknowledged in his oral evidence that the changes to the systems (namely the increased use of Protean) affected the work of both the Sales and Service Coordinators. He stated that the work of the Hire Coordinator was already heavily digitised even before the Protean system was implemented. Simon Burton also accepted that it would take a "few weeks" for a new administrator to be fully trained to do the role of Hire or Service Coordinator. He stated there would be no external costs for that because free training is provided by Protean. It would essentially entail on the job mentoring / supervising and some (free) training provided by Protean. Hence the roles are low-skilled administration roles that could be easily and quickly picked up by a person with administration skills or experience.

53. Based on these answers provided by both the Claimant and Respondent's witness, I find that the roles of Hire coordinator and Sales Coordinator were so

similar that it was outside the range of reasonable responses to not pool these roles. Alternatively, given that there was minimal training (and cost) required for the Claimant to be able to fully take over either the Service or Hire Coordinator roles, it was unreasonable to treat her as being in a pool of one. The range of reasonable responses would require there to have been a pool of two (or three) and competitive selection from the pool.

54. As to consultation, I find that this was also outside the range of reasonable responses in that the Respondent did not consult about the scope of the pool before deciding on a pool of one, nor did it inform the Claimant that she was in a pool of one (which would have encouraged her to comment on the similarities between their roles and perhaps change the trajectory of the process). The former failure would not have been fatal on its own, but combined with a failure to inform the Claimant of the scope of the pool after the decision had been taken renders it outside the range of reasonable responses. As a result of this failure, there was little to discuss during consultation because the decision not to pool the Claimant meant that redundancy was essentially a foregone conclusion unless the Claimant secured alternative employment in the wider group. Accordingly, consultation tended to focus on seeking vacancies rather than broader solutions to avoiding redundancy.

55. The Claimant did raise alternatives to dismissal which were rejected, including: (1) covering maternity cover for the Hire Coordinator; and (2) reducing her hours to 80% and undertaking administration across the departments. These suggestions were rejected without any real explanation and there was no evidence advanced that suggested they were ever considered or discussed by Simon Burton with any other members of management or advisors. He did not advance evidence of any such discussions nor did he explain there were such.

56. Indeed, in respect of the suggestion to cover maternity leave, Simon Burton refers to this at paragraph 22 of his statement, in the context of the final consultation meeting on 2 July 2020. However, the Claimant had in fact raised this as early as the 19 June 2020 meeting (two consultation meetings prior). The fact that his recollection is that she raised it (and he dismissed it) at the meeting in 2 July 2020 tends to suggest there was no consideration or discussion (within the business) of this suggestion. This tends to suggest that consultation as to avoiding redundancy was not genuine or effective.

57. I do not accept that the marking of assessments for the alternative roles was outside the range of reasonable responses. I find that the process followed in respect of assisting the Claimant in seeking alternative roles across the group was within the range of reasonable responses. It appears to have been a genuine assessment process and the Claimant herself states she did not expect to be suitable for or perform well in respect of the Operations Coordinator role. As to the Sales Advisor role, she did score well, but another candidate scored a higher score.

58. As to the arguments on bumping, I consider these to be conflated with the arguments in respect of the pool. The Claimant's representative only referred

to the other Coordinators' roles when raising the issue of bumping and the pooling of these roles is dealt with above.

Conclusion

59. Based on the foregoing, the decision to dismiss the Claimant was outside the range of reasonable responses due to: (1) a failure to apply its mind to the pool; (2) the choice of pool; and (3) the inadequacy of consultation in some (though not all) respects.

60. Given the conclusions reached, I considered it most appropriate to reserve the issue of Polkey deductions to a remedy hearing which shall be listed separately.

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Employment Judge Dobbie

Date: ……8th October 2021.

Sent to the parties on: ..15th Oct 2021
THY
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For the Tribunal Office