EMPLOYMENT TRIBUNALS

Claimant: **Mrs S O'Brien**

Respondent: **Pigment Productions Limited**

On: 12, 13 & 14 October 2021

Before: **Employment Judge Rogerson**

Representation
Claimant: Mr P Kerfoot, of Counsel
Respondent: Mr R Dunn, of Counsel

JUDGMENT having been sent to the parties on 18 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1 The claimant brings a complaint of unfair dismissal in relation to her dismissal for the purported reason of redundancy. The agreed list of issues identifies the applicable law in deciding whether the dismissal is by reason of redundancy as defined in section 139(1)9(a)(i) Employment Rights Act 1996('ERA'). In **Safeway Stores v Burrell 1997 ICR 523**, the EAT identified the 3 questions to be considered as follows.

1.1 Was the claimant dismissed? It was agreed the claimant had been dismissed on 3 July with notice ending on 3 August 2020.

1.2 Have the requirements of the employer's business for employees to carry out a particular kind ceased or diminished or were they were expected to cease or diminish?

1.3 Was the dismissal of the claimant caused wholly or mainly by the cessation or diminution?

2 Redundancy is a potentially fair reason for dismissal (section 98(2)(c) ERA). The burden of proof rests with the respondent to show the reason for dismissal is the potentially fair reason relied upon of redundancy (98(1) ERA). If the respondent shows that was the reason then applying a neutral burden of proof, the fairness of the dismissal must be determined having regard to the

requirements of section 98(4) of the Employment Rights Act 1996 which provides that:

"where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

a) depends on whether in the circumstances including the size and administrative resources of the employers 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".

3 The claimant advances 6 alternative reasons for her dismissal in her claim form:

3.1 The need for the type of work carried out by the claimant had not ceased of diminished and was not likely to cease or diminish.

3.2 The claimant's brother, and the former Managing Director, Mr Ian O'Brien had a disagreement with the other two Directors and the claimant's dismissal was to "*show Mr O'Brien they could do as they like to pressurise Mr O'Brien into selling his shares*".

3.3 In breach of the Shareholder Agreement the Directors had made the decision to dismiss without the agreement of Mr O'Brien.

3.4 The claimant had made a bullying complaint the claimant made against Mrs Burbidge had she influenced the decision to dismiss the claimant.

3.5 The claimant did not believe her dismissal saved costs because the cost of employing Mrs Burbidge would have continued.

3.6 Mr O'Brien had made an agreement on behalf of the respondent that the claimant and her husband would continue to be employed until they retired.

4. If there was genuine redundancy the claimant complains her dismissal was unfair for the following three reasons:

4.1 a failure to engage in reasonable consultation

4.2 a failure to act reasonably by not pooling the claimant with any other employee. The claimant identified Mr Jackson as the person that should have been pooled with the claimant at the time of the redundancy

4.3 a failure to reasonably consider suitable alternative employment.

5. **Findings of Fact**

5.1 I heard evidence for the respondent from

5.1.1 Mrs Lyndsay Burbidge, Finance Director
5.1.2 Mrs Debbie Saltmarsh, Commercial Manager
5.1.3 Mr Stephen Baker, Sales and Marketing Director.

5.2 For the claimant I heard evidence from

5.2.1 The claimant
5.2.2 The claimant's husband, Mr Richard Peck (former Consultant)

5.3 I also saw documents from an agreed bundle of documents running to 275 pages. On the first day of the hearing the claimant sought to rely upon a supplemental bundle (13 pages) of emails and communications between Mr O'Brien and the directors and Mr O'Brien and the claimant. Mr O'Brien was the former Managing Director of the respondent and is the claimant's brother. He was not called to give any evidence on behalf of the claimant to support the 3 "O'Brien" reasons for dismissal (3.2,3.3,3.6) advanced by the claimant who sought to rely on these documents to support those reasons. I agreed with Mr Dunn's concerns about the relevance of these documents and the late disclosure but agreed to consider any document that appeared to have any relevance.

5.4 The agreed facts about Mr O'Brien's sale of shares is that as a result of a management buyout completed in December 2020 Mr O'Brien sold his 62% shareholding to the other two directors and ceased to be a director or a shareholder of the respondent company. For some time prior to the sale Mr O'Brien had ceased to have any active role in the company. The shareholder's agreement governed the relationship between the shareholders/directors and ceased to have any effect when Mr O'Brien ceased to be a shareholder. The claimant was not a party to that agreement or to the management buy-out agreement. From December 2020 Mr O' Brien had no authority to control or influence any matters relating to the respondent including the redundancy dismissals in July 2021.

5.5 In making my findings of fact on any disputed matter I resolved any factual disputes based on my assessment of the credibility of the witness evidence attaching weight to the contemporaneous documents. I also attached weight to the unchallenged evidence of the respondent's witnesses as to the reason for the dismissal and the process that was followed. I made it clear at the outset of the hearing that the role of the Tribunal is not to substitute its view for the employer but to look at the information the employer had when it decided to dismiss and whether it acted reasonably applying the band of reasonable responses to the particular circumstances of this case.

5.6 The claimant was employed by the respondent as an IT Manager from 14 September 2015 until 3 August 2020. The respondent is a greetings card publisher selling directly to retail customers it is not an online business.

5.7 The original directors and shareholders of the company were Mr Ian O'Brien, Mr S Baker and Mr M Powderly until December 2020 when Mr O'Brien's shares were purchased by the other directors in a management buyout.

5.8 In 2016, Mr O'Brien engaged Mr A Peck (the claimant's stepson) as a consultant to help with the IT side of the business. Mr Peck developed a bespoke software package called Digital Office (DO) which was used extensively by the respondent. In 2016 the respondent purchased the intellectual property rights to the software from Mr A Peck for £60,000. The written agreement expressly provides that it is the entire agreement and supersedes any previous agreements made whether orally or in writing. (pages 79-87 of the bundle).

5.9 In contrast to that clear incontrovertible evidence Mr Richard Peck (Mr A Pecks father and a former consultant of the respondent) in evidence sought to rely upon a separate earlier 'gentleman's agreement' made in September 2015 between him, Mr O'Brien and the claimant. He said the respondent agreed to employ them until "*they no longer wanted to and new staff could take over or the systems were no longer in use by Pigment Productions"*. This gentleman's agreement was relied upon to support the third O'Brien reason for dismissal that Mr O'Brien had made an agreement on behalf of the respondent that the claimant and her husband would be employed until their retirement. The only agreement the Respondent made was the agreement with Mr A Peck in which he was paid £60,000 in exchange for the respondent having sole and full intellectual property rights to the software package developed by Mr A Peck The purchase agreement was the entire agreement superseding any previous agreement and does not include the words in the gentleman's agreement which the claimant seeks to rely upon. The respondent had not agreed to employ the claimant until her retirement.

5.10 From 2017 onwards Mr O'Brien had ceased to be involved in the day to day running of the business, which was left to the other directors and Mrs Saltmarsh (Commercial Manager). That was the unchallenged evidence of Mr Baker (witness statement paragraph 6). The claimant had reported to Mr O'Brien. It agreed she would report to Mrs Saltmarsh although the claimant was unhappy about this (paragraph 4 witness statement Mrs Saltmarsh).

5.11 In about June 2019 the Board agreed to the appointment of a part time consultant Finance Director, Ms L Burbidge. Her remit was to review operations, strategy, finance and corporate governance to ensure the future viability of the company. The financial side of the business had been run in the past by a bookkeeper. The company had outgrown that resource and agreed to engage the services of Ms Burbidge. She was to take responsibility of the company's entire finance function. Ms Burbidge is a Chartered Accountant with extensive commercial and operational experience. After reviewing the finances Ms Burbidge identified a significant and unusual high spend on IT given the size of the business (£300,000 in 12 months). Ms Burbidge consulted with the claimant who explained her plan for the business was to migrate the Pigment application, which was about 12 years' old to Digital Office in its entirety making it a completely bespoke package operated by the respondent who would then be solely reliant on Digital Office. The claimant's estimated this process would take 10 years. Although much time during the hearing was spent by the claimant disputing this, based on the contemporaneous evidence I was satisfied that was the time

estimate the claimant gave to Ms Burbidge at that time. There was no other source for that information. Although the claimant later revised her estimate down to 3 – 4 years, her original estimate was 10 years.

5.12 Given the spend in the previous year of £300,000 Ms Burbidge projected that the IT spend over the next 10 years would be £3 million. Ms Burbidge is not an IT expert. She sought external IT professional advice before committing the business to the time and expense of migrating to Digital Office. Ms Burbidge wanted to investigate whether there was an alternative IT solution that was more suitable for the business. MTech was engaged to conduct a review. Their first report was circulated to the IT team for comment. Risks were identified if the business continued to migrate to one system. The system was outdated and not fit for purpose. It was risky because it relied upon the knowledge of a few employees (the claimant and her husband) and because of the bespoke nature of the system. A second report was commissioned by the Board. MTech consulted with the claimant before providing that second report. The claimant reduced her initial estimate of 10 years to 3-4. The potential costs were identified in the region of £1.4 million to £3 million. The report identified the risks, the costs and the costs of an alternative lower risk and less cost strategy of purchasing an off the shelf third party product which in MTech's view would meet the business needs more effectively.

5.13 The respondent had sought external IT advice and consulted with the claimant and IT team to obtain their views before the Board made a decision at a Board meeting on 3 March 2020 that the business would not to migrate to Digital Office but would use a third party product. That was a business decision that the respondent was entitled to make in the best interests of the business. It was a genuine business decision properly made by the directors. The claimant clearly did not, and does not, agree with that business decision. She and Mr Peck were clearly wedded to the Digital Office system's and could not agree to it regardless of the risks or the costs to the business if it stuck with a system that was considered not fit for purpose. When Ms Burbidge presented her report to the Board, she informed them that the claimant disagreed with the proposal. She was not hiding the claimant's contrary view before the Board's decision not to migrate to Digital Office.

5.14 Ms Burbidge was trying to put into place better systems, tighter controls, more accountability and planning. The claimant did not like the level of scrutiny that she and her husband were being placed under that new system of closer management and tighter control.

<u>The bullying allegations against Ms Burbidge</u>

5.15 When Ms Burbidge joined the respondent, she became the claimant's line manager. It was decided that Ms Burbidge should have responsibility for the financial side of the business and have overall line management responsibility for IT.

5.16 In January and February 2020 Ms Burbidge sent some emails to the claimant which queried the invoices sent by Mr Peck. They were

queried for two reasons, firstly while the migration decision had been put on hold Mr Peck was not required to do as much consultation work on the Digital Office system. In fact, a cap had been set from November 2019 of 100 hours only. Secondly, insufficient information was being provided by Mr Peck regarding the time spent and work that had been completed. Ms Burbidge expected all consultants who provided invoices to provide that level of detail before approving payment.

5.17 The contemporaneous documents are the email chain which is at pages 132 – 135. From those emails the claimant accepts that the figure of 100 hours had been set from November 2019. On 8 January 2020 (page 135) Ms Burbidge queried an invoice from Mr Peck. She asked the claimant to ask Mr Peck to provide details of the hours that had been worked each month. The email specifically says, "*as we do for all other consultants rather than a block total*". The claimant's reply on the same date was "*I don't need Richard to supply details of the hours worked as I already have them, it's me that logs them for him".* Ms Burbidge's reply is *"okay, please can you add the details to the invoice for my benefit"*. It was clear that Ms Burbidge was making a perfectly reasonable management request in the context of the restriction placed using a polite tone and language in her emails resulting in a belligerent uncooperative and unreasonable response from the claimant.

5.18 The second email was sent on 4 February 2021 when Mr Peck had submitted an invoice for 121 hours, 21 hours over the 100 hours limit set by the respondent. Again, very politely Ms Burbidge asked the claimant if it was an error and requests details of the hours worked are provided. She confirms in that email the respondent's decision that *"the claimant and her team are not to do any work to progress migration to Digital Office because a decision had been made to put that on hold".* The claimant's response at page 135 starts *"I think you need to address the tone of your emails, it's a bit aggressive and smacks of attempted bullying"*. Instead of simply providing the requested information or passing on the request to Mr Peck the claimant tells her manager that she had "***decided it was in the respondent's best interest if her husband worked the hours that she had asked him to"***. The claimant had no authority to make those decisions for the respondent was refusing to comply with a reasonable management request made by her manager undermining her authority. The tone of the language used by the claimant in the email using phrases such as "*I decided"* "*I told you" repeatedly* and then using capital letters at the end of email to signify her annoyance supported my view.

5.19 The only reason these emails have been considered in this level of detail is because this is the alleged bullying the claimant relies upon to support her case that she was dismissed because she was being bullied by Ms Burbidge. There was no evidence to support those allegations.

5.20 In February 2020 the claimant raised this "bullying" allegation with the other Directors. They found that there was no basis for finding that the claimant had been bullied. At the time the claimant agreed she would put this matter behind her. She now seeks to rely on it as part of the reason for her dismissal on 3 July 2020 some five months later. Ms Burbidge was not involved in the redundancy decision made by the Directors. The redundancy process was managed by Mr Baker. The email exchanges show how the claimant felt a sense of entitlement because her brother had been the managing director. She felt she had power to make decisions autonomously. She did not like being managed and showed an unwillingness to take instruction.

5.21 Ms Burbidge attempted to start a redundancy consultation process with the claimant refused to cooperate and refused to engage with Ms Burbidge. As a result, the consultation process was put on hold. The claimant was then included as part of a wider redundancy exercise and consultation process that took place in April 2020 when more redundancies were contemplated as a result of the Covid pandemic and its impact on the business.

Redundancy consultation

5.22 Mr Baker carried out the redundancy consultation meetings with the claimant. None of the evidence he gave about the process he followed was challenged in cross-examination. The same redundancy procedure was applied to 18 other individuals at risk of redundancy. Mr Baker gave evidence that he conducted four or five other redundancy consultation and followed the same process each time.

5.23 On 18 April 2020, a company-wide email was sent to all affected staff asking for cost cutting suggestions (page 179 -180). The respondent proposed to make less than 20 employees redundant. On 1 June 2020 'at risk' letters were sent out to all affected employees. The letters explained that there was a significant downturn in sales exacerbated and compounded by COVID as a result of retail customers not using the respondent which was not an online business. The IT team was impacted because it supported the rest of the business whose activities had also reduced. There was a substantial loss of income (71% downturn) less work available, and that situation was expected to continue. An additional existing matter that affected the claimant was "*the results of the IT review the company commissioned where it was decided not to progress with migration to Digital Office"*. For those reasons the claimant's role as IT manager was placed at risk of redundancy. The claimant accepted that if anyone else had been employed in that role those reasons would have applied to them because it was the role and not the person that was at redundant. With the 'at risk' letter each affected employee was provided with nine pages of very detailed "frequently asked questions and answers" (page 181 – 190). They included the respondent's responses to any cost saving suggestions proposed by employees. It was clear that the affected employees were provided with proper information before the individual consultations to enable meaningful consultation.

5.24 The claimant had four consultation meetings with Mr Baker who was accompanied by an external HR advisor. At those meeting Mr Baker used a script to help him make sure that he had covered all the areas he needed to cover. There was nothing untoward about this and I do not accept the claimant's suggestion to the contrary. The claimant's request to have the meetings recorded was also agreed. After each consultation meeting, the claimant was provided with minutes of the meetings and she had the benefit of her own recording if she disagreed with the minutes provided by the respondent.

5.25 Mr Baker describes how the claimant's approach during the consultation meetings was to challenge the legality of the process by relying on the shareholder's agreement and the 'gentleman's agreement' made by Mr O'Brien. The claimant said the reason she raised this was because Mr O'Brien had drawn her attention to the shareholder's agreement and a clause that required the shareholders agreement before terminating the contract of a senior manager. This fits with the claimant's attempts to then change her job title from 'IT Manager' to 'Senior IT Manager'. There was no other reason that explains the timing of the change in the emails the claimant sent thereafter signing herself off with the new title. The claimant was attempting to make the case suggested by Mr O'Brien fit rather than present the true facts that her job title never changed.

5.26 Mr O'Brien's attempts to influence the outcome for the claimant were clear from the letter he sent to the other directors in June 2020, threatening legal action in relation to an alleged breach of the shareholder's agreement if the claimant was made redundant. Taking a step back now and looking at this objectively, the claimant might reflect upon the argument advanced and consider it is not attractive relying on nepotism to obtain an unfair advantage and her brothers position to exert undue influence. Unfortunately, the claimant did not take that step and continued to advance the argument that her employment could not be terminated without Mr O'Brien's agreement which has led to these damaging findings of fact being made.

5.27 During the redundancy process when these arguments were advanced Mr Baker repeated the respondent's position was that the shareholder's agreement was not applicable or relevant to the redundancy. He confirmed that the articles of association empowered the Directors to act in the best interests of the company which include making redundancies. This was a situation affecting 18 other employees so why should it be any different for the claimant. I agreed that must be right, otherwise, any disgruntled or unhappy former shareholder could hold the company to ransom after their departure and prevent any decision being made in the best interests of the company. Mr O'Brien was as a former shareholder trying to influence the outcome for the benefit of his sister. I agreed with Mr Dunn that the remuneration clause that contains the term relied upon governs the relationship between the shareholders and it is very doubtful it could be used to tie the company's hands in making redundancies in the way suggested.

5.28 The claimant asked 20 additional questions during the consultation process all of which were answered by Mr Baker. The claimant, in her witness statement, paragraph 21 alleges that "*despite having four consultations with Mr Baker never, at any time did I feel that I had a* ***satisfactory*** *response to any of my questions".* I explored with Mr Baker his views about this suggestion in the context of his own witness statement in which he refers to providing '*fair and reasonable answers to these questions which the claimant did not accept*'. He confirmed that he understood the use of 'satisfactory' to mean that if the claimant did not agree with the answer provided it was 'not satisfactory'.

Pool of employees

5.29 The issue raised at the end of the case was whether the respondent act unreasonably by not pooling the claimant with Mr Jackson who is described by the claimant as a "trainee programmer". The claimant's role was IT Manager. Her witness statement sought to highlight the differences in the roles not the similarities. She has more IT skills, more experience of software, and knows more about the Digital Office system than Mr Jackson. The Claimant was the only IT Manager.

5.30 The outcome letter sets out the company's rationale in relation to the pool at page 225. The respondent confirm it considered the claimant's role was a unique role and no other employee in the business performed the same or similar role. The claimant was in a pool of one. Counsel agreed that the employer only needs to show it has applied its mind to the correct pool and acts out of a genuine motive. The range of reasonable responses applies in deciding the appropriate pool for selection. It was clear from the frequently asked questions and the specific questions asked by the claimant that the respondent had applied its mind to the appropriate pool and decided that where roles were similar employees could be pooled and where employees were in unique roles they were not pooled. The respondent adopted a consistent and reasonable approach in deciding the appropriate pool for employees and as for other unique roles decided the Claimant was in a pool of one.

Alternatives to redundancy

5.31 During the consultation process the claimant suggested some alternatives to *"avoid any redundancies in the IT department"*. Firstly, she suggested a salary cut of 50% to her wage reducing her days from four days a week to three days a week. Secondly, she suggested that her husband, whose consultancy contract had been terminated in March 2020 should re-join the company and work for free until the business was on its feet again. Thirdly, she suggested a salary cut/ less days for Mr Nicholson and Mr Jackson who were the other two members of the IT department. The respondent considered the suggestions and provided a response in writing (page 225). In the response the offer of a salary cut was acknowledged and appreciated

but the business needed to save £1.1 million per annum. Having decided that the claimant's role was not required it would be a luxury the business could not afford and could operate without more efficiently. Similarly, it formed the view it was able "*to operate more efficiently without engaging Richard Peck who is not employed by the company and would not provide any additional savings".* In relation to cutting the hours or days for the other members of staff the respondent confirmed it was looking at that option with a number of employees and that it was something that was likely to be considered over the coming months but did not change the position in relation to the claimant's role.

5.32 The claimant had not identified any suitable alternative vacancies that existed at the time of her redundancy. She did not apply for any of the available vacancies identified by the respondent to all at risk employees during the consultation process. As a result, the respondent confirmed the claimant's role was redundant by letter dated 6 July 2020 and terminated the claimant's contract of employment with notice ending on 3 August 2020. A redundancy payment was paid in excess of the claimant's statutory redundancy pay entitlement.

Bumping

5.33 During the redundancy consultation process no complaint had been made by the claimant that the respondent should bump another employee whose role was not redundant to make that employee redundant instead of the claimant. It was not raised in the claim form, in the list of issues, or in the claimant's witness statement. Mr Baker was cross-examined in relation to the pool that was applied to Mr Jackson, but there was no suggestion that Mr Jackson or anyone else should have been made redundant instead of the claimant.

5.34 In cross examination the claimant suggested she could have been moved into the role performed by Mrs Saltmarsh (Commercial Manager) or Ms Burbidge (Finance Director). Was it reasonable for the employer not to consider making either Mrs Saltmarsh and Ms Burbidge redundant and not transferring the claimant into either the role of Commercial Manager or Finance Director? Ms Burbidge is a qualified Chartered Accountant and was the Finance Director. Mrs Saltmarsh has been employed as a Commercial Manager since 2014. She has many years of experience in that role. They were not questioned about their skills or experience or about the claimant's ability to perform either of their roles. It was not put to Mr Baker that either of those two individuals should have been dismissed by reason of redundancy instead of the claimant. If the claimant did not consider it at the time, it is difficult to see how or why the respondent should have considered moving the claimant into either role at the very difficult time the business was facing.

Applicable Law

6 There was no dispute about the relevant law that applies in sections 98(1)(2)(4). The reason for dismissal was disputed. A reason for dismissal is a set of facts known to the employer or it may be beliefs held by him which cause him to dismiss the employee (**Abernethy-v-Mott Hay and Anderson 1974 ICR323 CA**)

7 Section 139 ERA sets out the circumstances where an employee who is dismissed shall be taken to be dismissed by reason of redundancy. In this case the respondent says the dismissal was wholly or mainly attributable to "*the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish". s*ection 139(1)(b)(1) ERA.

8 In **Safeway Stores v Burrell 1997 ICR 523**, the EAT identified the 3 questions to be considered. Firstly, was the employee dismissed? Secondly, have the requirements of the employer's business for the employees to carry out a particular kind ceased or diminished or were they were expected to cease or diminish? Thirdly, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

9 In deciding the reasonableness of a redundancy dismissal **"***the employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his organisation"* **Polkey-v AE Dayton Services 1988 ICR 142 HL .**

10 It is not for the tribunal to investigate the reasons behind a redundancy situation which are often commercial reasons. A *"tribunal is entitled to ask whether the decision to make redundancies was genuine not whether it was wise"*. **Hollister -v- National Farmers Union 1979 ICR 542.**

11 In deciding the basis upon which to select for redundancy and the appropriate pool for selection the employer only needs to show they applied their minds to the problem and acted from genuine motives. **Thomas and Betts Manufacturing Co-v- Harding 1980 IRIR 255 CA.** In some situations, it may be appropriate to draw the pool widely in others more narrowly. The pool is usually those doing the same or similar work and the tribunal must consider whether it is a fair basis of selection: did it fall within the range of reasonable responses available to an employer, in the particular circumstances of the case.

12 In relation to bumping dismissals whereby an employee X whose job is redundant is redeployed to another job and the employee in that job Y is the one who is actually dismissed although Y's job may not be redundant his or her dismissal is clearly attributable to redundancy in that it is brought about by the diminished need for work of a particular kind namely the work previously done by X. Whether or not a failure to consider bumping another employee is unfair is a question of fact for the tribunal depending on the particular circumstances of the case. There is no absolute obligation for an employer to bump or consider bumping. If it is considered factors could include: whether or not there is a vacancy: how different the jobs are: the difference in remuneration between them: the relative length of service of

the 2 employees and the qualifications of the employee in danger of redundancy can be considered.

13 Counsel for the respondent helpfully cited the EAT case of **Mr P Byrne v Arvin Meritor LVS(UK) Ltd EAT 2002 239** in which the EAT emphasised that there is no absolute obligation to bump or consider bumping, the issue is what would a reasonable employer do in the circumstances and whether the employers decision falls within the band of reasonable responses. In that case removing a perfectly satisfactory employee did not form a reasonable employer's response to a redundancy situation affecting another employee (paragraph 19).

Conclusions

14 The first issue to decide was the reason for dismissal and whether the respondent has shown the reason for dismissal was redundancy. The set of facts known to the respondent at the time that caused it to make redundancies was the significant downturn in sales exacerbated and compounded by COVID as a result of the significant downturn in retail customers for a business which did not operate online. The IT team was impacted because it supported the rest of the business whose activities had reduced. There was a substantial loss of income (71% downturn), less work available, and that situation was expected to continue. An additional existing matter that affected the claimant was the IT review completed before the redundancies and the business decision not to progress with migration to Digital Office.

15 Although the claimant disagrees with those decisions and might have made different business decisions the respondent had genuine commercial reasons for making redundancies. The IT review had been completed the board had decided on a strategy the claimant did not agree with but were aware of her disagreement. Arguably the decision to dismiss the claimant could have been made earlier. In April 2019 there was a significant downturn in business which did not just affect the claimant but 18 other employees. The respondent has shown that the reason for the claimant's dismissal was for redundancy and the which is potentially fair. The evidence to support the 5 alternative reasons advanced by the claimant was poor and none of those reasons were supported by the findings of fact. The reason advances by the claimant that she does not believe her dismissal saved costs because of the cost of employing Mrs Burbidge. There was a significant downturn and the business needed to make cost savings and had identified the claimant's role and 18 others at risk of redundancy. It was a genuine commercial decision. While the claimant may not think the decision was wise and she would do things differently it was not her decision to make. The respondent had decided the need for the type of work the claimant did had ceased or diminished and was likely to cease or diminish and the claimant's dismissal was wholly attributable to that redundancy situation.

16 Based on the findings of fact made none of the alternative reasons for dismissal advanced by the claimant were proved. The 3 O'Brien reasons (see our findings of fact paragraph 5.4,5.9, 5.26) demonstrate that what has shaped the claimant's thinking was an expectation of preferential treatment

because her brother had been the former managing director and major shareholder of the company and a dislike of Mrs Burbidge (see paragraph 5.19). Even though Mr O'Brien had left the business in 2017 sold his shares in December 2020 and was no longer a director/shareholder, he was still trying to influence the outcome in July 2021. He was doing this for the benefit of one individual only, his sister. Notably no influence was exerted for the benefit of any other employee at risk of redundancy. Unfortunately, the attempt made by the claimant to unilaterally change her job title to fit in with that attempt to influence her outcome does not go to her credit.

17 Was the dismissal for redundancy unreasonable? The respondent warned the claimant in good time that she was at risk of redundancy. There then followed a period of full and meaningful consultation process with 4 consultation meeting, written questions and answers and a considered response to any of the matters raised by the claimant. The claimant complains about the pool for selection (see paragraph 5.29-2.30). The respondent had genuinely applied its mind to the appropriate pool for the claimant and other affected employees. Where roles were similar employees were pooled and where employees were in unique roles they were not pooled. The respondent adopted a consistent and reasonable approach in deciding the appropriate pool. The role of IT Manager was a unique role in a pool of one and did not include any other employee which was a decision falling within the range of reasonable responses available to an employer in these circumstances.

18 In relation to the complaint of unreasonableness because of a failure not to consider bumping (see paragraphs 5.33 and 5.34) Mrs Saltmarsh (Commercial Manager) or Ms Burbidge (Finance Director) and moving the claimant into one of those roles. The claimant did not raise the possibility of moving into either of these roles at the time. There is no absolute obligation for an employer to bump or consider bumping There were no vacancies these were key roles being by experienced qualified employees. The claimant's role was very different to that of Commercial Manager and Finance Director. The claimant she did not have the qualifications or experience for the respondent to have considered making one of them redundant and moving the claimant into their role at what was an extremely difficult time for the business. The claimant did have longer service than Ms Burbidge but was not a Chartered Accountant with the commercial and operational experience required to take over the company finance function. A reasonable employer faced with these circumstances would not have dismissed key qualified experienced personnel as a reasonable employer's response to a redundancy situation affecting another employee.

19 The respondent also took reasonable steps to try to avoid or minimise redundancies by deployment within the organisation by informing at risk staff of any vacancies. The claimant did not apply for any of the available vacancies and did not identify any other suitable alternative vacancies that existed at the time of the redundancy. In all the circumstances and having regard to the requirements of section 98(4), the respondent's decision to dismiss the claimant for redundancy was fair and the complaint of unfair dismissal fails and is dismissed.

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Employment Judge Rogerson

Date 24 January 2022