EMPLOYMENT TRIBUNALS

Claimant: Mrs Eunice Stewart

Respondent: J E Engineering Limited

Heard at: Birmingham CVP **On: 17 and 18 Feb 2022**

Before: Employment Judge Fitzgerald

Appearance:

For the Claimant: **Mr Duffy, Counsel for the Claimant**
For the Respondent: **Mr Ahmed, Counsel for the Respondent**

JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

REASONS

Claims and Issues

1. We established the scope of the issues before the Tribunal in this case at the outset of the hearing. The Claimant's claim is for unfair dismissal. It was not in dispute that the Claimant was dismissed and the fair reason put forward by the Respondent was redundancy. The issues are:
    a. Was there a genuine redundancy situation under s139 of the Employment Rights Act 1996?
    b. If so, was a fair redundancy process followed considering the points raised by the Claimant in paragraph 25 of the Further and Better Particulars of Complaint (page 41-42)?
    c. In the alternative is the Claimant's dismissal fair by virtue of some other substantial reason?
    d. If the dismissal was unfair should C's compensation be reduced under the principles of Polkey v AE Dayton Services, i.e. that had a fair procedure been followed then she would have been dismissed anyway?

Procedure, documents and evidence heard

1. I had before me a joint bundle of documents running to 215 pages. Links to audio recordings were e-mailed to the Tribunal but I was not directed to these by either party during the course of evidence. I flagged to the Respondent's Counsel that an Instructions to Counsel document had been sent to the Tribunal in error. I confirmed that I had not read this document and would not do so.

2. I heard evidence from the Respondent's witnesses Mr Douglas and Mrs Kinsella. A third witness was in attendance for the Respondent, Mr Layton and his evidence was accepted unchallenged. A fourth witness for the Respondent, Mr Steer, did not attend in person to give evidence and so I considered his statement but it had limited weight as there was no opportunity for cross-examination.

3. The Claimant gave evidence in support of her own case.

Facts

4. The Claimant commenced employment with the Respondent on 20 March 2017 as a Stores Controller.

5. At the time the Claimant joined the Respondent there was a large project on-going, Project Ares, which meant a large amount of work was coming in. When another employee left (Mario) the Respondent employed Jason Thompson Green to work with the Claimant in the Stores. His role was Storeman.

6. On 22 August 2018 the Claimant's salary was increased from £24,000 to £27,000 and her job description was amended to include managing Stores personnel (namely Mr Thompson Green).

7. It was not a hierarchical structure within the Stores department and the Claimant and Mr Thompson Green worked as a team side by side. However the Claimant could and would ask Mr Thompson Green to carry out tasks which he would do, and when she was off on furlough he called her to ask for guidance on various matters.

8. Due to the Coronavirus pandemic the Respondent put a number of employees onto furlough with effect from 1 April 2020 and this included the Claimant. The Respondent only required one employee to remain working in Stores and the Claimant was happy to take furlough (with Mr Thompson Green remaining at work) as she was having some health issues at that time.

9. On 4 May 2020 the Claimant was asked to return to work with the other furloughed staff members. However it became apparent that day that there was still not much work to do and in addition the Claimant was still not feeling well. She spoke to Mr Douglas and it was agreed that she would recommence furlough leave.

10. Mr Douglas was having some conversations with the Operations Manager Mr Steer about the situation of the Company and a review of overheads. I

find that these conversations were taking place in early June 2020 as confirmed by Mr Douglas and indirectly by Mrs Kinsella in evidence, and before the Claimant contacted Mr Douglas by e-mail on 8 June 2020. Mr Douglas did not want to start a redundancy process while the Claimant was suffering from ill-health and so he waited until she said she was fit to return before doing so.

11. The Respondent carried out a more detailed assessment of overhead staffing on 9 June 2020 and prepared financial figures shown at page 64. The Ares project had come to a pause in June 2018 and there was no sign of this re-starting again at that point. Whilst other work had come in, turnover had reduced and in 2020 the document on page 64 shows a loss in profit. Whilst this document lacks information, including showing turnover for April and May 2020 and information on losses which Mr Douglas says were sustained in previous years, I accept that the loss of Project Ares, together with the effect of the pandemic (as evidenced by the Respondent using the furlough scheme and the Claimant's own experience when she briefly returned to work on 4 May 2020), created a downturn in financial performance for the Respondent. On 9 June 2020 Mr Douglas also confirmed by e-mail to the Claimant that there was not sufficient work for her to come back to work at that time and she remained on furlough throughout the redundancy process.

12. The Claimant was put at risk of redundancy on 9 June 2020. She was given notice of a 2 week consultation period and the first consultation meeting took place on 11 June 2020. This was initially due to take place by telephone but was rearranged to in person at the Claimant's request. In his initial e-mail of 9 June Mr Douglas referred to 'administrative employees' and used this wording again at the start of the consultation meeting on 11 June. He went on to explain that the purpose of the meeting was to discuss the 'stores area in isolation' as a review had shown this to be the most uneconomically staffed department. The document on page 84 was given to the Claimant. The Claimant queried why Mr Thompson Green was not at risk as she said they both did the same job.

13. The minutes of the meeting were sent to the Claimant by e-mail on 12 June 2020. The handwritten copy of the minutes was not provided.

14. Following this meeting the Respondent carried out a comparison of the Claimant's role and the Storeman role. A comparison document was prepared by Mr Steer setting out the percentage differences in his view between the 2 roles. This was sent to Mr Douglas and commented on by him in an e-mail of 12 June. This e-mail demonstrates some confusion on Mr Douglas' part between the issue of which roles were appropriate to be in the selection pool and an assessment of the respective capabilities of the Claimant and Mr Thompson Green.

15. The comparison documents were not provided to the Claimant at any stage in the process due to the Respondent considering them confidential. The Claimant did see these documents eventually and although there was some confusion in her evidence as to when this was, I find that it was not until after the redundancy appeal process was complete.

16. The Claimant sent the Respondent a long e-mail on 21 June 2020 outlining her position on the redundancy and raising numerous issues. The Respondent had a further internal meeting on 22 June 2020 then extended the consultation period to 30 June 2020 and invited her to a second consultation meeting on 25 June 2020. By e-mail of 23 June the Claimant was sent information as regards the staffing review and why the Stores area had been identified as the focus for the redundancy situation. The Claimant was informed that the storeman's role was considered to be a different job and the Respondent did not feel there was justification to bump him.

17. A second consultation meeting took place in person on 25 June 2020. I find that the Claimant was given a copy of the job descriptions for her role and the Storeman role, although it is unfortunate that the latter is not in the bundle. There was a discussion about the two roles and why the Respondent felt they were different. The Respondent agreed that there was a large overlap in the roles, but said that the forklift truck was a major requirement, handling of heavier goods was mentioned as was the Claimant's higher pay grade. The Claimant stated that she did those roles previously. Mr Douglas said that he would consider the matter again with Mr Steer.

18. The Respondent held an internal meeting on 29 June 2020 to further review the situation with the Storeman role but remained of the view that there were 5 differences. These are set out on page 118.

19. The Claimant asked the Respondent to continue her furlough and delay any decision as regards redundancy. The Respondent considered this but Mr Douglas decided against it as he did not foresee a likely change in the financial position of the Company.

20. The Claimant was made redundant on 30 June 2020 with her employment ending on 31 July 2020. The document on page 118 was attached to the redundancy letter of 30 June.

21. The Claimant appealed against her redundancy and the appeal meeting took place on 20 July 2020. The appeal was heard by Mr Douglas. The Respondent prepared a draft appeal outcome (pages 136 – 137) which sets out Mr Douglas' considerations and this was distilled into an appeal outcome letter which was sent to the Claimant on 30 July 2020. The Claimant's appeal was unsuccessful.

The Law

22. In order for a redundancy situation to be genuine it must fall into one of the situations described in s139 Employment Rights Act 1996.

23. If the redundancy situation is genuine then I must find whether the employer acted reasonably, in all the circumstances of the case, in treating redundancy as the reason for dismissing the employee. I am mindful of the principles of procedural fairness set out in Polkey v AE Dayton Services 1987: namely that an employer must warn and consult

employees about proposed redundancies; adopt a fair basis on which to select for redundancy; and consider suitable alternative employment.

24. I must consider whether the decision to dismiss an employee was within the range of conduct that a reasonable employer could have adopted ("the band of reasonable responses test"), having regard to section 98(4) of the ERA 1996 and the principles of fairness established by case law.

25. In Williams and others v Compair Maxam Ltd [1982] IRLR 83, the EAT emphasised that tribunals should not impose their own standards and decide whether, had they been the employer, they would have acted differently. Rather, I must ask whether the employer's decision fell within the band of reasonable responses. The reasonable response test also applies to the choice of pool from which the redundancies are to be drawn (*Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM*).

26. Mr Ahmed has referred me to three further authorities which I have reviewed:
    a. Taskforce (Finishing and Handling) Ltd v Richard Love EAT;
    b. Handley v Tatenhill Aviation Limited (Midlands (East) ET);
    c. Moon and others v Homeworthy Furniture (Northern) Ltd 1977 ICR 117.

Conclusions

27. The first issue is whether there was a genuine redundancy situation under s139 Employment Rights Act 1996. The Respondent contends that the requirement for employees to carry on work of a particular kind had ceased or diminished.

28. I have found that Mr Douglas on behalf of the Respondent started conversations relating to redundancy in early June 2020 and before the Claimant's e-mail of 8 June. This was confirmed by Mr Douglas and supported by Mrs Kinsella, who whilst not at those conversations was aware of them happening. I do not consider that the chronology document on page 86 is inconsistent with discussions having taken place before 9 June. Whilst the financial information provided has omissions I accept that the Respondent faced a downturn in work due to the loss of the Ares project and subsequently the impact of the pandemic. I accept Mr Douglas' evidence that he had initially hoped that the Ares project would return but this appeared unlikely by June 2018. There seems little doubt that the pandemic affected work levels as a number of staff were put on furlough, there was very little work as of 4 May when the Claimant re-commenced furlough and there was still insufficient work for her to return from furlough as of 9 June 2020.

29. The documents are supportive of a genuine redundancy situation and I have heard evidence that there were no concerns as regards the Claimant's capability – she accepted this herself.

30. I heard in evidence that the Respondent had invested additional sums in marketing and the statements indicate that an Engineering Manager was taken on around that time. I accept that it was the Respondent's decision

to invest in different areas of the business to generate new work and is not inconsistent with a redundancy situation.

31. I therefore find that there was a genuine redundancy situation.

32. I now turn to the process followed. Firstly in relation to the selection pool. The Respondent took the decision to only put the Claimant at risk. It appears that the initial rationale for this was that the Stores department was the most uneconomically staffed and she was the 'middle manager'. The Claimant raised this issue at the first consultation meeting saying that she did the same job as Mr Thomson Green. It is clear that the Respondent then went on to consider this issue on numerous occasions. Firstly a comparison exercise took place on 12th June, then further internal meetings on 22 and 29 June, as well as further consideration at the appeal stage. The Respondent identified reasons as to why they believed that Mr Thomson Green's role was different and therefore should not be pooled with the Claimant's. The analysis was initially done by Mr Steer who was the Claimant's direct line manager and Mr Douglas also made contributions although he accepted he had less day to day knowledge of the roles. The differences according to the Respondent were summarised on page 118. The Respondent also considered the Claimant to be the 'middle manager' with a higher pay grade than Mr Thomson Green.

33. There is no doubt that there was a significant overlap between the Claimant's role and that of Mr Thomson Green. There is dispute about what the Claimant says she did (and told me in evidence she did) and the Respondent's assessment. Nevertheless, there are also some undisputed differences, namely the fact that the Claimant was in a higher paid supervisory role, the fact that she did not have a forklift truck licence, and the fact that their day to day roles differed in practice in some respects – for example covering different aspects of the e-bay selling process. There were also clearly tasks that the Claimant did which Mr Thomson Green did not - on the buying side for example. I accept the Claimant's evidence as to her considerable experience in the field and her ability to carry out a wide range of additional tasks, but under the legal test what I have to assess here is whether the employer addressed their mind to the pool and whether their decision to use the pool they did was within the band of reasonable responses. I cannot substitute my own view of what I think a better pool may have been. I find that the Respondent here did clearly address its mind to this question. It would have been better to do so in advance of the redundancy process starting, but nevertheless the assessment took place as part of the consultation process and before the decision to make the Claimant redundant was taken. Mr Douglas' e-mail of 12 June does evidence some confusion as between the question of pooling and the question of capability, but as a whole I consider that the Respondent gave adequate consideration to the pool. Despite some areas of dispute, I find that there were differences in the two roles, not least the managerial aspect which meant that the Respondent's decision to have a pool of one was not outside the band of reasonable responses.

34. In respect of the Claimant's role of managing Mr Thomson Green, I accepted her evidence that this was quite informal and they worked as a team. But she said that she was able to ask him to do tasks and he

sought her guidance. Her role change, plus the salary increase to reflect management responsibilities does create in my view a differential between the 2 roles.

35. As regards the provision of documents the Claimant was not provided with the comparison documents and this is unfortunate as it may have enabled her to see the Respondent's position more clearly. However the issue of the 2 roles was discussed from the first consultation meeting and throughout the process and the Claimant was provided with the role profiles and was able to put her views forward. Additional information as to the Storeman role was provided in the redundancy letter and prior to the appeal. So whilst it would have been better for the Respondent to provide this information to the Claimant, I do not find this takes the process outside the band of reasonable responses given the level of discussion and other information that there was. As regards the minutes of the 25 June meeting on balance I accept Mrs Kinsella's evidence that she would have sent these to the Claimant after the meeting and I think it is likely that the Claimant would have raised this had she not done so.

36. I turn to the Respondent's decision not to continue the Claimant's furlough period as an alternative to redundancy. I find that the Mr Douglas did consider this but decided against it as he did not see the situation changing. Whilst other employers may have reached a different view this decision was within the band of reasonable responses open to the Respondent.

37. The Claimant argues that the Respondent changed the goalposts by initially stating that the redundancies would affect administrative employees and then narrowing this to the Stores staff and then subsequently her. I believe that the language used by Mr Douglas may have been designed to soften the blow of being put at risk of redundancy, but it was unhelpful as the Claimant was then initially unclear as to the situation. However this was made clear in the first consultation meeting and therefore I do not find that it affected the overall fairness of the process.

38. The Claimant believes that Mr Douglas should not have handled the consultation process and heard the appeal. I agree that this is not ideal, but given the size and administrative resources of the Respondent's undertaking I do not consider that this renders the dismissal unfair. Overall I consider that the process followed was a reasonable one. Again given their size and administrative resources the Respondent sought to go through a proper consultation process, investigated and considered the issues the Claimant raised and extended the consultation to enable further consideration.

39. I find that the Respondent's decision not to pool, or bump, the receptionist Julie Neville was within the band of reasonable responses. As regards Mr Steer's role this was considered by Mr Douglas at least at the time of the appeal, page 136. The Respondent did not consider the option of a part-time role or a pay cut and these would have been valid options to consider, however on balance I do not find that the failure to do so in the circumstances was outside the band of reasonable responses.

40. Therefore in conclusion and taking all these matters into account, in addition to s98(4) Employment Rights Act and the legal principles stated above, I find that the Respondent's decision to dismiss the Claimant by reason of redundancy was fair. Therefore the Claimant's claim of unfair dismissal fails.

41. In light of my decision I have not gone on to consider the final two items on the list of issues as regards 'some other substantial reason' and any Polkey deduction.

Employment Judge Fitzgerald
Date: 06/04/2022