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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104318/2023 (V)

Public Final Hearing in Glasgow ET (by CVP) on 16-17 November 2023

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Employment Judge Tinnion

Mr. S. Cain

Claimant  
In person

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Cobry Ltd.

Respondent  
Represented by  
Ms D. Rookes (Solicitor)

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### JUDGMENT

1. The Claimant's complaint of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 is not well founded and is dismissed.

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### REASONS

#### Pleadings

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1. By an ET1 presented on 17 August 2023, Claimant Mr. S. Cain presented a single claim of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 (ERA 1996). By its ET3/Paper Apart, the Respondent denied the claim. It accepted dismissing the Claimant on 3 July 2023, but contended it had fairly dismissed him for redundancy and followed a fair redundancy procedure.
2. At the commencement of the hearing, the Claimant confirmed he had no complaints about anything other than the reason for his dismissal, and would not be arguing that the Respondent did not follow a fair redundancy procedure

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or had failed to make reasonable efforts to find alternative employment. The Claimant stated that his case is that it was a “*sham*” redundancy dismissal. When asked what he said the real reason was for his dismissal, however, the Claimant declined to suggest any alternative reason on the basis that he had not made the decision, did not know, and did not wish to speculate.

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3. At the commencement of the hearing, the Respondent confirmed that (a) it relied upon s.139(1)(b)(i) of ERA 1996 only (b) the “*particular kind of work*” which it alleged had diminished or was expected to diminish at the time of the selection for redundancy and dismissal was ‘*Change Management*’ work (“**CM Work**”).
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#### Issues

4. Based on the above, the issue for determination was narrow - was the Claimant’s dismissal wholly or mainly attributable to the fact that the requirements of the Respondent’s business for employees to carry out CM Work had diminished or was expected to diminish (it was common ground that the Respondent’s requirement for employees to do CM Work had not ceased nor had it been expected to cease entirely). The Claimant accepted he had received a redundancy payment, made no claim for a basic award, and limited his claim for compensation to 4 months pay having secured alternative employment elsewhere.
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#### Evidence

5. The claim was heard on 16-17 November 2023 (via CVP). The Tribunal heard evidence from three witnesses: Mr. S. Cain (Claimant); Mr. R. McKenna (Head of Finance and Operations); Mr. C. Bryce (Managing Director). The Tribunal was satisfied all three sought to give their honest, best recollection of events, none sought to embellish or exaggerate their evidence. All three were cross-examined, and before the Claimant cross-examined Mr. McKenna and Mr. Bryce the Tribunal informed the Claimant of the requirement to ‘put
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his case' to them where material facts were in dispute (which the Tribunal explained to the Claimant, and was satisfied he understood).

6. A Respondent production of 214 pages was provided (references to which are made in the square brackets), to which a small number of documents were added during the hearing. Having been given time to check, the Claimant confirmed all documents in his production were also in the Respondent's production, which the Claimant confirmed he was content to use. Both parties made oral closing submissions.

#### Findings of fact

7. The Tribunal makes the following findings of fact (and any contained in the other sections of this Judgment) on the civil balance of probabilities.

#### Parties

8. The Respondent provides IT/software services to business clients in the UK. Its founder, principal shareholder and Managing Director is Mr. C. Bryce. It is a small business, with fewer than 20 employees. Mr. R. McKenna is its Finance Officer. It has no dedicated HR department, instead paying a monthly retainer for external HR advice and documentation.

9. The Claimant is an experienced IT/software specialist with recognised expertise in Google's 'Workspace', a suite of business collaboration and productivity software products which include Gmail, Drive, Meet, Calendar, Maps, Docs, and Sheets. The main marketplace alternative is Microsoft, which offers a similar suite of collaboration and productivity products including Outlook, Word and Excel under the Office 365 and Office brands.

#### 2021

10. In 2021, the Respondent was seeking to secure a contract with Yonder Group Ltd, a UK subsidiary of US parent business 'Yondr'. This contract, if it materialised, would be a major business development – Yondr would be the

Respondent's biggest client and revenue source. The Respondent's negotiations with Yondr were successful, and the Respondent secured its first retainer agreement with Yondr (a copy of which was not included in the Respondent's production).

5 11. Mr. Bryce first contacted the Claimant on LinkedIn. The Claimant's expertise in Workspace was noted. In brief, Mr. Bryce sought to recruit the Claimant to work for the Respondent as its in-house Workspace expert. It is not in dispute that the Claimant's employment was linked to, and contingent upon, the Respondent securing the Yondr contract.

10 12. On 25 February 2021 [82], the Claimant and Respondent e-signed an employment contract [72-82] stating his employment would begin on 1 March 2021. Para. 2 of the contract stated his job title was Google Workspace Lead, reporting to the Managing Director. The contract itself did not specifically tie the employment to the Yondr contract. The Claimant's salary was £55,000  
15 (gross), which made him the highest earning employee at the time.

13. When the Claimant began working for the Respondent in March 2021, he began doing CM Work for Yondr pursuant to the Yondr contract. Yondr was not his only client - he also did CM Work for the Respondent's other clients.

## 2022

20 14. Yondr and the Respondent subsequently agreed an updated retainer agreement [119-125] for the period 11 March 2022 – 31 May 2023 [123].

15. In 2022, the Claimant continued to work for the Respondent doing work for Yondr, including CM work. However, during this period, the Claimant gradually began to assume additional management responsibilities. The  
25 Claimant's job title, however, remained Google Workspace Lead, which remained his title up until the time of his dismissal.

2023

16. By May 2023, the Claimant's work mix was considerably different from the mix when he joined in March 2023. Most relevantly, he was now doing far less CM Work for Yonder than before.
- 5 17. In 2023, Yondr informed the Respondent it was looking to change its contract. Yondr intended to move away from a fixed contract with the Respondent involving a large number of licences and monthly retainers to a contract which had no minimum number of licences. Importantly, Yondr notified the Respondent of its intention to move from Workspace to Microsoft for its  
10 collaboration and productivity apps. The Respondent subsequently entered into a new retainer agreement with Yondr reflecting those changes [126-132].
18. In late April or early May 2023, the Respondent's accountants created a forecast of the Respondent's 'net income' (ie, monthly profits/losses for the 12-month period 31 August 2023 to 31 July 2024 [117], reflecting the  
15 anticipated effect the loss of the original Yondr contract would have on the business. That forecast, which the Claimant did not challenge in cross-examination, forecast the Respondent would make monthly losses in the 6-month period 31 August 2023 – 31 January 2024 (-£9,200, -£6,685, -£7,738, -£4,807, -£3,955, -£3,060), before returning to relatively modest monthly  
20 profits in the 3-month period 29 February – 30 April 2024 (£1,477, £2,462, £7,214) with significantly greater profit forecast in the 3-month period 31 May – 31 July 2024 (£19,726, £20,533, £20,109).

Claimant's redundancy

19. The accountants' forecast was discussed at board level. The decision was  
25 made, and approved by the board and Mr. Bryce (who had final approval on all key business matters), to make the Claimant's post redundant. Mr. Bryce (the Respondent's founder, owner and MD) was the key decision-maker regarding the Claimant's redundancy and dismissal.

20. On 21 June 2023, Mr. McKenna verbally notified the Claimant he was at risk of redundancy. By letter to him dated 21 June 2023 [86], Mr. McKenna stated:

5                   “... due to the upcoming conclusion of our contract with one of our existing clients, we are expecting a decline in current and anticipated income and workload. Due to this, there is an urgent requirement to reduce overhead costs, and therefore we are making your role as Google Workspace Lead redundant, as this role was initially hired in direct relation to gaining this contract. Therefore I am writing to advise you that you have been selected for potential redundancy, as you are in a standalone role with the duties you carry out, you are the only person that is at risk.”

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21. On 26 June 2023, a first (remote) redundancy consultation meeting was held, which the Claimant attended [88-91]. The notes record the Claimant as having understood the reason for redundancy but not agreeing with it [89]. By email on 26 June 2023 [92], the Claimant was sent a copy of the note for his agreement. The Claimant was invited to a second consultation meeting [94].

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22. On 3 July 2023, a second (final) redundancy consultation meeting was held, which the Claimant attended [100-104]. The notes record the Claimant as not requiring further clarification of the reasons for his potential redundancy [101]. After a brief adjournment, the Claimant was told his position was being made redundant, with his notice period beginning on 4 July 2023. The Claimant was not required to work his notice period.

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23. By email on 3 July 2023 [105], the Claimant was sent a letter notifying him of his dismissal on grounds of redundancy [107], which stated (in relevant part):

25                   “*The reason for the redundancy is a result of the upcoming conclusion of our contract with one of our existing clients [Yonder] and lower-than-anticipated profits this year. As a result, we expect a decline in current and anticipated income and workload for the technical team. This lack of anticipated workload comes from the small number of Workspace projects in our sales pipeline over the coming months. Due to this,*

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5 *there is an urgent requirement to reduce overhead costs as salaries are the largest cost in the business. This role was initially hired in direct relation to gaining this contract but also to facilitate change management for other projects that we have been unsuccessful I finding more of and there is not sufficient alternative work elsewhere within the organisation as a result of the current economic climate ... You have the right of appeal against this decision ..."*

24. By email on 7 July 2023, the Claimant appealed against the decision to make his Google Workspace Lead post redundant [108], stating (in relevant part):

10 *"I have been employed by Cobry for over 2 years and have consistently exceeded expectations in my role. I have a strong record of performance and have been praised by Colin for my work on many occasions. In my most recent performance review, we discussed the work I do outside my normal working hours including on my 20%,*  
15 *holidays and weekends. Colin agreed we need to look into this. I understand that the company is facing difficulties, but I believe that my redundancy is unnecessary. I am willing to take a pay cut if necessary ... In addition to my strong track record of performance, I also have a number of skills and experience that makes me a unique*  
20 *asset to the company. I am also a team player and I am always willing to go the extra mile. I believe [ ] my redundancy is unnecessary. I am requesting that you reconsider your decision and allow me to keep my job."*

25. By letter dated 10 July 2023 [111], the Claimant was invited to an appeal meeting on 13 July 2023. On 13 July, the Claimant asked the Respondent to decide his appeal based on his writings and dispense with the meeting [112], which the Respondent agreed to if that was his preference [113-114].

26. By letter dated 17 July 2023 [115], Mr. Bryce notified the Claimant his appeal was unsuccessful. His letter explaining that decision stated in relevant part:

“Firstly, I would like to emphasize that this decision is in no way a reflection of your performance or capabilities. No-one is suggesting that you have not performed your duties to the highest standard. Your contribution to the team has been consistently valued and appreciated. Speaking personally, I really appreciated all the knowledge and passion that you brought to your time with Cobry and I know both I and the team will miss you. The redundancy is purely a business decision based on financial considerations and operational efficiency. We find ourselves in a situation where the work you’ve been doing could be carried out at a lesser cost through other means, primarily by leveraging internal training opportunities for existing team members. This would allow us to allocate resources more efficiently in a challenging business environment with the upcoming changes to our largest customer contract.”

#### 15 Differences between Yondr retainer agreements

27. The table below summarises key differences between the minimum payments to the Respondent required under the Yondr agreement for 2022 - 2023 [118-125] and the revised Yondr agreement [126-132] for 2023 – 2024 [132]:

Item	2022 Agreement	2023 Agreement
Period	11.03.2022 – 31.05.2023	01.06.2023 – 31.05.2024
Standard Support Activities (up to 50 tickets/month)	£2,500 per month	£2,625 per month
Standard Change Management	£900 per month	Not provided for - nil
Advanced Security Management	£900 per month	£945 per month
Total minimum monthly cost	£4,300 per month	£3,570 per month



Law: Unfair dismissal (general)

28. Section 98(4) of ERA 1996 provides (in relevant part):

(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—*

5 (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.*

10 (2) *A reason falls within this subsection if it ...*

*(c) is that the employee was redundant ...*

*(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)—*

15 *(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*

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

29. The fairness of a dismissal must be judged based on the facts and circumstances before the employer at the time of dismissal. A dismissal will be unfair if, and only, *considered as a whole* the dismissal fell outside the band of reasonable responses open to the employer at the time – the Tribunal must not focus solely on a dismissal's procedural or substantive fairness.

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30. A reason for dismissal is a set of facts known to and/or beliefs held by the employer which cause it to dismiss an employee. Abernethy v Mott, Hay & Anderson [1974] ICR 323.

#### Redundancy Dismissals

- 5 31. Sec 139(1) of ERA 1996 states that for the purpose of that 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  
10 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.
- 15 32. The initial burden of proof that an employee was dismissed on redundancy grounds rests on the employer. If the employer produces evidence which appears to show the reason for dismissal was redundancy, the burden passes to the employee to show there is a real issue as to whether that was the true reason. The employee cannot do this merely by asserting it was not – an  
20 evidential burden rests on the employee to produce evidence that casts doubt on the employer's reason. This burden is a lighter burden than the burden on the employer; it is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue. Maud v Penwith Council [1984] ICR 143 at 148-149, paras. G-C.
- 25 33. The language of para. 139(1)(b) of ERA 1996 raises two questions, both of fact: first, whether one or other of various states of economic affairs exist; second, whether the dismissal is wholly or mainly attributable to that state of affairs. Murray v Foyle Meats Ltd. [1999] 3 WLR 356 at 358, paras. F-G. There  
30 is no reason in law why the dismissal of an employee should not be attributable to a diminution in the employer's need for employees irrespective

of the terms of the employee's contract or the function the employee performed. Id. at p.360, paras. A-B.

34. The statutory definition of redundancy is not directed towards diminution in particular work but to a diminution in the employer's requirements for employees to do a particular kind of work. Thus even if the work in question remains to be done, an employee will be redundant if the business so organises its affairs that the work is done (or to be done) by fewer employees. Cullen v Davison Ltd. [1988] IRLR 30.

35. Provided a genuine redundancy situation arises, the Tribunal does not have jurisdiction to determine whether the decision to have redundancies either at all or in the numbers decided upon rather than an alternative course of action was unfair or unreasonable. In a genuine redundancy situation, the decision whether to make posts redundant is a business decision for the employer. Moon v Homeworthy Furniture (Northern) Ltd. [1976] IRLR 298.

Discussion / conclusions

36. Having considered the documentary and witness evidence, the parties' submissions, and the way each put their case, the Tribunal concludes that the Respondent has satisfied its burden of showing that the Claimant's dismissal on 3 July 2023 was wholly or mainly attributable to the fact that its requirement for employees to carry out work of a particular kind – both work for client Yondr in general and CM Work more particularly – had (a) diminished by that time, and (b) was expected to diminish further after that date.

37. The Tribunal's reasons for reaching that conclusion are as follows:

38. First, the principal reason the Respondent hired the Claimant in 2021 was to assist it in supplying services to Yondr pursuant to its new retainer agreement with Yonder, principally services relating to Google Workspace, including (but not limited) to CM Work for which the Respondent was to be paid in the region of £900 per months (plus VAT).

39. Second, the revised 2023-2024 Yonder retainer agreement showed a reduced need on the Respondent's part to provide services to Yondr – Yondr's minimum monthly payment to the Respondent was to reduce from £4,300 per month to £3,570 – a 17% reduction. The 2023-2024 retainer agreement omitted any obligation on Yondr's part to pay the Respondent for CM Work – that specific category of work was 'dropped' from the contract.
40. Third, by no later than May 2023 it was Yondr's intention to migrate from Google Workspace for its collaboration and productivity software needs to Microsoft's competing suite of products, which the Claimant had no special expertise in (in contrast to his recognised expertise in Workspace).
41. Fourth, by May 2023 the Respondent's accountants were forecasting that without corrective measures the Respondent would make monthly losses for the 6-month period 31 July 2023 – 31 January 2024 [117]. The Claimant did not suggest this was not the accountants' genuine forecast at the time.
42. Fifth, in these circumstances, in May and June 2023 the Respondent considered – reasonably in the Tribunal's view - the measures it could take to cut costs, and in that respect, it focussed on cutting salary costs, which the Tribunal accepts was the single largest element of its costs base at the time (the Respondent started off as an entirely remote business, the Claimant was hired in 2021 as a remote employee, and by 2023 many of the Respondent's staff were still working from home). The Respondent's premises are a modest rented office in Glasgow.
43. Sixth, in May – June 2023, the Claimant was the Respondent's highest paid employee. Terminating his employment, provided it could be accommodated with continuing to service the Respondent's ongoing business needs, would result in a significant reduction in its costs base.
44. Seventh, the Tribunal accepted the evidence of the Respondent's witnesses that the management work the Claimant had increasingly performed for the Respondent could be absorbed by its remaining staff.

45. Eighth, at the time of his dismissal, the Claimant accepted the Respondent was genuinely facing difficulties [107], which the Tribunal infers must have been a reference to business difficulties of some description.

5 46. Ninth, the Tribunal is satisfied that there was no reason for the Claimant's dismissal other than redundancy. Although the Claimant described it as a 'sham' redundancy dismissal – a term which would normally suggest that another ulterior reason was the real reason – the Claimant canvassed no other reason for his dismissal (when invited to offer an alternative reason he declined), and did not put to Mr. Bryce that he had been selected for  
10 redundancy or dismissed for any reason other than redundancy.

47. Tenth, there is no evidence nor any suggestion that the Claimant's dismissal was caused by or had anything to do with his conduct or capability, or was because of personal caprice on the part of Mr. Bryce or the Board of Directors, or was because of any antagonism towards him – the Claimant was a  
15 dedicated, flexible employee with valuable expertise in Google Workspace, and the Respondent recognised that. The Tribunal accepts the Respondent's submission that the Claimant was dismissed for purely business reasons which did not detract from his qualities as a hardworking, loyal employee. The Claimant enjoyed working for the Respondent, had a good relationship with  
20 Mr. Bryce, and would not have offered to take a pay cut instead of being dismissed if he had not wished to remain an employee there.

48. Eleventh, the Claimant challenged his dismissal on numerous grounds. Having considered those grounds, the Tribunal was satisfied that none showed that either (a) the Respondent was not in a genuine redundancy  
25 situation, or (b) the Claimant had been dismissed for any reason other than redundancy. 2023 business trip to California. The Claimant challenged his dismissal on the grounds that in 2023 the Respondent had, for the first time, at presumably some considerable expense, flown staff to the USA to attend a major Google presentation in California and paid associated costs (hotels,  
30 etc). The Tribunal accepted the Respondent's evidence that attendance at this event was as much about promoting the Respondent and developing

business opportunities as it was about educational/training on Google products – there is no inconsistency between attending business events to network, meet potential new clients and ‘drum up business’ and a need to reduce costs. Hiring new staff. The Claimant contended that the Respondent could not be in a redundancy situation because it hired 7 new staff in 2023. The Tribunal was satisfied by the Respondent’s explanation in relation to each new hire. New office space. The Claimant challenged the need to cut costs because the Respondent had rented additional office space. On closer examination, there was nothing untoward about this transaction – the Respondent occupied relatively small office premises, and needed some additional office space in which to have private conversations, which it achieved by renting a room adjacent to its office which had become available in the same building.

49. For the reasons stated above, the Tribunal finds that the Claimant’s claim of unfair dismissal is not well founded and is dismissed.

50. Finally, the Tribunal notes that if it erred in finding that the Claimant’s dismissal was wholly or mainly attributable to a redundancy situation, the Tribunal would have found that his dismissal was for the potentially fair reason of ‘some other substantial reason of a kind such as to justify the dismissal on an employee holding the position which the employee held’ under s.98(1)(b) of ERA 1996.

**Employment Judge: A Tinnion**  
**Date of Judgment: 14 December 2023**  
**Entered in register: 15 December 2023**  
**and copied to parties**