THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN:

Mrs S Ambili **Claimant**

AND

Level Developments Limited

Respondent

ON: **2 February 2018**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr Jones (Solicitor)**

JUDGMENT

1. The claimant's claim for unfair dismissal fails.

WRITTEN REASONS

The claim

2. By an ET1 dated 27 September 2017 the claimant brought a claim for unfair dismissal. She alleged that her dismissal by reason of redundancy was not fair because she had really been dismissed due to her having brought a grievance about being sanctioned for an unauthorised absence or that this had influenced the respondent's scoring of her. She also asserted that the dismissal was unfair because the respondent had not applied the Last In First Out principal during the redundancy selection.

3. The respondent submitted an ET3 dated 28 November 2017 refuting the claimant's claim. They stated that the real reason for the claimant's dismissal was redundancy and that a fair selection process was used.

The hearing

1. I heard from 3 witnesses; the claimant and two witnesses for the respondent, Martin Jones and Adam Treen. I was given a 193 page bundle. The respondent gave me written closing submissions.

2. The claimant applied for the hearing to be postponed at the outset of the hearing. The claimant had been represented by solicitors from before the submission of the ET1 and until the day before the hearing. The claimant's solicitors wrote to the tribunal the day before the hearing and withdrew. The claimant felt that her representatives had not set out her claim properly and that she was unable to proceed with the hearing without a lawyer.

3. I adjourned the hearing to consider the application and refused it. The case had been fully prepared including a witness statement for the claimant. All parties were present and the claimant was able to be assisted by me and the respondent's solicitor as a servant to the court when asking questions. She gave no new facts that indicated how her claim had been misrepresented by her solicitors and it was clear that the tribunal had all information it needed to make a decision. It was not in the interests of the overriding objective to adjourn the hearing at this stage and would disproportionately adversely affect the respondent whose witnesses and representative were ready to proceed. Full reasons for my refusal were given at the hearing.

List of Issues

4. The issues were agreed with the parties at the outset of the hearing.

5. Unfair dismissal

5.1 What was the reason for the dismissal? The respondent asserts that the reason was redundancy which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

5.2 In deciding whether the redundancy process was fair the tribunal can consider the following issues;
- 5.2.1 Did the respondent follow a fair consultation process when deciding to make the claimant redundant?
- 5.2.2 Was the consultation process genuine?
- 5.2.3 Was the claimant appropriately pooled?
- 5.2.4 Were the selection criteria applied potentially fair?
- 5.2.5 Were the selection criteria fairly applied?
- 5.2.6 Was there suitable alternative employment available for the claimant?
- 5.2.7 Was a fair procedure followed including whether the claimant had the right of appeal?

5.3 In the circumstances (including the size and administrative resources of the employer's undertaking) did the respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the claimant?

Findings of Fact

6 The respondent is a company which manufacturers equipment to measure levels e.g. level vials, electronic level sensors and inclinometers for measuring angles.

7 The claimant had worked for the respondent from 14 December 2010 as a Production Technician. Her role, at the time of dismissal, involved manufacturing vials.

8 The facts in dispute centred around two main issues. First the claimant's unauthorised absences and subsequent disciplinary issues and secondly the redundancy process and dismissal.

Unauthorised absences and disciplinary action

9 The claimant was absent from work on 18 November 2016. Mr Treen gave unchallenged evidence that the claimant was away for 11 days over 3 weeks. The claimant accepted that she had been away. She had to fly to India to care for a relative who was unwell.

10 On her return a disciplinary investigation took place and the claimant was sanctioned for her unauthorised absence. She was given a final written warning which she did not appeal.

11 In evidence the claimant accepted that she felt that it was fair for the respondent to sanction her regarding this absence as she had not notified them in accordance with their absence procedures.

12 On 6 March 2017 the claimant was absent again. On this occasion she emailed her line manager, Mr Treen, notifying him that she would not be going in because she had to go to Portsmouth regarding her daughter. She did not give him any information about the age of her daughter or why she needed to be with her.

13 Mr Treen emailed her back asking her to contact him. The claimant called and simply said that she couldn't really speak as her husband was in the car and gave no useful explanation.

14 The Claimant attended work on 7 March. Mr Treen had hoped to have a meeting with her to understand why she had been absent but she left an hour early.

15 Mr Treen therefore felt that a disciplinary process needed to be followed to consider whether the claimant's unauthorised absence needed to be sanctioned particularly in light of the claimant's final written warning that had been given only 5 months earlier.

16 The claimant was invited to a disciplinary meeting on 5 April which she attended. Following her explanation of why she was absent Mr Treen decided not to issue any sanction and wrote to the claimant explaining this. I accept Mr Treen's evidence that he was not aware of a grievance about him by the claimant at the time that he made this decision.

17 In the meantime the claimant brought a grievance about Mr Treen's decision to consider disciplinary action at all. This was investigated in June by Mr Jones and not upheld. It was not upheld because Mr Jones concluded it was reasonable for Mr Treen, in the circumstances, to investigate why the claimant had been absent when she had given an incomplete and inadequate explanation of where she was and why she was absent until Mr Treen interviewed her on 5 April 2017. I find that it was reasonable for the respondent to initiate a disciplinary process in these circumstances.

Redundancy consultation process

18 In May 2017 the respondent took the decision that it needed to make some redundancies because there was a reduction in client demand and they had increased their automation. This evidence was not challenged and I accept it.

19 The Respondent made the decision that it needed to cut the number of Production Technicians from 6 to 3. All 6 Production Technicians were pooled and scored. The claimant felt that the scoring process was unfair and that she was unfairly singled out because she had brought a grievance.

20 I conclude that the respondent acted appropriately to pool all 6 production technicians. No alternative pool was suggested.

21 The selection criteria applied were those set out at page 153 namely Absence, Appraisal, Disciplinary and Quality are potentially fair criteria. The Respondent evidenced why the claimant scored in the bottom three.

22 Taking the evidence regarding each criteria in turn. The respondent provided copies of the claimant's last two appraisals and why she was scored as she was. The claimant had not objected to her appraisals at the time that they were carried out. I accept the respondent's evidence as the claimant was not able to provide any evidence suggesting the appraisal assessments were unfair or inaccurate.

23 The respondent did take into account the final written warning from 2016 that the claimant had on her record. In evidence the claimant conceded that this disciplinary sanction had been fair in all the circumstances. It was clear from the respondent's evidence that the issues surrounding the claimant's absence on 6 March 2017 were not taken into account. No sanction had been issued about this absence so did not count to this criteria. There was no evidence that it contributed in any other way.

24 The claimant's evidence suggested that her sickness absence due to stress and anxiety arose out of Mr Treen's decision to investigate her absence on 6 March. There was no question as to the genuine nature of the claimant's ill health. However, given the respondent's findings regarding why the disciplinary investigation was appropriate in all the circumstances I find that it was reasonable for them to count this absence when scoring the claimant for this criteria. I also accept the respondent's evidence that even if the claimant's sickness absence during April and May had been disregarded she would have scored in the bottom three in any event.

25 The claimant stated that the problems with quality in her vial production had been caused by the dirty surroundings of the lab and the water being used in production. The respondent witnesses disagreed with her analysis of the problems facing the lab but stated that in any event the same problems would apply to all the Technicians and therefore she was no more disadvantaged by any of these issues than the others in the pool. I accept this evidence.

26 The claimant asserted that the respondent should have taken into account her length of service and applied Last In First Out principles which would have meant she would have remained in employment. The respondent did not feel that this was appropriate criteria. There is no obligation on an employer to choose certain criteria provided that those it uses are potentially fair and reasonably applied.

27 Overall I find that the claimant provided no plausible evidence as to how the respondent had wrongly applied these criteria to her nor why they were unfair. She also gave no evidence that her grievance played a part in the scores that she was given.

28 It is notable that the claimant did not have the lowest score and that two other people were made redundant. The respondent stated that it would not have created a redundancy situation for three people just to get rid of the claimant and I accept this evidence.

29 The claimant was clearly very upset and embarrassed about the incident on 6 March with her daughter and felt it was unfair that Mr Treen had considered disciplinary action in a situation where she had told him that she had to be absent. Throughout the hearing before the tribunal it appeared that she could not accept that she had not in fact been sanctioned for this absence and felt that Mr Treen's actions along in investigating it had tainted their continuing relationship and the redundancy process. However, other than stating that this was how she felt she provided no evidence of this at all.

30 The redundancy process followed by the respondent started with a team meeting on 10 May. The claimant was on sick leave for the entire consultation process. Mr Treen wrote to the claimant via email explaining what happened on 10 May and inviting her to a consultation meeting on 16 May. The claimant did not attend. She was given another opportunity to attend on 18 May but did not attend. She was given the option to provide written questions about the process but did not. The claimant was sent the selection criteria and asked to comment on them. She did not. The claimant was given an opportunity to attend a second consultation meeting on 25 May. She did not respond. She was again given the opportunity to contribute in writing. She did not.

31 The decision to make her redundant was sent to her on 1 June 2017. She was given the opportunity to attend a meeting on 5 June to discuss the decision but did not attend. She was given the right to appeal against the decision but did not do so.

32 The claimant said that she did not take part in the redundancy process on the advice of her solicitors because she had an outstanding grievance against Mr Treen and therefore she did not have to take part. She appeared to believe that the respondent could not dismiss her whilst there was an outstanding grievance. It is not for the tribunal to comment on what legal advice an individual has had. However, a refusal to take part in a process does not mean that the respondent had no right to continue with the redundancy consultation nor does it render it unfair. The claimant did not put forward any evidence forward as to how the consultation process was procedurally unfair.

33 The claimant gave no evidence that she felt that there were alternative roles within the respondent which she should have been offered or which would have avoided her being made redundant. I therefore accept the respondent's evidence that on concluding the consultation process they did not have any suitable alternative employment for the claimant to carry out.

The Law

34 S 94(1) Employment Rights Act 19916 states that an employee has the right not to be unfairly dismissed by his employer.

35 In determining whether a dismissal is fair s98 ERA applies.

S 98 ERA 1996

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……..

(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.

36. s 139 ERA defines redundancy as follows: .

(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.

Conclusions

37. I conclude that the reason the claimant was dismissed was redundancy. The claimant did not provide any cogent or plausible evidence that she had been dismissed for a different reason. The respondent gave unchallenged evidence that they had to reduce the number of Production Technicians from six to three due to a drop in customer demand and an increase in automation. They therefore required fewer people to undertake work of a particular kind.

38. The selection criteria applied were fair on the face of it. Appraisal, quality, absence levels and disciplinary sanctions are potentially fair criteria. It is not for the tribunal to substitute its opinion of what criteria ought to be used. Neither is it for the claimant to say what criteria she thinks ought to have been used. The lack of use of the LIFO criteria does not mean that the criteria used were unfair. There is no mandate for an employer to use certain criteria in selection provided they are potentially fair and fairly applied.

39. For each criteria the respondent evidenced why the claimant had been scored as she was. There was nothing that suggested that they had been influenced by the claimant's grievance about the disciplinary investigation in March 2016. They also provided the scores for the other individuals and it showed that the claimant was in the bottom three – she was number 5 out of 6. There was no evidence to suggest that the respondent had applied the criteria in a way that was unreasonable, irrational, unfair or not based on evidence that they relied upon before the tribunal.

40.The respondent's evidence that there was no suitable alternative employment was not challenged. The claimant was only qualified to be a technician. There were no openings for such roles at the relevant time. The respondent reduced its technicians

from six to three and still had only three production technicians at the time of the hearing.

41. I conclude that the respondent followed a fair procedure. They pooled all six Production Technicians and put them all at risk. They consulted with them about the criteria to be applied and held individual consultation meetings with all those affected. The fact that the claimant chose not to attend the meetings does not mean that the respondent failed to follow a fair process. The claimant was given the right to appeal against the decision to dismiss for redundancy and chose not to.

42. Overall I consider that the respondent's decision to dismiss the claimant for redundancy was reasonable taking into account all the circumstances of the case.

43. The claimant's claim for unfair dismissal is not upheld.

Employment Judge Webster

Date: 2 March 2018