EMPLOYMENT TRIBUNALS

Claimant: Ms Lindsey Richardson
Respondent: (1) Connells Group
(2) Countrywide Ltd

Heard at: Cambridge Employment Tribunal

On: 6 and 7 October 2022

Before: Employment Judge Freshwater

Appearances
For the Claimant: In person
For the Respondent: Ms Ibbotson (Counsel)

RESERVED JUDGMENT

1. The claimant's claim that she was unfairly dismissed is well founded. The principal reason for her dismissal was a relevant TUPE transfer and was automatically unfair.

2. A remedy hearing will take place on 21 February 2023 at Cambridge Employment Tribunal to determine the amount of compensation that will be awarded to the claimant. A case management order with directions for that hearing will be issued separately.

RESERVED REASONS

Introduction

1. The claimant was employed by Countrywide PLC on 21 September 2011. Her job was Head of Compliance (Financial Services).

2. On 8 March 2021, the first respondent acquired 100% of the shares in Countrywide PLC. Countrywide PLC then became known as Countrywide Ltd, which is the second respondent in this case.

3. The claimant was dismissed from her employment on 30.04.2021 when she was told that she had been made redundant.

Claim and issues

4. The claimant claimed that she had been unfairly dismissed. The basis of her claim against the first respondent is one of ordinary unfair dismissal. The basis of her claim against the second respondent is one of automatically unfair dismissal as a result of a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 [TUPE regulations.]

5. The issues before me are as follows:

    (i) Was there a transfer for the purposes of the TUPE regulations?

    (ii) If so, was the transfer the sole reason for the dismissal of the Claimant?

    (iii) If not, was the dismissal of the Claimant unfair in any event?

Hearing and procedure

6. The hearing took place in person over two days. At the start of the hearing, I clarified the issues with the parties.

7. I had before me an agreed bundle of documents.

8. The claimant gave evidence on her own behalf.

9. I heard from the following witnesses on behalf of the respondents: Howard Newton (Group Risk and Compliance Director); Claire Raines (Group Head of HR) and Richard Twigg (Group Finance Director.)

10. I received written closing submissions from both parties, which the respondents' representative highlighted orally. The Claimant did not wish to do so.

Evidence and findings

11. The material facts of the case were largely undisputed between the parties. The main area of dispute was the scope of the claimant's role. The claimant said that her role was not restricted to financial services compliance, which was the view taken by the respondents. The claimant agreed that this was the main focus, but said that her role was widening as far back as 2018 when a plan had been put in place that meant she would be responsible for estate agent monitoring (what was referred to as the branch oversite programme). Her team had started delivering this activity in 2019 before the Covid-19 pandemic interrupted the business in 2020 and estate agency branches shut. The claimant's team was furloughed. When her team returned to work, she

was about the role out the planned work but then the acquisition of the second respondent was announced and she was told by her line manager she should not pursue the branch oversite programme as there may be a change of approach following the acquisition. I found the claimant's evidence to be credible, and I accept that it was planned that the scope of her role would widen. To an extent, it did widen before the start of the Covid-19 pandemic. However, I find that the vast majority of the claimant's role related to financial services compliance and not to the wider business of the second respondent. It may have been that the claimant would have had a wider role and demonstrable breadth of experience had the Covid-19 pandemic not interrupted the plans that had been put in place. However, this had not happened at the point of the acquisition of the second respondent.

12. On 8 March 2021, the first respondent acquired the second respondent. At the point of the acquisition, the first respondent had already indicated that it wished to reduce duplication and make cost reductions in some head office functions.

13. As of 8 March 2021, the claimant's line manager was Mr Newton. He was the Group Risk and Compliance Director for the first respondent. As part of the preparation for the acquisition, Mr Newton was provided with the claimant's job description and he was aware of the staff structure of the second respondent. He also spoke to the claimant's previous line manager about the claimant's role.

14. There was duplication of work within the risk and compliance teams of the first and second respondents. Mr Newton's evidence was that it was always intended that the second respondent's teams would eventually be integrated with those of the first respondent and I find this to be the case.

15. Mr Newton was keen to move quickly to begin the process of having one integrated risk and compliance team. He began to work on the restructure from 22 February 2021. The first respondent had a "tried and tested model" in risk and compliance which supported various businesses that were part of the first respondent's group. Mr Newton wanted that model to apply in respect of the second respondent and received Board approval for his plan.

16. On 23 March 2021, a meeting took place between Mr Newton, Mrs Raines and the Group HR Operations Director of the first respondent. They discussed the requirement for pooling similar roles. Mr Newton was advised to compare the existing role profiles with the job profiles in the new structure. There needed to be more than a fifty percent match between the existing role and the new role in order for an employee to be matched with the new role. Further, Mr Newton was advised that where there was one match, employees could be moved into the role. Where there was more than one match, then employees would be placed into a pool and a selection process would be applied to decide who would move into the new role.

17. On 29 March 2021, it was announced by the Connells CEO that some Countrywide head office functions would be merged with Connells. This meant that some roles were at risk of redundancy.

18. On 29 March 2021, the claimant was informed by Mr Newton that her role was one of those at risk of redundancy. Mr Newton advised the Claimant that there would be three new 'Heads of' positions for: (i) compliance monitoring; (ii) compliance policy and guidance; and (iii) financial crime prevention. Existing Connell's employees had been mapped into those positions. The claimant was told that she had not been matched and that she was at risk of redundancy.

19. On 31 March 2021, the first consultation meeting took place between the claimant and Mr Newton. The claimant queried why she had not been put into a pool for any of the new 'Heads of' positions. Mr Newton told her that it was because she spent thirty percent of her time in each of the equivalent of the new 'Heads of' fields, and because of that there was not a fifty percent match with any of those new roles.

20. On 1 April 2021, the claimant emailed the HR department to challenge the decision and rationale not to place her in a selection pool. In her view, her role was not significantly different and was not a stand-alone position because she felt she was doing the same work that Connells employed three people to deliver.

21. The second respondent had decided that the claimant's role had a narrower remit than the roles of those people who were mapped into the new 'Heads of' positions because it was focused on financial services compliance instead of wider compliance across the entire business. The second respondent had also decided that the claimant was less specialized as she worked across all of the disciplines and therefore did not, overall, dedicate as much time to any one of the disciplines as the other people did.

22. No alternative positions were available to the claimant with either of the respondents.

23. The parent company of the first respondent was an external employer and so no fast track option for employment was available to the claimant there. The claimant was informed on 01 April 2021 that she would need to apply as an external candidate to the parent company.

24. On 6 April 2021, a conversation took place between Mr Newton and Ms Raines to review the pooling decision in respect of the claimant. Mr Newton confirmed that his original decision remained unchanged, but that if the claimant wished to put forward a counter-proposal then she could do so as part of the consultation process.

25. On 7 April 2021, the claimant put forward a counter-proposal of an alternative operating model for risk and compliance. This was referred to the Group

Chief Executive Officer for consideration but was ultimately rejected by the Board of Directors. Ms Raines informed the claimant of this on 9 April 2021.

26. The final consultation meeting occurred on 23 April 2021. On 28 April 2021 a final outcome letter was sent to the Claimant to confirm her redundancy.

27. The claimant was dismissed on 30 April 2021. At the time of her dismissal, the Claimant was responsible for a team of 11 people.

28. On 04 May 2021, the Claimant appealed her redundancy. The appeal meeting was heard on 04 June 2022, chaired by Mr Twigg.

29. On 09 June 2022, the Claimant received her appeal outcome letter.

<u>Law</u>

30. Regulation 7 of the TUPE regulations states that:

> (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.
>
> (2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
>
> (3) Where paragraph (2) applies—
>
> > (a) paragraph (1) does not apply;
> >
> > (b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
> >
> > > (i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
> > >
> > > (ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.
>
> (3A) In paragraph (2), the expression *"changes in the workforce"* includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act)

31. In respect of whether or not there had been a relevant transfer in this case, I was directed by the respondents to Regulation 3(1)(a) of the TUPE regulations. This defines a relevant transfer as a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.

32. However, in my view Regulation 3(1)(b)(i) of the TUPE regulations is also important here. That says a relevant transfer is a situation in which activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor") and in which the conditions set out in paragraph 3(3) are satisfied.

33. Regulation 3(3) states that the conditions referred to in paragraph (1)(b) are that—

    (a) immediately before the service provision change—

        (i) there is an organized grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

        (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

    (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

34. The relevant part of Section 98 of the Employment Rights Act 1996 states in subsection (1) that in determining whether the dismissal of an employee is fair or unfair, the employer must show the reason for the dismissal and that it is a reason falling within subsection (2). Redundancy is a potentially fair reason under ss (2).

35. Redundancy is defined in section 139(1) of the ERA 1996:

    (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.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

36. In respect of redundancy, in the case of *Williams v Compair Maxam Limited* [1982] IRLR 83 the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. Those factors are:

    (i) whether the selection criteria were objectively chosen and fairly applied;

    (ii) whether employees were warned and consulted about the redundancy;

    (iii) whether any alternative work was available; and

    (iv) whether, if there was a union, the union's view was sought.

    The EAT stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standard standards and decide whether the employer should have behaved differently.
    Instead it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

37. The case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 says that a decision to dismiss will be fair if it fell within a band of reasonable responses which a reasonable employer might have adopted. A tribunal must be careful not to substitute its own view as to what was the right course to adopt for that employer.

38. The case of *Polkey v A E Dayton Service Limited* 1988 ICR 14 says that where an employee would still have been dismissed had a proper procedure been followed, the compensatory award may be reduced to nil.

Conclusions

39. I do not find that the business of the second respondent transferred to the first respondent under regulation 3(1)(a) of the TUPE regulations. This is because the business (estate agency, lettings and financial services) of the second respondent carried on independently to that of the first respondent.

40. I do find that the activities of the second respondent in respect of compliance ceased to be carried out on its own behalf and were instead carried out by the first respondent on the second respondent's behalf. This is a relevant transfer for the purposes of section 3(1)(b) of the TUPE Regulations. The reason that I have found this is that the activity carried out by the claimant, and others in her team, was carried out by employees of the first respondent (and no longer existed within the second respondent). The claimant and her team were an organised group carrying out financial services compliance activities on behalf of the second respondent. This was their principal purpose, because although it had been planned that the scope of the claimant's role would expand the reality was that the vast majority of her work related to financial services compliance. As set out in paragraph 14 above, it was always intended that the second respondent's teams would eventually be integrated with those of the first respondent. This means that the transfer of the claimant's work was not in respect of a single event or a short-term task.

41. The second respondent had not carried out its obligations under Regulation 13 of the 2006 Regulations to inform affected employees and consult their representatives. This is because it had not put its mind the fact that a relevant transfer was about to take place.

42. At the point she was dismissed, I find that the reason for the dismissal was principally because of the transfer. It was not solely or principally for an economic, technical or organisational reason (redundancy). The fact was that her work was to be transferred to Connells and would no longer exist in Countrywide. It had already been decided at the point of acquisition that there was a wish to avoid duplication of some head office functions. The first respondent already carried out compliance functions for other companies in its wider group.

43. I find that had the second respondent properly carried out its obligations under the TUPE regulations, there would have been a period of consultation under which the Claimant would have been employed. In my view, this would reasonably have taken the second respondent four weeks. The claimant would have been employed during those four weeks, and would have been paid her normal salary and allowances.

44. I find that the Claimant would have been fairly dismissed by the first respondent in due course for redundancy reasons. This is because I find that that the dismissal in question lay within the range of conduct which a reasonable employer could have adopted. Fewer managers were needed to do financial services compliance work. I am satisfied that genuine consideration was given to how the redundancy pools should be defined, and that a reasonable justification was provided about the detail of the matching process between the relevant existing and new roles. This includes the decision to place the claimant in a pool of one, rather than to place her in a pool with the existing employees of the first respondent who were in the existing 'Head of' roles. An evidence gathering process was undertaken so that Mr Newton could understand the claimant's role and compare it to the

responsibilities that were to be expected. The claimant had the opportunity to speak to Mr Newton about her role and she was consulted throughout. Reasonable steps were taken to find alternatives to redundancy. No redeployment was possible. In my view, the redundancy process that was followed was thorough and fair – certainly within the range of conduct expected of a reasonable employer.

45. Save for the period of 4 weeks referred to in paragraph 43 above, there will be no compensatory award. This is because I find that the claimant would have been fairly dismissed had the second respondent carried out its obligations under the TUPE regulations. Accordingly, the compensatory award will be limited to a period of 4 weeks in accordance with the principles in the case of *Polkey*.

46. The case will be listed for a remedy hearing in order to determine the amount of compensation that will be awarded.

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Employment Judge Freshwater

Date: 9 December 2022

Sent to the parties on: 23/12/2022

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For the Tribunal Office