EMPLOYMENT TRIBUNALS

Claimant: MR FOZLU MIAH

Respondent: BOOTS MANAGEMENT SERVICES LIMITED

Heard at: Watford **On**: 9 & 10 February 2023

Before: Employment Judge Skehan

Appearances

For the Claimant: Mr S Miah, friend of claimant.

For the Respondent: Ms S Bowen, counsel

WRITTEN REASONS

JUDGMENT having been sent to the parties on 17 March 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

1. The Judgment in this matter was dated 10 February 2023. The claimant's claim for unfair dismissal was unsuccessful and dismissed. No request for written reasons was made at the conclusion of the hearing. I received the request for written reasons in this matter on 5 January 2024 and received the available documentation held by HMCTS on 17 January 2024. I have completed these reasons as quickly as possible following this time. I can see from the email correspondence that the claimant requested a copy of the reasons on 17 March 2023 and has emailed the tribunal at least three further times chasing these reasons. There has been an administration error in failing to forward these requests to me. I apologise to the claimant for the delay in providing these reasons.

The Hearing

2. At the start of the hearing the tribunal spent considerable time revisiting the issues. These were:
    a. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or some other substantial reason. The claimant explained that he accepted that the reason for his dismissal related to redundancy but questioned the process used by

the respondent. This concession was withdrawn by the claimant in his final submissions. I considered the reason for dismissal as a 'live' issue in any event.

b. If the reason was redundancy, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
    i. The respondent adequately warned and consulted the claimant;
    ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
    iii. The respondent took reasonable steps to find the claimant suitable alternative employment;
c. Was dismissal was within the range of reasonable responses from a reasonable employer.

3. The claimant had not prepared a witness statement. The claimant produced a lengthy statement from Mr Farhad Miah. This was Mr Farhad Miah's review of the claimant's case together with legal argument and was intended by the claimant to be used as evidence. Mr Farhad Miah was not present at the hearing, and he had played no part in the circumstances giving rise to this litigation. I explained to the claimant that while I had read the witness statement, very little weight could be placed upon it. I discussed how best to proceed with the parties. I noted that the claimant had prepared a six page detailed attachment to his original claim form and it was agreed that this would be taken as the claimant's witness statement. Further time was given to both parties to revisit the claim form in detail. It was agreed that the litigation did not include concerns raised by the claimant in relation to furlough and these could be ignored.

4. I heard evidence from Ms Annan, Ms Visram and Mr Gordon on behalf of the respondent. I heard from the claimant on his own behalf. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

The Facts

5. The respondent is 'Boots' the well-known retail pharmaceutical chain. The claimant was employed from 27 February 1999 to 31 August 2020. The claimant during the material time was employed as an assistant manager In the Edgware store and worked 15 hours a week at weekends.

6. Acas early conciliation commenced and concluded in this matter on 23 October 2020. By claim form dated 8 November 2020, the claimant claimed unfair dismissal only. The respondent's notice of appearance was accepted by the tribunal and the matter was defended.

7. On 9 July 2020 the respondent's CEO Sebastien James issued a statement to all staff relating to changes to the business due to Covid 19. This highlighted that there were just not very many people visiting the retail part of the stores during lockdown. The respondent identified a potential redundancy scenario and produced a detailed guide for its management dated July 2020 to assist managers in dealing with the forthcoming redundancy rounds. The respondent identified that it is a requirement for assistant managers within the Edgware branch had reduced.

8. Ms Annan, the Edgware branch manager, held a general staff meeting on 9 July 2020 to discuss the proposed reduction in hours for assistant managers. The Edgware branch had two assistant managers. The claimant was informed in writing and warned of the possibility of redundancy and invited to an individual consultation meeting by letter dated 13 July 2020. The claimant was sent a proposed template for the scoring criteria and asked to complete this prior to the first meeting.

9. The claimant's claim form contains an allegation of bias on the part of Ms Annan, however this was withdrawn and abandoned by the claimant.

10. Turning to the selection criteria adopted by the respondent. The claimant agreed that the selection criteria were objective. The selection criteria included performance, business knowledge, customer care, working at pace, technical skills, building and maintaining relationships, communication skills and leadership skills.

11. The first consultation meeting with the claimant was held on 15 July 2020. Ms Annan had prior to the meeting sent the claimant the proposed scoring criteria and had provisionally completed her scoring of the claimant, to facilitate discussion during the first consultation meeting. The claimant had not completed his own scoring as requested prior to the meeting. The claimant was allowed further time during this meeting to provide his scoring. Ms Annan said that the scoring was thereafter discussed. Ms Annan had provisionally scored the claimant 27/84 on the various competencies. The claimant scored himself 75/84 across the competencies. The claimant said there was no discussion between him and Ms Annan in relation to his scores prior to 3 August 2020. The claimant's evidence on this was confused, contradictory and at times incoherent. I consider it likely that that there was discussion on the scores as set out in Ms Annan's statement and supported by the hand written notes in the bundle.

12. When looking at the performance scoring the claimant complains that the scoring criteria does not exactly overlap with the existing performance rating within the respondent. The claimant complains of a lack of data showing the days or number of days he worked with Ms Annan the inference being that she was

unable to fairly assess his performance. The claimant accepts that Ms Anan was his line manager and that there was no other person who could reasonably assess him under the relevant criteria.

13. It is common ground that the claimant's performance was assessed as 'not performing' In 2017 and on three occasions in 2019. The claimant's performance had been assessed in the past as underperforming by three separate managers. The claimant was on a performance improvement plan immediately prior to the redundancy consultation exercise. Ms Annan had worked with the claimant sufficiently to previously assess his performance as 'Not performing' and had implemented his PIP. The previous allegations of bias on Ms Annan's part made by the claimant have been abandoned.

14. It can be seen within the bundle that when scoring the claimant against the criteria, Ms Annan makes comments in writing supporting her scores. She has set out her reasoning for applying her scores. Ms Annan discussed the proposed redundancy scores of both assistant managers with Mr Gordon who challenged anything he thought require more explanation of evidence. Her scoring was reasoned and consistent. The claimant has provided no credible evidence to suggest scoring should be different in any way.

15. The claimant raised the possibility of a job share between the assistant managers. The respondent consulted upon and considered a potential alternative to redundancy in the form of a job share however, as the other Assistant Manager was a full-time employee, his consent was required. The job share arrangement was not possible.

16. The Edgware branch had two assistant managers. Ms Annan also carried out the same process and scoring assessment for the other Assistant Manager. A copy of this assessment appears in the bundle. That manager scored 54 out of a maximum score of 84

17. The claimant was given notice of and attended a second consultation meeting on 31 July 2020, along with his union representative. It is common ground that the claimant was provided with a list of available vacancies. He was provided with the opportunity to interview for and attended interviews for 6 vacancies of interest. On one occasion the respondent's scoring within the redundancy process was requested and utilised by the interviewing manager. The claimant was unsuccessful in his search for alternative roles within the respondent organisation.

18. The claimant questions why he was not transferred to a vacant role without the need for interview. The respondent's evidence that there were other assistant managers across the respondent's business who had also been placed at risk of redundancy. The respondent chose to utilise an interview process in relation to available alternative vacancies and considers this to be a fair and practical way of dealing with alternative vacancies over a wide geographical area.

19. The claimant was provided with a letter detailing his provisional selection for redundancy on 3 August 2020. The claimant was invited to a further meeting on 5

August 2020. The termination of the claimant's employment was confirmed during this meeting and a letter stating the outcome was produced shortly thereafter.

20. The claimant points to the job advert relating to an alternative assistant manager role in a different branch following his dismissal, claims that his redundancy was a sham.

21. The claimant appealed the decision to terminate his employment. The appeal was dealt with by Ms Visram. The claimant was assisted by a union representative. The claimant submitted that Ms Annan was biased. Ms Visram revisited the working at pace requirements and the fact that the claimant had been unsuccessful in six internal interviews was discussed. Ms Visram considered ancillary matters such as the claimants complaints in respect to family member's discount cards and furlough. The claimant complained about the typographical error within his termination letter and matters to do with the company logo on meeting notes. This is all set out in Ms Visram's witness statement. Ms Visram investigated the matter by speaking to Ms Annan and Mr Gordon and revisiting the respondent's policy documentation. The claimant's appeal was unsuccessful.

The Law

22. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. The respondent relies upon 'redundancy'. *Section 139(1), ERA* provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business -
    a. for employees to carry out work of a particular kind, or
    b. 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.

    Alternatively the respondent claims that this dismissal was for some other substantial reason.

23. If the respondent establishes that redundancy was the real reason for dismissal, then the next question, where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal. The leading case on reasonableness in relation to redundancy is *Polkey v A E Dayton Services Ltd [1987] IRLR 503* in which the House of Lords held that an employer will normally not act reasonably (and a dismissal will therefore be unfair) unless it:
    a. Warns and consults employees about the proposed redundancy

b. Adopts a fair basis on which to select for redundancy encompassing matters such as identifying an appropriate pool from which to select potentially redundant employees and proper criteria
c. Considers suitable alternative employment.

24. It is important to remember at all times that the test to be applied is the test of reasonable response. *Williams v Compair Maxam Ltd* [1982] ICR 156 at [161] provides that:
"it is not the function of the [employment] tribunal to decide whether they 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:"

Deliberation and findings

25. I have carefully considered the available evidence, documentation and submissions by the parties. I take this opportunity to comment upon the evidence that I heard generally. The respondent provided organized, coherent and consistent evidence. Their response appeared consistent throughout this litigation. The claimant's evidence tended to be, in general terms, muddled, contradictory and at times incoherent. The claimant took many small points that were fairly described by the respondent as far fetched and unreasonable matters to bring to litigation. These are not included above as they do not go to my findings of fact relevant to the issues, but included:
    a. questions relating to headed notepaper;
    b. references to a typo in the letter of dismissal relating to notice period that was easily understood from the surrounding information within the letter,
    c. questioning of whom 'FM' was in respondent's notes, when it was an obvious reference to the claimant himself.
    d. Part of Mr Miah's cross examination of a witness was on the basis that the redundancy was a mistake on the respondent's part by reference to the authenticity of the original notice from the respondent's CEO Mr Sebastien James.

    I note that all of these minor issues were abandoned by the claimant during the course of the hearing. It is obvious that none of these issues could go towards the fairness of otherwise of the claimant's dismissal.

26. The respondent has demonstrated by reference to the background of the Covid pandemic, statement by its CEO Sebastien James and witness evidence that a redundancy situation existed. The respondent's requirements for employees to carry out work of the assistant manager in the branch when the claimant was employed by the respondent had, at that time, diminished. There was no evidence to suggest and I conclude that the redundancy was not a sham as alleged by the claimant. The existence of assistant manager's role elsewhere within the respondent organisation following the claimant's redundancy is not evidence of a 'sham' redundancy.

27. There were two assistant managers within the claimant's branch and both were placed in the redundancy pool. There was no suggestion that the pool was

inappropriate in any way. In any event, the identification of the pool on this basis falls within the band of reasonable responses of a reasonable employer.

28. The claimant argued that as he was a part-time weekend only assistant manager role, there was insufficient overlap between him and Ms Annan for Ms Annan to properly assess his performance and contribution to the business. However, the claimant accepts that Ms Annan was his line manager and that there was no other person who could reasonably have assessed him under the relevant criteria. Further, the respondent had allowed for Ms Annan's score to the 'stress tested' with Mr Gordon. The claimant's allegation of bias on the part of Ms Annan was withdrawn. I was unable to identify any reasonable objection to Ms Annan's part within the process. I conclude that Ms Annan's part within the redundancy process falls within the band of reasonable responses from a reasonable employer.

29. Although unclear, the claimant submitted that as he held a part-time position working at weekends only, he was prevented from undertaking essential aspects of his assistant manager role. The claimant argued that this should not be used against him within the scoring process. I considered this argument however I concluded that the respondent had decided it had a reduced requirement for assistant managers. It was within the band of reasonable response for the respondent to identify its requirements going forward. It is commonplace in redundancy exercises for some employees, for whatever reason, to have more experience than others or strengths in particular areas. It is for the respondent to identify the applicable criteria and weight placed upon particular criteria. While the respondent is obliged to apply that the criteria fairly, it is within the band of reasonable responses for an employer to assess the criteria on the actual skills, performance and experience of each employee.

30. There were three consultation meetings. The claimant was given notice of the consultation meetings and the documentation records that he was warned of the risk to his employment in the event that redundancy was confirmed.

31. In relation to general consultation, it can be seen from the documentation that the respondent explored ways of potentially avoiding a redundancy situation in a genuine way. For example, the possibility of a work share arrangement was consulted upon and considered, however it was not agreed between potential work share partners and the respondent did not have power to force such an agreement amongst employees.

32. The risk of redundancy was explained to the claimant. The claimant clearly knew what was happening during the redundancy process.

33. Both of the assistant managers within the redundancy pool were assessed against the identified selection criteria. There was no argument from the claimant that the selection criteria identified by the respondent were inappropriate or unfair. While it is possible that a different employer may have chosen different criteria, I conclude that the criteria chosen by the respondent appears objective and relevant and falls within the band of reasonable response of a reasonable employer. I do not consider the claimant's arguments that a different definition or

wording of performance requirements between the redundancy selection criteria and the respondent's capability process is unfair or inappropriate or capable of pushing the process outside the band of reasonable response.

34. The claimant raised an allegation that the criteria and scoring were simply not discussed with him however his evidence on this point was rejected as set out above. Ms Annan provided the proposed criteria to the claimant prior to his consultation meeting. Further time was allowed for the claimant to conduct his own scoring and this was discussed with the claimant.

35. When looking at the scoring carried out by Ms Annan. She approached this with a view to discussing the scoring with the claimant and the claimant was provided a reasonable opportunity to do so. The existence of performance concerns prior to the implementation of the redundancy process, and the fact that the claimant had been assessed as underperforming by three separate managers adds credibility to Ms Annan's evidence in respect of her application of the selection criteria. I note the evidence, including contemporaneous notes kept by Ms Annan and conclude that Ms Annan conducted a careful and considered scoring process. While the claimant questioned his scoring, he has not provided any credible evidence that would lead me to conclude that the respondent's scoring of his ability with reference to the selection criteria was unfair or inappropriate. It is not for this tribunal to re-score the claimant but I look at the process followed by the respondent. In the circumstances I conclude that the scoring process carried out by the respondent falls within the band of reasonable response from a reasonable employer.

36. It is common ground that the claimant was informed of potential alternative opportunities within the respondent organisation. The claimant argues that he should have been placed directly into a vacancy. However the respondent's evidence is that there were other assistant managers from other stores who were also placed at risk of redundancy and it identified that the interview process was a fair method of allocating alternative opportunities. Further, the claimant did not apply wish to be considered for all vacancies irrespective of geography. An automatic placing into an alternative role where the geographical location of the store may be unattractive may well be unwelcome and detrimental. I can find nothing in the respondent's approach that would push it outside the band of reasonable resp from a reasonable employer.

37. The claimant questions the respondent's decision to release his redundancy scores on request following a job interview. The scores were used to decide between two potential successful candidates. The release of the scores was not prohibited by any internal policy. Scores obtained through a fair redundancy process would be a useful tool for distinguishing between potential applicants. I do not consider that allowing for redundancy scores to be considered in the circumstances to push the process outside of the band of reasonable responses from a reasonable employer.

38. There is nothing relating to the length of the consultation process that would lead this tribunal to consider it outside the band of reasonable responses. It commences on 13 July 2020 and concludes on 5 August 2020.

39. There is no substance to the allegation that the decision was predetermined by reference to the timing of the termination letter. The Claimant's submissions referred to a failure to observe a 48hr period between being informed of the termination of his employment and issuing the letter appeared misconceived. The letter was sent to the claimant following the meeting where he was informed of his redundancy.

40. The claimant was afforded an appeal and I can find no flaw within that process.

41. Taking the entirety of the evidence into account, I conclude that the respondent did warn and consult the claimant about the proposed redundancy. The respondent adopted a fair basis on which to select for redundancy in that it identified an appropriate pool of two assistant managers within the store from which to select the potentially redundant employees and it identified and fairly applied proper criteria. The respondent ensured that the claimant was informed of all available suitable alternative employment opportunities and he was allowed fair and reasonable access to those opportunities.

42. For the reasons set out above, the claimant's claim for unfair dismissal is not well-founded and is dismissed.

Costs application

43. At the conclusion of the hearing and following delivery of my oral judgment the respondent made an application for costs, limited to counsel's fees for attending the hearing were £2250 plus VAT and the respondent requested a costs order in the sum of £1000 plus VAT. It was noted that this was a fraction of the costs that the respondent had incurred.

44. The cost order was pursued by the respondent on the basis that the claim had no reasonable prospect of success. It was noted that lots of points were taken by the claimant initially but abandoned. Reference was also made to the claimant's schedule of loss. The claimant pursued this claim against the respondent understanding that he was not entitled to any compensation even if he was successful. It was submitted that the claimant's actions in pursuing this litigation bordered on vexatious. It was noted that the claimant had not complied with previous directions. He did not provide a witness statement as ordered. The claimant's actions in providing a witness statement from his brother was unreasonable.

45. On behalf of the claimant it was submitted that the tribunal case was brought to protect the claimant's dignity and respect. The claimant questioned the process followed by the respondent because of the length of time the claimant had worked within the business.

46. Costs are dealt with under rule 76. I considered the respondent's costs application under the two-stages, firstly looking to see whether the employment tribunal had jurisdiction to make such an order and thereafter considering whether it was appropriate to exercise the tribunal's discretion to do so. This is a scenario where I considered that there was an argument on the respondent's side to say that the claimant had acted unreasonably in either the bringing of the proceedings or the way that the proceedings (or part) have been conducted. In particular, the

claimant has proceeded with a claim that appeared weak at best, in circumstances where even if he were successful, he would receive no monetary compensation. I refer to the claimant's schedule of loss. Further, the claimant failed to comply with the directions to produce a witness statement and spent considerable time taking points that could be fairly described as being hopeless with many arguments abandoned during the hearing. However, this was a claimant who had been employed by the respondent for nearly 20 years. He was acting effectively in person, without professional advice. There remains the possibility of genuine misunderstanding on his part. Taking the entirety of the circumstances into account I concluded that even if it could be shown that the claimant had acted unreasonably in bringing these proceedings or in the way in the proceedings have been conducted, I do not consider it appropriate to exercise the tribunal's discretion to award costs as requested. The respondent's costs application was dismissed.

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Employment Judge Skehan

Date: ……1 .2.2024……..

Sent to the parties on: 2 February 2024

For the Tribunals Office