EMPLOYMENT TRIBUNALS

Claimant:	Ms J Coelho
Respondent:	Soldo Software Ltd
Heard at:	London Central (by CVP)
On:	8 and 9 /11/2023
Before:	Employment Judge Mr J S Burns

Representation

Claimant:	In person
Respondent:	Mr T Westwell (Counsel)

JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

1. The claim arose out of the dismissal of the Claimant by reason of redundancy on 10/2/2023.

2. I heard evidence from Carlo Gualandri - (CEO and founder of the Respondent), Marie Degritot (HR Business partner) and then from Alexandra Oakley (Chief People Officer) and then from the Claimant.

3. The documents were in a main bundle of 1058 pages and in a supplementary bundle (SB) of 38 pages.

Facts

4. The Respondent sells Pay and Spend Automation software through two principal business formats, namely Online and Direct Sales.

5. The Claimant has previously worked for both McKinsey and Bain management consultants and by the time she was recruited by the Respondent she had had approximately 5 years strategic consulting experience. She was employed by the Respondent from 10 February 2020 to 10 February 2023 as Director of Strategy, reporting to Mr Gualandri.

6. She did not have a job description because when she was recruited the Respondent was not sufficiently organised to issue her one.

7. Although the Claimant took the initiative to do various and wide-ranging work, and did carry out some work implementing strategies that she had devised, her principal work, and the purpose of her recruitment, was to support and work with Mr Guilandri at a strategic company-wide level to undertake research and to advise him about strategy - ie about matters concerning the direction and means by which the whole business could be expanded and improved.

8. In September 2022 Anna Porra was recruited and she started in November 22 with the title of Head of Sales Planning and Operations reporting to Mr Johnson, within the Direct Sales structure. She had previously worked with Mr Johnson at another company and had a good working relationship with him. Ms Porra had a job-description (page 137) which does include references to responsibilities described as "*Run Growth Planning*" and "*Drive Growth and expansion"*. I have also noted Ms Porra's self-description on her Linked-in page (page 6 of the SB) in which she describes herself as "*Head of Market Development and Planning*", over which description however the Respondent has no control and the accuracy of which is disputed.

9. The planning and growth descriptions in Ms Porra's job description and Ms Porra's work in practice related to ways of improving the organisation and remuneration of the sales team within Direct Sales - ie was focused on comparatively menial operational tasks within a single unit, whereas the Claimant's role was strategic across the whole company. Another point of distinction was that Ms Porra had responsibility for managing three others within Direct Sales and had an established good relationship with Mr Johnson; whereas the Claimant did not have any other employees reporting to her and she was not involved in the day-to-day business operation within the Direct Sales structure.

10. On 1st November 2022, Mr Gualandri informed the Claimant that the current structure was not working as he did not have time to manage her. He said he would move her role into one of the business units, probably Online. The Claimant had been working on the Online side of the business for the previous 4 months. Mr Gualandri assured her, "*Leave it to me*".

11. Between 29/11/22- 29/12/22 the Respondent advertised for a new Head of Professional Services and the appointee started in February 23. The Claimant initially suggested that this appointment should not have occurred and she should have been offered the role instead but she did not pursue this suggestion at the tribunal hearing. In any event the role required specific engineering technical and managerial experience and skills which the Claimant did not have.

12. In December 2022 and January 2023 there was an unexpected significant change of direction forced on the business as a result of poor revenue performance showing a yearly growth of revenue of 22% against a planned target of 72% making a loss of over 22 million euros in the year. The investors and shareholders insisted on changes. The Board of Directors refused to approve further expansion and required a modified business plan.

13. A major part of the new plan was a requirement to cut costs and focus on direct sales rather than on the expensive online sales. A hiring freeze was put in place. The online sales business team (to which Mr Gualandri, in November 22, had suggested he might be able to transfer the Claimant) ceased to exist as a separate unit. The Respondent was no longer executing an expansion strategy and was abandoning its plans on growth to new countries, and instead focusing on restructuring the operational execution of the existing business which would be carried out under the autonomous responsibility of the various leaders of the surviving teams.

14. The resulting cuts did not only affect the Claimant. 6 other senior employees apart from the Claimant were made redundant starting in February/March in 2023 and a proposed increase in the total Respondent headcount was reduced from the 464 proposed in late 2022 to 354 achieved by August 23 (although this was in fact 7 more than the previous year).

15. Mr Guilandri decided in January 23 that an inevitable consequence of the change of direction was that the Claimant's role of Director of Strategy would have to be eliminated. By early February 23 he had taken advice from HR and reached the view also that for redundancy purposes the Claimant would be in a pool of one.

16. It was at this point that the consultation with the Claimant was started on 3/2/23. The deletion of her role was presented as an accomplished fact and the consultation mainly restricted to the question of whether an alternative role could be found for the Claimant. Nothing could be found because the only vacant role at that time was for a Director For (Anti) Money-Laundering which the Claimant was unsuitable for.

17. At the second consultation meeting on 9 February 2023 the Claimant raised the issue of her selection as recorded in the note of the meeting as follows : "*JC stated that she has not been provided with any selection criteria or evidence of why she has been selected for redundancy, nor any information or explanation about why others at a similar level have not been part of the same process also. JC stated that she does not know who she was compared with or how she was compared. JC stated this should have been completed by Soldo and shared*" .

18. After a third and final consultation meeting on 10 February 23 the Claimant was dismissed that day with pay in lieu of notice and a statutory redundancy payment.

19. In the dismissal letter the Respondent gave its explanation for the Claimant having been in a pool of one as follows: *"A second consultation meeting was held as a further opportunity to put forward any suggestions to avoid redundancy. You again had some questions or queries on the process, including the question of why Soldo had not created an 'at risk' pool to select from and why you were therefore the only employee being consulted with. It was explained that Soldo does not have a large number of senior employees at director level and that Soldo considers your role to be the only position within the Company that is responsible for strategy at a Company level. It was for this reason that the role you hold had been selected for redundancy, no other role was affected and there were no further roles that would require a pool of affected employees".*

20. After dismissal the Claimant appealed and her appeal was considered on the papers by Ms Oakley and Mr Johnson. The appeal was dismissed, - the letter stating "*It is not a requirement for Soldo to consider you for roles you feel are within your skillset, or might be roles you have previously held at other organizations, when that role is not being considered for redundancy and where there is a person already employed in that role*."

21. The Claimant then complained that Mr Johnson should not have sat on her appeal because he would have been biased in favour of retaining Anna Porra (rather than the Claimant).

Relevant law

22. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

    "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 –

    the fact that his employer has ceased or intends to cease –(i) to carry on the business for the purpose 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

    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"

23. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows: "*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) depends upon 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 shall be determined in accordance with equity and the substantial merits of the case*.'

24. Where redundancy is established, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on

which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.

25. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. Hodgson J in R v Gwent County Council ex parte Bryant 1988 COD 19.

26. The question whether the question as to whether consultation would make any difference is irrelevant to the question of fairness, (per Lord Mackay LC in Polkey 504, 4-5). However, both Lord Mackay and Lord Bridge allowed of an exception to the normal rule that consultation ought to take place, namely where to engage in consultation would be a useless or futile exercise.

27. In Mogane v Bradford Teaching Hospitals NHS Foundation Trust and Another 2023 IRLR 44 the EAT (Judge Beard) held that starting consultation after the claimant in that case had been selected and placed in a pool of one meant that consultation had not occurred at a formative stage and was unfair. The claimant and another nurse had been in the same or very similar roles and both would have been in the pool but for the fact that the claimant's fixed-term contract ended earlier than that of the other nurse. Simply choosing the claimant as the person to be made redundant because of her contract-expiry-date had resulted in a *fait accompli* based on an arbitrary decision which the claimant had had no opportunity of affecting.

28. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. Thomas Betts Manufacturing Ltd v Harding 1980 IRLR 255 CA. However, in choosing the pool the employer must act reasonably and must have a justifiable reason for excluding a particular group of employees from the selection pool where the excluded category do the same or similar work to those who are up for selection. British Steel PLC v Robertson EAT 601/94.

29. It is not the function of the Employment Tribunal to decide whether it would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

Conclusions

30. There was a genuine redundancy situation affecting the Claimant's role in that the Respondent had a decreased need for an employee working at a company-wide strategic level. Redundancy was the reason for the dismissal.

31. The Claimant complained she should have been told in November 22 that she was at risk of a redundancy dismissal, so she could have looked for a vacancy then and

(at least at one point of her case) applied for the Head of Professional Services role, which was advertised from late November 22 and filled in December 22. However, the Respondent in the person of Mr Gualandri did not know about the forced change of direction and the abolition of the online sales unit and that the Claimant's strategic role was redundant until shortly before he told her this in early February 23. He could not have told her she was at risk of a redundancy dismissal before then, because she was not at risk earlier.

32. The Claimant complained that the consultation did not start at the formative stage but only after the decision had already been made to delete her role. She submits that she should have been asked before that decision was made for her views on such matters as other possible ways in which the Respondent could have saved costs or, if her role was redundant, whether she should be pooled for selection with anyone else.

33. The Claimant says she should have been put in a selection pool with Anna Porra or allowed to bump Anna Porra out of her role in Direct Sales. She says that the Respondent's argument that her and Ms Porra's roles were dissimilar is weakened, by the facts firstly that the Claimant did not have a written job description and secondly because a selection exercise was not carried out using objective criteria and a transparent matrix. Alternatively, the Claimant says that even if the roles were different, as she and Ms Porra had interchangeable skills, they should have been put in a selection pool together.

34. I have considered the authorities cited above and in particular Mogane which Mr Westwell brought to my attention.

35. Mogane was a case in which two nurses were doing the same role, and the respondent hospital, because of financial strictures, needed to dismiss one nurse but allow the other to continue in her employment. The problem with the consultation in that case was not that the claimant had not been consulted about the possible ways (other than by dismissing one nurse) in which cost-cutting could be achieved but that she had not been consulted about how the consequent choice (about who was to be dismissed) was to be made. Hence Mogane is not authority for the proposition that an employee has the right to be consulted before the employer decides whether costs need to be cut, or, if so, where in the business the cuts should fall.

36. In the instant case, cost-cutting had been forced on Mr Gualandri by the Board and in turn on the Board by the investors and shareholders who otherwise would have withdrawn their support, which support was vital for the Respondent to keep trading. In these circumstances as CEO Mr Gualandri had the right as well as the obligation to act independently, quickly and without the necessity of prior consultation with the Claimant in deciding that the company-wide strategic expansion (which it was Claimant's role to promote) would cease, and the separate online sales unit would close and the Strategic Director Role be extinguished.

37. Where and how cuts had to be made across the organisation was the type of decision which the CEO was responsible for making and the Claimant did not had any right to be asked about it first. Nor could she reasonably have altered or affected that decision. Such consultation would have been futile. Furthermore, the Claimant did not put forward any

suggested alternative costs cutting measures either during the internal consultation or during the tribunal process.

38. Mogane is an example of a case in which the employee should have been consulted as to who should be put in a selection pool and about what the selection criteria should be. However, in contrast to the facts in Mogave , in Ms Coelho's case she was the only person doing the role which was redundant and I have found that there was no other person doing a role which was similar.

39. In Mogane the decision not to put the claimant in that case in a pool with the other nurse doing similar work was based on an arbitrary decision and a single criterion. In Ms Coelho's case the Claimant was put in a pool of one because she was the only person doing her role and all other roles were dissimilar. The redundancy of her role did not result from the arbitrary choice of a single criterion, but rather from an enforced change of direction away from expansion which it had been the Claimants specific and sole role to direct and advise on.

40. The Respondent decided that it did not want to put persons performing different roles in a pool with the Claimant and that it did not need to carry out a comparison between the skills, past experiences and potentials of the Claimant and of others who were established in different non-redundant roles.

41. On the facts of this case the Respondent was entitled to put the Claimant in a pool of one without consulting her about it first.

42. Although consultation did not start at the very beginning of the chain of events and decisions which lead to the redundancy situation arising, consultation started soon enough to be reasonable.

43. I agree that it would have been preferable if the Claimant had had a written job description. I also accept that the Claimant, who is a capable and hard-working person, could probably have adequately performed Ms Porra's role had the Claimant been allowed to bump Ms Porra out of her role.

44. Nevertheless, it is clear that the Claimant's and Ms Porra's roles were markedly different. Ms Porra was also established in her role and was apparently successful in it and she had a good working relationship with Mr Johnson. There is no obligation to bump other employees who are succeeding in non-redundant roles. I agree with the statement quoted above from the letter dismissing the appeal.

45. The Claimant complained that the redundancy process was rushed through to avoid having to pay her a slightly higher statutory redundancy payment to which she would have been entitled had the process been delayed by a further week or so. This is not based on any evidence and is inherently unlikely.

46. The period of consultation was short but the contemporaneous documentation suggests that it was reasonably thorough. It was long enough for the Claimant to be provided with and to study an organisational chart she had requested, and to consult with two firms of

lawyers. She was also granted a postponement of one meeting. By the time the process ended there was nothing more to be discussed as no suitable alternative role had been identified after a search by both the Respondent and the Claimant. In paragraph 18 of her POC the Claimant accepted that there were no suitable alternative vacant roles.

47. The Claimant complained that her appeal was affected by the possibility of bias on the part of Mr Johnson, because of his close working relationship with Ms Porra. Ms Oakley agreed that if she had been alive to the point at the time, she would not have chosen Mr Johnson to help her with the appeal. However, she was not alive to the point, firstly because the Claimant's appeal was not focused on Anna Porra specifically (but rather focused on matters such as her lost bonus and opportunity to gain equity), and secondly because the Claimant raised it only after she received the letter dismissing the appeal. The Claimant could not have raised it earlier because she did not know before that Mr Johnson would get involved in the appeal.

48. Mr Johnson's involvement in the appeal was unfortunate but he was not involved in the earlier stages of the process and it did not materially affect the overall fairness of the dismissal, and it would have made no difference if some other suitable person had assisted in the appeal.

49. The Respondent's procedure as a whole was within a range of reasonable responses.

50. Therefore, the claim is dismissed.

Employment Judge J S Burns
9/11/2023
For Secretary of the Tribunals
Date sent to parties : 09/11/2023