EMPLOYMENT TRIBUNALS

London South Employment Tribunal
15 and 16 December 2022

Claimant *Respondent*

Between

Mr Naigui Shang **&** **Surrey Nanosystems Limited**

Before
Judge M Aspinall (sitting as an Employment Judge)

Appearances
Dr N Shang (in person)
Mr R Hammond (Counsel for Respondent)

FULL MERITS HEARING
Reserved Judgment

Having heard evidence from the Claimant, a witness for the Respondent and submissions for both parties, I find:

1. The claim for unfair dismissal is not made out and is dismissed; the Claimant was not unfairly dismissed.
2. The claim for breach of contract (notice pay) is not made out and is dismissed; the Claimant was paid all sums properly due to him on termination, by redundancy, of his employment.

Claims and issues

3. The Claimant, Dr Shang, complained that he was unfairly dismissed and that the notice pay that was paid was incorrect.
4. It was agreed that the Claimant had sufficient continuous service to bring these claims and that he had done so in time. It was also agreed that the reason for dismissal was redundancy and that this was a potentially fair reason for dismissal. The issues that fell to be determined by the Tribunal were:

   Unfair dismissal

   a. Did the Respondent act fairly in deciding that the Claimant was effectively in a 'pool of one' for determination of the question of redundancy.
   b. Did the Respondent conduct a fair and effective consultation process, including affording the Claimant an opportunity to participate, set out his position and offer suggestions of suitable alternatives.
   c. Did the Respondent properly and fairly consider any alternatives to redundancy, whether of their own consideration or proposed by the Claimant.
   d. Did the Respondent properly and fairly consider suitable alternative roles/employment, whether of their own consideration or proposed by the Claimant.
   e. Did the Respondent follow a fair process.
   f. *If the Claimant was found to be unfairly dismissed*, would following a fair procedure or consultation process have made any difference to the outcome.

   Breach of contract (notice pay)

   g. What was the correct notice pay due to the Claimant on termination of his employment (whether contractual or statutory).

h. What notice pay was, in fact, paid to the Claimant on termination of his employment.

i. If the amount paid was less than the amount due, what reason(s) did the Respondent have for making any deductions.

a. Were any such deductions permitted by law, by contract, or agreed by the Claimant.

Remedy

5. I made clear, after initial exchanges in relation to preliminary issues (see below), that it was unlikely that the hearing would reach consideration of Remedy and that we would only deal with liability at this hearing.

Preliminary matters

6. I had to address four preliminary matters at the outset of this hearing. The commencement of the first day of the hearing was beset by technical difficulties which was unfortunate. However, I was able to hear argument in relation to four preliminary matters:

a. Dispute raised by Claimant over the hearing bundle

b. Dispute raised by Claimant over the supplementary statement of Mr Jensen

c. Dispute raised by Respondent over the supplementary evidence of the Claimant

d. Missing witness (Ms Adams) for Respondent

7. After hearing from both parties and having risen to consider the issues raised, I delivered a short extempore decision which, for completeness, I summarise here.

8. The first issue **(6(a))** was explained by the parties. The Claimant accepted that the joint bundle that was before me - originally prepared on 15/4/21 and subsequently repaginated but not altered - was accurate and no longer disputed. Therefore, I needed to decide nothing. It appeared to me that this issue ought not to have been raised at all given the ready concession made by the Claimant which he could (and ought) to have made in advance of the hearing.

9. The next two issues, it appeared to me, were best dealt with together **(6(b) and (c))**.

10. The supplementary statement made by Mr Jensen on 15/4/21 was in circumstances where the Claimant had provided additional material with his witness statement of 31/3/21 that had not previously been disclosed to the Respondent. The Respondent, rather than objecting to this new material (which they would have been entitled to), accepted, and incorporated, it into the joint bundle. They took the view that a short additional statement from Mr Jensen would set out the Respondent's view of that material. The Claimant argued that the supplementary statement should not be admitted and, if it was, then he ought to have been able to respond to it which is what his additional statements and material of 15/4/21 and 17/4/21 were intended to do.

11. I accepted that the Respondent incorporated the new material provided with the Claimant's witness statement into the joint bundle and that, as it was new material to them, it was reasonable for them to add a response. They did so by means of the supplementary statement of Mr Jensen on 15/4/21 which was provided to the Claimant on the same day. I was satisfied that it was reasonable for the supplementary statement of Mr Jensen to be admitted and that the Claimant would have the opportunity to cross-examine Mr Jensen about its contents during the hearing.

12. The further material provided by the Claimant after the 15/4/21 - including his supplementary witness statement of that date - was more troublesome. I was concerned that, over the course of 18 months or so, the Claimant had been seeking to bolster his case with considerable further material that ought to have been disclosed by December 2020 in line with the orders of the Tribunal.

13. The Claimant had relied on the Tribunal instruction that all documents must be provided to parties (and the Tribunal) by not less than 24 hours before the hearing as being the basis upon which he provided additional material on 15/4/21 and 17/4/21 (prior to an adjourned hearing) and then again in the week prior to the hearing before me.

14. It was unfortunate that the Claimant - an intelligent, well-educated man - had misconstrued those instructions. They were not an invitation to simply keep providing more and previously undisclosed evidence. Nor were they an invitation to provide more and more statements and written submissions - however the Claimant had labelled them. The deadlines for disclosure, exchange of evidence and statements had long passed. The preparation and submission of documents to the Tribunal is not an opportunity for parties to simply keep passing back and forth with more evidence. There must be some finality so that everyone knows what is going to trial.

15. I also noted, having looked through the additional material provided in occasional bursts of considerable

volume by the Claimant, that except for the evidence of his job searches (which might be relevant to any Remedy hearing if the Claimant succeeded on liability), the bulk of his additional material related to the *VantaBlack* and *SVIS* project work that he had been engaged in with the Respondent.

16. I ruled in September 2022, on an interlocutory application, that such material was not necessary when the Claimant sought an order for disclosure of all such materials from the Respondent. I then said, refusing the application, "*…I am satisfied that, given the Respondent's ready concessions in writing that the Claimant was integrally involved in the SVIS projects and, more importantly, given that I can see no possible relevance between the disclosure sought and the issues before the Tribunal…*".
17. I still see no relevance of that material - or the material now produced in such quantities by the Claimant - to the issues that I had to resolve; whether he was unfairly dismissed and whether he was due any further notice pay.
18. I refused the admission of all additional material, statements or other documents presented by the Claimant since 15/4/21 and this included the 'supplementary statement' that he wrote on 15/4/21. All other materials which were in the agreed bundle, the Claimant and Respondents original witness statements and the supplementary statement of Mr Jensen were admitted into evidence.
19. In considering the absence of Ms Adams **(6(d))**, I was satisfied that she was signed off work as being unwell due to stress and anxiety, and I accepted Mr Hammond's assurance (as an Officer of the Court) that this was related to issues around maternity. I admitted her statement but - given that she cannot be cross-examined – attached limited weight to it.

Procedure and evidence

20. This hearing was conducted using video technology (CVP) over two days.
21. The Claimant was not legally represented; he represented himself and was unaccompanied. He gave evidence on his own account – in the form of a witness statement and some supplementary material which had been incorporated into the agreed bundle. He was cross-examined. We were assisted by an interpreter appointed by the Tribunal.
22. The Respondent was represented by Mr Hammond of Counsel. There was one 'live' witness for the Respondent – Mr Jensen – who had provided a signed witness statement, a signed supplementary statement (both with an appropriate statement of truth). He was cross-examined. There was also the witness statement of Ms Adams who was not present.
23. Mr Jensen, a Director of the Respondent, had managed the redundancy process in respect of the Claimant. Ms Adams was an HR Advisor for the Respondent who had been engaged in the redundancy process.
24. The issues set out above were confirmed with the parties at the outset of the hearing.
25. In addition to the witness statements, there was an agreed bundle before me which consisted of 128 pages.
26. Both parties provided oral submissions following the conclusion of the evidence.

The law

27. An employer (Respondent) must demonstrate that the reason for dismissal was one which fell within the categories of potentially fair reasons set out in Section 98(1) and (2) of the Employment Rights Act 1996 ("ERA1996"). It follows that, of course, the employer must also show what the reason for dismissal was.
28. The Respondent says, and the Claimant accepts, that the reason here was redundancy. The dispute is about the fairness of the process.
29. Redundancy, defined at Section 139 ERA1996, is a potentially fair reason for dismissal under Section 98(2) ERA1996.
30. *Safeway Stores Plc v Burrell 1997 ICR 523*, approved by the House of Lords in *Murray & anor v Foyle Meats Ltd 1999 ICR 827*, sets down the approach to be taken to determine what is a dismissal by redundancy for the purpose of Section 139(1)(b) ERA1996. It provides a three-stage process:
    a. Was the employee dismissed. If so
    b. Had the requirements of the employers business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish. if so
    c. Was dismissal of the employee caused wholly or mainly by that state of affairs.

31. In deciding whether there was a real and genuine redundancy situation **(31(b))**, the only question for determination is whether there was, or was an expectation that there would be, a significant reduction or complete cessation in the requirement for work of a particular nature to be undertaken by employees of the Respondent; this does not mean, solely, the Claimant.

32. The third stage **(31(c))** is a matter of causation. The Tribunal must be satisfied that the whole or main cause of dismissal was a result of the redundancy. It follows that, even if there was a real and genuine redundancy situation, if the Tribunal found that it was not the cause of the dismissal, the Claimant would not have been dismissed by reason of redundancy.

33. The Tribunal is entitled to examine and consider all the evidence available to determine the real reason for dismissal. This is necessary to ensure that the decision to dismiss for redundancy was genuine. However, other than considering such evidence to satisfy itself of the genuineness of the redundancy, the Tribunal is not concerned with the commercial or economic reasons for that redundancy (*James W Cook and Co (Wivenhoe) Limited v Tipper & others 1990 ICR716 CA*).

34. If the Respondent can satisfy the Tribunal of a potentially fair reason for dismissal, it behoves the Tribunal to consider the evidence to determine whether they, nonetheless, acted reasonably in deciding to dismiss the Claimant for that potentially fair reason. It is for the Tribunal to decide rather than for either party to prove. To decide on the reasonableness and fairness of a decision to dismiss, it is necessary for the Tribunal to have regard to all the circumstances in the case and to the provisions of Section 98 ERA1996; particularly those points referred to in Section 98(4). It is of crucial importance that the Tribunal, however sympathetic or well-meaning, recalls that it is not for the Tribunal to substitute its own view for that of the Respondent. The question for the Tribunal is whether the Respondent acted in a fair and reasonable way, within the band of reasonable responses, in dismissing the Claimant.

35. The Tribunal must be satisfied that the Respondent acted reasonably in deciding any appropriate pool from which to select the redundant workers. *Thomas and Betts Manufacturing Limited -v- Harding [1980] IRLR 255* states that employers have greater flexibility in defining the unit of selection or pool where there is no agreed procedure. The Respondent needs to show that they applied their minds to the question and acted with genuine motives. The Tribunal has to be satisfied that the Respondent acted reasonably taking into account all the factors including whether other groups of employees are doing similar work to the group from which selections were made, whether employees jobs are interchangeable, whether the Claimant's inclusion in the pool is consistent with his previous position.

36. Any selection criteria must have been reasonable, and the Tribunal will need to be satisfied of this. They must be capable of being objectively assessed against data which might include attendance, length of service, effectiveness, efficiency. It is reasonable, with justification, for an employer to have a workforce that is retained based on a balance of ability, capacity, capability; therefore, an individual's own skills, knowledge, flexibility, expertise are – if they are objectively assessed – also reasonable considerations.

37. *Williams and Others v Compare Maxim Limited [1982] ICR 156* provides that it is also necessary for the Tribunal to be satisfied that any selection criteria were fairly applied. This does not mean that the Tribunal can, or should, enter a re-evaluation or re-assessment exercise since that would amount to substituting its view for that of the Respondent. Rather, the Tribunal needs to be satisfied that the selection method was generally fair and reasonably applied in respect of the Claimant.

38. *Polkey v AE Dayton Services Limited [1988] ICR 142*, clearly set out the necessity that the Tribunal looks to the consultation that was undertaken with the Claimant. Was the Claimant warned, and consulted, about the potential for redundancy. Given the known circumstances, was any consultation reasonable and adequate. These are, again, questions of fact to be addressed by the Tribunal.

39. The employer should do, as far as reasonably practicable in the circumstances, all that they can to provide suitable alternative work for the employee before dismissing for redundancy (*Thomas & Betts Manufacturing Limited v Harding (supra)*).

40. In addition to considering and applying the relevant statutory law, in reaching my decision, I have also considered and applied, as relevant, the authorities referred to herein and in submissions.

Findings on the issues

41. Having considered all the evidence available to me, I made the following findings of fact. I do not rehearse all the points made for reasons of conciseness. However, I have taken account of, and borne in mind, all things that were submitted to me or drawn to my attention.

42. Where any conflicts have arisen in the evidence, I have resolved them – on the balance of

probabilities – in accordance with these findings.

43. The Claimant was employed as a Senior Research Scientist, under a contract of employment, from June 21st 2011.

44. I heard evidence from both the Claimant and Mr Jensen for the Respondent. I was also referred to various documents contained in the agreed bundle which I read and considered. The Respondent's evidence was that there was a genuine redundancy situation brought about by a decision to move away from new research and development of already marketable and marketed products and into a scaling up of production for newer products, in particular paint and 'wet' chemistry products.

45. The Respondent took the position that the changed work meant that there was no longer a requirement for the role of a research scientist of the kind occupied by the Claimant and that, instead, the need was for production engineering capability (which is, as the name suggests, an engineering role) and for production and paint spraying staff, both of which were more junior roles than that occupied by the Claimant. The Respondent's evidence was that having considered all the options and needs for the stability and development of their business, the role occupied by the Claimant was the only role at risk of redundancy; they argued that to artificially add another role (from another team or a more junior post) would have been likely to cause unnecessary disruption and distress to others whose roles were not *really* at risk of redundancy.

46. The witnesses agreed that the nature of the changed model – from R&D to scaled production – was different to that which the Claimant had been engaged in previously. He, in his own evidence, accepted that he was not an engineer and confirmed the evidence given by Mr Jensen that he would not have been prepared to accept a lower-paid or more junior role than that which already occupied.

47. The Claimant had, it was clear from the preponderance of the evidence, been integral to the earlier success of the Respondent's business in the development of S-VIS and Vantablack products. I was referred to considerable material on these products by the Claimant; whilst these were interesting from a purely academic perspective, I did not find that they assisted me in deciding the issues at hand. The Respondent was clear that the S-VIS and Vantablack products were no longer their focus. The Claimant argued that he was continuing to work on both and that this ought to have meant that he could continue in his role.

48. The position, I find, was that by the time the redundancy situation arose, the nature and scope of the Respondent's business had changed, moved on, from where the Claimant had been so instrumental in the R&D of S-VIS and Vantablack. It was not controversial before me that much of the equipment used to produce those products had been decommissioned, removed and that the remaining equipment, used by only the Claimant, were suitable only for the production and materials testing of very small quantities of those legacy products.

49. The Respondent made what they considered to be a reasonable business decision to pivot their focus from legacy products to a new set of products in the wet and paint lines. The Claimant's role was the only one which, because of those changes in focus, would be at risk of redundancy.

50. In all the circumstances, bearing in mind that it is not for me to substitute my view of how the Respondent might have behaved for how they actually did, I find that the Respondent did act fairly in determining that there was 'a pool of one' at risk of redundancy. That was, in fact, the reality on the ground and had the Respondent artificially confected a wider pool, it would have been contrary to logic and would have likely caused gross unfairness to other people (whose roles were not genuinely at risk) and to the Claimant by muddying the waters and creating stages, steps and processes that were not necessary.

51. For the avoidance of any doubt, I also find that the requirements of the Respondent's business for any employees to carry out work of the kind undertaken in the role of Senior Research Scientist had ceased or diminished. I am also satisfied that the ultimate reason for the termination of the Claimant's contract of employment was caused by that state of affairs.

52. From the written evidence – and confirmed by both witnesses before me – I find that the Respondent first advised the Claimant that there was a potential risk of redundancy due to a change in the strategy of the business by writing to him on 19 August 2019. A further letter, inviting the Claimant to attend a one-on-one meeting ('first consultation meeting') with Mr Jensen was sent to the Claimant, three days later, on 22 August 2019.

53. The first consultation meeting was held, seven days later, on 30 August 2019. I am satisfied from the

minutes of that meeting and from the evidence given by Mr Jensen, which was largely unchallenged by the Claimant, that discussions took place at that meeting about the risk of redundancy, the change in business strategy which underlay it, the reasons why other roles were not at the same risk and that there would be a further process and meeting(s) before any final decisions were made.

54. I also find that, aside from asking questions about the reasons why his role may be redundant (the answers to which he appeared to have accepted in the first consultation meeting), the Claimant was primarily concerned with the correct calculation of his notice period.

55. It was also clear, both from the minutes of that meeting and the evidence more generally, that the Claimant was a well-regarded colleague and that his earlier contributions to the Respondent's business had been valued.

56. On 4 September 2019, five days after the first consultation meeting, the Claimant wrote to the Respondent (to Miss Adams) to put forward the reasons why he did not consider he ought to be made redundant and explaining that he disagreed with the potential calculations for his notice (he wanted 12 weeks' notice), holiday, and overall redundancy package. He also asked for a reference. Miss Adams responded on the same day confirming that a reference would be drafted, that she had amended the proposed package to include the requested 12 week notice period, setting out the 11.5 days of holiday that were accrued and how they were expected to be used during the notice period. She also explained that if the Claimant did not wish to accept voluntary redundancy on the terms proposed, a final consultation meeting would be arranged. I find that this was all within the scope of reasonable behaviour that might be expected of a reasonable employer of the size and resources as the Respondent.

57. On 11 September 2019, a letter was sent to the Claimant by Miss Adams because a concern had arisen around a potential breach of security. A short investigation followed which necessitated a delay in the consultation process. The Claimant, briefly, argued before me that the purported investigation was a sham and that the purpose was to dismiss him for gross misconduct.

58. I cannot find any evidence to support the Claimant's contention that the Respondent was in some way disingenuous in their approach to the alleged breach and its investigation. The greatest indicator that there was no such design by the Respondent is that the investigation was concluded within 13 days and no action was taken to bring disciplinary matters against the Claimant. The redundancy consultation process was reinstated from 24 September 2019.

59. The documentary evidence – and the oral evidence of the witnesses – confirms that the Respondent considered vacancies and provided details of the only vacancy available to the Claimant. I also find that the Respondent genuinely engaged with the Claimant in looking at alternative deployments to other roles. I find that the only available roles were those of Production Engineer, for which the Claimant accepted he was unsuitably qualified (as a scientist and not an engineer) and in the paint spraying team which would have been a demotion and lower grade to which he was not prepared to drop.

60. A final consultation meeting was held on 30 September 2019 at which the potential alternative roles and other options proposed by the Claimant were reviewed and the Respondent gave reasonable and detailed explanations why they did not consider the Claimant to be suitable for them. I am satisfied that the Respondent properly, openly, engaged with the Claimant in seeking alternatives to redundancy.

61. Following that meeting the decision to make the Claimant's role redundant was confirmed in writing. He was paid £6,300 as a redundancy payment and £10,194.48 as 12 weeks' notice. He was also entitled to take 14 days paid leave during his notice period.

62. There followed some correspondence in respect of the reference provided by the Respondent.

63. The Claimant did not directly challenge any of the evidence given by the Respondent or by Mr Jensen for the Respondent. In cross-examination, he persisted in reverting to questions about why the S-VIS and Vantablack products had been effectively discontinued and, despite several judicial interventions, persisted in making statements and not in asking questions. I gave him considerable latitude as a litigant in person but, after a very lengthy period during which he either made statements or repeatedly asked questions to which answers had already been given, having been asked, directed and warned to stop doing so, I found it necessary to curtail his cross-examination.

64. Taking all of the evidence to which I was referred, or which I heard, into account I find that the answers to each of the issues at (4)(a)-(4)(e) above is yes. The Respondent acted fairly, conducted a fair consultation, a fair process and properly engaged in terms of alternatives to redundancy. The Respondent acted as a reasonable employer might have done.

65. The issue at (4)(f) does not, therefore fall to be considered. The claim for unfair dismissal fails.

66. In respect of notice pay (issues (4)(g)-(4)(h)) matters can be considered shortly. The Claimant argued

that his contract of employment entitled him to 1 month notice plus 1 week for each year worked. As he had worked for 11 years, he said that he ought to be entitled to 15 weeks' notice (1 month plus 11 weeks). The Respondent argued that the contract of employment contained an obvious drafting error and ought to have read that it was up to a maximum of 12 weeks for the length of service (more than 4 years but less than 12) of the Claimant. Those who worked for 12 years or more were entitled to 12 weeks' notice and it would be perverse to accept the error in drafting as meaning that someone with less service would be entitled to more notice than a longer-serving employee.

67. I find the argument of the Respondent to be most reasonable and correct here; there would be perversity if a shorter serving employee accrued greater rights to notice than a longer serving one. In any event, the Claimant asked for 12 weeks' notice following the first consultation meeting, the Respondent accepted, and he was given 12 weeks' notice.

68. On that basis, the claim for notice pay also fails.

Judge M Aspinall on Thursday, 29th December 2022