EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Claimant	Ms A Heptinstall
Respondent	Bills Restaurant ltd
Employment Judge:	Mr J S Burns
Representation	
Claimant:	Ms N Payne (friend)
Respondent	Mr R Kohanzad (Counsel)

JUDGMENT

The claims are dismissed

REASONS

Procedural matters

1. The Final Hearing was held on CVP. There were no technical problems. The hearing started at 10.30 am.

2. The Claimant had not complied with the directions before trial, (which were issued in August 2020 to Ms Payne's correct address but which she denied receiving) having provided no list of documents or witness statement or even written representations. The Respondent had previously made an application to strike out, but did not pursue this and wished to proceed today.

3. The Claimant did not appear on the video but she was represented by her friend Ms N Payne. (and she was present off screen and audible in the background in the same premises as Ms Payne). Ms Payne explained that the Claimant did not intend to appear or give evidence because she suffering anxiety and depression, and that the Claimant was content for the hearing to proceed on the basis that Ms Payne would make points on the Claimant's behalf. I explained that it would be preferable for the Claimant to give evidence on oath.

4. I discussed with Ms Payne the possibility of the trial being adjourned to a later date to allow the Claimant to comply with the directions and possibly give live evidence on the next occasion, but ultimately decided against adjourning for the following reasons: (i) no application for an adjournment had been made by the Claimant who was content to have her case presented solely by Ms Payne as described above (ii) no medical evidence was provided to show either that the Claimant was unable to give evidence today, or that, if she was unable today, that she would be able to give evidence on a later occasion, (iii) as no advance notice of any Claimant indisposition had been given to the Respondent, the Respondent had incurred substantial

costs instructing Counsel to attend the trial today which would be thrown away by an adjournment (iv) if I permitted a very late adjournment at the Claimant's request, in fairness in the circumstances it was likely that I would be compelled to make a costs order against the Claimant which it would be difficult for her to pay.

5. I concluded that the overriding objective was best served by continuing with the trial today, (following a short interval adjournment between 11 am and 2pm to give the parties an opportunity to exchange and consider each other's witness statements which it appeared they had both failed to do earlier). These were exchanged and sent to me by 12noon. At 12.16 Ms Payne emailed to me and Mr Kohanzad internet links to new advertisements as described below.

6. The hearing resumed at 2pm. Mr Kohanzad objected to the admission into evidence of the new advertisements and I ruled them to be inadmissible for the reasons explained below.

7. I considered the documents in an electronic bundle of 77 pages and I received oral representations from Ms Payne and sworn evidence (per her witness statement) from Ms C O'Toole the "Head of People" of the Respondent. I found Ms OToole to be a truthful and reliable witness. I then received final submissions from Ms Payne and Mr Kohanzad.

The Claims/issues

8. The ET1 was presented on 25/6/2020, claiming unfair dismissal and notice pay. The Claimant had been dismissed for redundancy on 27/3/2020 after 6 and a half years' service as an Operations Support Manager at the Respondent's Head Office at 95 Aldwych London WC2B 4JF, which office was closed earlier this year at which point the administration of the Respondent moved to another office at 26-28 Conway Street, London, England, W1T 6BQ

9. Her case as per section 8.2 of the ET1 was (i) during the redundancy process two vacant roles were advertised at the "new office" that she was not informed about (ii) that her role had been merged with that of another employee and she should have been pooled with that another (unnamed) employee and given an equal opportunity to be considered for the combined single role and (iii) that she was paid less notice pay than another employee who had been in a similar role for a similar length of time.

Findings of fact

10. The Claimant's employment started on 3/6/2013.

11. On 15/1/20 she met with Ms OToole and given a first written warning of redundancy letter (46) and informed that a two-week consultation period would commence, the purpose of which was to explore alternatives to her redundancy.

12. On 22/1/2020 Ms OToole met the Claimant again and mentioned that the only alternative role available within the Respondent was as graphic designer. The Claimant "laughed it off". The Claimant did not mention any other roles and she was mainly interested in her redundancy compensation/notice package. The Claimant believed (incorrectly) that she was entitled to 3 months' notice period and referred to the fact that one of the PAs to the directors, Louisa Gomez, had a 3 months' notice period in her contract.

13. Ms OToole met the Claimant again on 29/1/20 – again the discussion was about notice pay.

14. On 3/2/20 the Claimant was given formal notice of a redundancy dismissal on 27/3/20. The Claimant was notified of her right to appeal and reasonable time off to look for alternative employment and to attend job interviews.

15. On 13/2/20 the Claimant appealed – the only ground of appeal being that she should have been given 3 months notice like another employee (52). She did not raise the arguments (i) and (ii) as set out in paragraph 9 above. The appeal hearing was conducted on 19/2/20 by David Hoyle ("Peoples' Director"). He considered the one point raised by the Claimant and agreed that she would be paid 7 weeks pay as "notice pay" but beyond that dismissed the appeal (54). On 24/3/20 the Claimant asked the Respondent to change its mind so she could be retained and furloughed but on 26/3/20 the Respondent declined to do so.

The alternative vacant role complaint

16. In these proceedings, the Claimant who had not further particularised her claims, or provided any list of documents or formal disclosure, and in response to an application to strike out, on 13/11/2020 (ie 12 days ago) disclosed to the Respondent a number of documents which she referred to as "her evidence". This included an undated job advertisement for an Executive Assistant at "The Ivy Collection" (pages 61 and 62) and an undated job advertisement for an HR administrator at "The Ivy Collection' (pages 65 and 66).

17. (The Claimant also disclosed a Facebook posting, dated 3rd March (year not specified), inviting interested parties to apply for a "Reactive & Planned Maintenance Co-ordinator" (page 64) – but did not pursue any argument about that posting at the trial today).

18. It was reasonably understood by the Respondent from this disclosure that the Claimant's complaint (that during the redundancy process two vacant roles were advertised at the new office that she was not informed about) related to claimed vacancies within The Ivy Collection, which is a quite separate business from that of the Respondent, but also based at the "new office" namely 26-28 Conway Street.

19. Hence in preparation for the trial the Respondent caused enquiries to be made with The Ivy Collection, and then produced Ms OToole's witness statement in which she confirmed "*that she was unaware of any Executive Assistant and HR administrator positions being available at the time of the consultation period and that she has recently checked with the HR Director at The Ivy Collection, Janene Pretorius who has confirmed that the Executive Assistant and HR Administrator roles were not advertised in the period from 15/01/2020 to 27/03/2020. There was an Executive Assistant at The Ivy Collection that did hand in her notice of resignation in June 2020 but immediately after, she retracted her notice and the job advertisement expired. The previous advertisement for Executive Assistant was back in 2018"*

20. The Claimant now accepts that what Ms OToole has stated is true. There were no vacancies at The Ivy Collection and the Claimant's disclosure on 13/11/2020 about this was misleading.

21. On receipt of Ms OToole's witness statement today, the Claimant/Ms Payne made further searches on the internet and found new adverts. In her witness statement the Claimant then wrote "*In reality there were two roles advertised at Conway Street closing in Jan 2020. These were with Caprice Holdings. As Executive Assistant (Closing 22nd Jan 2020) and HR*

Administrator (closing 23rd Feb 2020). Unfortunately when I did an online search for these roles other adverts came up which I submitted for evidence however I cannot believe that the respondent was unaware that there were two roles advertised and closing at the times I previously stated. I now attach screenshots of both. I could have done either of these jobs and neither were mentioned to me. There are many staff that work across Caprice Holdings. The CEO of Bill's and The Ivy was joint as is the Head of People whom is listed as the respondent in this claim.'

22. The screenshots which Ms Payne emailed to the Respondent and me at 12.16 today show job adverts as described by the Claimant for *Caprice Holdings and the Birley Clubs* based in Fitzrovia, London. This was the first specific reference in these proceedings to these vacancies.

23. When the hearing resumed at 2pm, Mr Kohanzad objected to the admission of the evidence about the claimed Caprice Holdings and the Birley Clubs vacancies and I reserved my judgment on this until I had heard Ms OToole's evidence and then ruled that the Claimant could not rely on it. My reasons for this are as follows:

24. I accept that when making a redundancy, acting fairly the employer should try as far as reasonable to find alternative work within its own organisation and where appropriate within other companies in the same group.

25. Hence, if the Claimant could have proved that the Respondent was in February/March 2020 in the same group as Caprice Holdings and the Birley Clubs, which had vacancies suitable at that time for the Claimant, which were within the actual or reasonable knowledge of the Respondent, then at least on a prima facie basis it would follow that the Claimant should have been offered a chance to apply for them.

26. However that argument cannot be tried fairly without an adjournment (which in any event the Claimant did not apply for in this regard) because, as a result of the Claimant not providing any proper disclosure and then providing misleading disclosure on 13/11/20 about the claimed vacancies being at The Ivy Collection and not disclosing until 12.16 today the new Caprice Holdings and the Birley Club advertisements which she now wishes to rely on, the Respondent has not had an opportunity to obtain the necessary evidence (both as to any possible group relationship and as to the existence and suitability of these new claimed vacancies) .

27. Ms OToole was able to give me some information. She told me that she has been working for the Respondent for nearly 4 years. She has been on maternity leave recently and since the end of March 2020 there may have been changes which she is ignorant of, but she was able to confirm the position until the end of March 2020. During that period the Respondent was operated independently in an office which was separate and with HR, directors and officers who were separate from those of both The Ivy Collection and Caprice Holdings Limited. She believed that a single person namely Richard Caring was the majority or sole shareholder of all three companies. However, on a day-to-day basis and from her HR perspective, the Respondent and Caprise Holdings Ltd had no contact or common dealings and if, for example, she was told to make enquiries with the latter company as to whether or not it had vacancies, she would not even know the person she should have to ask about this. After the end of March 2020 the administration and directorship of the Respondent was taken over by the same persons who lead The Ivy Collection whose head office is at 26-28 Conway street, which is a building she believes is owned by Richard Caring and is also the head office of Caprise

Holdings Limited. She believes that the Briley Club is some kind of private members club but beyond that knows nothing about it.

28. This evidence, which I accept, suggests to me that, even if it could be established that in March 2020 the Respondent and Caprise Holdings Ltd were in the same group, they were operated independently and so the latter company was not an obvious reasonable place to look for a vacancy when a redundancy was being made in the former.

29. The forensic disadvantage in not being able to adduce evidence about the claimed Caprice Holdings and the Birley Clubs vacancies is entirely of the Claimant's own making because she should have identified these and provided the disclosure much earlier.

30. Ms Payne complained that it was only when she read Ms OToole's witness statement that she realised that she had made a mistake, but that is to put the cart before the horse. The witness statements are supposed to deal with what has already been identified as the issues, and a claimant is not at liberty to materially change her case after witness statements have been exchanged, particularly if she is content to postpone that exchange until just before the trial.

31. As already stated, the Claimant now agrees that, apart from the newly claimed Caprise vacancies, there were no other suitable vacancies that she should have been considered for.

The complaint that the Claimant should have been pooled with Emily

32. The Claimant also claims that her role as Operations Support Manager was being combined with another staff member (namely Emily) who was based at the office located at Conway Street. I accept however Ms OToole's evidence that the Claimant's role was not combined with any role at the office at Conway Street, that the Claimant had no counterpart at the Conway Street office and that Emily was the receptionist and not a manager at Conway Street.

33. On 5/3/2020 Sebastiano Ligato sent an email to the Claimant with a long list (74/75) of other employees to whom she should hand over the responsibilities of her role. Answering the phone and dealing with incoming and outgoing post was assigned to "Reception" (which I take to be a reference to Emily), but all the other Claimant duties were assigned to various others, mainly at Officer level.

34. It is notable that the Claimant herself did not raise this claim during her appeal, which she might have been expected to do had she thought at the time that her role was simply being merged with Emily's.

35. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. I am satisfied that the Respondent acted reasonably in not pooling the Claimant with Emily.

The notice pay claim

36. The Claimant's employment contract provided that she would be entitled to one month's notice of termination. After 2/6/2019 she was entitled by section 86 ERA 1996 to 6 weeks' notice. In fact on 3/2/20 the Claimant was given formal notice of a redundancy dismissal on 27/3/20 – ie she was given in excess of 6 weeks' notice. The Claimant was also paid her statutory

redundancy pay and as a gratuity 7 weeks' pay which for some obscure reason the Respondent chose to call "notice pay".

37. For these reasons I find that the Claimant was fairly dismissed for redundancy and that on termination she received adequate notice.

J S Burns Employment Judge
London Central
25/11/2020
For Secretary of the Tribunals

date sent to the Parties – 26/11/2020