EMPLOYMENT TRIBUNALS

Claimant: **Ms A Rifat**

Respondent: **Supadance International Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **7 September 2021**

Before: **Employment Judge Gardiner**

Representation
Claimant: Mr Rhys Johns, counsel
Respondent: Ms Patricia Hall, Senior Litigation Consultant

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant was unfairly dismissed. A remedy hearing will determine the compensatory award to be received by the Claimant as a remedy for the unfair dismissal.

REASONS

Introduction

1. At a face-to-face meeting on 19 August 2020, the Claimant was told she was being dismissed from her role as Factory Manager for the Respondent. On the same day she was sent a letter about the redundancy. Before that, there had been no individual consultation with the Claimant about the reasons why her role was redundant and whether there may be any suitable alternative employment. She argues in these proceedings that her dismissal was an unfair dismissal. That is resisted by the Respondent.

2. It was agreed at the outset that the Tribunal would restrict its consideration to whether this was an unfair dismissal and if so, the chance that the Claimant would have been fairly dismissed had a fair procedure taken place. Remedy matters would be determined, if applicable, on another occasion. This would include whether the Claimant would have been fairly dismissed at a later date in any event.

3. Evidence was heard from Mrs Free, who was the Respondent's Managing Director and the Claimant's line manager, as well as from the Claimant and from her husband. All confirmed the truth of their witness statements on affirmation, although Mrs Free made a significant change to the date in paragraph 9, which I deal with below. They were then cross-examined on their evidence and answered questions from the Tribunal.

4. Evidence was also contained in a bundle of documents which extended to 112 pages, including three pages which were added by agreement on the morning of the hearing.

Factual findings

5. The Respondent business manufactures dance shoes for professional dancers and others. It has done so for around sixty years. Before the pandemic it employed more than 40 employees, of which around 30 were based in the Respondent's factory. The remainder of the employees worked in the Claimant's shop or office, which was at a different location. Mrs Free was based in the Respondent's office and shop and visited the factory only occasionally. She did not have a detailed knowledge of the particular roles carried out by particular employees.

6. The Claimant had worked at the Respondent since October 21,1985, initially as a shoe finisher. From 2017 onwards she had been promoted to the role of Factory Manager. This was in part because of her good people skills, but also in part because of her good knowledge of the different roles carried out by particular factory workers. On occasions, where a worker was off sick or required support, the Claimant was able to step in and cover a particular role. She was paid a higher salary, in recognition of the additional responsibilities she assumed in the role.

7. The role includes the following responsibilities set out in Mrs Free's witness statement at paragraph 4. These were recording the timing of staff arrivals, keeping a record of hours worked by staff, printing and distributing work tickets to relevant workers, and being the main line of communication to the office about issues with factory processes or problems with staff. She did not have a specific HR function. Her responsibilities also included responsibility for ordering supplies for the factory, for health and safety and her role as Fire Marshall.

8. The Claimant was never issued with a Job Description setting out the extent of her responsibilities. Given the extent of her remit, I find that the role of Factory Manager was a significant responsibility given the number of staff she managed. It was not the 5-10% of her working time that Mrs Free contended. Mrs Free did not spend sufficient time in the factory to know what proportion of Mrs Free's time was spent on different activities. It is telling that when describing the Claimant's role in paragraph 4 of her witness statement, Mrs Free focuses on the managerial aspects of her role. She does not mention the particular shoe finishing and packaging tasks that she sought to emphasise in her oral evidence.

9. I accept that, in addition to her managerial role, the Claimant also continued to carry out some limited work on the factory floor. This would include inserting socks into shoes and gluing them in place, stamping the Respondent's logo on the shoes,

cleaning them and packing them into boxes. This particular task was also generally carried out by a colleague, Thai Tu, who did not have any managerial responsibilities.

10. In both 2018 and 2019, the Respondent made a small financial loss. The evidence was that this was quite standard practice for the Respondent in the pre-pandemic years. In 2018, the Respondent took out a substantial bank loan to assist it with its finances.

11. The impact of the Covid-19 pandemic on the Respondent's order book was significant. As Mrs Free put it in her evidence, dancing is a contact sport, and the effect of the pandemic was to prevent such activity by requiring social distancing. Theatres were closed, although dance practice did continue at home, and lessons took place to some extent over zoom. There was still a significant reduction in dance performances and so a significant reduction in the demand for shoes. The Respondent noted that its order book fell from 21,538 pairs of shoes during the first six months of 2019 to 9,892 pairs during the first six months of 2020.

12. The Respondent took out a business interruption loan of £50,000 and furloughed many of its staff. However, the Respondent's Factory continued to operate on a part-time basis to fulfil the reduced order book. This meant that it would be closed for two or sometimes three weeks a month. When the factory was closed, factory workers would be furloughed, receiving 80% of their contractual pay. This arrangement became more established with the introduction of the flexible furlough scheme. It applied to the Claimant as it did in relation to other factory staff.

13. Given the downturn, at one point in early June 2020, the Respondent was seriously contemplating closing its factory. The Claimant was told of this prospect, understanding that if this took place both she and the other factory workers would lose their jobs. She was told to inform the factory workers of this possibility.

14. However, within a few days, Mrs Free had thought again about the best way forward financially. She had decided that the necessary cost savings could be made with a substantial headcount on the factory floor. She asked to meet with the Claimant to discuss the particular roles carried out by each factory worker, given that the Claimant had a much better understanding of this than she did. The Claimant was asked to assist the Respondent in making the necessary savings. It would have been clear to the Claimant from the discussion at that meeting and thereafter that her role would not be made redundant as part of that redundancy exercise.

15. With this information from the Claimant, a decision was made that 15 factory workers should be made redundant, roughly half the factory workforce. The decision was Mrs Free's decision but based on what she had been told by the Claimant. No consultation process was followed in relation to these employees, many of whom had worked for the Respondent for several years. Subsequently, a further worker was added to the list of potentially redundant workers. It was unclear on the evidence when the redundancies took effect, but in many cases the Respondent would have had to give a lengthy notice period and make a substantial redundancy payment given the employees' length of service.

16. From the Claimant's perspective there was no indication that there may be further redundancies or that her role might be at risk of redundancy at any point until the middle of August. This changed when she was asked to a meeting which took place on 19 August 2020. At the meeting she was told she was being made redundant and was handed a letter purporting to confirm her redundancy. Confusingly, the letter stated that it marked the start of a further redundancy procedure. In fact, there had been no procedure to that point in relation to the Claimant. There was no procedure thereafter. The only person who was being made redundant was the Claimant. The only rationale given to the Claimant was that the Respondent had considered recent trading loses and had no clear indication of when dancing would be able to resume. She was told that her notice period would begin at the beginning of September.

17. Given her length of service, she was subject to a 12-week statutory notice period. This notice period did not end until 24 November 2020. By that point, it had been clear for several weeks that the full furlough scheme was being reinstated, such that employees could be kept in their roles at no cost or no significant cost to their employers during weeks when they were not working. There is no evidence that the Respondent considered whether to keep the Claimant in her role, at least for the time being, in circumstances where the reinstatement of the full furlough scheme in October meant that the cost of continuing to employ the Claimant in the short term was lower.

Legal principles

18. It is common ground between the parties that the reason or the principal reason for the Claimant's dismissal was redundancy. This is a potentially fair reason for dismissal under Section 98(2) Employment Rights Act 1996.

19. In deciding whether an employer has acted fairly in dismissing for redundancy, under Section 98(4), the statutory language requires the Tribunal to consider whether the Respondent acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant. It is not for the Tribunal to substitute its own view of the employer's decision and of the process that led to that decision. Rather the tribunal should ask whether the decision to dismiss the Claimant for this reason lay within the range of reasonable responses to the redundancy situation. The same band of reasonable responses approach also applies to the process that the Respondent followed in the period leading up to the dismissal decision. That said, relevant considerations as to whether the employer acted within the band of reasonable responses include whether the Claimant has been placed in a suitable selection pool of those engaged in similar roles to which the same selection criteria have been applied; whether the selection criteria are based on objective factors and fairly applied to all; whether employees were warned and consulted about the redundancy; and whether any alternative work was available which could have been offered to the Claimant. In some cases, in order to act reasonably, an employer may need to consider whether to create another vacancy for the Claimant by bumping another employee from a role which the Claimant would be willing and able to perform. If an employee has treated the Claimant as being in a unique role, and therefore decided not to put them in a selection pool with other employees, the Tribunal will ask whether that decision was

within the band of reasonable decisions that could be taken by a reasonable employer.

20. If a fair procedure has not been followed, because it is outside the band of reasonable processes, then the dismissal will be an unfair dismissal. Ordinarily that would then require the Tribunal to consider making a basic and a compensatory award. However, where the claimant has been paid a statutory redundancy payment, the remedy will be restricted to a compensatory award.

21. As part of the consideration the amount of the compensatory award, the Tribunal must engage in an element of speculation as to what would have happened had a fair process been followed. If it can on the evidence before the Tribunal, it will go on to consider the chance that the outcome would have been any different had a fair process been adopted. This may lead to a decision to limit the duration of any award of compensation; and/or to apply a percentage discount to the arithmetical loss to reflect the chance that the Claimant may have been fairly dismissed in any event. This assessment is sometimes referred to as making a *Polkey* adjustment, after the name of the House of Lords case in which this principle was first discussed.

22. However, there are some cases where the process has been so limited and the evidence has been so scant that it is not possible for the Tribunal to reconstruct what would have happened if a fair procedure had been followed. In those cases, as was explained by Elias J in *Software 2000 v Andrews* [2007] ICR 825 at paragraph 54(3):

> "there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made"

23. In those cases, it is appropriate to award the Claimant the arithmetical financial loss suffered following the dismissal.

Conclusions

24. In closing submissions, Ms Hall, who appeared for the Respondent, accepted that there had been no consultation process with the Claimant before the decision was taken. She also accepted that a fair process might have taken a further month to give the Claimant fair warning of her potential redundancy and give the Claimant the opportunity to discuss alternative roles with the Respondent. At that point, one month later, she argued the Claimant would inevitably have been made redundant. This was, as she put it, both because of the dire financial situation facing the Respondent and also because she asked the Tribunal to accept that by this stage the Claimant had decided to look for a part time supermarket role. In addition, this was not a case, she argued, where a reasonable employer would inevitably pool the Claimant's role with that of other staff in order to select redundant employees. Her position was that the Claimant's role was a unique role and therefore was not a role that should be pooled with other members of staff, before selecting according to objective selection criteria.

25. The Claimant disputed that she had chosen to do a part-time supermarket role rather than continue with the type of work for which she had been employed for 35

years. I agree with the Claimant's evidence on this point. She had made a flippant remark during the 19 August 2020 meeting about working in a supermarket. which the Respondent's representative has been taken out of context. I find that she wanted to continue with her role at the Respondent given the good relationships she had with staff on the factory floor. It was also the place where she had worked for several decades and where her husband still worked. I find that the Claimant would have engaged positively with any proposals put by the Respondent for keeping her role, but which might also have had a cost saving dimension. These might have included taking on additional shop floor responsibilities, given the recent reduction in factory staff; considering a cut in salary or of hours; or dismissing other employees instead of the Claimant.

26. It is clear that there was still a role which required to be performed of managing the remaining factory workers, albeit it may not have required the same time commitment as previously. There were still around 15 workers to manage although there had been 30 workers previously. I reject the evidence of Mrs Free that she effectively took over this role herself, and only delegated these duties to others if she was abroad in Poland. I find on the evidence of the Claimant's husband, which I accept, that Mrs Free did not significantly increase the amount of time she spent in the factory. She continued to travel to Poland and base herself in the office. This was because she did not have the detailed knowledge required for day-to-day supervision of the staff on the factory floor, nor was she able to monitor attendance and timekeeping if she was not physically present. Rather, in practice, she assigned the Claimant's management responsibilities to others on an ad hoc basis.

27. Mr Johns, counsel for the Claimant, argues that it is not possible to reconstruct the chance that the factory manager role might have been retained had a fair process been followed. He notes the absence of any clear evidence as to the particular cost saving required in the second round of redundancies, nor any explanation for why the management role was not considered potentially redundant in the first round of redundancies barely two months earlier. He notes the complete absence of any process in both the first round of redundancies involving fifteen members of staff and in the process involving the Claimant. He points too to the oddity of Mrs Free's oral evidence that if the Claimant had chosen to make Mr Thai Tu redundant in the first redundancy process, then the Claimant would still have had a role she could have performed on the shop floor. It was always open to the Respondent to consider transferring the Claimant into Mr Tu's role and making Mr Tu redundant – a process sometime referred to as bumping. Again, no thought appears to have been given to whether this was a viable possibility, although it follows from her oral evidence that it could well have been a possibility in the second redundancy round, given that the Claimant's role and that of Mr Tu were regarded as interchangeable.

28. I am conscious it is always necessary to engage in a degree of speculation when considering what might have happened if a fair process had been followed. However, there are cases where the evidence is so scant that the task becomes impossibly speculative and no reconstruction can be made. This is one such case. Not only has the Respondent not engaged in any consultation with the Claimant whilst the proposal to make her role redundant was still at a formative stage, it does not appear to have considered any alternatives to redundancy – both before the furlough scheme was extended in October and thereafter. At no point has it identified the particular financial saving that making this redundancy would achieve,

nor explored other ways of achieving a similar cost saving. Given the Claimant's exemplary attendance record, length of service, and knowledge of various different factory processes, she ought to have been in a strong position had a decision been taken to select her from a pool of those with similar skills – if a decision had been taken to remove the managerial role and to pool her shop floor abilities with those of a similar skillset. I find that she would have been willing to work, if necessary, in a non-managerial role, or for a lower salary. These options were never explored with her.

29. Therefore, I reject the Respondent's argument that the remedy should be limited to one month's income because the Claimant would have inevitably been dismissed at that point after a process had been followed. Further, I am unable to adopt any rational basis for a percentage discount based on the chance that she would have kept her job had a fair process been followed at the time of the Claimant's dismissal.

30. Unless the parties can agree the appropriate sum for compensation, there will need to be a Remedy Hearing to determine the compensatory award that the Claimant should receive. As she has already received a redundancy payment, her compensation will be limited to a compensatory award. That award is limited by statute to one year's salary. However, the Respondent may seek to argue at the Remedy Hearing that there would have come a later point in time when the combination of sales orders, income, costs and restrictions on the level of furlough assistance would have meant it would have chosen not to employ a factory manager. If such a case is to be advanced, that will need to be shown by specific evidence.

Employment Judge Gardiner
Date: 17 September 2021