EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Milan Ralevic	**v**	Marshall Motor Group Limited

Heard at: Cambridge (Face to face) **On:** 28 & 29 July 2022

Before: Employment Judge R Wood

Appearances
For the Claimant: Dr Pandya of Pandya Arbitration Global
For the Respondent: Miss S Bewley, Counsel

JUDGMENT

The Claimant was fairly dismissed on the grounds of redundancy.

FULL WRITTEN REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal and wrongful dismissal. In relation to the unfair dismissal claim, it is alleged by the claimant that the respondent engaged in a sham redundancy, and that the real reason for the dismissal related to the claimant's age and/or because the respondent wished to reduce any termination related contractual payments to the claimant. Further, it was submitted that the consultation process adopted by the respondent was, in any event, unfair. For its part, the respondent states that it moved to reorganise that part of its business in which the claimant was employed due to changes in regulatory practices by the

Financial Conduct Authority (FCA) in relation to the sale of finance and insurance products. As a result it was suggested that about 40% of the income derived from these types of products would be lost. The respondent asserts that the policy it adopted was fair throughout and the claimant was fairly selected for redundancy.

Procedure, Documents and Evidence Heard

2. The Hearing took place on 28 and 29 July 2022. The claim was heard at a face to face hearing in Cambridge. From the respondent, I heard evidence from Mr Richard Jenkins (Head of Group Finance and Insurance), Mr Jonathan Head (Group Operations Director), and Miss June Miller (HR Business Partner). I also heard from the claimant, Mr Milan Ralevic, who had been employed by the respondent as a sales development manager since 2017. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. I also had an agreed bundle of documents which comprises 312 pages; and copies of helpful and thorough skeleton argument from both Dr Pandya and Miss Bewley. I was also given a copy of FCA repot entitled 'Motor Finance discretionary commission models…..etc.': Policy statement PS20/8 July 2020. At the conclusion of the hearing, I reserved my decision.

Legal Framework

3. Section 98 of the Employment Rights Act 1996 ("the Act") is the statutory basis for unfair dismissal and reads as follows,

> ‘‘General
>
> (1) In determining for the purpose 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-
>
> (a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed 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.

……"

4. Redundancy in the context of this case has the meaning assigned to it by section 139 of the Act, which states as follows:

"(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 -

……

(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."

5. The agreed questions for me to decide in relation to the unfair dismissal case were as follows:

(i) What was the reason given for the decision to dismiss?

(ii) If redundancy, was there a redundancy situation as defined by section 139 of the Employment Rights Act 1996?

(iii) If so, was the claimant's dismissal wholly or mainly attributable to that fact; and

(iv) Did the employer act fairly within the meaning of section 98 above?

6. In the context of this case, it is for the respondent to prove that there was a fair dismissal of Mr Ralevic on the grounds of redundancy. It must do so on a balance of probabilities.

Findings and Reason

7. I listened very carefully to the oral testimony from all of the witnesses. It was my impression that they were all trying to do their best. I acknowledge that it is was difficult situation for all of those who gave evidence during the hearing. Matters relating to employment and the dismissal of an employee are invariable emotive. We were also dealing with events dating back to early

2020, which was about 30 months ago. This clearly creates barriers to the clearest recollection. I had regard to all of these matters when assessing the quality of the evidence I heard.

8. In relation to the respond section witness, I found them to be thoughtful and informed. It was my impression that all three gave clear and consistent testimony on the relevant matters. I did not sense any attempted to mislead as to the reasons why the respondent engaged in the reorganisation of its SDM resource. In reality, there evidence was subject only to very limited challenge during the hearing. The claimant's case was based to a large extent not upon disagreement as to the primary facts, but on more nuanced points, to which I will return shortly. In summary, I found the respondent's witness to be credible and reliable.

9. As a result, I find the following matters to be true. The claimant was employed by the respondent as a sales development manager ("SDM") in 2017. He was involved in motor retail. The respondent is a company which, amongst other activities, is involved in the sale of cars, as well as finance and insurance products associated with the purchase of such vehicles. It was the claimant's job to manage these aspects of the respondent's activities, along with other SDM's.

10. The background to this case is that in 2019, the respondent anticipated that there would be changes to some of the Financial Conduct Authority (FCA) rules which regulated the sale of insurance and finance products in the car retail sector. Car Car Plan ("CCP") were the respondent's provider of these types of regulated products. CCP invited the respondent to a meeting in April/May 2019 during which they told the respondent that, pursuant to some of the proposed changes, they intended to restrict the margin earned on insurance products by the intermediary (i.e. in this case, the respondent) to a maximum of 50% of RRP (recommended retail price). Due to other FCA changes, it also seemed likely that the level of commission on finance agreements would also be reduced.

11. The respondent assessed the likely impact of changes and concluded that there would be a significant reduction of their margins. This resulted in a business review and an 'SDM proposal' which would be can found at page 158 of the bundle. The predicted impact was estimated to be in the region of £3.24 reduction of gross profit, which represented about 24% of total gross profit of the company. I find that these were significant proposed changes to the respondent's regulatory framework which were likely to result in significant impact on the respondent's business model.

12. There is limited disagreement as to what the respondent did next. In late 2019, the claimant was one of 8 SDM's. There were six permanent SDM's, one of which was the claimant. One other was on maternity leave. The other two were on temporary contracts, one of which was to cover maternity leave. In essence, therefore there were only 7 SDM roles within the respondent company. There was also a lead SDM. CCP also had their own development manager who acted to support the SDM's within the respondent. CCP

informed the respondent that it intended to increase this number to 4 development managers. Consequently, the respondent took the decision that it could reduce the number of it's internal SDM'S roles to 5, as a means to save costs in the light of the anticipated reduction in profits. Regrettably, this meant that 2 SDM' roles were to be made redundant. As I have said, there was little effective challenge to this evidence at the hearing. It had been the claimant's position prior to the hearing that the respondent had provided insufficient evidence of these matters. In my judgment, there was ample support for these matters within the witness evidence and the documents within the bundle. I accept this evidence.

13. I also accept that the nature of the remaining SDM's roles were to change, albeit to a limited extent. They were to cover more dealerships, and focus on those not achieving their sales targets. There would be no changes to their pay structure. The CCP development managers were to provide more support in the areas of coaching and induction of sales executives and managers, thus freeing up the respondent's SDM resource.

14. I accept the unchallenged evidence of Mr Jenkins who told me that he had been part of the final presentation on the restructure to the Executive Committee and SEO (see pages 158-62 of the bundle for associated documents). It was agreed that the restructure would take place as set out above. The announcement was made to staff on 17 January 2020 (see page 163 of the bundle) during which it was made clear that there would be a consultation process leading to potential redundancies. I will return to the process below, but in summary, there was a large volume of documentation generated by what followed, which all clearly set out that this was a process motivated by a redundancy situation. Further, it was the reason given for the claimant's dismissal on 24 February 2020 (page 247). He was the subject of a redundancy payment upon dismissal.

15. Returning to the questions I set above, I find that the reason given for the dismissal of the respondent was redundancy. I do not think this was disputed. However, there was some disagreement as to the next question, which relates to whether there was a redundancy situation as defined by section 139 of the Act. Dr Pandya's submission, on the claimant's behalf, was that the respondent had not been subject to a decline in work at all; in fact quite the contrary. It was suggested that the respondent had taken on more dealerships in the previous two years. Further, that there was no evidence that the amount of financial and/or insurance products being sold had shrunk. In other words, the amount of work required of the SDM's had not reduced. Mr Ralevic made the point on number for occasions that those SDM's remaining after the redundancy process would have had more work to do than before.

16. As a matter of fact, much of this is possibly true. However, the relevance of it for the purposes of this case is limited. Apply in the statutory wording of of section 139 as I must, it would be erroneous to focus on the diminution (or otherwise) of the work to be done, in this case by the SDM's. What is critical is an analysis of the requirement of the business. In this case, there is little

or no dispute that as a matter of fact, there was a reduction in the requirement of the respondent to have SDM's performing work, and that their numbers were reduced by 2 roles. This was the result of restructuring, and changes to the role, by the respondent, and CCP absorbing some of the SDM function. Accordingly, in my judgment, the statutory test is satisfied.

17. Futher, Dr Pandya submitted that the respondent had not satisfied a test of causation, namely that there was insufficient evidence that the proposed changes to the way the sale of financial/insurance products were regulated was the cause of the reorganisation, and therefore the redundancies. Again, I am of the view that this is to misunderstand the nature of the Tribunal's jurisdiction. The Tribunal is not required to go behind what may or may not have been the employer's motivation for engaging in a restructuring of its business. Of course, where there are allegations that a redundancy has been used to get rid of an employee, that is to be dealt with when looking at whether the redundancy was the real reason for dismissal and/or whether the dismissal was unfair. However, in this case, there is no need to prove a causal link between the FCA changes and their implications for the respondent, and the redundancies, once an actual redundancy situation has been established. In my judgment, it has been, in the clearest terms. I appreciate that the mere assertion of a business reorganisation does not necessarily result in a redundancy situation as defined. However, for the reasons set out above, I am satisfied that there was a redundancy situation here.

18. This brings me to the question of whether redundancy was the genuine reason for the dismissal. I find that it was. It was my impression of the respondent's witnesses that their testimony on this point was consistent and truthful. As I have already stated, there is evidence of a lengthy and methodical process, properly justified on the basis of proposed changes to the respondent's business structure. There were 4 others pooled with the claimant, and one other selected for redundancy (Alan Early), albeit that he was offered, and accepted, the temporary role of maternity leave cover. If this was, as alleged by the claimant, a cynical attempt to remove him, then it was a very elaborate one.

19. I tried on numerous occasions to investigate the true motives for the dismissal as alleged by the claimant. I found this part of his case to be at times vague and confusing. In his witness statement at paragraph 3, he gives the reason for the "fake redundancy" as a desire to "avoid paying sums that would be due on termination of my contract of employment". This is repeated at paras 15 and 16; and also set out in the particulars of claim (page 19 and 20 of the bundle). It was difficult Ito understand the logic of this explanation. By falsely giving the impression of a redundancy situation, the respondent was potentially increasing it financial liability on dismissal because it would have to make a redundancy payment in addition to any notice pay under the contract. I therefore dismiss this as a potential alternative motivation of the respondent.

20. During the course of the hearing, there was also some mention that the claimant had been singled out because of his age. I note that the claimant

had not made an age related discrimination claim. There is no mention of any age related discrimination in the claim form or in the claimant's witness statement. In cross of examination, Mr Jenkins was asked whether he he had changed his approach to the claimant, as opposed to the other candidates, because he was older than the others. Mr Jenkins denied this. Nothing at all was put to Mr Head on this issue, even though the evidence of all three witnesses was that they had jointly attributed scores to the candidates, and so had therefore jointly made the decision to select the claimant for redundancy. Similarly with Miss Miller, whilst a number of issues were put to her in cross-examination, it was not suggested that she had scored him down because he was older than the other candidates.

21. In his witness statement, the claimant does make the point (paragraph 22) that he was the closest to retirement age, being 55 years old. He added that the other candidates were aged in their thirties. Although the claimant was the oldest, I find that some of the other candidates at least were in their 40's and that the differences in age was not as significant as alleged by the claimant.

22. It was not until I asked the claimant questions at the very end of his oral testimony that he put any flesh on the bones of this part of his claim. He told me that in December 2019, a franchise director of Jaguar, had asked him his age at a meeting and then laughed. The claimant construed this as an ageist comment. On another occasion in November 2019, the claimant had been in the sales department when the CEO walked in. The CEO is said to have observed that the claimant was "old and had grey hair".

23. In my judgment, the age related aspect of the claim has not been properly pleaded, or put to the witnesses. In fact, it appeared to be something or an after thought. What little that has been said about it during the case, was vague and inconsistent. I also note that notwithstanding several opportunities to do so during the consultation process, the claimant never alleged that he has being discriminated against on any ground, let alone age. For all of these reasons, I place little weight on this evidence. In my judgment, the respondent has established that the genuine reason for dismissal was redundancy, and that the dismissal was wholly attributable to that fact.

24. I then turn to whether the dismissal was fair as defined by section 98 of the Act. In doing so, I must be careful not to substitute my own view for that of the respondent. I must also look at the process as a whole in deciding whether whether it has met the necessary threshold of fairness. For the dismissal to be fair, it must fall within a range of decisions that a reasonable employer might have taken if presented with the same circumstances. I made the following findings of fact about the consultation process.

25. The respondent decided that it would be fairer to have the existing SDM's apply for the new roles. There was a meeting on 17 January 2020 whereby the process was announced before all of the SDM's. Following this, there were meetings with all of the SDM's individually, during which it was discussed how the process would work. Each were informed that they were at

risk of redundancy. This was followed up by a letter at page 174 of the bundle which further explained the nature of the selection process.

26. The two SDM's on temporary contracts were dismissed as a means of minimising redundancies amongst the permanent. There was a further meeting with each remaining SDM on 24 January 2020. The notes for the appellant are at page 181 of the bundle. I am satisfied that the claimant was given every opportunity to consult with the respondent about the proposed redundancies on this occasion (and others). He was also given the opportunity to discuss the new SDM job profile and the proposed competencies to be used during the application process (pages 167-171). The claimant applied for the new SDM role on 24 January 2020 by email (177).

27. On 30 January 2020, the candidates were required to take part in a powerpoint presentation and interview. These were chaired by a panel made up of the Mr Jenkins, Miss Miller and Mr Head. Each made his/her own assessment of the performance of each candidate for each activity. Immediately afterwards, and whilst matters were fresh in their minds, the panel discussed each candidate's performance and arrived at an agreed score for each of the competencies. Mrs Miller was responsible for collating the scores for each candidate. These scores are summarised at page 235 of the bundle. The claimant scored the lowest of all of the candidates, and by a significant margin. He scored 43/110. The next lowest was Alan Early, who scored 73. Top score was 106.

28. On 4 February 2020, there was a meeting with each candidate to discuss the outcome of their interview and presentation. Each candidate was given some feedback, and given the opportunity to discuss their scores. Miss Miller issued the claimant with a vacancy shortlist and advised him to monitor the respondent's online list of available jobs, which was updated daily. Miss Miller also offered to give him some help with his CV and interview skills, an offer which the claimant accepted. There were no minutes of the this meeting, but a letter was sent on the same day which appears at page 239 of the bundle, which at least in part summaries the content of the meeting.

29. There was a further meeting between the claimant and Miss Miller on 21 February 2020 at which there were further discussions above the vacancy list, his CV, and interview skills. There was some role play of interview skills which took about 3 hours. The matters discussed were summarised in a letter of the same date (page 242 of the bundle). Finally, there was a meeting in 24 February 2020, at which matters were recapped and at which his employment was terminated on the grounds of redundancy. The notes or this meeting are at page 244 of the bundle, and dismissal letter is at page 247. The claimant did not appeal the decision to dismiss.

30. There are a number of criticisms of the consultation process made by the claimant. Firstly, in relation to those placed in the pool of candidates to be considered for redundancy, it is suggested that the employee on maternity leave should have been selected and that it was unfair for her to have been 'ring fenced' on the grounds that she was on maternity leave. As far as I

could ascertain, it seems that this lady had her baby in late October 2019, and that there were no particular health issues. Both mother and baby were well.

31. It was the respondent's position that by reason of regulation 10 of the Maternity and patently Leave Regulations 1999, it was legally required to offer suitable alternative roles to her as an employee on maternity leave. In my judgment, the provision of this regulation applied to the situation in this case, and that accordingly, the respondent had acted fairly in excluding her from the redundancy pool. In an event, it would not have assisted the claimant even if she had been included in the pool. Even if she had been selected in the bottom two candidates, whether above or below the claimant, Mr Ralevic would still have been dismissed. No other criticism is made of those selected to be placed at risk of redundancy. If one accepts the general underlying motivation for the changes made by the respondent (which I do), then it is difficult to be critical of the approach adopted by the respondent i.e. selecting all SDM's (excluding the employee on maternity leave, and the temporary staff). I find that the pooling was fair.

32. Some of the respondent's witnesses were criticised about the way they scored the claimant on 30 January 2020. Mr Jenkins was cross examined as to the lack of scores on his rating sheet which appears at page 229. It was suggested that this demonstrated a lack of objectivity and transparency. In response, Mr Jenkins said he had not added the scores in the final column because they had discussed it immediately afterwards. He maintained that he had adopted the same approach for all of the candidates. He knew the individuals well, which was why he had not written as much as others. He stressed that his scores were based on the strengths and weaknesses on the day.

33. Mr Head was not asked about this. However, Miss Miller was questioned about it. She said that the collated notes and scores for the claimant's interview were at page 184; and those for the presentation were at page 202. These were the collated notes and scores for all three of the panel members. She stated that as a HR manager she understood competency frameworks, and had worked with franchises, so had some understanding of the sector. She accepted that the competencies were not specific to the role, but were relevant to it.

34. I accept that it was not ideal what Mr Jenkins had not filled out his form in the way anticipated by the form itself. It would have made a better impression if his scores had been clearly noted. That being said, I do not find that this deficiency had a significant impact on the overall fairness of the process. I accept the evidence of all three witnesses that the collated scores were the result of a process involving all three panel members. The discussions about ratings took place immediately after the interviews and presentations for all candidates. I got the impression from Miss Miler that there were robust and frank discussions, and that they were a genuine attempt to arrive at a consensus on ratings. In which case, it is my view that Mr Jenkins' failure to

note scores on his sheet was not significant.

35. I am satisfied that all of those pooled were dealt with in the same way for the purposes of points scoring. I acknowledge that the rating sheets for the other candidates were not in the bundle. So far as I can ascertain, these have never been requested by the claimant. In my view, it is therefore difficult for Dr Pandya to raise a criticism now based on their absence. Moreover, it will only be in the exceptional circumstances that documents relating to retained employees will be relevant in this type of case. The question for me is whether the claimant was dismissed, not whether some other employee could have been fairly dismissed. I am not entitled to engage in a reassessment exercise like the one performed by the respondent in this case. In my judgment, the claimant's approach did, on occasion, fall into this error.

36. I am also satisfied that the claimant was properly consulted as to any suitable alternative job opportunities during the process. I find that he was constantly reminded in person and in writing that he should look at the online vacancies website, and was encouraged to speak to Mrs Miller about any jobs opportunities about which he was interested. Further, I accept Miss Miller's evidence that she provided hard copies of job vacancies and attempted to discuss them with him at their various meetings during the process. It was Miss Miller's evidence to me that he did not show any interest in other vacancies. Mr Ralevic did not take issue with this general observation when he gave evidence. He could not name any vacancy in which he had been interested, which he had been denied pursuing by some failure on the part of Miss Miller or anyone else from the respondent. Mrs Miller had explained that there had been some other roles available, which were not the same as the claimant's old role, and would have required some training. However, he was not interested. He would have been prioritised, had he shown an interest. I accept this evidence.

37. I should also add that I accept that Mrs Miller had given the claimant some help with his interview skills. The claimant accepts this. There was some dispute as to what assistance, if any, she gave him in respect of the CV. To the extent that it is necessary, I also find that Mrs Miller did help with him his CV. It would seem an obvious thing to do having assisted with interview skills. It would therefore seem at odds for someone who has helped the claimant with these matters, to be obstructive about alternative vacancies. I accept that respondent evidence on this point.

38. Some criticism was also made of the competencies chosen for the application process for the new role. In my view, they fall within a range of reasonable decisions that an employer might take. It is far from unusual to opt for these generic competencies rather than job specific skills. The particular criticism made by the claimant is that as one of the highest performing employees amongst the SDM's, he would have been better served by halving other criteria, which he did not spell out. There was insufficient evidence for me to be able to say whether and to what extent the claimant out performed his colleagues from a sale perspective. In any event, even if it was the case,

he would have been able to use this fact to optimise either his interview responses and/or his powerpoint presentation. I think it is therefore incorrect to say that this advantage (if it was one) for the claimant, was neutralised by the choice of competencies. Again, I also note that the claimant made no criticism of the competencies during the process, when he had the chance to do so. I therefore reject this argument.

39. Neither do I accept that the claimant was scored down as a result of Mr Head asking him questions during the early part of his presentation, causing him to over run on the allocated 20 minutes. I was told by the respondent's witnesses that he was not scored down by taking longer than 20 minutes. I accept this evidence.

40. There were some other matters raised in cross-examination of Miss Miller which I address now. It was suggested to her that she had lied in her witness statement, and in particular at paragraph 22 up to the words "….anything at all.". In essence, the claimant denied that during the 4 February meeting there had been a discussion about his scores or any feedback. It was put to Miss Miller that this was supported by the lack of any notes of the meeting, which she accepted did not exist. She said she had not made any because the claimant had not raised any comments. The claimant disputed this.

41. This was clearly quite an important point in the eyes of the claimant. Quite some time was spent on it during the hearing. I have therefore considered it at some length. I had regard to it when coming to my general conclusions as to the credibility of Miss Miller and the other witnesses for the respondent. However, as I have already stated, looking at the evidence as a whole, I am satisfied that Miss Miller was a credible witness. It would have been better if she had made notes of the 4 February. It would have been in keeping with the generally thorough nature of the consultation process and the record keeping associated with it. However, I do not agree that there is anything sinister in the absence of notes. There is a letter of the same date which, to some extent, stands as a record of the meeting, and in which Miss Miller states that there was a discussion about alternative employment. Given the context, it seems likely that there would have been some discussion about the interview and presentation, and the claimant's scores, at the 4 February meeting, given that it was the whole purpose of the meeting. I therefore accept Mrs Miller's evidence on this point, and find that the claimant has mis-recollected what was said.

42. In any event, looking at the process as a whole, I am satisfied that it was fair, and that the resulting dismissal was also fair. I find that the claimant had ample opportunity to consult with the respondent about the redundancy process, and also to engage with Mrs Miller in relation to potential suitable alternative job opportunities. Not only does the process fall within a range or reasonable responses, I take the view that it was a very good example of how, overall, such a process should be conducted. It was not at all perfect, as I have observed. However, it was thoughtfully and methodically managed, and well documented.

43. In summary, it is my judgement that the claimant was fairly dismissed on the grounds of redundancy and that the process that the respondent adopted was reasonable and fair in the circumstances. In other words, the claimant was fairly dismissed.

44. I then turn briefly to the claim of wrongful dismissal. There was some confusion about this part of the claim. From the pleadings, it appeared to be a claim for a breach of the notice provisions of the claimant's contract of employment. The puzzle was that the respondent had made a payment in lieu of notice, the payment being in respect of one months pay as required. There was no dispute that the payment represented the amount due under the contract, or that the respondent was entitled to make a payment in lieu of notice.

45. It was therefore difficult to understand what this claim was about. So far as I could ascertain, Dr Pandya's submissions were to the effect that if I had found that the dismissal for redundancy was a sham, then the respondent would have been in breach of it's own contractual redundancy procedure. He would therefore have been entitled to damages going beyond the date of termination. As a matter of law, this was not easy to follow. In any event, it seemed to be based on the premise that this was not a genuine redundancy. As I have already found that this was a fair dismissal on the grounds of redundancy, no further matters can flow from the alleged breach of contract. I therefore dismiss the claim for wrongful dismissal.

46. The claim is therefore dismissed.

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Employment Judge R Wood

Date: 5 August 2022…….

Sent to the parties on:

12 September 2022

For the Tribunal Office