EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Balding

Respondent: Asda Stores Limited

Heard by CVP **On:** 1 and 2 February 2024

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr H Zovidavi, barrister

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. It is not just and equitable to reduce the compensatory award on the ground the claimant would or might have been dismissed in any event had a fair procedure been adopted.

3. The respondent made unauthorised deductions from the claimant's wages in respect of 56 days of outstanding holiday pay and shall pay to the claimant the outstanding sum of £22,207.64 and interest thereon of £2,151.37.

4. The case shall be listed for a remedy hearing in respect of the unfair dismissal claim for 1 day.

REASONS

Introduction and Issues

1. These are claims for unfair dismissal and holiday pay.

2. In respect of the complaint of unfair dismissal the issues were discussed with the parties and identified as:

2.1 Was the reason or principal reason for dismissal that the claimant was redundant?
2.2 If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, including:
2.2.1 Did the respondent adequately warn and consult the claimant;
2.2.2 Did the respondent adopt a reasonable selection decision;
2.2.3 Did the respondent take reasonable steps to find the claimant suitable alternative employment;
2.2.4 Was dismissal was within the range of reasonable responses;
2.2.5 Was there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason such that the compensation should be reduced?

3. In respect of the claim for holiday pay the issues are:
3.1 What holiday did the claimant take in the years 2019 to 2022?
3.2 What was the entitlement to carry forward holiday?
3.3 What holiday did the claimant carry forward?
3.4 How many days' holiday including carry over leave were outstanding at the date of the claimant's termination of employment?
3.5 What sums is due having regard to the fact 5 days have been paid?
3.6 Is the claimant entitled to interest on any sum?

The Evidence

4. The claimant gave evidence. The respondent called Miss Katy Smith, HR Business Partner and Mr Michael Rowles, Senior Director, Ecommerce Trading Clothing and General Merchandise.

5. The parties submitted a bundle of documents which ran to 327 pages.

Facts/background

6. The respondent is a major retailer. It has a clothing homeware brand known as *George*. The products are sold from stores and on-line.

7. On-line business forms a significant amount of the respondent's business. It sells to 12 million customers per week. This is through 11 transactional websites, of which Asda.com and George.com are the best known. The Ecommerce team manages the online business.

8. The claimant was employed by the respondent in 2006. He undertook 7 different roles over the following 16 years, the last of which was the George Future Lead, Ecommerce to which he was appointed on 10 October 2021. The role had been created in June 2021, but the claimant was its first post holder. It was described in the letter of appointment, belatedly issued on 22 November 2021, as a permanent position. The claimant had a meeting with the Vice President to express concern about the enforcement of the job change and the status of the programme which led to the provision of a one-off retention bonus. In a letter dated 27 October 2021, the Vice President agreed to pay to the claimant £9,125 on 21 April 2023 conditional upon him remaining an employee of the respondent.

9. In early September 2022 Emma Ford, the Senior Director, Future Programme Ecommerce Lead spoke with Miss Smith about her intention to restructure her team. She said that the role of the claimant was no longer required, because his team possessed the requisite knowledge about *George.com*. She sent an email to Miss Smith on 6 September 2022 in the following terms. The email read:

> "*The George SME role was put in place in June 2021 to be the subject matter expert in all things George.com for Future migration of the systems off Walmart. Over the past year the role has upskilled and moved the knowledge to both technology and business teams, having supported the selection on multiple vendors. Having been part of a small team of 7 this role is now part of a team of 400. The role of the SME is no longer required having fulfilled its original purpose. This role was a permanent role and is no longer needed. There is one CIO reporting into this role which would be moved into Product*".

10. Ms Ford and Miss Smith had a meeting with the claimant on 7 September 2022. He was informed of this plan and the intention to consult with him with a view to the proposed changes. He was told the role was no longer required and was at risk of redundancy. He was informed there would be discussions about his thoughts and suitable alternative vacancies over the next few weeks in individual consultation meetings. Miss Smith said she would send a formal letter and a questionnaire which would assist with redeployment opportunities. The letter was sent later that day, attaching notes of the meeting. Apart from referring to changes which were discussed, it included no further breakdown or written explanation of the reasons for the abolition of the post. It informed the claimant he could be accompanied at any further meeting by a trained colleague representative, a work colleague or trade union representative.

11. The first individual consultation meeting took place on 9 September 2022. The claimant was not accompanied. Ms Ford and Ms Smith were present. The claimant expressed his confusion about the business plan. Ms Ford stated that in her view there was no longer a full-time permanent stand-alone SME position at his level because of the knowledge transfer to the wider, larger team. She stated that the tasks he was undertaking could be undertaken by other staff. He was informed he would be considered for alternative vacancies which for which he might express an interest.

12. The second consultation meeting took place on 16 September 2022. Mr Rowles conducted the meeting with the assistance of Miss Smith. Ms Ford was on leave. The claimant stated that he did not feel he had sufficient clarity of the business case or the reason for the redundancy. Mr Rowles suggested that the claimant should set out the basis of any objections and set out his own counterproposals with specific examples and arguments in support.

13. The third consultation meeting took place on 23 September 2023 with Mr Rowles and Miss Smith. The claimant had prepared a slide deck presentation explaining his role and what gaps would be left were his post to be deleted. He gave examples of a series of tasks and duties including what work had been undertaken and the aspects of the programme which remain to be delivered. Mr Rowles forwarded this to Ms Ford for her consideration. She was to resume the consultation process.

14. The fourth meeting took place on 12 October 2022 with Ms Ford and Miss Smith. There was discussion about the vacancy list which had been provided and the efforts to explore options. Ms Ford disagreed with the claimant's proposals. She accepted that there were potential challenges in changing the programme but was satisfied these could be resolved by other members of the team who were now upskilled. There were some further discussions about alternative vacancies. Ms Ford said she would have another look at what the claimant had shared.

15. The final consultation meeting took place on 19 October 2022. The redundancy was confirmed and there was some discussion about what progress had been made in respect of alternative vacancies. The claimant had not returned the questionnaire but had sent his CV to Miss Smith on 23 September 2022. The claimant had expressed interest in a number of roles; Senior Manager Proposition, Principal Engineer, Transformation Programme Manager and Transformation Office Delivery Lead. He had not been considered to have the necessary skillset or experience for the vacancies by the relevant managers who headed the respective departments. The claimant's employment was terminated with pay in lieu of notice on that day, 19 October 2022.

16. That was confirmed in a letter dated 25 October 2022. It included a financial settlement of notice pay, statutory redundancy pay and an ex gratia payment. It stated that there was a policy whereby former employees could not reapply to the respondent for any post for 12 months but, in the event of exceptional circumstances they would be happy to review that. If the claimant were re-engaged in such circumstances the enhanced element of the redundancy payment would have to be repaid.

17. The claimant was offered the right of appeal but chose not to exercise it.

The Law

18. By section 139(1) of the Employment Rights Act 1996 redundancy is defined:

> *For the purposes 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.*

19. By section 98 of the ERA*, (1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*.

20. Section 98 (2)(c) includes a reason that the employee was redundant.

21. Section 98(4) provides, "*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*".

22. In ***Williams and others v Compair Maxam [1982] ICR 156*** the Employment Appeal Tribunal held that it is not the Tribunal's function to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

23. It also provided the following guidance about the correct procedure in redundancy situations.

> *1. 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.*
> *2. 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.*
> *3. 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.*
> *4. 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.*
> *5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

24. The form and nature of fair consultation was explained in the administrative law authority of ***R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price*** **[1994] IRLR 72**:

> "*Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely. It is axiomatic that the process of consultation is not one in which the*

consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting."

This is the correct approach to the evaluation for redundancy cases, see *King v Eaton Ltd [1996] IRLR 199*.

25. By section 13 of the Employment Rights Act 1996:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made

Analysis

Was redundancy the reason or principal reason for dismissal?

26. The respondent says that the role of the claimant had run its course, albeit earlier than had been envisaged when he had first been appointed in September 2021. The team had grown from 7 to 400 and had become sufficiently knowledgeable and experienced in the work undertaken by the clamant that his post had become surplus to requirements. Ms Ford had therefore made the decision to reorganise the department and this had been managed through HR. Miss Smith had not accepted what Ms Ford had said about the restructure at face values but had taken time to talk through her proposals and was satisfied that this was a genuine business reorganisation founded on a rationale assessment of the needs of the business.

27. The claimant disputes there was any redundancy situation and that the role he undertook had become redundant. He points out that the post was described as a permanent one and he had been given a retention bonus to remain in employment until the following year. A day before he was informed he was to be redundant, a colleague called Tom Lamb was announced to be taking the lead on George migration, at a group meeting. There had been no one-to-one meetings with Ms Ford in the summer of 2022 and the decision had come out of the blue on 7 September 2022. In previous meetings there had been no suggestion his performance had been anything than good. The claimant pointed out there was no evidence that duties he had been undertaking had been successfully taken over by others.

28. The respondent has not established the reason for the dismissal was redundancy within section 98 (1) and (2) of the ERA. The evidence did not satisfy me that there had been a reduced requirement for employees to undertake work a particular kind or that there was any expectation of that. Ms Ford did not give evidence. She had left the respondent about a year ago.

29. The respondent relied upon the evidence of Miss Smith, the HR advisor. She had been satisfied with the explanation provided to her by Ms Ford about the

claimant's role no longer being required. Miss Smith was a genuine witness, but she was not responsible for the exercise and was dependent on what she was told by Ms Ford. The claimant had presented a comprehensive explanation of his role and functions, further to the suggestion of Mr Rowles. It is in the tribunal bundle. It is detailed and extensive, providing many examples of his duties and a critique of the problems which would follow if he were not to remain in post. For the purpose of these reasons, it is sufficient to cite the summary of it from the witness statement of Mr Rowles: "*in short, it appeared to me that [the claimant's] proposal was that the functions he performed were very much a keystone in the performance of the team and that his removal, and his skill set, would leave "gaps" which would impact service delivery. Primarily [the claimant's] challenge was around the impact from removal of role, created loss of George.com business partner, feedback input into future design conversation, resource and team expertise void and challenges to programme delivery. Along with outlining a series of tasks that will work in progress and not completed".*

30. There is a marked a lack of written information about the business reorganisation in this case. It is limited to the email sent by Ms Ford to Miss Smith on 6 September 2022, a copy which was never shown to the claimant. It states: "*Over the past year the role has upskilled and moved the knowledge to both technology and business teams, having supported the selection on multiple vendors. Having been part of a small team of 7 this role is now part of a team of 400. The role of the SME is no longer required having fulfilled its original purpose. This role was a permanent role and is no longer needed".*

31. The claimant never received any meaningful response to his informative written representations about the need for his role. The dismissal letter made no reference to it at all. The only explanation which the claimant received from Ms Ford about why she rejected what he had said was given at the fourth consultation meeting. The notes recorded her comments: "*This is not about performance or the value you as a colleague add to the business of the role. How you are performing is not in debate. To that end I won't be commenting or responding to those elements in the pack and will concentrate on the role itself. Whilst I recognise some of the challenges highlighted in the deck around the programme, the google.com SME role responsibilities do not solve these issues and are the accountabilities of several other colleagues across the team. Nothing in the deck has raised any new concerns or new angles to review keeping the George.com SME role. There is no role for grocery or any of the other business units/websites service remains that this role has come to an end naturally and reached the point where it is no longer required. A lot of the roles you have suggested operate in the business either in a singular role or as part of a role. I accept there is a gap from an end-to-end customer experience however this role would be a CIO and sit potentially in the use team."*

32. In his evidence the claimant gave further clarification of the slide deck and the function he performed. He said that part of his role involved the transfer of data from Walmart to Asda, a major migration project across respondent which was expected to last until 2024 or 2025. His role was broken into a front-end function, which was customer facing and a back-end function, which he described as behind the scenes. On 6 September 2022, without forewarning Ms Ford announced part of his job was to be transferred to Tom Lamb. The claimant had to provide him with contacts and information about projects and plans. He said that although the team had grown substantially, it was relatively new and although there had been some training and upskilling, they would not have the knowledge and breadth to facilitate and set up a

successful operation of the programme. He pointed out that the process is still ongoing.

33. It was said there are now 400 people in the team. No evidence was adduced about who did what amongst them, which were employees and which third party contractors and how and which employees were to discharge each of the claimant's various duties. Mr Rowles says the claimant's role has not been replaced, but that does not mean the definition of redundancy has been established. It is for the respondent to show the requirements of the employer for employees to undertake work of a particular kind have reduced or diminished, or were expected to. It was never suggested the kind of work the claimant had done had reduced; rather that others had become sufficiently skilled to do it. The kind of work the claimant did remains. But there is no evidence about the workforce who have taken over the task and whether it involves an increased number of employees, the same or fewer. For example, Mr Lamb took over some duties, but I do not know what happened to his duties and whether he simply absorbed the claimant's into his own or if another employee was needed to do Mr Lamb's work. I took the figure of 400 in the team as a global one and nowhere was it broken down.

34. I cannot recall a previous case in which such a restructure of this nature was not reduced to writing with a breakdown of the respective functions of the role and how they were to be rearranged or redistributed. Such a written proposal is then typically used for the start of the consultation process, upon which the affected employee can make meaningful response in his representations. The situation here is even more problematic by the complete absence of any written job description for the claimant or any particulars of his role in his letter of appointment. The Tribunal was dependant on the claimant's description of his duties, none of which was rebutted by evidence from the respondent.

35. The claimant repeatedly said he could not understand the rationale for the restructure. That is understandable. It was not adequately explained. Ms Ford's views are no more than assertions that the work could be done by others. In the absence of explaining how and why the same kind of work could be undertaken by other or fewer employees, the evidence falls short of establishing the reason for the dismissal was redundancy. This is not to question the commercial decisions of the respondent, which are not a matter for the Tribunal (***Moon v Homeworthy Furniture (Northern) Ltd [1997] ICR 117***). The respondent has simply not established the ingredients of section 139 of the ERA applied to the situation.

Consultation

36. The consultation process involved a number of individual meetings and the procedural steps in respect of accompaniment were followed.

37. The essential deficiency of it was the failure to provide the details and particulars upon which the assertion the job had become unnecessary and were based. Without those, the claimant was left to make his own case that the work was still necessary for the business and his role was needed. When he did that, in a comprehensive slide presentation, his representations were glossed over, without any attempt at providing a reasoned response. This fell well short of the requirements set out in ***R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price****,* above.

38. It fell outside a reasonable band of responses. Moreover, it invited the inference that the consultation process was not a genuine one, that Ms Ford had

already made her decision and was not prepared to keep an open mind. In the absence of Ms Ford to give evidence to the contrary and given the other peculiarities of the case, I draw that inference. The job was always anticipated to last beyond 2024 and the claimant had been given a retention bonus by the Vice President to a date well beyond his redundancy. No word had been breathed of a change in the weeks and months before the decision was announced on 7 September 2022.

Alternative employment

39. I accepted Miss Smith's evidence that she had done her best to assist the claimant during the consultation period to provide a list of vacancies and to assist him find other opportunities. I reject the claimant's criticisms in that respect. I do not regard her as having been complicit with Ms Ford in an exercise which was not fair and meaningful, but she accepted Ms Ford's opinion.

40. It was unreasonable to terminate the contract immediately with pay in lieu of notice. The claimant could have been placed on garden leave to similar effect, but with the advantage that he could have applied for any vacancies which arose at the respondent during the notice period. If he had found alternative work elsewhere the respondent could then have released the clamant from his notice. By taking the step it did, the claimant became subject to the policy of being disqualified from applying for posts for a year, save for a review in exceptional circumstances. Miss Smith had said the claimant had been told he could apply for any job and that the letter was unfortunately worded. I did not regard that as satisfactory, given that the claimant was likely to rely on the wording of the formal letter. Taken on its own I would not have found this part of the decision-making process to have fallen outside a reasonable band, but together with the other deficiencies I am satisfied it was unreasonable.

Polkey

41. As I have found there was no redundancy I do not find, had there been a fair exercise, that the claimant might have been dismissed in any event. The process was so deficient, for the reasons set out, that I shall make no adjustment in the respect.

42. It is open to the parties to make submissions in respect of how long the employment might have continued more generally, for the purpose of evaluating losses. That might include consideration of when the migration of data in his field would have otherwise been completed.

Holiday pay

43. The respondent's policy was that for the years 2019/2020, 2020/2021 and 2021/2022 employees were entitled to carry over unused holiday for up to 24 months. This was due to the Covid pandemic. Carried forward holiday was then to be treated as used first in the carried over years.

44. The claimant's holiday entitlement was 28 days per year until 2021/2022 and thereafter it was 29 days. The respondent produced a number of holiday planners following a subject access request of the claimant, but none for the years 2018/2019 or 2022/2023.

45. For the year 2019/2020 the claimant had carried forward 10.5 days from 2018/2019. He said that was agreed by his manager and there was no evidence to

refute that. The claimant took 26.5 days holiday in that year, so carried forward 1.5 years untaken leave for that year and the 10.5 days from the previous year, that is 12 days untaken leave to 2020/2021. The respondent does not dispute the 1.5 days' carry over but challenges the 10.5 days. I find that if the 10.5 days carried over are deemed to have been used first, the claimant accrued untaken leave for the whole year of 12 days. That is what the planner for 2020/2021 records as carried forward.

46. In the year 2020/2021 the claimant says he took 5 days leave but the respondent says he took 14. That is what the planner says. The claimant says these were initially requested, but not taken and the planner has not been updated properly. He says due to the exceptional circumstances he did not take what he had intended. He has checked his diary and other family records to produce the detail of when he took leave. He says he took only 5 days holiday. I accept the claimant's evidence about that and find the planner is inaccurate. He therefore had 23 days to carry forward into 2021/2022. He was carrying the additional 12 days from the previous year. That would make a total of 35 days carried forward to 2021/2022.

47. For the year 2021/2022 the claimant says he took 11 days leave. The planner shows no days taken. I prefer the claimant's evidence. The leave days taken are drawn down from the carried over leave from the first 24 months. That reduced the untaken leave for the first year to 1 day. That could not be carried further forward. The claimant therefore carried forward into 2022/2023 the 29 days for the second year and the 23 days for the first.

48. For 2022/2023 there was a pro rata entitlement to 17 days. The respondent says the claimant took 10 days but the claimant says he took 8. I prefer the claimant's evidence given the absence of records from the respondent. The 8 days would reduce the carry over from the first year of the 24 months carry over to 15 days ((23 – 8).

49. That left the following entitlement when the claimant left. 15 days from the first year of the 24 month carry over period, 29 days for the second year of the 24 month carry over period and 17 days of the current year, a total of 61 days. The claimant was paid for 5 days. He is owed holiday pay for 56 days.

50. The claimant was paid £396.57 per day. He is entitled to £22,207.64. He claims interest on that sum for a period of 15 months from October 2022 at bank base rate plus 2.5%. I am entitled to award such sum as I consider appropriate to compensate the claimant for any financial loss sustained by him which is attributable to the unauthorised deduction, under section 24(2) of the Employment Rights Act 1996. I am satisfied the claimant could have invested that sum and obtained interest at the rate claimed. I therefore agree with the claimant's calculation in respect of holiday pay and award the sum claimed plus interest which is £22,207.64 and £2,151.37 respectively.

Employment Judge D N Jones

Date: 5 March 2024

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/