EMPLOYMENT TRIBUNALS

Claimant: Ms S Dale

Respondent: Ixion Limited (trading as 1Clickprint)

WRITTEN REASONS

1. This is a claim for unfair dismissal and unpaid holiday pay. The ACAS early notification was made on 27th April 2022 and the certificate was issued on 7th June 2022. The claim form was presented on 5th July 2022.

2. The hearing was listed for one day and has taken place via CVP video link. I was provided with a bundle of documents running to 111 pages and witness statements. At the outset of the hearing I clarified the issues with the parties and set a timetable. The following issues were agreed:

   2.1 Whether the Respondent had a potentially fair reason namely redundancy

   2.2 If so whether the selection criteria were objectively chosen and fairly applied, whether employees were warned and consulted and whether the employer had taken reasonable steps to look for suitable alternative employment.

3. The approach was for the Tribunal not to apply its own standards but to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

4. It was also agreed that the Tribunal would consider whether, if the employer had not followed a fair procedure, it would have made any difference to the decision to dismiss. This is otherwise known as the '*Polkey'* issue (**Polkey v AE Dayton Services Ltd [1988] ICR 142 HL**).

5. The issue in respect of holiday pay was whether the Claimant was owed any and if so how much.

6. I heard from Mr Jamie Turner, Managing Director, and from Scott Taylor, Production Director of the Respondent and from the Claimant, Mrs Sarah

Dale. I heard oral representations in closing and retired to consider my decision which I promulgated orally.

The Law

Unfair Dismissal

7. Under s.98(2)(c) of the Employment Rights Act 1996 redundancy is a potentially fair reason for dismissal.

8. Redundancy is defined under s.139 which states:

> (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—
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> (a)the fact that his employer has ceased or intends to cease—
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> (i)to carry on the business for the purposes of which the employee was employed by him, or
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> (ii)to carry on that business in the place where the employee was so employed, or
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> **(b)the fact that the requirements of that business—**
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> **(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,
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> have ceased or diminished or are expected to cease or diminish.

9. I have highlighted the above section which is the scenario applicable to the facts of this case.

10. In **Murray v Foyle Meats Ltd [1999] ICR 827 HL** held that the key word in s.139 was '*attributable'* and that there was no reason why the dismissal of an employee should not be attributable to a diminution in the employer's need for employee's irrespective of their contract and job function.

11. Having regard to fairness of a dismissal, the provisions of s.98(4) Employment Rights Act 1996 are set out as follows:

> (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)—
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> (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
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> (b)shall be determined in accordance with equity and the substantial merits of the case.

12. In **Williams v Compair Maxam [1982] IRLR 83** it was held by Browne Wilkinson J at paragraph 18 that: *'it is not the function of the employment tribunal to decide whether they 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.'

13. In that case it was also held that an employer acting reasonably in a redundancy case might be expected to consider whether the selection criteria were objectively chosen and fairly applied; whether employees were warned and consulted and whether the employer had taken reasonable steps to look for suitable alternative employment.

14. In **Capita Hartshead v Ryan UKEAT/0445/11/RN**, which concerned the dismissal of an actuary from a chosen pool of one, the tribunal at first instance had decided that the employer's decision to limit the size of the pool to one actuary was unfair as there were other actuaries that could have been included within the pool. The EAT, dismissing the appeal by the employer, held that an employer is under an obligation to apply its mind to the issue of selecting the pool from which the employee is to be made redundant and that the Tribunal is under a duty to scrutinise the way in which an employer has selected a pool.

15. The '*no difference rule'* was set out in **Polkey** and means that in circumstances where it is found that there was a procedural defect, the Tribunal is satisfied that had an employer completed a fair process it would not have made any difference to the decision to dismiss, this can affect how much the employee may receive in compensation.

Holiday Pay

16. Under s.13(3) ERA 1996:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

17. The Working Time Regulations 1998 set out the entitlement to holiday pay at Regulation 13 and at Regulation 15 set out the notice provisions.

Submissions

18. On behalf of the Claimant it was argued that the Respondent had not led any evidence of diminishing requirements. Alternatively, taking the Respondent's case at its highest there were two roles that were required to be reduced to one. The selection decision was made because of the incident with Mr Cox and there was a lot of coverage of this in the Respondent's documents. The Respondent did not apply its mind to the pool. There was insufficient and no meaningful consultation: there were no 121s. There was no documentation shared with the Claimant for the purposes of consultation: the document shown to the Tribunal was a cleaned-up copy. There was no reasonable consultation on the skills criterion with no opportunity to challenge this. The Claimant could have raised points about her experience in boxing and wrapping had she been

properly consulted. It was not the Respondent who had suggested unpaid leave but nonetheless it had passed if off as a suggestion it made. The Claimant would only have been able to take time off in any event because of the redundancy payment. The decision to dismiss the Claimant had been pre-determined after Ms Bird had been put on shrink wrapping. There was evidence that Mr Taylor was keen to get rid of her earlier. It wasn't possible to say what would have happened had a fair procedure been carried out in this case owing to the deficiencies. The Claimant ought to have been able to carry over holiday pay as there was otherwise no opportunity to take leave owing to furlough and sickness absence. The Respondent had not reminded her she could take it.

19. On behalf of the Respondent Mr Turner submitted that the Claimant's evidence of the meeting on 28th was shaky. It was implausible that the Respondent would make her redundant in respect of an incident that happened 2 years before. The Respondent had already made 12 people redundant. The staff who had been dismissed were more skilled. Ms Bird was brought downstairs in March 2020. The process was not perfect but there was some consultation because the unpaid leave option came up. There were no vacancies or alternatives to dismissal. The Claimant would have been dismissed in any event.

Findings of Fact

20. The Claimant was employed by the Respondent as a Dispatch Supervisor from 8th January 2018 to 25th February 2022. The Respondent is a small company that manufactures and dispatches framed prints. It trades as 1ClickPrint. The company employs employees with specific skills and also those without skills. In the past the company has employed unskilled temporary workers at peak times of the year to assist with its operation. The managing director of the company is Mr Jamie Turner and the Claimant is his stepsister.

21. In or around August 2020 there was an incident between the Claimant and Mr Cox, Frame Maker. It was not necessary for me to make findings about this incident but suffice it to say that there was incident which resulted in a physical altercation. The Respondent did not discipline either the Claimant or Mr Cox at the time and no further action was taken.

22. In August 2021 the Claimant was informed that she was going to be put on furlough until 1st November 2021. There was no discussion about people using holidays to cover furlough. The correct date for the ending of the Coronavirus Job Retention Scheme was in fact 30th September 2021. The Claimant was paid at 80 per cent of her salary. The Respondent retrospectively stated to the Claimant on 28th January 2022 that the Claimant's annual leave had been used to take her through October 2021.

23. The Claimant had an operation on 1st November 2021 and was signed off work until 13th December 2021. The Claimant attended work on 13th December 2021 and had a discussion with Mr Turner. She informed him that the medical advice had been for her to take it steady. He then sent her home

and asked her to return in the New year. She was given full pay. The Claimant then returned to work on 4th January 2022.

24. On Tuesday 25th January 2022 the Claimant was asked to see Mr Turner. On the way up to his office she encountered Mr Craig Silkstone. She was handed the letter which is at page 48 and which stated that she was being considered for redundancy. It stated that the Claimant was to be invited to a redundancy consultation meeting on 28th January 2022 at 10am and that attending the meeting would be Jamie Turner and Scott Taylor. The letter gave the Claimant the right of accompaniment and went on to say that at the purpose of the meeting was to discuss the redundancy process; to give the Claimant the opportunity to make suggestions and raise questions and to identify her needs during the process and provide her with any necessary support or assistance. There was a reference to the Respondent considering the representations after the meeting and it stated that it may be necessary to have a further consultation meeting.

25. At that meeting Mr Silkstone discussed with Mr Turner the possibility of taking three months leave to see if business levels would go up again and Mr Turner agreed to this. This was offered to the Claimant but she declined it. Owing to Mr Silkstone's presence the Claimant says that she could have discussed matters but was not keen to do so in case it was not kept confidential. However, in paragraph 13 she says that it would have been helpful had she had the opportunity to speak to Mr Taylor and Mr Turner privately prior to 25th January. In theory there was an opportunity for her to do so between 25th and 28th but I take into account that the consultation obligation is of course on the employer. I do find an employer acting reasonably would have provided the opportunity to have a 121 meeting with the Claimant however.

26. The Respondent did not provide any documents to the Claimant save for this letter. There was a document in the bundle at page 54 which was a list of the structure prior to the Claimant's redundancy but this was drawn up after the event. In addition a list of staff and their skills and experience was at page 55 of the bundle and this, I heard, was not the original document that the Respondent had looked at but was a 'cleaned up' copy. Mr Taylor gave evidence that there was a spreadsheet with names of employees and a list of skills where the boxed of skills for each employee was ticked. However this was not in the bundle and had not been disclosed so I attached limited weight to this evidence.

27. On 28th January 2022 the Claimant attended a meeting with Mr Turner. Craig Silkstone was present. As I have found, the Claimant did not have any individual consultation meetings. At the start of that meeting the Claimant was handed the letter at page 59. This stated '*as discussed in the consultation meeting on 28th January 2022 to discuss the risk of redundancy I am very sorry to confirm that you have now been selected for redundancy. Unfortunately we have not been able to identify any suitable alternative work for you.'*

28. The Claimant having received that letter noticed that her annual leave entitlement from the previous year was not referred to in that letter. She enquired about it and was told by Mr Turner at that point in time for the first time that it had been used to cover the October period of leave.

29. At paragraph 19 of her statement the Claimant says that she asked why she had been chosen to be made redundant and that Mr Turner had said that this was because of the incident involving Mr Cox. This was disputed by Mr Turner. He said that the only context in which Mr Cox came up was because after the Claimant remonstrated about her holiday pay, he said that he became annoyed and asked her how much money he had to give her before she didn't feel hard done by. He said that he then listed how he had helped her including how he had done nothing about the incident with Danny Cox.

30. In her evidence the Claimant said in response to Mr Turner's questions: *'It was the redundancy meeting on 28th that prompted me to talk about Danny Cox…. You handed out letters….I read it……I then said why have I been picked for redundancy and Danny Cox came up.'*

31. I did not find that the Claimant gave sufficiently clear evidence about a context relating to how the subject of Danny Cox came up. She simply said 'Danny Cox came up.' Having regard to the sequence of events I find that it is more likely than not that the Claimant was handed the letter, that she then asked about her holiday pay and that Mr Turner then told her that he had used her leave for October. I find that she confronted him about this and that he then responded and gave her a list of how he had helped her including the reference to the incident Danny Cox. I find it wholly unlikely that he would have told her that was the reason he had chosen to make her redundant even if it had been the real reason (which I find it was not).

32. Mr Turner's case is that the Claimant was retained from August 2020 till January 2022 despite that incident and having made 12 staff redundant in the interim period. I accept this and find that the Danny Cox incident did not feature in his decision to make the Claimant redundant.

33. Having heard Mr Turner's evidence I find that in August 2021 it was more likely than not that the Respondent was struggling commercially. The advertising returns were getting worse and the levels of business were dropping. I find that this is likely because the Claimant and her peers were furloughed at that point in time and despite the furlough scheme ending in September the Claimant was maintained on furlough throughout October. The Respondent says that the less advertising it does, the better the return so it had to scale back in order to maximise its returns at that point in time. The Respondent merged dispatch with shrink wrapping and boxing. Julie was given general production work to fill time and it was decided to make the Claimant redundant. There was less work for the Claimant and her colleagues to do accordingly. I find that there was in fact a redundancy situation under s.139(b)(i) ERA 1996.

34. In my finding there was no consultation at the meeting on 28th January because there ensued a disagreement and the Claimant left. In any event the letter handed to the Claimant was final and was handed to the Claimant at that meeting. Because of this there was no meaningful consultation at that meeting or prior and the Respondent had simply looked at the Claimant's position and made the decision to dismiss her. Mr Turner has indicated today that the decision was made on the basis that the Claimant was unskilled and her role could be assimilated into the existing role done by Julie Bird. The evidence I heard was that the reason Ms Bird was not made redundant was because she had customer services skills and this was a hard area to find people to work in. The Claimant says that she could do what Ms Bird was doing in the form of boxing and shrink wrapping.

35. The Respondent did not apply its mind to a pool. The Respondent decided it was the Claimant who it needed to dismiss and that was it.

36. Given the absence of adequate consultation I find that the dismissal was unfair. The Claimant was not given any opportunity to make representations about, for example, whether Ms Bird should be in the pool (which is the argument she has advanced today). While the Respondent has relied on skill as the reason for retention of Ms Bird in that she had a customer service skill which was more difficult to source, there was no discussion about this with the Claimant. Further there were no objective matrix or selection criteria applied as part of the selection decision. The Claimant was not properly consulted prior to the decision being made to make her redundant. Therefore it follows that the decision was unfair.

37. In respect of whether the Respondent ought to have put Ms Bird in the pool it stated that she had customer service skills which set her apart from the Claimant. I have had regard to whether it can be said that an employer acting reasonably would have had regard to this as a selection criterion: I find that this was an objective selection criterion and could have been likely to lead to an employer acting reasonably weighting this in favour of Ms Bird's retention. However I consider that an employer acting reasonably would also have relied on other objective selection criteria. Therefore I do find on the evidence that I have heard today about the Claimant's transferable skills on boxing and shrink wrapping that the percentage chance of the Claimant being dismissed in any event is 50 %. I add that I do not consider that the Respondent retraining the Claimant would be something an employer would have to embark on in order to act reasonably in the circumstances so reject the argument that the Respondent was under an obligation to retrain her so as to avoid her redundancy.

Holiday pay

38. The Claimant claims her full annual leave entitlement for 2021. She says that she did not have the opportunity to take those days and that they ought to have been carried over into the leave year 2022.

39. The Claimant was entitled to 20 days holiday plus bank holidays.

40. The Respondent's holiday year runs from 1st January to 31st December.

41. At paragraph 8.3 of the contract an employee may only carry over holidays with the written consent of the company.

42. The Respondent concedes that there are 5 days owing from the Claimant's carry over the year before and agrees to pay her this accordingly.

43. I dismiss the holiday pay claim as the Claimant did not have written consent to carry over those holidays. But I will make a judgment in respect of the 5 days the Respondent says it is prepared to pay.

Remedy

44. The compensatory award was in issue, the Claimant having been paid her redundancy entitlement.

45. The Claimant was paid by the Respondent from 28th January to 25th February 2022 and then took leave. At the end of March 2022 she had some health problems to include a tear of a surgery scar and a COVID. The Claimant went into a hardware shop on 21st April and enquired about a vacancy but that was the extent of her job search. Her friend's husband died in May 2022 and she went to Spain to support her between 21st May 2022 and 23rd July 2022. She started looking for work on 24th July 2022. I find that this was when she did take reasonable steps to mitigate her loss. She started new employment on 3rd October 2022. It took her just over two months therefore to mitigate her loss. She selected her job offer on the basis of four suitable offers because of proximity to home and flexible working. The Claimant had four job offers within three months.

46. I find that had the Claimant taken reasonable steps to look for alternative employment from when she was dismissed, she would have been able to mitigate within five months fully which would be by 25th July 2022. This was when she in fact actively started looking for work. Therefore I find that she did not mitigate her loss within this time period and is not entitled to any compensatory award.

47. I award loss of statutory rights of £350

48. The Respondent has agreed to pay the Claimant £311.95.

49. Therefore the Respondent shall pay the Claimant the total of £661.95.

Employment Judge A Frazer
Dated: 25th November 2022