EMPLOYMENT TRIBUNALS

Claimant Mr Justin Feller

Respondent Venesky-Brown Recruitment Limited

Heard at: Watford (by CVP) On: 28 and 29 May 2024

Before: Employment Judge C Fearon (sitting alone)

Appearances
For the Claimant: Ms J Majithia, Counsel

For the Respondent: Ms N Gray, Solicitor

RESERVED JUDGMENT

The judgment of the tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

REASONS

Introduction

1. This was the hearing of a claim for unfair dismissal presented to the tribunal on 4 December 2023. Early conciliation via ACAS began on 15 September 2023 and a certificate was issued on 28 September 2023. The response was presented on 6 February 2024 defending the claim.

2. The claimant was employed by the respondent from 1 December 2020 until 8 September 2023 as a senior business analyst.

3. The respondent is one of five subsidiary companies that make up the Venesky-Brown Group. It is a recruitment company which currently employs 65 members of staff and, in 2023, generated a £45 million turnover.

Procedure

4. The hearing took place remotely by way of CVP for its duration. A list of issues was agreed on the morning of the first day, along with some agreed facts.

5. Parties agreed that only liability would be dealt with in evidence, given the time constraints, with remedy to be dealt with at a further hearing, if necessary. The witness statements dealt only cursorily with remedy.

6. An agreed joint bundle was provided to the tribunal totalling 500 pages. The claimant provided an additional supplementary bundle of 19 pages the day before the hearing, along with a supplementary statement from James Hair, the claimant's witness. Leave was given for these documents to be adduced in evidence, there being no objection from the respondent.

7. The claimant provided transcripts from a number of covert recordings he had taken during meetings with the respondent in July and August 2023. Whilst some typographical errors were noted by the respondent, it was agreed that their contents were substantively accurate.

8. I heard sworn oral evidence from Craig Brown and Martin Cairns on behalf of the respondent, along with the claimant and James Hair. The oral evidence was tested by cross-examination.

9. By the conclusion of the evidence in the afternoon of Day 2, there was insufficient time to hear submissions, deliberate, and deliver an oral judgment. The parties' representatives agreed to prepare written submissions, with an opportunity to respond in writing to the other's submission if they felt necessary. Submissions were sent to me on 30 May 2024, including a summary of the applicable case law. I adopt the law set out in those submissions and am grateful for the assistance of both parties' representatives.

The issues

10. The issues were agreed at the outset of the case as follows:

    i. What was the principal reason for the claimant's dismissal?

ii. Was it for a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?

iii. Whether the definition in section 139(1)(b)(ii) was met in this case; namely that the requirements of the respondent for employees to carry out work of a particular kind, in a place where the employee was employed, had ceased or diminished;

iv. If the reason was redundancy, was the dismissal fair or unfair within the meaning of 98(4), namely did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, bearing in mind its size and administrative resources?

In determining (iv), the tribunal will consider in particular:

a) Did the respondent adequately warn and consult the claimant?

b) Was an appropriate and reasonable selection pool identified?

c) Was there a reasonable search for suitable alternative employment?

d) Was dismissal within the range of reasonable responses?

v. Alternatively, was there a substantial other reason capable of justifying the dismissal, namely a business re-organisation, and if so, was that a fair dismissal, in accordance with equity and the substantial merits of the case?

The legal framework

11. The issues follow the legal framework that I am bound as a tribunal to follow for claims of unfair dismissal.

Unfair Dismissal

12. The right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act 1996 (ERA). The tribunal must consider whether the respondent is able to establish a fair reason for dismissal (as defined by section 98.

"Section 94

(1) An employee has the right not to be unfairly dismissed by his employer..."

"Section 98

(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—

(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.

(2) A reason falls within this subsection if it is that the employee was redundant…"

13. Section 98 therefore identifies redundancy as a potentially fair reason for dismissal. The definition of 'redundancy' is found in section 139 ERA which states:

"(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."

14. The case of **Safeway Stores plc v Burrell** [1997] IRLR 200 and **Murray v Foyle Meats Ltd** [1999] IRLR 562, are two key cases which centre on the application of section 139. The relevant test amounts to two separate questions of fact summarised as follows:

a) Does the economic state of affair exist as set out in the wording of s.139(1)(b)?

b) Is dismissal attributable, wholly or mainly, to that state of affairs?

15. The leading case remains **Williams -v- Compair Maxam Ltd** [1982] IRLR 83 which describes steps employers should take to consult with employees about their proposals and to mitigate hardship caused by redundancies.

16. The tribunal must objectively assess the circumstances at the time of the decision, including the business case for redundancy; the manner in which those at risk were selected from the workforce; the criteria for selection from those at risk; the process of consultation with the individuals at risk of redundancy; and the procedure leading to dismissal, including any appeal. Not all of these factors arise or carry equal weight in every case

17. It is also important for the tribunal to apply the 'band of reasonable responses' test, as laid down in **Iceland Frozen Foods Limited v Jones** [1983] ICR 17, rather than substitute its own subjective view for that of a reasonable employer.

18. If the requirements of section 98(1) are fulfilled by the employer, the tribunal must consider then whether the dismissal was fair or unfair in accordance with section 98(4):

> "(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)—
>
> (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
>
> (b)shall be determined in accordance with equity and the substantial merits of the case."

19. When considering fairness, the tribunal must consider all the circumstances of the individual case, having regard to the factual situation, and to the 'size and administrative resources' of the employer. This last point recognises that

an employer of three people is not expected to follow the same procedures as an employer of 30 or 300 employees.

Some Other Substantial Reason

20. 'Some other substantial reason' is one of the permissible reasons for a fair dismissal, as set out in section 98(1)(b) ERA above. The employer must show that the decision to dismiss for this reason was reasonable in all the circumstances in accordance with section 98(4).

General approach

21. In this case, as in others, evidence touched on points about which I make no decision. That is not an oversight or an omission on my part; it reflects the reality that not everything that was brought up in this case was relevant to my decision-making.

22. In approaching the witness evidence, I kept in mind the guidance in **Gestmin SGPS -v- Credit Suisse** (UK) Ltd [2013] EWHC 3560 which acknowledges the fallibility of the human memory, such that an honest witness can still be a mistaken witness. I make clear that where I prefer one account over another, I make no value judgement about a person's wider character or integrity.

Findings of fact

23. The claimant was employed by the respondent from 1 December 2020 until 8 September 2023 as a Senior Business Analyst.

24. The claimant's contract was initially with the respondent's Associated Company, Vescala Ltd. His employment contract then transferred to the respondent on 1 July 2022 and he was contracted to work on a remote basis.

25. Mr Hair was the claimant's line manager until 30 June 2023, when Mr Hair left the company. Thereafter, the claimant reported to, and was line-managed by, Mr Brown, Chief Executive Officer.

26. Prior to his dismissal, the claimant himself line-managed one full-time data analyst in his department, Nichola Jackson and another data analyst, Jack Brunton, who spent half of his hours with the claimant's team and the rest with other teams. Both had smaller salaries and were more junior.

27. I accept that prior to July 2023, there was a downturn in the expected profitability of the construction element of the business, as I accept the financial documents provided by the respondent which indicate that conclusion, and I accepted Mr Cairns and Mr Hair's evidence on that point, albeit the language around the financial position was, at times, obscure. The alternative would be to find that these witnesses were being directly untruthful about the financial position, which was not my impression. I do accept, however, Mr Hair's evidence that the forecasts for the construction element probably were ambitious and that the company was not in overall serious difficulty during this time. I found Mr Hair to be a credible and consistent witness with little vested interest in the case and someone who was willing to concede points where appropriate.

3 July 2023 meeting

28. It was the respondent's position that decisions about the business and finances were taken by Mr Brown and Mr Cairns in a "fluid" way through talking at weekly and monthly meetings which they described as 'director's meetings'; they kept no minutes of these meetings, hence there were no documents to support their thought process or decision-making. Mr Cairns said only the minimum legal requirement of quarterly Board Minutes were maintained in the company. The earliest of these Minutes in the bundle were dated February 2023.

29. Notwithstanding that they held each other to account regarding tasks, Mr Brown said that he and Mr Cairns would remember their actions, "in their heads", though Mr Cairns said he did keep hand-written notes, none of which were provided. I find it surprising that decisions of this importance were made without any paper trail: either i) they exist but were not provided; Mr Cairns did comment in passing during oral evidence that he, "wouldn't have put in the documents if there was a dispute about it"; or ii) this was an indication of how the business was run more widely: purely at Mr Brown and Mr Cairns' discretion.

30. I find that Mr Cairns and Mr Brown had a monthly meeting on 3 July 2023. The claimant initially suggested this meeting did not happen, which I reject based on the claimant's later concession that this may have taken place and the clear

evidence from Mr Cairns and Mr Brown that this meeting did take place. There was no documentary evidence of what was discussed at this significant meeting. I accept Mr Brown's evidence that it included consideration of who would be made 'redundant', he said: "we resolved we didn't require a senior resource in the [technology] team". Mr Cairns also confirmed in oral evidence that this was when the decision to reorganise the business was taken. I therefore find that at the meeting on 3 July 2023, Mr Brown and Mr Cairns formed a view that the claimant should leave the company as the most expensive person on the technology team.

5 July 2023 - Claimant's promotion request

31. I accept the claimant's case that he had been working towards a promotion around this time under the line management of Mr Hair, as both the claimant and Mr Hair sent emails to Mr Brown with the claimant's personal development plan (PDP) containing his aspirations for promotion. Mr Brown must therefore have been aware of the claimant's position as he says he looked at the PDP. The claimant then sent an email directly on 5 July 2023 raising the issue of his promotion to Mr Brown. I find it likely that Mr Brown was irritated by this email, as he felt it was out touch with the business realities he felt existed at the time and because he and Mr Cairns already considered the claimant a very likely candidate for dismissal; he said he was "in disbelief" when he received the claimant's email about promotion, which corroborates this, as does the fact that he then ignored the email.

11 July 2023 "Review" document

32. Mr Brown's case was that an operational and financial review, "the review", had taken place prior to July 2023, which underpinned the decision for the claimant's redundancy. The evidence was unclear as to what this review practically entailed and when it started. For example, Mr Brown said it began in January 2023 however later told the claimant in a meeting that it began when he took over line-managing the claimant on 30 June 2023. Mr Cairns also gave a later timescale of July 2023 for this review.

33. The sole documentary evidence relied on for the review having taken place was a document titled, "Business process to save costs", which was created by Mr Cairns on 11 July 2023, and modified on 15 April 2024. I draw no

adverse inference from the modification itself, as no question was put to Mr Cairns in cross-examination suggesting he deliberately doctored it. Mr Cairn was uncertain but said the review itself happened over two days around 13-14 July 2023. The 'business process' document is two pages long. No other documents or email threads surrounding the creation of this document were produced, despite Mr Cairns saying it was made collaboratively with himself and Elizabeth Kennedy, Senior Manager for Human Resources; Mr Cairns said that any information required was simply lifted from OneDrive without a paper trail.

34. The document also includes what appears to be selection criteria and scoring between employees within the technology department. It says a "comprehensive analysis of each department was carried out" but again, no documentary evidence of this was produced or suggested to be in existence. Mr Brown said an additional scoring matrix was provided to him by Mr Cairns and Ms Kennedy; he couldn't remember how, whether by phone or discussion. This was not produced in evidence.

35. The respondent accepts that only the claimant was placed in a redundancy pool of one. No other potentially relevant colleagues appear to have seriously been considered for "redundancy". For example, Mr McNally, was an external fee-earner whose high salary was paid from within the construction department. It was accepted there was 'no current role for him' and he was continuing to be paid his salary until his role became available. Yet he was not considered as at risk of redundancy. Mr Hair also mentioned another colleague in a similar position, who was equally not considered at all. I accept Mr Cairn's evidence that Mr Brown, "convinced" him to keep on Mr McNally. In the respondent's review document, it has a heading, "employee considered" and lists the three technology department staff, including the claimant. Regarding the two junior colleagues, the document then says, "these employees only considered if Senior Business Analyst was to be considered instead of a business analyst". No written business case or contemporaneous documentary evidence was provided to show why no other colleagues were considered for the pool, which for a company of its size, with the human resources at its disposal, seems surprising. It is accepted that the claimant was not consulted at any stage about the pool.

36. I also found the production of the review document and the discussions around it unusual, given the respondent's size and administrative resources. Whilst I accept that there were ongoing discussions about the general need for business cost-savings and ways to make the company 'leaner' from January 2023, I do not accept that there was a measured review exploring whether the claimant's role was redundant in the technical meaning of that word. I find the document was created after the claimant was identified as likely to be dismissed on 3 July 2023. Therefore, I find that "the review" was carried out in the knowledge that the claimant would very likely be the person dismissed, a decision that was solidified as set out below.

19 July 2023 – Disagreement

37. On 19 July 2023 there was a meeting between Mr Brown and the claimant. I prefer the claimant's account of what happened at this meeting, namely that after a discussion about the 'candidate journey', a part of the respondent's business model, Mr Brown grew frustrated with the claimant's answers and became heated. This is because Mr Brown was vague and uncertain in his recollection of the incident, which was not addressed in his witness statement. In contrast, the claimant gave a clear account that was corroborated by actions such as seeking to arrange a meeting with Mr Cairns to discuss what had happened and mentioning the meeting to Ms Kennedy when they spoke two days later. It is further supported by Mr Cairns who said it would "not be unusual" for Mr Brown to have heated discussions, the impression being that this may well have been part of his management style. It is also corroborated by the claimant's description of Mr Brown as 'impulsive' in his decision-making, which he mentions in a PDP, and I accept to be broadly accurate.

38. Accordingly, I find that Mr Brown did heatedly ask what the claimant and Ms Jackson, "actually did?" and that by the end of the meeting, he was clear in his mind that the claimant would indeed be the person to leave the company, having formed that preliminary view at the 3 July 20223 meeting with Mr Cairns, as described above.

39. The next day, on 20 July 2023 at 19.55, Mr Brown sent an invitation for a remote meeting with the claimant to take place the following morning, titled, "CB/JFeller" and with no other context or agenda.

21 July 2023 at risk of redundancy meeting

40. At the meeting on 21 July 2023, the claimant met with Mr Brown and Ms Kennedy. Mr Brown told him that he was at risk of being made redundant. It would be usual for a meeting of this kind to be recorded in writing which it was not. I accept the claimant was not expecting Ms Kennedy to join when she did and that he did not know what this meeting would be about.

41. After the meeting, the claimant called Ms Kennedy privately, as supported by his covert transcript. She said the decision to make him redundant was ”very recent”, which I accept as true. I also accept that the claimant had a call on his mobile phone with Mr Cairns that same day in which Mr Cairns said it was Mr Brown’s decision, though in the private knowledge that he had been part of the decision-making. Finally, an email from Mr Brown was sent the same day to the claimant stating his proposed redundancy was due to an “operational and financial review” having been carried out.

42. The claimant requested evidence of the respondent’s “redundancy process” by emails dated 21 and 24 July 2023. He explained this was to help inform his proposals for the consultation meeting and to better understand the process that led to him being put at risk. An email was sent initially to Ms Kennedy, then Mr Cairns, with Mr Brown cc’d in. The claimant was told he would have the information at the first consultation meeting and then by a later stage but nothing was ever sent to him. This meant that at no point did the claimant have information about the redundancy process, for example, the selection criteria; the business case for redundancy, with supporting evidence; or the reason why work in his role had or was expected to cease or diminish. The respondent had a redundancy policy but this was not sent either.

43. An email from Mr Cairns was sent to Mr Brown dated 24 July 2023 in which Mr Cairns bullet points a ‘cost cutting process’. The last bullet point lists 14 July 2023 as “potential redundancy and job moves identified. Provisional selection for redundancy process commences”. I do not accept that the last two bullet points are accurate, having found already the claimant was identified at 3 July 2023. I do however, accept the broad accuracy of the finance meetings described before that.

44. On 24 July 2023, Mr Brown and the claimant had a meeting during which the claimant answered a number of questions for Mr Brown about their technology systems and current work.

31 July 2023

45. On 31 July 2023, Ms Kennedy sent the following email to Mr Brown and Mr Cairns: “I have prepared the narrative below for Thursday as a rationale for the potential redundancy and copied Martin [Cairns] in case he has anything else to add”.

46. Ms Kennedy then went on to prepare almost verbatim scripts for both consultation meetings, with significant additions and prompts, such as:

> *“if pushed say this: there has been a downturn in the construction sector by ???% this is however confidential information...’*
>
> *“leave a pause here, we want to make a decision then either way”*
>
> *“We need to think of what to say here. I have added what you said at the meeting.”*

Consultation meetings 3 and 11 August 2023

47. The events at the two consultation meetings were not disputed and recorded by way of transcripts. The claimant attended the first consultation meeting on 3 August 2023 where an ‘operational review’ was again mentioned as the rationale for redundancy. Mr Brown told the claimant*, ‘the work you’ll be doing will start to diminish as we have no plans to start or bringing in new systems into the business.’*

48. This was not an accurate statement as the respondent then signed a contract with a new technology supplier, Onboarded, days later on 9 August 2023, which Mr Brown must have been aware of as CEO. I found that there were also conversations taking place about other new software being brought in and whether existing systems, such as RSM, required further implementation or could be managed by other departments. Another system, Vincere had been implemented but was not yet fully effective.

49. A second consultation meeting took place 11 August 2023, at which the claimant was told he was being made redundant. A script was followed near verbatim, as prepared by Ms Kennedy.

50. By way of a letter on 14 August 2023, the claimant was given written notice that his employment would terminate by reason of redundancy.

Appeal

51. The claimant lodged an appeal on 18 August 2023.

52. Ms Kennedy and Mr Brown were involved in drafting responses to the claimant's appeal points, which Mr Cairns had the opportunity of adding to. I find Mr Brown and Mr Cairns were heavily involved in the appeal process notwithstanding their involvement in the initial consultation meeting. Mr Cairns was also involved in the initial consultation meeting preparation and was part of the original decision to dismiss, as I have mentioned.

53. An appeal meeting was held on 24 August 2023, chaired by Mr Cairns with Hannah Simpson, another HR manager, attending. At that meeting, Mr Cairns told the claimant:

> *"We can't stop bringing in technology, but there is a budget for tech which is lower than expected and planned, which cannot support head of technology, we come back to economic terms causing the issue."*

54. The Claimant was advised of the appeal outcome on 30 August 2023, which was unsuccessful.

55. The Claimant completed his period of notice and his employment terminated on 8 September 2023, after which the claimant was paid a statutory redundancy payment of £1,286.

56. The technology department was disbanded in February 2024, when the last remaining individual working in that department, Mr Brunton, was made redundant.

Discussion

57. I first had to determine the objective question of whether there was a redundancy situation as defined in section 139(1)(b)(ii). The respondent's case on paper was that the business requirements for work of the claimant's type, namely a senior business analyst had, or was going to, cease or diminish. However, when Mr Brown was asked directly whether that was the reason for the claimant being made redundant, he said no, it was not. This presented the respondent a real difficulty in proving on the balance of probabilities that there was a redundancy situation.

58. Furthermore, in contrast to Mr Brown's statement to the claimant that, "no new technology was being brought on", the respondent was at that same time bringing in Onboarded, a new technology system, midway through the redundancy consultation process. There were also other technology systems that needed further implementation and/or maintaining. Whilst I accept that some of this work could well have been managed by the junior members or other departments, on the facts presented, it was not accurate to say the work requirements of a senior data analyst had or were expected to cease or diminish at that time. It seems the respondent equated cost-savings and reorganisation with the technical definition of redundancy.

59. I also bear in mind the wider lack of supporting evidence, for example, email threads between departments about the possibility of the claimant's redundancy; I would have expected the decision-makers to have made use of their large human resources department at an early stage if there was a genuine redundancy situation. I would also have expected to see some evidence of the exploration of alternative steps or plans to avoid the redundancy from an earlier stage, for example, approaching Mr Hair, head of construction for costs reductions, which he confirmed never happened; instead the only supporting evidence was the review document, dated as late as 11 July 2023, and an email from Mr Cairns mentioning redundancies dated 24 July 2023, post the decision.

60. There was a notable contrast between the lack of emails and paper trail prior to July and the various emails between Mr Cairns, Mr Brown and Ms Kennedy in July, when the "redundancy process" was taking place. This suggests HR was not aware of the prospect of the claimant's redundancy prior to July, as corroborated by Ms Kennedy's statement to the claimant that the decision was

"very recent". I therefore find there was not a redundancy situation as defined in section 139.

What was the principal reason for dismissal?

61. I consider that the principal reason for dismissal was a cost-cutting exercise; the claimant's salary was too high and Mr Cairns and Mr Brown believed his work could be distributed among the remaining 1.5 junior technology analysts or the finance department. The claimant alone was identified as the person who was the most likely to be dismissed at the meeting between Mr Brown and Mr Cairns on 3 July 2023. Mr Cairns told the tribunal that is when they decided the claimant would be at risk of redundancy. He did not mention any other person being at risk of redundancy at this meeting and the scoring exercise that is said to have taken place, in which other colleagues were explored, came later. For this reason, I find that Mr Cairns and Mr Brown settled provisionally on the claimant as the person who would be dismissed. This initial decision was then cemented in Mr Brown's mind shortly thereafter by the claimant's request for a promotion and by their heated disagreement on 19 July 2023.

62. Therefore, by 20 July 2023, when Mr Brown requested the meeting with the claimant, Mr Brown's mind was clearly made up and Mr Cairns was unlikely to have required much further persuasion, given their agreed preliminary view reached already on 3 July 2023 and his previously willingness to "be convinced" by Mr Brown regarding their decision to keep on Mr McNally.

63. The decision to dismiss the claimant therefore predates the 'redundancy process' that followed. The two consultation meetings and the appeal itself were therefore directed towards 'fitting' the decision already made, which explains why the discussions about narrative and rationale took place as they did, for example, "if pushed, say there was a downturn in the construction element of the business of ???%" and "we want to make a decision here either way."

64. I do not accept the claimant's case that the principal or entire reason for his dismissal was the heated disagreement at the meeting on 19 July 2023 or purely a personal dislike of him by Mr Brown; the decision to dismiss predated

that disagreement and that level of sentiment was not conveyed by the transcript of their recorded conversation on 24 July 2023.

Was the dismissal fair or unfair within the meaning of section 98(4)?

65. Even if there was a genuine redundancy situation which was the principal reason for dismissal, I would still have found that the claimant was unfairly dismissed due to the unfair process that followed.

66. As a general point, the informal and undocumented methods of central decision-making by the respondent's leadership, for example, Mr Brown and Mr Cairns, "keeping things in their heads", is surprising for a business of the respondent's size and turnover, especially when its employees' employment is on the line. This does not instil confidence that these decisions were measured and objectively made.

67. In terms of specific procedural irregularities, these include:

    a. The claimant was not consulted at a formative stage in the decision-making; the consultation meetings took place after 19 July 2023, by which stage Mr Cairns and Mr Brown had concluded that the claimant would be the person leaving. In light of the findings I have made, there was no adequate warning.

    b. The claimant was not provided with any business case for redundancy or why his role alone was affected and he was not provided with the respondent's consultation policy; Mr Brown, Ms Kennedy and Mr Cairns were all aware that the claimant was seeking this information yet took no steps to ensure it was given to him. If they were confused by what the claimant meant, as Mr Brown and Mr Cairns suggested, they should have sought to clarify what the claimant meant and to provide redacted copies of documents if they were concerned about sharing sensitive information.

    c. At no point was the claimant consulted about the selection criteria, or indeed informed of its existence, despite his request. This meant that the claimant was formulating responses 'blind' without any meaningful way to address the respondent's specific concerns about the viability of his role and options to prevent redundancy. In written evidence, Mr Brown said he was "nearly shocked" by the presentation the claimant gave on proposals

to avoid redundancy, as they would cost money or create an unknown lag before generating business, yet at no point did he convey these concerns in a timely way to the claimant so they could be addressed.

d. At no point was the claimant given any explanation as to why only he was in the selection pool and none of his colleagues were; indeed, he was not consulted about the selection pool at any point. The Tribunal heard that fee-earning roles would secure profitability in the future, so were not part of the pool, yet there was no corroborative evidence about that. It was unchallenged that the claimant made £150,000 in cost savings and had a collaborative role; therefore greater clarity should have been given to the claimant to explain why he was the "no brainer" choice as Mr Brown suggested in his witness statement.

e. The selection criteria and pooling decisions were not made objectively, being taken by Mr Cairns in the first instance, who was involved in the redundancy process throughout. Coupled with what I outlined in (d) above, the approach taken to pooling by the respondent was outside the band of reasonable responses in these circumstances.

f. Mr Cairns carried out the appeal having been heavily involved in the original decision-making process, so was not objective; his response to that point was simply, "do you think I could not be impartial?" Regarding his involvement in the appeal itself, his responses had been drafted at length for him by Ms Kennedy and Mr Brown; the impression was not one of 'fresh eyes' being given to the appeal.

g. I accept that there were no suitable available posts open to the claimant; they were junior fee-earning roles and a reasonable search to ascertain this appears to have been conducted by the respondent.

Was there some other substantial reason, namely reorganisation?

68. Having found that there was not a redundancy situation and redundancy was not the principal reason for dismissal, I am asked to find in the alternative that the business reorganisation amounts to a substantial other reason of a kind to justify dismissal.

69. Scant corroborative evidence was presented to the tribunal to set out the business reason for reorganisation, namely, the dismissal of the claimant alone and absorption of his work into other areas of the business. However, I accept the respondent's evidence that moving the claimant's work to other departments and staff members was a genuine and legitimate cost-saving exercise. In rebuttal, the claimant points to the technology department not being disbanded until February 2024 and that the dismissal of the claimant alone did not lead to any demonstrable advantage. However, I remind myself that it is not for the tribunal to substitute its own view on the merits of reorganisation or of a particular business decision and it is for the employer to decide whether a reorganisation is warranted. For that reason, I consider that there was a substantial other reason capable of justifying dismissal, namely reorganisation.

70. I must then consider whether the decision to dismiss for that principal substantial other reason was reasonable in all circumstances in accordance with section 98(4).

71. I adopt the case law presented to me by the claimant on this point, in particular **White v Reflecting Roadstuds Ltd** [1991] ICR 733. In light of the flaws surrounding the redundancy process, consultation, and appeal, which I have outlined above at paragraphs 66- 67, I consider that the dismissal was unfair and not in accordance with equity and the substantial merits of the case.

Conclusion

72. In conclusion, there was not a redundancy situation as defined by section 139. The reason for dismissal was a 'substantial other reason', namely a business reorganisation. However, due to the flaws in the dismissal process that followed and the manner in which the decision was taken, the claimant was unfairly dismissed. Remedy, including any Polkey issue, will be dealt with at a separate hearing.

Employment Judge C Fearon

Date 24 June 2024

Sent to the parties on: 2 July 2024....

For the Tribunal Office