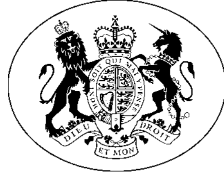

EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr A Garcha	**AND**	**Winmark Ltd**

Heard at: London Central (By CVP video link)

On: 9 & 12 July 2021

Before: **Employment Judge Brown**

Representation:

For the Claimant: **In person**
For the Respondent: **Mr K Ali, Counsel**

JUDGMENT

The judgment of the Employment Tribunal is that:

1. **The Respondent did not unfairly dismiss the Claimant.**

REASONS

Preliminary

1. The Claimant brings a complaint of unfair dismissal against the Respondent, his former employer.

2. At the start of the hearing the issues to be decided were agreed as follows:

Liability

1. Was the reason for dismissal the potentially fair reason of redundancy?

2. Was the Claimant fairly selected for redundancy? Was he appropriately pooled?

3. Was a fair overall process followed? Was the Claimant fairly warned and consulted?

4. Was the Claimant considered for suitable alternative roles?

5. The Claimant's specific challenges set out in his ET1 (p 7) appear to be:
   (1) The decision to make the Claimant redundant was pre-determined?
   (2) The Respondent made a decision to make his role redundant without a business case. And the business case was only provided to the Claimant the day before the first consultation meeting without enough time to consider it.
   (3) The Respondent lied about the reason for redundancies (initially suggesting the change in strategic direction was driven by client needs, and then suggesting it took place as a direct result of Covid-19).
   (4) Mr Stephen Moore should have been added to the selection pool for redundancies.
   (5) The Respondent failed to conduct a fair, reasonable and meaningful consultation.
   (6) The Respondent failed to provide the Claimant with Winmark's redundancy process and procedures document until after the Claimant was made redundant.
   (7) The Respondent used false information to reject the possibility of using furlough (by suggesting the Respondent was excluded from the scheme). The furlough option was then offered late, and it wouldn't have allowed the Claimant to stay in contact with the organisation, and he would then have been made redundant thereafter whenever the Respondent wished.
   (8) During the consultation process internal sales meetings were cancelled by the sales leader (Stephen Moore) suggesting the redundancy decision was pre-determined.
   (9) The Respondent failed to make any attempt to discuss alternative roles. Trial periods were not explained to the Claimant.
   (10) The Respondent did not offer salary protection.
   (11) The Claimant's role still exists as the role of C-suite manager has been created.
   (12) The Respondent tried to push the Claimant into an appeal process without the chance to put his appeal in writing.
   (13) It was unfair to place the Claimant on garden leave during his notice period, rather than let him work his notice period as had been earlier suggested, thereby locking him out of work systems.

6. Was the Claimant's dismissal within the "range of reasonable responses" available to the Respondent in all the circumstances?

7. If there was any procedural unfairness in the Claimant's dismissal, would it have made any difference to the decision to dismiss the Claimant had that procedural unfairness not taken place?

Remedy

[Schedule of Loss at p 595; Counter Schedule of Loss at p 599]

8. Is the Claimant entitled to a basic award? [The Respondent submits there is no such entitlement because the Claimant has received redundancy pay]

9. Did the Claimant fail to mitigate his losses by not applying for alternative roles made available to him by the Respondent?

10. Did the Claimant fail to mitigate his losses by not accepting the offer by the Respondent to be placed on furlough?

11. Did the Claimant fail to mitigate his losses by deciding to set up and run his own company following his dismissal?

12. Did the Claimant fail to mitigate his losses by not applying for sufficient alternative jobs following his dismissal?

13. What is a fair period to award the Claimant compensatory losses over? And what should this award be? What are the Claimant's loss of earnings and pension losses?

14. What is any appropriate award for loss of statutory rights?

15. Does the ACAS Code apply to redundancy dismissals? [The Respondent will suggest it does not] And if so should the Claimant's damages be uplifted on grounds of any failure to follow by the Respondent to follow the ACAS Code?

3. The hearing was listed to determine both liability and remedy, if appropriate.

4. The Tribunal was provided with:

   a. an indexed Bundle of documents (page references in these reasons are to pages in that Bundle);
   b. a witness statement from the Claimant; and
   c. witness statements on behalf of the Respondent: from John Dembitz, Company Chair and Non-Executive Director; John Jeffcock, Chief Executive Officer; Christopher Honeyman Brown, Chief Finance Officer; Kerry Ghize, Company Chair and Non-Executive Director; and Stephen Moore, Chief Commercial Officer and the Claimant's line manager. (Roles in the Respondent stated as at the relevant time).

5. The Claimant also submitted witness statements from other employees, but did not call those witnesses. I did not take their witness statements into account as they had not attended to give evidence.

6. The hearing was conducted by CVP videolink. The parties could hear what the Tribunal heard. Members of the public could attend and did attend.

7. The Tribunal heard evidence from the Claimant and from all the Respondent's witnesses.

8. Both parties made submissions. The Tribunal reserved its judgment.

Findings of Fact

9. The Respondent is a Company which provides knowledge to, and facilitates connections for, business leaders, in relation to the governance, performance and sustainability of their organisations. It also provides management research to its client business leaders.

10. The Claimant started work with the Respondent on 1 March 2018. He was originally employed as a Network Director. The Claimant was promoted to Network Director and Head of Revenue on 3rd October 2018.

11. Following a Board meeting on 16 March 2020, the Respondent Company announced, on 7 March 2020 that it would undertake a "digital pivot". Essentially, this

involved changing the services it offered to clients to remote, digital services. The Company announced a first redundancy exercise. Nine people were put at risk of redundancy and six new roles were created (pp 44 – 57) in line with the move to a more digital business.

12. The Claimant told the Tribunal that one of these new roles was the "Head of Partnerships" role. The Claimant said that the Head of Partnerships role effectively took over the Network Directors' existing responsibility for new business partnership sales. He contended that the Company must have already planned to remove the Network Directors, but chose not to inform them at that stage.

13. On late March 2020 the UK government announced a national lockdown because of the covid-19 pandemic.

14. On 30 March 2020 the Respondent announced a second redundancy exercise.

15. The Claimant was put at risk of redundancy, along with three other Network Directors. He was told this in a meeting on 30 March 2020, confirmed in writing the same day.

16. The 30 March 2020 "at risk" letter invited the Claimant to a consultation meeting on 3 April 2020 to be held with Christopher Honeyman-Brown, CFO. The very detailed letter said, amongst other things, "Revenues have all but dried up and there is no evidence that they are going to return … unless we significantly change our offering to members … the move to a digital offering is likely to mean a reduced need for face to face sales capability. The Network Directors are the highest paid team in Winmark and the cost saving … by making these roles redundant is significant. These savings could be used in part to fund a more digital offering. It is therefore proposed that the face to face sales team, all four Network Directors, are put at risk of redundancy…".

17. The letter said that the Respondent had considered furlough as an alternative, but that, " .. whilst it would result in a temporary cost saving, our current view is that we would not have the right roles or structure in place to give our members what they want in the future (a digital offering). Our understanding of the government furlough scheme is that it is intended to be used to furlough employees whose roles would otherwise be made redundant as a result of the COVID-19 pandemic. We do not consider this to be the case here; whilst COVID-19 has obviously impacted on our revenue, this proposal is more about ensuring that we have the right structure going forward to enable Winmark's survival than about temporarily saving costs."

18. On 31 March 2020 Marta Adamus, HR manager, sent the Claimant job descriptions for all 6 new roles identified in the first redundancy consultation. She set out the timetable for expressions of interest in the roles and interviews for them, p61.

19. The Claimant cross examined Mr Jeffcock about the decision to make the Network Directors redundant. He suggested that it had been made earlier than 30 March 2020. Mr Jeffcock said that the Company had had 2 digital plans – one internal plan and one to 'go to the market" plan. Mr Jeffcock said that the internal digital plan caused the first redundancy round. He said that, because of covid, the "go to market" digital plan was massively accelerated. He said that it was not decided on 16 March

to delete the Network Director posts, but that, in the following 2 weeks, the sales pipeline disappeared - there was no prospect of sales for a long time. As a result, the Company could not afford a face to face sales team.

20. On 31 March 2020, the Claimant asked, pp60 & 61, for the Company's business case document, which set out the rationale for the proposed redundancies. He also asked for 5 working days to review the business case, once it had been shared.

21. The Respondent Company put the business case on MS Teams on 2 April 2020, p80 – 86, when the Claimant was on annual leave. He did not become aware of the document until another Network Director mentioned it to him half an hour before his consultation meeting on 3 April 2020.

22. The Claimant attended a consultation meeting on 3 April 2020 with Christopher Honeyman-Brown, CFO, and Marta Adamus, HR manager, p88. The meeting lasted about 30 minutes.

23. In the meeting, the Claimant said that 30 minutes was not a long time to discuss his proposed redundancy. Ms Adamus said that the consultation would continue until the final meeting. She encouraged the Claimant to put further questions and suggestions in emails, or in a follow up meeting. The Claimant asked why the business case had not been provided at the same time as the redundancies were announced. He was told that the business case had been outlined in his "at risk" letter. The Claimant challenged the statement in his "at risk" letter that clients wanted a digital offering. He also asked why the furlough scheme was not being used by the Company to avoid his redundancy. He was told that the Company was looking further at the Furlough scheme and that it was "definitely not off the table." The Claimant said that the Company needed its commercial team of Network Directors to increase revenue. He was told that the revenue received in December and March 2019/2020 was already substantially below budget, before the impact of Covid, and that the Company would suffer further as their clients reduced their spending, given the impact of Covid. The Claimant asked why Mr Moore, the Chief Commercial Officer, had not been included in the pool for selection. He was told that this would be responded to later. The Claimant also asked whether there would be any changes to the 6 roles which had been created. He was told that it was possible that new/different roles would be created during the consultation process, pp88-89.

24. The Claimant sent a list of questions and observations to Mr Honeyman Brown and Ms Adamus on 6 April 2020, p91 - 98.

25. On 7 April 2020 Ms Adamus sent the Claimant a written response to the questions he had raised in his first consultation meeting, p120. She said that a further written response would be provided to his email of 6 April 2020. Ms Adamus also reminded the Claimant that he needed to apply for any new role by 8 April 2020, and that interviews would be held on 9 April 2020.

26. Ms Adamus' 7 April written response included answers to 34 issues the Claimant had raised. It said that, while the Respondent's business case for the redundancies was outlined in "at risk" letter, the more detailed business case, dated 2 April 2020, included financial assumptions which could not be provided until the end of the

financial year in April. The response also said, of Mr Moore, the CCO, not being included in the pool for redundancy, that he had previously been Director of Sales and Marketing at The Law Society and that his role at the Respondent Company included Marketing, which was key to the success of the digital pivot. It also said that the redundancy proposal was not focused on individuals' past performance, but resulted from the Network Director role not being needed.

27. The response said that the Company's offering was now 100% digital and that it anticipated that clients would take 6 months to adjust to this. The response said that a recent report concluded that organisations who adopted digital, automation and AI would be more resilient to economic stresses and would better adapt to the new normal, post covid-19, market.

28. The response also said that no decisions would be made on appointments to the 6 new roles until all employees, who were at risk, at been interviewed, p122.

29. Mr Jeffcock sent the Claimant a further written response on 8 April 2020, p155. He said that he would be putting the Claimant's comments on the consultation process to the Board, including that Mr Moore should also be put at risk of redundancy, that the Company should use Furlough, and that the Respondent would additional roles, including 2 Heads of Partnership and 2 C-suite Managers, p158.

30. On 8 April 2020 Ms Adamus emailed the Claimant, telling him that the interviews for the new roles would be conducted on 9 April and that the Board would meet on 14 April, with final consultation meetings being held on 16 April. She said, "This means no decisions will be taken as to the outcome of your at risk of redundancy process or the appointment of the six new roles until after the Board meeting and the completion of this second consultation", p160.

31. The Respondent produced a Furlough Policy on 9 April 2020, p161. This made furlough available to the Claimant and other Network Directors, as an alternative to redundancy. The Policy said,

"All members of staff who are made redundant by way of the consultation process, where the redundancy is caused by the Covid-19 pandemic, will be offered the Furlough option as an alternative to immediate redundancy. They then have two options:

- Accept Furlough – go into Furlough until 1 June 2020 (or longer, if the scheme remains available and employees are eligible for continued Furlough leave), then serve their notice period and get their redundancy pay. However, the situation will be reviewed at the end of the Furlough leave period to see if any viable alternatives to the redundancy proposal have arisen in the meantime which mean that we no longer have to make the role redundant.
- Not Accept Furlough – serve their notice period and get their redundancy pay."

32. The Claimant replied to Mr Jeffock's 8 April email, early on 14 April, addressing each of Mr Jeffcock's points, p164. He criticized Mr Moore's performance and said that a sales capability was required. He also said that employees had been given insufficient time to consider whether to accept Furlough – he said that he needed to

know as soon as possible whether he would be furloughed. The Claimant said that the lack of salary protection for the Head of Partnerships role, along with his reservations about the role itself, had meant that he could not apply for it.

33. Mr Jeffcock responded early the same day, saying that the Claimant's points would be put to the Board meeting that morning, p172.

34. Mr Jeffcock wrote again to the Claimant after the Board meeting, addressing each of the Claimant's further comments, p181. In particular, Mr Jeffcock said, regarding Mr Moore, that the Company might have to conduct further reviews and that no one was 100% safe from redundancy. He said that everyone who was made redundant would be offered Furlough. Regarding salary protection for the Head of Partnerships role, Mr Jeffcock said that he had not heard of salary protection in that way before, but had understood that new roles came with their respective pay brackets. Mr Jeffcock also said that the sales function would now be covered by the CCO, Head of Partnerships and Mr Jeffcock himself. He said, regarding the new marketing posts, "We will need to do are best to make this work but if it does not work we will need to make further changes until it does", p183.

35. The Claimant cross examined Mr Jeffcock about the Respondent's failure to offer pay protection in the redundancy exercise. The Claimant pointed out that pay protection was mentioned in the Respondent's written redundancy policy.

36. The relevant policy said, "Whether alternative work may be considered suitable depends on a number of factors, including the following:

- Pay - Where possible, earnings will be protected against a fall in the current rate of pay." P279.

37. Mr Jeffcock said that the Company did not follow its redundancy policy, but took guidance from the Federation of Small Businesses throughout the redundancy process. He said that the Company's own redundancy policy was discretionary and was 10 years old. Regarding pay protection in particular, Mr Jeffcock said that he was shocked when the Claimant suggested it – Mr Jeffcock was not being paid a salary at all at the time; the Respondent was in a terrible financial position and the Claimant did not appreciate how dire the situation was. I accepted Mr Jeffcock's evidence about why the policy was not followed. He gave a vivid picture of the catastrophic financial situation in which the Respondent found itself. Given the pandemic, and the national lockdown, it was not surprising that Company's pipeline had almost disappeared and costs savings were urgently required.

38. During the consultation process, the Respondent decided to add a further C-suite Manager role to the roles available for potentially redundant employees.

39. On 14 April 2020, Mr Jeffcock wrote to the Claimant, inviting him to a consultation meeting on 16 April. He said that, if the Claimant was made redundant, he would be offered furlough and would have until 20 April 2020 to decide whether to accept furlough, p192.

40. The Claimant attended another consultation meeting on 16 April 2020, p379. Mr Dembitz, Company Chair, chaired the meeting, with Ms Adamus in attendance. The Claimant told the Tribunal that this was not, in reality, a consultation meeting.

41. In the meeting the Claimant was asked whether he wished to apply for the C-suite manager roles. There was also a lengthy discussion regarding furlough. The Claimant was told that he would not be allowed to work for the Respondent during the furlough period. The Claimant questioned how he could be made redundant and put on furlough, as he said that the purpose of furlough was to avoid redundancy.

42. The notes of the meeting record the exchange as follows:

"[Ms Adamus] The decision is being postponed for the period of furlough leave and there is another board meeting taking place towards the end of the furlough leave period ends which as of now is 31st May. As you know things are changing very quickly and rapidly, there might be changes made to the situation too.
[Claimant] This conversation started with you are being made redundant and you have the option to go onto Furlough and now what your saying is I'm not being made redundant and you will review afterwards. It has to be one or the other and I need clarity because I have just had two conflicting statements.
[Mr Dembitz] Hang on, the clarity is that you here and now have the option to say I want to be made redundant here and now. If that's what you want, that's what the company will do. However, the company is giving you an option, we can forget about redundancy for the time being, put it on the back burner put you into Furlough and as Marta has stated very clearly once the furlough period is over the board will then revisit whether to put you into redundancy, have further consultations with you or given whatever the circumstances might be at that time to make a completely different approach." P213.

43. On 16 April 2020, following his second meeting, Ms Adamus wrote to the Claimant, p201. She attached a draft furlough agreement letter and a new job description for the additional C-Suite Manager role. Ms Adamus said that applications for that new role would close on 17 April. Ms Adamus said, "If you decide not to apply for the role and not to enter the Furlough Scheme, and as we have not been able to identify any suitable alternative employment for you … you will be given notice of termination of your employment by reason of redundancy… You will be expected to work your notice period as the company may require."

44. Ms Adamus also sent the Claimant a "decision tree" setting out his available options following the meeting, p209. These were furlough, applying for the C-suite manager roles, or redundancy. The decision tree stated, regarding the C-suite manager role, "If your application is successful you will receive written confirmation of your new terms of employment, including role and salary and commencement date. The new role will be for a mutual trial period. If the trial is unsuccessful you would be eligible for any continuing furlough scheme, or be considered for any other new roles emerging or for redundancy." P210.

45. The Claimant responded on 16 April, asking for notes of the consultation meetings, minutes of the 14 April Board meeting, the Company's Furlough Policy and

the Company's redundancy policy, p217. He said that it was unreasonable to give him 48 hours to decide whether to apply for the C suite manager role.

46. At the Tribunal, the Claimant contended that the C-suite manager roles were, in fact, Network Director roles (with a different name). He cross examined Mr Jeffcock about this. Mr Jeffcock told the Tribunal that the C-suite manager role had no person management duties; they were not required to carry out appraisals, for example. He said that C-suite managers ran no campaigns and had no targets. The new role involved running the Respondent's digital rooms and community and the content of those rooms. Mr Jeffcock said that it was also a more junior role. I accepted Mr Jeffcock's evidence on this. He had intimate knowledge of the new company structure and the new roles in it.

47. It was not in dispute that the Claimant had asked for the Company's redundancy policy on a number of occasions during the consultation process.

48. On 16 April 2020 , Mr Jeffcock emailed the Claimant, telling him that the Company had been using the FSB (The Federation of Small Business) guidelines and had been 'checking in regularly'. Mr Jeffcock also extended the deadline for the Claimant to apply for the C-suite manager role by 1 hour, p220.

49. On 17 April 2020 Ms Adamus wrote to the Claimant, noting that he had not applied for the C-suite Manager role and asking whether he would be accepting the offer of Furlough, p223.

50. On 17 April 2020 at 12.32 Mr Jeffcock sent an email to the Claimant saying, p355, "I am sorry you decided not to apply for a role and we will miss you". He sent a handover document to the Claimant, saying it should not take more than a few hours to complete.

51. The Claimant cross examined Mr Jeffcock and suggested that Mr Jeffcock was keen for the Claimant to leave. Mr Jeffcock said, "I would have liked you to apply for a role... but you can't treat anyone differently. I can't be seen to favour people."

52. On 17 April 2020 at 14.09 Mr Jeffcock emailed the Claimant again, asking that the Claimant complete his handovers by 5.30pm that day because the Respondent needed to shut off his remote access as he would not be allowed to work during furlough, pp356-357. He also said, "I would like to look at what I can personally do or the company can do to help you. Any ideas even if you have them in a few weeks' time I am very open to. I am planning to bulk up our alumni offering and in addition, for example, if you wanted to draft a LinkedIn quotation I would be happy to look at this and other things".

53. The Claimant said that this showed that he would automatically have been made redundant - been made an alumnus - at the end of his furlough leave, so that there would not have been a genuine chance to review the redundancy at that point. The Claimant also said that Mr Jeffock's "we will miss you" email indicated that a decision had already been made to dismiss the Claimant.

54. On all the evidence, I considered that the Claimant misinterpreted many of the Respondent's actions during this time. Mr Jeffcock's emails on 17 April appeared to be attempts to be humane towards the Claimant. In the circumstances that the Claimant had not applied for any alternative roles, he was either going to be made redundant or would be on furlough, so he would not be present in the Company and would be "missed".

55. The Claimant emailed Mr Jeffcock and Ms Adamus on 17 April 2020 at 15.59 saying that he would not be taking furlough. He asked that he be sent documents regarding the appeal process. He said that he would be in the business until 17 June and would complete his handover by then, p249.

56. When the Claimant declined to be put on furlough on 17 April 2020, he was placed on gardening leave and locked out of all the Company's systems.

57. At the Tribunal, the Claimant pointed out that gardening leave had not been mentioned in any of the documentation, nor in meetings, including the final meeting with Mr Dembitz, pp 361 - 365. In fact, the Claimant had been told that, if employees did not accept furlough, they would be made to serve their notice.

58. The Claimant said that, again, this indicated that the Respondent wanted to "get rid" of him. He cross examined Mr Jeffcock about this.

59. Mr Jeffcock explained that, if the Claimant had opted for furlough, he would have needed to be excluded from the Company's electronic systems, to stop him from working. Accordingly, the Respondent had to prepare for an electronic shut-out. In addition, the Company had gone through a traumatic time with the redundancy exercises and digital change and it needed to bond the new team quickly. Mr Jeffcock said that he wanted the new team to have a clean start.

60. I found Mr Jeffock's evidence on this to be compelling and convincing. I was impressed by the conscientiousness with which the Company approached the furlough scheme and its duty to ensure that employees did not work while receiving furlough pay.

61. On 17 April, at 17.48, in response to the Claimant's confirmation that he would not take furlough, Mr Jeffcock gave the Claimant notice of dismissal "for redundancy", p252.

62. On 20 April, Mr Jeffcock wrote again saying, "As you have opted for redundancy and to appeal please find the attached letter..", p257. The attached letter invited the Claimant to an appeal meeting in the week beginning 20 April 2020 chaired by Kerry Ghise, p258.

63. The Claimant replied, saying that he had been told by Mr Dembitz that he would have 7 days to submit his appeal in writing. He said that he expected that the appeal hearing would take place after this. The Claimant was then given time to submit his written appeal. The appeal was not heard until 5 May 2020. Ms Kerry Ghise, who heard the appeal, dismissed it. She sent the Claimant a comprehensive explanation of her decision on 2 June 2020, pp431-451.

64. The Claimant contended that the Company's apparent eagerness to conclude the appeal process again showed that it wanted to be rid of him. Mr Jeffcock said, in evidence, "You wanted to appeal and Marta sought Kerry's availability – she would have given it as that week. It is as simple as that. Some people prefer an appeal to be heard quickly, some slowly".

65. The Company's own redundancy policy was provided to the Claimant on 21 April 2020, after the decision had been made to dismiss him.

66. It was not in dispute that, when the Network Directors were put at risk of redundancy, Stephen Moore, Chief Commercial Officer and the Network Directors' manager, cancelled all daily sales meetings. The Claimant said that this, too, indicated that a decision had already been made to make all the Network Directors redundant. The Claimant pointed out that Mr Jeffcock was questioned about the cancellation and said that one-to-one meetings had replaced the sales meetings, but the Claimant told the Tribunal that one-to-one meetings did not happen either.

67. Mr Moore told the Tribunal that he had been involved in another restructure at a previous employer. At the time of that restructure, lots of the at risk employees wanted to remove themselves from team meetings and wanted one-to -one meetings only. He therefore cancelled team meetings to be sensitive. Mr Moore said that he had had many one -to -one meetings with other Network Managers, but that the Claimant had not indicated that he needed them. Mr Moore was convincing in his evidence on this. He appeared genuinely sensitive to the feelings of those who reported to him.

68. The Claimant told the Tribunal that, in a "Firmwide" meeting on 6th April 2020, during the 'consultation period', Mr Jeffcock and Mr Moore demonstrated the capabilities of Zapnito, a digital online community platform, and stated that they were ready to commit to it. The Claimant said that this, too, showed that a decision to make the Claimant redundant had already been made. I considered, however, that it reflected the decision to move to a digital offering, rather than a decision to make particular individuals redundant.

69. It was not in dispute that Stephen Moore, Chief Commercial Officer, was never included in the redundancy pool with the Network Directors. The Claimant told the Tribunal that the majority of Mr Moore's responsibilities were exactly the same as the Network Directors. The Claimant said that, like the Claimant, Mr Moore's main duty was to bring in revenue by selling the company's products and services – and that Mr Moore had had a very public sales target of £100k in his first six months of employment, which he had not achieved.

70. The Claimant cross examined Mr Jeffcock about why Mr Moore had not been included in the pool with the Network Directors. Mr Jeffcock told the Tribunal that Mr Moore was the Network Directors' line manager and had other responsibilities. The Company was going through massive changes, flipping to a digital offering, as well as undergoing HR changes. Mr Jeffcock said that he needed senior managers in the business to implement these. He said that Mr Moore would have been in any third round of redundancies, if those had been necessary. His explanation was consistent

with the explanations given in the Respondent's contemporaneous written responses to the Claimant during consultation.

71. The Claimant also cross examined Mr Jeffcock about why the Claimant was not offered a trial period in the new roles. Mr Jeffcock said that trial periods were always expected with any new role and that this had been made explicit in the decision tree sent to the Claimant on 16 April, p210. He also said that there were changes the C - suite role as the Respondent went through the redundancy process. The Respondent had not, however, changed the Head of Partnership role because it had thought that that role would work as proposed.

72. It was not in dispute that one of the other "at risk" Network Managers, Sandy Markwick, applied for, and was appointed to, the role of C—Suite Manager. Another individual opted for furlough leave and was still on furlough leave until at least March 2021.

73. The Claimant told the Tribunal that he was not given answers to the questions he raised in the consultation process. He was asked which questions had not been answered. The Claimant said that the following matters were not addressed: Why was CCO not considered for redundancy; Why no business case was put in place before the redundancies without being shared; What was the evidence that the Pivot to digital was driven members' needs; Why were the Network Managers were being excluded from the change from face to face to digital and why decisions were being taken on his networks. Regarding the latter, the Claimant told the Tribunal that he did receive a response, saying this was a local network issue.

74. On the facts, the Claimant's other questions were answered by Ms Adamus in her email of 7 April. Ms Adamus had said that the Respondent's business case for the redundancies was outlined in "at risk" letter and the more detailed business case, dated 2 April 2020, included financial assumptions which could not be provided until the end of the financial year in April. Her response also said that Mr Moore had previously been Director of Sales and Marketing at The Law Society and that his role at the Respondent Company included Marketing, which was key to the success of the digital pivot. It also said that the redundancy proposal was not focused on individuals' past performance, but resulted from the Network Director role not being needed. She said that clients would take 6 months to adjust to the digital offering, but that organisations who adopted digital, automation and AI would be more resilient to economic stresses and would better adapt to the new normal, post covid-19, market.

Relevant Law

Unfair Dismissal

75. *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

76. *s98 Employment Rights Act 1996* provides that it is it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA,* " .. or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

77. Redundancy and "some other substantial reason" are both potentially fair reasons for dismissal.

78. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 6. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, *Orr v Vaughan* [1981] IRLR 63.

79. Redundancy is defined in *s139 Employment Rights Act 1996.* This provides, so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
…
(*b*) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind…

have ceased or diminished or are expected to cease or diminish."

80. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

81. *Williams v Compair Maxam Ltd* [1982] IRLR 83 sets out principles which guide Tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

82. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

83. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

84. In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

85. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296; *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70.

86. In all these matters, the employer must only act reasonably and there is a broad band of reasonable responses open to a reasonable employer.

Polkey

87. If an employer has dismissed an employee in a way which is unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v Dayton Services* [1987] 3 All ER 974.

Discussion and Decision

Reason for Dismissal - Redundancy

88. I considered whether the Respondent had shown that the reason, or principal reason, for the Claimant's dismissal was redundancy.

89. Looking at the totality of the evidence, I was satisfied that the reason for dismissal was redundancy, in particular, that the Respondent Company did not need Network Directors, who were a face to face sales force. I accepted that the unprecedented circumstances of the covid-19 pandemic accelerated the Respondent's plan to move to a digital, remote model for its client offering. I accepted that sales had fallen and were not anticipated to recover. I accepted that the Respondent decided that it could not afford, and did not need, the Network Director sales team. I accepted the Respondent's evidence that the new roles which were created, and the roles which were retained, were directing to achieving this "digital pivot".

90. I had little difficulty accepting the Respondent's evidence on this. It accorded with the widely reported experience of businesses in the covid-19 pandemic – that businesses needed to move very quickly to new ways of remote and digital working, in order to survive. It also accorded with the contemporaneous documents shared with the Claimant at the time of his dismissal.

Fairness of Dismissal

91. <u>The decision to make the Claimant redundant was pre-determined?</u>

92. I rejected the Claimant's contention that the decision to make him redundant was predetermined. This was clearly a meaningful consultation process. The Respondent adopted a furlough scheme, as an alternative to redundancy, during the process. The Respondent made an additional C-suite manager role available. It also adapted the C-suite manager job description, in response to consultation.

93. The Claimant chose not to apply for furlough, although it was offered to him as an alternative to being made redundant.

94. One of the other "at risk" Network Managers, Sandy Markwick, applied for, and was appointed to, the role of C—Suite Manager. Another individual opted for furlough leave and was on furlough leave until at least March 2021. All this showed that the Respondent was genuinely seeking alternatives to making Network Managers redundant.

95. I accepted Mr Jeffcock's evidence that he would have liked the Claimant to apply for a role, but that Mr Jeffcock could not be seen to be favouring individuals. I found Mr Jeffcock to be a reliable and dispassionate witness. His evidence reflected what was communicated to the Claimant during the consultation process.

96. The Claimant had interpreted various actions as indicating that the Respondent's decision to dismiss him was predetermined. As I have indicated in my findings of fact, I accepted Mr Jeffcock's explanations for these. On all the facts, I found that the Respondent was simply reacting to the circumstances at the time. There was no plan to "get rid of" the Claimant. For example, the decision to lock the Claimant out of the electronic system arose from the need to do so, in the event that the redundant employees accepted furlough. They would not be permitted to work for the Respondent during furlough. Furthermore, there was a need to embed and unite the new team after an unsettling period. In addition, the offer of a prompt appeal hearing was simply based on Ms Ghise's availability that week.

97. <u>The Respondent made a decision to make his role redundant without a business case. And the business case was only provided to the Claimant the day before the first consultation meeting without enough time to consider it.</u>

98. The Respondent acted within the broad band of reasonable responses in providing an explanation for the proposal to make redundancies in the Claimant's "at risk" letter.

99. The Respondent provided a very detailed business case on 2 April 2020. I considered that the Claimant had ample opportunity before 16 April 2020, when the consultation process ended, to provide comments and questions on this document.

100. I accepted that the Respondent acted reasonably in not producing the final business case until 2 April 2020, because the end-of -year financial figures could not be known until then.

101. I considered that both Ms Adamus and Mr Jeffcock gave lengthy and detailed responses to the Claimant's questions arising out the business case during the consultation period. This represented genuine and meaningful consultation.

102. <u>The Respondent lied about the reason for redundancies (initially suggesting the change in strategic direction was driven by client needs, and then suggesting it took place as a direct result of Covid-19)</u>

103. I did not accept that the Respondent had lied about the reason for redundancies. I accepted Mr Jeffcock's evidence that there was more than one reason for the

Respondent's decision to put the Network Directors at risk of redundancy. The Respondent needed, both, to save costs and to change its offering to clients.

104. The Claimant's "at risk" letter explained this at the time - "Revenues have all but dried up and there is no evidence that they are going to return … unless we significantly change our offering to members … the move to a digital offering is likely to mean a reduced need for face to face sales capability. The Network Directors are the highest paid team in Winmark and the cost saving … by making these roles redundant is significant."

105. Mr Stephen Moore should have been added to the selection pool for redundancies

106. I concluded that the Respondent genuinely applied its mind to the issue of whether Mr Moore should be included in the pool for redundancy. Ms Adamus told the Claimant on 7 April that Mr Moore had previously been Director of Sales and Marketing at The Law Society and that his role at the Respondent Company included Marketing, which was key to the success of the digital pivot. She also said that the redundancy proposal was not focused on individuals' past performance, but resulted from the Network Director role not being needed.

107. I considered that the Respondent's decision not to include Mr Moore in the selection pool was reasonable. Mr Moore was not a Network Director, but a more senior manager and his skills were needed by the Company. That was a rational reason for excluding him from consideration for redundancy.

108. The Respondent failed to conduct a fair, reasonable and meaningful consultation

109. The need for redundancies was explained to the Claimant in his at risk letter, and in the business case.

110. There was a first consultation meeting, on 3 April, when the Claimant raised questions and was given answers. Ms Adamus provided further written answers on 7 April 2020. The Claimant then had a detailed email exchange with Mr Jeffcock from 8 to 14 April, in which Mr Jeffcock responded to every issue raised by the Claimant.

111. Mr Jeffcock and the Company adopted some of the Claimant's suggestions, by agreeing to offer furlough to the Network managers and by adding another C-suite manager to the available alternative roles.

112. There was a second consultation meeting on 16 April. I found that the 16 April 2020 meeting constituted meaningful consultation. The Claimant was consulted on the remaining alternatives to redundancy, C-suite manager and furlough. No decision to dismiss had been made at that stage.

113. I found that the very many questions which the Claimant raised during the consultation were answered in painstaking detail by the Respondent. The examples which the Claimant gave, in evidence to the Tribunal, of questions he had asked, had in fact all been answered.

114. <u>The Respondent failed to provide the Claimant with Winmark's redundancy process and procedures document until after the Claimant was made redundant.</u>

115. I accepted the Respondent's evidence that its procedure was 10 years old and that it took guidance from the Federation of Small Businesses during this process. There is no legal requirement to implement a particular type of redundancy process, save that the fundamental requirements of a fair redundancy procedure must be adhered to - fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters. The Respondent complied with all of these.

116. I found, on the facts, that the Respondent told the Claimant of the procedure it would adopt, including the dates for applying for alternative roles, and the dates when consultation meetings would occur. The Claimant knew what steps would be taken during the process.

117. For example, on 31 March 2020 Ms Adamus sent the Claimant job descriptions for all 6 new roles identified in the first redundancy consultation. She set out the timetable for expressions of interest in the roles and interviews for them, p61. The Claimant was also provided with a decision tree on 16 April, p210.

118. I concluded that the Respondent did not act unreasonably or unfairly in not following an old policy.

119. Insofar as the Company did not offer pay protection, I considered that it was reasonable for the Respondent to offer alternative roles with designated, lower, pay bands. It would defeat one of the purposes of the redundancy exercise - saving money - if employees were retained on the same salaries as before. The Company's financial position at the time made saving money of prime importance.

120. <u>The Respondent used false information to reject the possibility of using furlough (by suggesting the Respondent was excluded from the scheme). The furlough option was then offered late, and it wouldn't have allowed the Claimant to stay in contact with the organisation, and he would then have been made redundant thereafter whenever the Respondent wished.</u>

121. I considered that the Respondent was entirely reasonable in initially thinking that furlough could not be offered to employees who were being made redundant because of a change in business strategy. Furlough was available to prevent redundancies caused by covid. There was a reasonable argument that the Network Directors' redundancies were caused by a company reorganization which would have happened in any event.

122. Nevertheless, the Respondent reasonably undertook more investigations and did offer furlough to the Network Directors. It was not unreasonable for the Respondent to make clear that the Claimant would be unable to work, or access the company systems, during furlough. It was a requirement of the scheme, at that time, that employees did no work for their employer during furlough. The Respondent acted reasonably by preventing furloughed employees from working, thus ensuring that it would not defraud the Revenue.

123. The Respondent did not say that the Claimant would be made redundant whenever it wished, following furlough. The Claimant was told in clear terms in the 16 April meeting that his redundancy would be reconsidered at the end of the furlough period and circumstances might have changed by then, "… once the furlough period is over the board will then revisit whether to put you into redundancy, have further consultations with you or given whatever the circumstances might be at that time to make a completely different approach." P213.

124. The Furlough Policy also said, "However, the situation will be reviewed at the end of the Furlough leave period to see if any viable alternatives to the redundancy proposal have arisen in the meantime which mean that we no longer have to make the role redundant." P161.

125. <u>During the consultation process internal sales meetings were cancelled by the sales leader (Stephen Moore) suggesting the redundancy decision was pre-determined.</u>

126. I concluded that the Claimant had misinterpreted Mr Moore's actions. I accepted that Mr Moore was trying to be sensitive towards employees who had been placed at risk of redundancy. He had learned, at a previous employer, that "at risk" employees did not want to attend group meetings during the consultation process, but preferred one to one support. I accepted Mr Moore's evidence that he did hold one- to- one meetings with the Network Managers who needed them.

127. <u>The Respondent failed to make any attempt to discuss alternative roles. Trial periods were not explained to the Claimant.</u>

128. I considered that the Respondent acted scrupulously fairly in not approaching the Claimant and discussing individual roles with him. I agreed with Mr Jeffcock that it would have been inappropriate for Mr Jeffcock to be seen to be favouring one employee over another.

129. The Claimant was able to raise any issue he wished in the consultation period and could have asked about trial periods.

130. The decision tree sent to the Claimant, p210, said that there would be a trial period for the C-suite role. If the Claimant was unclear about what a "trial period" meant, he was free to ask.

131. <u>The Respondent did not offer salary protection.</u>

132. As explained above, it was easily within the band of reasonable responses for the Respondent not to offer salary protection. In this case, the Respondent Company was attempting to ensure its survival in unprecedented circumstances. It would defeat one of the important purposes of the redundancy exercise - saving money - if employees were retained on the same salaries as before.

133. <u>The Claimant's role still exists as the role of C-suite manager has been created.</u>

134. On the facts, I found that the Network Managers' role was not the same as the C-suite manager role. On Mr Jeffcock's evidence, the C-suite manager role had no person management duties and C-suite managers ran no campaigns and had no targets. The C-suite role involved running the Respondent's digital rooms and community and the content of those rooms. It was also a more junior role.

135. Those were such significant differences that it was quite apparent that C-suite manager role was not the same as the Claimant's previous role.

136. The Respondent tried to push the Claimant into an appeal process without the chance to put his appeal in writing.

137. The Claimant was not required to attend an appeal hearing without putting his appeal in writing. An early appeal hearing was initially suggested to him, but was withdrawn when the Claimant objected. The Claimant was able to put his appeal in writing.

138. It was unfair to place the Claimant on garden leave during his notice period, rather than let him work his notice period as had been earlier suggested, thereby locking him out of work systems.

139. I have already decided that this did not indicate that the decision to dismiss was predetermined. Otherwise, the decision to put the Claimant on garden leave was not relevant to the fairness of the decision to dismiss, because it happened during his notice period.

140. In summary, I concluded that the Claimant was fairly dismissed for redundancy, following meaningful consultation and the Respondent having made reasonable efforts to offer alternatives to redundancy. The selection of pool was reasonable. The Claimant's claim fails.

Employment Judge Brown

Dated: …28 July 2021………

Sent to the parties on:

28/07/2021.

For the Tribunal Office