EMPLOYMENT TRIBUNALS

Claimant: Elizabeth Long

Respondents: CH & Company Ltd (1)
Gather & Gather Ltd (2)

Heard at: Bristol (video hearing) **On:** 08 & 09 November 2021

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Grace Nicholls, of Counsel, instructed by Boyes Turner LLP

JUDGMENT

The claim is dismissed.

REASONS

Summary

1. Ms Long was dismissed. The Respondent says this was a fair Covid related redundancy dismissal. The Claimant accepts that it was a redundancy dismissal, but says that it was not fair, because she was being lined up for dismissal even before Covid, she was not told of, and so missed out on, consultations, and while two of the three PAs were dismissed, the third was not in the pool for selection, and should have been.

2. The Respondents say that it was a genuine redundancy, that it was fair, but even if not, the same result was inevitable.

3. There was disagreement about which of the Respondents employed Ms Long. The 1st Respondent is the owner of the 2nd Respondent.

4. I decided that it was the 1st Respondent which employed Ms Long, but that it does not affect the outcome. (Originally the claim was against the 1st Respondent only, and the 1st Respondent asked that the claim be struck out

as they said she was employed by the 2nd Respondent. At a case management hearing on 10 May 2021 the 2nd Respondent was joined, and Employment Judge Dawson decided that the issue would be determined at this hearing.)

5. I decided that Ms Long was not unfairly dismissed by the 1st Respondent, and that any unfairness there might have been made no difference to the outcome, which was always going to be a redundancy situation. In particular, she was employed at Bristol and after the redundancies there was no PA post there, no alternative role there, that a pool of one was not improper, and that it was not required of the 1st Respondent to consider *"bumping"* the 3rd PA, who was employed at a different location doing a rather different job.

6. I delivered an extempore judgment and written reasons were requested by the Claimant and so this judgment is prepared.

Evidence

7. I heard oral evidence for the Respondents from Allister Richards, who was the line manager of the Claimant, and Managing Director of the 2nd Respondent until he became Chief Operating Officer of the 1st Respondent in March 2020, from Rob Fredrickson, Managing Director of the 2nd Respondent from 01 March 2020 (having taken over from Allister Richards). Mr Fredrickson had previously been MD of another subsidiary of the 1st Respondent. I also heard from Charlotte Hutchings, Group People Director since January 2021. I heard oral evidence from the Claimant. There was an agreed bundle of documents of 222 pages, and the Claimant provided 8 further documents.

Law

8. The reason put forward is redundancy, which is a potentially fair reason for dismissal[1]. Was that the reason? Was the situation within the statutory definition of redundancy[2]? The test[3] is

> *"(i) was the employee dismissed?*
>
> *(ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?*
>
> *(iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?"*

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[1] S98(2) of the Employment Rights Act

[2] S139 of the Employment Rights Act 1996:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

[3] Safeway Stores Plc v Burrell [1997] UKEAT 168_96_2401

9. Was the dismissal procedurally fair[4]? If not, what were the chances of dismissal if there was a fair procedure[5]?

10. These questions require findings of fact, and as the Respondent dismissed the Claimant the burden of proving those facts lies on them, and the standard of proof is the balance of probabilities (more likely than not).

11. If the reason was redundancy, the issue is whether it was fair, or not. The starting point for the issue of fairness is the words of Section 98 (4) of the Employment Rights Act 1996 ("the Act")[6].

- Was there adequate consultation?
- Were there alternatives to dismissal (such as voluntary redundancy by others, part time working, alternative employment)?
- Was the choice of a pool for selection reasonable?
- What were the criteria for selection, and were they fair?
- Was the Claimant properly assessed against those criteria?

12. There is no burden of proof in deciding the issue of fairness, for it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.

13. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act.

14. The compensatory award is dealt with in Section 123 of the Act[7].

15. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code"). There is provision for increase in compensation of up to 25% if the Acas Code is not followed by an employer which unfairly dismisses an employee.

The Hearing

16. I made a typed record of proceedings. Save for some minor technical problems, which were overcome, the hearing was uneventful. There is no need to set out the evidence and the submissions, and the important parts of both find their way into the findings of fact and conclusions below.

Findings of fact

17. Ms Long was employed from 05 August 2013 as personal assistant ("PA")

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[4] Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588

[5] Polkey v AE Dayton Services Ltd [1987] UKHL 8

[6] "…. 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"

[7] S123(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".

to Allister Richards. They were both employed by Mitie Catering Services Ltd., part of Mitie Plc. They worked for a brand called "Gather & Gather". In an internal reorganisation in 2017 both moved to Mitie Plc.

18. In 2019 Mitie Plc decided to sell the Gather & Gather business to the 1st Respondent. Ms Long and Mr Richards were transferred back to Mitie Catering Services Ltd on the same day, 06 September 2019, that the 1st Respondent acquired that company. The company, now owned by the 1st Respondent, later changed its name to Gather & Gather UK Ltd[8].

19. It follows that the Claimant was employed by the 2nd Respondent at the point of transfer. The Claimant did not know this as the contact from her employer was very confusing and while some said that it was Gather & Gather Ltd (which is what the 2nd Respondent became), others made it clear that she was transferred to CH&Co Ltd. She was paid by CH&Co Ltd.

20. The point was raised in the context of there being an Acas certificate only for the 1st Respondent, to raise a technical objection to the claim against the 2nd Respondent, against whom they say the claim should have been raised. Given the (admitted) confusion in the documentation I would have permitted the claim against the 2nd Respondent to proceed in any event, had I not decided that Ms Long was transferred to the 1st Respondent in February or March 2020 in the circumstances that follow.

21. Ms Long says she was transferred to the 1st Respondent along with Mr Richards when he became COO of the 1st Respondent in March 2020. There was a transition period from February 2020. I agree. She joined Mitie Catering Services Ltd in 2013 as Mr Richards' PA. She remained his PA until her dismissal on 10 September 2020 (although not working once furloughed on 31 March 2020). After Mr Richards moved to the 1st Respondent Ms Long remained his PA. Her payslips came from the 1st Respondent (although she did not see them before these proceedings). All the letters about the process came from the 1st Respondent. That of 03 July 2020 said *"CH&Company has found that it needs to put your position as PA to Managing Director* [presumably of the 1st Respondent] *at risk of redundancy"* (of course by then Mr Richards was not managing director of the 2nd Respondent, but COO of the 1st Respondent, but this is plainly an error. It cannot mean PA to the MD of the 2nd Respondent, for it was never suggested that Ms Long worked with Mr Fredrickson.)

22. The letter refers to CH&Co terminating her employment. The Respondents say this was an error in the use of a template letter. However, the letter of 03 June 2020 (which was not a template letter) expressly stated that *"the consultation process undertook to transfer your employment to the CH&CO Group",* and *"Your pay will appear on your bank statement as from CH&CO".* The CH&Co organogram showed Mr Richards as the COO and Ms Long as his PA. She had been moved to work for CH&Co. I need to have primary regard to the reality of the situation[9]. This was that Ms Long moved with Mr

[8] Confusingly, a letter of 03 June 2020 (111) to Ms Long about her employment states that "Gather & Gather UK Ltd is the trading name of MITIE Catering Services Ltd.

[9] Uber BV & Ors v Aslam & Ors [2021] UKSC 5, paragraph 83 is about worker status, but the point is the same: one starts from the reality of the situation, not the documents, in cases of worker / employee protection.

Richards to the 1st Respondent. Everyone else in the organogram was employed by the 1st Respondent, and while it is logically possible that the COO's PA was employed by a subsidiary company it is unlikely. It is even more unlikely that Gather & Gather Ltd employed a PA to its MD, but who was not working for that MD but for the COO of the holding company. Ms Long supervised an employee, Fiona Bidston, who worked on Gather & Gather business, but she was on a short term contract which ended.

23. On or about 18 March 2020 the pandemic closed many businesses. The lockdown which started on 23 March 2020 effectively stopped the Respondents from trading. On 31 March 2020 Ms Long was furloughed, along with many others.

24. On 15 June 2020 employees were notified that there would be a redundancy exercise, but Ms Long was left off the distribution list, in error.

25. On 22 June 2020 a redundancy consultation email was sent out to employee representatives (113). It said that of 511 administration employees 283 were to be removed, leaving 228. Overall, the group was making about 2,500 people redundant, leaving about 6,500, such was the result of the pandemic on a catering business. Because the Respondents needed to make so many redundancies, they had to give 90 days' notice. They were not to know that the furlough scheme would be repeatedly extended. They needed to get on with the redundancies so that most of the notice periods would be funded by furlough payments.

26. Ms Long was contacted by her employee representative about the email on 24 June 2020 (152). She would not have been part of the initial meeting (as she was not a representative) and learned about it from her representative in good time.

27. Ms Long was placed in a pool of one – the only director's PA in Bristol. In terms of Bristol Ms Long does not say this was unreasonable.

28. There were 3 people in the group who were PAs to directors. Two were made redundant. One, Melanie Eldon, was not. Her job title was Directors' PA (this related to her historical role as pa to both directors of a business which was taken over by the 1st Respondent some years before). While her primary responsibility was to the Chief Executive she also looked after all the statutory directors of the 1st Respondent. She attended investment meetings and board meetings. While superficially a pool of all 3 PAs might seem logical, provided an employer has given rational thought to the pool for selection it is not the role of the Employment Tribunal to find that a different pool might have been preferable. It was logical to consider that Ms Eldon was in a different category to the other PAs. It was logical to consider all the admin staff in Bristol as one pool.

29. Ms Eldon was *"ring fenced"* given her importance to the CEO of the 1st Respondent. She was retitled office manager for a period, which may have been an attempt to avoid comparison with others, but looking at the merits even if so it makes no difference. This was a period where the 1st Respondent was (inevitably) in breach of its banking covenants, was deeply involved with its private equity investors, had suffered a collapse in turnover from some

£500m a year to about £30m a year. No CEO would contemplate replacing a trusted PA at such a time.

30. Ms Long managed Fiona Bidston. Ms Bidston was in the G&G administration team and was made redundant. Ms Long's maternity cover was not made redundant, but asked for and was given a year's unpaid sabbatical. She resumed part time work in September 2020 as a human resources assistant in Reading. Ms Long did not ask for such a sabbatical. It was not an alternative to redundancy to suggest to Ms Long that she should become a nominal employee for a year unpaid in case a job might be available in a year.

31. On 29 June 2020 Ms Long emailed Lisa Anderson in human resources (job title "People Business Partner") (158). She said that she was in the G&G redundancy documents but was in CH&Co with Mr Richards, and wanted the opportunity to be considered in the wider group structure. Ms Anderson contacted Mr Richards. He asked Charlotte Hutchings, who told him in an email (155) that the PA to the CEO remained with extra remit added. Mr Richards then emailed Ms Anderson to say that he had already spoken with Ms Long in detail. He was clear that he was not retaining a PA, and that Mr Fredrickson was not having a PA either. Nor was the person whose PA was made redundant along with Ms Long. He observed that Ms Eldon's role was being expanded to include office management duties and other things (154). Whichever way you looked at it, he said that Ms Long's role was redundant.

32. On 24 July 2020 Mr Fredrickson write to Ms Long to give her notice. On 10 September 2020 Ms Long's employment ended.

33. On 30 September 2020 Ms Eldon asked for administration rights to Mr Richards' diary: hitherto she could access it but not amend it. Ms Long was furloughed, Ms Eldon could not enter things in Mr Richards' diary, so plainly he was doing this himself. As he said, at the time there was little to put in it other than crisis meetings.

34. There are no PAs employed by the Respondents now, save Ms Eldon.

35. The Bristol office has now been closed.

Conclusions

36. This was a very large-scale redundancy exercise. Some senior managers had PA support. That was three people. Two of the PAs were made redundant. The Group CEO has an assistant, who was his PA and who still performs that role for him and other statutory board directors, is now also office manager and who attends board and investment meetings. That Ms Eldon was not put on furlough at a time when every possible salary saving was being made indicates how important her role and contribution was considered to be.

37. It is plain that this was a redundancy situation, and that Ms Long's role had been removed. There was no alternative employment opportunity anywhere in

the group. There was an obligation to look throughout the group[10]. There were no vacancies anywhere in the group, as Ms Long accepted.

38. The only way Ms Long could have remained in employment was if Ms Eldon had been dismissed instead. She was not in the same pool as Ms Long, and was not put at risk at all. Ms Long says that she was artificially restricted to the G&G structure, and that it was unfair that she was not in a wider pool (which is why her claim was brought against CH&Co). It was not unreasonable to think that Ms Eldon was in a different role to that of Ms Long, especially when given other responsibilities. Of course, Ms Long's view is that she could have been reallocated that role in a pool of three. I have decided that the pool limited to the Bristol office was reasonable so it was not going to be considered. If there had been a pool of three, realistically it was not going to be the decision of the Respondent that Ms Eldon should be dismissed so that Ms Long could take her job.

39. Ms Long was employed in the Bristol office. There was no PA role there after the mass redundancies. While a bumping dismissal can be fair there is no obligation on an employer to create a job for a redundant employee by *"bumping"* another out of hers[11].

40. Ms Long says that it was unfair that she was missed off the initial communication and that was unfortunate. She was contacted by her representative soon after. She suffered no detriment as a result.

41. There were some issues about notice and amount of redundancy payment: these are the consequences of the decision to end Ms Long's employment but are not relevant to the question of whether it was fair or not.

42. If Ms Long should have been pooled with the other two PAs for the one PA role remaining, Ms Eldon was the only PA of the three in both Respondents who was retained. Given how much she did, it would have been inevitable that she would be the one PA who was retained. It would have been a fair selection.

43. Further, Ms Long worked 4 days a week, and lived in Bristol. Ms Eldon was based in Central London (although she worked from home sometimes). Ms Long would go to London perhaps once a fortnight. It is not realistic to expect that the 1st Respondent would dismiss Ms Eldon in favour of Ms Long. While *"bumping"* may be permissible it is not an obligation. In the circumstances had Ms Eldon been *"bumped"* she would have had a strong claim for unfair dismissal herself.

44. I enquired how the job could be done in 4 days a week, as Ms Eldon is full time. Ms Long said she would have gone up to full time, but this is not something she ever told her employer. She said she would have travelled to

[10] VOKES LTD (appellants) v. D C BEAR (respondent) - [1973] IRLR 363

[11] Samels v University of Creative Arts [2012] EWCA Civ 1152, paragraph 31: "Mr Samuels informs us that he did take this point below, but the key is that it is not compulsory for an employer to consider whether he should bump an employee. As Mr Williams made clear, if an employer takes the route of bumping another employee, it can be very detrimental to employee relations. It is in essence a voluntary procedure."

London more, but worked more from home. It is unrealistic to think that the Respondents would substitute the PA to the CEO of a company facing an existential threat.

45. There is a more fundamental point not raised by the Respondents which I brought up at the end of the evidence. S139[12] says that where the needs of the employer for employees *at a particular place of business* have ceased or diminished that is a redundancy situation. That was the case for the director's PA in Bristol. Ms Long accepts that there was no other role for her in Bristol. Whoever she was employed by, her selection for dismissal was fair. The choice of a pool for each place of business is rational and it is not for me to say that it would have been fairer to have a pool of three.

46. In addition, and alternatively there was no redundancy in London where the CEO wanted (for good reason) to keep Ms Eldon. It would not have been fair to "bump" Ms Eldon.

47. These factors inevitably mean that the dismissal was fair.

48. Ms Long also feels strongly that in February 2020 (so pre-Covid) there was an intention to remove her job, so that her redundancy was predetermined, and was unfair. This is not covered in the findings of fact for, assuming this to be so, the impact of Covid-19 on this business was so profound – of 2,500 employees were dismissed leaving 6,400, and half all admin staff – that this was overtaken by events.

49. Ms Long says that, pro rata and as a London salary, Ms Eldon's rate of pay was not dissimilar to hers, so that they had similar jobs. Even where people have identical job specifications where there is a redundancy situation one must be chosen. Even had Ms Eldon been in the pool for selection it was logical to choose Ms Eldon to remain.

50. There were a few errors in the process, unsurprising given the large nature of what was happening and its critical importance to the Respondents. I find that Ms Long suffered no detriment as a result and these did not make the dismissal unfair. If I had found it unfair there would have been a *Polkey* reduction of 100%.

51. The simple facts are that there were only 3 PAs in the group in different locations, and 2 were made redundant, and the 3rd was doing a greater role that the other two. That person was not redundant, in terms of both job content and job location. It would not have been fair to *"bump"* her. She was not in the pool with them for a good reason, or if she should have been pooled with them it would not have been unfair on the other 2 to select her as the one to remain.

52. For these various reasons the dismissal of the Claimant was a fair redundancy dismissal.

[12] Footnote 2 sets it out

Employment Judge Housego
Date: 9 November 2021

Judgment sent to parties: 2 December 2021

FOR THE TRIBUNAL OFFICE