EMPLOYMENT TRIBUNALS

Claimant: Ms April Barker

Respondent: M Parker & Sons Limited

Heard at: Nottingham

On: 13 and 14 January 2021

Before: Employment Judge Phillips (sitting alone)

Representation
Claimant: Ms S Firth of Counsel
Respondent: Mr G Gunstone of Counsel

RESERVED JUDGMENT

1. The meetings which occurred between the Claimant and Mr Michael Parker on 7,14 and 17 June 2019 were not protected conversations for the purpose of s111A Employment Rights Act 1996 and are therefore admissible within the proceedings;
2. The Claimant was unfairly dismissed by the Respondent;
3. There shall be a reduction of compensatory award pursuant to the decision in Polkey v AE Dayton Services Limited [1987] UKHL 8 in the amount of 60%; and
4. The case will be listed for a hearing to determine remedy.

REASONS

Background

1. The Claimant was employed by the Respondent as a Bookkeeper and Accountant between 1 November 2003 until 17 June 2019. The Respondent carries on business as a building firm with interests in both the United Kingdom and Tenerife, and throughout the period of the Claimant's employment also owned other property assets within the United Kingdom.

2. The Claimant alleges that her employment was terminated on 17 June 2019 by

the Respondent making her redundant, without consultation and in the absence of any agreement on her part. In those circumstances, she avers that she was unfairly dismissed.

3. The Respondent alleges that the termination was voluntarily agreed between the parties, with protected conversations having taken place, an agreement reached, and settlement paid. Accordingly, the Respondent avers that the Claimant cannot have been unfairly dismissed.

Issues

4. It was not in dispute that the Claimant was an employee of the Respondent, had the requisite length of service to bring a Claim for unfair dismissal and had brought her claim in time to the Tribunal.

5. There was an agreed list of issues between the parties which I reproduce below:

FACTUAL ISSUES

i. Did the role of the Claimant within the Respondent diminish in the years prior to the termination of her employment;
ii. When there was a discussion between the Claimant and Mr Parker on 7 June 2019 was this
    a) An unexpected meeting which was the first indication of an impending redundancy termination; or
    b) A protected meeting under s111A ERA 96;
iii. Was it agreed between the Respondent and the Claimant that her employment would be brought to an end on terms of full notice pay and statutory redundancy, or was that a unilateral decision of Mr Parker;
iv. How and in what circumstances did the letter dated the 17 June 2019 come to be drafted, printed and delivered to the Claimant;
v. Did the Respondent treat the Claimant reasonably in matters relating to the termination of her employment; and
vi. The purpose and significance of a cash deposit, the Claimant had created in the company safe.

LEGAL ISSUES

i. Were the meetings on 7,14 and 17 June 2019 protected meetings under s111A Employment Rights Act 1996 ('ERA 96);
ii. Was the termination of the employment agreed between Mr Parker and the Claimant or was she dismissed within the meaning of s95 ERA 96;
iii. If the Claimant was dismissed, what was the reason for the dismissal;
iv. Did the Respondent treat the Claimant reasonably within the meaning of s98(4) ERA 96; and
v. If the Claimant was not dismissed fairly in the way it took effect, would it have made any difference (Polkey.)

6. I have omitted issues pertaining to remedy, which were not dealt with at the

hearing. The Respondent had also raised the question of contributary fault, however in his closing submissions, Mr Gunstone, for the Respondent, did not pursue submissions on this point. Accordingly, Ms Firth for the Claimant did not address the Tribunal on this point. It therefore is not an issue on which I make findings.

Evidence

7. The Tribunal heard evidence from Mr Michael Parker, the owner of the Respondent and the Claimant herself. The events in question occurred in June 2019 and largely, I did not find that time had diminished the recollection of events.

8. Miss Barker was a credible witness. Her answers were clear and consistent with her witness statements and case. She was clearly very knowledgeable about her role and the nature of work which took place in the Respondent's office.

9. Mr Michael Parker was not as credible a witness as the Claimant. At times, his evidence was at odds with the Respondent's pleaded case. Whilst it was clear that he was aware of many of the relevant issues in the case, at times, there was clearly confusion as to what was being asked and therefore, his answers given in evidence.

10. In my findings of fact, the page references I use are those from the final bundle of documents agreed between the parties.

The Law

11. In this case, it was common round, between the parties, that the Claimant was an employee, had been continuously employed for not less than two years and had brought her claim in time.

12. The parties disagree on whether the Claimant was dismissed by the Respondent for the purposes of s95 ERA 96. The Claimant avers that she was dismissed, whereas the Respondent avers that the parties mutually agreed to a termination of employment on agreed terms.

13. The Tribunal will have to look at the circumstances and make findings of fact to untangle this question. The burden of demonstrating there was a dismissal in these circumstances falls upon the Claimant.

14. Given its case, the Respondent also avers that the conversations which led to the mutually agreed termination (on its case) are protected by virtue of s111A ERA 96. It provides that any such conversations are inadmissible in any proceedings brought under s111 ERA 95, namely claims for unfair dismissal.

15. The Claimant alleges that there was no agreement for her employment to end and as such, the conversations cannot, as a matter of fact, be protected

conversations.

16. I was referred to case law, which didn't fit neatly with the circumstances of this case. Essentially, the fact of whether the meetings were protected conversations was in issue between the parties and goes to the heart of the case.

17. This was not a case where the effective date of termination was in issue. Here it is agreed that the effective date of termination was 17 June 2019. Accordingly, the case of Basra v BJSS Ltd (2016) UKEAT 0025 provides useful guidance on the approach to take.

18. After discussing with the parties and with their agreement, it was decided the most appropriate course of action was to deal with the question of whether the meetings themselves were admissible, having heard the evidence as a preliminary issue within my judgment.

19. Clearly, if in my judgment, the meetings were, because of their content, inadmissible by virtue of s111A ERA then I would specifically not consider the matters which were discussed or any evidence which related to the meetings and the discussions which occurred. If, however, I find that the meetings were not, as a matter of fact, protected conversations, then they are relevant to the determination of the outcome of the unfair dismissal claim.

20. If the Tribunal finds that there has been a dismissal, s94 ERA 96 provides that an employee has the right not to be unfairly dismissed.

21. Section 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—

(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.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

22. It is for the employer to show that the reason for the dismissal is either one of those reasons set out in s98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The Respondent has the burden of proving that it dismissed for a potentially fair reason.

23. In this case, in the alternative to its primary case, the Respondent avers that the reason was redundancy. Accordingly, the Tribunal must see whether in the circumstances of this case, the conditions set out in s139 ERA 96 are met.

24. In reaching a determination as to whether redundancy was the real reason for dismissal, the Tribunal must consider the two-stage test Safeway v Burrell [1997] I.C.R. 523 (EAT). Firstly, the Tribunal must establish whether there was a redundancy situation, asking whether there was a diminution or cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of the same in the future. Secondly the Tribunal must then consider whether the dismissal was attributable wholly or mainly to the redundancy.

25. In reaching a determination, the Tribunal should not consider the commerciality of the decision and Mr Gunstone, for the Respondent, referred the Tribunal to TNS UK Ltd v Swainston (2014) WL 1660 on this point.

26. If the Tribunal finds that the Respondent has shown the reason, in this case redundancy, then I must consider as per s98(4) ERA 96, whether in the circumstances the action taken by the Respondent falls within the band of reasonable responses of a reasonable employer in those circumstances and in that line of business. Specifically, this means determining whether (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. Here the burden of proof is neutral.

27. Ms Firth, in her skeleton argument, rightly set out the three key strands which the Tribunal must consider as to whether a redundancy was fair, namely, selection, warning and consultation and alternative employment. There should usually also be the opportunity to appeal.

28. On the question of a fair consultation process, Ms Firth referred me to R v British Coal Corporation and Secretary of State for Trade and Industry (ex parte Price) [1994] IRLR 72.

29. Both parties agreed that in some situations, where normal procedural steps would have been utterly useless or futile, it might be reasonable for an employer to conclude that the usual procedural steps would not need to be taken as per Polkey v A E Dayton & Services Ltd (1988) AC 344 (Polkey.) However, Ms Firth, for the Claimant, drew my attention to Heron v Citylink-Nottingham UKEAT/409/91 which provides that even in such cases, the employers belief that they have no alternative but to make an employee redundancy does not obviate the need for consultation per se.

30. Finally if the Tribunal finds that there was a dismissal and such dismissal was procedurally unfair, I must consider whether there should be a reduction to reflect the chance that had a fair procedure been undertaken, the Claimant would have any event been dismissed as per the principles in Polkey.

The Facts

31. As set out above, in this case, it is first required that I make preliminary findings regarding the meetings on 7, 14 and 17 June 2019. The parties' respective evidence was diametrically opposed as to their nature.

32. I do not set out those differences in full, but they can be found at paragraphs 2-5 of the Claimant's first witness statement and paragraphs 7-9 of the first witness statement of Michael Parker. Essentially the Claimant avers that in a meeting on 7 June 2019, she was told by Mr Parker that the company needed to make redundancies, or the business would close. She goes on, that in that conversation it became clear that she was to be the only employee who would be made redundant and that Mr Parker told her to calculate her own redundancy figures. This was a position from which she did not resile in cross examination and her evidence remained consistent with her pleaded case.

33. In evidence, Mr Parker averred that the conversation was the initial stage of seeking to mutually agree the Claimant's departure from the business. Mr Parker cited previous examples of the two keepers for the shoot who had been let go by the business at the beginning of 2019. There he had spoken with the two keepers and agreed a figure informally with them as their work would not be continuing.

34. What is troubling about the evidence on this point though, is that in both the Respondent's ET3 Response form and at paragraphs 7-8 of his first witness statement, the Respondent alternatively sets out that the meeting on 7 June 2019 was actually the first stage of notifying the Claimant of the potential for redundancy and that this essentially formed part of following (loosely) the ACAS procedure for redundancy.

35. To my mind, those two positions asserted by the Respondent and its witness cannot both be true. Either, the meeting was one in which the terms of departure for the Claimant were being discussed to reach a mutual agreement or the meeting was the first stage of following the ACAS procedure where the possibility of redundancy was notified to the Claimant. It cannot have been both.

36. In cross examination on this point, Mr Parker talked about the conversation as seeing whether the figures could be agreed in the old-fashioned way before initiating formal redundancy procedures if required. Although he was clear when put to him that he hadn't talked of voluntary redundancy, that he had, he also talked of getting things sorted. When put to him that he couldn't really remember, he replied that he didn't think anybody can remember everything that went on. He also accepted that at the meeting, he had informed the Claimant that his daughter in law would be brought in to carry out the bookkeeping.

37. The confused evidence and pleadings, to my mind, points to an inescapable conclusion that at the meeting on 7 June 2019, Mr Parker informed the Claimant that she was to be made redundant. As per the Respondent's pleaded case and paragraphs 7-8 of Mr Parkers first witness statement, this meeting was actually one where the Claimant was informed that she was going to be made redundant as opposed to a meeting where voluntary redundancy and a mutually agreed departure of the Claimant was discussed.

38. Turning to the meetings on 14 and 17 June 2019, given my finding regarding the 7 June 2019, it therefore follows that I prefer the Claimant's evidence regarding the discussions which took place on those dates too. Accordingly, and subject to the findings later in this judgment, I find that the discussions which took place in these two meetings were also concerned with making the Claimant redundant and not about agreeing either voluntary redundancy or a mutually agreed departure from the business.

39. Given my findings, the meetings were not protected conversations by virtue of s111A ERA 96 and as such are admissible within the proceedings.

40. Turning next to the list of issues and firstly whether the role of the Claimant within the Respondent diminished in the years prior to the termination of her employment.

41. The evidence before me was clear that the company had dramatically reduced

both its scope in terms of ongoing work and its level of staff. Mr Parker in his first witness statement sets out that at one time the company had been employing, through a mixture of permanent staff and sub-contractors some 70-80 people. This was a reflection, he said, of the reduced scope of the company and its changing business. The Claimant, in her evidence said there had been some 20 full time staff at one time along with a large number of sub-contractors.

42. Clearly the Respondent at one time undertook significant activity and employed directly and sub-contracted to a far larger number of people than in June 2019, when there were 4 members of full-time staff. I have no difficulty, therefore, in finding that the Claimant's work as a bookkeeper (for which she was primarily employed) had significantly reduced. It would appear that the Claimant was able and capable to undertake other duties within the office so as to fill her day.

43. However, my impression of the evidence, is that objectively, the need for a bookkeeper to be kept on full time by the Respondent had dramatically reduced by June 2019. This is further reinforced by the Respondent now only requiring a couple of days a week of bookkeeping and accounting to be undertaken by Mr Parker's daughter-in law. Accordingly, the evidence shows that the role of the Claimant had significantly diminished at the point of her employment ending.

44. I have already made findings on the meeting on 7 June 2019 not being a protected conversation but for the sake of completeness, I now deal with the question of whether the meeting was a first indication of an impending redundancy termination.

45. The parties' respective evidence on this point is largely congruous. I therefore make a finding that the meeting was the first indication to the Claimant by the Respondent that redundancy was a possibility. Mr Parker's evidence does set out a question of some monies having been left in the safe by the Claimant, perhaps for her wages had the company been unable to pay her. To my mind, this point, not largely explored in live evidence does not, on its own, support a finding that the Claimant had previously been aware of redundancy being a possibility.

46. In addition to the monies found in the safe, emails were found between the Claimant and the Respondent's accounting firm from February 2019 where the Claimant states that she was fully expecting to be made redundant in March of 2019. For context, the emails were sent at the same time as the keepers from the shoot having been made redundant. The Respondent avers that these emails demonstrate that redundancy or the question of it, did not come as a surprise to the Claimant.

47. By June 2019, however, the Respondent had sold the Ship Inn public house for a significant amount of money in May 2019. The Claimant was aware of this fact and I find, on the evidence, that her impression of the financial state of the

company was that things had settled down by this point.

48. I have already set out my findings regarding whether the conversations which took place on 7,14 and 17 June 2019 were protected conversations by virtue of s111a ERA 96. Having found that the meetings are admissible within the proceedings, further examination is useful to make findings of exactly what occurred in them.

49. Mr Parker talked of getting things sorted to see if the Claimant was amendable to an agreed termination of her employment. The Claimant maintained in her evidence that Mr Parker simply told her she would have to be made redundant.

50. The evidence points to the Claimant's version of events being true. Her evidence was consistent on this point. Ms Firth questioned Mr Parker about the nature and amount of monies which had been paid to the Claimant upon her termination. The figures were the statutory minimum which the Respondent owed to the Claimant. By contrast, the voluntary redundancies which had been agreed with the keepers from the shoot in early 2019 had been far more than the statutory minimum amounts.

51. Mr Parker said this was to account for the fact that the jobs had tied accommodation and he felt he owed the keepers more because they were not only losing their jobs but also accommodation. That may well have been the case and I have no reason to doubt the reasoning, but in the Claimant's case, I find that the statutory minimum being paid is instructive that there was no negotiation regarding the Claimant's termination. Redundancy was presented to the Claimant as something that was going to happen.

52. Preferring the Claimant's evidence, I find that Mr Parker told the Claimant that she was going to be made redundant and asked her to prepare and calculate the statutory redundancy payment she would be owed. There is no evidence to suggest that any negotiation of an amount more than the statutory amount for redundancy was discussed. The decision to make the Claimant redundant was a unilateral decision of the Respondent.

53. It is also useful here, to set out my findings regarding the way in which the Claimant's employment ended. Given that I have found that there were no conversations about a mutual termination or voluntary redundancy, it therefore follows that the Claimant was dismissed within the meaning of s95 ERA 96, the Claimant having me the burden of demonstrating this. Her employment was terminated by dismissal. To reinforce this point, there is no question, on the evidence, that the Claimant at any stage gave her freely given consent to her employment being terminated.

54. Turning next to the question of the letter dated 17 June 2019, I make the following findings on it. It can be found at page 54 of the bundle. The letter

purports to show Mr Parker's signature, on company headed letter paper setting out that the Claimant was being redundant. Mr Gunstone, offered me the opportunity to have the original letter provided to me, should I require it, but on balance I did not find that this would be necessary, given a legible copy of the letter was provided in the bundle. Both parties agreed that the original letter matched this copy, although they disagreed as to how it came to be in existence.

55. The Claimant's evidence is that, after having initially refused to draft such a letter, she eventually gave in to Mr Parker's request for her to do so on her last day of employment. She says that she simply looked for and re-used a letter which had been used in 2009 when the Respondent had previously made redundancies. Her evidence was that she had cut and pasted the letter on the computer and essentially filled in the blanks to include her name, relevant financial figures and the correct date of termination.

56. For the Respondent, Mr Parker denied ever having seen, let along having signed the letter. His evidence went further on this point and said that following a thorough search of the Respondent's computers, they could find no record of this letter. He emphatically denied signing the letter and said it was a false letter in cross examination.

57. What Mr Parker's evidence and indeed the Respondent's case did not do was to go so far as outright stating the letter had been fabricated by the Claimant to assist her case. This was so even when I enquired as to who he believed had signed the letter. That in itself gives doubt in my mind as to the reliability of Mr Parker's evidence on this point. Mr Parker's evidence on how the letter was created was confused and strangely focused on the Claimant having copied and pasted the letter. The mere fact that it had been created in this way, is not evidence of the letter having been fabricated.

58. In terms of my general impression of both parties' evidence is that there was one party, the Claimant, who was adamant throughout the discussions that things should be done in a formal way. And another, Mr Parker for the Respondent, who came across as someone who preferred to do things far less formally in ways which one might characterise as gentleman's agreements.

59. The evidence was balanced on this point, but I prefer the Claimant's evidence. This is because her evidence remained steadfast under cross examination and on a number of points remained consistent in terms of making sure that things were formalised. She firstly requested that the Respondent bring in professional HR consultants to deal with the matter, she repeatedly refused to initially draft her own redundancy letter, she drew up the statutory figures and provided them to Mr Parker requiring that he sign them before she drew up the bank transfer document. It was only at the point at which her departure was imminent did she finally agree to draft the letter and I have no doubt that she would not have made the payment of the sums to her bank account unless such a formal redundancy letter had been signed and drafted.

60. I therefore find that the Claimant drafted the redundancy letter which was signed by Mr Parker at the time of her departure and if not at the same time, likely in the same time period as the redundancy figure and bank transfer papers were signed by him.

61. Having already found that there was a dismissal, I must examine the evidence with regards to the real reason for the dismissal.

62. The Respondent's evidence on this, contrary to its primary pleaded case, is that this was clearly a redundancy dismissal. The Respondent's need for a full-time bookkeeper had dramatically reduced as the company was far smaller and the works it was undertaking had reduced. It was selling off plant machinery, it had sold the Ship Inn and whilst some small administrative tasks would be remaining, the mainstay of the company's work were a few small building schemes and its activities in Tenerife. As a result, its bookkeeping could be undertaken in two days a week by Mr Parker's daughter-in-law for free as a family member with an interest in the continuing success of the company.

63. The Claimant's evidence is primarily that her role had not diminished, and she was still busy with various tasks in the office which she undertook. Her case is that the work which she was undertaking could not feasibly be undertaken in just one or two days a week by Mr Parker's daughter in law.

64. On this point, the Respondent avers that the Claimant would often come into the office later in the morning, would take extended lunch breaks to walk her dog and would leave each day at 5:30pm. As a result, the Respondent avers that the Claimant was not as busy as she claims.

65. When one objectively looks at the evidence of the Claimant's work, it is clear that the Respondent was far smaller than it had been in say 2009. Its scope of work was reduced and its headcount was far lower. I accept Mr Parker's evidence regarding the Claimant's level of work because on the evidence, it would appear that the bookkeeping element of her job is now being undertaken for far fewer hours per week. It is also clear from evidence that the Claimant would often do odd jobs to assist Mr Parker, such as taxing his car which were not strictly part of her job role implying that she had the time to do other work aside from bookkeeping.

66. Consequently, in consideration of all of the evidence, I find that the Claimant's role as a whole had diminished. Administrative tasks were largely undertaken by her colleague Tricia and the requirement for a bookkeeper had reduced significantly.

67. Following on from this, the circumstances in which the Respondent found itself, meant its need for the Claimant to be employed in the way that she was, was

ceasing or had certainly diminished to a great extent. It had the services of Mr Parker's daughter-in-law to call upon to assist. In this case, it is clear that the dismissal was wholly attributable to the diminished need for the Claimant.

68. The final area in which I am required to find facts, relates to the question of the manner in which any redundancy process was carried out. Given my earlier findings of fact, it would appear that the meeting on 7 June 2019 was the first meeting at which the Claimant was informed that she was at risk of redundancy. In this case, however, the evidence goes further, and I have found that at this meeting, the Claimant was told that she was going to be made redundant.

69. Taking the evidence as a whole, both parties are largely in agreement that in terms of the procedure followed for the redundancy, there was no pooling for selection and no right of appeal conferred.

70. On the question of warning, the Respondent, in its pleadings, sought to suggest that the meeting which took place on 7 June 2019 was the first stage in warning and consulting the Claimant regarding the redundancy.

71. The evidence, however, tells a different story. I have already found that the Claimant was simply told by Mr Parker that she was going to be made redundant on 7 June 2019. During that meeting, both parties gave evidence that there was some discussion about the other employees and whether they were going to be made redundant. On the evidence, I find that the Claimant was told that for various reasons, she was the only person who would be made redundant as she had no experience in selling plant machinery, the Tenerife role was complex and Tricia would not be made redundant because of her personal circumstances which Mr Parker felt meant she should be excluded. The Claimant was therefore selected by default on arbitrary selection criteria, or worse, by default owing to Mr Parker's assessment of the situation.

72. Given this, I cannot find, on the evidence, that the meeting of 7 June 2019 came anywhere near close enough to the ACAS code of practice for redundancy in terms of the substance that one would expect to have been discussed. The Claimant was not warned or consulted about the possibility of redundancy. Ms Firth described it as having been a fait accompli and that submission is, in my findings, correct.

73. On the question of pooling, the discussions which took place demonstrated that Mr Parker did not even consider whether there should have been a pooling exercise. To my mind, this failure to consider whether a pooling exercise was necessary, even in the Respondent's small business, was unreasonable. Had such consideration been given, the Respondent may still have chosen not to undertake a pooling exercise, but at least that would have been done in the context that it had been considered and ruled out. The Respondent's evidence was that it wasn't considered because it was clearly inappropriate, however for

reasons set out later in this judgment, that argument is not tenable.

74. I therefore find that the process that was undertaken did not comply with the ACAS code of practice. In some situations, it will not always be necessary for an employer to carry out these processes where it would be an entirely futile process because it is clear that only one person's role is redundant.

75. In his closing submissions, Mr Gunstone set out the context of the process that was undertaken. The Respondent, he said, was a very small organisation and the choice regarding who had to be made redundant was one which essentially made itself.

76. The Claimant in her evidence, said she was open to reduced hours, reduced salary or taking over the roles carried about by one of the other employees. This was characterised by Mr Gunstone as a case of, 'well she would say that now, wouldn't she.' Equally the possibility of the Claimant undertaking the role concerning Tenerife was characterised as being unfair to drop someone new into matters which had been ongoing for a number of years. Mr Gunstone added to this, the question of the Claimant's non-existent Spanish language skills, likely a point well made.

77. However, it was clear from Mr Parker's answers under cross examination that the decision had already been made. When it was put to him that the Claimant might have considered reduced hours or reduced salary, it was clear that such considerations had never been considered.

78. Some of the Claimant's suggestions as to what she might have considered or the work she would have been able to undertake were clearly not plausible, but I accept her evidence regarding reduced hours or reduced salary as being something she might have considered. It is clear that had any consultation taken place, the Respondent might have given some or all of the Claimant's suggestions serious consideration. The question, therefore, of this being a case where the same result would have occurred in any event, does not apply.

Determination

79. Given my findings of facts, I now turn to applying the law to those facts to reach a determination.

80. I have already made findings that the Claimant was dismissed as opposed to taking voluntary redundancy or some other mutual termination of her employment. The conversations and meetings which took place on 7, 14 and 17 June 2019 were not protected conversations pursuant to s111a ERA 96.

81. In those circumstances, it is for the employer to show the reason for dismissal. This was a redundancy dismissal. I have found that the work which the Claimant

undertook had reduced significantly and that there can be no other explanation for the dismissal. The Respondent had genuine need to make redundancy given its reduced business activity. The Respondent has therefore shown the reason, namely redundancy in this case.

82. In terms of the process which was undertaken, I must consider whether, in light of s98(4) ERA 96, the actions of the Respondent fell within the band of reasonable responses and specifically whether (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee.

83. In this matter there can be no doubt, given my findings, that this was not a case where the Respondent could be justified in undertaking no formal redundancy exercise whatsoever. The claimant was told that she was going to be made redundant without fair warning. She left the business within ten days of the first conversation regarding redundancy. This was unfair.

84. It is clear Tricia and the Claimant (in addition to bookkeeping) both undertook similar types of admin work and the claimant would have been able to undertake the work that Tricia was undertaking. The Respondent did not even countenance whether pooling of Tricia and the Claimant was appropriate given overlap in some of their duties. The evidence was equally clear that Mr Parker did not consider whether Tricia should be made redundant, at all, because of her personal circumstances. Admirable as that may have been, it was clearly disadvantageous to the Claimant and ultimately unfair.

85. In addition, had the respondent, sought to consult, it may well have reached a different conclusion. I accept the Claimant's evidence that she was prepared to consider either reduced hours or reduced salary for different work, but this was not explored at all by the Respondent.

86. In the circumstances, in my view, a reasonable employer in the same circumstances of the Respondent would have at least undertaken some form of fair warning, would have considered a basic level of consultation to determine if redundancy was the only option and would have also had a fair and transparent basis upon which it declined to undertake a pooling exercise. For those reasons, the procedure which the Respondent followed was, in the circumstances, unfair. Consequently, the Claimant was unfairly dismissed.

87. The final issue to be decided is whether I should make a ruling regarding the application of Polkey to this case, essentially the percentage chance that had the Respondent followed a fair redundancy procedure, the same outcome (the Claimant's redundancy) would have resulted.

88. I was presented with two opposing submissions by the parties' respective

Counsel. Mr Gunstone argued this was a case where even had a fair procedure been followed, the result would have been exactly the same. He invited the Tribunal to make a 100% reduction of any award to the Claimant on this basis, failing which a high deduction of 80%.

89. Conversely, whilst accepting that a Polkey deduction was appropriate, Ms Firth argued that any deduction should be at less than 50% simply on the basis that there were plainly other options available to the Respondent which it did not explore.

90. In my view, a middle road, appears to me to be appropriate. It is clear that had a fair procedure been followed, the same result might still have occurred, yet at the same time, options which were open to the Respondent were not explored or discussed at all which could have led to the Claimant continuing to work for the Respondent, albeit in a different form or on a different salary. Had those discussions taken place, the Claimant may well have agreed to work in a different way, undertaken different work or agreed to a lesser salary. I therefore order that a deduction of 60% is the appropriate figure when balancing all of the competing arguments.

91. One final point to note, is that Mr Gunstone also invited me to make a ruling as to the basis of any future calculation in terms of the salary upon which any such calculation should be based. I specifically decline to do so, because it would be more appropriate for those arguments to be dealt with at the remedy stage when all the evidence will have been heard on remedy.

92. This judgment shall be accompanied by an order to the parties which will be sent under separate cover dealing with the listing for a remedy hearing.

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Employment Judge Phillips

Date: 18 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note

This was a remote hearing. The parties did not object to the case being heard remotely. The form of hearing was V- video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

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