EMPLOYMENT TRIBUNALS

Claimant: Ms Louise Collard

Respondent: STS Storage Systems Limited

Heard at: Reading **On: 9 April and 21 May 2021**

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: In Person
For the Respondent: Mr D Leach, counsel

JUDGMENT

1. The claimant was unfairly dismissed.

2. A remedy hearing shall take place by CVP on **27 August 2021**. The parties are to send to each other by **30 July 2021** any witness statements and copies of any documents that they wish to rely on at the remedy hearing.

REASONS

1. In a claim form presented on the 31 July 2020 the claimant made a complaint of unfair dismissal. The claimant appeared in person, she was assisted in the presentation of her case by Mr Jonathan Stewart, a friend. The respondent was represented by Mr D Leach, counsel. At the start of proceedings, the claimant made an application to amend the claim to include a claim of sex discrimination. When it was clear that allowing the amendment would mean that the proceedings would have to be adjourned the claimant withdrew her application for an amendment to be made to the claim.

2. The respondent relied on the evidence of Mr Malcom Beill, Mr Mark Heard and Mr Richard Tyrell. The claimant gave evidence in support of her own case. I was provided with a bundle of documents containing 215 pages of documents. During the course of the hearing I was provided with further documents by the claimant and by the respondent these were, a service contract and a document headed 'THSP Training Quote Audit report' (p217-2019), attached to an email dated 20 May 2021 from the claimant 10 further documents, some further documents in an email dated 26 May 2021 from the claimant, and an email from the respondent dated 22 May 2021. The

respondent also provided a skeleton argument and a bundle of authorities, Murray v Foyle Meats Limited [1999] IRLR 562, Wrexham Golf Co Limited v Ingham UKEAT/0190/12RN, Mugford v Midland Bank plc [1997] IRLR 208 and Taylor v OCS Group Limited [2006] IRLR 613.

3. The hearing commenced at 11am on 9 April 2021, the respondent's witness gave evidence, and the claimant commenced her evidence. The case was adjourned part heard to the 21 May 2021 when the claimant's evidence was concluded, and the parties made submissions. Both parties asked for and were given permission to make further written submissions, if they wished to do so, on the coronavirus job retention scheme and its relevance to the case.

4. The respondent provides industrial storage, specialising in warehouse storage, handling solutions, pallet storage systems, racking, mezzanine floors and shelving systems. The claimant was employed as a Sales Administrator by the respondent. The claimant commenced employment on 28 August 2012 and was dismissed on 1 July 2020. The claimant had seven years' continuous service.

5. When the first national lockdown was announced in March 2020, the respondent's business ground to a halt. All nine members of staff were asked to work from home, once the Coronavirus Job Retention Scheme (CJRS) (also known as the Furlough Scheme) was introduced by the Government, the respondent decided to place three members of staff on Furlough, including the claimant. Mr Beill, the chairman, a director of the respondent and one of the owners of the respondent, sent a letter to the claimant on 3 April 2020 seeking the claimant's consent to be placed on Furlough. The claimant agreed to be placed on Furlough. Two other employees were also placed on Furlough, a CAD Designer and Project Engineer. Around the end of May 2020 the Project Engineer and CAD Designer were taken off Furlough and returned to work. The respondent did not consider that there was sufficient work to bring the claimant back to work.

> *"Whilst there was just about enough work to support the claimant's colleagues that were taken off Furlough Leave, there was clearly not enough work for the claimant to undertake and we formed a reasonable conclusion that this pattern of little or no work would continue for the foreseeable future."* [1]

6. The respondent considered the claimant's role and decided that the role was no longer required. The respondent says the extent of claimant's skills and job duties were considered and it was concluded that she did not have the qualifications and experience to fulfil another role within the company. The claimant was placed in a redundancy pool on her own. There were no available jobs that the respondent could offer the claimant as an alternative

[1] Paragraph 17 witness statement of Malcom Biell

to redundancy.

7. Mr Beill telephoned the claimant on 26 June 2020 inviting her to a meeting on the on 29 June 2020. The claimant asked if she was to be made redundant and Mr Beill confirmed that she would be dismissed due to redundancy. The decision to dismiss the claimant had been made.

8. Mr Beill contacted the respondent's accountant to ask for advice as to the correct level of notice pay and redundancy pay for the claimant.

9. On the 29 June the claimant met with Mr Beill and Mr Mark Heard, she was told that she would be made redundant and also told what her notice pay, and redundancy pay would be.

10. On 29 June the claimant wrote an email to Mr Beill asking questions about her dismissal, redundancy package and lack of consultation procedure prior to dismissal. This prompted Mr Beill to respond that he is "*checking a few things with an HR consultant".*

11. The claimant was informed in writing of her redundancy, "*from today's date"* in a letter dated 1 July 2021 (p44).

12. Mr Beill was informed by the HR consultant that the respondent should have carried out a consultation procedure prior to terminating the claimant's employment. This prompted Mr Beill to send an email to the claimant stating: "*I have taken advice from an HR consultant and there is a protocol that should be followed. Firstly we should notify you of our intention to make the Sales Administrator redundant which we have done. There should then be a consultation period, the length of which is not specific, so I see no reason to elongate it and hope two weeks will cover it."* Mr Beill subsequently sent a letter to the claimant inviting her to a consultation meeting on 6 July 2020.

13. In an email dated 3 July 2020 the claimant explained that she did not wish to attend the consultation meeting on 6 July but did want to appeal the decision to terminate her employment.

14. The claimant's appeal was considered by Mr Tyrell. Mr Tyrell started working for the respondent on 5 May 2005 as a CAD Technician and had worked his way through the ranks to become Operations Manager.

15. Mr Tyrell stated that his role in the appeal process was to consider the claimant's grounds of appeal, consider whether the correct decision had been made when terminating the claimant's employment, and whether the correct process had been followed. During her questioning of Mr Tyrell, the claimant put it to Mr Tyrell that he was not the final decision maker on the appeal and that he had agreed during the meeting that he was not the final decision maker. Mr Tyrell stated that he could not remember whether he had previously said that he was not the final decision maker. Mr Tyrell

stated that he would have reported back on the appeal to Mr Beill and Mr Heard, the respondent's directors, but ultimately as company directors *"it would fall back to their decision".* Then in re-examination he stated that he was brought in as a neutral and that "*I would like to think that they would take my recommendation on board and do what they needed to do.*"

16. Mr Tyrell upheld the decision to dismiss the claimant. Mr Tyrell says that he considered that it was reasonable to place the claimant in a redundancy pool on her own. The claimant's role was different from the role of the project manager and that the claimant had not performed project manager tasks for more than two years. Mr Tyrell appeared to acknowledge that the respondent failed to follow the correct procedure in making the decision to dismiss the claimant before any consultation had taken place but concluded that the same decision would have been taken in any event if the claimant had been allowed a consultation period. He parroted Mr Beill in saying that the outcome would have been the same.

17. The claimant contends that she was not fairly selected for redundancy. The claimant also states that the appeal was unfair as Mr Tyrell could only make recommendations to the two directors and not over turn or reverse their decision. The claimant challenged the suggestion that she could not do the work of a project manager and relied on a number of concessions made by the respondent's witness in respect of the jobs that she did which she suggested showed that the evidence revealed that she did more than just administrative office work. The claimant states that she has shown that her skill set was greater than that which the respondent suggested. The claimant did not accept that it would have been financially prohibitive for the respondent to keep her on Furlough. The claimant challenged the respondent's assertion that by making her redundant at the start of the pandemic it gave her an opportunity to get another job before other people saying that in fact she would be unemployed for longer as firms were shedding employees at that time and it would be much later in the year before there was any growth in job prospects. The claimant submits that she was not fairly selected for redundancy.

18. The respondent produced a written skeleton argument and states that the issues are whether the dismissal was unfair under section 98(4) Employment Rights Act 1996 (ERA), and if so what effect *Polkey* has on the remedy position. It is not in dispute that the claimant was dismissed on 1 July 2020. The reason for dismissal was redundancy. The challenge is to the fairness of the claimant's selection for redundancy and that there was no proper consultation.

19. The respondent states that it was within the range of reasonable responses to put the claimant in a pool of one because the claimant was employed as a Sales Administrator, a role that did not involve any project management. There was a meeting with the claimant on 29 June 2020, at which the situation was discussed, the claimant had the opportunity to protest and make alternative suggestions, but she did not do so. That an offer was made to "reconvene" the meeting on 6 July 2020 which offer was rejected

by the claimant in favour of pursuit of an appeal. The appeal took place and was conducted with the assistance of an external HR professional. The outcome upheld the original decision. In the circumstances it is said the dismissal was fair. As to the *Polkey* it is contended that in any event, no amount of consultation could have changed the outcome in this case as there was no viable suggestion that could be made. The claimant would inevitably have been dismissed within a short time anyway.

20. I raised with the parties the CJRS and allowed the parties the opportunity to provide further written submission on the effect of the scheme on the question of fairness of the decision to dismiss the claimant for redundancy.

21. Section 94(1) Employment Rights Act 1996 (ERA). An employee has the right not to be unfairly dismissed by his employer. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and, in the circumstances of this case, that the employee was redundant (see ERA 98(1)). Where the employer has fulfilled the requirements of ERA 98 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 (ERA 98(4)).

22. 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 (ERA 139(1)).

23. It is generally accepted that an employer must consult with an employee who is affected by redundancy. Consultation must involve at least one meeting with an employee to talk about the changes planned and explain why the employee is at risk of redundancy. The consultation process is intended to see if redundancy could be reduced or avoided. The consultation must be genuine and meaningful.

24. Where no consultation about redundancy has taken place the dismissal will usually be unfair. A dismissal for redundancy where there has been a failure to consult is not necessarily unfair where the consultation "*would be an utterly futile exercise*".

25. I am satisfied that the claimant was unfairly dismissed for the following reasons.

26. Mr Beill stated that the decision to make the claimant redundant was not a reflection of the performance of her work in her role, he explained that he was not aware of the requirement to consult with employees before making redundancies. Mr Beill considers that a reasonable consultation period would have been two weeks following which the same decision to dismiss the Claimant for redundancy would have been made. Mr Beill was in effect saying that consultation was futile. Yet Mr Beill offered the claimant a consultation period, after which he considers the result would be exactly the same decision. If this was the case, why did the respondent offer consultation? Was it to go through the motions of consultation? Why not simply confirm the decision to dismiss rather than offer the claimant a pointless consultation process?

27. I am satisfied that there were a number of points that were up for discussion about ways to prevent the claimant's dismissal. The first was the CJRS, though at the time neither the claimant or the respondent appears to have had that in mind. The second matter that could have been discussed is the work that the claimant could have done by way of project work. There was no real dispute that the claimant did some project work the question was the extent of the work she did, her ability to do larger project work and the claimant's willingness to do work. These matters could have been explored in a meaningful consultation as ways to avoid dismissal. The failure to consult with the claimant was not in my view merely a failure to carry out a futile exercise.

28. There was no consultation before the decision to dismiss the claimant. The respondent put forward a proposal for consultation after the dismissal decision was made, not surprisingly the claimant rejected this as she had been told unequivocally that the decision to dismiss her had been made. The letter inviting the claimant to the consultation did not say that the consultation would seek to find ways to avoid dismissing the claimant. Mr Beill said in terms that even if there had been consultation the dismissal would still have followed. The failure to consult in this case rendered the dismissal unfair.

29. Further the dismissal was unfair because there was no proper appeal. The appeal was an illusion because Mr Tyrell was to report to back to the directors Mr Beill and Mr Heard who made the decision to dismiss the claimant, they would also have the final say on the appeal. This was not a fair appeal. The dismissal of the claimant was unfair for that reason also. The futility of the appeal in this case is demonstrated by the fact that Mr Tyrell though recognising that the process to dismiss the claimant was flawed by the failure to consult took no steps to remedy that defect, he simply upheld the decision to dismiss.

30. *Polkey*: In considering whether an employee would still have been dismissed even if a fair procedure had been followed the Tribunal can reflect the uncertainty by reducing the normal amount of compensation to reflect the chance that the employee would still have lost her employment.

31. The CJRS did not come with a prohibition on dismissal. An employer could act reasonably in deciding to dismiss as redundant notwithstanding the CJRS. The respondent gave no consideration to the possibility of continuing the claimant's employment on Furlough. There is a complete absence of any mention of such consideration being given in the witness statements of any of the respondent's witnesses.

32. When Mr Heard gave his oral evidence he was asked about the CJRS, he had not mentioned this in his statement. Mr Heard read from a crib sheet. The observations he made were not contained in his witness statement, had they been considered relevant considerations at the time the claimant was dismissed I would have expected to see them in his statement or that of Mr Beill. My note of what Mr Heard said while reading from his crib sheet was "*my understanding was that you should only be using employment* [on Furlough] *for someone who would be in employment after the pandemic, I did not feel it was right to keep the money. There will be a cost* [to the respondent] *NI, pension and insurance. I have to make a decision based on the facts as I know them at the time, I have to make a decision in the best interests of the company as a whole."* Not only was this explanation not featured in the written statement of Mr Heard or Mr Beill, but when Mr Beill was asked the same questions about retaining the claimant on the CJRS he said that the respondent could have kept the claimant on Furlough but would have to make the role redundant.

33. I have come to the conclusion that had a fair procedure been followed the respondent would have given consideration to using the CJRS to avoid dismissing the claimant. I am not satisfied that true consultation would still have resulted in the claimant's dismissal, the claimant's skill set for and willingness to carry out work available is a matter that could have been explored and need not have resulted in the claimants dismissal. The claimant could do project work and there was such work available. If the amount of work was in question a combination of the CJRS and working may well have been capable of preventing dismissal. I am not satisfied that a fair process would have resulted in the claimant dismissal on 1 July 2020. Having regard to all the circumstances the question of compensation remains at large a *Polkey* reduction is not just and equitable.

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Employment Judge Gumbiti-Zimuto
Date: 30 June 2021.

Sent to the parties on: .15/07/2021....

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For the Tribunals Office

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