# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Sally Yellowley

**Respondent:** YBC Cleaning Services Limited

**HELD AT:** Watford by CVP **ON:** 16 September 2022

**BEFORE:** Employment Judge Moss

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr G Ridgeway (Employment Law Advocate)

## RESERVED JUDGMENT

The judgment of the Tribunal is:

The claimant's claim for unfair dismissal is not well founded and is dismissed.

The claimant's claim for a redundancy payment is dismissed upon withdrawal.

## REASONS

**Introduction**

1. The respondent company provides facilities management services in the South East of England, employing approximately 400 employees around the time of the claimant's employment with the organisation. The claimant commenced her employment with the respondent on 1 April 2020, having transferred from her former employer, Nviro, upon which her employment rights were protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The claimant was dismissed from her employment by the respondent on 19 February 2021.

## Tribunal Hearing

2. The hearing took place on 16 September 2022. In advance of the hearing, I had been provided with the electronic hearing bundle comprised of 96 pages, together with the witness statements of the claimant and respondent witnesses, John Naldrett (Commercial Director), Yogen Chhetri (Managing Director) and Joshua Chhetri (Operations Manager).

3. The claimant appeared in person and gave sworn evidence.

4. The respondent was represented by Mr Ridgeway. John Naldrett, Yogen Chhetri and Joshua Chhetri gave sworn evidence on behalf of the respondent.

5. The respondent had prepared written closing submissions. The claimant was afforded the opportunity to consider those in addition to the respondent's oral submissions to assist her with preparing and making her own oral submissions.

## Claim and issues

6. The claimant brought a claim alleging that the respondent unfairly dismissed her.

7. The claimant does not accept that her dismissal came about as a result of a genuine redundancy situation. She also alleges the respondent failed to undertake proper consultation leading up to her dismissal.

8. The respondent disputes the claim and contends that it acted reasonably in dismissing the claimant by reason of redundancy.

9. The issue for me to determine was whether the claimant was unfairly dismissed. This would involve consideration of the following:

    9.1 What was the reason (or the principal reason) for dismissal.
    9.2 Was the reason a potentially fair reason under s98 Employment Rights Act 1996 (ERA).
    9.3 Did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant.
    9.4 Was the dismissal fair or unfair in accordance with s98(4) of the ERA.
    *9.5* If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed – *Polkey v A E Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825.*

10. Although the claim form also included a claim for a redundancy payment, it was agreed at the outset that there was a single live claim to be determined, that of unfair dismissal. Any monies due to the claimant had been paid and the claim for a redundancy payment was not being pursued. On the papers before me it was not clear whether that claim had formally been brought to a conclusion. It

was therefore dismissed upon withdrawal to ensure it no longer remained to be determined.

11. On the documents and oral evidence presented I make the following essential findings of fact, restricted to those necessary to determine the central issue of whether the claimant was unfairly dismissed.

12. The claimant's continuous employment was transferred from Nviro to the respondent, YBC Cleaning Services Limited, on 1 April 2020.

13. Prior to transfer, the claimant had been working on a contract delivering services in Hampshire. Nviro had failed to deliver an acceptable service and it fell to the respondent to initiate improvements.

14. At the same time, YBC was experiencing changing demands generally for its services owing to the Covid-19 pandemic. Some clients continued to require normal services to be provided whereas others had either closed their premises completely or needed a reduction in services or a change in operating hours so that cleaning could take place earlier or later than it had done before the outbreak.

15. As a result of those combined factors, the respondent decided to undertake a restructure with a view to improving supervision controls across the Hampshire estate, but also to better utilise the management team across the whole of the business. As part of that process, meetings were held with the claimant on 12 and 19 June 2020, led by the respondent's Regional Manager, Jamie Salmon. Potential options were discussed, including the claimant's promotion to the role of either Area Manager or Project Area Supervisor. The claimant decided she would like to remain in the role of Area Supervisor and an updated job description was issued on 30 June 2020. The claimant's geographical area of responsibility increased from 47 to 103 sites in Hampshire.

16. While it was clear the company was making efforts to find a role to suit both the claimant and its business requirements around this time, the claimant was not advised the roles were being offered as an alternative to redundancy. This is evident from the fact that none of the correspondence issued at the relevant time made any reference to the claimant being at risk of redundancy. Nobody was in fact made redundant at the time, but some were asked to undertake different responsibilities.

17. The claimant issued a grievance at work on 7 July 2020 complaining about improper treatment. This included allegations that she was being checked up on all of the time, being told to work while she was on the sick and that she was being 'pushed out'. A meeting was held on 10 July 2020, chaired by Jamie Salmon, at the end of which the claimant confirmed that her concerns had been settled.

18. Towards the end of 2020/beginning of 2021, the claimant complained to Joshua Chhetri about working long hours and that she was feeling stressed

and tired. She was offered a role in Reading, closer to home involving a lot less travelling and earlier finishes. The claimant was receptive initially and started in the role on 25 January 2021, but within a few weeks informed Mr Chhetri that she was not happy. The claimant had understood it to be a temporary role to cover for a supervisor who was shielding. The respondent's position was that an end date wasn't given and there would be work available at Reading for the foreseeable future. The claimant disliked the role because she had been used to working in office blocks, shopping centres or business parks and was now working in an area that was known locally as 'The Bronx'. During the conversation with Mr Chhetri she complained about the smell of drugs, of rats and of feeling unsafe walking the streets. I accept the evidence of Mr Chhetri that, during the same conversation, the claimant threatened to go sick if she was asked to continue in the role. He gave evidence that the claimant said she was entitled to sick pay and would go off sick with stress. The claimant did indeed contact Mr Chhetri on 15 February 2021 by text message stating she was not feeling well and would not be at work. While I am alive to the possibility a witness may fabricate evidence to fit with the situation as it transpired to be, I do not find this to be the case as far as Mr Chhetri's evidence is concerned. I found him to be a credible witness and considered his evidence to be balanced, recalling events as best he could and acknowledging he may have got dates wrong at times but maintaining throughout the claimant had threatened to go off sick if she wasn't removed from the role at Reading.

19. The claimant had asked to return to the Hampshire role but it was no longer available. Mr Chhetri had agreed to make further enquiries but, were it to be made available, the job would involve the same travelling and long hours that had given rise to the claimant's complaint about feeling stressed and tired. The move to Reading had been made to accommodate the claimant. Returning her to a role that had adversely impacted her health was unlikely to have been a viable option.

20. A letter dated 15 February 2021 was issued to the claimant containing the subject heading 'Notice of Redundancy'. It included "YBC have sought to directly involve you in the restructure review and you were offered alternative full time duties and employment by assigning you to our Reading Borough Council contract due to diminished work within our Hampshire County Contracts. After initially being in full agreement to the change you have recently communicated to Joshua Chhetri, your line manager, clients and staff of Reading Borough Council, that the role is not suitable for you. You have also refused and commented that you are unable to be flexible to meet the demands of the role as per the nature of our business and clients' requirement". The 'redundancy' was stated as taking effect on 19 February 2021, although the claimant was invited to a meeting on 24 February 2021 to discuss the situation.

21. A meeting was held on 24 February 2021 between the claimant and Mr Naldrett, Commercial Director at YBC. The claimant asked Mr Naldrett why she was not informed her role was at risk of redundancy. He responded that the company had only recently taken the decision regarding the restructure

but that the claimant had been involved in the process by being placed on the Reading Borough Council contract and there had been extensive discussions regarding her role during 2020.

22. A letter dated 26 February 2021 headed 'Termination of Employment by Reason of Redundancy' was issued to the claimant. It stated that the only alternative work available was an Area Manager role which had previously been consulted on in the hope the claimant would fulfil it. Other than that, the respondent had failed to identify any suitable alternative work. The letter provided a right of appeal within 5 working days from receipt.

23. The claimant notified the respondent of her intention to appeal on 1 March 2021 and attended an appeal hearing on 5 March 2021. The appeal was heard by Yogen Chhetri, Managing Director at YBC. The claimant raised the issue of lack of consultation about redundancy. Discussions took place about the managerial positions that had been offered to the claimant and turned down. Further, that the respondent considered the Reading job to be most suited to the claimant due to its location and that the company had been left with no choice due to lack of flexibility and inability of the claimant to continue with the Reading project. It was explained that the outcome would have been the same even had formal discussions taken place and that it was not considered in the claimant's best interests for it to have dragged on. Assurance was provided that the claimant would receive her full redundancy package and that her remaining notice period would be paid in full.

24. The claimant did not ask to be reinstated during the appeal hearing or put forward her own suggestions for continuing her employment with the respondent. When asked if there was anything else YBC could do for her the claimant replied that there wasn't and that she now had full clarity regarding the situation.

**Relevant Law**

25. An employee has the right under s94 ERA 1996 not to be unfairly dismissed.

26. Where a complaint of unfair dismissal is made, it is for the employer to show that it dismissed the claimant for a potentially fair reason ie. one within s98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held. If the respondent fails to do that the dismissal will be unfair.

27. Dismissal for redundancy is a potentially fair reason falling within s98(2).

28. The definition of redundancy is set out in s139 ERA as follows:

*(1) For the purpose of this Act 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.*

29. In *Safeway Stores plc v Burrell [1997] IRLR 200* the Employment Appeal Tribunal (EAT) indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

(a) whether the employee was dismissed?

(b) if so, 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?

(c) if so, was the dismissal of the employee caused wholly or mainly by the cessation or dimunition?

30. The Tribunal is entitled to re-label the potentially fair reason ascribed to it by the employer. This was emphasised by the EAT in *UPS Ltd v Harrison UKEAT 0038/11/RN.* The Tribunal should first make findings as to the employer's own reasons for dismissal. It should then ask itself how those reasons are best characterised in terms of s98 ERA. The pleaded label is of less significance, of central importance is that the live, operative reason for dismissal is considered rather than any statutory label.

31. Once a potentially fair reason is established by the employer as the reason (or main reason) for dismissal, then s98(4) must be considered, the burden being neutral at this stage. S98(4) provides as follows:

*Where the employer has fulfilled the requirements of 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.*

32. In applying s98(4), the Tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA; Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

33. Under the principle in *Polkey v A E Dayton Services Ltd 1988 AC 344,* where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event had there been no unfairness ie. if a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the claimant would have been dismissed in any event.

**Conclusions**

34. I am satisfied that the respondent's factual reason for dismissing the claimant was her unwillingness to adapt to the changing needs of the business. The respondent had been compelled to reorganise its resources to improve the services provided to clients following the failure of Nviro to perform the Hampshire contract effectively, but more importantly to meet the individual requirements of its existing clients where they had changed in response to the Covid-19 pandemic. The claimant was offered a number of roles, one of which she took up working in the same area as previously, though covering a greater number of sites. Having complained that the long hours were taking a toll on her health, the respondent offered her a role closer to home to drastically reduce the travelling involved. That role was taken up briefly before the claimant complained about the working conditions and threatened to go on the sick if she was asked to continue. The respondent was entitled to reorganise its business and in doing so to take decisions that required an adaptable workforce, particularly in light of the impact of the pandemic.

35. Although the respondent categorised the reason for dismissal as redundancy, I am not satisfied that the circumstances prevailing at the time of the claimant's dismissal, or during the months leading up to it, fell within the definition of redundancy in s139 ERA. The respondent had not ceased to carry on the business for the purposes of which the claimant was employed, either generally or in the place where the claimant was employed. Although the requirements of the business for employees to carry out work of a particular kind had altered, in the sense of a more flexible approach being called for to meet the changing demands of clients, it was not apparent from the evidence that they had ceased or diminished. Nobody was made redundant. None of the correspondence between the respondent and the claimant prior to her dismissal referred to her being at risk of redundancy. The claimant's employment with the respondent had continued for some 10 months following her transfer from Nviro, during which discussions were ongoing about potentially suitable roles, but the

circumstances fell short of a redundancy situation. Supervision and management resources were refocused and realigned to meet the needs of clients, but it essentially amounted to a reorganisation of the work as opposed to a cessation or diminution of it. Indeed, at the time of the claimant's dismissal, the respondent had recently acquired the work in Reading and could be said to be expanding in some respects.

36. Having found the respondent's reason for dismissal to have been a reorganisation of its business that required an adaptable workforce and the claimant's unwillingness to work flexibly in response to where the need arose, I deem it appropriate to re-label the potentially fair reason for dismissal to that of 'some other substantial reason of the kind such as to justify the dismissal' (SOSR). SOSR is an acceptable category for dismissal within s98 ERA.

37. In terms of whether the dismissal was fair in accordance with s98(4), Mr Ridgeway conceded in his closing submissions that the procedure invoked by the respondent was less than perfect. The claimant had not been given notice that she was about to be dismissed and had thus been deprived of an opportunity to make representations that may have influenced the decision. Failure to follow a fair procedure does not automatically render a dismissal unfair. The entire context of the dismissal will determine whether it was within the band of reasonable responses. Ongoing discussions had taken place over several months between the respondent and the claimant about potential suitable roles for her within the business. Managerial positions had been offered and had been declined. The claimant had been offered and had taken up work at her preferred location in Hampshire initially. When she complained of long hours the respondent offered her a role closer to home, which she was receptive to but decided against it after a few weeks of working there and threatened to go sick if she was asked to continue. I consider this to be one of those rare cases where it would have been futile to have entered into further discussions with the claimant prior to dismissal. She had demonstrated by her actions that she was unable or unwilling to adapt to the changing landscape of the business.

38. Moreover, procedural failings are able to be remedied on appeal. The claimant attended an appeal hearing at which it was open to her to challenge the decision. Had she wanted to argue against the respondent's decision to dismiss her this was the ideal opportunity for her to do so. She did not ask to be reinstated in any capacity, simply sought clarification of the respondent's reasons for lack of consultation beforehand.

39. I have concluded that the claimant's dismissal was within the band of reasonable responses in the circumstances. While the procedure was not ideal, it was not unfair when set against the background of the respondent's genuine but failed attempts to retain the claimant in various capacities. The futility of engaging in further discussions with the claimant is illuminated by the fact she did not seize the opportunity at the appeal hearing to seek to remain in employment with the respondent.

40. For completeness, had I found the dismissal to have been procedurally unfair, I would have gone on to find there would have been 100% chance of dismissal in any event and the compensatory award would have been reduced to nil.

Employment Judge Moss

Date 3 November 2022

JUDGMENT SENT TO THE PARTIES ON

11 November 2022

FOR THE SECRETARY OF THE TRIBUNALS

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.