EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr S Arens		Forest Garden Limited

HELD AT Birmingham **ON** 18th November 2021 and 13th December 2021

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In person

For the respondent: Mr Changez Khan (Counsel)

JUDGMENT

The claimant's claim for automatically unfair dismissal fails and is dismissed.

REASONS

Background

1. The claimant brought a claim for automatically unfair dismissal for a reason connected to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE/TUPE regulations").

2. The respondent is a national manufacturer and distributor of garden and timber products.

Evidence and documents

3. I heard evidence from the claimant and for the respondent from Mr Alexander Seaborn (Group Financial Director), James Mayo (Group Head of IT) and Emma Roberts (Group HR Manager).

4. I also had an agreed bundle of some 252 pages. On the first day of the hearing I was also presented with a Framework Agreement and a copy of the claimant's wage slip for October 2021. In addition, I was provided with a reading list, cast list and chronology to which the claimant confirmed that he had no objections. Finally, I was also provided with written submissions by the claimant and by Mr Khan who referred to one authority (see below).

Issues

5. The issues for the Tribunal to consider were as follows :

5.1 Was the reason or principal reason for the claimant's dismissal a TUPE transfer? If so, the claimant will be regarded as unfairly dismissed.
5.2 If the dismissal is unfair, applying the principles in Polkey would the claimant have been fairly dismissed in any event?

Remedy

5.3 If the claimant was unfairly dismissed what remedy is the claimant entitled to? In particular:
   a. to what basic award is he entitled to under section 119 of ERA; and
   b. what compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the claimant under section 123 of ERA? Was dismissal a sanction within the range of reasonable responses?
5.4 In particular:
   a. Has the claimant reasonably mitigated his losses?
   b. should any compensatory award be reduced to take account of the chance that the claimant would have been dismissed in any event?

Facts

6. I make the following findings of fact :

6.1 The claimant commenced employment with the respondent on 28 April 2014 as a Systems Developer at the respondent's Hartlebury site. In his role as Systems Developer the claimant built and supported new and existing software products.
6.2 The claimant's role involved building new web applications for internal use by various departments. The claimant was also responsible for finding and fixing data related issues. In addition, the claimant was responsible for maintaining a legacy application called Symphony, which was a problematic application and caused many issues. Towards the end of 2019 the claimant was asked to build a system for the Customer Services department called Vision. This involved the migration of data to the new data base from the Symphony database.
6.3 Also in 2019, as a part of its ongoing conversations around the way in which the respondent's business was operating, mitigating risk and undertaking an ongoing review of the business as a whole, the respondent's board identified that there was a risk to the business in having only a single in-house Systems Developer, particularly in the event that the claimant was off sick or on holiday.
6.4 In order to mitigate against that risk the respondent made the decision in early 2019 to recruit a second software developer. However, the respondent then found that there was insufficient work to keep two full

time developers occupied at all times as the business' need for the systems development peaked and troughed throughout the year. As such, the employment of the second software development was terminated at the end of his probationary period. He was not replaced but the respondent began to think of other ways that it could manage the business' requirements.

6.5 The respondent gradually began moving towards purchasing off-the shelf applications rather than continually developing bespoke applications in-house. The respondent initially bought a number of known, proven products rather than developing similar products in-house.

6.6 By December 2019 Symphony was coming to an end. As such, on 17 December 2019 the claimant sent an email to Mr Mayo asking what his future would look like without Symphony and what the future plans were for building and supporting new and existing software products. He did not receive a response to his email.

6.7 When Mr Mayo was asked during cross examination why he did not respond to this email, he indicated that he did not do so as at that point the respondent did not have a roadmap and if he told the claimant that there were no plans to continue with development work he was worried that the claimant would have left the respondent's employment before they were ready for him to do so.

6.8 2020 was a year of change for the IT department of the processes and infrastructure that it supported for the respondent as a whole in large part due to necessary server upgrades. The claimant played a pivotal role in these changes as applications needed to be migrated to the new servers which involved web server configurations, code changes where appropriate and upgrading applications to be consistent with the new servers. This work was completed during November 2020.

6.9 By November 2020 the respondent were of the view that all development work would be stopped and the respondent would instead purchase all of its systems and application products from external providers. As a result the claimant's role was identified as being at risk of redundancy. The respondent's rationale for this was that as its business continued to grow the requirement for additional resource in application development including the hours supporting those applications was increasing and it did not wish to place the business at risk by employing only one developer to build and support all of the business' bespoke applications. As such, it wanted to move all application development and support to a third party offering resource which was appropriate to its current and future business development requirements.

6.10 On 9 November 2020 the respondent entered into a Framework Agreement with Blueberry Systems Limited for the supply of software development and support services with an effective date of 27 October 2020. This agreement includes boilerplate sections on software development. The statement of works contained within the Framework Agreement provides for software development for support on-boarding and software application support at a cost of £2,250 per quarter invoiced one month in advance of support.

6.11 On 27 November 2020 the claimant was informed that the respondent was proposing to remove the role of Systems Developer from its business structure. As the claimant was the only person undertaking this role he was informed that his role was at risk of redundancy. The respondent sent the claimant a letter explaining that his role was at risk of redundancy. This letter included the line: *"We are therefore considering moving all application development and support to a third party[…]"*. The respondent accepts, in hindsight, that this letter was poorly worded.

6.12 A consultation meeting took place with the claimant on 30 November 2020. During this meeting the claimant put forward a number of disadvantages of going to a third party company, highlighting that this

approach did not make sense for small projects. Furthermore, the respondent would not be a priority as they would have other clients. The claimant was of the view that taking another developer was the only option. Mr Mayo agreed to take everything the claimant had said to the board for them to consider. It was agreed that the next consultation meeting would take place on 2 December 2020.

6.13 Following the meeting Mr Mayo sent a letter to the Claimant confirming the discussions. This letter again stated: *We are therefore considering moving all application development and support to a third party[…]".*

6.14 The next consultation meeting duly took place on 2 December 2020 via telephone. During this meeting the conversation again centred around the employment of a second developer. Towards the end of the meeting the Claimant raised the question of TUPE and whether the respondent had considered the application of TUPE to the claimant's situation. Mrs Roberts indicated to the claimant that she did not believe that TUPE would not apply to this situation as the respondent was not taking ownership of another company. The claimant indicated that he had read a lot about TUPE and had taken advice and he believed that TUPE would apply. Mrs Roberts agreed to take away the claimant's query away and come back to the claimant.

6.15 Following the meeting the claimant emailed Mrs Roberts to point out that TUPE could apply to an outsourcing situation.

6.16 The following day Mr Mayo email the claimant to arrange another call for 7 December 2020 to discuss the queries raised by the claimant.

6.17 A further consultation meeting duly took place on 7 December 2020 via telephone. During this meeting Mr Mayo recognised that TUPE could apply to an outsourcing situation. The claimant indicated that the business was growing and there would be a need for new applications and that his role existed. Mr Mayo confirmed that there were no new applications in the pipeline and that the respondent intended to buy finished off the shelf products should the need arise in the future rather than bespoke ones. He also explained that new project and supporting applications would be split between different companies depending on the application. In light of this Mrs Roberts confirmed her view that TUPE did not apply as the claimant's role was not being outsourced.

6.18 Later that day the claimant sent Mr Mayo and Mrs Roberts an email summarising his position and asking for a breakdown of his job in terms of activities and provide a breakdown of evidence for the justification of fragmenting them and distributing them between several service providers and also the cost implications of this.

6.19 Mr Mayo responded on 8 December 2020 on behalf of the respondent setting out why the respondent took the view that TUPE did not apply to the claimant's situation. Namely, that there were no new application requirements and there was no development road map for the next year and beyond; that they would be purchasing "off the shelf" products instead of bespoke applications which made approximately 50% of the claimant's role. It was the respondent's view that "boxed products" are fully supported and present a lower-risk and higher value creation solution for the business than bespoke products. Furthermore, report development (which represented some 10%) of the claimant's role could be divided between in-house resource and Datel; support for any bespoke applications would be outsourced to a third party who would have a team of developers rather than relying on one individual. As the respondent moved to a 24/7 operation migration to a third party was a logical choice to help reduce business risk. Finally, all existing reports (which comprised a small part of the claimant's role) could be supported by a third party or in house. The claimant was also invited to a further meeting on 9 December 2020. The claimant responded to Mr Mayo's letter on 9 December 2020 disputing the reasons provided by the respondent.

6.20 To give the respondent time to consider the points made the final meeting with the claimant was put back until 14 December 2020.

6.21 During the meeting on 14 December 2020 Mr Mayo confirmed the respondent's view that TUPE did not apply as the respondent was no looking to replace the work undertaken by the claimant to a third party. Mr Mayo confirmed that first line support such as permissions would go to the respondent's helpdesk and if they could not resolve it then it would go to a third party. Employee portals and forecasting was still being looked at. It was also confirmed that the development part of the claimant's role would cease to exist as there were no plans for bespoke development in the future. All new functionality would be bought off the shelf and there was no requirement for in-house development.

6.22 Following the meeting the claimant emailed Mr Mayo to confirm his views that there was a TUPE situation and that any dismissal as a result of TUPE would be automatically unfair.

6.23 The claimant was invited to a final meeting on 15 December 2020 via telephone at which he was informed that after consideration of the points the claimant had made the decision had been taken to make the claimant's role redundant. The claimant was advised of his right of appeal.

6.24 The decision to dismiss the claimant on the grounds of redundancy was confirmed in a letter from Mr Mayo dated 15 December 2020. In his letter Mr Mayo confirmed his view that TUPE did not apply due to the development aspects of the claimant's role (which constituted a substantial part of his role) being discontinued in their entirety. Mr Mayo confirmed that it was not proposed that the development aspects of the claimant's role would not be continued either within the business or by any third party. Further the support aspects of his role would be performed in the first instance by the respondent's own helpdesk and if not resolved by them by a number of different providers. As such, the respondent was satisfied that there was a genuine redundancy situation and given that the respondent had not been able to identify any suitable alternative employment the decision had been taken to dismiss the claimant by reason of redundancy.

6.25 The claimant's employment came to an end of 15 December 2020 as the claimant was paid in lieu of his 3 month notice period.

6.26 In his evidence Mr Mayo confirmed that following the termination of the claimant's employment, he absorbed a lot of the support work that the claimant had undertaken previously on the applications that the claimant had himself developed. About 5% of the claimant's support work had been outsourced to a third party but no development work had been carried out, whether in-house or by any third party since the claimant had left the respondent's employ. Mr Mayo further confirmed that in the 12 months since the claimant's dismissal the respondent had purchased two off-the-shelf products – a time and attendance system and a warehouse management. Whilst the respondent entered into a "framework agreement" with Blueberry which contains boilerplate section on "Software Development", Blueberry had never in fact been instructed to do any development work for the respondent. Blueberry had merely undertaken some modest amount of support on Forecasting and SupplyConnect. For other products the support function had been absorbed by the respondent's existing IT team.

6.27 On 16 December 2020 the claimant submitted a letter of appeal against the decision to dismiss him re-iterating his view that there was a TUPE situation. In his letter of appeal the claimant indicated that he disputed the respondent's assessment that 50% of the claimant's role involved development work, arguing it was "*more like 80%*". However, during cross examination would not corroborate his own assessment that 80% of his role was development and 20% was a support role. Instead, he insisted that it was hard to say what the split was as this varied with

some days he was doing more support work and the lifecycle of his work was to design, analyse, build, test and support programs. The claimant indicated that it was not possible, as a matter of fact, to quantify his role.

6.28 When asked in cross examination whether the claimant was aware of any development work being in the pipeline as at December 2020 the claimant could not point to any such work.

6.29 The claimant commenced a new role with Venersys on 11 January 2021. His appeal hearing took place on via teleconference on 14 January 2021 and was heard by to Mr Seaborn, who was the Group Finance Director at the time, Mr Seaborn was accompanied by Mrs Roberts. The claimant chose not to be accompanied. Mr Seaborn's evidence was that he had considered the TUPE point prior to the appeal hearing as it had been referred to in the claimant's appeal letter. Mr Seaborn, having full awareness of the respondent's plans in terms of systems support and development and, based on this was comfortable that TUPE did not apply as he was of the view that the majority of the claimant's role was made up of development work such as developing in-house, bespoke systems and applications which the respondent had decided to cease. In addition, there were no plans for any future development for the foreseeable future. Furthermore, the support work which the claimant undertook on existing bespoke applications this was to be carried out by various different external providers.

6.30 The claimant strongly disagreed with this assessment and also challenged why the redundancy proposal had fundamentally changed during the consultation process. As such, Mr Seaborn agreed to take these points away and consider the issue further.

6.31 Mr Seaborn was clear in his evidence that the only development work that the respondent might ever require a third-party provider to undertake would be for further bespoke development of an existing "off-the-shelf" product where modifications were needed to meet specific client demands. There would be no requirement for constant development of application which had been the main part of the claimant's role.

6.32 Mr Seaborn considered the points raised by the claimant during the appeal hearing by reviewing all of the minutes and documents from the consultation process. He also spoke to Mr Mayo to ascertain if there was any way to avoid the redundancy situation. Mr Mayo confirmed to Mr Seaborn that there was no way to avoid the redundancy. Having considered all the information relating to the redundancy consultation Mr Seaborn decided to uphold the decision to dismiss the claimant on the grounds of redundancy.

6.33 By a letter dated 21 January 2021 Mr Seaborn advised the claimant of his decision. Mr Seaborn accepted that the way in which the claimant had initially been advised of the redundancy situation (namely, that his role was being outsourced) could give rise to the suggestion that TUPE might apply, on the basis that TUPE can apply to outsourcing situations. However, this broad portrayal did not take account of the particular detail and nuance of the respondent's proposal. Mr Seaborn pointed out that Mr Mayo had assessed that the claimant's role had been evenly split between support and development functions but noted that the claimant had assessed that the development aspect of his role was more like 80% of his role. Mr Seaborn advised the claimant that the support aspect of his role was to outsourced to more than one third party provider and that the development aspect of his role was being discontinued as the respondent had decided to purchase "off the shelf" products. Furthermore, the respondent did not have any bespoke development plans for 2021 and beyond but that the respondent would be focusing on using off the shelf packages. As such, the development aspect of the claimant's role which he had assessed at 80% would no longer be continued.

6.34 Mr Seaborn also disagreed with the claimant's assertion that software development and software support were essentially the same activities. Mr Seaborn took the view that there was a material difference in software development and support. Off the shelf products came fully developed and tested, so there was no requirement for the business to undertake development activities. Instead, the respondent would be purchasing a product. Mr Seaborn was of the view that as a large proportion of the claimant's role would cease in its entirety and the support aspect would be fragmented amongst more than one third party provider. As such, Mr Seaborn was satisfied that TUPE did not apply.

6.35 In relation to the claimant's second point of appeal (namely that the redundancy proposal had fundamentally changed during the consultation proposal), Mr Seaborn accepted that there were some alterations to the proposal during the consultation process. However, he did not accept that the respondent's proposal changed fundamentally or that the reason for the proposed redundancy changed from the start to the end of the consultation process. Instead, the proposal evolved/developed throughout the process which demonstrated that the respondent had not made a final decision on the matter. Mr Seaborn was satisfied that it was the respondent's decision to adopt a different model in respect of the development aspect of the claimant's role and to outsource the support aspect of the claimant's role that had led to the redundancy situation.

6.36 The claimant responded to Mr Seaborn twice on the same day to indicate that he did not accept Mr Seaborn's assessment.

6.37 On 19 July 2021 the claimant commenced employment with EDM earning £50,000.

Applicable law

7. Regulation 3(1)(b) of the TUPE Regulations provides:

"3.— A relevant transfer

(1) These Regulations apply to—
(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
(b) a service provision change, that is a situation in which—
(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
(ii) […] or
(iii) […]
and in which the conditions set out in paragraph (3) are satisfied.
(2) […]
(3) The conditions referred to in paragraph (1)(b) are that—
(a) immediately before the service provision change—
(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

8. Regulation 7 of TUPE provides :

"7.— Dismissal of employee because of relevant transfer

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer."

9. As the claimant has sufficient service to bring a claim for ordinary unfair dismissal following the Court of Appeals decision in ***Maund v Penwith District Council [1984] IRLR 24*** it is for the respondent to show the reasons for dismissal in relation to the claim for automatically unfair dismissal.

10. The case of **Polkey –v- A E Dayton Services Limited 1987 IRLR 503 HL** indicates that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless or until it has carried out certain procedural steps which are necessary, in the circumstances of that case, to justify the course of action taken. In applying the test of reasonableness in Section 98 (4) the Tribunal is not permitted to ask whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been "futile". Nevertheless, the **Polkey** issue will be relevant at the stage of assessing compensation. **Polkey** explains that any award of compensation may be nil if the Tribunal is satisfied that the Claimant would have been dismissed in any event. However, this process does not involve an "all or nothing" decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

Submissions

11. Mr Khan, for the respondent, contends that there was no "relevant transfer" which qualified under regulation 3 of TUPE for two reasons. Firstly, he submits there was no relevant transfer because the condition in regulation 3(3)(b) is not met in this case. Mr Khan asserts that the activity – in this case developing bespoke software for the respondent – consists "*wholly or mainly of the supply of goods for the client's use*." There can be no "*service provision change*" under regulation 3 because Mr Khan submits we are in a scenario concerned with the supply of goods (software) and that is enough to dispose of the claim. For an example of such a case. Mr Khan referred the Tribunal to the case of *Pannu v Geo W King Ltd* UKEAT/0021/11/DA in support of his argument.

12. Secondly, in any event Mr Khan submits, that the claimant's claim for automatic unfair dismissal is bad in law. He argues it is based on the claimant's misunderstanding of the TUPE Regulations and that there was no "relevant transfer" under regulation 3(1)(b)(i). The claimant's primary role, which Mr Khan submits amounted to 60-80% of the claimant's work, consisted of developing bespoke software. That activity was not "transferred" to a third party; it was gradually phased out, discontinued and ultimately replaced by purchasing mass-produced, off-the-shelf products.

13. Mr Khan points out that the claimant indicated in his appeal letter that 80% of his role consisted of software development. Mr Mayo in his witness statement estimated that 60% of the role was software development. As such, even if the Tribunal took a mid-point of 70% the majority of the claimant's role consisted of development (designing and creating a product). The residual balance was support – "*what comes after the finished product"* as indicated by the claimant in oral evidence. This involves troubleshooting users' problems.

14. Mr Khan accepts that the respondent's letter of 27 November 2020 advising the claimant that he was at risk of redundancy should have been expressed more clearly to say that bespoke development was being ceased but support was being moved to third parties instead of saying "*We are therefore*

considering moving all application development and support to a third party […]".

15. However, given that no development work was outsourced to a third party and only limited support work was undertaken by third parties, Mr Khan argued that there had been no relevant transfer of activities. Bespoke software development had been gradually phased out from 2019 onwards and had become obsolete by November 2020. Mr Khan argued that the activity was discontinued, not "transferred". Finally, Mr Khan argued that software support only accounted for a small minority of the claimant's role and of that only a modest amount had been undertaken by a third party and the rest absorbed by the respondent's existing staff.

16. The claimant, in his submissions, referred to the wording in the at risk letter of 27 November 2020 which stated: "*As the business continues to grow the requirement for additional resource in application development, including the hours supporting those applications, increases. At the same time, the risk to the business of employing only one developer to build and support all of the business! bespoke applications, becomes greater. We are therefore considering moving all application development and support to a third party; offering resource appropriate to current and future business development requirements*." The claimant submitted that this demonstrated that the respondent's business was growing, the requirement for application development had increased, there was a single third party provider and there was an ongoing need for development work. It was a result of the work being transferred to a third party that his role was being made redundant. Furthermore, the claimant submitted that the respondent had not even considered the issue of TUPE until he had raised it.

Conclusions

17. In reaching my conclusions I have considered all the evidence I have heard and considered documents to which I have been referred. I have also considered the oral and written submissions made by and on behalf of the parties.

18. I do not accept Mr Khan assertion that the "activity" in this case consisted purely of developing bespoke software for the respondent and that the decision to buy off the shelf software meant that we were dealing with the supply of goods (software) and that is enough to dispose of the claim. I do not accept this assertion as the claimant's role consisted not only of development work but also support work.

19. However, I am satisfied on the evidence before me that there was no "relevant transfer" under regulation 3(1)(b)(i). I reach this conclusion on the basis that I am satisfied, on the evidence before me, that a substantial part of the claimant's work (more than 70%) consisted of developing bespoke software. Whilst the claimant refused to put a figure on the amount of development work he undertook at the hearing I note that he himself said that it amounted to 80% of his work in his letter of appeal. The claimant's line manager was of the view that at least 60% of the claimant's role consisted of development work. I also accept the respondent's evidence that the bespoke development work was gradually phased out, discontinued and ultimately replaced by purchasing mass-produced, off-the-shelf products. Indeed, I note that the claimant himself was so concerned about his future given this phasing out that in December 2019 (a year before he was made redundant) he reached out to Mr Mayor and Mr Seaborn to voice his concerns and to ask about what his future would look like once the work on Symphony had been completed.

20. In the twelve months following the claimant's departure only two off the shelf products were purchased by the respondent and no bespoke products were developed either inhouse or by a third party. Further, given that the support element of the claimant's role was undertaken inhouse with a small element being outsourced to a third party it is clear that there is no service provision change to which TUPE could apply under regulation 3(1)(b)(i) of the TUPE regulations. This is clearly not a case where activities which were being carried out in house were transferred to a third party. Only a small part of the claimant's support role was transferred to a third party and this is not sufficient for TUPE to apply. Furthermore, the development work ceased entirely.

21. Based on the evidence before me and the findings I have made, I am satisfied that the claimant was not dismissed for a reason connected to TUPE, that the reason for the claimant's dismissal was redundancy and that there was no relevant transfer under TUPE.

22. The claimant's complaint of automatically unfair dismissal therefore fails and is dismissed.

Employment Judge Choudry
3 April 2022