EMPLOYMENT TRIBUNALS

Claimant: **Jane Lenny**
Respondent: **National Federation of Roofing Contractors Ltd**

Heard at: **London Central (CVP)** **On: 18 & 19 May 2022**

Before: **Mr. N Deol (Employment Judge)**

Representation

Claimant: **In person**
Respondent: **Mr. C Murray (Counsel)**

JUDGMENT

1. **The Claimant's application to amend the Claim is rejected.**

2. **The Claimant's claim for unfair dismissal is not well founded.**

EMPLOYMENT TRIBUNALS

Claimant: Jane Lenny
Respondent: National Federation of Roofing Contractors Ltd

REASONS

Application to amend

1. The Claimant submitted her claim form on 7 December 2020 claiming unfair dismissal in relation to the termination of her employment by the Respondent on 10 September 2020.

2. The Claimant applied on 26 January 2021 to amend her claim to include a complaint of breach of contract. As at the date of this hearing that application had not been considered.

3. The Claimant had pursued a separate claim for arrears of pay under case number 2204457/2020, which was heard on 11 December 2020 by EJ Nicklin at London Central Employment Tribunal (CVP) and dismissed in a Judgment dated 30 December 2020.

4. The Claimant's application to amend covers the same factual matters as set out in her claim under case number 2204457/2020. The Claimant set out the grounds for her application in a detailed letter dated 28 April 2022 to which the Respondent replied on 13 May 2022.

5. These documents were considered by this Tribunal along with oral argument from both sides.

6. The Tribunal has a discretion under Rule 29 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to permit amendments to a claim. In exercising its discretion in an amendment application, a Tribunal must do so in accordance with the over-riding objective and considering all the circumstances, including: (i) the nature and extent of the amendment, (ii) the applicability of time limits (iii) the timing and manner of the application and (iv) the relative prejudice/hardship to the parties of either granting or refusing it.

7. Having considered the arguments and these principles the Claimant's application to amend is refused on the basis that the application was pursued significantly outside the normal time limit for bringing a claim and seeks to reopen matters that were argued, considered, and decided upon in the Claimant's original claim under case number 2204457/2020.

8. The reasons for this finding were given orally at the hearing before proceeding with the hearing of the Claimant's unfair dismissal claim.

Additional documents

9. The Claimant and Respondent sought to add additional documents to the agreed bundle at the outset and during the proceedings. The Claimant's application was contingent on whether the Respondent's application was allowed.

10. Despite the timing of the application, the additional documents were limited in number and relevant to the issues in dispute. Accordingly, both the Respondent's and Claimant's additional documents were added to the trial bundle.

Evidence

11. The Employment Tribunal heard evidence from the Claimant and from the Respondent's witnesses; Tanya Cooper (the Chief Operating Officer at the relevant time) and James Talman (Chief Executive Officer).

12. The evidence was set out in detailed witness statements which were read before each witness was cross examined.

13. The Employment Tribunal had the benefit of a comprehensive and agreed bundle of documents and written submissions from both parties, which were only eventually received in July 2022 through no fault of the parties.

Findings of Fact

14. The Claimant commenced her employment as a Sponsorship and Advertising Sales Manager with the Respondent on 1 May 2018 and her employment ended on 10 September 2020 when she was made redundant.

15. As a result of the Covid-19 pandemic and its impact on the Respondent's business, the Respondent took the decision to use the Coronavirus Job Retention Scheme to furlough eight of its employees, including the Claimant. The Claimant agreed to being furloughed on 31 March 2020.

16. The Claimant's role included managing and delivering commercial sponsorship income and designing and creating sales frameworks for the Respondent. As the Respondent was not engaging in this activity over the pandemic the Claimant's continued furlough was confirmed to her in writing on 26 May 2020.

17. On 27 May 2020, the Claimant raised concerns and a grievance regarding the continuation of her furlough. The grievance was considered and rejected by way of a letter dated 1 July 2020, including one issue that the Claimant had raised, that her role was not being protected. The Claimant appealed the grievance outcome, and an appeal hearing took place on 14 July 2020 following which an outcome letter was sent to the Claimant on 5 August 2020 rejecting her appeal in full.

18. On 22 July 2020, the Claimant was advised that the Respondent's NFRC Commercial Limited company was in financial difficulties and that there was an intention to restructure. The Claimant was informed in writing that the proposed restructure placed her role at risk of redundancy, but that a consultation process would take place to discuss ways to avoid the redundancy.

19. There is an issue between the parties as to whether the proposal to make redundancies had arisen earlier, such that the Respondent should have alerted the Claimant of this risk in May 2020 or even at the point that she was furloughed in March 2020.

20. The Respondent's evidence on the issue and the governance behind this process was far from clear. That said, given the course of the pandemic and the uncertainty behind the CJRS facility, the forward trading and operating position for the Respondent must have been exceedingly difficult to predict. The evidence does not support any suggestion that the delay between May 2020 and July 2020 was tactical to limit the Claimant's access to alternative roles, but there was little in the way of explanation or supporting documentation from the Respondent to explain the reason for the delay in tabling the

proposal to the Claimant and others affected by the proposed redundancies.

21. The initial consultation meeting in relation to the proposed redundancy eventually took place between the Claimant and Mr Talman on 27 July 2020, prior to which the Claimant was sent a Business Case Information Pack setting out the Respondent's financial difficulties, including operating at a deficit and anticipated losses and the rationale.

22. The Respondent argued before this Tribunal that it discussed alternatives to redundancy with the Claimant including the opportunity of suitable employment within the organisation. The only available position identified by the Respondent was that of a part-time Project Manager which is did not consider a suitable alternative as it was an external role, and the responsibilities of the role were quite different to that of the Claimant.

23. There were other vacant roles which the Claimant expressed an interest in. These roles were filled prior to the redundancy consultation starting.

24. On 4 August 2020, the Claimant was invited to a final consultation meeting to take place on 7 August. The letter set out the issues to be discussed and reminded the Claimant that she was entitled to be accompanied by a colleague or trade union representative and that an outcome was that the Claimant would receive notice of termination on the grounds of redundancy.

25. On 7 August 2020, the Claimant attended the final consultation meeting at which she was given notice of the termination of her employment on the grounds of redundancy. The Respondent wrote to the Claimant to confirm its decision, and in doing so, informed the Claimant of her right of appeal.

26. The consultation process was rushed and truncated, with the Claimant’s representations being given less attention and focus than one would expect in such circumstances.

27. The Claimant's notice period commenced on 11 August 2010 with the effective date of termination of 10 September 2020.

28. On 14 August 2020, the Claimant appealed against the Respondent's decision and was invited to an appeal hearing on

10 September 2020. This extract from the Claimant's grievance sets out the thrust of her complaint to the Employment Tribunal:

Two 'vacant' roles have been filled since I was furloughed on April 1st, 2020 – Marketing Manager NFRC Ltd and Project Manager – RoofCERT both of which my skills set match. The two new employees started after June 1st, 2020.

Therefore, my redundancy is unfair as it was known my role ceased to exist in March and there was clearly going to be a risk of redundancy at some stage, or my role would not be redundant now, that I was not invited to I apply for either roles.

"To date, you have failed to explain why I was not given the opportunity to apply. I was on furlough at the time and capable of carrying out either roles. That the decision for redundancies was made in July 2020 is not consistent with the statement sent to me on July 1st, 2020 stating my role had ceased to exist in March 2020 until at least the 31st of January 2021.

Therefore, my redundancy is unfair as the NFRC have not followed procedure and failed to give me the opportunity to apply for these roles neither of which were advertised internally, and it appears the redundancy consultation was delayed until all relevant vacancies were filled and my dismissal from the NFRC a 'foregone' conclusion as there are now no 'suitable' alternative jobs".

29. The appeal was heard by Mr Steve Revell who decided to uphold the decision to dismiss. The Respondent wrote to the Claimant on 10 September 2020 to confirm their decision to uphold the dismissal and to address the points made by the Claimant.

30. In relation to the specific issue of alternative roles that the Claimant was interested in applying for, the Respondent's position was that these had been filled prior to the redundancy process starting.

31. The role of Marketing manager had been offered to a Ms Applegate at the beginning of March 2020 and accepted by her on 6 March 2020 before the Claimant had been furloughed.

32. The Project Management position referred to earlier was an external consultant position and was not available either in May or July 2020. The contract was formed with Red Ryan Consulting on 9 or 10 March 2020 with a start date of 16 March 2020, before the Claimant was furloughed.

33. It was more likely than not that Ms Ryan would have been appointed under a competitive process given that was already working on the project (on a consultancy basis).

34. Finally, a Ms Flemming was brought back from furlough as an Accounts Assistant and on her existing terms and conditions to coordinate a help desk on a temporary basis whilst remaining in her original role.

35. The Claimant came across in her evidence to the Tribunal as a very motivated and experienced employee who could very easily turn her hand to a different role and transfer her skills. She was willing to work for less favourable terms to secure employment and avoid redundancy and keen for the Respondent to better understand her value to the organisation. It is very unfortunate that she was put in a position of having to make these points at the Tribunal hearing, rather than having a fuller opportunity to do as part of the consultation process.

The Law

36. The Tribunal had the benefit of detailed legal submissions and copy authorities from the Respondent which were considered and relied upon in deciding this case. The law in this area is well established and set out clearly in the submissions from Mr Murray.

37. The relevant legal provisions in relation to the Claimant's unfair dismissal claim are set out in Section 98 of the Employment Rights Act 1996 ("ERA"). The Respondent must show the reason for the dismissal, and this must be one of the potentially fair reasons set out in Section 98(2)(b) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. (Section 98(1)(b).

38. The Respondent argues that the fair reason for dismissal was redundnacy, which is not disputed.

39. If the employer has a potentially fair reason for the dismissal, the tribunal must then determine whether the dismissal was fair or unfair under Section 98(4). It must determine whether the employer has acted reasonably in dismissing for the reason given.

40. Section 98(4) provides that the "determination of the question whether the dismissal if 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 shall be determined "in accordance with equity and the substantial merits of the case. In this regard there is no burden of proof on either party and the issue is a neutral one for the Tribunal to decide. An important aspect of this test is whether the Respondent has followed a fair process.

41. The Tribunal must not put themselves in the position of the employer and consider what they would have done in the circumstances. Instead, the Tribunal should look at whether the employer's action falls within the band (or range) of reasonable responses open to an employer. This test applies not only to the decision to dismiss but the procedure by which that decision is made. (**Sainsburys Supermarkets Limited v PJ Hitt 2002 EWCA Civ 1588**.)

42. The Tribunal also had reference to the ACAS Code of Practice and the case of **Williams v Compair Maxam Ltd** which dealt with the specific question of fairness in relation to redundancy dismissals. In such cases;

(i) the employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

(ii) the employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

(iii) whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

(iv) the employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

(v) the employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

43. The House of Lords in the case of Polkey v AE Dayton Services Ltd [1988] A.C. 344 put it is follows:

"… *In the case of redundancy, the employer will normally not act reasonably unless he warns and consult any employees affected or their representatives, adopts a fair decision with which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation."*

44. The duty on an employer is only to take reasonable steps to find alternative employment. Whilst an employer can create a vacancy at the expense of another employee (as "bumping"), there is no obligation to do so, or even to consider doing so. The issue is what a reasonable employer would do in the circumstances, and whether what the employer did do was within the reasonable band of responses of a reasonable employer?

45. Where an Employment Tribunal finds that a dismissal was procedurally unfair, but that had a fair procedure been followed the employee would have been dismissed in any event, the Tribunal is entitled to reduce compensation by the percentage chance that they employee would have been dismissed in any event.

Conclusions

46. The Covid-19 pandemic presented organisations with unprecedented challenges and uncertainties. The Claimant considered that her role should have been protected, mainly based on her individual performance rather than the specific requirements of the role. Given the Respondent's circumstances, the reason for the Claimant's dismissal is a reasonable one.

47. The Tribunal does not accept the Claimant's suggestion that the Respondent specifically targeted the Claimant in its redundancy proposal because of her grievance or delayed the redundancy process itself to preclude the Claimant for specific opportunities for alternative employment.

48. There was no need for the Respondent to create or consult over selection criteria given that it was the Claimant's specific role that was redundant. Whilst she had been told that she was in a pool of three others, the Respondent was simply saying that other employees were also affected rather than pooling separate roles together.

49. There was no need for Trade Union consultation and the specific requirements as regards collective redundancies did not apply.

50. Faced with a redundancy scenario one would have expected the Respondent to have acted promptly to advise the Claimant that she was at risk of redundancy. This is not a formality but an essential requirement that allows an employee faced with redundancy the time and opportunity to make representations and to explore alternatives to redundancy.

51. The Claimant was notified that she was at risk on 22 July 2020 and dismissed on 7 August 2022 leaving little time for her representations to be given proper consideration.

52. The thrust of the Claimant's complaint is that had she been aware of the risk of redundancy earlier she may have had access to alternative roles. The Respondent's explanation was that these roles were filled well before the Claimant's role was identified at risk, an explanation that the Tribunal accepts.

53. Therefore, even if the redundancy consultation had started earlier (in May 2020) it is unlikely that the outcome for the Claimant would have been any different. The Claimant's arguments centred on access to three specific alternative roles, two of which had been filled and the other was a contractor role for which there was a better candidate.

54. It was not reasonable to suggest that the Respondent should have started redundnacy consultation earlier at the point that it decided to use the CJRS Scheme. At that stage, the course of the pandemic was very uncertain, as was the possibility for the CJRS scheme to be extended.

55. It is equally unreasonable to suggest that because of the existence of the CJRS Scheme the Claimant and other employees should have never been at risk of redundnacy. The CJRS Scheme itself recognised that redundancies could still take place even where employees were furloughed, and that the obligation to consult over such redundancies in such circumstances remained intact.

56. The Tribunal makes no criticism of the appeal process itself, which did address many of the Claimant's concerns including the specific concerns raised about access to alternative roles. In this respect the appeal process did remedy some of the disadvantage that the Claimant faced from what was otherwise a rushed consultation process.

57. Whilst it is tempting to find that the delay to, and length of, the consultation process was unfair, the Tribunal must exercise some caution in substituting its own decision now for a decision that the Respondent had to take in the very challenging and unpredictable circumstances that many businesses faced at the outset of the pandemic. For these reasons, the Tribunal concludes that the Respondent's decision to dismiss and the process it followed did not fall outside the range of reasonable responses open to an employer at that time and in those circumstances.

58. It is also the case that had the process been unfair, any award to the Claimant would have been reduced to nil because the basic award was compensated by the payment of statutory redundnacy pay, and any compensatory award would be reduced by 100% on the basis that the Claimant would have been dismissed in any event as there was no suitable alternative roles available at the time of her redundnacy.

59. The outcome to this case may have been different had the evidence suggested that the Respondent had delayed the consultation process to preclude access for the Claimant to potentially suitable alternative roles for whichever of the reasons advanced by the Claimant. Based on the findings in this Judgment, clearly this is not the case.

60. For these reasons, the Claimant's unfair dismissal claim fails and is dismissed.

Case No: 2207480/2020

Employment Judge Deol

REASONS SIGNED BY EMPLOYMENT JUDGE ON

31 August 2022

REASONS SENT TO THE PARTIES ON

.01/09/2022

FOR THE TRIBUNAL OFFICE