EMPLOYMENT TRIBUNALS

Claimant: Mr D Ives

Respondent: Neenah Red Bridge International Limited

HELD AT: Manchester **ON:** 11-12 May 2022 (in person), 26 July 2022 (in chambers), 27 July (by CVP) 2022

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: In person
Respondents: Ms L Fenton, Employment Advisor

JUDGMENT

1. The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Preamble

1. In a claim form received on 3 November 2020, following ACAS Early Conciliation that took place on 16 October 2020, the claimant brought a complaint of unfair dismissal.

Evidence

2. I heard evidence from the claimant on his own behalf. For the respondent I heard from Jonathan Robson, Managing Director; Christopher Blackwell and Jamie Flanagan, sales; and Nicola Haigh, an investigator for NJH & Associates Consultancy.

3. In the 330-page bundle there were *inter alia* copies of notes and documentation from the redundancy process and the claimant's termination. There are also witness statements from the claimant and the respondent's witnesses.

Agreed issues

4. The issues were agreed between the parties, as follows:

i. Was there a redundancy situation at all?
ii. Was the pool for selection for redundancy fair?
iii. Were selection criteria reasonable and valid?
iv. Was claimant was correctly selected in accordance with criteria?
v. Was a fair process followed?

Facts

5. The respondent is the UK/European division of an international company that provides paper, textiles and designs for the publishing sector. This division now employs about 50 people. The claimant's employment commenced in 1983 and he eventually reached the position of Business Development Manager. He was dismissed on 22 October 2020 by reason of redundancy.

6. It is not in dispute that there was a redundancy situation that arose in 2020 due to the COVID pandemic. The respondent made twelve people redundant from a workforce of, at that time, 65.

7. The redundancy exercise was announced on 15 June 2020, with the consultation stated to run for twenty days, though in fact it closed on 1 July. The sales team including the claimant were scored in the redundancy exercise on five criteria. Four of the criteria related to the 'pipeline' in the respondent's key strategic sectors, called performance labelling and security. The 'pipeline' is a metric intended to gauge sales prospects. A prospect in the pipeline that results in an order becomes a 'win'. The fifth criteria were based on sales, called 'performance versus budget'.

Law

8. The Employment Rights Act 1996 materially states:

98 General

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

...

139 Redundancy

(1)For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)the fact that his employer has ceased or intends to cease—

(i)to carry on the business for the purposes of which the employee was employed by him, or

(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business—

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

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

9. Where an employer claims that there is a redundancy situation, which means that there is a reduction in the need for employees to do work of a particular kind, then the employer must prove that this was the only, or at least the main reason for dismissal. If the employer cannot prove that, then the dismissal is unfair. Employees with two or more years' continuous employment have statutory protection against unfair dismissal.

10. If redundancy was the sole or main reason for the dismissal, then the employer must also prove that it acted reasonably in treating redundancy as a sufficient reason to dismiss. The tribunal considers whether the employer gave reasonable consideration to a pool of employees who were selected for redundancy, whether there were reasonable criteria used to select who was in the pool, whether there were reasonable steps taken to consult with the employees about the pool, and whether the employer made a reasonable attempt to find alternative roles for the selected employees. The tribunal can only interfere if the employer's decision, or its procedure, was so unreasonable that no reasonable employer could have acted that way.

Conclusions

11. The claimant claims that he was unfairly dismissed because the redundancy programme implemented by the respondent in June 2020 was not fair and in effect targeted him for redundancy. The claimant's main complaint is that the redundancy criteria was selected specifically to ensure that he was made redundant.

12. With reference to the issues set out above, it is not really in dispute that there was a genuine redundancy situation. Despite accepting in his claim form that there was a redundancy situation due to the COVID pandemic, the claimant did put some questions to Jonathan Robson about whether furlough (officially the Coronavirus Job Retention Scheme) could have avoided some redundancies, and re-iterated this point in submissions. Mr Robson made the point, and I accept, that the respondent's customers were saying that they would not increase their orders until 2023, and in the summer of 2020, it was unknown how long furlough would last.

13. The claimant was not the only person made redundant in the exercise. Eleven others were made redundant across different areas of the business. It is not for the tribunal to substitute it's view for the respondent's about the necessity for redundancy. I accept that there was a genuine redundancy situation.

14. The second issue is whether the pool for redundancy was fair. There was one person, Vivian Taylor, who was associated with the sales team but was not included in the pool. There was one other employee who was associated with the sales team who worked in Asia but he was not considered in the evidence. The two people mentioned above were not argued to have the same job as the claimant or the other members of the dedicated sales team. I accept that Ms Taylor's role, and that of the other employee in Asia, were different enough that their exclusion does not impact on the fairness of the claimant's inclusion in the pool. The pool included others whose job was the same, ie Christopher Blackwell and Jamie Flanagan.

15. I address the selection criteria. There is a wide discretion here because respondent is entitled to determine for itself how to run its business. The claimant's complaint is primarily that four of the five criteria are based on the 'pipeline', and only one on sales 'performance versus budget'. There is also a complaint that the assessed time periods for the 'pipeline' criteria and the 'performance versus budget' are different.

16. I find that the use of the 'pipeline' as a significant criterion is not unfair or unreasonable. There are three issues that I see as relevant. The first is the respondent's longstanding use of the 'pipeline' as a performance metric.

17. There is no evidence that it is a contrived metric for the purposes of the redundancy consultation. From the evidence I understand there not to be dispute that the 'pipeline' was a major strategic tool used by the company since at least 2018, well before the redundancy situation arose.

18. I understand that the claimant was aggrieved about the use of that metric. I accept that for some time prior to the redundancy exercise he had disputed the appropriateness of the 'pipeline' as a measure of performance. As I understand it, the claimant considered it to be speculative, and dependent upon an individual's subjective characterisation of their sales prospects. A prospect in the 'pipeline' may or may not result in actual sales.

19. I accept that the respondent had used the 'pipeline' as a measure of performance for some time. The 'pipeline' was, as I understand it, a major focus in their meetings for at least a few years before the redundancy exercise. I find that it was reasonable for the 'pipeline' to be a significant basis for the redundancy scoring. In any event, the redundancy criteria included scoring for 'wins' ie prospects from the 'pipeline' that had resulted in sales.

20. The second issue about that is the weighting. The claimant argued that the weighting was inappropriate, and that the different time periods for the 'pipeline' criteria and the 'performance versus budget' were contrived against him.

21. The claimant also took issue that the redundancy criteria focus on certain sectors of the business that he felt left him at a disadvantage, because his sales record was focused on other areas. In fact, this focus on these particular areas had been a source of conflict between the claimant and Mr Robson prior to the redundancy. I find that it was clear that Jonathan Robson had determined well before the pandemic, ie well before the redundancy situation arose, that Performance Label Marketing (PML) and Security, respectively, should be the respondent's strategic focus.

22. The fact that PML and Security had been the respondent's focus for so long indicates that the respondent was acting in what it believed to be its own strategic best interests by focusing on those prospects in the 'pipeline' in the redundancy. Disagreeing whether that focus was right for the business is not the test I need to consider. Mr Robson gave evidence that he "knew we needed to focus on criteria that linked to the strategic focus of the business." I accept that it did. The inclusions of 'performance v budget' incorporated recognition of the employees' past performance and was weighted highly. It is not unreasonable in these circumstances to incorporate forward looking criteria as well as previous sales at that point.

23. On this issue I take into account the 2019 and 2020 budgets in the bundle. These documents were not, according to my notes and recollection, expressly brought to my attention. But what I understand them to show is the company's major income streams. It is clear that Security is the company's major income area but that PML was significantly increasing. This document lends weight to the respondent's argument that the areas considered in the redundancy were linked to the strategic focus of the company. The respondent's view was that the available market for PML was very large. From the respondent's perspective, focus on PML was reasonable.

24. I agree that the use of different time periods for the four 'pipeline' criteria and the 'performance versus budget' criterion requires explanation. I accept the respondent's argument that the yearly business cycle was uneven, ie sales tended to take place in certain parts of the year. Alongside that, I accept that in June 2020 the COVID pandemic was causing different impacts in different countries. I accept the respondent's justification for using different time periods for assessing the 'pipeline' criteria and the 'performance versus budget' criteria.

25. The evidence does not show that the use of different time period is either unreasonable or contrived to target the claimant. I have considered in detail the claimant's arguments on this point and I note the claimant's appeal letter of 28 July 2020 addresses this. But it is not shown that shifting the time periods would have resulted in a different outcome. The numbers might have changed to some extent with regard to the 'pipeline', but it is not shown that this time period was the one used because it left the claimant in last place.

26. The claimant gave evidence that he did not feel that he had been appropriately consulted in the process, and the criteria and indeed the decision to make him redundant were presented as a *fait accompli*. Christopher Blackwell and Jamie Flanagan said, and I accept, that there were discussions about the criteria in meetings. This is also evident from the contemporary correspondence between the claimant and Jonathan Robson. The claimant's views on the pipeline were well known to Mr Robson

and the rest of the sales team. I take into account that the claimant was able to put forward ideas about what might be better ways for the company to save money. These ideas were ultimately rejected.

27. The test is not what is in the Tribunal's view, or even the claimant's view, the best way for the company to save money in the redundancy situation. The test is only whether ultimately a fair and reasonable process was followed in all the circumstances.

28. The evidence does not show that the redundancy was a result of a personal vendetta against the claimant. I take into account that the relationships in the sales team had been fractious for some time. Jamie Flanagan was palpably hostile to the claimant in the hearing. It seems to me that the claimant's upset at his job being advertised while his performance was being reviewed was understandable. Further, the claimant's upset at his replacement being interviewed at a time when there was consideration of a performance improvement plan that, as I understand it, had not reached any kind of resolution was understandable. It is also surprising that Jamie Flanagan accompanied Jonathan Robson to that interview.

29. But that issue had been resolved some years before, and parties gave evidence that between 2016-2018 serious effort was put in on both sides to repair the working relationship. That is not to say that the relationship was repaired or was fully positive. But that does not equate to evidence that the redundancy criteria were designed with motivation to target the claimant.

30. I find that the claimant was not unfairly dismissed. I find that the claimant's claim is not well-founded within the meaning of the Employment Rights Act 1996.

_____

Employment Judge Ficklin

11 December 2022

SENT TO THE PARTIES ON

12 December 2022

FOR THE TRIBUNAL OFFICE