EMPLOYMENT TRIBUNALS

Claimant: **Mr D Payne**

Respondent: **The Best Connection Group Ltd**

Heard at: **Midlands West (and by CVP)** **On:4 7 and 8 November 2022**

Before: **Employment Judge Woffenden**
Members: **Mrs B Hicks**
Mr N Howard

Representation
Claimant: In Person
Respondent: Mr E Beever of Counsel

JUDGMENT having been sent to the parties on 9 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1 The claimant presented his claim to the tribunal on 9 March 2021. He was employed as the respondent's quality and compliance manager from 1 April 1997 to 3 December 2020. He had claimed unfair dismissal age discrimination and breach of contract but confirmed at the beginning of the hearing that he had no claim for breach of contract and withdrew his claim of age discrimination during the hearing on 4 November 2022.

2 There was an agreed list of issues for the unfair dismissal claim as follows:

2.1 What was the reason for dismissal?

2.1.1The respondent asserts the reason was it was a reason related to redundancy and/or 'some other substantial reason' which is a potentially fair reason under section 98(2) Employment Rights Act 1996 ('ERA')).

2.1.2 The claimant contends that there was no redundancy situation and/or that that redundancy was not the reason because another person was appointed to cover most of the claimant's work.

2.2 Did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant.

2.2.1 The respondent failed to consider and/or consult on alternative roles

2.2.2 The appeals officer was not impartial and engaged in discussions with others

2.2.3 The respondent should have had a 'pool' including the Business Assurance Team.

Evidence

3 There was an agreed bundle of documents of 144 pages to which was added (at page 145) a manuscript table of redundancies at the respondent's head office showing ages. We heard from the claimant and on behalf of the respondent we heard from N Yorke (dismissing officer and a director of the respondent) and M Recci (appeals officer and former director of the respondent).

Fact finding

4 At the time he was dismissed the claimant was employed by the respondent as its quality and compliance manager at its Bromsgrove Headquarters. The respondent is an employment business placing temporary workers on temporary assignments at various different clients. It employed approximately 800 employees and had a human resource team of 2 or 3 people.

5 Mr Yorke was responsible for overseeing a number of Head Office departments including the business assurance function in which the claimant worked. The claimant (whose employment began on 1 April 1997) had designed the respondent's Quality Management System with Mr Yorke and had worked with the respondent's branches to secure compliance, developing standardised ways of operating via documentation systems and training as the respondent's business grew over the years.

6 By March 2020 the claimant's role comprised the design and implementation of quality management processes, dealing with temporary worker complaints and customer complaints (though the latter were very unusual and infrequent), conducting internal in person audits and assisting the respondent's branches with external audits and running an employee helpdesk.

7 The respondent suffered a downturn in business in March 2020 because of the pandemic. Monthly turnover was down 13 % ;by April 2020 it was 40% down year on year. On the introduction of the government furlough scheme the respondent needed to make urgent costs savings and furloughed all staff that were not essential to business operations. Mr Yorke decided this included the claimant who was asked to go on furlough from 23 March 2020.The respondent took steps to reduce costs in relation to business rate grants and asking its landlords for rent freezes. By June 2020 it was considering reducing staff headcount but it first stopped pay rises and annual and interim dividends and dismissed employees with less than 2 years' service. In July 2020 the respondent's board of directors

met and it was decided that formal redundancy consultation had to begin. The respondent's directors each considered their respective areas of the business and the roles within them to decide which were potentially redundant .

8 Mr Yorke looked at the claimant's role and decided it was potentially redundant because ,as far as design and implementation of quality management processes were concerned, in 2018, the respondent had decided it needed to modernise its systems and undergo digital transformation .Its managers would work with externally appointed consultants to replace its paper systems and processes with digital ones. They would design and have to work with the new systems which would no longer be created by a central function. As far as in person audits were concerned travel among branches had stopped and Mr Yorke decided that managers would be responsible for ensuring compliance and internal audits would be carried out remotely. The claimant's role in helping branches with external audits would be replaced by increasing training and guidance to managers who would therefore need less support. Staff with queries could raise them with their managers so the helpdesk could be shut and those managers would also be responsible for resolving temporary workers' complaints, using an email service to send the complaint to the senior manager in the area in question. The claimant accepted in his claim form that during furlough his role had been taken over by other people.

9 The respondent's Chief Executive Andrew Sweeney wrote to employees (including the claimant) on 3 July 2020 explaining that he was sure they would understand the (substantial) implications of delivering 35% less business than usual and some of steps taken to ensure the viability of the business in particular that its 18 branches had merged to establish 9 'key locations.'

10 By 5 August 2020 Mr Sweeney wrote to employees explaining the sector had been adversely affected by the pandemic ,the levels of business provided was approximately 70% of normal and warning them of the requirement for redundancies and of an announcement to be made on 11 August 2020.

11 During a companywide video presentation on 11 August 2020 Mr Sweeney said 120 redundancies were necessary that consultations were to be completed by 11 September 2020 and that same day in a video conference meeting Mr Yorke told the claimant his role was potentially at risk of redundancy .

12 Mr Yorke wrote to the claimant on 17 August 2020 to confirm that as discussed on 11 August 2020 a redundancy situation had arisen and inform him the respondent would now begin its consultation process, the purpose of which was to explore ways to avoid or reduce the number of redundancies and if necessary discuss other options such as suitable alternative employment and other internal roles. He was reminded that as explained at the meeting if the pool was of only one person one there would be no scoring against selection criteria.

13 Mr Yorke had considered whether other employees should be in a pool with the claimant and decided they should not. He concluded that the claimant's role was unique ,having developed organically over the previous 23 years. There were no colleagues performing the same role at a more junior or senior level. Looking at the rest of the staff in the Business Assurance team he did not think they should be in a pool with the claimant. He considered Hayley Hall (a Quality

and Compliance Consultant) who was paid less than half of the claimant's annual salary (£50676) and carried out a lot more administrative work. She had no function in process design or the employee help desk or temporary workers' complaints. She had some involvement in external and internal audits (though that work was expected to be greatly reduced) and carried out a number of different tasks the claimant had no involvement in such as managing 2 tier suppliers, creating employee surveys and creating and deploying client and temporary workers surveys. The claimant conceded under cross examination that his role was fundamentally different to hers though there were some areas of overlap. He also considered the Business Assurance Manager's role (Jane Power) which was much wider than that of the claimant including the implementation of the management review meeting framework and of the risk management framework (which included the creation of risk registers) collating and providing management information to demonstrate performance and KPIs and managing the surveys created by Ms Hall and running the Business Continuity and Disaster Recovery meetings and process (which he regarded as being of particular importance during the pandemic and lockdown). Mr Yorke decided their roles were significantly different from the claimant's and concluded the roles were not interchangeable or sufficiently similar to be pooled together. Under cross examination the claimant conceded he could not undertake Jane Power's role with his skills and experience.

14 By August 2020 the claimant's role had been carried out by others for 5 months .

15 Mr Yorke wrote to the claimant on 21 August 2020 to invite him to attend an individual consultation meeting on 26 August 2020.He reminded him his post was one of those at risk of redundancy but no final decision had been taken and reiterated what had been said in his letter of 1 August 2020 (see paragraph 12 above)about the purpose of consultation in particular mentioning discussion of possible suitable alternative employment in the respondent.

16 The first consultation meeting took place between Mr Yorke and the claimant on 26 August 2020.Typed minutes were made of that (and all other) meeting. Mr Yorke explained why following a review of the claimant's duties and responsibilities it had been identified that his role was surplus to business needs and the need to reduce headcount. He said he wanted to open up the discussion to hear the claimant's thoughts and suggestions on ways to avoid redundancy. He explained there was a position in internal audit but it was 'well below your skill set' at the remuneration level of Hayley Hall. He said they were making people responsible for audits instead of doing it to them which was a different approach. said more than happy to hear his suggestions and ideas which he could put now or consider and write to him or discuss at the next meeting. The claimant said he had nothing to contribute now – he'd have a think about it. The claimant then expressed concern that he was in a pool of one and what he had been involved in had been allocated to Ms Hall and Ms Power which Mr Yorke conceded was the case 'to some extent.' Mr Yorke explained why he did not think this (a pool) was appropriate and that the clamant was unique in terms of his role. In relation to next steps Mr Yorke said he needed to hear from the claimant 'ASAP' of his 'alternative employment options/thoughts' and they could discuss at the next

meeting. The claimant accepted under cross examination he knew the next meeting was an opportunity to discuss alternatives to redundancy.

17 The claimant was invited to a second consultation meeting with Mr Yorke by a letter dated 2 September 2020.He was told that the respondent's response to any comments/suggestions he had made to avoid redundancy and any alternative thoughts or suggestions he might have ,the outcome of the redundancy process would be discussed and details of any redundancy package ,where applicable would be discussed.

18 The claimant sent Mr Yorke an email on 8 September 2020 raising some queries. In particular he asked for confirmation that there would be no requirement to carry out audits in branch and referred to his long experience in designing processes which would be a full time task for an individual and said there were 1194 vacancies advertised on the respondent's website which was comparable to pre Covid levels. He concluded by stating he strongly believed his role existed 'perhaps not in the same form'. As the claimant knew the respondent's website also contained the respondent's internal vacancies and he was able to access it. Under cross examination he said he had looked on it for vacancies.

19 Mr Yorke responded to the claimant on 10 September 2020 .He explained that managers and directors would be responsible for managing their own processes with support from the Business Assurance Manager.

20 A second meeting took place with Mr Yorke on 11 September 2020. Mr Yorke went through the points the claimant had raised in his email dated 8 September 2020 again. He explained why there would be no central audit function conducting audits and why in his view there was not a role for the claimant in the respondent's digitisation and modernisation project team. The number of vacancies was not an accurate measure of the amount of business the respondent had. Mr Yorke asked the claimant if he had any further comments suggestions or ideas to discuss and the claimant said no- Mr Yorke ' had made' his point. Mr Yorke then confirmed in the absence of identification of any feasible alternative options to avoid redundancy his 'selection' was confirmed and the discussion went on to the redundancy payment.

21 On 16 September 2020 Mr Yorke wrote to the claimant giving notice of termination of employment to expire on 4 December 2020.The letter informed the claimant about his redundancy payment and of his right of appeal to Mr Sweeney. Mr Yorke said the respondent had explored ways in which redundancy could be avoided and the possibility of alternative employment but had been unable to identify any or any way in which redundancy could be avoided.

22 The claimant exercised his right of appeal setting out his grounds in a letter dated 18 September 2020. He complained about the redundancy payment of age and sex discrimination and expressed his view that his job still existed 'albeit it might not in the future, but it does now' and his expertise could be used in the respondent's digitisation modernisation project.

23 On 22 September 2020 the claimant was invited to an appeal hearing on 25 September 2020 before Mr Recci. The latter had had no prior involvement with the redundancy process concerning the claimant.

24 At the appeal hearing the claimant complained of age discrimination that he did not know Jane Power was his line manager why he thought his job was not redundant at the present time and that his expertise would be required to deliver the digitisation modernisation project. He emphasised his long contribution to the respondent.

25 After the appeal hearing Mr Recci went to see Mr Sweeney (about the age discrimination allegation) Mr Yorke Jane Power and the digitisation modernisation project team to discuss the points the claimant had raised and on 5 October 2020 he wrote to the claimant to tell him his appeal was not successful. In particular he explained he had spoken to the digitisation modernisation project team and said the claimant had no experience of how the processes would work in a digital system and had not been involved in the project for 2 years .There were no vacancies or role in the project .The claimant did not challenge this in cross examination of Mr Recci. We accept Mr Recci's evidence that he had no knowledge of a position of quality and compliance consultant. He retired from the business in February 2021 and the claimant's employment terminated 4 December 2020.

26 In January 2021 Jag Chohal became a quality and compliance consultant reporting to Jane Power. He had been a Group Finance assistant in the finance team and had wanted a transfer. There was no vacancy as such for the consultant role which was created to accommodate his desire to transfer and because the Business Assurance team had a need to check NHS worker packs for NHS compliance .He worked in that team on a part time basis (25 % of his time) before taking up the role full time in March/April 2021. This was because he was needed in Finance till then because the demands of year end auditing. The job profile for this role shows it was full time and that key areas of responsibility were employee surveys (design and production) monthly reports for Regional Operational Review meetings and checking NHS worker packs for NHS compliance and the receiving and recording of customer complaints and to chase resolution. Experience in Qualtrics software was desired. The claimant had no experience in the latter. The overlap between his role and the claimant's role was confined to the infrequent (customer) complaints and the support which the claimant had given to a fellow manager as far as checking NHS worker packs for NHS compliance was concerned.

The Law

27 Section 98(1) and (2) of ERA provide that:

"(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 –

(c) is that the employee was redundant."

28 Under section 139 ERA

‘(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.’

29 It was held in **Murray v Foyle Meats [1999] ICR 827** that section 139 ERA asks 2 questions of fact (1) whether there exists one or other of the various states of economic affairs mentioned in the section , and (2) a question of causation ,whether the dismissal is wholly or mainly attributable to that state of affairs .As regards whether there is a redundancy situation ,it is not for tribunals to investigate the reasons behind such situations. So, a tribunal’s concern is whether the reason for the dismissal was redundancy not with the economic or commercial reasons for the redundancy.

30 Section 98(4) of ERA provides that:

“(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

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

31 The burden of proof is neutral in applying section 98 (4) ERA.

32 It was held in the case of **Sainsbury’s Supermarkets Ltd v Hitt [2003]IRLR 23 CA** that the range of reasonable responses test applies to all aspects of the decision to dismiss.

33 We remind ourselves that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a

reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair (Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT).

34 In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether ,due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal .The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

35 In **Capita Harsthead v Byard [2012] IRLR 814** it was held that the question of how the pool should be defined was primarily a matter for the employer to determine. It would be difficult for the employees to challenge it where the employer had genuinely applied his mind to the problem.

36 In **Williams and others v Compair Maxam Ltd 1982 IRLR 83 EAT** it was said that 'Although it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances ,there is a generally accepted view in industrial relations that ,in cases where employees are represented by an independent trade union recognised by the employer, reasonable employers will seek to act in accordance with the following principles'. One of those principles was 'The employer will seek to see if whether instead of dismissing an employee he could offer him alternative employment.'

Submissions

37 We thank both the claimant and Mr Beever for their oral submissions which we have carefully considered.

Conclusions

38 We conclude that the respondent has shown the reason for dismissal was that the claimant was redundant. The respondent decided against a background of a downturn in business during the pandemic and the need to save costs that 120 redundancies were necessary. After consultation Mr Yorke decided for the reasons set out in paragraph 8 above that the claimant's job no longer existed. While the claimant was on furlough his role was carried out by others. The respondent needed fewer employees because the claimant's work could be done by others .The requirements of the business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish. There was no evidence to support the claimant's contentions at paragraph 2 .1.2 above; Mr Chohal's position came into being after the decision to dismiss the claimant had been taken and his employment had terminated and he did not cover most of the claimant's work as alleged.

39 Turning now to section 98(4) ERA, we remind ourselves that it is not for us to decide what we would have done if we were in the respondent's position. We must not decide what was the right course for the employer to adopt.

40 Mr Yorke decided there was no role for the claimant in the ongoing digitisation and modernisation project. Mr Recci investigated this with the relevant team during the appeal process and there were no vacancies. The claimant knew what vacancies the respondent had on the vacancy list on its website and despite being given the opportunity to discuss alternative employment during the consultation meetings expressed no interest in them or the suggested role put forward by Mr Yorke. There was no evidence before us about job vacancies he would have applied for or should have been offered. As far as the role performed by Mr Chohal is concerned we conclude this was a position that did not come into being until after the claimant's employment had terminated so was not a role that fell to be considered as alternative employment during the redundancy process . It was not materially similar to that carried out by the claimant in any event.

41 We conclude that the assertion Mr Recci was not impartial is not sustainable. The claimant's case on this point is based on the discussions which Mr Recci had with Mr Sweeney and Mr Yorke because he thought that the appeal process should be independent of the people who conducted the first set of meetings . We are satisfied that when Mr Recci came to make his decision he did so with an open mind. Mr Recci formed the view on the basis of points raised by the claimant in his appeal that further investigation was necessary. There was no evidence before us that during the further investigations he conducted any attempt was made to undermine his independence as a decision maker .

42 We conclude that Mr Yorke did genuinely turn his mind to the issue of the pool and that his decision on this issue -that the claimant's role was unique and that there be no pool comprising the Business Assurance team -fell within the range of reasonable responses ;the claimant's role was different to Jane Power's role (which he could not do) and Hayley Hall 's role was junior performing a lot more administrative work for Jane Power and did not have the responsibilities and varied functions of the claimant's role in quality assurance and she performed a number of different tasks in which the claimant had no involvement .

43 We conclude that the procedure applied by the respondent was within the range of reasonable responses. The respondent warned its employees on 5 and 11 August 2020 and the clamant was warned he was at risk of redundancy on 11 August 2020 .He was invited to and attended a consultation meeting on 26 August 2020 at which his views were sought and discussed. The points he raised in the interim were responded to .There was a further meeting on 11 September 2020 at which his views were sought. He was given the opportunity to appeal (which he exercised) and his appeal was heard on 25 September 2020. He was informed of the outcome on 5 October 2020. We have therefore concluded that the respondent acted reasonably in treating the reason that C was redundant as a sufficient reason for dismissing him. The dismissal was fair .

Employment Judge Woffenden

Case No: 1300763/2021

Date 23/03/2023