EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
S V A Driver	v	Weller Media Agency Limited

Heard at: London Central by CVP **On**: 18 and 19 January 2024
Before: Employment Judge Anderson

Appearances
For the claimant: T Wood (counsel)
For the respondent: M Peckham (solicitor)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is upheld.

2. Remedy will be determined at a further hearing.

REASONS

Background

1. The claimant was employed by the respondent, a digital and creative marketing agency, from 19 November 2020. At the time of her dismissal on 5 June 2023 her job title was Global Design and Development Director. The claimant brings a claim of unfair dismissal. A claim of breach of contract was withdrawn before this hearing began. The respondent's defence is that the claimant was dismissed for redundancy or some other substantial reason, namely a business re-organisation.

The Hearing

2. The hearing was listed for two days to include liability and remedy. The parties filed a joint bundle of 437 pages and five witness statements. In addition, there was a supplementary bundle of 88 pages which I admitted into evidence. The witnesses for the claimant were the claimant and John Holborow, who was, at the time of the claimant's employment, a non-executive director of the respondent. The respondent's witnesses were

Crystina Cinti, Sebastian Weller and Erika Thomas, the owners and directors of the respondent. All witnesses attended and gave evidence on oath.

3. Three preliminary matters were raised by Mr Wood and Mrs Peckham, representatives for the claimant and respondent respectively.

   a) Late witness evidence: the parties exchanged witness statements on 10 January 2024. The respondent had not expected a witness statement from John Holborrow and on reading his statement decided to serve a rebuttal statement from Sebastian Weller. This was served on 16 January 2024. Mr Wood objected to the late service. I heard the representatives on this matter. Mrs Peckham said that the respondent had no advance notice that a witness statement from John Holborow would be filed or of the claims he made in that statement. Mr Wood said that there were documents forming part of the disclosure from Mr Holborow which would have put the respondent on notice of his statement and its contents. Mrs Peckham said that the respondent did not know the documents were authored by Mr Holborow.

      While it could be expected that the respondent would endeavour to ascertain what the documents were that the claimant had disclosed if it was unsure, I do not think it is clear from the documents what Mr Holborow's evidence was likely to be. I note that the parties left witness statement exchange very late. I did take note of Mr Wood's comments that the respondent had consistently failed to meet deadlines, but also, I was told that case had been listed quickly with short preparation time. I decided to allow the witness statement from Mr Weller, which the claimant has had since Tuesday. I noted that both statements appeared to refer to matters not evidenced in the bundle and I would take this into account when considering the weight to give to this witness evidence.

   b) Covert recordings: The claimant wanted to include transcripts of three covert recordings. One was of a conversation between the claimant and Ms Cinti on 20 April 2023 regarding a complaint made to the senior leadership team by the claimant on 19 April 2023. The other two were recordings of the first and second redundancy consultation meetings. Mrs Peckham was not clear on whether she opposed the application but when I pressed her for her position objected to the inclusion of the transcript from 19 April 2023 on the grounds that it was not relevant to the claim. Mr Wood said it was entirely relevant in that it was the most accurate evidence that there was no fair reason for the dismissal.

      I had regard to the cases of *Chairman and Governors of Amwell View School v Dogherty [2007] IRLR 198, [2007] ICR 135, EAT* and *CIBC v Beck [2009] EWCA Civ 619, [2009] IRLR 740*. In *Dogherty* the EAT held that the first question to be asked in this situation is whether the recordings are relevant. In *Beck* the Court of Appeal commented that relevance alone was not enough, the evidence must be necessary to

the fair disposal of the case. I did not find that there was any issue of confidentiality attached to the three transcripts. In relation to the transcript of 20 April 2023 I found that the evidence was both relevant and necessary. It is a transcript of a conversation between the claimant and the respondent about the claimant's complaint. It is the claimant's case that the complaint led to her dismissal. I decided that the evidence should be admitted. I was less convinced of the necessity of the other two transcripts as there were notes of the meetings in the bundle and evidence that the claimant had queried whether they were accurate at the time. However, the transcripts were available, and Mrs Peckham, for the respondent, did not voice any objections to their inclusion, so I decided, they should also be admitted.

c) At the outset of the second day of the hearing Mrs Peckham said that the respondent had made further disclosure, following on from a question put to Ms Cinti in cross examination during the first day. I asked her if she was making an application to admit further evidence and she said she was. She said the parties had an ongoing duty of disclosure and the disclosure was relevant. Mr Wood objected. He said the evidence, an email from Mr Weller to Ms Cinti saying they should pause the Swedish expansion because the financial figures are poor, took the matter no further. He said there was no reason why this document should not have been disclosed earlier when the matter it was relevant to formed part of the chronology, and it would impact the timings as it would involve further questioning.

   I noted that respondent has been professionally represented throughout and there was no good reason why this should not have been disclosed earlier if a proper disclosure exercise was undertaken. The claimant had prepared her case on the evidence disclosed to her and the document, as described, did not refer to redundancy so was unlikely to assist the tribunal. I refused the application to admit it having decided that it was not in furtherance of the overriding objective to allow late evidence for the reasons set out above.

4. It was apparent from the outset that two days was now too short a listing in which to hear and decide a case in which there were five witnesses and 500 pages of documentary evidence. Mrs Peckham said that remedy evidence should be deferred. I agreed. I discussed with the representatives whether they were of the view that all of the oral evidence could be heard in what was, effectively, a day and a half after I had read in. They both agreed that it could. I proceeded on the basis that the likelihood was that judgment would be reserved, and if necessary, closing submissions could be in writing. In the event there was time for oral submissions.

5. Although the respondent's defence was that the claim was dismissed for redundancy or some other substantial reason, Mrs Peckham confirmed in her closing statement that the respondent said that this was a redundancy

situation and did not rely on some other substantial reason. No other submissions were made on that point by the respondent. For this reason, in reaching my decision, I considered only the respondent's arguments that the dismissal was for the reason of redundancy.

The Issues

6. The parties agreed a list of issues as follows:

Jurisdiction

1. There are no time limit issues.

2. It is agreed that:
   (1) The claimant was an employee/worked under a contract of employment;
   (2) The claimant was dismissed;
   (3) As at the effective date of termination (05.06.2023), the claimant had at least two years' continuous service.

Liability

Unfair dismissal

3. What was the reason or principal reason for the claimant's dismissal? The respondent says the reason was redundancy. The claimant contends that there was not a redundancy situation and that her dismissal was a sham, the real reason being her grievance of 19.04.2023.

4. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The tribunal will usually decide, in particular, whether:
   (1) The respondent adequately warned and consulted the claimant;
   (2) The respondent adopted a reasonable selection decision, including its approach to a selection pool;
   (3) The respondent took reasonable steps to find the claimant suitable alternative employment;
   (4) Dismissal was within the range of reasonable responses;
   (5) The claimant has indicated that she challenges the fairness of the dismissal as follows [PC.18]:
      (a) The appeal officer (Erika Thomas, US Managing Director) was in a role more junior than the officer making the decision to dismiss (Crystina Cinti, Global Vice President);
      (b) Ms Thomas was also a member of the Senior Leadership Team who would have been part of the decision to "pause" the Sweden expansion, and highly likely to have been involved in the initial decision to dismiss the claimant;
      (c) The consultation process commenced after the pool of candidates had already been determined, which was a pool of one (the claimant); and
      (d) There was no genuine consultation during which alternative options were considered.

Remedy

Unfair dismissal

5. The claimant does not wish to be reinstated and/or re-engaged.

6. What basic award is payable to the claimant? How is it to be calculated?

7. If there is a compensatory award, how much should it be? The tribunal will decide:
   (1) What financial losses has the dismissal caused the claimant?;
   (2) Has the claimant taken reasonable steps to replace her lost earnings?;
   (3) If not, for what period of loss should the claimant be compensated?;
   (4) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?;
   (5) If so, should the claimant's compensation be reduced? By how much?

Relevant findings of fact

7. The claimant was employed by the respondent from 19 November 2020 as a Senior Global Project Manager, Design and Development ('D and D').

8. The respondent is a digital creative and marketing agency based in the UK and the USA, providing services globally. It currently employs around 55 people. The respondent has a senior leadership team (SLT) consisting of Sebastian Weller (CEO), Crystina Cinti (Global Vice President) and Erika Thomas (US Managing Director).

9. On 16 May 2022 the claimant was promoted to Global Director of D and D, which role she held until her dismissal.

10. In January 2023 the respondent began the process of opening an office in Sweden which would be managed by the claimant who would relocate to Sweden. The claimant said in oral evidence that discussion about this project began in October 2021, being signed off in January 2022, and this evidence was unchallenged.

11. In order for the claimant to work in Sweden she required a work visa and discussions about the application for the visa began on 6 January 2023 when Mr Weller emailed the claimant with information provided by the respondent's Swedish lawyers about the visa application process. The claimant enquired about the progress of the visa a number of times over the next few months. On 31 March 2023 Ms Cinti stated in an email to the claimant '*I am hoping we get some good news on your visa over the next few weeks…'.* As the visa application process takes 90 days, I find that this comment was intended to convey to the claimant that the visa application had been submitted.

12. By 18 April 2023 the visa application had not been completed. On 18 April 2023 the respondent sent out a press release announcing its expansion into Sweden. The press release was not discussed with the claimant and did not mention that she would be in charge of the Swedish office. She found out about that press release when a friend sent it to her the following day.

13. The claimant sent an email to the SLT team and Mr Holborow (non-executive Director) on 19 April 2023 as follows:

> *I can't quite put into words the absolute shock of being sent an external link to the WMA Sweden press release this morning, with no inclusion or prior warning whatsoever from anyone within the company. I'd like to think that the*

intention was to not make me feel utterly blindsided, but that is most definitely the result.

As to why I have been entirely omitted from the news, I just can't understand and truly need complete clarity on this. To my knowledge, key staff members are always noted on press releases (Nashville, Melbourne, US PR).

I'm at a complete loss as to why I've not been deemed worthy of mention, particularly since this was undeniably my idea as well as considering absolutely everything that I have continuously put into this venture for over a year now.

I have repeatedly been told that the Swedish expansion is happening only to retain me, so this does raise huge concerns. If the underlying intention is to remove me from the business, I ask that you communicate that directly, officially and without further delay.

Despite my constant requests, I am still without any formal confirmation of Visa Submission, salary, legal obligations, and so on. The distress that this has caused is frankly too much. I am taking the rest of today to recollect myself and evaluate the situation.

14. The claimant said in oral evidence that she had contacted the Swedish migration department on 19 April 2023 before she sent the email and been told that no application for a work visa had been made for her. This evidence was not challenged by the respondent.

15. The claimant and Ms Cinti spoke by telephone the next day. Ms Cinti asked the claimant why she had not called her to discuss her concerns and said more than once that she did not think the claimant's email of 19 April 2023 was the correct approach to have taken. Ms Cinti said to the claimant that there was nothing untoward in the fact that the press release had not named the claimant as the lead in Sweden and said that if the claimant's view was that the respondent was trying to work her out of the business, the complete opposite was happening.

16. On 27 April 2023 Ms Cinti emailed the claimant stating that she would arrange a meeting where they could resolve the issues raised by the claimant in the email of the 19 April and call of 20 April in order that they could move forward.

17. On 2 May 2023 the claimant commenced a period of sick leave ending on 9 May 2023.

18. Also, on that date Ms Cinti had a telephone conversation with John Holborow. Ms Cinti said in evidence that the meeting is in her diary, but she does not remember it. Mr Holborow took notes, and these appeared in the bundle. He notes 'Jury out on WMA Scandi'. He said that Ms Cinti said the jury was out as to whether the Sweden expansion was continuing in light of the claimant's behaviour. Mr Holborow also said that he asked Ms Cinti whether it was correct that the claimant had been misled over the visa application and Ms Cinti confirmed that this was true. Ms Cinti said in oral

evidence that she did not recall the meeting but that she would not have made either of those comments.

19. On 15 May 2023 Mr Weller contacted the respondent's Swedish lawyers and instructed them to pause their work on the claimant's visa application pending further instructions.

20. On 17 May 2023 Ms Cinti called the claimant and then emailed her to confirm that the respondent had decided not to proceed at that time with the expansion of the business into Sweden. The reason given was that D and D targets were not being met but costs were rising.

21. On 19 May 2023 an 'at risk' meeting was held, and the claimant was advised by Ms Cinti that her role was at risk of redundancy. She was asked to suggest solutions to the situation that would avoid redundancies. The claimant asked for information about what the respondent was trying to achieve in terms of savings and for various pieces of information to help her come up with suggestions. Ms Cinti told the claimant that hers was the only role being considered for redundancy in D and D but the respondent was looking at other departments too. She said she was looking for suggestions on cost cutting such as team restructure, reduction of hours and changing roles. She said that overheads needed to be cut and bringing in further work would not be a solution. In a letter following up the meeting Ms Cinti wrote that 'we propose [the claimant's role] can be done by someone with less experience and at a more junior level, thereby decreasing a salary level, whilst senior management can concentrate on strengthening the existing relationship with our largest clients…'

22. On 22 May 2023 Ms Cinti emailed the claimant as follows:

'…

In relation to our meeting and your request on the number that needs to be achieved, I am not in a position to share.

Ahead of our next meeting on Friday it would be appreciated if you could share some possible solutions and alternatives, which we can then discuss in our meeting.

…'

23. In oral evidence Ms Cinti said that she was advised by the respondent's external HR providers, Citation, not to provide the financial information to the claimant that she had requested.

24. The claimant responded on 23 May 2023 querying why she had been told a visa application had been submitted when it had not. She said that she thought she was being punished for discovering this by being made redundant. She asked for the job description for the more junior role being proposed and said that she believed two junior designers in the department were underemployed and a combined saving of their wage would be in excess of her own.

25. On 25 May 2023 Mr Holborow and Mr Weller had a meeting by video. It is Mr Holborrow's evidence that he was asked by Mr Weller whether he was aware of any conduct issues pertaining to the claimant and Mr Weller said that neither the claimant's attitude nor her behaviour were compatible with what the respondent needed. In the bundle was a page of handwritten notes in which Mr Holborrow records some of this conversation. It includes the words 'redundancy for Sophie: manage a dismissal?'. Mr Weller denied that he asked the question about conduct or that he made the comments claimed.

26. The respondent questioned the credibility of Mr Holborow's evidence of his meetings with Ms Cinti on 2 May 2023 and Mr Weller on 25 May 2023. Mr Weller said that he had not seen Mr Holborow to be taking notes during the meeting and Mrs Peckham put it to Mr Holborow that it was clear when someone was taking notes. Mr Holborow said that he had taken notes and that it is not always clear on a video call when you do not see what a person is doing with their hands. Mrs Peckham put it to Mr Holborow that the respondent had shortly after dispensed with Mr Holborow's services and there was ongoing disagreement, and that this was his way at getting back at the respondent. Mr Holborow acknowledged that he believed the respondent owed money for work carried out by him but said that appearing at a tribunal in a situation like this was something likely to be harmful to his reputation. Ms Cinti said that she did not recall the conversation with Mr Holborow. Mr Weller's recollection of the meeting was not as clear as Mr Holborow's which was supported by a contemporaneous note. I do not accept that the notes are anything other than contemporaneous or genuine. It is entirely credible that Mr Holborow would take notes of meetings he had with his client, the respondent. I also accept Mr Holborow's point that rather than his appearance at the tribunal being an act of vengeance, it is more likely, if of public knowledge, to be harmful to his business. For these reasons I found the evidence of Mr Holborow to be credible and find that Ms Cinti and Mr Weller did make the comments he attributes to them in the meetings of 2 and 25 May 2023.

27. A second redundancy process meeting was held on 30 May 2023. The matter of the two junior designers was raised again and Ms Cinti asked the claimant if she wished to suggest that as an alternative. The claimant said she did not. In oral evidence she said that this was because she knew it was pointless as the respondent had decided to dismiss her, and that she did not want that (suggesting the dismissal of two colleagues) to be her last act. I accept that those were the claimant's reasons for deciding not to ask the respondent to consider this alternative to her redundancy.

28. Ms Cinti said, in her witness statement:

Prior to commencing the restructuring, the Company did look at alternatives such as lay off or short time working. We could not do lay off or short time working, firstly there is no such clause in the contract permitting that and the staff are very skilled industry designers. If we suggested lay off, the designers would have left and that would have irreparably damaged the

Company because we would not have the designers to provide the service to the clients who were paying retainer services let alone, generate new business which was urgently needed. Word would also get around in the industry and that would affect our brand reputation. The impact of reducing hours would have also adversely affected the business because we run the social channels, by reducing hours, it reduces the service to the client and that would impact on another division and their overhead.

29. In oral evidence Ms Cinti agreed with Mr Wood that she could not know that the designers would have left if she had raised lay off. He suggested that even without a clause employees could have been consulted about short time working and lay off. Ms Cinti said that the designers were the company's offering. She said that the respondent had considered reducing hours and lay off but decided that was not feasible. When asked why, if this was the case, she had not said that to the claimant in the redundancy meetings and had in fact listed these as possible alternatives in her letter to the claimant after the first meeting, Ms Cinti said that she was just trying to give examples.

30. Witness evidence was given by the respondent (Ms Cinti and Mr Weller) that it had lost contracts in early 2023 amounting to more than £1.5 million. Mr Weller said that was a large amount for a large company, however no documents were supplied which put this figure into context within the respondent's overall turnover.

31. Mr Weller, Ms Cinti and Ms Thomas were all in agreement that there had been a downturn in business which they wanted to address. I find that there was a downturn in business which the respondent's senior leadership team wanted to address by looking at saving costs. I find that there is no documentary evidence that discussions or plans were had or made within the SLT as to how this might best be achieved or what the various costs savings options were. The witness evidence does not provide dates for such discussions. I find that whilst the SLT may have noted the financial downturn and discussed the possibility of costs savings, no other discussion or planning work on the possible routes to costs savings took place, other than that a decision to pause the expansion to Sweden was made. As noted above, Mr Holborow's evidence, which I have found credible, was that Ms Cinti said the Swedish expansion may not proceed because of the claimant's behaviour, rather than that it was a matter of costs saving.

32. Mr Weller and Ms Thomas both said that they were aware of the redundancy plan but were not involved in it as that was not their job. Mr Weller said *'Mrs Cinti and Mrs Thomas have total autonomy for their areas of the business and are free to make their own decisions. I did not get involved in the redundancy restructuring process.'* Ms Thomas said in oral evidence that she was not involved in the decision to make the claimant redundant.

33. As noted above there was no evidence in the form of meeting notes, emails or financial projections to indicate that work had been undertaken either by SLT or specifically by Ms Cinti in looking at how costs could be saved. Mr

Weller and Ms Thomas did not have any information about the restructuring of D and D and yet Ms Cinti said that the plan was for SLT to pick up some of the work that the claimant had been carrying out in terms of relationships with major clients. I do not find it credible that such a plan had actually been agreed upon, where all SLT members would have extra responsibility, without the involvement of the SLT. While this may have been an approach agreed after the claimant's dismissal, I find that it was not a potential plan discussed by SLT before the redundancy process was started.

34. Ms Cinti said that the respondent was also considering redundancies in the department called Social, however, the Director of Social gave notice of his resignation on 7 May 2023 therefore no redundancies were required in that department. Again, there is no documentary evidence relating to a consideration of a possible redundancy exercise in Social.

35. Also on 30 May 2023 Ms Cinti emailed Mr Holborrow, asking him to call a recruitment candidate named Ines Coleman, and she attached to the email what she describes as a 'spec'. The spec is a job description for the role of Creative Services Manager, which includes management of the D and D department. On 7 June 2023 Ms Cinti states 'I would love it if you could have a call with Ines Coleman as a final step before we offer her'.

36. I found Ms Cinti's oral evidence on this matter to be unclear. Mr Wood described it in his closing submissions as 'at best confusing' with which I agree. Ms Cinti said in evidence that the respondent was not recruiting at the time of the redundancy exercise, that the respondent would always have a conversation with a candidate and that does not mean there is a job, that there was no position open at the time, and in answer to the question as to why this job description had not been shared with the claimant Ms Cinti said 'this wasn't an open role'. I find that Ms Cinti had created a job description which she could have provided to the claimant as part of the redundancy process but did not do so and was planning on recruiting Ms Coleman to the new role from before the date on which the claimant was advised that she was dismissed.

37. A final redundancy meeting was held on 5 June 2023 at which Ms Cinti advised the claimant that she was redundant. A letter confirming dismissal was issued the same day in which Ms Cinti states as follows:

You were aware from that first meeting that your job was at risk of redundancy, and on 30th May we explored alternatives to your redundancy. Unfortunately, none have been forthcoming, nor have any alternative jobs been identified for which you could be considered/which you wished to consider.

38. No documentary evidence was before the tribunal about consideration of alternative jobs for the claimant by the respondent or a discussion of such with the claimant. The job description she requested for the restructured more junior position was not provided to her. In the redundancy meetings Ms Cinti told the claimant that the respondent was planning to recruit someone more junior with a decreased salary while SLT took on some of

her duties. Ms Cinti said in oral evidence that the job would have been too junior for the claimant, though on Mr Holborow's evidence the salary was always in a range similar to the claimant's. In oral evidence the claimant agreed that she did not have experience in a number of areas listed in the job description for Creative Services Manager, though she believed she could have learned the relevant skills. Ms Cinti said this would have involved extensive training. I find that the respondent did not put its mind to whether there was an alternative role for the claimant.

39. The claimant appealed the decision to dismiss her in an email dated 11 June 2023 noting that she believed there were other reasons for the dismissal, namely that the claimant had queried why no visa had been applied for, and her email of 19 April, and stating that she believed the redundancy process had not been fair.

40. Erika Thomas, US Managing Director, was appointed as appeal manager. An appeal hearing took place on 4 July 2023. Ms Thomas was present, but the meeting was conducted by, and all questions to the claimant were put by, Martin Tench from Citation, the respondent's external HR provider. In oral evidence Ms Thomas said she was involved in the appeal process and Mr Tench was advising her. No evidence was provided about Ms Thomas's deliberations, and she did not speak to Ms Cinti in connection with the matters raised by the claimant in her appeal. The Employment Rights Act 1996 and the ACAS code of guidance are referred to in the decision letter that was issued following the appeal. Ms Thomas said she did not know about the Act or the Code but that was why the respondent employed Citation. I find from the evidence that Ms Thomas was the appeal manager in name only and the appeal was both conducted, and the decision made to refuse it, by Mr Tench. I find there is no evidence that Ms Thomas considered the claimant's appeal points or that she made any enquiries about the points raised. Ms Thomas said, in response to the question as to why she had not investigated with Ms Cinti her reasons for selecting the claimant for redundancy, '*From the appeal hearing and from my understanding it was not about the grievance, it was about the decision to reduce costs, which is why the role was made redundant*'.

41. The claimant's appeal was dismissed by way of a letter dated 14 July 2023.

42. A number of times during evidence it was raised that the D and D department was underperforming. There was some argument as to whether its targets had been achieved in 2022. There was conflicting documentary evidence on this. The claimant said that she understood that targets were met in 2022 and pointed to a document evidencing this. This document shows different figures for the last three months of 2022 than another, similar, document showing the figures up until June 2023. Although the contradictory evidence was disclosed and included in the bundle it was not addressed in evidence by the respondent.

43. There was also some discussion about how far behind target the D and D department was in May 2023. This centred around whether the department

had only achieved 46% of its target to May or it had achieved 46% of its target for the year by May, the year having commenced on 1 January 2023.

44. On the matter of underperformance of D and D I took into account that Ms Cinti said in her witness statement that '*I also explained to the Claimant that the fall in the profits in the D and D department was not the Claimant's or the Company's fault.',* and the claimant's unchallenged evidence, reflected in the witness statement of Mr Holborow (this part also being unchallenged) that the claimant was very good at her job and a high performer. Furthermore, the claimant's appraisal for 2022 is included in the bundle and shows that the respondent believed her to be doing a good job. I find from this that although any downturn in profits made by D and D may have been relevant to an overall issue for the company on profits, it was not of any relevance as to why the claimant should be selected for redundancy.

45. On the matter of costs savings from a reduction in employee numbers, the following unchallenged evidence was presented. The savings of losing the two design staff would be around £100,000. The claimant earned £60,00. The tribunal was not told how much was saved by the resignation of the Director of Social. Ms Coleman, who was recruited to a different role, but which covers some of the claimant's duties, as well as some of the duties of the Director of Social, is paid £57,000.

Submissions

46. Both representatives filed skeleton arguments on which they relied in oral submissions. Below is a brief synopsis of their oral submissions.

47. Mr Wood, for the claimant, said it was for the respondent to satisfy the tribunal that redundancy was a genuine and sole or principal reason for dismissal. Though there may be a potential fair reason for dismissal it does not necessarily follow that that was the reason for dismissal. He said it is not enough for the respondent to say that the tribunal cannot look at the business decisions of the respondent and that is the end of that. The tribunal cannot decide for itself whether it is a good idea, but it needs to look to see if the reason is genuine rather than manufactured. Mr Wood set out the claimant's position on the lack of evidence around the need for cuts and noted that despite poor Quarter 1 figures the Sweden expansion plan continued up until mid-May. He said that there was no evidence that the respondent had put its mind to alternatives to redundancy. He said that Ms Cinti was clearly unhappy about the claimant's email of 19 April 2023, and that cost cutting never entered the agenda until after that date. Mr Wood said that if the tribunal found that redundancy was the genuine reason for dismissal, then the process was unfair and any consideration of whether a fair dismissal would have taken place would be so speculative that it would not be safe to make any reduction to a compensatory award.

48. For the respondent, Mrs Peckham said that the principal reason for the claimant's dismissal was redundancy. On the respondent's evidence there was no need to restructure, and the dismissal clearly falls within redundancy rather than for some other substantial reason. The dismissal was not related

to the claimant's email of 19 April and was about a reduction of work and loss of business. The consultation process followed was fair and from the respondent's perspective it was faced with someone who was not engaging when it wanted to explore alternatives. The burden is on the claimant to show that the email was the reason for redundancy and the evidence was that the respondent was still proceeding with the Sweden expansion after 19 April. It was paused because of poor figures in the claimant's department. The expansion was still proceeding on 2 May 2023 and the decision to pause was made two or three weeks later. There was simply no connection between the redundancy and the claimant's email. The respondent followed a fair process, but if it did not, did that make any difference? It did not. The claimant did not have the skill set required for the junior job and the respondent had no legal obligation to create a role. The respondent has shown there was a genuine business reason for the dismissal which did not only affect the claimant's department, however other departments reduced costs through natural wastage.

Law

49. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

50. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason. Redundancy is a potentially fair reason for dismissal under section 98(2).

51. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case. In a case of dismissal for redundancy an assessment of fairness involves a consideration of the redundancy process and specifically whether there was a fair process involving (i) warning and consultation (ii) a fair basis for selection, (iii) consideration of alternative employment and (iv) an opportunity to appeal *(Polkey v A E Dayton Services [1987] IRLR 503).*

52. Redundancy is defined in the Employment Rights Act 1996 (ERA 96) s139 as follows:

53. *"(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."

Decision and reasons

54. The respondent's case is that it dismissed the claimant for redundancy after a fair process, due to a downturn in business leading to a cost saving exercise. The claimant's claim is that she was not dismissed for redundancy but because she complained about the lack of progress in obtaining her work visa in an email dated 19 April 2023 and that she found out that day that no visa application had been submitted.

55. The burden of proof lies with the respondent to show that it dismissed the claimant for a potentially fair reason, in this case redundancy. It is for the tribunal to decide, on the balance of probabilities, whether the respondent has proven that it dismissed for redundancy. There is no burden of proof on the claimant to show that she was dismissed because of the email she sent to the SLT on 19 April 2023.

56. Mrs Peckham, for the respondent, made the following point in her skeleton argument, which she referred to in oral submissions:' *It is not the Tribunal's role to investigate the commercial merits of an employer's decision that redundancies were required; James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] ICR 716 CA. Further, there is no legal requirement for an employer to show an economic justification or business case for the decision to make redundancies; Polyfloor v Old EAT 0482/02. The Respondent's financial decisions regarding its business operations are a matter for the respondent.*' Mr Wood, for the claimant, said that it was not enough simply for the respondent to say that. The tribunal cannot decide for itself it whether the respondent has made a good decision, but it needs to look at the decision in order to decide whether it is genuine rather than manufactured. I have kept both of these submissions and the relevant case law in mind throughout my deliberations.

57. The evidence of the SLT was that there were some financial difficulties for the respondent and contracts worth £1.8 million were lost in the first quarter of 2023. Although there was no context provided as to whether this would lead to a substantial fall in profits for the company, I accept that this is

evidence that, potentially, a redundancy situation had arisen for the purposes of s136(1)(b) ERA 96.

58. I must then go on to consider whether redundancy was the reason for the claimant's dismissal. A genuine redundancy situation may exist, but this does not mean that the reason for dismissal was redundancy.

59. As I have set out in the findings above, I have seen no documentary evidence of any work undertaken by the SLT together, or Ms Cinti in isolation, to indicate that the respondent undertook a costs saving review, looked at the options and decided that its preferred option was a redundancy process. I have seen no documentary evidence that having settled on a redundancy process for the purposes of costs saving, a process was undertaken to ascertain who should be considered for redundancy and why. There is no documentary evidence that any other departments were looked at for the purposes of redundancy other than the oral evidence of Ms Cinti that the department called Social was also in the frame, but the director of that department resigned in any event for unconnected reasons. The only evidence before me was the oral evidence of the SLT and documents referring to unmet targets in 2023 for D and D. However, the respondent's evidence was that the financial downturn was across the board and not due to a single factor or underperforming department. SLT witnesses said they did not take a note of informal meetings. I am unpersuaded that people running a business with a multi-million pound revenue (I base this on the evidence that D and D turnover, a single department whose work was not entirely directly revenue generating, had a revenue in excess of a million pounds in 20221 and 2022) who did not work together in the same office, would have had no written record of such discussions and decisions, however informal, had they taken place.

60. I have before me evidence that the claimant was well regarded and not to blame for any financial downturn. There is evidence that she was told the visa application process was proceeding and good news on the visa was expected within weeks by Ms Cinti on 31 March 2023. There is evidence that Ms Cinti was perturbed by the approach taken by the claimant on 19 April 2023 in setting out a complaint in writing to the SLT both from the transcript of the call to the claimant on the 20 April 2023, and from Mr Holborow, in his account of his telephone conversation with Ms Cinti of 2 May 2023 supported by his notes of that conversation. I have found credible the evidence of Mr Holborow that Ms Cinti was less keen on proceeding with the Sweden project after the claimant's email, and that she admitted the respondent had misled the claimant over the progress of the visa application, as well as that Mr Weller said that the respondent was looking to dismiss the claimant in their conversation on 23 May 2023. Ms Cinti emailed Mr Holborow on 30 May about a candidate she was considering for the role of Creative Sales Manager, including a job description. This was before the claimant's final redundancy meeting. She instructed him on 7 June 2023 to speak to the candidate before 'we offer'. This was two days after the claimant was made redundant.

61. In addition, throughout the redundancy exercise Ms Cinti withheld information from the claimant about the savings the respondent needed to make and salaries within her department. She told the claimant there was no job description for the role she was designing that would cover some parts of the claimant's role. Ms Cinti said this role was too junior for the claimant and/or she did not have the necessary experience. The job paid almost the same as the claimant earned but she was not given the opportunity to apply for it. Ms Cinti told the tribunal that she had already ruled out short time working, lay off and making design staff redundant before the redundancy consultation with the claimant began. She did not tell the claimant that. The onus was placed upon the claimant in the process to suggest alternatives, but the respondent failed to provide information to help her, failed to take the initiative in looking at whether two junior design staff were underemployed, and said that the solution of bringing in more business was not one that it was interested in. Ms Thomas was unable to provide any evidence of having given proper consideration to the matters raised by the claimant in her appeal, she did not speak to Ms Cinti about the claimant's argument that the reason for redundancy was raising that she believed she had been misled over her visa.

62. All of the matters set out in the paragraph above would form part of a consideration of whether a reasonable and fair redundancy process had been carried out by the respondent, for the purposes of reaching a decision on fairness under s98(4) of the Employment Rights Act 1996, but the facts are also relevant to my consideration of the genuineness of the stated reason of redundancy.

63. I find that the way in which the process was run provides doubt about the genuineness of the reason for dismissal. If it was genuine and the respondent was considering the redundancy of an employee who was a good performer, then it might be expected that the respondent would make a demonstrable effort to work with the claimant to identify alternatives solutions and, if not, alternative roles. The way in which the exercise was run points to it being used as a convenient way of dismissing the claimant for a reason other than redundancy.

64. The lack of any evidence from the respondent about its discussions of what was required in terms of costs savings, and how this might best be achieved, together with the clear evidence of its concern over the claimant's email of 19 April 2023, and the obstructive approach taken towards the claimant in the redundancy process lead me to conclude, on the balance of probabilities, that redundancy was not the reason for the claimant's dismissal.

65. As I have found that the reason for dismissal was not redundancy, I have not gone on to make findings about the fairness of the process.

66. The claimant's claim of unfair dismissal is upheld.

67. Both parties addressed me on Polkey deductions. As I have found that the reason for dismissal was not redundancy, then no deduction on Polkey grounds is appropriate.

68. Remedy will be determined at a hearing on 15 May 2024

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Employment Judge Anderson

Date: 27 January 2024

Sent to the parties on: 29/01/2024

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For the Tribunal Office