



EMPLOYMENT TRIBUNALS

Claimant: Ms L Robson

Respondent: IBM UK Limited

Heard at: Croydon **On:** 18 and 19 January 2018

Before: Employment Judge K Bryant

Representation:

Claimant: Mr S Robson (Solicitor)

Respondents: Mr N de Silva (Counsel)

RESERVED JUDGMENT

The Claimant was not unfairly dismissed. Her claim therefore fails and is dismissed.

REASONS

Claims and issues

1. As confirmed at the start of the hearing, the Claimant's sole claim in this case is for unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 ('ERA').
2. The potentially fair reason for dismissal relied on by the Respondent is redundancy or, in the alternative, business reorganisation which the Respondent says was some other substantial reason of a kind such as to justify dismissal within the meaning of section 98(1)(b) of the ERA.
3. As set out in her ET1, and refined during the course of the hearing, the Claimant says as follows:
 - 3.1 There was no genuine redundancy situation in that the requirements of the Respondent's business for employees to carry out work of a particular kind had not diminished and were not expected to do so;
 - 3.2 An appropriate pool for selection was not chosen by the Respondent;
 - 3.3 The selection of the Claimant for redundancy was not fair.

Evidence and findings of fact

4. At the start of the hearing the tribunal was provided with an agreed bundle of documents in two volumes, an agreed cast list, chronology and list of abbreviations and a skeleton argument from the Respondent.
5. During the course of the hearing an issue arose concerning the extent of the Respondent's disclosure of the scores and ranking of employees in the selection pool in accordance with the three selection criteria discussed further below. The scores of the bottom 200 or so, which included the Claimant, had already been disclosed. The Claimant wanted to see the scores and ranking of the entire pool of over 3000. The issue was resolved by the Respondent giving voluntary disclosure of a spreadsheet, anonymised save in respect of the Claimant, which showed the scores and ranking for all employees in the selection pool. A copy of the spreadsheet was also provided to the tribunal.
6. The Respondent called evidence from the following witnesses, each of whom gave evidence by reference to a written witness statement:
 - 6.1 Susan Thomas, HR Leader;
 - 6.2 Martin Ulyatt, Executive Partner, and at the time of the Claimant's dismissal her line manager;
 - 6.3 Paul Bushfield, Partner, who heard the Claimant's appeal against dismissal.

7. The Claimant gave evidence on her own behalf, again by reference to a written witness statement. She did not call any other witnesses.
8. In light of all the evidence heard and read by the tribunal, it has made the following findings of fact:
 - 8.1 The Claimant was employed by the Respondent as a Project Manager from 5 July 2011 until the effective date of her dismissal on 3 January 2017.
 - 8.2 She was employed in the Respondent's Global Business Services business unit ('GBS'). Within GBS there were a number of different types of role, including various types of Project Manager.
 - 8.3 The Claimant's role involved working on projects which could last a short period but could last for over a year. A project could be for an external client or for another part of the Respondent's business.
 - 8.4 Mr Ulliyatt was the Claimant's line manager from March 2014 and was responsible for such matters as booking annual leave, sick absence, authorising training and providing input for career development. When working on a project the Claimant would be managed on a day to day basis by others on the particular project.
 - 8.5 Employees within GBS are expected to be proactive in seeking a new project to move to when their current project is finished. On occasions an employee will have a period of time between projects when they are 'on the bench' but they are encouraged to keep this to a minimum as such periods do not generate revenue for the Respondent.
 - 8.6 One of the measures of performance used by the Respondent is called utilisation. There are a number of types of utilisation. Productive utilisation is all time spent in useful activities, and includes such things as training, working on bids for new work and working on internal projects. Chargeable utilisation is work for which a fee can be charged to an external client either by the individual employee's unit or another unit. Billable utilisation is work for which a fee can be charged to an external client by the individual's unit. Billable and chargeable utilisation will often be the same, but chargeable may be higher in some circumstances.
 - 8.7 Employees within GBS are subject to an annual performance appraisal. The best rating is 1 and the worst is 4 which indicates unsatisfactory performance. An employee's rating is affected by their level of chargeable and billable utilisation.
 - 8.8 At the time Mr Ulliyatt took over the Claimant's line management she had recently been given a performance rating by a previous manager of 3 for the year 2013. This rating indicated a need to improve and meant that she had to undergo a Performance Improvement Plan ('PIP').
 - 8.9 Issues identified in the 2013 appraisal included that the Claimant needed to improve her reputation as a leader appropriate to her level of seniority and also to be more flexible with assignment opportunities. Although the Claimant completed the PIP on this occasion, these issues continued to be a cause of some concern to

Mr Ulliyatt, in part because they made it more difficult for the Claimant to be assigned to new projects which increased the risk that she could be 'on the bench' for periods of time.

- 8.10 The Claimant was given a performance rating of 2 for 2014, ie a solid performance.
- 8.11 The tribunal heard much evidence, not much of which was ultimately in dispute, as to the work done by the Claimant during 2015. The Respondent does not dispute that the Claimant was doing productive work during 2015. However, the Respondent says that the Claimant's billable utilisation, which reflects revenue being generated for her part of the business from external clients, was at 5.7% which was considered to be low.
- 8.12 For 2015 the Claimant's performance rating was again 3, indicating a need to improve. Even taking into account the internal project that she had worked on for much of that year, which would not generate billable utilisation, this figure was considered low and is what in large part led to her performance rating for that year.
- 8.13 She contemplated appealing against the 2015 rating but ultimately did not pursue any appeal. As a result of the 2015 rating she was again put on a PIP which started in February 2016 and which she completed in April 2016.
- 8.14 The tribunal heard much evidence about 'strategic growth areas' and whether the Claimant had ever worked in such an area. The tribunal finds that the five growth areas at the material time were Cloud, Analytics, Mobile, Social and Security and that the Claimant had never worked on a project in any of those areas. The tribunal should add, however, that there has never been any dispute that the Claimant had the capability to work on a project in a growth area; the dispute, as discussed further below, is as to how long it would take the Claimant to be able to perform successfully in such an area.
- 8.15 The Respondent decided that GBS was not sufficiently profitable and that, as a result, its headcount should be reduced. It did not identify particular roles within GBS in respect of which headcount should be reduced. Rather, it decided to reduce GBS headcount and that the pool of those at risk of redundancy would include all GBS staff.
- 8.16 A collective consultation process involving an employee consultation committee ('ECC') commenced on 20 July 2016. The ECC included representatives from management and HR and also 10 elected employee representatives.
- 8.17 All GBS staff should have been informed about the collective consultation process and the Respondent's reason for deciding to reduce headcount by email dated 12 July 2016. As a result of an administrative error the Claimant, along with a small number of other employees, was missed off the circulation list but the mistake was spotted and the Claimant was notified via Mr Ulliyatt on or shortly after 29 July 2016.
- 8.18 GBS employees were also asked at the start of the consultation process whether they wished to take voluntary severance. The voluntary severance scheme ran at the same time as the collective consultation process. Of the initial 3,368 employees in the pool, 53

- ultimately volunteered which reduced the number of anticipated compulsory redundancies from 191 to 138.
- 8.19 The ECC first met on 20 July 2016 and then on 8 further occasions, the final meeting taking place on 14 September 2016. Employees were able to raise issues with the ECC via their elected representatives.
- 8.20 The approach to be adopted for selecting those to be made compulsorily redundant, including the selection pool, selection criteria and weighting, was agreed by the ECC. The agreed selection criteria and weighting were as follows:
- 8.20.1 Performance, which was scored out of 30, the score for each employee being the result of a formula applied to performance ratings for the previous three years.
- 8.20.2 Market value, which was scored out of 20, the score being based on an entirely objective comparison between the employee's rate of pay and that of employees in similar roles with other employers.
- 8.20.3 Criticality to the business, which was scored out of 50, which was intended to reflect how critical an employee was to the business by reference to their skills, experience and potential for future development.
- 8.21 The tribunal notes that the weighting for the scoring for the selection criteria changed during the course of the consultation process from the original weighting proposed by the Respondent, as did the way in which business criticality was to be assessed by managers. The changes were as a result of discussion at the ECC meetings, in particular input from the employee representatives.
- 8.22 The selection process involved HR inputting the score for each employee into a spreadsheet for the first two criteria described above. For the third criterion, line managers would score employees who reported to them, ie each manager would score the members or his or her team. In late August 2016, once the selection criteria had been agreed by the ECC, managers were provided with training in the redundancy process, including how to score employees against the relevant selection criterion. They were also provided with detailed written guidance. The detailed approach to scoring under this criterion and the training and guidance to be given to managers had been discussed at length and agreed by the ECC.
- 8.23 Once individuals had been scored by their managers, the scores for the third criterion were input into the spreadsheet together with a summary from the relevant manager of the reason for their score.
- 8.24 The total scores were then subject to a three-stage process of 'normalisation' intended to ensure consistency and to identify and correct any anomalies. The first stage was undertaken by Service Area Team Leaders ('SATLs'), ie a higher level of management than those who had undertaken the scoring. The second stage was undertaken by Service Line Leaders, ie the next level up from SATLs. The third stage was undertaken at a meeting of senior managers, chaired by the head of GBS for UK and Ireland, and then in follow-

- up discussions in a very few cases where new evidence came to light after the meeting.
- 8.25 It is clear from the documents seen by the tribunal that the scores of a number of employees in the selection pool changed as a result of normalisation and of those that did change some went up and others went down.
- 8.26 The Claimant's scores for performance and market value were 0 and 15 respectively. Although there was an issue in these proceedings concerning the performance score, it was confirmed in closing submissions that this was no longer the case. The only live issue concerning scoring is therefore as to the business criticality score given by Mr Ulyatt. The tribunal notes that none of the Claimant's scores changed during the normalisation process.
- 8.27 When considering the appropriate score to give to the Claimant, Mr Ulyatt referred to the written guidance provided to him and in respect of which he had received training. The guidance is detailed but in broad terms it contains a series of brackets of points, 0, 5-10, 15-20 and so on up to 50, and within each bracket there are a number of descriptions (with letters from A to E) which broadly relate to the type of role being undertaken. The approach is to identify which letter most closely aligns with the employee's role and which point bracket most closely aligns with their skills, experience and development potential.
- 8.28 Once the appropriate point bracket is identified the starting point is the bottom of the bracket but then a maximum of 5 bonus points can be given for various matters as set out in the guidance.
- 8.29 As noted above, Mr Ulyatt had been the Claimant's line manager since 2014 although he did not manage her day to day work on projects. He took into account his own knowledge of the Claimant but also sought feedback from others who had managed her on a day to day basis. He had feedback from Martin Devine and Gerry VanHee. The former's comments were broadly positive. The latter was also a line manager involved in the scoring of other employees and he indicated that the score that he would give to the Claimant was 15.
- 8.30 Mr VanHee suggested that Mr Ulyatt also speak with Martin Devine and another of the Claimant's colleagues, Phil Davies. Mr Ulyatt already had feedback from Martin Devine and he understood, because this is what the Claimant had told him, that Mr Devine was her immediate day to day line manager. He therefore felt it unnecessary to obtain further feedback.
- 8.31 In the case of the Claimant, Mr Ulyatt decided that the appropriate letter was A. The Claimant does not dispute that this was an appropriate assessment.
- 8.32 Mr Ulyatt also decided that the appropriate point bracket for the Claimant was 25-30, the third from top of the available brackets and somewhat higher than Mr VanHee had suggested. This is the part of his assessment that is challenged by the Claimant.
- 8.33 Finally, Mr Ulyatt looked at the issue of bonus points and decided that the Claimant met three of the additional criteria as described in

- the guidance. He therefore started with 25 points and added a further 3 bonus points. There is no issue as to the assignment of bonus points; the sole issue is whether the points bracket chosen by Mr Ulyatt was a reasonable one.
- 8.34 The Claimant's score for business criticality was therefore 28. In his summary of the reasons for this score, Mr Ulyatt made a number of positive comments about the Claimant's skills and experience.
- 8.35 The essence of the Claimant's challenge to Mr Ulyatt's scoring is that his assessment, in accordance with the guidance, was that the Claimant would be able to perform successfully in a strategic growth area of the Respondent's business within 3-6 months (which places her in the 25-30 bracket) whereas the Claimant says that she could have performed successfully in such an area in under 3 months (which would place her in the 35-40 bracket).
- 8.36 Mr Ulyatt's reasoning was that the Claimant would be able to perform successfully in a new area given her transferable skills and her previous experience. However, in order to perform successfully a project manager such as the Claimant would need to demonstrate their ability to the client so as to gain the confidence of the client in their ability. Mr Ulyatt had had previous feedback as to how others perceived the Claimant's abilities and he felt that it would take her between 3 and 6 months to demonstrate her abilities sufficiently to a client to be classed as performing successfully in a new, growth, area.
- 8.37 The Claimant's total score was 43. This put her in the category at risk of redundancy: the cut-off was 51 points.
- 8.38 The Claimant attended individual consultation meetings on 10 October 2016 with Paul Betts, Mr Ulyatt's line manager, and by phone with Mr Ulyatt (who was by then based in Amsterdam) on 12 and 20 October 2016. There was also email correspondence during this period between the Claimant and Mr Ulyatt in which the Claimant asked for, and was provided with, further information on a number of points.
- 8.39 No suitable redeployment opportunity having been identified, Mr Ulyatt and the Claimant met on 24 October 2016 and he confirmed that she would be dismissed by reason of redundancy with effect from 3 January 2017. This was confirmed in a letter dated 24 October 2016.
- 8.40 The Claimant appealed against her dismissal by email dated 28 October 2016 and her appeal was heard by Paul Bushfield on 15 November 2016.
- 8.41 Having followed up a number of the points raised by the Claimant, including whether she had previously worked in a strategic growth area, which he concluded she had not, Mr Bushfield reached his decision not to uphold the Claimant's appeal. This decision was communicated to the Claimant by email dated 2 December 2016.

The parties' submissions

9. It was said on behalf of the Claimant that this is legally a straightforward case. The first point made was that the requirement of the Respondent's business for employees to carry out work of a particular kind had not diminished and therefore there was no redundancy situation. Saying that there was a need to reduce headcount in GBS without identifying which roles were to be reduced in number was not enough. The Respondent had therefore failed to establish any potentially fair reason for dismissal.
10. Next, it was said that the Respondent cannot rely on some other substantial reason, namely business reorganisation, which results in a reduction of headcount that is not a redundancy situation. In other words, the Respondent's case stands or falls on redundancy.
11. It was accepted that it is not for the tribunal to substitute its own view for that of the Respondent; the question is one of the band of reasonable responses. However, it was said that the selection pool was unreasonably large and that the fact that a large number of managers each scored only a few employees against the business criticality criterion meant that it would be impossible to pick up anomalies. It was also said that there was no proper normalisation process and that you could not tell whether a particular score had been given based on evidence or simply because the manager did or did not like the relevant employee.
12. It was accepted that Mr Ulyatt applied the guidance fairly when assessing the Claimant's score. However, this could, it was said, put the Claimant at a disadvantage if other managers were not applying the guidance fairly. It was also said that the evidence relied on by Mr Ulyatt was incomplete.
13. The Claimant should have been given 10 additional points for business criticality, it was argued on her behalf, which would have taken her above the cut-off.
14. The Respondent's submissions were largely set out in their skeleton argument the contents of which the tribunal will not repeat here. In oral submissions it was accepted that this is not a legally difficult case and also pointed out that there are only limited disputes of fact.
15. In terms of the reason for dismissal the Respondent's principal case is that it had decided to reduce the headcount in GBS. That was a reduction in the requirement for employees to carry out work of a particular kind, ie the work done by GBS, and therefore amounted to a redundancy situation.
16. In terms of the pool for selection, there is no requirement, it was said, for specific jobs to be identified as those where headcount is to be reduced. It is enough for an employer to identify that everyone in a particular area of its business is potentially at risk, as was done in this case.

17. It was said that two of the three selection criteria, all of which had been agreed during collective consultation, were entirely objective. Any element of subjectivity in respect of the third criterion, business criticality, has to be seen in that context.
18. In so far as there was a dispute as to whether the Claimant ever worked in a strategic growth area, the Claimant had accepted that it was a matter of opinion. The clear evidence from Mr Ulliyatt and Mr Bushfield was that the project she said was in a growth area was not.
19. One key issue in the Claimant's case is how long it would take her to switch successfully to a growth area. Mr Ulliyatt said 3 to 6 months which was a conclusion justified by his knowledge of the Claimant and the feedback he had received. It was his judgment but it was one made genuinely and on the basis of relevant evidence.
20. There was a detailed process, including detailed consultation, which was handled thoughtfully and carefully throughout. The normalisation process did not involve people saving their favourites, but rather putting evidence forward as to why a particular score should be reconsidered.
21. In the case of the Claimant, even if she had been moved to a higher point bracket for business criticality there is no guarantee that she would have received the same number of, or indeed any, bonus points. The chances are that she would have scored 35 rather than 28, which would not have increased her overall score sufficiently to take her above the cut-off.
22. Overall, it was said on behalf of the Respondent, the procedure adopted by the Respondent and the decisions taken in respect of the Claimant were fair.

The law

23. The tribunal has reminded itself of the relevant provisions of the ERA, in particular sections 98 and 139. It has also considered the guidance given in the authorities to which reference is made in the Respondent's skeleton argument and which were accepted on the Claimant's behalf as relevant and helpful. These were *Capita Hartshead v Byard* ([2012] IRLR 814, EAT), *Mitchells of Lancaster v Tattershall* (unreported UKEAT/0605/11/SM), *British Aerospace v Green* ([1995] IRLR 437, CA) and *Bascetta v Santander* ([2010] EWCA Civ 251).

Discussion and conclusions

24. The first question is whether the Respondent has established that the Claimant was dismissed for a potentially fair reason. The tribunal has no hesitation in finding that it has. The Respondent decided, as it was entitled to do, that it required fewer employees to work in GBS. Work in GBS was, the tribunal finds, 'work of a particular kind' within the meaning of section

139 of the ERA. For work to be of a particular kind there is no requirement that more specificity in terms of types of job or individual jobs be identified.

25. The question is then whether, pursuant to section 98(4) of the ERA, the Claimant's dismissal was fair or unfair in all the circumstances of the case. The tribunal has reminded itself that there is no burden of proof in this regard on either party and that it is not to substitute its own view for that of the employer. Whether the tribunal would have adopted a different approach, for example to the pool or criteria for selection, may inform consideration of the question of fairness but it cannot answer that question.
26. In this case it is clear that a genuine and thorough consultation process was adopted and there has been no real criticism of that process by the Claimant. The tribunal notes, for example, the number and content of ECC meetings and individual consultation meetings with the Claimant. That consultation was meaningful is demonstrated by the fact that the weighting for the scoring for the selection criteria changed during the course of the process as did the way in which business criticality was to be assessed by managers.
27. The Claimant challenges the size of the selection pool and the fact that it contained individuals undertaking a number of different roles. However, there is no requirement that only employees undertaking the same or similar work may reasonably be included in a selection pool (see *Capita Hartshead*). Indeed, in previous redundancy exercises the Respondent had restricted the selection pool to specific roles and the feedback received from employees was to the effect that this approach was unfair. The tribunal also notes that the approach to the selection pool, as all other aspects of the process, was agreed as part of the collective consultation exercise.
28. A further criticism of the selection pool adopted in this case is that so many managers were involved, each of whom assessed a small number of employees, that there could be no degree of consistency in the scoring. However, it seems to the tribunal that immediate line managers, with appropriate feedback from others, were in the best position to assess their own team against the business criticality criterion. Further, the multi-stage normalisation process was, the tribunal finds, a reasonable approach to adopt to iron out any inconsistencies or anomalies in scoring.
29. The question is not whether a fairer selection pool could have been identified but, rather, whether the selection pool chosen by the Respondent was outside the range of pools that a reasonable employer could have adopted; the tribunal cannot say that the pool in this case was outside that range.
30. The next issue concerns the scoring of the Claimant. As noted above, by the time of closing submissions the only live issue was as to the business criticality score. The Respondent submitted, and the tribunal sees the force in this point, that the real problem for the Claimant in terms of scoring sufficiently highly to beat the cut-off was her score under the performance

criterion, which is no longer challenged. She scored 0 out of a possible 30 points.

31. The key point made by the Claimant in evidence and submissions as to the business criticality score is that she would have been able to perform successfully in a growth area in less than 3 months rather than the 3 to 6 months as assessed by Mr Ulyatt. The tribunal finds that Mr Ulyatt's assessment was based not only on his own experience of the Claimant but also that of others who had worked closely with her. Indeed, Mr Ulyatt's assessment was considerably more generous to the Claimant than that of one of those who provided feedback to him. It was reasonable for Mr Ulyatt to conclude, as he did, that he had enough evidence on which to base his assessment; he had feedback from the manager who the Claimant had told him was her day to day line manager and there was no need for him to seek further feedback.
32. It is correct that the scoring under the business criticality criterion required an element of judgment by the relevant manager and, therefore, it included an element of subjectivity. However, the other two criteria (which made up half the possible maximum score) were entirely objective and with regard to the business criticality score the Respondent, with the assistance of the ECC, went to great lengths to ensure consistency of scoring, including giving detailed training and written guidance to managers, requiring them to provide evidence for their scores and instigating a multi-stage evidence-based normalisation process.
33. It is not for this tribunal, it reminds itself, to dissect in minute detail the approach to selection adopted by the Respondent. Having gone into the Respondent's approach in some detail in evidence and in the above findings of fact, the tribunal has no hesitation in finding that the approach adopted by Mr Ulyatt was well within the range of fairness.
34. Finally, in terms of specific points raised by the Claimant, the tribunal notes that she complained during the individual consultation process prior to dismissal and also during the course of these proceedings that she had not been shown the scores of all others in the selection pool. She was provided by the Respondent, during the consultation process, with her own score and its breakdown in accordance with the three criteria and also with the cut-off score. She was not provided with everyone else's scores and there was no requirement for the Respondent to do so and no unfairness in it not doing so. In any event, the tribunal notes that as a result of voluntary disclosure during the course of the hearing the Claimant was provided with the scores and ranking for all GBS employees, including the initial scores and the scores after each normalisation stage. Whatever suspicions the Claimant may have had as to the content of the overall scores and rankings, these were not borne out by the content of the spreadsheets ultimately disclosed to her.
35. The tribunal has also considered whether any other aspect of the redundancy process adopted by the Respondent, including the appeal

against dismissal, could be said to be unfair but has reached the clear conclusion that it could not. The Respondent's approach was both procedurally and substantively fair and the Claimant's claim for unfair dismissal therefore fails.

Employment Judge K Bryant QC

31 January 2018
