EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs M Stroud	**v**	**Mitie Group Plc**

Heard at: Watford **On**: 10 to 12 October 2022

Before: District Tribunal Judge Shields sitting alone (as an Employment Judge)

Appearances
For the Claimant: Ms G Nicholls, Counsel
For the Respondent: Mr A Rozycki, Counsel

JUDGMENT

1. The complaint of unfair dismissal is well founded. This means the claimant was unfairly dismissed by the respondent.

2. A 25% reduction in the compensatory award for unfair dismissal will be made under the principles in Polkey v A E Dayton Services Limited [1988] ICR 142.

3. The basic award is nil because the claimant has already received a redundancy payment from the respondent.

4. The compensatory award is £46,933.64 (less the sum of Job Seeker's Allowance received from the DWP to the claimant to be recouped and paid to the DWP by the respondent of £1,933.10, leaving the final award of £45,000.54).

REASONS

Introduction

1. The claimant, Mrs Stroud, was employed by the respondent Mitie Limited as a Quality Lead in their Quality Health and Safety and Environmental Team. Her employment commenced on the 7th of January 2002 until her dismissal on 31st of March 2020 she had been employed in the role of quality lead for the last three years of her employment.

2. The claimant claims that her dismissal was unfair within section 98 of the Employment Rights Act 1996.

3. The respondent contests the claim stating that the claimant was fairly dismissed for redundancy.

4. The claimant was represented by Miss Nicholls and gave sworn evidence. The respondent was represented by Mr Rozycki and presented sworn evidence from 3 witnesses, John Colley, Neil Plant and Mark Hughes.

5. ACAS was notified under the early conciliation procedure on 17 June 2020 and the certificates were issued on 16 and 17 July 2020. The ET1 was presented on 13th August 2020 and the ET3 was received by the tribunal on 24 September 2020.

Claims and Issues:

6. The claimant has brought a claim for unfair dismissal and the claim is as summarised below:

7. What was the reason or principal reason for dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent says the reason was redundancy

8. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    8.1. The respondent adequately warned and consulted the claimant;

    8.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

    8.3. The respondent took reasonable steps to find the claimant suitable alternative employment; and

    8.4. Dismissal was within the range of reasonable responses.

9. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

Procedure, documents and evidence heard:

10. The tribunal heard evidence from the claimant and we heard from the following witnesses on behalf of the respondents, Mr Colley, Mr Plant and Mr Hughes. The tribunal had the benefit of four signed witness statements that had been exchanged.

11. There was a tribunal bundle of approximately 362 pages. The representative of the claimant (Counsel) and the respondent representative (Counsel) provided written closing submissions/skeleton argument at the end of the hearing. One additional document was supplied at the commencement of the hearing and that was a job description for the claimant's role of Quality Lead.

12. At the start of the hearing, both parties informed me of the documents that I needed to read before the hearing and I took the time to read the witness statements and cross reference the pages of the bundle as referred to in those statements.

13. The evidence of the parties was completed over the two days and I used the morning of the third day for my deliberations on the claim.

Findings of fact

14. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

15. The claimant, Mrs Stroud, was employed by the respondent Mitie Limited from 7 January 2002, for just over 18 years, until her dismissal on 31 March 2019. In the last three years of her employment, the claimant held the role of Quality Lead.

16. The respondent is a facilities management and professional services company. It is part of a larger Group, Mitie Group. It is a large employer.

17. The claimant, as a Quality Lead, was part of the Quality, Health and Safety Environmental (QHSE) Team. Her line manager was Mr Plant. Mr Plant is the Quality Health Safety and Environment Director managing the overall QHSE function for technical services.

18. Mr Hughes is the group Quality and Assurance Director in Quality Health Safety and Environment. He provides strategic leadership for quality and assurance. Each business unit has a QHSE director, in this case Mr Plant, and there is a dotted reporting line from the QHSE director to Mr Hughes. Mr Colley was the Group Quality Health Safety and Environment Director with overall responsibility for the management of the QHSE function and setting the strategic direction for the Group. There is at the relevant time a small central specialist team with four business units with their respective teams and the directors of those teams reporting into Mr Colley.

19. In January 2019, the claimant was appraised and awarded a rating of outperforming. Furthermore, in January 2019 she took part in the tendering process for the GSK contract which I shall refer to as "the Contract" going forward.

20. In the August of 2019, the claimant started work on the mobilisation of the contract alongside her normal role. In October 2019, the claimant was appraised and her rating was marked as outperforming.

21. On the 14 October 2019, the claimant queried who was to carry out the one to one meetings with employees that were to transfer from Sodexho to the client, GSK. The following day she was asked to complete the one to one meetings if they were in the quality team. On the 16 October 2019, the claimant raised her concerns that the one to one meetings had not been arranged and she stated that she could not fit them into her diary over the next two weeks. She was informed by Mr Bell that she needed to make herself available. She again stated that she did not have time to fit these in and the response from Mr Bell was that she would need to rearrange her diary.

22. It is accepted by both parties that on the afternoon of the 16 October 2019 the claimant had a telephone call with Mr Plant and that during that call she was tearful and stated that she could not attend the one to one meetings as she could not fit them into her diary. She further stated that she had not been sleeping and that she was overloaded with work and stressed. Mr Plant referred to the health and welfare of the claimant being the number one priority and suggested if that she felt unwell she should see a doctor. He stated that her health was more important than anything and that she should seek medical advice if she needed support.

23. The claimant wrote to Mr Plant in the late afternoon on the 16 October 2019 and copied Mr Hughes, Mr Colley and Mr Bell into the email regarding her workload. Mr Plant responded to the claimant on 17 October and the email is set out on page 74. He asked her to list all her activities in diary commitments over the coming weeks in order to assist her in managing her diary and with prioritisation. Mr Hughes went on to suggest that a face to face meeting would have been better. Mr Colley in response acknowledged that Mr Plant had spent an hour and a half discussing the situation and attempting to agree solutions with the claimant. Mr Colley supported Mr Plant's position in attempting to re-prioritise the claimant's work.

24. On the 20 October 2019, Mr Plant wrote to Mr Colley in some detail regarding the next steps and this email is on page 70 of the bundle, this sets out three steps to deal with the issues that were arising, with step two containing three options with respect to keeping the claimant on the contract or not. Step three refers to feedback from Mr Bell that needs to be addressed. It refers to those not wanting to work with the claimant. The email referred to as from Mr Bell is not within the bundle.

25. On 21st October 2019, the claimant emailed Mr Plant, Mr Hughes, Mr Colley and Mr Bell. She restated her case that she is overworked and

cannot re-prioritise her work in order to undertake the one to one meetings. On page 80, the claimant specifically states that she cannot continue to work on the Contract under the current conditions. We can see from the bundle that the claimant sought advice from a female colleague before sending the email. On the 21 October 2019, Mr Bell asked for thoughts on Mr Plant replacing the Quality Lead on the Contract and states that the claimant has managed to alienate third parties and is invisible to the project team and Mr Plant seeks advice from Mr Colley.

26. The Client, in an email at page 86, provides a list of key points for quality stream catch up/concerns and allocates the claimant to being full time dedicated to the transition.

27. On the 22 November 2019, unbeknownst to Mr Plant or Mr Hughes, Mr Carlo Aloni requested the removal of the claimant from the contract and further goes on to state "and (eventually MITIE)". This email is on page 88. I find that Mr Aloni was an MD of the business unit but he was a peer of Mr Colley and akin to a client. I found that he had no involvement in the Performance Improvement Plan nor any subsequent redundancy process. He did not influence decisions regarding the claimant.

28. Mr Colley responds with his email on page 87. He refers to an ongoing issue which is being managed carefully. He states that after the claimant steps away from the mobilisation then the performance management process will commence. He states that her contribution has been next to non-existent and it is like she has "gone native". He goes on to state that once the Claimant has left the contract he will personally address the longer term outcome himself and that he hopes this gives context and comfort regarding the actions being undertaken. Mr Bell responds on the same page referring to addressing poor performance and inappropriate behaviour. I find that Mr Colley was not pressurised by Mr Aloni's email to then take steps to terminate the employment of the Claimant. He writes in very careful terms as to the performance management steps he is taking.

29. On 16 December 20119, Mr Colley confirmed that the claimant's activities with the contract mobilisation are now concluded.

30. On 21 January 2020, a review was carried out on the mobilisation contract, This is at page 93 of the bundle and focusses entirely on the claimant.

31. On 22 January 2020, Mr Colley states the changes to be made within the quality function in order to reduce costs in the region of £240,000 and it includes the reduction of one Quality Lead across the technical/business services. This was to be part of the five year transformation programme across the respondent with group wide cost savings targeted at £20 million in 2020 to 2021. The risk assessment referred to on page 90 was not included within the bundle. I accepted Mr Colley's evidence to the Tribunal that the work of the Quality Lead that was made redundant was to be shared among the remaining Quality Leads. Mr Hughes provided evidence that this has been the case since the redundancy. I noted the claimant' s position that this was not possible but preferred the evidence of the

respondent's witnesses that the content of the job role was not so specialised that a wider remit across the business divisions was not possible.

32. On the 28 January an email was sent to Human Resources and with a copy to Mr Hughes requesting a draft letter of concern (this is from Mr Plant). Arrangements were made on the 31 January for Mr Plant to meet with the claimant and Mr Hughes to review the mobilisation contract.

33. The letter of concern was sent on the 4 February 2020 and is it page 120 of the bundle where it clearly states that there is a decision not to proceed with formal disciplinary action. The letter is not intended to be a formal warning and does not form part of the company's disciplinary procedure. It goes on to state that it is not a formal warning but should there be any repeat of the conduct or misconduct in general it may be subject to formal disciplinary action. The letter invites the claimant to a Performance Improvement Plan meeting on the 13 February 2020.

34. The meeting took place on 13 February 2020 and the minutes are set out from pages 122 onwards. The claimant maintains that she had no training to carry out to the one to one meetings and no time in her diary. The respondent stated that they wanted to talk about the Performance Improvement Plan in order to support her and do the best that she can and they asked her to reflect on the Performance Improvement Plan and suggested that she do so. This was then sent to her by email for her to further consider.

35. On 20 February 2020, the claimant was marked as "delivering" on her appraisal. In response to the Performance Improvement Plan, on page 138 to 140, the response from the claimant is that she is unclear how she could deliver on the Performance Improvement Plan as it cannot be reviewed or measured since the mobilisation of the contract has finished. She continued to take issue with the letter of concern and raised the fact that this was four months after her stress induced event causing her to step away from the project.

36. I found that the Consultation Process PowerPoint in February 2020 (page 171) sets out in the section Business Overview, the reasons for the redundancy. It is noted that the evidence does not set out a full financial justification behind the wider cost saving project but on the basis of the oral evidence of Mr Colley and the evidence in the bundle, I am satisfied that, objectively, there was a redundancy situation that involved reducing the number of Quality Leads by one,.

37. On 24 February 2020, Mr Hughes arranges a meeting with the quality directors in order to start the process of selection for the redundancy of a Quality Lead role. He emails the quality directors with instructions on the scoring matrix and he is to score each of the Quality Leads for the claimant. The claimant is to be scored by Mr Plant, Mr Hughes and two others: Mr Bell and Mr Thompson. These are in accordance with the decisions taken and identified on page 152B. In fact, I find that Mr Bell and Mr Thompson

were appropriate as a Managing Director and Operations Manager. I find that they would be appropriate to score the claimant. The other Quality Leads were treated in the same manner but with similar appointments. Mr Plant went on to offer to assist Mr Bell and Mr Thompson in coordinating their scoring and I accept this was on the basis that they were busy.

38. On the same date, 24 February 2020, Mr Plant supplies a chronology to Human Resources regarding the appraisal decisions for the claimant and, the reason for this is that the claimant refuses to agree with the Performance Improvement Plan and the appraisal grading.

39. On 25 February 2020, there was an email from Human Resource asking for redundancy costs calculations with regard to all four Quality Leads.

40. On 26 February 2020, it is clear that Mr Plant responds to queries raised by the other Quality Directors in relation to the claimant and that he closes those queries down and states that they are confidential in terms of content. Mr Hughes confirms that the priority is to ensure there is a fair process. I accepted the oral and written evidence of Mr Plant and Mr Hughes that they did not choose the claimant and adapt the process to ensure she was chosen.

41. This leads me on to the selection criteria. I find that the selection criteria chosen were objective and reasonable.

42. Mr Plant completes his selection criteria score and adds a substantial amount of justification. He marks the claimant 34 in total. Mr Hughes marks the claimant at 48. Mr Hughes is responsible for adding in audit performance and management into the selection matrix and he scores 4 for audit performance and management and 6 on disciplinary record whereas Mr Plant scores 4 on the audit performance and an 8 on the disciplinary record. It is acknowledged that the rationale for Mr. Hughes is set out on page 166 and there is a brief rationale. I accept that advice was taken by Human Resources regarding the letter of concern and that Mr Plant amended his selection matrix to 6 regarding the disciplinary record. But then he increases the future potential score up to 4 so that his final score remains 34.

43. All of the scoring is carried out by Mr Plant and Mr Hughes on 27 February 2020 and before 4 March 2020. Mr Plant offers to assist Mr Bell in completing the selection matrix by obtaining his feedback, scoring it on his behalf and supplying it back to Mr Bell. Mr Bell approves the scoring matrix on 4 March 2020. He does not score on audit performance and management or disciplinary record and his overall score is 14. There was very little justification for this other than the email contents that he had originally sent on 25 February 2020.

44. On 4 March 2020, the claimant and the other three Quality Leads are placed at risk of redundancy. The selection criteria are provided. The claimant is not informed of the two managers who are going to score her alongside Mr Plant and Mr Hughes but it is noted that she was given a copy of her

personal scoring matrix to review and challenge if selected for redundancy. This is confirmed in writing to her on page 184. The letter states that if the respondents do not hear anything further with regard to the criteria they will continue with the scoring proposals. In fact, the scoring had already been completed at that time and therefore if any feedback had received from any one of the Quality Leads, the scoring would have to have been all re-done. That meeting took place at 11:00 AM on 4 March 2020 and the documents were emailed to the claimant at 14:23 PM on 4 March 2020.

45. Mr Plant had already provided the completed scoring document to Mr Bell on 27 February 2020 at 13.28. Mr Bell responded accepting the scoring on 4 March 2020 at 10.44, approximately 16 minutes before the at-risk meeting began.

46. Mr. Thompson dates his redundancy selection matrix on 27 February 2020 but sends it to Mr Plant on 4 March at 16.41pm. Mr Thompson does not score the criteria of audit performance and management or disciplinary record and scores the claimant at 24, with very little justification.

47. Mr Hughes takes over from Mr Plant with regard to consultation because Mr Plant is on sick leave. The consultation meeting on 10 March 2020 was when the claimant was provided with the scoring matrices. Although the box was ticked to say that she was provided with a copy and explains how they came to that decision, the notes show that she was provided with the matrices but it was suggested that she take them away and read them through and then email any questions. Therefore, discussion did not take place on the actual scores. The claimant asked about the business structure going forward but was not provided with any information.

48. At the meeting on 10 March 2020, it was confirmed that the claimant had scored the lowest mark. At no time, then or now, has the respondent put forward any bench level mark on which the claimant would have to score in order for her not to be made redundant. The respondent has not provided the other Quality Leads' scores on an anonymised basis.

49. The Performance Improvement Plan was put on hold on 11 March 2020 after the claimant queried whether it was necessary to continue. It is noted that the claimant continued to respond on the Performance Improvement Plan up to 4 March 2020. On the 16 March 2020, Mr Hughes stated to the claimant in an email that he was waiting for confirmation of her final redundancy pay. He answered some questions in relation to any termination date, redundancy notice pay and holiday entitlement.

50. On 18 March 2020, and just before the second consultation meeting, the claimant set out eight queries that she wished to discuss in the meeting which included the scoring matrices and the process.

51. I find that the claimant did question the scoring matrices, the process and the scores. She specifically refers to the scoring and therefore redundancy selection and stated that it was largely based on the mobilisation project. The low scores from Mr Hughes were based on him stepping into the

mobilisation project and she states that Mr Plant comments that it leads to the low score and those issues have never been raised before. She goes on to identify concerns that she had with the rest of the process at paragraph 8 of her email.

52. The notes of the meeting that took place on 18 March 2020 are at page 217. They have very little discussion about the outcome of the scoring assessment. It states that they were provided at the first consultation meeting. The notes state that they went through each of her email points in turn. The last paragraph of the notes states that "points one to six will be dealt with by Emma Evans for clarification and 7 to 8 to be sent to Human Resources for advice". I conclude that the scoring matrices and process were not substantively dealt with at that consultation meeting.

53. The claimant's third and final consultation meeting took place at 12 noon on 25 March 2020 by Teams because the pandemic meant that it had to be held remotely. The response to points 7 and 8 raised by the claimant were sent to her by email following the final consultation meeting on the 25 March 2020. This is confirmed in the meeting notes as well.

54. The response from the respondent on the scoring matrix points consists of four small paragraphs. It does not fully address the issues raised by the claimant at point 7 of her email. The claimant is invited at the end of each email to please let the respondent know if she wished to discuss the matter in more depth. The onus being on her to raise further queries if she wasn't happy. It is clear from the notes on page 228 that regarding "points to discuss on point 7 and 8" should have been re-capped and recorded. The tick boxes were ticked and she was advised on the 25 March 2020 at 12 noon that she was receiving a formal notice of redundancy with confirmation of the termination date and advised of her right to appeal and therefore the consultation procedure had ended on 25 March 2020 without consultation on points 7 and 8 raised by the claimant.

55. On the 26 March 2020, the claimant was provided with details of an internal vacancy list. No discussions took place on the contents. Nothing on the list in terms of alternative employment were suitable and this is because of the pandemic and the fact that the respondent was going through a cost cutting programme. Both parties acknowledge that is correct. A further perfunctory offer was made on 26 March 2020 to discuss the selection matrices and the process, i.e., points 7 and 8, in more depth. As I have said above, my conclusion is that the consultation procedure had already ended on 25 March 2020.

56. Between 25 and 30 March 2020, the claimant received various details about how her benefits would be dealt with post termination. On 30 March 2020, the claimant received her termination letter where it states that the proposals were not exhausted. I find that this is contrary to the other evidence put forward because it is clear from the meeting on the 25 March 2020 that the dismissal of employment had been communicated and the consultation was at an end.

57. The claimant appealed against the termination of her employment writing to Mr Colley on 31 March 2020.

58. Mr Colley chose to conduct a hearing of the appeal on paper only and did not arrange a meeting with the claimant by any Teams meeting.

59. Mr Colley did not look at the scoring matrices for the other Quality Leads. In his evidence, he did not know who scored the other Quality Leads. Mr Colley did not carry out an assessment or review of those scores; he focused on the process of scoring rather than the scores themselves. These are statements that he provided in his evidence: he could not recall the details about how he approached that decision regarding his consideration of other Quality Lead assessments.

60. On page 266, there is his redundancy appeal decision, which was provided to the claimant on 29 April 2020, a month after her termination date. I find that the appeal did not investigate the matters raised by the claimant and was perfunctory in nature. Mr Colley did not reach his appeal decision based on a fair investigation of the circumstances raised by the claimant.

Law

61. The law has been set out by Counsel on both sides.

62. Under s139(1) Employment Rights Act 1996, a dismissal is 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.

63. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. It is acknowledged that the law is set out for unfair dismissal in section 98(4) of the Employment Rights Act 1996 Section 98 of the 1996 Act deals with the fairness of dismissals. There are

two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason

64. The leading redundancy case is Williams v Compair Maxam Limited. a reasonable employer might be expected to consider the following:

• whether the selection criteria were objectively chosen and fairly applied

• whether employees were warned and consulted about the redundancy

• whether, if there was a union, the union's view was sought, and

• whether any alternative work was available.

Conclusions

65. This is a two stage process as to whether the dismissal was fair or unfair. The first stage is for the respondent to show a potentially fair reason for dismissal and secondly if that is done the question then arises whether dismissal is fair or unfair.

66. The first matter I've had to decide is what was the reason or principal reason for dismissal?

67. I was satisfied the respondent has shown that the reason for the dismissal was a redundancy and that it was a part of the transformation programme at the company referred to as Project 2025. This is a fair reason for a dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

68. The claimant was under significant pressure in October 2019 and she failed to follow a reasonable instruction to rearrange her diary or accept help to do so. I have concluded that the letter of concern and Performance Improvement Plan arose from the post mobilisation debrief and that it was not created for the purposes of terminating the employment of the claimant or so that they could score the claimant on a redundancy procedure at a lower score than others. The respondent had genuine concerns regarding the claimant's ability to manage the GSK mobilisation contract and that was acknowledged as a completely new sector for all but with a substantial step up. Those issues and genuine performance concerns were evident from October 2019 onwards.

69. The claimant was right to raise this as an issue due to the proximity in time of the redundancy process. I do not consider that the redundancy was carried out on the instruction of Mr Aloni. Mr Plant and Mr Hughes were not

copied into the email from Mr Aloni to Mr Colley. Mr Bell had already raised issues in October 2019 with the claimant's work. The timing is regrettable but I do not consider that the redundancy was created in order to specifically get rid of the claimant.

70. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

71. The next question I need to consider is whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. I note that the respondent is a large employer with a number of group companies.

72. I'm satisfied that this dismissal was procedurally unfair.

73. The respondent did adequately warn the claimant of the impending redundancy on 4 March 2020.

74. The respondent did not adequately consult with the claimant. The consultation was perfunctory in nature. No business reorganisation structure was ever provided to the claimant or to the tribunal. The selection criteria matrices were provided to the claimant. The claimant was supplied with the scores at the first meeting but no meaningful consultation took place on the contents of the scoring matrices.

75. On 4 March 2020, it was already accepted by the respondent that she was the identified party to be made redundant. The queries that the claimant raised in an email dated 18 March 2020 were not dealt with at the second or third consultation meeting that related to the scoring and the process followed. There were opportunities for the respondent to open the consultation on those points but they did not do so in any meaningful manner. The claimant was not given an opportunity to discuss the scores on a face to face or Teams basis.

76. The next issue to consider is whether the respondent adopted a reasonable selection decision, including its approach to a selection pool.

77. The company's approach to the pool on which to select the potentially redundant employee was not challenged by the claimant and I agree that a pool of four Quality Leads would be appropriate as described.

78. I concluded that criteria adopted by the company to assess the Quality Leads were objective.

79. Mr Hughes was the only consistent factor across all four Quality Lead assessments. Whilst this is unusual, I consider this falls within the range of reasonable responses in a large organisation with separate business units. There is a consistency in using the business unit Line Manager an Operations Manager and an appropriate MD and I find that was within the band of reasonable responses.

80. It is not the tribunal's place to interfere with individual scores. However, I do need to decide whether the selection criteria were fairly applied. The letter of concern and Performance Improvement Plan were not disciplinary sanctions and therefore it is not within the range of reasonable responses that the claimant received a score lower than the maximum score permitted for that criteria. The letter of concern was clear, it was not a disciplinary sanction therefore the claimant had no live disciplinary warnings or investigations. Further, if the respondent wished to take the letter of concern and Performance Improvement Plan into account, it could do so as described by Mr Hughes under the audit performance and management criteria. In this case, Mr Hughes marked the claimant down on both audit performance and management and disciplinary record. This appears to be double counting on the same issue.

81. I concluded that this was not within the range of reasonable responses of an employer. No reasonable employer would have applied the criteria of a disciplinary sanction in the way that the respondent applied the criteria for this disciplinary record. It is not a reassessment exercise to state that application of this criteria was marred by unfairness. The respondent ignored the contents of the letter of concern and Performance Improvement Plan and applied the criteria unfairly to the claimant.

82. Thirdly, I need to look at the respondent taking reasonable steps to find the claimant suitable alternative employment. Again, this was perfunctory in nature. There were no discussions or attempts to avoid the redundancy itself with the vacancy list being emailed on the 26 March after all three consultation meetings had been completed. There was no attempt to discuss alternative employment at the consultation meetings.

83. I find, therefore, that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

Relevant law and conclusions - Polkey

84. As recorded above, I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis

& Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604. I turn to this issue now.

85. The respondent invites me to find that a 100% Polkey deduction should be made on the basis that any procedural defect would have made no difference or that any further consultation would have likely delayed the inevitable decision. The respondent refers to the scores received by the claimant being scored relatively low by her managers and that they were able to make such valid contributions based on their experience of working with her. The respondent stats that she did not challenge the scores themselves.

86. The claimant states that there is no chance that she would have been fairly dismissed in any event.

87. I find neither argument compelling. The two managers that worked closely with the claimant scored her more highly than those who did not work on a day to day basis with her. The respondent did not provide any evidence of the scores applied to the three other Quality Leads. No cut off score was provided.

88. I concluded that a Polkey deduction of 25% was appropriate. There were elements that I have identified that the respondent did not carry out fairly and therefore there were procedural flaws. Such flaws could have changed the result of the redundancy process. There remains a 25% chance that the claimant would have been dismissed in any event. She was in a pool of four Quality Leads and at the start of the process she had a 1 in 4 chance of being the redundant employee.

REMEDY

Findings of fact

89. The claimant was paid her statutory redundancy pay of £10,237.50 in full at the end of her employment.
90. The respondent did not cross-examine the claimant on her schedule of loss and did not argue that the claimant had not sought to mitigate her loss.
91. The figures set out in both parties' schedules of loss were broadly in agreement.
92. The effective date of termination was 31/03/2020. The claimant was 44 years old at the date of termination.
93. The claimant claimed Job Seeker's Allowance from the end of her employment. She received the sum of £1,933.10 in Job Seeker's Allowance.
94. She accepted a contracting job paid at a day rate between 26th May 2021 and 23rd December 2021. She accepted a further contracting job at a day rate between 4th January 2022 and 5th April 2022. This role became a permanent role on 6th April 2022.
95. The Claimant was out of work for 48 weeks.

96. She incurred no additional expenses in looking for work.
97. The claimant had net weekly pay of £827.43 with her benefits being £312.23 per week. This is a total loss of £1,139.66 per week or £54,703.68 in total.
98. The claimant incurred a loss of statutory rights in the sum of £500.00.
99. The total loss incurred is therefore the sum of £55,203.68.

Issues

100. What basic award is payable to the claimant, if any?
101. If there is a compensatory award, how much should it be? The Tribunal will decide:
    101.1. What financial losses has the dismissal caused the claimant?
    101.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    101.3. If not, for what period of loss should the claimant be compensated?
    101.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    101.5. If so, should the claimant's compensation be reduced? By how much?
102. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
103. Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

Relevant conclusions

104. The statutory redundancy payment is offset against the basic award and therefore the claimant is not entitled to the basic award.
105. The compensatory award is for a period of loss of 48 weeks and is calculated as follows:

<u>Prescribed Element (loss of wages to date of remedy judgment):</u>

105.1. Net weekly pay = £827.43
105.2. Benefits = £312.23
105.3. Together the weekly net pay and benefits = £1,139.66
105.4. Taking into account, 48 weeks of loss = £54,703.68
105.5. Loss of statutory rights = £500.00
105.6. Total = £55,203.68

Less:

105.7. Job seeker's allowance of £1,933.10
105.8. Total = £53,270.58

Less:

105.9. A 25% deduction for Polkey, as above.

106. Prescribed element: The total is £39,952.94. The period of the prescribed element is 01/04/20 to 13/10/22.
107. There is no non-prescribed element (other losses) because the claimant had obtained full time employment with no ongoing future losses.
108. There is no uplift for a failure to follow the ACAS Code of Practice as claimed by the claimant. The Code does not apply to redundancy cases and the Tribunal has found that this is a redundancy case.
109. The Tribunal then needed to calculate the element of the award over the tax-free limit of £30,000 and to gross it up. The tax-free element of the compensation is £19,762.50 (because the claimant had already used part of the £30,000 tax free limit).
110. The remaining element of the compensatory award upon which tax is payable is £20,190.44. When this is grossed up by 20%, the correct award of the taxable element is the sum of £25,238.04.
111. Putting the tax free award (£19,762.50) and the taxable element (£25,238.04) together, the total compensatory award is £45,000.54, plus the sum of £1,933.10 Job Seeker's Allowance to be paid to the DWP. The total compensatory award is £46,933.64.
112. The statutory cap of fifty two weeks pay or the upper limit was not applied because it was not reached.

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District Tribunal Judge Shields

Date: …23 November 2022……...

Sent to the parties on: 9/12/2022

N Gotecha

For the Tribunal Office