EMPLOYMENT TRIBUNALS

BETWEEN

MRS CAROLE PAMELA HOUSE (nee CLARK)

Claimant

AND

BROMFORD HOUSING ASSOCIATION LIMITED

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD by VHS **ON** 8th and 9th June 2022

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person
For the Respondent: Mr G Ridgeway of Wolverhampton Citation Limited

JUDGMENT

The judgment of the tribunal is that the claimant was fairly dismissed by reason of redundancy and the claimant's claim for unfair dismissal is dismissed.

REASONS

1. In this case the claimant Mrs House, who was dismissed by reason of redundancy, claims that she has been unfairly dismissed. The respondent contends that the reason for the dismissal was redundancy, and that the dismissal was fair.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 284 pages, the contents of which I have recorded. In addition, an Excel spreadsheet containing the respondent's mapping analysis of the restructure was produced to the Tribunal and admitted as evidence, by agreement. I also received and considered witness statements from the claimant, and from the respondent's

four witnesses, being John Wade, Helen Swinnerton, Lauren Marsden (nee Carolle) and Amanda Swann.

3. I have heard from the claimant, and I have heard from Mr Ridgeway of Wolverhampton Citation Limited on behalf of the respondent. I have also heard from each of the four witnesses. Finally, I have received written submissions from Mr Ridgeway and Mrs House.
4. The order made is described at the end of these reasons.
5. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in giving evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

6. The claimant began employment with the respondent on 1st October 2002, carrying out a number of roles. For the last eight years or so at the respondent she was Head of Insight. As such, she led a number of departments, comprising Performance Reporting, Customer and Colleague Feedback and Insight. She was latterly also Benefits Lead for a Transformation Programme. Over time, her exact role has evolved and changed, although there does not always seem to have been a matching update in her job description. In her role, she also worked closely with the head of Innovation, referred to as the Innovation Coach, who was very much on the same level as her and treated as her peer. It is clear that she has received much positive feedback for her performance over the years.
7. It is agreed that the claimant was an employee and has over two years continuous service for the purposes of the Employment Rights Act 1996
8. The respondent is a large housing association, operating in the south west and the Midlands. It has around 1800 employees and is clearly a large undertaking.
9. In recent years, the respondent has undergone a number of mergers which has resulted in organisational and cultural changes as different entities are integrated. Cost pressures have led to reductions in employee numbers. A new chief executive and senior leadership team were hired from outside the respondent's sector and sought to bring the disparate elements together in a more coherent and collaborative whole, seeking new approaches to working.
10. This approach led to organisational changes internally as well as team reductions, including within the claimant's team. One such reorgnisation and related redundancy round was planned in late 2020 and launched in January 2021. At the start of the process the claimant was warned by her line manager, John Wade, that her role was at risk of redundancy. The formal consultation period began on 3rd February 2021, when a 62 page briefing document was provided to the claimant.
11. This briefing document gave details of a restructure across the whole of the respondent's business. It also set out the reasons for the restructure and there is no basis to question the reasons themselves or the motivations behind them. Legitimate reasons were put forward which would certainly lie within the band of reasonable actions a company could take. It is not the Tribunal's place to question this or to consider whether these were appropriate.
12. The restructure was in fact made up of different components; in the case of the part of the business in which the claimant worked, this comprised the merger of the Insight service with the Innovation service to create a new combined R&D

service. A new head would be appointed to run this combined service, sitting above the current service heads. The result of the creation of this new role, which would take on many of the responsibilities of the claimant's existing role as head of Insight, was there was a need to reduce by one the number of roles in the new combined service.

13. In considering the pool for redundancy, the respondent decided that the overlap meant that only the head of Insight role should be in the pool as all other roles continued as before. The claimant argued that both heads of service should be in the pool as they both at the same level. The respondent argued that there was little if any overlap between the head of Innovation role and the new R&D role and therefore a one person pool was appropriate. I find that both were reasonable options and so it was open to the respondent to treat the claimant as alone in the pool for consideration.
14. The claimant was offered the opportunity to apply for the new R&D head role, alongside other applicants. She was not prepared to do this but because she believed she would lose her right to appeal against the eventual decision; this was based on anecdotal evidence, including an email from the respondent's HR function to another person. This email was not provided to the Tribunal and so it is not possible to determine if her belief was correct; it is in any event not material to the outcome of the case as she was able to carry out an appeal and apply for the role after that.
15. The claimant instead asserted that the new role was either such a direct match for her existing role that she should be given it or was a suitable alternative to her existing role which again she should be awarded.
16. The claimant attended four individual meetings during the consultation period at which she sought clarity as to why the new role was not a direct match or a suitable alternative. The respondent had carried out an exercise to identify the differences but did not share the output. Until the final meeting, the concerns do not seem to have been fully addressed, focusing on the generality of the reorganisation and the new objectives for the company over the specifics of the new role. An explanation of the changes was given by John Wade on 1st and 9th March 2021. At that final consultation meeting – on 22nd March 2021 – these were gone through in more detail. That all gave more detail but not with the clarity of the mapping analysis provided to the Tribunal.
17. The claimant argues that this failure to give granular detail rendered the consultation process unreasonable and she has further alleged that this was driven by a belief that Mr Wade had predetermined the outcome of the process. She has pointed to the fact that she was excluded from meetings in late 2020 where others were more involved. On balance, I do not find that there was any predetermination by Mr Wade who was instead attempting to engage in the consultation process in a reasonable manner. If there were failings in the process, these were not sufficient to render it unfair. The fact that the consultation process was extended beyond the initial 30 days and that four consultation meetings were held coupled with the fact that she was able – and did appeal – is all evidence of a fair consultation.
18. As the claimant continued to refuse to apply for the new role, the consultation process was ended and she was informed on 23rd March 2021 that her role was redundant as of 30th April 2021. She was given the right to appeal the decision which she exercised on 26th March 2021.
19. The appeal was conducted by Ms Amanda Swann, with an appeal hearing taking place on 12th April 2021.

20. The outcome of the appeal was issued by a letter dated 26th April 2021. The appeal found that the new R&D head role was not a direct match or suitable alternative role to the claimant's existing role as head of Insight and that a fair process was followed in relation to identification of the individuals placed at risk, ie in the pool.
21. However, the appeal also partially upheld the claimant's appeal in two respects.
22. First, it found that the consultation could have been considered "partially' meaningful, concluding that "more could have been done to ensure that your questions were answered in a specific, timely and detailed way. I have concluded that following the consultation you had not received full and specific answers to your questions, which may have impacted your understanding of some elements. Therefore I partially uphold the challenge that insufficient answers were provided to some questions during the consultation process".
23. The appeal also partially upheld the complaint that "there have been failings by the Leader in relation to basic leadership requirements". The Leader in this case is Mr Wade. The upheld complaints related to failures to hold 1:2:1 meetings and return to work conversations, so failing "to sufficiently undertake the requirements of the Bromford Leader Led approach".
24. In each case, the partially upheld appeals outcome letter did not overturn the decision as a result but simply recommended internal improvements for future processes. Instead, the claimant was again given the opportunity to apply for the new role. The opportunity was enhanced in that external recruitment was suspended and it was made clear to the claimant that she would be given a priority opportunity to apply ahead of other candidates.
25. The claimant again refused to avail herself of the opportunity to apply, continuing to insist that the new role was a direct match or suitable alternative for her existing role. She also maintained that the relationship with Mr Wade had deteriorated to the point where she would not get fair consideration, believing that all internal candidates were bound to fail, based on the experience of others.
26. As a result, the claimant's employment ended on 21st May 2021, with a payment being made in lieu of notice together with a substantial enhanced redundancy payment.
27. Taken as a whole, I find that the consultation process including the appeal was a fair process. Any defects in the process, especially in relation to providing information, were addressed through the appeal and the fact of its occurrence. The appeal was thorough and reached reasonable conclusions. The opportunity offered to the claimant to apply for the new role ahead of others was an appropriate step. The claimant did not, on the balance of probabilities, demonstrate that the process was bound to fail.
28. For the purposes of this case, it is necessary in addition to make a finding of fact on whether the new R&D role was indeed a match or a suitable alternative for the existing role. The requirements for a suitable alternative are considered further below. Much evidence and assertion was provided by both sides as to why the roles were or were not different. At its simplest levels, they were both head of service roles within the same pay band at the respondent. However, the new role was managing the Innovation head whilst the old role was beside it. The new role was attracting a higher level of pay. Clearly much of the Insight role was to be taken on by the new role but teams were to be changed.
29. Much play was made in relation to the percentage overlap or otherwise, using some fairly crude parameters to measure this. I found this approach by both sides unconvincing and felt that instead it was necessary to step back and ask whether these were the same roles or not. Ms Marsden summarised this well by saying that

the approach taken was holistic and I agree with this. Assessed on this basis, it is clear that the aspirations for the roles were very different. The business was seeking to transform itself with new directions and approaches. This new role was perceived as of a higher level than the existing head of Insight, joining and supporting the senior management in driving cultural and behavioural change across the company.

30. It is noted that the role ultimately was not filled and was subsequently abolished. I find this indicative of the fact that it was of a different level to the existing role. Evidence was not provided as to the reasons for the failure to recruit but it seems reasonable to assume that the increased pay being offered fell short of the leadership roles and responsibilities being sought, leading to a dearth of suitable applicants; potential employees with the required skillsets were earning more elsewhere.
31. Accordingly, I find that the new role was not a match for the existing role. Whilst that role could well have been a suitable alternative, it is necessary to consider whether going through an interview process and a trail period was an appropriate requirement. I consider that below.

Claim

32. The claimant is claiming that she has been unfairly dismissed and is claiming compensation.
33. More particularly, her case is that the decision to make her position redundant was unfair dismissal as this was not a genuine redundancy situation. She argues that she was selected unfairly for redundancy and the respondent failed to offer an alternative role that was a very close match to her existing role.
34. She had also ticked the relevant box in her Form ET1 for a recommendation if claiming discrimination. However, she has confirmed that there is no claim for discrimination and so this has been disregarded, by agreement.
35. The respondent's case is that she was fairly dismissed by reason of redundancy.

Law

36. Having established the above facts, I now apply the law.

Redundancy

37. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
38. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or 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"
39. The issue here is whether this a redundancy rather than simply a business reorganisation. Just because there is a reorganisation and people lose their jobs does not necessarily mean that the definition of redundancy in section 139 has been fulfilled. The claimant's loss of her job was part of a wider redundancy exercise. However, this is not relevant, it is this part of the redundancy exercise

we need to focus on. Section 139 refers to the "requirements…for employees to carry out work of a particular kind". Here this is the work of the Insight and Innovation services. The fact that there is a pool of one and the alternative is another person from within those services but no wider demonstrates this. At its simplest level, the position here is that one person is going out and one person coming in, which would not appear to suggest any cessation or diminution of this area of work, simply a reorganisation.

40. This is consistent with the case of Barot v London Borough of Brent EAT 0539/11 where the EAT found that "a reorganisation of a business that involves simply reshuffling the workforce may not create a redundancy situation if the business requires just as much work of a particular kind in question and just as many employees to do it, even if individual jobs disappear as a result". The Barot case draws the distinction between a reduction in work of a particular kind being done as opposed to a change in who does that work. The claimant had a largely managerial role and there is clearly a lot of overlap between her role and the new role.
41. The key difference here is the level of responsibility, with the new role taking on a broader, cross company perspective and a higher profile within the company. That is not to say that the claimant was not already doing some or all of this, it is the question of degree and responsibility. Inevitably, there is a limit on how much one person can do and it is clear that the claimant was also performing sub-managerial roles to cover for lost personnel below her. It is also clear that there was an expectation in the business that the change in role and emphasis would mean that the level of sub-managerial work would diminish. The case of McCrea v Cullen and Davison Ltd 1988 IRLR 30, NICA makes it clear that if fewer employees are needed to do work of a particular kind, there is a redundancy situation. The potential difference here is that we are talking about a reduction in a fraction of one employee not a whole employee.
42. This is certainly a very tight call as to whether this is sufficient to constitute a redundancy. In reaching my conclusion, I have considered the three stage test set out by His Honour Judge Peter Clark in the case of Safeway Stores plc v Burrell 1997 ICR 523, EAT, which was subsequently affirmed by the Court of Appeal. The test was first whether the employee was dismissed. The answer is clearly in the affirmative in this case. Secondly, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? As set out above, a diminution was expected, albeit potentially not of a large amount. Finally, was the dismissal of the employee caused wholly or mainly by the cessation or diminution? The answer to this would appear to be no, the main reason was the transfer of the responsibilities to other people, including the proposed new R&D head.
43. However, in this case the claimant's position is being replaced with a person expected to be of a higher grade with greater responsibility. This was considered in BBC v Farnworth EAT 1000/97 where a person on one level was replaced by a more experienced person. The EAT held that an employee is redundant when his or her particular specialism is no longer required, even if the employee is replaced by an employee with a different specialism so that the overall requirements of the business for employees have not diminished.
44. The new role here leads to the same number of employees and a greater cost but the role is different. The need for the work the claimant did would diminish, with new responsibilities being taken on by the replacement. This case is, however, in my view more marginal because both the existing and new roles are on the same

pay band, albeit with a £8,000 per annum differential. On balance, I find the extent of the new role, its responsibilities and its expectations sufficiently different that they can be distinguished. As a result, the requirement for a role at the level of the claimant had diminished and the dismissal is attributable to that.

45. Accordingly, I find that the claimant's role was redundant for the purposes of section 139(1) of the Act.

Fairness

46. I have next considered section 98(4) of the Act which provides "…. 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".
47. In considering section 98(4), I have considered whether there has been fairness in selection, fairness in consultation and consideration of suitable alternatives. I have set out my findings on the questions of fairness in selection and consultation above and found that on balance both were fair, albeit with some shortcomings on consultation. I have found that those shortcomings were sufficiently mitigated by the appeal process and by the renewed opportunity to apply for the new role ahead of other candidates.
48. I have also considered the question of suitable alternatives above. During evidence, the claimant seemed to accept that the R&D head role was not a direct match but argued it was a suitable alternative. The respondent seems to have accepted that as well and I have found that it could be viewed as a suitable alternative. No other roles have been suggested by either party. The issue comes down to whether the respondent was reasonable in requiring an interview and a trial period for the new role.
49. This role would be a promotion and at a high level. The appointment to that post was forward looking for the business and would entail taking on important new responsibilities across the company. In this situation, an employer could legitimately seek to require tests of any candidates, internal or external, in order to assess their ability to perform in the new role. Both an interview process upfront and a trial period once hired were reasonable requirements. There are sufficient differences here that requiring these of the claimant was fair.
50. The claimant has argued that the application processes was not in some way real but no evidence to show this was produced. Ms Swann gave the example of herself in an earlier process, although there were difference, it does evidence that there was no policy against internal hires in reorganisations.
51. The opportunity to apply for the new role was offered to the claimant twice – first as part of the process and again following the appeal but she twice demurred. She felt that the new job was very similar to the old job and so any dismissal would be unfair. As mentioned, I do not agree that is very similar and is sufficiently different to be treated as a separate role. I have also found that requiring an interview and a trial period was legitimate and fair. Accordingly I do not find unfairness as a consequence of the failure to offer this or another role.
52. Accordingly, I do find on balance that the process here was fair.
53. This has been a finely balanced case. However, even if I am incorrect in any of my conclusions, I do consider that the actions of the claimant, and in particular her

refusal to apply for the new role, would have resulted in any damages awarded had she been successful being at best negligible, especially in the context of the enhanced redundancy payment received by her and her subsequent employment in a new role in the Ministry of Justice.

54. I have considered the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT, Barot v London Borough of Brent EAT 0539/11; McCrea v Cullen and Davison Ltd 1988 IRLR 30, NICA ; BBC v Farnworth EAT 1000/97 and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

Decision

55. My decision is the claimant was fairly dismissed by reason of redundancy and the Claimant's claim for unfair dismissal is dismissed.

56. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 31; a concise identification of the relevant law is at paragraphs 37, 38 and 46 ; how that law has been applied to those findings in order to decide the issues is at paragraphs 39 to 45 and 47 to 53.

Employment Judge H Lumby
Dated 27 June 2022

Judgment sent to Parties: 29 June 2022

FOR THE TRIBUNAL OFFICE