



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Ms P Wilson

Kingfisher Lettings Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video) **ON** 14th and 15th October 2021

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimant: Mr M Green, Counsel

For the Respondent: Mr P Doughty, Counsel

JUDGMENT

Background and issues

1. The claimant was employed as a business manager for the respondent company. She was made redundant on 31st July 2020 and brings a claim of unfair dismissal alleging that her role was not redundant and that the respondent's managing director, who had made the decision to dismiss, had been motivated by a desire to 'get rid' of the claimant following her request for a performance bonus which had purportedly angered him.

2. The issues were agreed between counsel prior to the commencement of the hearing and they were:

2.1 *Unfair Dismissal*

Was the Claimant unfairly dismissed, in particular:

- (a) What was the reason for dismissal? The Respondent alleges redundancy or some other substantial reason, namely, a business reorganisation carried out in the interests of economy and efficiency. The Claimant alleges the real reason was that the Claimant had

- angered Mr Smith by requesting a bonus that he considered to be “shocking”.
- (b) Was the Claimant’s role as a Business Manager redundant under s98(2)(c) of the Employment Rights Act 1996?
 - (c) Did the Respondent act reasonably in dismissing the Claimant, taking into account the following (non-exhaustive) issues:
 - i) The existence of a strategic review and the conclusions that it reached, if any;
 - ii) The reduction in the work of the Business Manager role and the Lettings Manager role;
 - iii) When any reduction in work was going to take place;
 - iv) Whether the Claimant’s selection was a fair one;
 - v) What alternatives were considered to deletion of the Claimant’s role.
 - (d) Was the procedure undertaken fair in all the circumstances. In particular:
 - i) What consideration was given to measures to avoid compulsory redundancies?
 - ii) Were voluntary redundancies sought?
 - iii) Was there sufficient warning of redundancy?
 - iv) Was an adequate consultation process followed?
 - v) Was the pool appropriate and was the Claimant able to input into this?
 - vi) Were the selection criteria appropriate and was the Claimant able to input into this?
 - vii) Was consideration given to any suitable alternative roles?
 - viii) Should the redundancy have been transferred to the Letting Negotiator?
 - ix) Was there a fair appeal process?
 - (e) In the circumstances (including the size and administrative resources of the Respondent’s undertaking) did the Respondent act reasonably or unreasonably in the treating their reason for dismissal namely redundancy/SOSR as a sufficient reason for dismissing the Claimant.
 - (f) If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2.2 I have adopted these issues to the extent relevant to the facts in this case.

Procedure and evidence

3. The hearing was conducted by VHS. I was provided with an agreed bundle of documents of 130 pages (R1) including witness statements for the

claimant, for Mr M Smith, Managing Director of the respondent, and Mrs Rebecca Beard, HR Consultant to the Respondent. I was provided with additional documents C1 – C6 and an agreed list of issues. The witnesses were cross examined.

Findings of fact

4. Findings of fact are made on the basis of the evidence before the Tribunal taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Conflicts of evidence have been resolved on the balance of probabilities. The credibility of witnesses and the consistency of their evidence with surrounding facts and documents has been taken into account.

5. I found the claimant to have a determined and emphatic approach to giving evidence. There was absolutely no self doubt in her suppositions or assumptions and absolute certainty about her evidence being the correct version of events, nor any doubt about the integrity of her case. Whilst I do not doubt the claimant's honesty, that is not to say that I accepted the entirety of her evidence as being the objective truth rather than her version of the truth.

6. Mr Smith was generally positive in his approach to giving evidence but his evidence was vague at times and therefore at times, less reliable. Mrs Beard was not an employee of the respondent but a professional HR consultant engaged by the respondent to assist in the redundancy process. I found Ms Beard to be a direct witness who attempted to assist the tribunal. She readily admitted where her professional practice had fallen short of what might have been expected; she was frank about her approach to the redundancy process seeing it as a simple situation with an employee in a unique position and the redundancy process therefore being relatively straight forward. I did not have any indication whatsoever that she had lied, been spare with the truth, evasive or had exaggerated with a purpose of attempting to assist the respondent in its defence of the claimant's claims. It is to be noted that it is not the Employment Judge's function to resolve each and every disputed issue of fact. What follows are the relevant factual findings in relation to the issues set out above.

6.1 The claimant was engaged by the respondent on a permanent basis on 1st October 2015 as business manager. The company is privately owned by Mr Mark Smith and his wife. They are both directors. They own portfolios of commercial and residential premises for let. The business also employed a lettings negotiator and a maintenance operative. Mr Smith's business was divided between five companies within the property management and development sector. The total asset value at the relevant time was about £15m. The profit over five companies was about £1/2 m but had been as high as £1m.

6.2 The claimant and her two work colleagues were employed by the respondent. The claimant performed many of the tasks that Mr Smith had undertaken during the 15 years prior to the claimant's employment. Mr Smith had been personally more involved in the day to day tasks of running the lettings business before the claimant's engagement which had freed him to focus on larger scale project management tasks and the overall development of the business.

6.3 The claimant had an employment contract dated 10th October 2015. There is no bonus provision in the contract. As business manager, the claimant had responsibility for day to day management of the properties within the commercial portfolio which included processing payments, liaising with tenants, managing the other two members of staff, the HR function, and organising property maintenance.

6.4 The claimant worked 24 hours, then subsequently 26 hours a week at about £21.00 per hour. The claimant's position as business manager was senior to the lettings negotiator's role which had been filled by the same member of staff for about three years on a part time basis of 16 hours a week at £10.71 an hour. The business manager role required telephone cover for the lettings negotiator; this occurred on the four days a week when the claimant worked, during the final two hours of each day after the lettings negotiator had completed her working hours and gone home. Cover included taking phone calls on behalf of the lettings negotiator and delegating tasks back to the lettings negotiator or the maintenance operative. The claimant also covered for the lettings negotiator when she was off sick or on holiday. The claimant and Mr Smith had a good working relationship. The three employees had a good team relationship.

6.5 During the redundancy process, job descriptions were produced for the business manager and lettings negotiator roles. These showed a substantial difference in the roles of business manager and the lettings negotiator which was reflected in the pay and hours differential. Whilst a job description was not provided to the claimant on commencement of her employment, the content of the job description created in July 2021 to reflect her role was not materially disputed by the claimant. There were no performance issues with the lettings negotiator who had 9 years experience in such a role, of which three years were with the respondent. She had what was described as a "great" relationship with the residential tenants, and the hours she worked suited her child care needs.

6.6 By 2020 Mr Smith had been trading through the respondent company for 25 years. During 2019 Mr Smith had discussed informally with his accountant the introduction of software to outsource parts of the business which could make savings in the business. In January 2020 Mr Smith began to consider ways in which to modernise the infrastructure of his businesses. He consulted with other business owners in the same industry sector and he identified software which

would help him make the business more efficient. There is no documentary evidence to support this claim but there is no reason why there ought to be any documentary evidence of Mr Smith's thoughts or intentions about his business. He discussed business matters with his wife, a co-director. He ran a family owned business as shareholder/director and had to report his thoughts on strategy or future business plans to no one.

6.7 On about 13th February 2020 Mr Smith telephoned Ms Rebecca Beard who ran her own HR consultancy business specialising in helping small to medium sized business owners with their HR needs. Unlike Ms Beard, Mr Smith was clear about the date and the time of the call because it was on the day that he was attending a development site in Gosport and waiting to attend at auction at 12.30pm.

6.8 Ms Beard gave Mr Smith initial guidance in their telephone conversation which lasted about 15 minutes. During that conversation Mr Smith explained he wanted to improve the efficiency of the management of his company by introducing new software to streamline administrative tasks and to make use of outsourced services. New property management software would automatically process tenants payments and would avoid manual entry of data because it was recorded automatically from the bank payments.

6.9 Ms Beard discussed with Mr Smith the impact such changes would have on his three members of staff, particularly identifying the impact it would have on the role of business manager. Mrs Beard suggested to Mr White that he undertake a job profile for the business manager role to assess the impact of his reorganisation of administration tasks on that role.

6.10 Mrs Beard understood at the time of the call, that because of the emerging effects of the Coronavirus pandemic, Mr Smith was not in a rush to take any steps immediately. Ms Beard kept no record of that telephone conversation but recalls that it was agreed that Mr Smith would contact Ms Beard if and when he decided to pursue their discussions. It was not Ms Beard's practice to create a client file after an initial telephone inquiry when she gave initial guidance or information, without charge, to encourage a potential new client to return with a substantive instruction.

6.11 Mr Smith went on holiday for five weeks in mid February 2020. His return was delayed by the Covid 19 lockdown by one week. He returned to the office on 29th March 2020. During Mr Smith's absence in February and March 2020 the claimant ran the business on a day to day basis, as she had on other occasions when he had been on holiday. Mr Smith had remained in touch with the claimant during his holiday absence by email and occasionally by phone. The claimant reported what she was proposing to do and what needed to be done, particularly about the lockdown, and Mr Smith supported the claimant. He described it as the claimant saying "*this is what I am doing, do you agree?*" It

was a case of the claimant's initiatives being taken with his support. There was no concern about the claimant's competence or diligence.

6.12 The country went into lockdown on 23rd March 2020. The claimant furloughed the other two members of staff, the lettings negotiator and the maintenance operative; she brought home the necessary office equipment to enable her to run the office from home and continued running the business in Mr Smith's absence from home. That included managing the rental 'holiday' on residential tenants imposed by the government. Like many working from home, it avoided the necessity of having to commute to work and sit in traffic. The claimant was not unhappy about working from home although it did involve her working more hours until the lettings negotiator and the maintenance operative returned to the office in June 2020.

6.13 Until Mr Smith's return to work on 30th March 2020 the claimant had also taken on some of Mr Smith's duties and had completed additional tasks he had given her. During his absence the claimant had worked 8 – 10 hours a day and had covered the phones out of hours for any emergencies. The claimant logged her working hours which had increased from 24 hours a week by about 15 hours a week. The claimant worked the extra hours out of a sense of duty and believing that she had helped Mr Smith maintain his business. The claimant claimed for and was paid for all extra worked hours.

6.14 On about 17th June 2020 after returning to office based work along with her two work colleagues, the claimant asked Mr Smith for a financial bonus in recognition of her efforts during his absence and lockdown to keep the business running smoothly. The claimant believed that some recognition of her efforts should be made because she had worked throughout lockdown whereas the other two members of staff had not and had nevertheless received 80% of their pay for staying at home.

6.15 The claimant claims that Mr Smith was angry at her request. I preferred Mr Smith's evidence that he was taken aback, not angry, for reasons explained below. Mr Smith had not anticipated the claimant's request. When she first asked him for a bonus, his first concern was whether she had been paid for all of the extra hours she had worked, to which the claimant confirmed that she had. Mr Smith asked the claimant what figure she was thinking of. The claimant did not state orally what size bonus she wished for. They agreed that the claimant would have 12 days extra holiday in 2021 to compensate for the adjustments made for the other two members of staff at the end of lockdown.

6.16 The claimant did some calculations and left a sheet of paper on Mr Smith's desk. No copy of this document was produced at the hearing. The respondent believed the figures suggested a payment of £8k - £9k. The claimant's evidence in cross examination was that she had requested about £3,000 as a cash bonus.

6.17 Mr Smith found the claimant's calculations ambiguous; he discussed them with his wife. They did not think the sum claimed by the claimant was acceptable. In response, Mr Smith offered the claimant in writing various permutations of taking additional paid leave to balance up the paid time taken off by the two other members of staff who had been furloughed until June 2020.

6.18 The options offered to the claimant were (i) taking two days paid leave a week for 8 weeks, effectively working 50% of the week for eight weeks on full pay; or (ii) four weeks 'solid' holiday on full pay. The third option was having five weeks additional leave at 80% to mirror what the other staff had taken during furlough. Mr Smith also offered in addition a cash bonus of £500 and the previously agreed extra two weeks holiday in 2021.

6.19 The permutations would have entailed holiday pay in excess of £2,000. The total value of Ms Smith's offer was about £2,700 excluding additional holiday in 2021. This was not far short of the £3,000 the claimant had said in cross examination she was asking for and potentially more than that figure including the additional holiday in 2021|.

6.20 In early July 2020 Mr Smith again contacted Ms Beard by telephone to progress the discussion they had had in February 2020. There was some debate about the date of the telephone conversation and whether it was before or after 10th July. Mr Smith thought it was in the week before, Ms Beard was not sure and thought it could have been the 9th or 10th July. I find that the exact date is not relevant for the reasons set out below in the conclusions.

6.21 Mr Smith discussed the efficiencies he wanted to introduce including taking a more active role in the business himself. Ms Beard identified during their discussion and that the role of business manager was distinct from the role of lettings negotiator and reiterated that the business manager role would be impacted by the changes. Some days later Mr Smith phoned Ms Beard for a third time to formally appoint her to assist in overseeing a redundancy process. Ms Beard talked through the redundancy process and suggested that Mr Smith should have a face to face meeting with the claimant to warn her about the redundancy process that company intended to implement and the reasons for redundancy consultation.

6.22 On 10th July 2020 the claimant rejected Mr Smith's bonus proposals by email. She explained that she was disappointed with Mr Smith's response to her request for a bonus. The claimant explained in her email what the dictionary definition of 'bonus' was and when a bonus might be paid as an incentive or to reward good performance. She also asked Mr Smith to reconsider his offer. The claimant believed that she was in a negotiation with Mr Smith.

6.23 Mr Smith however did not think he was in a negotiation with the claimant. On 15th July 2020 Mr Smith confirmed by email to the claimant that he was not going to make a further offer.

6.24 On 16th July 2020, Mr Smith held an informal meeting with the claimant, as Ms Beard had suggested, to warn the claimant about the proposed redundancy. Mr Smith's choice of language was not as subtle as Ms Beard had intended, and he effectively told the claimant that the business manager role was going to be made redundant. Mr Smith phoned Ms Beard to inform her that the claimant had been angry and distressed on hearing about the redundancy consultation.

6.25 Ms Beard drafted a letter on behalf of the respondent inviting the claimant to a formal first consultation meeting and provided a redundancy policy for the respondent to adopt.

6.26 On 17th July 2020 Mr Smith held a first consultation meeting with the claimant in the office, chaired by Ms Beard. The claimant was upset and confrontational. She began to record the meeting. Because the claimant was so upset, Ms Beard did not ask her to stop. The claimant alleged that the decision to make her redundant had been influenced by the exchange between her and Mr Smith about her request for a bonus. She also believed that the role of letting negotiator should have been in the redundancy pool. The claimant raised the question why a new role had not been created for her; she had been previously been promised by Mr Smith a 'job for life' and therefore the redundancy situation was unfair.

6.27 Ms Beard explained the business reasons behind the redundancy process and explained that a review of the business manager role and lettings negotiator role had been undertaken and a conclusion reached that they were significantly different roles with different daily core responsibilities and different levels of autonomy. The business manager role was therefore unique. Mr Smith also explained the business reasons for the redundancy process and that they were not personal to the claimant. The claimant did not believe him.

6.27 On 21st July 2020 Ms Beard drafted and emailed to the claimant a letter on behalf of the respondent company summarising the points of discussion at the meeting on 17th July. This is the respondent's only record of the conversation on 17th July 2020 as Ms Beard did not keep notes of the discussions.

6.28 The reason given to the claimant for the redundancy conclusion process was that in light of the company reaching its 25th year of trading, a strategic review of the business processes, income streams and staffing structure was conducted in February 2020. There is no documentary evidence of this claim, but it is a fact that Mr Smith had a telephone consultation with Ms Beard in February 2020 about his future plans for the business.

6.29 The letter confirmed that the claimant had been informed that her role of business manager was, as a result of the business review, at risk of redundancy because of automation through new software and online processes, and the intention to reduce the company's commercial stock by 20% in the following 12 months with directly affected the claimant's role. In addition Mr Smith wished to take on more of the operational management duties himself which would also reduce the need for the claimant's role.

6.30 The letter addressed each of the claimant's concerns namely about the interchangeability of the business manager role and the lettings negotiator role; the allegation that the redundancy process was being rushed; the allegation that the redundancy situation had been prompted by the claimant's request for a performance bonus, and finally a complaint that the respondent had breached the GDPR by emailing the claimant on the office email address about redundancy which made the correspondent accessible to other members of staff and was therefore a breach of the claimant's confidentiality.

6.31 On 22nd July 2020 the respondent held a second consultation meeting with the claimant, chaired by Ms Beard. The claimant continued to reject the business rationale for the redundancy process, insisting the motivation for it was her request for a bonus. As a result the conversation became, as Ms Beard put it, "unconstructive". In the subsequent letter dated 24th July 2020 Ms Beard summarised the claimant's points made during the meeting and responded to them. The claimant had mainly alleged that the outcome of the redundancy was predetermined and she had wanted information about what aspects of her role were to be automated or outsourced. The claimant was given the option of a third consultation meeting.

6.32 A third meeting did take place on 31st July 2020 chaired by Ms Beard. Her letter of outcome of 3rd August 2020 is again, like all of the consultation meetings outcome letters, the respondent's only record of the content of the meetings. Ms Beard repeated the history of the redundancy process up to the point of that meeting. Ms Beard then summarised the points of discussion including the introduction to software systems and on line processes to manage and join up payroll, accounts, HR and tenant rental payments functions; the outsourcing of PA and HR support and the retention by Mr Smith to himself of all remaining operations and business management responsibilities.

6.33 It was noted that no suitable alternative vacancies were identified and no other alternative ideas or suggestions had arisen during the consultation process. The claimant's dismissal by reason of redundancy was confirmed effective from 31st July 2020, with a pay in lieu of 5 weeks' notice. The claimant was given the right to appeal.

6.34 The claimant appealed on 4th August 2020. Her main points of appeal included her objection to the lettings negotiator role not being included in the redundancy pool as the collection of rent was 75% related to the lettings agents role and perhaps 20% of the business manager role. Furthermore, she asserted the business manager role included covering for the lettings negotiator role for 2 hours every day (that the claimant worked) and for holidays and that this overlap was not ad hoc and was sufficient to justify the lettings negotiator role being included in the redundancy selection pool.

6.35 The claimant reiterated her belief that the redundancy had been triggered by her request for a performance bonus and was not a genuine redundancy. She stated that she believed that if she had not requested a bonus she would still be working there. The claimant pointed out that if Mr Smith had intended to make her redundant why would he offer her three holiday options a £500 bonus and extra holiday in 2021? This ignores the fact that the offer of holiday options postdated the bonus request. The claimant believed that payroll, HR and commercial accounts were already automated and there was no need for her role to be automated, as it already was automated. The claimant believed that the decision had been predetermined and put forward her arguments as to why she believed her role was not being made redundant but was being made the subject of a variation of contract. The claimant also expressed her view that she was entitled to compensation because of Mr Smith's broken promise that she would be employed "until she retired".

6.36 On 6th August 2020 the claimant was invited to attend the Appeal meeting to be held on 11th August 2020, again to be chaired by Ms Beard with Mr Smith present. On the evening before Ms Beard sent to the claimant the job descriptions for the business manager role and the lettings negotiator role for discussion. Ms Beard had also prepared a selection matrix for both the claimant and the member of staff in the letting negotiator role. Ms Beard had taken the view and had advised Mr Smith that as no new grounds of appeal had been raised, it was not necessary to appoint an independent chair to conduct the appeal meeting. Ms Beard was the appeal chair.

6.36 The appeal meeting took place on 11th August. It was conducted by Ms Beard. In the letter of 13th August 2020 Ms Beard summarised the points raised in the appeal hearing and the discussion which followed. Again, the outcome letter is the only note of the meeting. The letter confirms that the appeal held no new appeal grounds which had not been already discussed during the redundancy consultation meetings. The letter confirms that the marks retrospectively attributed to both employees in their respective roles as set out in the selection criteria marking matrix, showed that the outcome would not have been any different. The lettings negotiator had been marked higher than the claimant. The letter records that the claimant had been provided with both the job descriptions and the completed scoring matrix for both roles prior to the appeal meeting and the claimant had not provided any feedback on the selection

criteria matrix, nor challenged, nor made a claim that she had not received the documents.

6.37 The letter dealt with each of the points of appeal, repeating and in some cases expanding on the areas of plans for automation. It was confirmed that in addition to the 20% reduction in commercial property portfolio, the buy to let mortgages would be reduced to four or five by converting to portfolio mortgages which would provide great time savings in data input and dealing with multiple mortgage providers.

6.38 A considerable part of the appeal outcome letter dealt with the claimant's continuing complaint about a breach of the GDPR which is not relevant to the redundancy decision.

6.39 The respondent did not replace the claimant with any new recruit after her dismissal. It implemented new property management software, 'Breathe' HR management software to cover all aspects of leave requests, sickness absence and tracking hours, outsourced creation of commercial leases and HR liaison. Mr Smith expanded his own duties to include drafting financial accounts, banking reconciliation payroll Vat returns. The portfolio was reduced and the basis of the buy to let mortgages was also reduced. The respondent delayed the implementation of further computerisation of the financial duties until April 2021 after the firm's accountant had advised that it would be preferable to wait until the end of the 2019/2020 financial year before switching over to the new software.

Submissions

7. I was provided with written submissions by both parties and heard subsequently oral submissions. I have read and re-read all submissions and have taken them into account.

The law

8. An employee is dismissed by reason of redundancy within S139(1)(b) Employment Rights Act 1996 if the reason for the dismissal is that the requirement for employees to do work of a particular kind has ceased or diminished or are expected to cease or diminish.

9. In **Safeway Stores v Burrell [1997] IRLR 200** HHJ Peter Clark set out the three stage process to establish whether or not a redundancy situation existed under S139(1)(b) RA 1996:

- (i) Was the employee dismissed?
- (ii) 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? And if so,
- (iii) Was the dismissal of the employee caused wholly or mainly by that state of affairs?

10. **Murray and Anor v Foyle Meats Limited [1999] IRLR 562 HL** affirmed **Safeway Stores v Burrell**. Lord Irvine of Lairg stated

“My Lords, the language of paragraph [s130(1)] (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter.

This conclusion is in accordance with the analysis of the statutory provisions by Judge Peter Clark in Safeway Stores Plc. v. Burrell [\[1997\] IRLR 200](#) and I need to say no more than that I entirely agree with his admirably clear reasoning and conclusions.”

This is a question of causation. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter.

11. If the answer to that question favours the employer, the Tribunal must then decide whether the dismissal was fair under s98(4) ERA 1996. The two issues are (i) whether the employer followed a fair procedure; and (ii) did the decision to dismiss fall within the range of reasonable responses open to a reasonable employer.

12. What amounts to a fair procedure includes consultation at the formative stage, objective criterion/criteria for selection for redundancy and following a fair selection in accordance with such criteria. Finally the employer should make reasonable efforts in respect of alternative employment which could prevent a dismissal: **William v Compare Maxam Ltd [1982] IRLR 83 [18]**.

13. The case of **ASLEF-v-Brady [2006] IRLR 576** involved a dismissal on grounds of misconduct. The words of Elias P in that case would read thus, *“if I substitute for misconduct the words ‘redundancy situation’ It does not follow therefore that wherever there is a redundancy situation which could justify dismissal, a Tribunal is bound to find that was indeed the operative reason. For*

example, if the employer makes the redundancy situation an excuse to dismiss an employee ..., then the reason for the dismissal – the operative cause – will not be the redundancy situation at all since that is not what brought about the dismissal, even if the redundancy situation in fact merited dismissal. Accordingly, once the employee has put in issue with proper evidence of basis for contending the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing the principal reason is a statutory reason. ... On the other hand, the fact the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There is a difference between a reason for dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.”

Conclusions

14.1 The claimant invites the Tribunal to find that on behalf of the respondent company, Mr Smith, its managing director, the proprietor and the controlling mind of the company, decided to dismiss the claimant after she had angered him by asking him for a financial bonus in recognition of her work in keeping his business running through the early weeks of the Covid 19 pandemic when the country went into the first lock down.

14.2 The claimant based her assumption that she had angered Mr Smith when she asked for a financial bonus, on his reaction which she claimed had been to say that her request was ridiculous and had ruined his and his wife’s weekend. Mr Smith denied he had said ridiculous. Even if Mr Smith had used the word ‘ridiculous’ in a dismissive way, that does not prove that he was angered by the claimant’s request to the extent that he would, in retaliation, fabricate and incur the cost of an HR professional to prepare for and implement a redundancy procedure resulting in her dismissal. If Mr Smith had been angered and unsympathetic to giving the claimant some recognition of her sterling efforts during the covid pandemic, the obvious reaction would have been to have refused the request outright. Instead he sought a not unreasonable business compromise with the claimant.

14.3 The claimant’s assertion that her dismissal was retaliation for her asking for a bonus, entails the necessity of the Tribunal finding that the reason or principal reason for the claimant’s dismissal was that Mr Smith was angered by the claimant’s request for a bonus and that the procedural steps taken by Mr Smith and Ms Beard were a sham, no more than a thin veil designed to hide Mr Smith’s decision to get rid of the claimant because of her demand for a bonus.

14.4 In response to Mr Smith’s counter proposals which exceeded in financial value the claimant’s request for a bonus, the claimant rejected his offer and gave Mr Smith a lecture on what a bonus means. He could have seen that as

patronising; which it was. Mr Smith was not obliged to continue a negotiation with the claimant. Mr Smith was taken aback by her forthright and persistent demand. In the light of the respondent's evidence relating to the reasons for redundancy, an assertion that the dismissal was retaliatory is simply not credible. The timing of the redundancy and the claimant's demand for further financial recognition of her worth, may make the dismissal appear opportunistic but that does not make it unfair (**Aslef v Brady**) as the allegation in this case does not and cannot extinguish or outweigh the evidence before the Tribunal of a genuine redundancy situation.

14.5 In support of her contention that she was dismissed because she asked for a bonus, the claimant makes several assertions. One is that as business manager the claimant was unaware that Mr Smith had started a strategic review of the business in January 2020 and therefore she did not believe that any such strategic review would take place or had in fact taken place without her knowledge. As already stated, Mr Smith and his wife had no duty to discuss his plans for the future of his family business with an employee and the fact that he did not, does not mean that he could have had no plans. This point has no probative value.

14.6 The claimant asserted lack of financial evidence to support the redundancy exercise such as invoices which would illustrate professional advice had been taken on a strategic review or cost savings which could be made. She asserted that there was no need to introduce cost saving automation/computerisation as the claimant already referred to an HR consultancy and ACAS for HR/employment issues; she said that PA services and pay roll were already outsourced. The claimant alleged that automation of rent collection would only affect the claimant's role by 30%, whereas the role of the lettings negotiator would have a reduction of 70% in rent collection if the process was automated. It was asserted that invoices shown to the claimant subsequently were not evidence of her role needing to be made redundant as they did not disclose when contracts were entered into, or the scope of the contracts. It was claimed that this illustrated the fact that the reduction in the scope of her role was not because of her work being outsourced.

14.7 The claimant is in a difficult position to prove these points. The respondent has shown that it has outsourced several services either completely or to a greater degree than whilst the claimant was employed and subsequently. Mr Smith intended to reduce (and subsequently did reduce) the size of the commercial property portfolios and intended to take on a greater management role himself. It is not a requirement for the respondent to prove economic justification for its decision to make the business manager role redundant as the claimant suggests, but to demonstrate that it had a diminution in the requirements of the business to do work of a particular kind undertaken by the claimant. I find that it has done that.

14.8 The claimant asserted that Mr Smith had asked a rhetorical question before the 3rd consultation meeting - "*how have we come to this?*". When the claimant replied because it was what he wanted after the claimant had asked for a bonus, Mr Smith did not reply. The claimant interpreted his silence as evidence that the consultation was superficial and unfair. She concluded that Mr Smith did not know why he was making the claimant redundant. This is supposition. I have no doubt that Mr Smith did know why he was paying professional fees to Ms Beard's consultancy - it was to conduct a proper redundancy programme.

14.9 The claimant accepted that about 1/3rd of her commercial role would go with automation, she also acknowledged that she was informed that 1/3rd of her role would be undertaken by Mr Smith. She did not accept as true the need to outsource to a PA service as out of hours calls were already serviced to an outsourced PA. This further outsourcing however would have included outsourcing during the claimant's normal working day. Putting aside the issue of an outsourced PA, the proposed reduction in the commercial portfolio (which subsequently took place), and Mr Smith picking up 1/3rd of the claimant's duties, is sufficient to operationally justify the respondent's claim that there was less need for the claimant to perform the former business manager role.

14.10 I then consider whether the procedure followed by the respondent was fair in all the circumstances. Mr Smith with little knowledge of the process, followed Ms Beard's advice throughout. Ms Beard effectively led the consultation process..

14.11 On Ms Beard's advice the respondent put the claimant in a redundancy selection pool of one. To Ms Beard the situation had seemed clear. The claimant was the business manager working 26 hours a week at £28,000 per annum. The lettings negotiator was paid half that rate for 16 hours a week. The claimant worked on the commercial portfolio, the lettings negotiator on the residential portfolio. There was only overlap to the extent that the claimant could do the lettings negotiator role but the lettings negotiator role was not interchangeable with the claimant; she could not fulfil the business manager role. That much is clearly indicated by the claimant's actions on behalf of Mr Smith at the time of lock down in March 2020.

14.12 Ms Beard had established that there were no concerns about the lettings negotiator's performance; she had a total of nine years experience in the role, of which three years was with the respondent. She had a "great" relationship with the residential tenants. She was happy in her role and the respondent was satisfied with her performance. She was part of a tight knit team.

14.13 I find taking phone calls for the lettings negotiator for the last two hours of the afternoon and cover by the senior employee of a junior employee's absence on holiday does not make the roles interchangeable or any overlapping to sufficient degree. The claimant did not perform the lettings negotiator role, she took phone messages. I find Ms Beard's assessment that the business manager role and the lettings negotiator role were different and not interchangeable, was justified.

14.14 Ms Beard and Mr Smith (led by Ms Beard), met with the claimant at three consultation meetings. The claimant was angry, upset and hostile. The claimant had little if any belief in the integrity of the redundancy process from the start because she attributed to Mr Smith an ulterior motive for making her redundant, not the business need, but retaliation for asking for a bonus. Despite this, the respondent, through Ms Beard, attempted to engage with the claimant and responded in detail to all her objections to the process. Ms Beard attempted to show that the business manager role and lettings negotiator role were different. She also relied on the job description of both roles and drew up a matrix with selection criteria for Mr Smith to mark, which purportedly showed that even if the claimant and the lettings negotiation had been put in the same pool, the claimant would have nevertheless been selected for redundancy. I found this latter exercise to be futile as no complete marks on the selection criteria were made available in evidence and therefore the exercise was of no evidential value.

14.15 Ms Beard who chaired the three consultation meetings attempted to respond to the claimant's criticisms during the meetings. Despite this, the claimant persisted in her disbelief that the redundancy was genuine. The claimant had an opportunity to engage with the process but she had lost trust and confidence in Mr Smith after he refused to make any further bonus offer and did not really engage in a constructive way.

14.16 The claimant during the redundancy consultation and during cross examination initially relied on the assertion that there was sufficient overlap between her role and the lettings negotiator role to justify them both being in the selection pool for redundancy. The claimant initially said that if that had occurred and she was still selected, she would have accepted her redundancy. However as a result of counsel preparing the list of issues including the issue of whether the respondent should have considered the transferred redundancy of the lettings negotiator, once the claimant had been informed of what a transferred redundancy was, otherwise known as 'bumping', the claimant also put her case as one where a transferred redundancy should have taken place. The claimant

alleges that this failure to make the lettings negotiator redundant instead of the claimant was a failure in procedural fairness and rendered the dismissal unfair.

14.17 I have considered the facts. Whether to consider and implement a transferred redundancy is essentially a voluntary exercise for the respondent taking into account the effect it would have on the business. The lettings negotiator was competent and by the claimant's own admission, an experienced lettings negotiator. There were no issues with the lettings negotiator's performance. The lettings negotiator earned approximately half the claimant's annual salary and worked ten hours a week less than the claimant. The lettings negotiator role was not redundant. Her role was not as affected by automation and outsourcing as the claimant's role was. She did not have the authority or the autonomy of the claimant. She had length of service of about 3 years whilst the claimant had just over 5 years. That is not a significant difference. Whilst the new software would also partly affect the lettings negotiator's role, Mr Smith was not intending to take on one third of her role. He intended to take on one third of the business manager role, a role he had done himself prior to the engagement of the claimant five years earlier.

14.18 The claimant did not raise bumping as an option to be considered during the consultation meetings. Ms Beard did not suggest to Mr Smith that 'bumping' the lettings negotiator was an option open to him as she did not think it appropriate. If she had, by the time it came to the second consultation meeting and given the claimant's challenging approach to the redundancy process and situation, her palpable anger and disappointment in Mr Smith, it is highly unlikely that Mr Smith would have positively considered transferring the claimant's redundancy dismissal to the lettings negotiator as a viable option in circumstances where the business is a micro family business with a team of two employees. It would have reduced the claimant's role to a lesser role on half the rate of pay on fewer hours, whilst Mr Smith undertook parts of the claimant's former role. It would have been potentially difficult from a team relationship viewpoint given the size of the work force.

14.19 For these reasons, I find that if consideration had been given at the time to 'bumping' (which it was not), the outcome would not have been any different. The failure to consider a transferred redundancy in this case does not render the dismissal unfair.

14.20 The claimant also submits that there was no consideration given to alternative roles or to part time working. As the claimant's role had been reduced or would be reduced by about 66% by automation and Mr Smith taking on his former managerial duties within a reduced property portfolio, this would have reduced the claimant's hours to about 9 hours a week. The claimant had been

given ample opportunity to raise these points during the consultation process but she made no suggestions of this kind. The respondent was under no duty to create a new role for the claimant. The respondent employed three staff and reduced to two. Given the size and administrative resources of the respondent, there was extremely limited, if any scope for finding alternative employment within the business. The claimant did not claim that working 8 – 9 hours a week was viable and there was not discussion on it at any point between claimant and respondent as to whether it was viable or not. What was left of the claimant's duties were absorbed by Mr Smith and the lettings negotiator. I find that it is not a persuasive argument on unfairness that the respondent did not consider part time work given the size of the business, the size team and the impact it would have on the other team members.

14.21 In summary, the dismissal of the claimant by reason of redundancy met the legal tests of S139(1)(b) and **Safeway Stores v Burrell**. The respondent had a genuine reason to dismiss, and I also find that it followed a fair procedure. The dismissal was fair. In the circumstances it is not necessary to consider whether the appeal process was fair.

14.22 For the sake of completeness however I have addressed the respondent's failure to engage an experienced independent, 'new' chairperson for the claimant's appeal. Ms Beard conducted the appeal meeting as she had the three previous consultation meetings but this time she made the decision make, not Mr Smith. It would have been very difficult if not impossible in the circumstances for Ms Beard to overturn Mr Smith's earlier decision to dismiss the claimant. That situation might look initially unfair as it could not be a true appeal without the potential for a different outcome from the final consultation and dismissal meeting.

14.23 Would it have been any different on the facts of the proposed redundancy if an independent HR consultant had conducted the appeal? I contemplate what a newly appointed chairperson would have found. Having found that the claimant's role was being reduced through automation in several areas, and through Mr Smith's intention of taking over part of the claimant's managerial role, and that the other staff would absorb some of her role, thus establishing the basic premise that there would be a diminution in need for the claimant to perform her role, the independent chair was highly likely to find that the first part of the **Safeway Stores v Burrell** test is made out. The independent consultant would then have found that there had been one informal warning meeting, three previous consultation meetings, the respondent had given plausible business reasons during those meetings for making the role of business manager redundant; and the grounds of appeal were no different to the points made and discussed during the consultation meetings. He or she would observe that the

claimant had every opportunity to put her case, which she did whether or not she could have been more constructive. The independent consultant would have considered the reasons put forward by Mr Smith, the size and administrative resources and the highly likely, if not only outcome, would have been that the appeal was dismissed and the redundancy dismissal decision upheld. He or she would also have considered the main objection to the redundancy was that it was retaliatory, personal, because the claimant had presumed to ask for a bonus and he would have learned that respondent had made a reasonable counteroffer to the claimant which had been rejected. There is little to undermine the respondent's contention that it had followed a fair and reasonable procedure. It is highly likely that the appeal hearing conducted by another HR consultant would not have altered the outcome, nor the time frame of the redundancy process such that **Polkey** is not in issue.

14.25 The claim is dismissed.

Employment A Judge Richardson
Dated: 30 November 2021

Judgment & reasons sent to parties: 16 December 2021

FOR THE TRIBUNAL OFFICE