Case Number: 1406553/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms G Sullivan**

Respondent: **IBM (United Kingdom) Ltd**

Heard at: **Exeter by video** **On:** **6 March 2023**

Before: **Employment Judge Smail**
Members Mr R Spry-Shute
Mr D Clements

Representation
Claimant: **Mr R Johns, Counsel**
Respondent: **Mr G Graham, Counsel**

REMEDY JUDGMENT

1. The Respondent shows that there was a 100% chance that the Claimant would have been selected for redundancy anyway, notwithstanding the procedural flaw established at the liability hearing. Accordingly, no compensatory award is payable.

2. No Basic Award is payable because the Claimant received a redundancy payment.

REASONS

1. As a sensible preliminary matter, we have been invited in this remedy hearing to give judgment on the question of a Polkey reduction. That concept was very much at the forefront at the conclusion of the remedy hearing, when we wondered, having given our judgment, whether in fact there was scope for a remedy hearing at all. Because of the lateness in the day on that occasion we asked for submissions in writing. I assessed the submissions and wondered whether I could make an executive decision based upon the clarity of the positions and the certainty of the result. I decided I could not and that the only appropriate step was to have a hearing with the parties, to hear Counsel, together with my colleague members of the Tribunal, elaborating upon their succinctly stated positions in their skeleton arguments.

2. The issue is what is the percentage chance that this particular employer would have fairly dismissed for redundancy in any event. Based upon our findings, some things would not have changed. First of all, there would need to be a selection for redundancy of six people from nineteen. There would be a selection exercise based upon allocation of points as against criteria having followed a process. All of that would have been the same.

3. On the last occasion the claimant, represented by Mr Johns, launched a spirited attack on the criteria. There were three primary criteria: current skills, performance and adaptability and flexibility. We rejected at paragraph 41 of our decision Mr Johns' contention that the criteria, and the manner of the evaluation being reliant on stakeholders, was so subjective as to be unreasonable. We found that the criteria were relevant to the roles and the stakeholders were in position to evaluate the candidates' performance in those roles. We accepted the respondent's position that it was reasonable to have some evaluation of competence and performance against criteria by those who were in the best position - the stakeholders.

4. The successful challenge to the process has been that the relevant managers, including Ms Sandhu, should not have been in the same pool. She should have been in a separate pool. As we know, as it happens, she scored heavily and was, along with her fellow managers, at no real risk of redundancy at the end of the day. However, by putting them in the same pool certainly created the appearance of bias and was, as we found, a most unusual thing to have done.

5. We have to recreate what the likely position would have been either if Ms Sandhu was in a separate pool, or indeed if another manager not at risk of redundancy, undertook receiving feedback from stakeholders. Would similar scorings have resulted given that the stakeholder process involved asking stakeholders open questions as against the criteria, obtaining the information from them, their views and observations as to the performance of the relevant candidate for redundancy. We have documented in detail the feedback given by the stakeholders in our findings; some slightly more favourable than others, some relatively negative and from that feedback we ascertained that the scorings ascribed to the claimant against the criteria were objectively sustainable. We have Excel spreadsheets of all the feedback as against every candidate carefully collated. The process was, at the first stage, that the relevant manager would obtain the stakeholders' comments, would then transpose that information into the Excel spreadsheet and there would then be moderation meetings across management to check the fairness of the scoring as against the information obtained from the stakeholders and the appraisals.

6. That process resulted with the claimant, in a comparative table of nineteen employees, being positioned on the league table second from bottom with 51 points. The lowest scoring employee was 37 points, next up 62, 65 and then there were seven at a tiebreak of 76 points. For the claimant's to have reached a tiebreak, that is with a chance of keeping her job, she would have needed 25 more points. Doing the best that anyone could do in construing the marks that she got, she might have, on one view, got 65 points; but there was no likelihood objectively, on the answers given by the stakeholders, that she could obtain 76 points.

7. We expressly found that Ms Sandhu had done a fair job in good faith in recording the information available from the stakeholders and the appraisals in respect of the claimant. Does the respondent show that the likelihood is that any other manager would have obtained the same sort of information resulting in the same scoring? The claimant does not show that there was material that was overlooked and she does not show that she ought to have hit 76 points and then a tiebreak. Regrettably, she does not do this and it is material in this regard that the claimant did not appeal within the Respondent's procedure. We understand that she lost confidence in the respondent. By the same token she did not adduce any other material or basis of assessment which would have been accepted as meaning that she fell out of the bottom six of those who were selected for redundancy.

8. Does the Respondent show it would have fairly dismissed for redundancy, anyway? Mr Johns' principal position has been based upon unconscious bias. Bearing in mind we found that Ms Sandhu acted in good faith, is there nonetheless a real risk of unconscious bias? The Claimant's position is a notional submission only in our judgment. It has not led to any identifiable factor from which we could make a finding that there was a likelihood that the claimant would have scored 76, and then further, won a tiebreak. We do not have the material with which to do that. All we have from the claimant is a notional submission that this was unsatisfactory for the reasons that the Tribunal found. There must be therefore some risk of unconscious bias, submits Mr Johns, and on that basis the Tribunal should find a notional percentage Polkey reduction only. The claimant submits that if the process is void then take the statistical probability of the risk of redundancy of six out of nineteen gives a 31.5% chance of being made redundant. The Polkey reduction should only be 31.5% on that basis, argues Mr Johns.

9. In wondering whether we should take any kind of notional figure, the only figure that the Tribunal was momentarily attracted to was whether there would be a one third chance that the claimant might keep her job. That is to say a statistical Polkey reduction of 67% only because there was criticism of the process.

10. After detailed consideration and having heard the submissions from the parties, we have concluded that would not be an intellectually honest position to arrive at. It would be a notional position. We need to root a conclusion in evidence. Unfortunately, when we do that, although we do make criticism of this most unusual practice of pooling the managers who undertake the interviews with the stakeholders in the overall redundancy pool, we still need to root the claimant's prospects in evidence. We cannot ignore the assessment of the feedback that was recorded, coupled with the analysis of the appraisals. We know the relative position because of the Excel spreadsheets and the two moderation meetings. The respondent shows the claimant's relative position with others.

11. It is unfortunate for someone with a length of service such as the claimant's. As we said in our judgment, there is no question of any contributory fault. It is unfortunate that someone with her background should leave in a redundancy process. Six people were going to be made redundant in any event. We do not have the material upon which to say that the claimant had

a realistic prospect of not being in the bottom six; she was in the bottom two. There is an argument that she might have been in the bottom four but there was no argument based upon evidence whereby we find she had real prospects of not being selected for redundancy. The Respondent shows a 100% chance that the Claimant would have been selected for redundancy anyway.

12. We would have liked to have awarded a basic award to make the point to the respondent that this was a most unusual thing that they did; but of course, the claimant has already received a redundancy package including a substantial payment equivalent to a redundancy payment. Unfortunately, a basic award is cancelled out if there has been the payment of a redundancy payment. Although we would have liked to have made a basic award, we cannot because the claimant has had the equivalent in a redundancy payment. The Claimant would have to give credit in any event for the sums she received in the redundancy package.

13. The problem for the claimant in this case has been whilst there is very real procedural criticism of one aspect of this process, it does not translate into an identifiable real prospect of her having not been selected for redundancy. We do not blame her for not appealing, as she had lost confidence in the Respondent, but she did not her relative position in the redundancy by any material that might have been available to her to put in an appeal.

14. The Polkey reduction is 100%.

Employment Judge Smail
Date: 29 March 2023

Judgment & Reasons sent to the Parties: 13 April 2023

FOR THE TRIBUNAL OFFICE