



EMPLOYMENT TRIBUNALS

Claimant: Ms Sarah Mitchell

Respondent: Greenyard Fresh Limited

Heard at: Nottingham **On:** 6 and 7 October 2021
14 October 2021 (in Chambers)

Before: Employment Judge Victoria Butler (sitting alone)

Appearances

For the Claimant: Ms Duane, Counsel

For the Respondent: Mr Bloom, Solicitor

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The decision of the Employment Judge is as follows:

1. The Claimant's claim of unfair dismissal is well founded and succeeds.
2. The Claimant's claim for holiday pay is dismissed on a withdrawal.

REASONS

Background

1. The Claimant issued her claim on 15 January 2021 following a period of early conciliation between 4 November 2020 and 25 November 2020. She was employed as a Sales and Sourcing Manager from 4 July 2011 until her dismissal by reason of redundancy with effect from 13 October 2020.

2. The Claimant originally presented claims for unfair dismissal, indirect sex discrimination, part-time worker discrimination, unpaid wages and unpaid holiday pay.
3. Prior to this hearing, she withdrew the discrimination and unpaid wages claims. She withdrew her claim for holiday pay at the hearing itself so the only complaint I was required to determine was that of unfair dismissal.
4. The Claimant says that her dismissal was unfair, more particularly the decision not to slot her into a role in the Respondent's new structure and the decision not to pool her with those employees who held the same, or a similar role, to her.

The issues

5. I was required to determine the following issues:
 - 5.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.
 - 5.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, in particular, whether:
 - 5.2.1 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
 - 5.2.2 The Respondent adequately warned and consulted the Claimant;
 - 5.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment; and
 - 5.2.4 Dismissal was within the range of reasonable responses.

The hearing

6. I heard evidence and submissions on 6 and 7 October 2021. There was insufficient time for me to deliberate and give judgment, so judgment was reserved.
7. Prior to the hearing the parties presented an agreed bundle of documents and witness statements.
8. References to page numbers in these Reasons are references to the page numbers in the agreed bundle

The evidence

9. I heard evidence from the Claimant and from the following for the Respondent:
 - Mr Jamie Rungay, Sales and Sourcing Director;
 - Mr Mark Spurdens, former Operations and Supply Chain Director; and

- Mr Giles Armstrong, Managing Director

10. I found the Claimant's evidence to be entirely honest, credible and consistent with her position during the redundancy exercise, which was recorded in contemporaneous documents.
11. I found the same largely for the Respondent's witnesses. My only concern was in respect of Mr Rungay's evidence regarding the slotting in process. His evidence on this point was vague and changed during cross examination, although I do not believe that he set out to mislead me. Rather, he struggled to recollect what he did at the time thereby leading me conclude that no formal process was in fact followed. My conclusion is supported by the lack of information provided to the Claimant during the consultation period, despite it being an otherwise well-documented process.

Findings of fact

12. The Respondent is a specialist supplier of UK and imported fruit sourced from growers around the world. It supplies fruit to a number of major retailers across the country such as ALDI, Marks and Spencer, Tesco, Asda, Morrisons as well as other non-retail customers who use fruit for fresh salads.
13. The Respondent's Sales and Sourcing area (where the Claimant's role was situated) is responsible for the buying and selling of its products. It categorises product areas by groups that sit within specific structures, each with their own reporting structures and profit and loss responsibilities. Employees' roles are typically customer or grower facing, albeit some have elements of both. The individual structures are Topfruit (i.e. apples and pears); Tropical; Avocados; Grapes; Stonefruit; and, Dried Fruit and Nuts.
14. More recently, the Respondent lost a number of contracts across its business as a result of major customers deciding to buy or engage directly with growers, or simply because of the Respondent's failure to secure various tenders. This had a severe impact on the Respondent's business resulting in an annualised turnover reduction in excess of £45 million against the previous financial year. This reduction was in addition to turnover losses over the preceding two-year period from a turnover of circa £170m down to £127.7m. In respect of Stonefruit, the turnover had reduced from approximately £37m in 2018/ 2019 financial year to less than £8m per annum
15. The Claimant was most latterly employed as a Sales and Sourcing Manager within Stonefruit. The Claimant had a job description, one element of which was to "*negotiate profitable seasonal and spot prices with customers and suppliers ensuring compliance processes are followed and volumes agreed are in line with the demand and forecast and the demand/sales forecasting team are engaged to ensure accuracy of the forecast*" (pages 46-48).
16. Previously, the Claimant had worked within a number of departments across the Respondent including Avocado, Tropical, Dried Fruit and Nut, Topfruit,

Grapes and Stonefruit. Accordingly, she had cross-functional knowledge and skills and was considered by the Respondent as a “*super user*”.

17. The Claimant had four direct reports which she managed on a day-to-day basis. Whilst she did not undertake negotiations with growers on a daily basis, she had previous experience of conducting them on behalf of the Respondent.
18. The Claimant sat in the Stonefruit structure within Stonefruit and Grapes and worked alongside Ed Sly (Sourcing Manager Lead); Martin Beeby (Buyer) and Rebecca Allen (Buyer). Ms Beata Duda held the same role as the Claimant within the Grape structure.
19. In mid-2020, against the backdrop of the aforementioned financial difficulties, the Respondent decided to restructure the Sales and Sourcing area of all products. It was decided to merge the Topfruit, Stonefruit and Grapes structures.
20. In the existing structures, there were a number of other Sourcing Managers, albeit it was only the Claimant and Ms Duda who shared the same job title. In the new structure, there were five Sourcing Manager roles. The role of Sales and Sourcing Manager held by the Claimant and Ms Duda did not exist.
21. The Respondent's Sales and Sourcing Director, Mr Jamie Rungay, lead the restructure. At the time of designing the new structure, Mr Rungay had been the Claimant's line manager for circa two months. In that time, he had not conducted an appraisal with her, or sat down to understand her day-to-day duties and capabilities.
22. Mr Rungay took the view was that where employees' roles did not change significantly, they would be slotted into roles in the new structure and would not be placed at risk of redundancy. He undertook the slotting in exercise himself based on his existing knowledge of the roles and without reference to job descriptions, discussions with respective line managers or the employees themselves. He did not consider putting those in the same or similar roles into a pool for selection.
23. Mr Rungay slotted Ms Duda into the role of Sourcing Manager (Grapes) based on his belief that she was carrying out that role in practice. He did not consider the Claimant for this role, despite sharing the same role as Ms Duda in the old structure, albeit in Stonefruit.
24. Out of eight employees who held similar Sourcing roles, seven were slotted into roles in the new structure. Mr Rungay took the view that there were no suitable alternative roles for the Claimant and, therefore, her role alone was at risk of redundancy and she was in a pool of one. He gave no consideration to whether the Claimant could slot into the roles of either Account Executive or Key Account Manager.

25. Once Mr Rungay completed the slotting in exercise, he presented the new structure to the Board which approved it. Thereafter, he drafted a consultation document with assistance from the Respondent's HR team. The briefing confirmed that the Claimant's role would cease to exist. The document stated that the proposals for implementation were as follows:

“where roles do not significantly change then colleagues may slot back into a role. However, if there is a reduction in the number of roles and colleagues required in the new proposed structure who perform the same or similar work required for the role then a process will be undertaken to fill the positions.

Any process used will be discussed before it is undertaken and shared with colleagues. Should there be new roles and we do not identify within those who are at risk to be able to fill the positions then the roles will be advertised internally and if not filled internally will then be advertised externally.

Where an opportunity is not identified for a colleague at risk all opportunities will be reviewed within the business for suitability up to the date of any potential redundancy” (page 66).

26. The document also explained that the new structure was a proposal and management would consider any comments or alternatives to the proposed structures that were received (page 68).
27. The Respondent determined that collective consultation was not required given that there were only eight affected employees, including the Claimant. The consultation document confirmed that consultation would take place over a period of ten days and would include two one-to-one meetings with affected employees.
28. On 18 August 2020, Mr Rungay announced the restructure in a Teams meeting because the majority of staff were working from home as a result of the covid-19 pandemic. Thereafter, the Respondent emailed a copy of the consultation document to the Claimant, along with a Q&A document (page 69).
29. The Q&A document confirmed that if a suitable alternative position was available, then employees at risk would *“not need to go through the recruitment and selection process”* (page 76).
30. On receipt of this email, the Claimant emailed HR and requested job descriptions for the positions of Account Executive and Sourcing Managers in the new structure so she could review them ahead of her one-to-one meeting. These were sent to her the same day (page 70).
31. The Claimant was invited to attend her first one-to-one consultation meeting on 20 August 2020, chaired by Mr Rungay (page 79). The Claimant queried why her role had not been slotted into the new structure and explained that her current skill level fit the criteria for roles in it. Mr Rungay advised the Claimant that he was not there to debate the reasons for decisions already taken, rather

the meeting was an opportunity to ask questions. Mr Rungay was not prepared to allow the Claimant to challenge the slotting in process, despite the associated documentation confirming that it was a 'proposed' structure subject to consultation.

32. The Claimant questioned why she had not been considered for the Account Executive role, explaining that she undertook all the operational tasks required and seven out of the ten key objectives. Mr Rungay answered quite evasively saying that her role was ceasing and simply that other people had been slotted into roles which reflect what they were currently doing. He provided no further detail other than that. Mr Rungay also explained that the Claimant would be able to apply or express an interest in any other roles at the close of the consultation period.
33. Thereafter, the Claimant raised a number of queries which Mr Rungay and Ms Hayman (HR) committed to respond to after the meeting. More particularly, the Claimant believed there were equivalent roles in the new structure and wanted to understand why she had not been considered for them. She felt that the process was unfair and prejudged. She also queried why her role was not being pooled with others and expressed her view that the process was unfair and "*not an open consultation especially with these slot in roles which has no selection process instead of a pool and makes it look pre-judged with tight regimented time scales*" (pages 81-86)
34. On 24 August 2020, Ms Hayman e-mailed the Claimant attempting to answer some of her questions. In response to the Claimant's assertion that the process had been unfair and pre-judged on role consideration the response was:

"the reason why your role is currently at risk of redundancy under the proposed structure is due to the reduction in Stonefruit business, I can confirm that there is no pre judgement as we are currently in the consultation process which gives everyone a fair and consistent opportunity to put forward any comments or feedback. Counter proposals can also be put forward which take into account the current challenges being faced, which could potentially result in the outcome changing, therefore the proposal has not been pre-judged in any way".
35. This was in direct contrast to Mr Rungay's position in the one-to-one meeting that the slotting in process was '*not up for debate*'.
36. The Claimant was also advised within the e-mail that the following roles were available within the proposal – Buyer (Tropical, Avocado and DFN), Sourcing Manager (Stonefruit and Cross Functional), Account Executive (Topfruit, Stonefruit and Grapes) and Key Account Manager (Topfruit, Stonefruit and Grapes). Ms Hayman asked the Claimant to let her know if she was interested in any.
37. The Claimant was invited to her second one-to-one meeting on 25 August 2018, chaired by Mr Rungay. The Claimant queried again if she had been considered for any of the slotting in roles and if not, why not, because she had not been

given a clear explanation from Mr Rungay at their previous meeting. She questioned whether it was down to job descriptions and titles and what the criteria was for being slotted across.

38. Again, Mr Rungay failed to provide any detail other than explaining that an employee was slotted into a role in the current structure if they were effectively doing the role anyway. He was not able to explain any criteria used to underpin the exercise because none were used. (pages 118-123 and 241-278)
39. Following the meeting, Ms Hayman contacted the Claimant again with responses to the further queries that she and Mr Rungay were unable to be answer during the meeting itself. Ms Hayman confirmed that there were no alternative comparable roles available for her in the new structure but that she could “*express an interest*” in available roles if she wanted to. Whether a job is suitable depends on “*how similar the work is to the employee’s current role; the terms of the role being offered; the employee’s skills, abilities and circumstances in relation to the role; and the pay (including benefits), status, hours and location*”.
40. Ms Hayman also explained that employees were slotted into roles “*when the individual is already deemed to be carrying out the role*” but, yet again, no detail was provided about how the slotting in was determined (page 125).
41. Accordingly, the Claimant asked Ms Hayman a further time to confirm the criteria for the slotting in process, querying if it was simply a change of title rather than new roles and whether any other other criteria had been used. She also requested a copy of the job description for the Key Account Manager and confirmed that she already had those for Account Executive and Sourcing Manager. The Claimant also asked: “*to enable me to consider these roles fully could you please give me some indication on salary expectations for these three roles along with the shift pattern/ working hours as I’m currently part time I need to understand the expectations of these three roles and is this also another factor of no slot in being offered*” (page 127).
42. Ms Hayman replied later that day attaching the job description for Key Account Manager and explaining that:

“in terms of the slotting process, this occurs when an individual is already deemed to be carrying out that role. Therefore, in the instances contained within the proposal e.g. the proposed Sales Controller role is a slot in role for a Department Head as this is in essence the same role with a change of job title. They are not new roles, rather a proposed change of job title. When new roles are proposed to be added to the structure, these are mentioned as 1x role will be added to the structure ...

As mentioned previously this is the opportunity to provide feedback or any counter proposals to the proposed structure and also to register any interest in the roles that are available within the proposed structure. Within the proposal the proposed structure does not define if the roles

are full time/ part time and therefore this is something that can be considered or discussed further at the point of any process to select an individual for the role... (page 129).

43. The Claimant responded the following day on 28 August 2020. She said:

"I have a few questions which whilst I appreciate you have answered some of these the responses are still unclear, you mentioned that there are no suitable alternative roles can you confirm has this been explored by the business and the criteria in which this has been completed. You are stating the below for the two roles which I'm most interested "within the proposal the proposed structure does not define if the roles are full time/ part time and therefore this can be considered or discussed further at the point of any process is to select an individual for the role".

I've already raised within my first one to one the fact that I'm already covering on a daily basis 100% of the operational tasks set out within the Account Executive JD along with 7/10 of the key objectives therefore I'm still unclear on why the business isn't considering this as a suitable alternative role whilst I appreciate I currently work within Stonefruit and have done since September I can and have worked cross functionally within the business and during my nine years have demonstrated my skill set and the attributes in my relationship with customers.

We keep referencing the fact I work within Stonefruit, which whilst I agree this is my current assigned product area my contract refers to a posting within Greenyard not a specific product area implying my role is cross functional and again why I believe I should have been put into a pool and scored against the criteria for roles within the proposal and for this reason feel I'm being discriminated against and treated unfairly as Greenyard have not demonstrated to me in any way that they have considered or explored any possibilities for redeployment.

I'm still very unclear on the rationale and the criteria for the slotting process, from the detail below this implies this is purely on job description and now with the criteria has been taken in consideration i.e. daily task, job analysis, skill set and whether the individual is the best person suited for the role. Could you please confirm the actual criteria that has been used as some people have been considered for slot in whilst I haven't and again I don't understand the businesses rationale in this decision and want to be clear on the criteria used as I feel this has been done unfairly.

As mentioned at the start of the process I don't feel the 10 days has been sufficient time for such a complex proposal we're not just looking at a couple of roles, we're looking at whole departmental structure and by slotting people in roles with no apparent criteria there is nothing to indicate that the business has considered who is best suited to the role and therefore in order for the structure to succeed in my opinion a criteria really should have been used for this process rather than simply because the person does the job and it's a change of title with no pooling process.

I'd like to formally express my interest in the Key Account Manager and Account Executive role within the proposal" (page 138).

44. Ms Hayman replied later that day confirming that there were no suitable alternative roles for the Claimant to slot into within the proposed structure. She explained:

"to slot into a suitable alternative role, this is based on a number of factors such as how similar the work is to the employees current role; The terms of the role being offered; The employees skills, abilities and circumstances in relation to the role; And the pay (including benefits), status hours and location.

Our current role of Sales and Sourcing manager within Stonefruit is proposed to cease under the proposed structure, and where individuals have slotted into roles this is because they are already carrying out that role, however the job title is not reflective of what they are currently carrying out. It would not be possible to slot into the role of Account Executive as this role is a lower salary than what you are on currently, is a lower role in terms of the responsibility associated with the position, and within your current role interaction is focused around other management and logistics, there is currently no exposure to negotiation or interaction with buyers/ customers day to day, which is a requirement of the proposed Account Executive position, therefore the skill set between both roles also differs.

The reason your role of Sales and Sourcing manager is proposed to cease is due to the reduction in business and turnover within the area of Stonefruit and within the consultation. Everyone has been provided, as mentioned in previous emails and meetings, with the opportunity to put forward any feedback or counter proposals to the structure. Where available roles have been identified within the structure, you do have the right to express an interest in these roles. I can confirm we will keep a note on file that you have expressed an interest in the key account manager and account executive role within the proposal..." (page 137).

45. In the meantime, the Claimant's colleague, Ms Rebecca Allen, attended her one-to-one consultation with Mr Rungay. She told Mr Rungay that there had always been plans for her to have a job share with Mr Sly (Sourcing Manager in the new structure) because he was proposing to reduce his hours. It was agreed that Ms Allen would have a chat with her manager and submit a formal proposal in respect of a job share, which she did on 28 October August 2020 (pages 338-339).

46. In her second consultation meeting, Ms Allen suggested that Mr Sly could train her on tenders and the financial side of the role, and the Respondent was enthusiastic about her proposal. The reality was that this role was earmarked for Ms Allen, despite her not having the requisite experience and her requirement for training. The proposed job-share was not discussed with the Claimant in her individual consultation meetings.

47. On 3 September 2020, the Respondent e-mailed all employees affected by the restructure to confirm the outcome of the consultation, namely that there were no changes to the proposed structure. However, the Respondent confirmed that the Sourcing Manager (Stonefruit) position held by Mr Sly would become a job share and, therefore, a part time position was available (pages 143-144).
48. On 7 September 2020, the Claimant appealed the outcome of the consultation saying:

“Throughout the process I have requested clarification on the criteria of the “slot in roles” or whether the business has explored the possibility of suitable alternative employment.

I have received no substantial evidence of the criteria for the slot in roles other than that they are “deemed” to already do that role, I was informed it was not debatable that this was a business decision to complete the relevant slot in and that no slot in was comparable to my role. At no point has any criteria been discussed or provided to understand why colleagues with the same job description/ title as myself have been given roles and I haven't. In order for this to be a fair process why wasn't a criteria set prior to the consultation and those effected/impacted be pooled together for available roles.

I have received no substantial evidence to show that the business has at any point tried to avoid my redundancy, at every opportunity I have asked for alternative comparable roles and even explaining within my 2nd 121 on the 25th August the definition of a suitable comparable role to which the immediate response was “there isn't any” this doesn't display evidence that this option has been explored and indicated that the outcome had already been pre judged...

I have shown interest in two available roles within the new structure and was informed by HR that due to my lack of interaction with buyers/ customers day to day that my skills were not suitable for either of these roles and simply a note would be added to my file, however if the business had completed the annual appraisal along with the job skills analysis prior to the consultation they would in fact be aware of my ability to deal with customers at all levels, on a regular basis along with multi cross functional ability that I have demonstrated strongly during employment and the tasks which I'm currently completing.

This whole consultation has been pre-judged and unfair by slotting selected individuals into role that “someone” deems is suitable with no apparent criteria other than that they currently eligible do the role. The business has not considered whether I would be better suited to the role.

At no time has the business meaningfully considered my redeployment I'm repeatedly stated that I'm at risk due to my work within Stonefruit. However, having worked for the business in excess of 9 years and only recently joining Stonefruit via a previous consultation last year my wider knowledge and experience has not been taken into consideration at any time and as I have pointed out my contract is generic within Greenyard

and not Stonefruit specific. Therefore, I'm being treated unfairly due to my appointment within Stonefruit where instead I should have been put into a pool for selection criteria with other colleagues of the same job description or similar roles... (pages 152-153).

49. The Claimant was invited to attend an appeal hearing on 10 September 2020, chaired by Mr Mark Spurdens, Operations and Supply Chain Director. The Claimant raised her points of appeal and in respect of other employees being slotted into roles Mr Spurdens explained:

“some of the roles that have been deemed as slotting ... are people that have slotted into the role they are actually doing at the moment almost at that time the music stops and we enter the consultation process is so substantially close to that role, not to slot them in wouldn't be an option”.

50. He mirrored Mr Rungay's position that there was no opportunity to challenge the slotting in process. After listening to the Claimant, Mr Spurdens adjourned for fifteen minutes and within that time concluded that he was not upholding her appeal. He took no active steps to investigate the Claimant's concerns and confirmed his outcome in writing the same day (page 160-161).

51. On 11 September 2020, the Respondent sent out a vacancy list which included the Sourcing Manager job-share, Key Account Manager, Account Executive and Sourcing Manager (Stonefruit and Cross Functional). Save the job-share, these were all advertised on a full-time basis. The Claimant did not apply for the job-share role having understood from Ms Allen that it was earmarked for her and did not apply for any other roles because they were advertised on a full-time basis and there was no indication that they could be considered on a part-time basis. Further, the Claimant had already been told that she did not have the required skillset for the Account Executive role.

52. On 21 September 2020, Ms Heyman e-mailed the Claimant to say she had noticed that she had not applied for the roles of Account Executive and Key Account Manager roles. She did not make reference to the Sourcing Manager job-share position.

53. The Claimant replied and referred Ms Hayman to her earlier email dated 28 August explaining that the Account Executive role was not appropriate for her to be slotted into. The Claimant said: *“this led me to understand the business didn't deem my skill set to be relevant or suitable for either position”*. The Claimant continued to explain that the vacant roles were advertised on a full-time basis and it had been confirmed to her in her appeal hearing that they were full-time positions with substantially different hours and salary.

54. Ms Hayman replying the following day stating that her comments in relation to the Account Executive role were in respect of it being considered a suitable alternative position to slot into. However, this did not preclude the Claimant from applying for the role. She did not expressly address the Claimant's point that the roles were full-time (pages 171-172).

55. On 29 September 2020, the Claimant was formerly served with notice to terminate her employment with effect from 13 October 2020 (page 182).
56. The Respondent offers its employees two opportunities to appeal and the Claimant attended a second appeal hearing on 8 October 2020 chaired by Mr Giles Armstrong, Managing Director. Mr. Armstrong ensured he understood the Claimant's grounds of appeal and adjourned the meeting to conduct his investigations. He spoke to Mr Rungay to understand why the Claimant had not been slotted into the role of Account Executive, although did not evidence this in writing.
57. At the reconvened hearing, Mr Armstrong went through the Account Executive criteria one by one which the Claimant appreciated because she had asked for it repeatedly. Mr Armstrong also explained that it was a full-time position because there was no cover available "*unless somebody can convince me it could be managed in a different way*".
58. Mr Armstrong also explained the difference between a 'slot in' role and suitable alternative employment, but encouraged the Claimant to apply for the Account Executive role explaining any gaps in her skill set could be filled by training and any flexibility in working hours could be discussed. This was the first time this had been actively discussed with her. She responded by saying that she would consider applying but at that point, her trust and confidence in the Respondent was just not there (pages 193-199 and 293-332).
59. Ultimately, the Claimant chose not to apply for the role and her employment terminated on 13 October 2020.
60. Ms Allen attended her interview for the Sourcing Manager job share on 29 September 2020 and was formally offered the role on 2 October 2020.

The Law

61. Section s.98 ("ERA") provides.

- "(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.*
- (2) A reason falls within this subsection if it—*
-*
- (c) is that the employee was redundant*
-*

- (4) *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."*

62. Section 139 ERA provides:

- "(1) 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".

63. In **Williams v Compair Maxam Ltd [1982] ICR 156**, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. Reasonable employers might be expected to consider:

- Objective and fairly applied selection criteria;
- Early warning and consultation about the redundancy;
- If there is a union, consultation with that union; and
- Consideration of alternative employment

64. In **Polkey v AE Dayton Services Limited [1987] IRLR 503** it was held that an employer will normally act reasonably if it warns and consults employees; adopts a fair basis on which it selects them for redundancy; and, gives consideration to suitable alternative employment. Failure to follow a fair procedure will likely render a dismissal unfair unless the employer could reasonably conclude that doing so would be futile.

65. When considering the question of reasonableness, the Tribunal must not impose its own standards and decide whether they would have acted

differently. Rather, the test to be applied when considering the fairness or otherwise of the decision to dismiss is whether the dismissal fell within the range of conduct which a reasonable employer could have adopted ("*the range or band of reasonable responses test*") - **British Leyland (UK) Ltd v Swift 1981 IRLR 91, CA; Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT; Foley v Post Office HSBC Bank plc (formerly Midland Bank plc) 2000 ICR 1283, CA.**

Conclusions

Has the Respondent established that the reason, or principal reason, for the Claimant's dismissal was for the potentially fair reason of redundancy?

66. I am entirely satisfied that the reason for the Claimant's dismissal was for the potentially fair reason of redundancy. The Respondent has explained the financial backdrop to the restructure and the Claimant accepts the difficulties it faced.

67. Given the financial losses experienced by the Respondent, it had a diminished requirement for employees to do work of a particular kind in accordance with s.139(1)(b)(i) and, therefore, I am satisfied that a genuine redundancy situation had arisen. The Respondent was entitled to embark upon a restructure in order to reduce costs and it is not my role to interfere with that decision.

68. Indeed, the Claimant does not challenge the rationale for the restructure. Nor does she challenge that the reason for her dismissal was by reason of redundancy. Rather, her complaint is about the procedure followed in selecting her for redundancy.

Did the Respondent adopt a reasonable selection decision, including its approach to a selection pool?

69. In considering the reasonableness of the pool for selection, I considered the following factors:

- whether other groups of employees were doing similar work to the group from which selections were made;
- whether employees' jobs are interchangeable; and
- whether the employee's inclusion in the unit was consistent with his or her previous position.

70. Mr Rungay was responsible in the main for leading the restructure. He designed the new structure and decided who would be slotted into the roles. In undertaking this process, it is abundantly clear that he failed to apply his mind to pooling the affected employees. There was no documentary evidence to this effect in the bundle, nor did he say he considered it in his witness evidence.

71. Mr Rungay simply mapped across employees who, in his view, were already carrying out the roles without any further examination. Whilst there may have been specialties within each role, no consideration was given to the degree of

their interchangeability, similarity or, in the Claimant's case, roles/duties she had undertaken in the past. Mr Rungay had been the Claimant's line manager for only two months and at no stage sat down with her to discuss her skill set either via an appraisal process or otherwise to fully understand her capabilities.

72. Ms Duda, who shared the same job title and job description as the Claimant, albeit working in Grapes, was automatically slotted into the Sourcing Manager role in the new structure without question. The Claimant was not even considered for it, despite sharing the same role. Notably, during the hearing Mr Rungay was unable to explain what skills the Claimant lacked compared to Ms Duda rendering her unsuitable for the role.

73. Mr Rungay's evidence under cross examination about the process he followed when undertaking the slotting in process was vague at best and this was simply because no objective process was undertaken, or certainly not one that he could articulate at this hearing.

74. In re-examination, Mr Bloom asked Mr Rungay what the outcome of a competitive exercise between the Claimant and Ms Duda would have been if one had taken place. Mr Rungay naturally said Ms Duda. However, absent any evidence of an objective appraisal of their respective roles, I cannot accept this to be the case.

75. Given that the Respondent failed to consider whether the Sourcing roles were interchangeable; failed to consider the Claimant's skillset in the round (including her previous experience); failed to apply any objective criteria to the slotting in process; and, failed to consider pooling the Claimant with others in Sourcing roles, I am satisfied that the Respondent failed to adopt a reasonable approach to selection, including its approach to the selection pool.

Did the Respondent adequately warn and consult the Claimant?

76. The Claimant was adequately warned about her potential redundancy following a group briefing at which the proposals were set out verbally and then followed up in writing with a Q&A document in support.

77. The Claimant was invited to two individual consultation meetings, but the Respondent treated the consultation itself as a process to be followed as opposed to a genuine and meaningful consultation with her. The Claimant raised valid challenges to the proposal and how it was being implemented. However, she was told by Mr Rungay that the slotting in exercise was "*not to up for debate*" and that the consultation was really an opportunity to ask questions. This stance was reinforced by Mr Spurdens when he said in respect of the slotting in process that '*almost at that time the music stops*'.

78. The Claimant challenged the lack of pooling and the fact that she had not been slotted into a role from the outset. However, the Respondent was unable and/or unwilling to provide her with any meaningful explanation of how those decisions had been arrived at. In respect of the slotting in, on one occasion she was told that job descriptions were considered and on another that it was a skills-based

exercise. On the facts, I conclude that the Respondent was unable to provide any adequate information because no objective assessment was ever undertaken.

79. Consultation should be entered into with an open mind and be capable of influence about the matters which form the subject matter of that consultation. However, the Claimant's challenges were dismissed without consideration. Accordingly, I am satisfied that the Respondent failed to consult with the Claimant in any meaningful way and the consultation was, therefore, wholly inadequate.

Did the Respondent take reasonable steps to find the Claimant suitable alternative employment?

80. Throughout the consultation process, the Respondent differentiated between roles that were considered appropriate for slotting in and those that were considered suitable alternative employment that 'at risk' employees could apply for at the close of the consultation. The consultation documents state that employees would not need to go through the recruitment and selection process for the suitable alternative roles.

81. The Claimant expressed an early interest in the Account Executive and Key Account Manager roles. However, Ms Hayman told her on 28 August 2020 that the role of Account Executive was not suitable alternative employment for her – this was a decision made unilaterally by the Respondent despite the Claimant asserting that she undertook all of the operational tasks required and seven out of the ten key objectives. Ms Hayman merely said that she would keep a note on file that she had expressed an interest and was silent on the Key Account Manager role. The Claimant understandably took that silence to mean that both roles were not considered suitable alternative employment for her.

82. The Respondent failed to offer the Claimant a trial period in either role despite her cross-functional experience and its own description of her as a 'super user'. It seems that the Claimant was blocked in every attempt to secure a new role in the new structure. Notably, the Respondent was enthusiastic about offering training to Ms Allen, but no such offer was forthcoming for the Claimant.

83. The Claimant's ability to secure a role in the new structure was further compounded by the fact that she was a part-time worker. After the close of the consultation, the Account Executive and Key Account Manager roles were advertised on a full-time basis. There was nothing within the vacancy list to indicate that they could be considered on a part-time basis, in contrast to the job share Sourcing Manager role which was explicitly advertised on a part-time basis.

84. The Claimant cannot be criticised for taking the view that these were full-time roles, particularly given that at no point was she advised to the contrary. Even at the second appeal stage, Mr Armstrong explained that the Account Executive role was full-time because there would be no cover available. Whilst he encouraged her to apply for it a few days before she was due to leave and said

that the hours of work could be discussed, he could not give any commitment that she could undertake it on a part-time basis. The Claimant said by that point she had lost all trust and confidence in the Respondent and I am satisfied that was a reasonable view to take.

85. The Claimant did not apply for the job-share but again, this was not unreasonable given that it was clearly earmarked for Ms Allen. It was the key focus of Ms Allen's consultation meetings and the Respondent had also offered to train her in areas where her skillset was lacking. No such discussions were held with the Claimant either before or after the close of the consultation period.
86. In light of the above, I am satisfied that the Respondent failed to take reasonable steps to find the Claimant suitable alternative employment.

Was the Claimant's dismissal within the range of reasonable responses?

87. In light of my findings above, I am satisfied that the Respondent failed to follow a fair procedure in dismissing the Claimant by reason of redundancy. It failed to consider pooling her with other Sourcing Managers, despite her undertaking a similar role (and, in the case of Ms Duda the same role albeit in a different section), her interchangeable skills and previous experience within the Respondent.
88. Consultation with the Claimant was wholly inadequate. She was told that the slotting in process was '*not up for debate*' despite her protestations that it was unfair. The Respondent failed to provide the Claimant with a clear rationale as to why she was not pooled and gave her vague and differing answers about how the slotting in had been undertaken.
89. The Respondent also failed to take reasonable steps to find the Claimant suitable alternative employment. She expressed an interest in two roles in the new structure, but the Respondent unilaterally took the view that neither amounted to suitable alternative employment. It failed to offer her a trial period in either, or training in areas that it considered she lacked experience. In fact, it took no active steps to her assist in securing another role at all.
90. The Claimant had the opportunity to apply for the job-share role, but she reasonably took the view that it earmarked Ms Allen, as evidenced in Ms Allen's consultation meeting notes, and did not apply for it. The only other available roles were full-time and there was no indication that they could be done on a part-time basis or that any flexibility at all could be offered.
91. Given the above, I am satisfied that the Claimant's dismissal fell outside the range of reasonable responses and her claim of unfair dismissal succeeds.
92. The amount of compensation payable to the Claimant will be determined at a remedy hearing to be notified to the parties under separate cover.

Employment Judge Victoria Butler

Date: 14 December 2021

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