EMPLOYMENT TRIBUNALS

Claimant:
Ms Adina Savut

v

Respondent:
Hilton Hotels UK Ltd
t/a Waldorf Hilton

Heard at: London Central (via CVP) **On:** 30 November & 1 December 2021

Before: Employment Judge Fredericks

Appearances
For the claimant: In Person
For the respondent: Ms A Rumble (of Counsel)

JUDGMENT

1. The claimant's claim for unfair dismissal is not well founded and is dismissed.

WRITTEN REASONS

Background

1. The claimant was employed by the respondent as Director of Groups, Conferences and Events Sales at the time of her dismissal effective on 5 January 2020. She began working at Waldorf Hilton on 5 June 2015. The claimant began employment with Hilton Hotels UK Ltd on 22 September 2008.

2. The claimant claims that her dismissal was unfair contrary to section 94 of the Employment Rights Act 1996 because the outcome of the redundancy process was pre-determined such that the other individual she competed against for the role was retained in employment instead of her. In so doing, she says, the respondent did not comply with its own procedures or policies and so the procedure used to determine her dismissal was unfair. Further, the claimant claims that the appeal stage of her redundancy process was insufficiently robust, which exacerbated the previous unfairness.

3. The respondent contests the claimant's claim entirely. It says that the claimant was fairly dismissed for the potentially fair reason of redundancy (section 98(2)(c) Employment Rights Act 1996). It says this dismissal occurred following a fair process where two senior roles were merged into one, and where the claimant did not perform as strongly in the selection process for alternative employment as the other candidate she was competing against for the sole remaining position.

4. The claimant entered ACAS early conciliation on 15 December 2020 and the ACAS Certificate was issued on 13 January 2021. The claimant's claim form was received by the Employment Tribunal on 9 February 2021. The claim is in time.

5. The claimant represented herself at the hearing and gave sworn evidence in support of her claim. Her thoroughness and preparation in aid of her own case is commended. The respondent was represented by Ms Rumble of Counsel, who called sworn evidence from: Mary Mant (Director of Commercial and operations at Waldorf Hilton); Guy Hilton (General Manager at Waldorf Hilton); and Bernadette Gilligan (General Manager at DoubleTree by Hilton – Tower of London Hotel).

6. There was also a bundle of documents which ran to no less than 1163 pages. Page references in this judgment relate to pages of the hearing bundle provided.

Issues to be decided

7. The parties agreed that there was a genuine need for redundancies to be made after identifying a requirement to reduce head count in the business. This was in response to the impact of the Covid-19 pandemic on the hospitality sector and the respondent's business. Consequently, the issues to be decided related to the process followed by the respondent in deciding to make the claimant redundant at the conclusion of the redundancy process. The issues were:-

    7.1. Was the claimant dismissed for the potentially fair reason of redundancy?

    7.2. Was the claimant's dismissal unfair because those carrying out the redundancy process for the respondent had pre-determined the outcome, such that:

        7.2.1. The other candidate benefitted from being returned to work from furlough and could perform better in the interview competition; and/or

        7.2.2. There was a lack of transparency around the process for securing alternative employment following the claimant's role being made redundant; and/or

        7.2.3. The claimant suffered lower scores from being asked 13 questions rather than 12 questions in interview for the alternative employment; and/or

        7.2.4. The claimant's interview scores for the alternative employment were lower than her performance deserved; and/or

7.2.5. The interview scores for the alternative role were altered after the interview stage to ensure that the claimant's scores were lower than the other candidate's scores; and/or

7.2.6. The investigation in respect of the claimant's appeal against dismissal was insufficiently robust?

7.3. If the claimant was unfairly dismissed:-

7.3.1. Has the claimant taken appropriate steps to mitigate her loss?

7.3.2. Should any compensation awarded be reduced on the ground that the claimant would have been dismissed in any event (following *Polkey v AE Dayton Services Ltd [1987] UKHL 8)*?

Findings of fact

8. Having heard the witness evidence and considered the documentary evidence contained within the hearing bundle, I find the relevant facts are as follows. Where I have had to resolve any conflict of evidence, and find facts on the balance of probabilities, I indicate how I have done so at the material point.

Claimant's maternity leave

9. There was some discussion in the hearing relating to the claimant's prior maternity leave and return from it, but the claimant brought no claim for discrimination and nothing to do with the redundancy process turns on the discussion. Therefore, I do not go into the detail of it in this judgment other than to note that the claimant returned to work earlier than planned on 4 February 2020, prior to the significant impact of the pandemic on the business and prior to the first 'lockdown' in late March 2020.

COVID-19 and furlough

10. The Waldorf Hilton operates within a portfolio of owned and managed hotels. The impact of the Covid-19 pandemic was significant on the hotel, and business was diminished prior to the first 'lockdown' being announced on 23 March 2020. The hotel closed entirely in late March 2020. All but twelve staff were placed on to furlough, and the twelve staff remaining were responsible for keeping the site safe and functional.

11. On 27 March 2020, the claimant signed a 'Willingness to Work' form in which she declared that she would only be able to work remotely because her husband is in a vulnerable group (page 116). Consequently, the respondent did not consider the claimant suitable for a return to work on site during 2020 and she was not requested to return from furlough in order to work.

12. Mr Hilton, as the hotel's general manager, was conscious in early summer 2020 that the furlough scheme was due to end in the autumn, and that the hotel was going to struggle thereafter despite the respondent having utilised all of the available government support. He therefore undertook a business review which aimed to

examine where costs might be saved and which would take account of the uncertainty caused by the pandemic. Each head of department was asked to review their team and look at where efficiencies could be made.

13. I accept Mr Hilton's evidence that the claimant's role was not one as useful in the circumstances as that of the Director of Sales, who was returned from furlough. The claimant's role was described as more 'reactive', in that she was to respond to and deal with requests for large events to be run at the hotel, and then run those events. Conversely, the Director of Sales was a more 'proactive' role involving the use of contacts to sell to corporates. Mr Hilton's evidence makes complete sense in circumstances where the running of any group events was either impossible or extremely challenging in light of the social restrictions in place in London over this time period, but where rooms may still be sold on a single occupancy basis to corporates who needed people to be in London for essential work.

Consultation on proposals for redundancy – the claimant's role

14. On 16 July 2020, the respondent issued a presentation bearing the title "Business Recovery Impact Proposal. Hotel: Hilton Waldorf" (pages 118 to 214). This comprehensive document details the review undertaken and outcomes. It notes that hotel occupancy in 2020 was forecast to be "47% down" on the previous year (page 122). There were proposals for significant role redundancies across all aspects of the hotel's business. Page 159 contains the proposal for the management structure of the Commercial Team, which is where the claimant's role sat. It was proposed that the claimant's role be made redundant along with the Director of Sales Role. Instead, a new combined role would be created called "Director of Sales and Events". This role would oversee both the claimant's team and the sales team. It was accepted that this role would have been a promotion for the claimant if it had been secured.

15. The respondent began collective consultation in relation to the proposals and the claimant was elected as a team member representative for the commercial department. The claimant was to be given training in relation to this role and would attend all of the consultation meetings so long as she continued to work in the respondent's business (page 280). The first meeting took place at 1pm on 30 July 2020. Following this meeting, the respondent sent an advance notice of redundancies form to the Insolvency Service. This form indicated that the potential redundancy headcount could be as many as 61 (pages 303 to 307).

16. A second consultation meeting took place on 13 August 2020 and a third on 20 August 2020. There was to be a second proposal about redundancies to reflect the continuing uncertainty caused by the pandemic. This was released on 26 August 2020. A fourth consultation meeting took place on 2 September 2020 and a fifth on 9 September 2020. On 15 September 2020, the respondent announced that it was to implement the second redundancy plan (pages 467 to 516). The decision about claimant's role and the Director of Sales role was as envisaged. Both roles were to be made redundant. The Director of Sales and Events role was still to be created for either the claimant or the Director of Sales (page 491). The claimant was informed of this by letter dated 16 September 2020 (pages 518 to 528).

Preparation for the claimant's interview

17. As well as contributing to the consultation process, the claimant was also preparing for her interview for the new Director of Sales and Events role. The respondent had decided that an interview was the fairest means of selecting a candidate for the role. This is because there were only two people competing for the role, and because the claimant had been out of the business on furlough and so there was no current means of assessing her performance alongside the other candidate.

18. On 7 August 2020, the claimant sent Ms Mant an e-mail containing 30 questions about the expectations for the new role, strategy, feedback from customers, KPIs and swot analyses (pages 309 to 310). Ms Mant replied on 9 August offering to answer the questions but stating that the answers would need to be shared with the other candidate for the new role (pages 308 to 309). On 10 August, the claimant wrote to say that she did not want her questions or answers shared with the other candidate, but that she was simply seeking to ensure a 'level playing field' because the other candidate was on site and could access the information that the claimant was asking Ms Mant to provide. On 17 August, the claimant was advised by the respondent's human resources team that she could have the information requested without it being shared on the basis that the other candidate could access the information already if desired. The information was then provided by email from Ms Mant on 5 September 2020 (pages 422(i) to 422(iv)).

19. The claimant raised another issue relating to an unlevel playing field by e-mail on 17 September 2020 (page 535). She notes that one of her proposed interview panel had worked closely with the other candidate for some time and so she could be biased against the claimant. In comparison, the claimant said she would be an outsider to the proposed panel member. The claimant was concerned about the unconscious bias introduced by the interviewer knowing one candidate better than the other. On 23 September 2020, Ms Mant informed the claimant that this interviewer would no longer sit on the panel and that Christine Jones, Regional Director of Sales Ops (UK Provinces), would sit on the panel instead. In her evidence, Ms Mant said that Ms Jones did not know either candidate, and that she believed that she and Mr Hilton had never met Ms Jones either.

20. Separately to this, Mr Hilton emailed the claimant on 21 September 2020 to explain that the presentation element would not be assessed in respect of *"commercial numbers, facts or information that an external candidate would not be able to find through the internet etc"* (page 538). He explained in his evidence that this email was sent to provide reassurance to the claimant that she should have access to all of the knowledge she needed to perform strongly in the presentation part of the interview assessment, which she ultimately did.

21. Ms Mant and Mr Hilton both explained that the accommodations described in paragraphs 17 to 20 above were made with the claimant's comfort in mind, to ensure that she could perform as well as possible during the interview and that she was not disadvantaged by having been on furlough during 2020. The claimant disagreed with this evidence, and contended that the fact she needed to point these issues out were indicative of a process designed to be against her. I prefer the respondent's evidence in relation to the reasons these adjustments were made. Aside from Ms Mant and

Mr Hilton both presenting as honest and compelling witnesses, the contemporaneous correspondence supports their assertions entirely.

22. In my view, if the respondent was seeking to create a process whereby the claimant would be disadvantaged, or was apathetic about such a disadvantage, then it would not have sought so carefully to respond to the claimant's concerns. It would not have requested human resources input about whether information must be shared with the other candidate and it would likely have retained the original interview panel composition as it was entitled to do. Consequently, I find as a fact that the respondent approached the pre-interview process with the intention of seeing through a fair process where each candidate, and especially the claimant, could perform as well as possible in the circumstances.

The claimant's interview process

23. The claimant's interview for the Director of Sales and Events role was conducted at 11am on 24 September 2021. The content of the interview is a central point of dispute between the parties and two different accounts of the interview were presented in evidence to the tribunal. The interview was split into two parts: the presentation; and the interview questions. The presentation element of the interview is not disputed. The claimant scored strongly for her presentation (the slide show was provided in the bundle at pages 544 to 561). Mr Hilton did describe the presentation as a little long, but overall I find that the presentation was very well received as recorded by Ms Mant in her typed notes from the interview: *"Presentation was fantastic and exceeded expectations of all three interviewers"* (page 565).

24. There was significant divergence of evidence in relation to the questions section of the interview. The claimant's evidence is that she was asked thirteen interview questions. The respondent's evidence is that twelve scoring interview questions were asked. The claimant contends that the lack of score for a thirteenth question meant that she scored less overall than the other candidate. The respondent replies that the other candidate was also scored over twelve questions, so there would be no discrepancy in scoring even if the claimant had been asked additional questions.

25. The claimant also asserts that her answers deserved scores which were higher than those given, and robustly challenged the scores given by the respondents' witnesses in cross examination. Her position was that her answers should have scored higher because of her experience in the area and that some of the questions asked were her 'bread and butter' in terms of knowledge in her day-to-day role. The respondent replies that the claimant's answers were disappointing and were either not answered, lacked depth, or did not carry supporting evidence to measure successes, and this means that the higher scores for such a senior role could not be attained.

26. There is a dispute about whether or not the other candidate's interview scores were altered to create a bigger performance deficit. On 30 September 2020, Ms Mant telephoned the claimant to inform her of the outcome of the interview process. She informed the claimant that she had been unsuccessful. The claimant wanted to know what her scores were, and this is information that Ms Mant says she had not prepared to deliver. The claimant says she was very keen to know what scores she received to understand what had happened and Ms Mant says that she felt placed

under pressure by the claimant. Ms Mant told the claimant that she had scored 29 in the interview, and the other candidate had scored 32.

27. The respondent later stated that the other candidate actually scored 38 in the interview and points to its records of the interviews in support of this. The claimant says that the other candidate did score 32, but that the interviewers may have then colluded to increase the score to 38 after the claimant raised the issue about the thirteenth question. The claimant notes that the Word documents containing the notes were 'modified' by Ms Mant after the telephone call. In reply, Ms Mant and Mr Hilton confirm that the other candidate scored 38 in interview. Ms Mant admits that the wrong scores were given in error. She notes that the Word document would show a 'modified' time stamp when she saved the document and perhaps when she attached it to an e-mail for distribution.

28. The claimant notes that the original hand-written interview notes from the interviewers are not available and contends that this is evidence of further collusion or pre-determination. Mr Hilton and Ms Mant both admit to destroying the notes once their thoughts were collated together on the interview pack forms, but state that this was their standard practice and also what the instructions on the interview pack require. They were both adamant that there was no collusion or pre-determination, and no interview scores were altered.

29. On the balance of probabilities, I prefer the evidence of the respondent in relation to each of these points of evidential conflict. I found Ms Mant and Mr Hilton, who gave evidence about the interview process on behalf of the respondent, to be compelling witnesses. Their evidence was measured and thoughtful, and both were open to admitting where they could not remember certain matters. Both were clearly affected by the redundancy process they had carried out and I was able to perceive their genuine care and concern for the claimant even under the stress of taking part in these tribunal proceedings. Mr Hilton was open to the possibility that the redundancy process could have been better handled. Ms Mant was forthcoming about errors she made in communicating the outcome of the interviews. Despite robust cross examination, neither, in my judgment, gave any reason for their answers to be doubted.

30. Additionally, the respondent's witness testimony is supported by the contemporaneous documentation contained within the bundle. The interview pack for the claimant's interview was provided at pages 563 to 594. This was sent by Ms Mant to the respondent's human resources team on 30 September 2020. This shows that the claimant was scored over twelve questions, that she scored a total of 29 points, and that she was not successful at this interview stage. The comments in relation to the answers given highlighted the respondent's view that the claimant gave a disappointing performance, noting that the claimant variously: *"initially struggled to answer"*; *"seemed very challenged to answer this question"*; *"described buzz words rather than demonstrating depth*"; *"did not answer question"; "did not answer question despite intervention";* and *"answer did not elevate beyond basics"*.

31. Ms Mant was also clearly confused by the claimant's claim that there had been thirteen interview questions asked, and remarked in an email on 4 October 2020: *"I re-looked and can't see where I missed a question :S"* (page 625). The other

candidate's interview notes (pages 579 to 594) also show that twelve questions were scored. The other candidate scored a total of 38 points. The 'best practice' notes on the front of each interview notes pack invites the interviewers to *"destroy the hard copies"* of the notes. Ms Gilligan's notes from conducting meetings relating to the claimant's appeal (pages 648 to 664) confirm that all three interviewers on the panel came to similar conclusions about the claimant's performance – including Ms Jones, who had no direct working history with any of the parties.

32. In contrast, the claimant relies entirely upon her own memory of the interview to support her evidence and confirmed this to be the case in cross examination. Generally, I found the claimant's evidence to be difficult to accept at face value. When challenged about her recollection of the events in dispute, the claimant asserted that she has *"a very excellent memory"*. However, she then went on to misremember and so mischaracterise an answer that Ms Mant had given to her in response to one of her questions only the previous day. In my judgment, the claimant also displayed a tendency to exaggerate implications of passages of dialogue in her evidence and drew conclusions from points of evidence that I struggle to find sustainable.

33. For example, the claimant mentioned several times that the witness statement given by Mr Hilton was a 'character assassination' and invited me to conclude that he was trying to make her out to be a difficult character to affect the view of the tribunal about her. Having carefully read that statement multiple times with this invitation in mind, I cannot agree. Mr Hilton showed concern for the claimant in that statement, and praised and complimented her progress with the respondent. He did mention some aspects of their working history which had been challenging, but these points, to me, do not communicate negative connotations about the claimant's character. Mr Hilton undertook no character assassination.

34. I find that the claimant was scored over the twelve questions contained in the interview pack. There may have been additional questions articulated either as part of the conversation or as interventions to help the claimant answer scored questions, but this does not alter the fact that twelve scoring questions were asked and twelve questions were scored. I find that the other candidate was scored in the same way, as the contemporaneous documentation in the bundle shows.

35. I accept the respondent's evidence that the claimant's performance was disappointing at interview and that her scores were poorer than expected by everyone as a consequence. I accept Ms Mant's explanation that she made a mistake in initially communicating the scores to the claimant, but that this was because she was not expecting to give out such detail and so had not refreshed her mind to the exact scoring ahead of the telephone call.

36. In my view, there is no cogent evidence that any interview scores were altered after 30 September. I therefore find that those scores are an accurate reflection of each candidate's interview performance and that the claimant was the weaker of the two candidates competing for the role. Even if the other candidate's score had been altered from 32 to 38 between Ms Mant's telephone call with the claimant and the documents being sent to human resources on 30 September, and the other

candidate had scored 32 at interview, then I find that the claimant would still have been the lower performing and unsuccessful candidate.

The claimant's appeal against dismissal

37. The claimant was informed that she was unsuccessful at the interview on 1 October 2020. Mr Hilton offered to speak to the claimant informally about her interview performance, but the meeting did not happen after the claimant said she wanted a companion at the meeting and Mr Hilton felt he did not want that more adversarial style of meeting outside of any formal appeal process. Mr Hilton encouraged the claimant to appeal the outcome, as was her right, if she remained unhappy with it. The claimant was included in the respondent's alumni network to receive news of other opportunities in other hotels.

38. The claimant sent notification of her appeal to Ms Gilligan, the appeal officer, on 7 October 2020. The claimant relied on nine separate grounds for appeal, all of which related to either: (1) the scoring of questions in the interviews; (2) the number of questions asked; (3) lack of transparency in scoring at feedback; or (4) an inability to receive formal feedback (page 636). The claimant also provided *"detailed grounds for appeal"* to support her position (pages 638 to 640).

39. The claimant asked for the appeal to provide seven 'desired outcomes'. There were: (1) a fresh, thorough and independent review of each low score received with justifications; (2) the score of the missing 'Integrity' question included in the scoring summary; (3) an explanation why the 13th question was left out of her score and why there had been no reply about it; (4) the model answers to each question asked; (5) a thorough and independent review of the transparency and fairness of the scoring process; (6) access to the original independent scores of each interviewer; and (7) an explanation as to why she was denied access to the original scoring notes which she says any person being made redundant should be given (page 637).

40. Ms Gilligan conducted an appeal hearing with the claimant on 26 October 2020. Notes of the appeal hearing were provided at pages 648 to 654. Each of the claimant's grounds of appeal were explained and Ms Gilligan confirmed that the claimant's desired outcomes would be borne in mind during the investigation.

41. Ms Gilligan met with Ms Mant on 5 November 2020. Notes of the meeting were provided at pages 655 to 660. Ms Gilligan asked Ms Mant about the claimant's treatment on furlough in comparison to the other candidate's. Ms Gilligan asked Ms Mant about the redundancy process and the interview. She asked Ms Mant about the scoring of the interview and the interview questions. Ms Mant told Ms Gilligan that the scoring was fair and accurate, and that she was not sure why the claimant recalled there to have been thirteen questions at interview. She said that the claimant's role was not required to be returned from furlough.

42. Ms Gilligan also met with Christine Jones, the other interview panel member, on 5 November 2020. Notes of the meeting were provided at pages 661 to 662. Ms Gilligan asked about the interview and Ms Jones' perception of the claimant's performance. Ms Jones said that the claimant's presentation was exceptional but that her interview portion was different. Ms Gilligan's notes quote: *"Presentation was*

incredible but when we went to the interview it went massively wrong I felt she did not answer the questions well and did not elaborate there was a lack of clarity it was like a conversation with a different person compared to presentation". When asked who was the better candidate, Ms Jones said that neither 'blew her away' but that it was not the claimant.

43. Ms Gilligan met with Mr Hilton on 6 November 2020. Notes of the meeting were provided at pages 663 to 664. Ms Gilligan asked Mr Hilton about the redundancy process, the merging of the claimant and other candidate's role, the interview process and the scoring process. Mr Hilton explained what accommodations had been made for the claimant and how the candidates had been treated in the run up to the interview. He said that he had not wanted to lose either candidate. He said that the claimant's interview was 'undetailed', but that after the presentation stage he had been excited because he thought that the claimant would get the role. He said he thought that confusion around there being a thirteenth question was explained by the claimant not listening properly in the interview, or not remembering it properly afterwards.

44. On 17 November 2020, and prior to the communication of the outcome of the appeal, the claimant was sent a letter confirming her redundancy and redundancy pay (pages 670 to 671).

45. On 27 November 2020, Ms Gilligan sent the claimant her appeal outcome letter via email. A copy of that letter was provided at pages 674 to 678. The letter is dated 26 November 2020. The letter outlined each of the claimant's nine grounds of appeal and explained that, having conducted an investigation, Ms Gilligan had found that: (1) there was no inaccuracy with scoring, although there had been a miscommunication initially about the scores; (2) there had been no additional questions asked and all answers given had been scored; (3) the scores received were reflective of answers at interview; (4) support had been offered to the claimant before and after the interview as appropriate; and (5) the way the candidates were treated in relation to furlough was a reasonable strategic approach keeping in mind the needs of the business.

46. Ms Gilligan also provided the claimant with copes of the model answers for the interview questions which were asked, and also extended an offer from Mr Hilton to meet informally to give feedback on the claimant's interview performance to help improve. The claimant wrote to Ms Gilligan on 7 December 2020 to thank Ms Gilligan for her efforts but to note that the seven 'desired outcomes' from the interview process remained outstanding.

Applicable law

47. Under s98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of redundancy. Redundancy is a potentially fair reason falling within section 98(2) and it is agreed here that there was a genuine reason for the redundancy process to be carried out.

48. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, section 98(4) of the Employment Rights Act 1996 states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with the equity and substantial merits of the case.

49. In *Williams v Compare Maxim Ltd [1982] ICR 156*, the Employment Appeal Tribunal laid down matters which a reasonable employer might be expected to consider in making redundancy dismissals:

    49.1. Whether the selection criteria were objectively chosen and fairly applied;

    49.2. Whether employees were given as much warning as possible and consulted about the redundancy;

    49.3. Whether, if there was a union, the union's view was sought;

    49.4. Whether any alternative work was available.

50. However, when determining the employer's reasonableness, the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead, the question is whether the decision of the employer to dismiss lay within the range of conduct which a reasonable employer could have adopted. The Tribunal should also keep in mind that the matters outlined in *Compare Maxim* are not a strict checklist and that a failure of the employer to act in accordance with one or more of these principles does not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

51. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In *Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255* it was held that employers need only show that they have applied their minds to the problem and acted from genuine motives. Provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it (*Capita Hartshead Ltd v Byard [2012] IRLR 814)*.

52. When considering alternative employment following redundancy, there is no requirement for all subjectivity to be removed from the process where two individuals are being interviewed for the same job and it need not be a strictly objective exercise (*Jones v Northumberland County Council EAT 0482/08)*.

53. If a finding of unfair dismissal is made as a result of unfair procedure, then the Tribunal should consider the likelihood that the claimant would have been made redundant in any case had a fair procedure have been followed. The

compensation to be awarded should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

Conclusions

54. I have carefully considered the evidence and circumstances of the case, and the applicable law. The respondent carried out a redundancy exercise, which was necessary, in response to the impact the Covid-19 pandemic had on its business. This meant that redundancies were necessary at the Hilton Waldorf. The claimant contributed to the redundancy consultations and accepts that her role was to be made redundant following the merger of her role and the Director of Sales. The claimant was informed about each stage of the process and was afforded the opportunity to ask questions. She was elected to be a staff representative during the consultation period and she contributed to that consultation.

55. The claimant alleges that she was not requested to return from furlough because the respondent had decided that she should be made redundant if there were to be redundancies. The respondent denies this, and points to the form completed on 27 March 2020 where the claimant declared that she could only work remotely because her husband is in a vulnerable group. Due to this, others were requested to return and so, by the time the claimant indicated a willingness to be on site, there was sufficient workforce in place so that the claimant was not required. In my view, it was reasonable for the respondent to respect the claimant's desire not to return to work on site and the respondent acted appropriately by securing the work of others to help the claimant remain away from the site. The successful candidate was returned to work prior to the interview stage taking place. This probably did introduce some discrepancy to the knowledge available to each candidate during preparation for the interview but, as outlined above and below, the respondent took steps to mitigate or remove that impact entirely in an effort to preserve the overall fairness of the process.

56. The respondent acted reasonably by inviting the claimant to apply for one merged role, with the expectation that she would compete with the other candidate, who had held the now redundant Director of Sales role. In the circumstances, it was appropriate to select the two roles for redundancy following consultation. The claimant had been out of the business for some time on furlough, whilst the other candidate had been working on site. The respondent, I have found, was concerned about the impact this may have on the selection process. In response, it decided to use an interview process to recruit for the merged role, which would diminish the impact that being out of the business would have had on the performance of the claimant. The candidates were specifically advised that there was no expectation that current, internal data should be utilised. Information was provided to the claimant alone to make up for the possibility that the other candidate had direct access to any such information. This all assisted the claimant to the point that it is difficult to conclude that the other candidate benefitted from returning from furlough prior to the interview process beginning.

57. Indeed, given that the claimant had informed the respondent that she did not wish to work on site at the outset of the pandemic, it seems entirely reasonable that she would not return. In any event, as I have found, there was a greater

requirement for the other individual's role during the pandemic than there was for the claimant's role. Nothing about this set of facts indicates that the respondent acted outside of the band of reasonable responses available to it when dealing with the redundancy consultation, the preparation for the interview process, or any issues in relation to furlough.

58. In relation to the interview itself and scoring, I have found that each candidate was scored on the same questions and that there was no difference to the process followed in each case. They may have been some variation in each interview, but as noted in ***Jones***, it is impossible to rule out all subjectivity where two candidates are interviewed for one job role. I have also found that the claimant was not given undeservedly low scores to interview answers and that the scores were not altered after the interview process had concluded. In my judgment, the interviewers felt that the claimant was the weaker performer during the overall interview process, and they were entitled to form that view within the framework of such a process. It is also notable that the respondent had taken account of the claimant's discomfort about the other candidate's close colleague sitting on the interview panel by removing that interviewer from the panel. This is another example of the respondent accommodating the claimant's observations about the process in order to try to achieve additional levels of fairness.

59. Following the interview, it is regrettable that the claimant was given mistaken scores initially over the telephone. I have found this to have been an honest mistake having considered all of the available evidence. I also draw no adverse conclusion about the respondent from the notes from the claimant's interview having been destroyed once the scoring had been put on to the final sheet. I have found that this was in line with the usual practice of the individuals concerned. Indeed, it is also in line with the guidance given to the interviewers on the interview pack.

60. There is simply no evidence of any pre-determination or failure to follow due process or policy on the part of the respondent. On the contrary, it seems to me that the selection method and process was tilted to account for the claimant having been out of the business for a period of time. The respondent was also keen to share responses to questions asked by the claimant with the other candidate in an effort to ensure neither had the advantage. In the absence of any evidence to the contrary, or any cogent reason why the respondent should want to 'get rid' of the claimant, and noting that at each stage prior to the appeal the respondent acted within the band of reasonable responses available to it, I can only conclude that the redundancy process leading to the decision to dismiss the claimant was not unfair.

61. The claimant considers that Ms Gilligan's conduct of the appeal stage of her dismissal was insufficient because it did not fully address all of her concerns and, in particular, her concerns about having been mis-scored through being asked an additional question were not adequately addressed. Ms Gilligan spoke to all of those involved with the interview process, and discussed the claimant's concerns, but did not find any of the concerns to have sufficient merit to overturn the decision. In my view, this was a conclusion that was within the band of reasonable responses for her to have drawn on the information available to her.

62. Ms Gilligan was not under a strict obligation to meet the claimant's desired outcomes. The claimant exercised her right to appeal, and the appeal was unsuccessful. Having heard Ms Gilligan give evidence and considered the evidence available to her at the time she made her decision, I can only conclude that the appeal process which effectively confirmed the decision to dismiss the claimant was not unfair.

63. Consequently, I find that the claimant was dismissed for the reason of redundancy, and that the decision to dismiss was made following a fair process in which the respondent acted reasonably. Quite simply, the claimant and another candidate competed for one merged role and the other candidate was successful in that competition. The claimant was not unfairly dismissed. The claimant's claim is accordingly dismissed.

64. Having dismissed the claimant's claim, I am not required to decide whether the claimant has taken appropriate steps to mitigate her loss or to consider any point on *Polkey*.

Employment Judge Fredericks
31 December 2021

Sent to the parties on:

4 January 2022

For the Tribunal Office: