EMPLOYMENT TRIBUNALS

Claimant: Mrs R Cowley

Respondent: Stonyhurst

Heard at: Manchester (by CVP) **On:** 15 and 16 March 2022

Before: Employment Judge Rhodes

REPRESENTATION:

Claimant: Mr J Ratledge (Counsel)
Respondent: Mr S Peacock (Solicitor)

JUDGMENT

The judgment of the Tribunal is as follows:

1. By agreement, the claim is amended to include a complaint of wrongful dismissal.

2. The complaint of unfair dismissal is not well-founded and is dismissed.

3. The complaint of wrongful dismissal is not well-founded and is dismissed.

REASONS

Introduction and Issues

1. The claimant complains of unfair and wrongful dismissal. The latter claim was accepted by way of an agreed amendment on the first day of the hearing. It was accepted that the claimant was dismissed. The respondent relied on redundancy as the reason. The claimant asserted that the real reason was that she had become a thorn in the respondent's side, that she had been set up to fail and that she had raised concerns about COVID compliance.

2. The issues were set out in a list which had been agreed between the parties. The issues are addressed in the 'Discussions and Conclusions' section below.

Evidence and Bundle

3. I heard evidence from the claimant, Barbara Church-Bradford (College Catering Manager), Simon Marsden (Bursar) and Ian Brown (Headmaster).

4. I was referred to a 319-page bundle and the parties had helpfully agreed a chronology.

Law

5. Section 98 Employment Rights Act 1996 ("the Act") provides:

> *"(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—*
>
> *(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—…*
>
> *(c)is that the employee was redundant…*
>
> *(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."*

6. Section 139 of the Act provides:

> *"(1)For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a)the fact that his employer has ceased or intends to cease—*
>
> *(i)to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii)to carry on that business in the place where the employee was so employed, or*
>
> *(b)the fact that the requirements of that business—*

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

7. The leading case on reasonableness in relation to redundancy dismissals is the decision of the House of Lords in ***Polkey v A E Dayton Services Ltd [1987] IRLR 503***. An employer will not normally act reasonably unless it: (1) warns and consults employees, or their representative(s), about the proposed redundancy; (2) adopts a fair basis on which to select for redundancy by identifying an appropriate pool from which to select potentially redundant employees and selecting against proper criteria; and (3) considers and offers (if available) suitable alternative employment.

8. An employer may choose a pool which is the same size as the number of the redundancies to be made but, in doing so, it must have genuinely turned its mind to the appropriate pool and made a decision which is within the band of reasonable responses (***Capita Hartshead v Byard [2012] IRLR 814***).

9. There is no general obligation on an employer to consider 'bumping' a more junior employee to retain a more senior employee who is at risk of redundancy but, in certain cases, it may be unreasonable not to do so. In considering the issue of bumping, the sort of factors to take into account (as set out by the EAT in ***Lionel Leventhal Limited v Mr J North UKEAT/0265/04/MAA***) may include: (1) whether or not there is a vacancy; (2) how different the two jobs are; (3) the difference in remuneration between them; (4) the relative length of service of the two employees; (5) the qualifications of the employee in danger of redundancy; and (6) other factors which may apply in a particular case.

Findings of Fact

10. The respondent is a co-educational Roman Catholic Independent Day and Boarding School based in Lancashire. The claimant was latterly employed as Enterprises Director, reporting to Mr Marsden in his capacity as Bursar. She had been promoted into that role in around January 2017 having previously been Events Manager. She was employed from 13th June 2016 to 25th April 2021.

11. The claimant's contract of employment that related to her previous Events Manager role provided for one month's notice of termination during the first five years of employment and statutory minimum thereafter. The claimant's evidence was that, upon her 2017 promotion, she had orally agreed with the Bursar that her notice period would increase to three months, in her words "putting her in line with the staff under her management". The bursar does not recall any such agreement but gave evidence that none of the claimant's peers, let alone those under her management, had three months' contractual notice. It therefore seems unlikely that there would have been an agreement to that effect. If others did have longer notice this was likely to have been a product of statutory entitlements, not contractual. I therefore prefer the Bursar's evidence on this point.

12. The claimant was a highly regarded and valued member of staff, evidenced by the fact that she had been headhunted in the first place and then promoted. Mr Marsden also tipped her for future progression.

13. The respondent's Enterprises arm delivers its commercial, income-generating activities, such as summer language schools, camps, clubs, tours, retreats, parties, weddings and similar events.

14. The respondent was badly impacted by the economic fallout of the COVID pandemic. The wider context to the events leading to the claimant's dismissal was that the governors had asked for £1million of savings to be made. Sixteen members of academic staff had been put at risk of redundancy, and there was a voluntary severance scheme in place which was open to members of affected departments, including the claimant.

15. Enterprises was particularly badly affected and went from making a £221,000 profit in FY20 to a £224,000 loss in FY21. It had generated almost no income at all in the ten months prior to January 2021 when the country was put into another national lockdown. There was no immediate prospect of a return to the respondent's usual commercial income-generating activities. This is, of course, unsurprising given that the sort of in-person events on which Enterprises heavily relied for its income were banned or severely restricted during the various periods of lockdown. The voluntary severance scheme had resulted in significant cost savings but not enough to avoid the need to take further measures.

16. The respondent was entitled to reach the view that its short- to medium-term focus was on ticking over and recovery and that strategic growth would be the last part of Enterprises' activities to come back on stream. It was also entitled to reach the view that ticking over and recovery could be overseen by the Enterprises Manager and that the Bursar could absorb any higher level aspects of the claimant's role into his own during this period.

17. I entirely accept that the claimant had several well-reasoned objections to the commercial sense of this decision, particularly in the light of recent recruits to the Sports Centre, but it is not for the Tribunal to judge the commercial prudence decisions such as these; rather it is for the Tribunal to be satisfied that the respondent reached a view based on proper information and after due consideration, and I am satisfied that it did in this case.

18. I do not accept the contention that there was a plan to re-recruit to the claimant's role within three to six months. The fact is that there was considerable uncertainty as to the future and the Bursar's view, as per his letter of 22 February 2021 (page 134), was that the recovery of commercial activity could take much longer than envisaged and hoped for, possibly up to 18 months, into the summer of 2022.

19. The respondent warned the claimant that she was at risk of redundancy at an initial meeting on 28th January 2021 and, thereafter, held five consultation meetings with her (4th February, 11th February, 18th February, 11th March and 12th March 2021). An appeal hearing took place on 21st April 2021. The claimant's employment ended on 25th April 2021.

20. I do not accept that the roles of Enterprises Director and Enterprises Manager were interchangeable or had a high degree of overlap. The claimant was at a higher tier of management - she reported straight to the bursar - and this was reflected in a £10,000 salary differential. Whilst the claimant could have done the Enterprises Manager role there is no evidence that the Enterprises Manager could have done the claimant's role.

21. In any event, the respondent did consider “bumping” the Enterprises Manager to retain the claimant within the business. It asked the claimant's view on this, but she was non-committal, as she was entitled to be. It was not for her to suggest it or to make that decision, but ultimately the respondent ruled it out as an option because (1) it did not know if the claimant would accept if offered; (2) the Enterprises Manager was a reasonably long-serving and well-regarded employee; (3) it would have resulted in the cascading down of anxiety and uncertainty; and (4) ultimately the respondent felt it would be unfair in all the circumstances to dismiss the Enterprises Manager from a role which was not itself redundant.

22. I do not accept the contention that the respondent was “flip flopping on bumping”. What we see reflected in the consultation process is that the respondent had not entered the process with a closed mind to that as an option, and it was still potentially up for grabs before eventually being ruled out.

23. On the issue of consultation more widely, I find that there was a genuine exchange of views. The claimant was invited to (and did) put forward alternative proposals which were considered and responded to during the consultation process. The respondent was not obliged to adopt those alternative proposals, but was obliged to give them reasonable consideration, and I accept that it did.

24. I do not accept that it was unreasonable for those proposals not to have been discussed at the consultation meeting on 18 February 2021. The claimant had emailed them at 3.23pm the day before at a time when the bursar was absent from school for personal reasons. He therefore did not have a reasonable opportunity to consider them before the meeting which commenced at 10.00am the following day. He did however respond to them in detail in writing on 22 February 2021.

25. On the question of furlough, I accept that this would only have been a short-term measure that could only have taken the claimant as far as September 2021 when the scheme was due to end, and the respondent reasonably concluded that the impact on the claimant's role was longer term, lasting until potentially summer 2022. The respondent was entitled to reach the view that this would not ultimately have prevented the claimant's redundancy.

26. On the question of the appeal, I do not accept that it was perfunctory. The claimant submitted detailed grounds, and these were aired at the hearing. The headmaster’s outcome letter was detailed and evidenced that he had given a lot of thought to the issues. It was not necessary for him to respond point by point in the letter provided that he had given due consideration to the grounds of appeal, and I accept his evidence that he had.

Discussion and Conclusions

Had the requirements of the business for employees to carry out work of a particular kind ceased of diminished?

27. Yes. The claimant's duties had not ceased entirely, as evidenced by the fact that she had not been furloughed and did still have tasks to perform during the consultation process. However, for the reasons noted at paragraph 16 above, the respondent had genuinely reached the view that the work of three employees could be taken forward by two, by deleting the Enterprises Director role from the new structure. This represents a diminution in the respondent's requirements and the statutory definition of redundancy is therefore satisfied.

Was the claimant's dismissal caused, wholly or mainly, by that state of affairs?

28. Yes. I am not at all persuaded by the claimant's contention that there was an ulterior motive to remove her because she was seen as troublesome or an obstacle to change. The claimant was well-regarded. She had been headhunted and promoted and tipped for future success. In August 2020 she had been added to the Bursar's management team, and she had received excellent feedback in her most recent 360º appraisal.

29. Enterprises had gone from being a profitable part of the school to a cost centre, with no immediate prospect of a return to normality. I accept that the respondent was genuinely motivated by a need to address that state of affairs and that there was no ulterior motive. Any tensions between the claimant and the respondent were no more than you would expect to see in a senior leadership role, especially in the trying circumstances of dealing with the impact of COVID.

Did the respondent act reasonably, in all of the circumstances of the case, in treating that reason as sufficient to justify dismissing the claimant?

30. Yes, given the financial situation faced by Enterprises.

Was the decision to dismiss the claimant reasonable in all the circumstances?

31. Turning to the general question of reasonableness under section 98(4), I have considered particularly the following issues: (1) whether it was reasonable to have a pool of one i.e. the claimant herself; (2) whether reasonable consideration was given to suitable alternative employment by bumping the Enterprises Manager; and (3) whether there was reasonable consultation with the claimant.

32. The issues of pooling and bumping largely boil down to the same thing, as it is likely that, if the claimant and the Enterprise Manager had been pooled and considered for selection together, the claimant would have come out on top. I remind myself that I need to judge the respondent's decision based on the range of reasonable responses, and I must not substitute my own view as to how it should have proceeded.

33. For the reasons set out at paragraphs 20 to 22, the respondent did genuinely turn its mind to the issuing of pooling and bumping and its decision not to put at risk – or bump – the Enterprises Manager was reasonable in all the circumstances. The

Enterprises Manager role was not vacant; the two roles were not interchangeable or similar; there was a significant pay differential between the two and the respondent was entitled to have regard to the anxiety/unfairness which would have been visited on the Enterprises Manager who was a reasonably long-serving and good employee and whose role was required in the new structure.

34. On the issue of consultation, the process entered into by the respondent was reasonable. There were five consultation meetings, in addition to the initial meeting at which the claimant was warned that her position was at risk, and an appeal. The respondent invited the claimant to submit alternative proposals. The claimant took up that invitation and her proposals were considered and responded to during the course of the consultation process.

35. The decision to dismiss was reasonable in all the circumstances.

36. In the light of these findings, it is not necessary to consider the issue of any ***Polkey*** reduction.

Was the claimant dismissed without adequate notice (or payment in lieu of notice)?

37. No. For the reasons set out at paragraph 11 above, I find that the claimant was entitled to one month's notice, which she received. She was therefore not wrongfully dismissed.

Employment Judge Rhodes
Date: 31st March 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 April 2022

FOR THE TRIBUNAL OFFICE