EMPLOYMENT TRIBUNALS
London Central Region
Heard by CVP on 8 and 9 September 2022

Claimant: Ms M Davies

Respondent: Squire Patton Boggs (UK) LLP

Before: Employment Judge Mr J S Burns

Representation
Claimant: Mr J Davies (Counsel)
Respondent: Ms A Mayhew KC

JUDGMENT

The claims are dismissed

REASONS

1. This was a claim for unfair dismissal, the Claimant having been employed as an associate solicitor at the Respondent firm of solicitors from 8/8/2018 to the expiry of her notice period on 17/11/20, when she was dismissed in a redundancy exercise.

2. I was referred to a bundle of documents of 917 pages and heard evidence from the Respondent's witness Mr P Crossley (Partner) and then from the Claimant. A statement of Ms B Rene (Respondent's HR Business Manager) was not challenged. I received a written skeleton argument from Mr J Davies and oral final submissions.

3. I accept both the Claimant and Mr Crossley as reasonably credible witnesses, subject to my reservations about accepting claimed hearsay which I refer to below in paragraph 45.

Findings of fact

4. The Claimant was employed as a level 1 Associate in the Respondent's International Dispute Resolution practice group. The four partners in the IDR group were Messrs P Crossley, B Holland and M Rockall in London and Mr A Martinez who was based in Australia on a two year secondment.

5. The Claimant was one of 5 level 1 Associates in the London office.

6. She worked in 2019 almost exclusively under the supervision of Mr Holland, for a substantial client called Overgas, which work came to an end in acrimonious circumstances in February 2020. This was not the fault of the Claimant but arose from Overgas failing to pay a large sum in accrued fees due to the Respondent.

7. Three other large pieces of work carried out by the IDR team also came to an end at about this time. The work flow for the team fell to a low level, which situation was aggravated by the Covid19 pandemic and the associated lockdowns.

8. By June 2020 the London-based partners had decided that they needed to make two redundancies in the group, one of which was to come from amongst the 5 level 1 Associates who were put together into a selection pool. The partners who were to make the selection were Messrs Holland, Crossley and M Rockall who knew all the candidates in the pool.

9. Ms Rene in HR provided the firm's standard selection criteria which the Respondent had been using since 2008, when they had been agreed by staff representatives at the time of a large-scale redundancy exercise.

10. The criteria were; 1. Technical skills and performance; 2. Chargeable hours; 3. Non-Chargeable hours 4. Client service. 5. Team working; 6. Attendance; 7. Working without supervision; and 8.Disciplinary/Below Standards Performance Procedure. Under each criterion a range of scores could be awarded ranging from 0 equating to very poor to 5 for very good as set out accompanying explanatory notes.

11. These criteria were then discussed between the three partners and a consensus reached between them as to which scores should be given to each candidate in the pool. No written records were kept of these discussions.

12. Part but not all of the information which was considered for purpose of the Claimant's redundancy scoring was information in an Associate/Advisor Evaluation Form for the Claimant which had been completed by Mr Holland, Mr Martinez and a Senior Associate Bernhardt Maier in October 2019 against a variety of other criteria such as expertise, research skills, analysis skills etc. Most of the information and comments on this form are favourable to the Claimant but there were also some reservations, especially from Mr Holland who knew her work best.

13. This form should have been given to the Claimant at the time by Mr Holland but she claimed at the Tribunal that it had not been and that she saw it for the first time when she received it in response to a Data Access Request made after her ET claim had been presented.

14. Further appraisals had been carried out in earlier in 2020 which were also part of the information which would have affected the Claimant's scoring as would her recent performance generally which included in April 2020 her writing an article for marketing purposes for Mr Rockall which he did not regard as wholly satisfactory as he found that the Claimant in so doing had plagiarised another firm's material.

15. Mr Crossley explained in his email dated 5/8/2020 to the Claimant that "*the matrix was undertaken by the 3 London IDT partners with reference to their own observations and experience of working with you as well as feedback from your evaluation from the previous Associate Review…"*

16. One of the candidates in the pool Zanaid was treated as something of a special case because she is an Arabic speaker and negotiations were underway within the Respondent to secure a substantial transaction in Doha which if successful would result in her transferring to another firm. This favourably affected the manner Zanaid was perceived and scored.

17. Despite the fact that the Claimant's billable hours had fallen to a low level in 2020, the marking partners decided to award her 5 ie full marks against this criterion because it was recognised that she was not to blame for the sudden cessation of her work for Overgas and previously she had worked very hard and recorded an abundance of chargeable hours. Despite this, the total of the Claimant's marks was the lowest of the 5 candidates, and so she was provisionally selected.

18. On 20/7/20 Mr Crossley told the Claimant she was at risk of redundancy and issued her with a letter to this effect, and summoned her to a virtual meeting to discuss the fact on 21/7 at 3.30. The letter attached copies of the redundancy selection matrix used, the matrix score guideline notes and a copy of the firm's redundancy policy. With this material the Claimant was able to see that the pool consisted of 5 associates of which she was one, what the selection criteria were, the generalised guidance as to how the marking was to be done, and the marks which she and the other four candidates had been assigned against each criterion, although the names of those others were withheld. The notes to the criteria included the following "*the selection of individuals is scored in relative rather than absolute terms*".

19. The redundancy procedure contains inter alia the following: "*4.1 "The criteria used in selecting employees for redundancy will depend on the existing circumstances and the particular needs of the organisation at the time. However all reasonable efforts will be made to construct a fair and robust set of criteria following appropriate consultations…4.2 Individual employees who are provisionally selected for redundancy, following the application of the criteria will be informed of the fact and invited to a meeting, at which they will be informed of the fact and invited to a meeting at which they will be given an opportunity to make representations if they feel that the application of the criteria results in unfairness to them or that there has been a mistake in the application of the criteria".*

20. The four other associates who had higher scores were not informed of the process and did not receive warning letters or attend consultation meetings.

21. The Claimant attended three lengthy minuted redundancy consultation meetings with Mr Crossley and Ms Rene on 21/7/2020, 27/7/2020 and finally on 19/8/2020. In addition the Claimant submitted several lengthy written representations between meetings arguing for higher scores etc which Mr Crossley considered and responded to systematically and in detail providing a full account of the Respondent's reasons and the process which had been followed.

22. In response to one such argument Mr Crossley agreed to increase the Claimant's score for the Client Service criterion by 1 from 3 to 4.

23. The Claimant suggested that a trainee solicitor called Harriet (who had done very well and who on 31/3/2020 had been offered and had accepted an Associate Level 1 employment contract to take effect on 1/9/2020 when her training ended) should have been made redundant instead. In response to this Mr Crossley agreed to add Harriet to the selection pool and she was scored against the selection criteria by the same three partners in consultation with Harriet's manager but the Claimant's scores remained the lowest so she remained the selected candidate.

24. During this consultation period the Claimant was informed about a possible alternative role in Corporate Tax based in Leeds or Manchester which she declined. She was also sent on 23/7/2020 a list of all current fee-paying vacancies in the Respondent's UK offices and the discussion about possible alternative roles continued throughout but the Claimant was not interested in pursuing any of these.

25. On 10/8/2020 the Claimant's then solicitors made a lengthy submission on the Claimant's behalf ending in a threat to issue tribunal proceedings if the Respondent did not alter course. This was responded to in detail by Mr Whincup the following day. Following a delay caused by this correspondence, the final meeting took place on 19/8/2021 at the end of which the

Claimant was dismissed with effect from 17/11/2021, this being confirmed by letter the same day.

26. The Claimant via her then solicitors appealed on 26/8/2021. This was dealt with on paper and dismissed by P Walsh in a detailed letter dated 19/9/2020 which engaged with all points.

Relevant law

27. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

"*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 purpose 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"

28. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

"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) depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.'

29. Where redundancy is established, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.

30. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. R v British Coal Corp ex parte Price 1994 IRLR 72 at para 24.

31. Warning about redundancy and consultation about it do not have to be two separate processes. The warning can come at the beginning of the consultation Elkouil v Coney island Ltd IRLR 174 2002 13

32. To warn of impending redundancies and then to announce the result does not comply with the duty: Rowell v Hubbbard Group Services Limited [1995] IRLR 195.

33. In Boal and anor v Gullick Dobson Ltd EAT 515/92, employees complained that the consultation with them over their proposed dismissals for redundancy was rendered defective by the employer's refusal to disclose details of how their rivals for redundancy had been assessed. They argued that they could not challenge the decision to select them if they were unable to draw comparisons between the way in which they had been assessed and the way in which those retained had been assessed. In short, they could not answer the question '*Why me?'.* The EAT emphatically rejected these arguments. There was no legal authority for the

proposition that consultation had to be as detailed as the employees claimed. The duty on the employer was to act reasonably within the terms of S.98(4) ERA. It could not be said that an employer was under a duty to provide an employee selected for redundancy with all the information on which the decision to dismiss had been based so that the employee could examine it, point out any mistakes that might have been made, and require the employer to go through a revision exercise. If this were required, the employer would not be able to carry out the redundancy exercise at all; it would lead to an '*intolerably protracted and utterly impracticable process'.* Moreover, the disclosure of such information to employees would involve breaches of confidentiality and would destroy the morale of both workers and management.

34. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. Thomas Betts Manufacturing Ltd v Harding 1980 IRLR 255 CA. However, in choosing the pool the employer must act reasonably and must have a justifiable reason for excluding a particular group of employees from the selection pool where the excluded category do the same or similar work to those who are up for selection. British Steel PLC v Robertson EAT 601/94.

35. The employer must seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service. Williams v. Compare Maxam Ltd 1982 IRLR 83 A tribunal may not substitute the selection criteria it would have chosen for those used by the employer. The Tribunal should consider if criteria fall within range of reasonable responses (Post Office v Foley, Graham v Secretary of State for Work and Pensions)

36. Tribunals should not generally get involved with the minutiae of how individual scores are arrived at, as indicated by the Court of Appeal in British Aerospace Plc v Green and others [1995] IRLR 433, and again by the Court of Appeal in Bascetta v Santander [2010] EWCA Civ 351. Instead a tribunal should focus on whether the employer has a good system in place for assessing employees against the criteria.

37. In Nicholls v Rockwell Automation Ltd UKEAT/0540/11 and UKEAT/0541/11 the EAT confirmed that it was not appropriate for the tribunal to effectively re-score an employee unless the employer's motives were in question.

38. The employer should try as far as reasonable to find alternative work within its own organisation and where appropriate within other companies in the same group

39. It is not the function of the Industrial Tribunal to decide whether it would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

Discussion and conclusion.

40. There was a genuine redundancy situation in that the Respondent had a reduced need for employees to do Level 1 associate work in its London IDR group.

Selection pool

41. The selection pool, with or without Harriet, would have been within a range of reasonable responses. The effective decision was to include her. This was reasonable because at the relevant time Harriet was doing the same or similar work to the Level 1 associates and the Respondent was contractually committed to take her on in the near future.

Selection criteria

42. The selection criteria were reasonable. I reject the submission that the Respondent breached paragraph 4.1 of its own redundancy policy because it did not consult with the Claimant in advance about the selection criteria. By then the Respondent had already constructed a fair and robust set of criteria following appropriate consultations in 2008 which HR reasonably advised remained suitable in 2020. The criteria are reasonable. The Claimant at the time did not suggest that they were not or suggest that other criteria should be used.

43. I do not accept that the note in the criteria about marking being relative rather than absolute is difficult or ambiguous - it is obvious what it means.

The scoring

44. The choice of scorers was reasonable. Contrary to the Claimant's submission, Mr Rockall did know the Claimant as she had worked with him on business development since October 2019, including on the plagiarised marketing article. The fourth partner Mr A Martinez was not a scorer as he remained away in Australia.

45. I reject any submission that the marking was biased, predetermined or otherwise wrong or based on a desire to get rid of all employees associated with the Overgas account. The only evidence of this is hearsay allegedly gleaned by the Claimant from Mr Holland after he had left the Respondent. Mr Holland was not called as a witness without explanation and in the circumstances I give this aspect of the Claimant's evidence very little weight.

46. I reject the submission that Zanaid's favourable treatment in the marking was unreasonable or made the Claimant's selection unfair. The Respondent had a strong business need to retain Zanaid's services, not only because she spoke Arabic but because she was seen as essential to the conclusion of a pending transaction in Doha. For this reason, it would have been reasonable to exclude her from the pool altogether. As she was included, it was inevitable that her special circumstances would influence the marking in her favour - for example in the Client Services criterion. I do not find that she was scored by anyone other than the three partners who scored the rest.

47. While no minutes or notes were made of the discussions between the scorers, the Respondent was not obliged to keep such a written record and it can be readily appreciated how doing so would have tended to hinder free and frank discussion and exchange of information between the markers.

48. Reading the documentary record of the consultation period as a whole, including the explanations given by Mr Crossley and by P Walsh in the letter dismissing the appeal, the Respondent provided a substantial explanation for the scoring and I am not in a position to try to re-score the candidates even if this was appropriate, which it is not.

The consultation

49. I reject the submission that the Claimant should have been separately warned before the consultation process started. This is contrary to the case law and also contrary to paragraph 4.2 of the Respondent's redundancy policy.

50. I reject the submission that the decision had been made by the time the consultation began. At that stage the Claimant had been provisionally selected only.

51. I reject the submission that the consultation obligation extended to those in the pool who were not provisionally selected. Until such time as anyone was selected as the provisional candidate for dismissal, there was nothing to consult with that person about. The Respondent's method of limiting consultations to the person who had been identified was both efficient and likely to avoid unnecessary stress and anxiety being caused to others.

52. The consultation period was extended and its content was very detailed and thorough.

53. The Claimant was provided at the outset with the essential information about why the redundancy had arisen and how and why she had fared as she did in her scoring against the other candidates. This information very considerably supplemented by the correspondence between the Claimant and Mr Crossley during the consultation process itself and during the appeal.

54. It was submitted that the Claimant was unable to participate effectively in the consultation because she did not have the October 2019 Associate/Advisor Evaluation Form for the Claimant which had been completed by Mr Holland, Mr Martinez and a Senior Associate Bernhardt Maier in October 2019. However, the Claimant knew that that she had been subject to performance reviews by inter alia Mr Holland who was one of the markers and that it would be likely that her recent performance assessments would influence the scores. Mr Crossley made express reference to recent assessments in his email on 5/8/22. If the Claimant did not have earlier assessments, she should have asked for them at the time rather than saved up this complaint for the Tribunal.

55. In any event I have not been referred to any authority that all the evidence used for or which influences the particular scoring of a prospective redundancy candidate must be disclosed in writing to the candidate during the consultation period. Such a principle if generally adopted could have very far-reaching implications. For instance, the Claimant simply referring to her own 2019 Evaluation Form without being able to compare it with the 2019 evaluation forms of the other members of the selection pool would be of little value. Furthermore, where scoring is based on a manager's/partner's impressions gained over time but not committed to paper, such disclosure is impossible in any event.

56. The Boal authority (referred to above) deals with the issue of information sharing between candidates and is to that extent distinguishable, but nevertheless supports a conservative approach to the obligation on the employer to disclose background information influencing scoring.

57. In the instant case I find that the Claimant had adequate information on which to respond.

58. I also reject the related submission that that the Respondent's use of evaluation forms was unfair or inconsistent. To the extent that they were available for the various candidates, they would have provided a source of useful information, but it does not follow that the scorers in assessing the candidates would have to consider each of them against exactly the same type or amount of background information - inevitably such material will vary from person to person.

59. It was accepted in final submissions that the Respondent complied with its duty to consider alternative roles for the Claimant.

60. I reject the submission that the Respondent should have placed the Claimant on furlough as an alternative to making her redundant. The purpose of the furlough schemes was to assist employees to retain employees whose services were required, and not to artificially extend at tax-payers' expense the service of redundant employees.

61. This was not a situation in which a recruitment freeze was appropriate. Harriet had already been recruited in March before the redundancy situation arose in June.

62. I have attempted to refer to the main points made on the Claimant's behalf and to the extent that I have not referred to all the points, I confirm that I have nevertheless considered them but that they have not persuaded me to reach a decision other than that which I have reached.

63. The Claimant's dismissal for redundancy was procedurally and substantively fair and accordingly her claims are dismissed.

J S Burns Employment Judge
London Central
9/09/2022
For Secretary of the Tribunals
Date sent to parties: 09/09/2022