EMPLOYMENT TRIBUNALS

Claimant: **Lyda Rodriguez**

Respondent: **Building Perspectives Limited**

Heard at: **East London Hearing Centre**

On: **4 January 2022**

Before: **Employment Judge Burgher**

Appearances

For the Claimant: **In person**
For the Respondent: **Ms K Bater (HR Consultant)**

JUDGMENT having been sent to the parties on 7 January 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Issues

1. At the outset of the hearing the issues in the case were identified as follows:

    1.1 Whether the Respondent has established a potentially fair reason for dismissal. The Responded asserted redundancy;

    1.2 Whether dismissal was fair and reasonable in all the circumstances having regard to whether the Claimant was given warning of possible redundancy;

    1.3 whether she was consulted on the selection pool and selection criteria; and

    1.4 whether alternative work was sought to avoid redundancy.

Evidence

2. The Respondent called the following witnesses

2.1 Mr Alan McMahon, Director
2.2 Mr Jason Hitchins, Managing Director; and
2.3 Ms Kelly Bater, HR consultant

3. The Claimant gave evidence on her own behalf.

4. All witnesses gave evidence under oath of affirmation and were subject to cross examination and questions from the Tribunal.

5. I was also referred to relevant pages in an agreed bundle of 157 pages.

6. There was much evidence put forward by the parties relating to a settlement discussions that were floated on the 11 May 2020 which did not subsequently result in agreement. As these were without prejudice discussions I excluded the detail of them from consideration of the case. However, to the extent that the Claimant was alleging that her redundancy was a sham to get rid of her I considered the fact of settlement discussions as a relevant matter.

Facts

7. I have found the following facts from the evidence.

8. The Claimant commenced employment with the Respondent on the 1 August 2017 as an Assistant Quantity Surveyor. She was dismissed by reason of redundancy on the 4 December 2020.

9. The Respondent is a small employer, employing 6 people at the relevant time including also employed a director, senior quantity surveyors and one other assistant quantity surveyor in its business.

10. On 27 April 2020 the Respondent construction business was suffering from a severe downturn in work and following review it decided to utilise the government job retention scheme and assign employees as furlough workers on the 30 April 2021. The Respondent sudden reduction of immediate work had the effect of the anticipated work being put on hold.

11. All furloughed employees, including the Claimant, were paid 100% furlough pay. The Respondent continued to review its business and on the 11 May 2020 two

assistant quantity surveyors including the claimant were informed by Mr McMahon that their position was potentially redundant and they were informed what their entitlement would be. The Respondent suffered a reduction of 8 client to two at this stage.

12. Both the Claimant and Mr Bates, the other assistant quantity surveyor, were offered settlement agreement to consider ending their employment. However, discussions were put on hold on 12 May 2020 when the government announced that the job retention scheme was to be extended to the 31 October 2020. The Respondent agreed with the Claimant's request for furlough to be extended. The Claimant was informed that her furlough would continue and the redundancy process would be put on hold. The Claimant was paid 100% salary until end of July 2020 and then 80% of salary in accordance with the job retention scheme thereafter.

13. The Claimant expressed concern that she was sidelined and there was a lack of engagement by Mr Hitchin with her and she was not invited to Monday meetings that were said to have been arranged. I accept that that was the impression the Claimant formed. However, the evidence before me is Mr Hutchins assisted the Claimant with her website, he permitted her to undertake her continuing practise development online course which she and did during the furlough period and completed in September 2020 with the Royal Institution of Chartered Surveyors, gaining a certificate in quantity surveying practise.

14. Mr McMahon spoke with the Claimant again on the 25 August 2020 regarding future work. The Claimant was informed that the Respondent was trying to win more business to recover from the pandemic. Mr McMahon stated that the situation was not positive and there was a high probability that her position would no longer be required. Mr McMahon stated that the Respondent was trying its best to keep the team together he would let the Claimant remain on furlough until the government ended the scheme on the 31 October 2021. Mr McMahon added that if the government extended the furlough the Respondent would keep her on the scheme. The Claimant was hopeful that things would improve for the Respondent and they would get more business.

15. On 22 October 2020 during a telephone discussion Mr McMahon offered the Claimant another settlement agreement. At this stage, the decision had been taken not to extend employment in line with the government's extended furlough period following October 2020. The Claimant did not agree to the settlement terms and she asked for a further three weeks to consider throughout November 2020. During this conversation concerns were expressed by Mr McMahon who discovered that the Claimant had been on holiday in US and Mexico, he was concerned that the Claimant may have not being acting in accordance with the furlough scheme by taking extended holiday. The Claimant had not informed the Respondent of her pressing personal circumstances at the time, in particular her father had sadly died in September 2020 following a period of being in intensive care; and that she was pregnant. The Claimant was in Columbia but she was not on holiday.

16. The Claimant was provided with notice of redundancy confirmation by letter dated 5 November 2020. She was given one months' notice and the last date of employment was the 4 December 2020. The Claimant's access to her computer was removed. The Claimant was given the right of appeal to Jason Hitchins.

17. Mr Bates, the other assistant quantity surveyor was not made redundant at this time. He was provided work in the marketing team. It was not suggested that the Claimant had the skills or experience that would have allowed her to be redeployed to marketing and it was not suggested by her. The redeployment of Mr Bates occurred following his request to see where there were other things he could do for the Respondent instead of being made redundant. This was in contrast to the Claimant's central suggestion which was that she should remain on furlough in lieu of being made redundant.

18. The Claimant appealed her selection for the redundancy by email dated 10 November 2020. This was emailed to Mr Hitchens' correct email address but was not processed. The Claimant asked for clarification of whether ways avoiding redundancy had been considered, specifically considering allowing her to remain as employee of the firm on the government furlough scheme for the foreseeable future and until March 2021.

19. Whilst the Claimant's appeal was not formally addressed by Mr Hitchens, the substance of it was by Ms Bater's response dated the 26 November 2020 stating that the job retention scheme had a number of changes that affect the Respondent financially, being national insurance and pension contributions and notice pay was not covered by the furlough grant in addition the other costs is accruing during the furlough. It was stated that unfortunately the additional costs are not sustainable for the Respondent which was unable to retain her as a furloughed worker.

20. The Respondent changed it's organisation structure at this stage. Whilst Mr McMahon remained as a officer/director his employment as a director/surveyor was terminated alongside deleting the two assistant quantity surveyors from the organisational structure.

21. In October/November 2021 work in the Respondent picked up and Mr Bates was able to be transferred from marketing to be employed as a quantity surveyor.

Law

22. Section 98 of the Employment Rights Act 1996 states:

> **General.**
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> (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
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> (a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

5). . . . . .

(6) Subsection (4) is subject to—

(a)sections 98A to 107 of this Act, and

(b)sections 152, 153 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

23. I had regard to the guidance in the well known case of Williams v Compair Maxam Ltd [1982] ICR 156 EAT where Browne-Wilkinson J stated:

In law therefore the question we have to decide is whether a reasonable tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed industrial tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this appeal tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this appeal tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform

themselves of the relevant facts, consider possible alternative solutions and, _f necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When *a* selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

2. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

Conclusions

24. In view of my findings of fact and the law set out above I conclude as follows.

25. The Respondent has established a potentially fair reason for dismissal namely redundancy. The pandemic led to a severe downturn in work from losing 8 clients to 2 and this had serious financial implications on keeping the company alive. There was a reduction in the requirement for assistant quantity surveyors.

26. Whilst Mr McMahon remained as a director his employment had terminated as a surveyor and the two assistant quantity surveyors were deleted from the organisational structure. It is proper to note that in October/November 2021 work picked up and Mr Bates was able to be transferred from marketing to be employed as a quantity surveyor but this did could not have been relevant to the reasoning as at November 2020 when the Respondent was in serious financial constraints.

27. When considering whether the Claimant's dismissal was fair and reasonable in all the circumstances, the Respondent is a small organisation. The Claimant was informed of potential redundancy on the 11 May 2020, 25 August 2020 and 22 October 2020. She was in no doubt of the parlous financial state that the Respondent was in.

28. In reality the Claimant's key concern in this case was that the Respondent did not keep her on furlough given that the government had extended it to March 2021. She considered this to be unfair. The Claimant maintained that the Respondent, through Mr McMahon acted capriciously following its wrong conclusion that she was on holiday during furlough and sought to bring her employment to an end because of this. The Claimant also states that the Respondent failed to consider her appeal in this regard.

29. I conclude that there was a continuing cost to the Respondent that they could no longer sustain. Mr McMahon ended his employment with the Respondent to save costs, even though he remained a statutory director. Mr Bates' position as an assistant quantity surveyor was deleted. The redundancy were genuine.

30. I do not conclude that there was inconsistent treatment between the Claimant and Mr Bates. Mr Bates was provided alternative work with a completely different skill and experience requirements in marketing, an area the Claimant was not able to undertake.

31. I conclude that the Claimant has confused the fairness of her dismissal for redundancy with the failure of the Respondent to meet her expectations under a settlement agreement. It was not unreasonable for the Respondent with its continuing financial difficulties to not extend the furlough process until March 2021 there was a continuing cost.

32. I do not accept that the Respondent sought a convenient opportunity to dismiss the Claimant and whilst it can be criticised for not fully exploring the reasons why the Claimant was out of the country and not formally dealing with her appeal these shortcomings do not render the dismissal unfair.

33. In these circumstances the Claimants claim for unfair dismissal therefore fails and is dismissed.

Employment Judge Burgher
Dated: 31 January 2022